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UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

GLENWOOD SPRINGS CITIZENS' ALLIANCE,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT, Secretary of the Interior; U.S. BUREAU OF LAND MANAGEMENT; WILLIAM PENDLEY, Acting Director of the BLM; JAMIE CONNELL, Colorado BLM State Director; and LARRY SANDOVAL, JR., Field Manager of the BLM's Colorado River Valley Field Office,

Defendants.

Case No:

COMPLAINT FOR VACATUR, EQUITABLE, DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff, Glenwood Springs Citizens' Alliance (GSCA), files this suit for vacatur, and equitable, declaratory and injunctive relief under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, Federal Land Policy Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701 *et seq.*, the Materials Act of 1947, 30 U.S.C. §§ 601-604, the Surface Resources Act of

1955 (also known as the Common Varieties Act of 1955), 30 U.S.C. § 611, and their implementing regulations and policies, challenging the actions and inactions of the United States Department of the Interior (DOI) and Bureau of Land Management (BLM) in authorizing and allowing Rocky Mountain Aggregates, Inc (also known as Rocky Mountain Resources, Inc. or Rocky Mountain Industrials, Inc.) (RMR) to mine/excavate, remove, transport, and sell common variety rock and stone from RMR's Quarry (known as the Mid-Continent Quarry or Quarry) located on federal public lands managed by the DOI/BLM just outside the City of Glenwood Springs, Colorado, in violation of the above-listed laws, policies, and regulations.

2. Under these federal mining and public land laws, an entity that holds a mining claim on federal public land such as RMR may not mine, remove, or sell "common variety" minerals from its mining claim(s), without specific approval for such mining/removal/sale under BLM's common variety regulations (43 C.F.R. Part 3600), and pursuant to a Mineral Materials Sale Contract under those regulations. Despite BLM acknowledging that RMR has mined/removed/sold common variety rock and stone since 2016 (when RMR purchased the mining claims at the Quarry), BLM has continued to allow RMR's operations unabated, without subjecting such operations to the proper regulatory controls.

3. In 1982, BLM authorized the previous owners of the Quarry to mine/remove/transport/sell only "valuable mineral deposits" from the Quarry – high-quality, chemical-grade limestone to be used for dust suppression at now-closed coal mines in the region and other limited applications. That approval, as amended in 1989, continues in force today. That still-current approval, however, did not authorize the mining/removal/transport/sale of minerals that are not considered "valuable mineral deposits" under the 1872 Mining Law (30

U.S.C. §§ 21-43). Yet that is what RMR has been doing since it purchased the Quarry in 2016, with the full knowledge, approval and allowance by BLM.

4. Instead, based on records of RMR's rock sales to local construction companies (obtained by GSCA through Freedom of Information Act requests), the majority of truck trips from the Quarry through Glenwood Springs consist of rocks blasted from the hillside above the City and sold/delivered to local construction companies for roadbase, backfill, rip-rap, and similar uses – uses that BLM admits qualify the minerals as "common varieties" under the 1947 Materials Act and 1955 Common Varieties Act, and not "valuable minerals" under the 1872 Mining Law.

5. BLM's authorization and continued allowance of RMR's mining/removal/sale of common variety rocks and stone from the Quarry results in immediate, ongoing and significant adverse effects to the residents of the City of Glenwood Springs and surrounding areas, including the members of GSCA. RMR is authorized to remove and transport up to 20 trips a day of large industrial mining haul trucks through residential neighborhoods in Glenwood, neighborhoods in which many of GSCA's members live.

6. BLM's actions and omissions in authorizing the illegal mining, removal, transport and sale of common variety rocks and stone from the Quarry have caused serious concerns within the community. In addition to repeated letters from GSCA to BLM, the City of Glenwood Springs, through its elected mayor and City Council, has submitted detailed letters to BLM State Director Connell and other BLM officials, urging BLM to follow the law and halt RMR's illegal activities. Despite numerous letters, and in person meetings with State Director Connell, Field Manager Sandoval, and other BLM officials, BLM informed the City that its decision to authorize continued common variety mining would stand and BLM had no intention of curtailing RMR's operations at the Quarry.

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7. The stark difference between the two sets of statutes and regulations, governing "common varieties" versus "valuable minerals," is critically important in this case. Under the 1947 and 1955 Acts, BLM can only authorize mining/removal/sale of common variety minerals if the operation is not "detrimental to the public interest," and fully "protect[s] public land resources and the environment and minimize[s] damage to public health and safety during the exploration for and removal of such minerals." 43 C.F.R. § 3601.6. In addition, the removal and sale of common variety minerals can only occur pursuant to a Mineral Materials Sale Contract, where BLM receives fair market value for all removed materials. BLM has complete discretion to deny the removal/sale of common variety minerals. Id.

8. In stark contrast, the mining and sale of minerals qualifying as "valuable mineral deposits" under the 1872 Mining Law, as approved by BLM in 1982, is governed by an entirely different set of regulations, 43 C.F.R. Part 3809, which do not contain any "public interest" requirement, and where the claimant pays no royalty or price to the federal government. Further, where a claimant has made a discovery of a valuable mineral deposit on each mining claim, BLM's authority is constrained by the claimant's statutory rights under the 1872 Mining Law. Such constraints do not exist for the mining of common variety minerals as those minerals are not governed by the 1872 Mining Law and a person has no right to mine, remove, transport, or sell those minerals.

9. In this case, BLM has failed to apply the correct statutory and regulatory structure for the mining/removal/transport/sale of the common variety rock and stone from the Quarry, to the ongoing detriment of GSCA, its members, and the Glenwood Springs community.

10. For these and the related reasons addressed herein, GSCA asks this court to declare that BLM's actions and omissions in authorizing RMR to mine,

remove, transport and sell common variety rocks and stone violate the above-listed federal laws, regulations, and policies. GSCA asks this court to set aside/vacate and remand BLM's decisions and enjoin any mining, processing, removal, transport and sale of common variety minerals pending compliance with federal law.

JURISDICTION AND VENUE

11. This is a suit pursuant to the APA, FLPMA, the 1947 Materials Act, the 1955 Common Varieties Act, and other federal statutes, regulations and requirements. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question), § 2201 (declaratory relief), and § 2202 (injunctive relief).

12. Venue is properly before the District of Colorado pursuant to 28 U.S.C. §§ 1391 (b) and (e). The BLM Colorado River Valley Field Office, and named defendant Larry Sandoval, as well as BLM State Director Jamie Connell and Acting BLM Director William Perry, are located in Colorado. The Quarry is located in Garfield County, Colorado, directly above residential neighborhoods in the City of Glenwood Springs. Plaintiff GSCA is located and resides in Glenwood Springs, Colorado.

PARTIES

13. Plaintiff Glenwood Springs Citizens' Alliance (GSCA) is a nonprofit organization based in Glenwood Springs, Colorado that is concerned with protecting the Glenwood Springs area from the adverse impacts of the mining, processing and transport of minerals from the Quarry. GSCA was specifically formed in 2018 to respond to the environmental and economic threats posed by the ongoing operations at the Quarry, as well as RMR's proposed expansion of the Quarry. Members of GSCA use, enjoy, and value the lands and resources affected by the Quarry, including the public lands and access roads around the Quarry. GSCA members live in close proximity to the Quarry and use on a

daily basis the roads in Glenwood Springs that all of the Quarry's truck traffic utilizes to transport minerals removed from the site. In addition to the direct and adverse impacts to GSCA members resulting from the blasting, removal and transport of the common variety minerals from the Quarry on these roads, members of GSCA hike, view and photograph wild plant and animal life, and generally enjoy using the lands around and affected by the Quarry for recreational, historical, conservation, and aesthetic purposes.

14. In addition to continuing to use and be adversely affected by, on a daily basis, RMR's industrial traffic on these roads, members of GSCA intend on continuing to use and value the lands at, and affected by, RMR's continued operations at the Quarry, including the mining/removal/transport/sale of common variety minerals that would not occur but for BLM's allowance and/or acquiescence during 2020 and in future years. These uses are, and will be, immediately, irreparably, and significantly harmed by the Quarry, including the mining/removal/transport/sale of common variety minerals that would not occur but for BLM's allowance and/or acquiescence of RMR's common variety operations.

15. On October 11, 2018, GSCA submitted a detailed letter to BLM, urging the agency to properly regulate the Quarry and protect the community and public interest from RMR's continued mining/removal/transport of common variety minerals – to no avail, as BLM never responded to that letter. GSCA submitted a Freedom of Information Act (FOIA) request to BLM also in 2018, asking for all BLM documents regarding the Quarry. To date, BLM has still withheld or blacked-out hundreds of pages of the requested documents. GSCA submitted another FOIA request, on November 8, 2019, to obtain all recent documents, and again BLM has only partially responded, withholding an undisclosed number of critical documents.

16. On February 5, 2020, GSCA submitted another letter to BLM, detailing the legal and factual basis for BLM's illegal allowance of RMR's continued mining/removal/transport/sale of common variety minerals. On February 13, 2020, Defendant Larry Sandoval emailed a short response letter to GSCA's counsel, reiterating BLM's refusal to curtail RMR's ongoing common variety operations.

17. Faced with BLM's actions and omissions authorizing RMR's continued mining/removal/transport/sale of common variety minerals from the site in violation of federal law, GSCA has no adequate remedy at law, and now has no choice but to seek judicial review in this Court.

18. Defendants Department of the Interior and Bureau of Land Management are agencies of the United States government responsible for the management and protection of the public lands at and around the Quarry site. Secretary of the Interior David Bernhardt and Acting BLM Director William Pendley have management responsibility over the public lands at and around the Quarry site, and supervisory responsibility over the actions and omissions of DOI/BLM officials in Colorado. The BLM's Colorado River Valley Field Office, and Field Manager Larry Sandoval, have direct responsibility for the public lands at and around the Quarry and are responsible for the actions and omissions in allowing RMR to continue mining/removing/transporting/selling common variety minerals from the Quarry. BLM Colorado State Director Jamie Connell has supervisory responsibilities over the Field Office and the public lands at and around the site. Based on documents obtained from BLM, State Director Connell and Field Manager Sandoval have approved and authorized BLM and the Colorado River Valley Field Office, to allow RMR to continue mining/removing/transporting/selling common variety minerals from the Quarry. The named individuals are sued in their official capacities.

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STATUTORY AND REGULATORY BACKGROUND FOR THE MINING OF COMMON VARIETY ROCK AND STONE FROM PUBLIC LANDS

19. The "'cornerstone of federal legislation dealing with mineral lands' is the General Mining Law of 1872, Act of May 10, 1872, 17 Stat. 91 (1872) (codified as amended at 30 U.S.C. § 22 *et seq.*)(1872 Mining Law). *United States v. Coleman,* 390 U.S. 599, 600 n. 1 (1968)." Copar Pumice Co. v. Tidwell, 603 F.3d 780, 785 (10th Cir. 2010).

20. Under the 1872 Mining Law, ''All valuable mineral deposits in lands belonging to the United States … shall be free and open to exploration and purchase, and the lands in which they [valuable minerals] are found to occupation and purchase." 30 U.S.C. § 22. The Law "allowed citizens 'to go onto unappropriated, unreserved public lands to prospect for and develop' these mineral deposits, *United States v. Locke,* 471 U.S. 84, 86 (1985)." Copar Pumice, 603 F.3d at 785.

21. Under the 1872 Mining Law, "[a]fter discovering a valuable mineral deposit, and complying with minimal procedures to formally locate the deposit, citizens have the right of exclusive possession of the land for mining purposes." Copar Pumice, 603 F.3d at 785.

22. The Tenth Circuit has described the requirements for the discovery of a valuable mineral deposit under the Mining Law:

> Two tests have been applied for determining what qualifies as a ''valuable mineral deposit'' under the General Mining Law: (1) the ''prudent man test,'' and (2) the ''marketability test.'' A mineral deposit is valuable under the ''prudent man test'' if the deposit is ''of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.'' *Coleman,* 390 U.S. at 602, 88 S.Ct. 1327 (quotation and citation omitted). The ''marketability test'' is the ''logical complement'' to the prudent man test: it requires a mining operator to show ''that the

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> mineral can be extracted, removed and marketed at a profit.'' *Id.* at 600, 602, 88 S.Ct.1327 (quotation omitted).

Copar Pumice, 603 F.3d at 785.

23. The mere filing of a mining claim, however, does not provide any rights to occupy and remove minerals, absent the discovery of a valuable mineral deposit on the claim. "Under both federal and state law, a valid mining location cannot be made without a discovery of valuable minerals within the claim. 30 U.S.C. 23." United States v. Zweifel, 508 F.2d 1150, 1154 (10th Cir. 1975).

24. The 1872 Mining Law initially applied to most valuable minerals found on the western public lands (coal being a notable exception). Federal policy towards the disposition of western minerals evolved over the years. In 1920, for example, Congress removed oil, gas, and other fuel minerals from coverage under the Mining Law. *See* 1920 Mineral Leasing Act, 30 U.S.C. §§ 181 *et seq*.

25. After World War II, Congress became increasingly concerned about abuses of public land under the auspices of mining claims, and enacted two laws further aimed at limiting the types of minerals that could be claimed and removed under the statutory rights flowing from the discovery of a valuable mineral deposit under the 1872 Mining Law.

26. "Because certain very common minerals, such as common earth and common clay, were never disposable under either the mining law or the mineral leasing acts, Congress enacted the Materials Act of 1947, 61 Stat. 681 (1947) (codified as amended at 30 U.S.C. § 601 et *seq.*), to provide a method for their disposal." Copar Pumice, 603 F.3d at 785 (citations omitted).

27. "Congress later amended the Materials Act when it enacted the Surface Resources Act of 1955 (also known as the Common Varieties Act), 69 Stat. 367 (1955) (codified at 30 U.S.C. § 601 *et seq.*)." Id.

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28. "Together, these Acts provide that the Secretary of the Interior and the Secretary of Agriculture, 'under such rules and regulations as [they] may prescribe, may dispose of *mineral materials* (including but not limited to *common varieties* of the following: sand, stone, gravel, pumice, pumicite, cinders, and clay) … on public lands of the United States.' 30 U.S.C. § 601 (emphasis added)." Copar Pumice, 603 F.3d at 785-86. (citations omitted). "Generally, the disposal of these mineral materials occurs 'by contract let through competitive bidding.'" Id., at 86.

29. In Copar Pumice, the Tenth Circuit described the effect of the 1947 Materials Act and the 1955 Common Varieties Act on the mining of federal public land minerals:

> [T]he Common Varieties Act removed certain ''common varieties'' of minerals from the General Mining Law's definition of ''valuable mineral deposit.''
>
> > No deposit of *common varieties* of sand, stone, gravel, *pumice,* pumicite, or cinders and no deposit of petrified wood *shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States* so as to give effective validity to any mining claim hereafter located under such mining laws….
>
> 30 U.S.C. § 611 (emphasis added).

Copar Pumice, 603 F.3d at 786.

30. "Disposal of these 'common varieties' was now 'permissible only under the Materials Act of 1947.' *Watt v. W. Nuclear,* 462 U.S. 36, 57 (1983)." Copar Pumice, 603 F.3d at 786. In this case, BLM has allowed/authorized the disposal of the common variety minerals from the Quarry without compliance with, or consideration of, the 1947 Materials Act or the 1955 Common Varieties Act.

31. Not all "common varieties" of rock, stone, etc., were eliminated from the operation of the 1872 Mining Law. "[T]he Common Varieties Act only

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removed certain 'common varieties' of minerals … from the application of the General Mining Law." Copar Pumice, 603 F.3d at 786.

32. Deposits of common variety rock and stone could be considered a "valuable mineral" subject to claiming under the 1872 Mining Law, if the deposit itself "has some distinct and special value." 30 U.S.C. § 611.

33. "'Common varieties' as used in this subchapter and sections 601 and 603 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value …." 30 U.S.C. § 611.

34. "Thus, an ordinarily common variety mineral, such as pumice, would remain locatable under the General Mining Law as an 'uncommon variety' if it had 'some property giving it distinct and special value.''' Copar Pumice, 603 F.3d at 786.

35. Under the Mining Law, in order for a common variety mineral to qualify as an "uncommon variety," its end use must also require the "distinct and special value" to be utilized in that use. According to a leading Interior Department decision dealing with common varieties:

> **[I]t is the end use of the [mineral] that is determinative of whether the mineral is uncommon and thus locatable. The [mineral] is uncommon only if it is actually used in an application that utilizes its distinct and special value.** Take away the garment finishing (or the biofilter) market for Copar's +3/4" pumice and it is nothing more than common variety pumice. **Similarly, if the [mineral] is used for construction or other uses that do not require the unique property of +3/4" pumice, because of any size will do, it cannot be said to be uncommon variety pumice**.

United States v. Kelly Armstrong, 184 IBLA 180, 196 (2013), 2013 WL 6631451, **13 (emphasis added).

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36. Thus, importantly for this case, a mineral deposit is considered a common variety if it is being sold/used for common variety purposes, such as for roadbase, rip-rap, backfill, and boulders for local construction projects.

37. BLM mining claim regulations summarize the types of minerals that are subject to the 1872 Mining Law:

> Which minerals are locatable under the General Mining Law?
>
> Minerals are locatable if they are:
> (a) Subject to the General Mining Law;
> (b) Not leasable under the Mineral Leasing Acts; and
> (c) **Not salable under the Mineral Materials Act of 1947 and Surface Resources Act of 1955, 30 U.S.C. 601-615 (see parts 3600 through 3620 of this chapter**).

43 C.F.R. § 38230.11 (emphasis added).

38. In addition to the statutory distinctions between "valuable minerals" and "common varieties," the disposition and use of the two different types of mineral deposits are subject to very different regulatory structures.

39. The Interior Department regulates the exploration, mining, and removal of "valuable mineral deposits" pursuant to 43 C.F.R. Part 3809. Those regulations govern only "locatable" minerals (i.e., those types of minerals that can be claimed under the 1872 Mining Law), and not common variety minerals such as rock and stone:

> This subpart applies to operations that involve locatable minerals, including metallic minerals; some industrial minerals, such as gypsum; and a number of other non-metallic minerals that have a unique property which gives the deposit a distinct and special value. This subpart does not apply to leasable and salable minerals. Leasable minerals, such as coal, phosphate, sodium, and potassium; and **salable minerals, such as common varieties of sand, gravel, stone, and pumice, are not subject to location under the mining laws. Parts 3400, 3500 and 3600 of this title govern mining operations for leasable and salable minerals.**

43 C.F.R. § 3809(2)(e)(emphasis added).

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40. One distinction between locatable minerals under the 1872 Mining Law and common variety minerals is that locatable minerals "are free and open to exploration and purchase," 30 U.S.C. § 22, whereas common variety minerals are considered "salable minerals," which can only be removed by an operator under a sales contract with BLM.

41. Interior Department/BLM regulations governing the actual exploration, mining, processing, removal and transport of the two different types of mineral deposits are also very different.

42. Under the Part 3809 regulations for locatable minerals, BLM is limited in its ability to restrict the mining of valuable mineral deposits. For initial exploration, and for the actual mining/occupancy of valid claims under the 1872 Mining Law, BLM is limited to preventing "unnecessary or undue degradation" of the public lands pursuant to FLPMA. 43 U.S.C. § 1732(b). For exploration and the mining/occupancy of valid claims, BLM cannot refuse to allow operations as a matter of discretion to protect other non-mining resources at the site (such as environmental, wildlife, water, etc.). *See generally* 43 C.F.R. Part 3809.

43. In marked contrast, BLM's review and approval of non-locatable common variety mineral operations is entirely discretionary, meaning that BLM is free to limit or deny any proposal to mine and remove common variety minerals as a matter of complete discretion.

44. The "location of a mining claim encompassing a deposit of a common variety [mineral] establishes no right to develop the common variety [mineral] on the claim." John Steen, 166 IBLA 187, 190 (2005), 2005 WL 3072880, **WL2. "We have frequently recognized that BLM has considerable discretionary authority under the Materials Act and the implementing regulations regarding mineral materials at 43 CFR Part 3600, whether to approve an application to

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purchase mineral materials from the public lands." Id., 166 IBLA at 190, **WL3.

45. BLM regulates common varieties as "Mineral Materials," which are regulated by 43 C.F.R. Part 3600. "*Mineral materials* means, but is not limited to, petrified wood and common varieties of sand, stone, gravel, pumice, pumicite, cinders, and clay." 43 C.F.R. §3601.5.

46. The Mineral Material regulations provide complete discretion for BLM to approve, limit, or deny any proposal to mine and remove common varieties and place strict controls to protect the public interest, the environment, and public health and safety:

> It is BLM's policy:
> (a) To make mineral materials available **unless it is detrimental to the public interest to do so**;
> (b) To sell mineral material resources at not less than fair market value;
> (c) To permit Federal, State, Territorial, and local government entities and non-profit organizations free use of these materials for qualified purposes;
> (d) **To protect public land resources and the environment and minimize damage to public health and safety during the exploration for and the removal of such minerals**;
> (e) To prevent unauthorized removal of mineral materials; and
> (f) To require purchasers and permittees to account for all removals of mineral materials.

43 C.F.R. § 3601.6 (emphasis added).

47. BLM also has complete discretion to deny the mining or removal of common variety minerals to protect other public resources as "BLM will not dispose of mineral materials if we determine that the aggregate damage to public lands and resources would exceed the public benefits that BLM expects from the proposed disposition." 43 C.F.R. § 3601.11.

48. In addition, as stated in the Part 3600 regulations, FLPMA requires "BLM to manage the use, occupancy, and development of the public lands under the

principles of multiple use and sustained yield in accordance with the land use plans that BLM develops under FLPMA." 43 C.F.R. § 3601.3.

49. FLPMA further requires that "the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use." 43 U.S. C. § 1701(a)(8).

50. FLPMA also mandates that "the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute." 43 U.S. C. § 1701(a)(9).

51. BLM's duty to protect "the public interest," to "protect public land resources and the environment and minimize damage to public health and safety during the exploration for and the removal of such minerals," to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values," and ensure "the public benefits" from mining/removal of common variety minerals is not found in BLM's Part 3809 regulations governing locatable minerals.

52. In addition, while the federal government receives no payment or royalty when a mining claimant removes "valuable minerals" under the Mining Law and Part 3809 regulations (i.e., it is "free," 30 U.S.C. § 22), BLM can only "sell mineral material [common variety] resources at not less than fair market value." 43 C.F.R. § 3601.6(b).

53. The sale of common variety minerals, if approved by BLM at its discretion, can only be done pursuant to a "Mineral Materials Sales Contract," under detailed

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regulations ensuring that the federal government receives fair market value for the removed minerals. "BLM will not sell mineral materials at less than fair market value. BLM determines fair market value by appraisal." 43 C.F.R. § 3602.13(a).

54. No person may enter public lands to remove mineral materials without the specific approval of BLM, and under a Mineral Material Sales Contract:

> (a) Except as provided in paragraph (b) of this section, you must not extract, sever, or remove mineral materials from public lands under the jurisdiction of the Department of the Interior, unless BLM or another Federal agency with jurisdiction authorizes the removal by sale or permit. Violation of this prohibition constitutes unauthorized use.

43 C.F.R. § 3601.71 (note: the referenced paragraph (b) deals with the situation when the person seeking mineral removal owns the surface estate, which is not at issue in this litigation, as BLM owns the complete fee estate for all of the lands covered by RMR's mining claims at the Quarry).

55. BLM never applied its duties under the 1947 Act, the 1955 Act, and FLPMA to protect "the public interest," to "protect public land resources and the environment and minimize damage to public health and safety during the exploration for and the removal of such minerals," to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values," and ensure "the public benefits" from mining/removal of common variety minerals in its consideration of operations at the Quarry – whether in its approval of the PoO in 1982, later amendments in 1989, or at any time since then, including its authorization/allowance of RMR's continued mining/removal/transport/sale of common variety minerals.

BLM'S FAILURE TO PROTECT THE PUBLIC INTEREST AND PUBLIC LANDS FROM ILLEGAL MINING AND REMOVAL OF COMMON VARIETY ROCK AND STONE FROM THE QUARRY

56. The operation of the Quarry was first reviewed and approved by BLM in 1982 for mining only chemical/metallurgical-grade limestone as a "valuable mineral deposit" subject to claiming and location under the 1872 Mining Law. *See* 1982 Environmental Assessment for Mid-Continent Limestone Quarry.

57. BLM's approval of the Plan of Operations (1982 PoO) for the Mid-Continent Quarry in 1982, and later amended in 1989, was strictly for the mining and removal of a locatable mineral and in no way authorized the removal and sale of common variety limestone. BLM's review and approval of the 1982 PoO was done pursuant to BLM's locatable minerals regulations at 43 CFR Part 3809, which does not regulate or approve the removal/sale of minerals to be used for common variety purposes.

58. The Mid-Continent Quarry began operating in 1982, providing crushed limestone to the Mid-Continent Coal Mining Complex near Redstone to minimize hazardous coal dust. Mid-Continent Resources Minerals, Inc. and the associated Pitkin Iron, Inc. continued removing stock-piled limestone from the area. The original mining claims were abandoned in the 1990s and the current mining claims covering the Quarry were staked in 2001. In early 2009, CalX Minerals, Inc. acquired the Mid-Continent Quarry mining claims and resumed operations. RMR purchased the mining claims covering the Quarry in 2016.

59. Since 1982, BLM has stressed on numerous occasions to RMR's predecessor owners of the Quarry – Pitkin Iron Co., Mid-Continent Resources Inc., and CalX Minerals, Inc. – that the mining, removal, transport and sale of minerals for common variety uses was strictly prohibited and was not authorized by the 1982 PoO approval. In the 1990's and 2000s, BLM challenged such

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removal/sale, which resulted in legal cases before the Interior Board of Land Appeals and the federal District Court for the District of Colorado. *See* Mid-Continent Resources, Inc., Pitkin Iron Corp., 148 IBLA 370, 1999 WL 485018 (1999); Pitkin Iron Corp. v. Kempthorne, 554 F.Supp.2d 1208 (D. Colo. 2008).

60. Throughout those cases and disputes, these companies argued that the minerals removed from the Quarry were strictly valuable locatable minerals under the 1872 Mining Law and were not common variety minerals. The companies successfully argued that previously-mined limestone containing over 95% calcium carbonate was "chemical or metallurgical grade," and had a "distinct and special value" used for qualifying end uses for suppression of coal dust at coal mines and for industrial acid-neutralizing purposes. Pitkin Iron, 554 F.Supp. 2d at 1213-16.

61. The end result of those cases was that the companies could continue to mine and remove valuable chemical-grade limestone under 43 C.F.R. Part 3809 without requiring the submission and approval of a Mineral Materials Sales Contract and request for approval under the 43 C.F.R. Part 3600 regulations which govern the removal/sale of minerals used for common variety purposes.

62. That, however, is no longer the situation at the Quarry, and has not been the case since RMR purchased the mining claims at the Quarry, if not earlier. Now, the Quarry produces and sells large tonnages of rock used for roadbase, backfill, and rip-rap in local construction projects – certainly not for qualifying uses requiring the "chemical or metallurgical grade" limestone as had been solely the case before.

63. Under the Mining Law, in order for a common variety mineral to qualify as an "uncommon variety," its end use must require the "distinct and special value" to be utilized in that use. "[I]t is the end use of the [mineral] that is determinative of whether the mineral is uncommon and thus locatable. The

[mineral] is uncommon only if it is actually used in an application that utilizes its distinct and special value." United States v. Kelly Armstrong, 184 IBLA 180, 196 (2013), 2013 WL 6631451, **13.

64. Thus, in this case, even if all of RMR's mined limestone continued to exhibit the chemical/metallurgical grade calcium carbonate percentage (which has not been demonstrated by the record), it is no longer considered an "uncommon variety" if it is being sold/used for common variety purposes, such as for roadbase, rip-rap, backfill, and boulders for local construction projects.

65. As BLM became aware that the Quarry was producing and selling minerals for these common variety end uses, it questioned whether the original 1982/89 PoO approval was still valid, as that approval only allowed the mining/sale of the valuable chemical-grade limestone used for specific qualifying purposes (such as coal dust suppression).

66. For example, in an April 22, 1987 "Conversation Record" between BLM and the operator. **"We explained that the use for construction material and or road base was not permissible** from a locatable claim since the Material Sale Act of 1955 required payment for salelabe (sic) materials. We told him he would have to purchase limestone if it were to be used for roadbase or other common uses." (emphasis added).

67. In an October 13, 2004 letter from BLM to Pitkin Iron Corp., BLM advised the company that it was not authorized to mine, remove and sell limestone that was to be used for "non-qualifying uses," such as for construction purposes: "[S]o long as any material removed from a claim meets the necessary criteria, such as, MSHA rock dust specifications and it is clearly demonstrated that the material is being used for rock dust and **not for non qualifying uses, such as road base** or being stored for speculation, there should not be a common variety issues. The ability to enter the existing rock dust market, however, must

be demonstrated, sustained and documented, otherwise a trespass may occur. This will require copies of the contracts and/or agreements between Pitkin … and the qualifying end users." (emphasis added).

68. Similarly, in an October 19, 2012 letter to CalX Minerals, Inc., BLM stated: "This letter is a follow-up to our September 27th meeting in which the concern was raised that your current mining operations have exceeded the BLM authorized Plan of Operations dated Aug. 18, 1982. As such, it was agreed upon that CalX Minerals would supply a comprehensive modification to the Mine Plan of Operations no later than January 15, 2013." Regarding the question about the mining of minerals for common variety end uses, BLM further required that "CalX will supply the BLM with monthly sales information" to verify that the removed/sold minerals were not being used for common variety purposes. Although CalX did eventually provide those sales reports, a revised plan of operations was never approved.

69. RMR purchased the mining claims at and around the Quarry from CalX in October/November 2016.

70. At that time, BLM reiterated to RMR that it was required to continue providing monthly sales reports, just as CalX was required to do. In a November 1, 2016 email from BLM Geologist Jessica Lopez Smith to Gregory Dangler, RMR President, BLM stated:

> Per its June 15, 2009 BLM authorization for the Mid-Continent Quarry (attached), CalX was required to provide monthly scale tickets to this office. As the new operator of the Mid-Continent Quarry, and having assumed all liabilities and responsibilities under the existing Plan of Operations, please provide the scale tickets from Oct 12, 2016 (the date of sale) to Oct 31, 2016 at your earliest convenience. RMR Aggregates, Inc. will be required to provide the scale tickets for each coming month as well.

71. BLM specifically informed RMR just prior to its purchase of the Quarry from CalX that any materials removed from the site for common variety purposes

could not be allowed under the 1982 PoO, which was approved for only the removal of locatable minerals. BLM and RMR "discussed the potential **need for the operation to have a Mineral Materials Contract for the construction material that the quarry produces.**" Conversation Record between Jessica Lopez Pearce (BLM) and Isaac Morgan (RMR) dated September 19, 2016 (emphasis added).

72. A few weeks later, in a conversation between Gloria Tibbets (BLM) and Gregory Dangler/Isaac Morgan (RMR), then Field Manager Tibbetts verified that "I explained that the BLM would need to review the processes and/or final products to determine if they meet the requirements to be considered locatable." Conversation Record, between Tibbetts and Dangler/Morgan dated October 4, 2016.

73. BLM never made this common variety determination as it said it "would need to" to do in 2016. Instead, BLM has authorized/allowed RMR to excavate, transport, and sell the limestone rock for common variety uses, which as BLM previously stated are not qualifying end uses such as to be considered a valuable locatable mineral under the 1872 Mining Law and the 43 C.F.R. Part 3809 regulations – without complying with the required 43 C.F.R. Part 3600 regulations and the governing statutes (1947/55 Acts and FLPMA).

74. GSCA and the larger Glenwood community first became aware of the serious problems at the Quarry when RMR announced its proposal in 2018 to expand the Quarry from its current roughly 15 permitted acres to over 440 permitted acres.

75. Based on GSCA's investigations, it became clear that RMR was mining and selling limestone for common variety uses – and not only for the strict chemical/metallurgical uses that were the basis of the 1982 PoO approval.

76. For example, in GSCA's October 11, 2018 letter to BLM, GSCA attached an RMR document entitled "2018 Rocky Mountain Resources – Mid Continent Quarry Price Sheet," showing that RMR is producing, and selling, the following materials from the site: "Road Base," "Structural Fill," "Rip Rap," "Screened Rock," and various types of "Boulders."

77. None of these materials qualify as locatable minerals under the 1872 Mining Law, 30 U.S.C. §§ 22 et seq., the 1947 Materials Act, 30 U.S.C. §§ 601-604, or the 1955 Common Varieties Act, 30 U.S.C. § 611.

78. "There are numerous cases involving specific examples of materials which have been held to be not locatable under the general mining law. Among these are … **common or inferior limestone 'for building of levees or railroad embankments or filing [sic] up low places**,' Holman v. Utah, 41 L.D. 314 (1912); Gray Trust Co. (On rehearing) 47 L.D. 18 (1919), … common rock for 'filling purposes' Solicitor's Opinion M-36295, supra; Holman v. Utah, supra." United States v. Bienick, 14 IBLA 290, 297 (1974), 1974 WL 12889, **WL5 (emphasis added). "[W]e reiterate that among these nonlocatables are materials used for fill, grade, ballast and base." Id. at **WL6.

79. The "road base," "fill," "rock," and "boulders" that RMR is selling on the local construction market are not locatable minerals under the 1872 Mining Law. The production of these minerals, then, falls under the Common Varieties Act and 1947 Materials Act – not the 1872 Mining Law.

80. As the Interior Board of Land Appeals ("IBLA") has held:

> Two years after the enactment of the Multiple Use Mining Act, the Solicitor addressed an inquiry whether it was permissible for holders of unpatented gold placer mining claims to sell sand and gravel from the claims as a by-product of gold mining operations. He answered "in the affirmative" with respect to valid claims located prior to the July 23, 1955, passage of the Act, "assuming that the sand and gravel is a valuable mineral," but for claims located thereafter, he stated that the claimant could "use the sand and gravel

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> for any mining purpose, **but he has no authority to appropriate and sell it**." Solicitor's Opinion, "Disposal of Sand and Gravel from Unpatented Mining Claims," M-36476 (Aug. 28, 1957) at 2, 4. See 1 American Law of Mining, § 21.03 [2] (2d. ed. 1996). Thus, the Solicitor distinguished between the rights of claimants to dispose of sand and gravel on their unpatented mining claims based upon the date of the location of their claims. **For claims located on or after July 23, 1955, he found the claimants had no right under the mining law to appropriate and sell sand and gravel from their claims. Disposition could only be authorized in accordance with the Materials Act.**

Ronald W. Byrd, 171 IBLA 202, 207-208 (2007), 2007 WL1761028, **WL3 (emphasis added).

81. In that case, because minerals that were being removed from the two mining claims were common variety minerals – the situation at RMR's Quarry – the IBLA upheld BLM's order to the company that it "cease and desist" from such activities. "[E]xtraction and removal of stone from those claims could take place, if at all, only pursuant to authorization from BLM under the mineral material disposal regulations in 43 CFR Part 3600. To the extent BLM's August 4, 2004, decision ordered Byrd to cease and desist extraction and removal of mineral materials from the Duff and Dan L. Green claims, as an unauthorized use under 43 CFR 3601.72, it is affirmed." Ronald W. Byrd, at 208-209, **WL4 (emphasis added).

82. Here, because RMR's claims at the site post-date 1955, any removal of these common variety minerals, without the proper Mineral Material Sales Contract and approvals issued pursuant to 43 CFR Part 3600, is considered a "Mineral Material Trespass" under BLM policy and applicable law. According to BLM Manual Handbook H-9235-1, "Mineral Material Trespass and Abatement":

> **The unauthorized use or disposal of common variety mineral material from a mining claim located after July 23, 1955, is a trespass regardless of whether there is a valid discovery of other locatable minerals**, such as gold. … Trespass damages should accrue from the onset of operations on the claim(s) and liability of the parties begins from that date. Common

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> variety sand and gravel, which occurs with valuable minerals such as gold on unpatented placer mining claims, located on or after July 23, 1955 (P.L. 84-167) (30 U.S.C. 611 et seq.), may not be sold by the claimant, but may be used for on site mining purposes. Solicitor's Opinion M-36467, dated August 28, 1957, Disposal of Sand and Gravel From Unpatented Mining Claims states that "The taking of sand and gravel from a mining location perfected after July 23, 1955, by one with knowledge of the existence and date of location of the claim, is willful trespass."

H-9235-1, Chapter I.A.12 ("Disposal of Common Variety Mineral Material From Mining Claims" (emphasis added). https://www.blm.gov/sites/blm.gov/files/uploads/Media%20Center_BLM%20Policy_H-9235-1.pdf (viewed February 15, 2020)

83. Under BLM Mineral Material Disposal regulations: "you must not extract, sever, or remove mineral materials from public lands under the jurisdiction of the Department of the Interior, unless BLM or another Federal agency with jurisdiction authorizes the removal by sale or permit. Violation of this prohibition constitutes unauthorized use." 43 CFR § 3601.71(a). "Unauthorized users are liable for damages to the United States, and are subject to prosecution for such unlawful acts (see subpart 9239 of this chapter)." 43 CFR § 3601.72.

84. Thus, even if the RMR mining claims still contain some valuable chemical grade limestone (which GSCA does not admit), RMR cannot remove and sell the common variety minerals without receiving specific authorization under the Part 3600 regulations and obtaining a Mineral Materials Sale Contract from BLM – neither of which has occurred here.

85. Since GSCA first raised the common variety issue to BLM in 2018, other affected entities, including the City of Glenwood Springs and Garfield County, have submitted additional evidence that RMR has been mining and selling common variety minerals from the Quarry for local construction uses.

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86. For example, on May 8, 2019, after a public hearing in which RMR presented its case, Garfield County issued a Notice of Violation to RMR for violating its County permit, which was specifically contingent on RMR mining and removing only valuable minerals for coal dust uses.

> Based upon the evidence available to the Garfield County Community Development Department, including evidence presented during the April 22, 2019 hearing, RMR's current operations are not in accordance with the BOCC's conditions of approval for Resolution No. 82-222 and Amended Resolution No. 2009-97, as follows:
> 1. The size of the current operation exceeds the permitted 16.3 acres. (Resolution No. 2009- 97 (B) (1)).
> 2. The operator is extracting and selling materials outside of the original approvals. (Resolution No. 2009-97 (B) (1)). **The approvals granted via Resolution No. 82-222 and No. 2009-97 are for the extraction, processing and sale of limestone dust to be used in coal mines and coal fired power plants.** ***RMR has been extracting, processing, and actively marketing various types of materials primarily used in construction of roads and retaining walls.***

Notice of Violation, at 2 (emphasis added).

87. Thus, the previous Quarry owners in 1982 (when the Quarry was initially approved by BLM) and again in 2009 agreed that its operations were limited to the mining of chemical/metallurgical grade limestone for use as coal dust suppression and other locatable mineral qualifying end uses. Now, as confirmed by Garfield County, RMR is mining and selling limestone for common variety end uses, in violation of the County permit and previous representations by the previous owners of the Quarry. RMR has filed a state court action challenging that Notice of Violation on the grounds that Garfield County's action is preempted by the 1872 Mining Law.

88. Notably, RMR does not contest the fact that it is removing and selling rock and stone from the Quarry for common variety construction uses. In January 2020, RMR stated in its court filing in its current lawsuit against Garfield County, that it has been selling the rock from the Quarry for local construction projects.

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RMR acknowledged that "rocks purchased from RMR" have been "used in the reconstruction of the City's Grand Avenue Bridge." RMR Response in Opposition to City's Motion to Intervene, Case Number: 2019CV30087, at p. 2 (January 27, 2020). RMR boasted that the Bridge "may not have been possible but for the availability of material purchased from RMR by City contractors within 2 miles of the project site." Id. at n. 1.

89. RMR stated in its most recent 10-K Report to the federal Securities and Exchange Commission, at 1 (For the fiscal year ended March 31, 2019): "The operation currently serves Arch Coal, Hickman Farms, **local construction firms, and various city and county government construction projects**." (emphasis added). https://www.sec.gov/Archives/edgar/data/1556179/000110465920000861/tm1920806-1_10k.htm#b_003 (viewed February 16, 2020).

90. In June of 2019, the Mayor of the City of Glenwood Springs reiterated the City's serious concerns with BLM's authorization of RMR to mine and sell common variety minerals without the proper regulatory oversight – especially in light of the clear evidence that such mining/sales were occurring. In a letter to Defendants State Director Connell and Field Manager Sandoval, as well as BLM officials in Washington, D.C., the Mayor stressed that "BLM commence full enforcement actions at the quarry with respect to its unauthorized use, extraction, and sale of common variety minerals for road, construction aggregate, and other unauthorized uses, in violation of RMR's Plan of Operations ("PoO") and federal law. **The City of Glenwood Springs respectfully but strongly requests again now that the Colorado BLM office commence that enforcement, including on the basis that RMR is extracting and selling common variety minerals in violation of their authorization."** June 12, 2019 letter from Glenwood City to BLM, at 1 (emphasis in original).

91. In its response to GSCA's FOIA request for all documents related to the Quarry, BLM provided RMR's Sales Reports/Receipts from late 2016 to mid-2018, showing the number of sales, truck loads, and tonnages of the minerals removed and sold from the site.

92. Based on RMR's Sales Reports/Receipts submitted to BLM, in just one month, October 2017, RMR made over 350 separate invoices to a single local construction company, for "Roadbase" and "Backfill" (in addition to deliveries to other local construction firms). Based on the Sales Report for that month, RMR sold a total of 6,133 tons of product, which consisted of:

- 3,306 tons of Roadbase Class 6
- 1,426 tons of PLS Bulk and PLS Bagged
- 797 tons of Backfill Class 1
- 368 tons of 3/8" minus and 3/4" minus product (gravel)
- 182 tons of 8"x3" Screened Limestone and 3"x1" Screened Limestone
- 36 tons of boulders
- 16 tons of chicken grit and 1/8" minus product

93. Based on those Reports from 2016-18, GSCA prepared the following chart, showing the decreasing level of limestone sold for qualifying end uses (GSCA assumes, but does not admit, that sales to the coal industry are for uses requiring the chemical/metallurgical grade limestone, as BLM has provided no verification of such uses), compared to the increasing level of sales for common variety construction uses.

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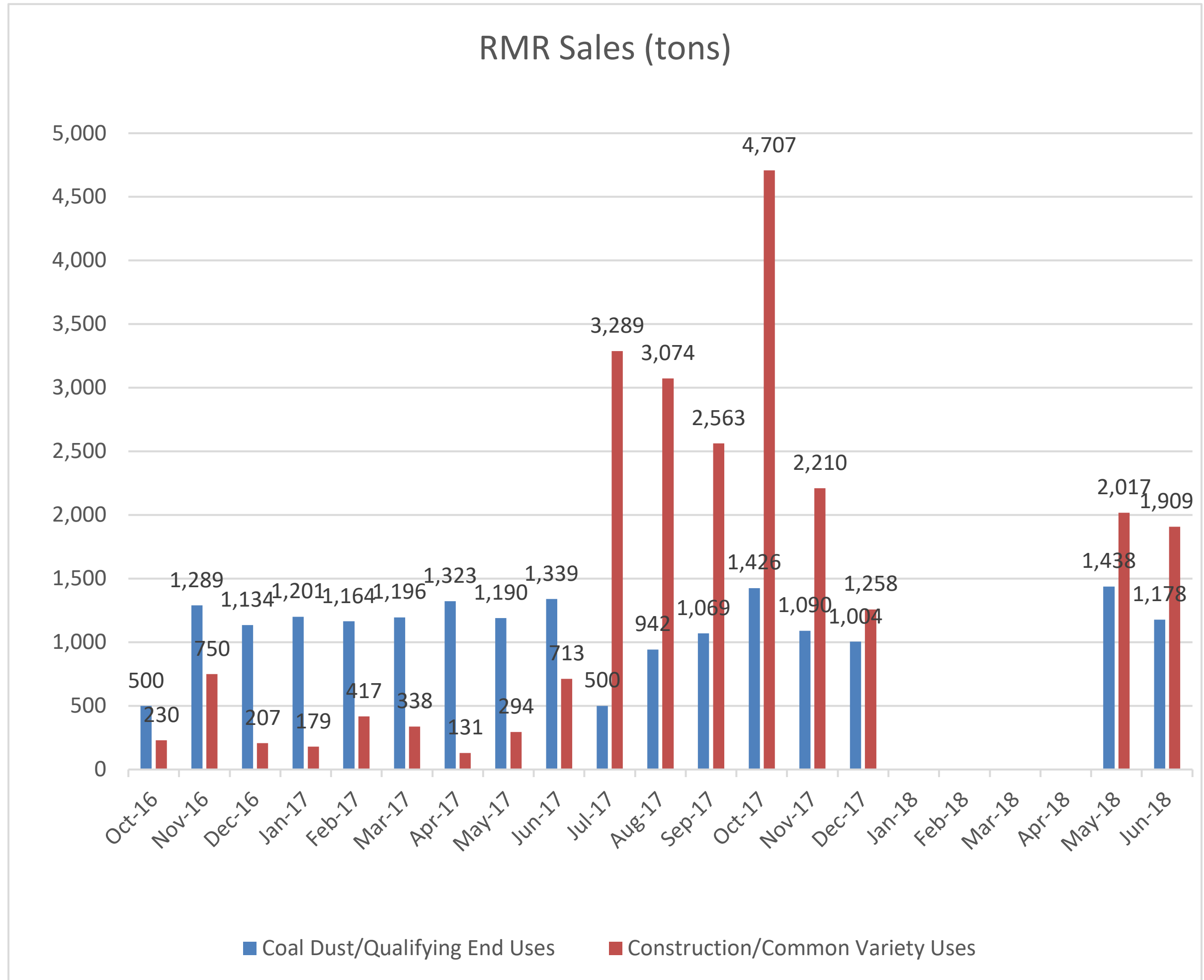

95. Although BLM has so far failed to produce similar reports of sales since mid-2018, despite GSCA's outstanding FOIA requests, on information and belief, GSCA believes that the number of sales for common variety uses continues to far outpace sales for qualifying locatable mineral end uses.

96. BLM has not attempted to rebut the overwhelming evidence before the agency showing that RMR has been producing and selling rock from the Quarry for common variety purposes. Instead, BLM has continued to allow the mining, processing, transport and sale of this common variety rock without letup – and

all pursuant to the 1982 PoO approval which did not authorize the removal or sale of limestone for non-qualifying common variety uses.

97. Based on RMR Sales Reports, it is also very possible that RMR's mining claims covering the Quarry are no longer valid under the 1872 Mining Law, which would also require BLM to suspend operations. Under the Mining Law, a claimant cannot rely on sales of common variety minerals to support a finding that the claim contains the requisite discovery of a valuable mineral deposit (i.e., that the valuable and locatable minerals from the claim can be removed and marketed at a sufficient profit under the above-noted prudent-person and marketability claim validity tests outlined in Copar Pumice, 603 F.3d at 785). According to the Interior Department:

> It is improper to rely upon revenues from common variety sales to conclude that a potentially locatable material can be mined and marketed at a profit. When there is more than one market for the mineral from a claim, and the sales in one or more of those markets would be considered sales for common variety uses, that fact must be taken into consideration when determining whether there is a discovery of a locatable mineral. The uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals (or products) may not be considered when predicting profitability.

United States v. Kelly Armstrong, 184 IBLA 180, 225 (2013), 2013 WL 6631451, **37.

98. Despite this, BLM continues to act as if all of RMR's claims are still valid and all mineral extraction qualifies under the 1872 Mining Law. BLM has not determined whether RMR's mining claims covering current Quarry operations are valid under the 1872 Mining Law.

99. BLM refuses to apply the proper regulatory review of the current operations. "Even though a claimant may have made a discovery on a claim, the claimant runs the risk of losing the discovery if the mineral deposit is exhausted or if there is a material change in market conditions rendering it unreasonable to

expect that the mineral can be mined at a profit. The loss of the discovery, either through exhaustion of the minerals, changes in economic conditions, or other circumstances, negates the locatability of the mineral. *E.g., Mulkern v. Hammitt*, 326 F.2d 896, 898 (9th Cir. 1964); *U.S. v. Multiple Use, Inc.*, 120 IBLA at 81." Armstrong 184 IBLA at 196, WL 661451, **13.

100. As RMR recently stated in its financial reporting, even combining all of the sales from the purportedly locatable minerals sold to the coal industry, along with its sales of minerals for common variety uses, the Quarry is not profitable:

> We anticipate that we will incur increased operating expenses prior to realizing significant revenues. We therefore expect to incur significant losses into the foreseeable future. We recognize that, if we are unable to generate significant revenues from the sale of our products in the future, we will not be able to earn profits or continue operations. There is no history upon which to base any assumption as to the likelihood that we will prove successful, and we can provide no assurance that we will generate any revenues or ever achieve profitability.

RMR most recent 10-K filing to the federal Securities and Exchange Commission, at 6. https://www.sec.gov/Archives/edgar/data/1556179/000110465920000861/tm1920806-1_10k.htm#b_003 (viewed February 16, 2020).

101. Yet, the fact that RMR may be relying on future limestone sales from its proposed expansion to support claim validity is irrelevant as to whether the current operation satisfies the test for valid claims under the Mining Law, or whether BLM can postpone its required reviews of the mining and sale of common varieties under the Part 3600 regulations, the 1947 and 1955 Acts, and FLPMA.

102. Based on the evidence regarding the large tonnage volumes and truck trips associated with RMR's common variety mineral mining/sales, if RMR was allowed to only mine, transport, and sell valuable locatable minerals, the

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current level of mining, including the use of local and residential streets to transport the minerals, would be dramatically lower, with the associated reduced environmental, health, and safety impacts to GSCA members and Glenwood Springs residents.

103. BLM has stated that it has begun to investigate the common varieties issue and will prepare a Determination of Common Variety (DCV), all the while still authorizing common variety minerals to be mined and sold unabated. In a March 21, 2019 letter to RMR President Gregory Dangler, Defendant BLM Field Manager Larry Sandoval stated that BLM will "allow operations that are currently authorized to continue." This is despite the fact that, based on BLM's own documents showing years of common variety mineral production and sale, such mining/sale was not legitimately "currently authorized," as the current Plan of Operations, approved in 1982 did not in any way "authorize" the mining and sale of common variety minerals.

104. In the March 21, 2019 letter to RMR (and a subsequent BLM to RMR letter dated July 10, 2019 (discussed below)), BLM authorized continued mining, subject only to RMR and BLM establishing an escrow account to purportedly cover the sale of these minerals.

105. In response to GSCA's February 5, 2020 letter to BLM questioning the legality of the establishment of the escrow account and BLM's authorization of the continued mining/sale of common varieties, Field Manager Larry Sandoval stated: "BLM did in fact require RMR to establish and pay into an escrow account, which was executed, and payments submitted going back to RMR's November 2018 plan modification submission to expand the Mid-Continent Quarry."

106. To date, BLM has failed to provide the documents associated with the DCV and escrow account as requested by GSCA's FOIA requests.

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107. BLM relies on its 43 C.F.R. Part 3809 locatable mineral regulations to establish the escrow account. These regulations state that:

> On mining claims located on or after July 23, 1955, you must not initiate operations for minerals that may be ‘‘common variety’’ minerals, as defined in Sec. 3711.1(b) of this title, until BLM has prepared a mineral examination report, except as provided in paragraph (b) of this section.
>
> (b) Interim authorization. Until the mineral examination report described in paragraph (a) of this section is prepared, BLM will allow notice-level operations or approve a plan of operations for the disputed mining claim for.
> …
> (3) Operations to remove possible common variety minerals if you establish an escrow account in a form acceptable to BLM. You must make regular payments to the escrow account for the appraised value of possible common variety minerals removed under a payment schedule approved by BLM. The funds in the escrow account must not be disbursed to the operator or to the U.S. Treasury until a final determination of whether the mineral is a common variety and therefore salable under part 3600 of this title.

43 C.F.R. § 3809.101.

108. Thus, according to BLM, as long as it requires an escrow account for the sold common variety minerals, RMR is free to continue mining and transporting those minerals under the original PoO approval.

109. At the outset, this escrow account provision only applies, if at all, to when BLM “approve[s] a plan of operations,” §3809.101(b). The ability to establish an escrow account for a new mining plan does not apply to the situation here – where BLM is authorizing the mining of common variety minerals under a long-ago approved PoO (here from 1982/89) when that PoO approval was limited to mining only minerals that were locatable under the 1872 Mining Law.

110. In any event, BLM’s reliance on this regulation, as applied to the situation in this case, violates FLPMA, the 1947 Materials Act, and the 1955 Common Varieties Act.

111. The fact that RMR will pay into an escrow account while the mining and sale of common variety rock and stone continues, while potentially providing some future benefit to the public treasury, does not mean that BLM is complying with its duties to protect the public interest and public lands and resources under FLPMA, the 1947 Materials Act, and the 1955 Common Varieties Act.

112. As noted above, BLM previously informed RMR of the "need for the operation to have a Mineral Materials Contract for the construction material that the quarry produces." Conversation Record between Jessica Lopez Pearce (BLM) and Isaac Morgan (RMR) dated September 19, 2016.

113. Despite this commitment to verify that any sale of "construction material that the quarry produces" could only occur under a Mineral Materials Contract, the BLM failed to meet this legal requirement, as BLM has never subjected the mining, removal, transport and sale of the common variety minerals to the proper review under 43 C.F.R. Part 3600 (the common variety regulations), the 1947 and 1955 Acts, or the multiple use and environmental protection requirements of FLPMA.

114. BLM's decisions authorizing RMR to continue mining and selling common variety mineral materials also ignore the significant differences between BLM regulation of valuable locatable minerals versus common variety minerals.

115. BLM's actions and omissions in not applying the 43 C.F.R. Part 3600 regulations means that BLM is failing to protect the "public interest" and other requirements mandated by these regulations. "No disposal is authorized by the statute where it would be 'detrimental to the public interest.' 30 U.S.C. § 601 (2000); 43 CFR 3601.6(a)." Ronald W. Byrd, 171 IBLA 202, 208 (2007), 2007 WL1761028, *4.

116. Because RMR "must not extract, sever, or remove mineral materials from public lands," and because such extraction/removal is an "unauthorized use" of

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public lands, 43 C.F.R. § 3601.71(a), BLM cannot allow such activities to continue.

117. In authorizing RMR to continue mining/selling common variety minerals from the Quarry as long as RMR pays into an escrow account, BLM never undertook the required "public interest," "multiple use," and other environmental, public health and safety, and other analysis and determinations required by the 1947 and 1955 Acts, FLPMA and BLM's Part 3600 Mineral Material/Common Variety requirements.

118. In addition, the establishment of the escrow account was done without any public review or input, and as such the public has no idea as to the legal sufficiency of RMR's payments.

119. Due to BLM's failure to adequately respond to GSCA's FOIA requests for the relevant documents, including BLM's decision to approve the escrow account, GSCA is unable at this time to produce that decision document. Nevertheless, that decision document is one of the final agency actions challenged in this case and GSCA will reference that specific document, and any other BLM decision documents, once they are produced to GSCA and this Court (as part of the administrative record).

120. BLM has authorized RMR to continue mining under the 1982 PoO, which was approved pursuant to the condition that the Quarry would only mine and produce valuable locatable minerals under the 1872 Mining Law and the Part 3809 regulations. Yet BLM's review of the 1982 PoO application never considered its obligations under 1947 and 1955 Acts, FLPMA, and the Part 3600 regulations.

121. Further, even if an escrow account could conceivably be established as the remedy for unauthorized mining under an existing operation, BLM refused to apply the proper beginning date for the payment of monies into the account.

This represents a significant financial windfall to RMR, which allows it to continue mining at its chosen rate – with the associated adverse impacts to GSCA members and Glenwood Springs residents.

122. Initially, BLM informed RMR that the beginning date for the calculation of the amount to be deposited in the escrow account was based on RMR's acquisition of the Quarry in 2016:

> In accordance with 43 CFR 3809.10l(b)(3), while the DCV [Determination of Common Variety Mineral Examination] is in progress and until it is determined whether the minerals are of a common or uncommon variety, the **BLM may** continue processing your Plan and **allow operations that are currently authorized to continue**, provided that you first establish an escrow account in a form acceptable to BLM and make payments for the in-place value of the materials removed. Per your March 5, 2019 discussion and agreement with Northwest District Manager Andrew Archuleta, payments to the escrow account shall be retroactive to RMR's acquisition of the Mid-Continent Quarry in October 2016.

March 21, 2019 letter from Larry Sandoval, BLM Field Manager, to Gregory Dangler, RMR President, at 2.[1]

123. Then, after RMR met with BLM State Director Connell in June of 2019, BLM abruptly reversed course and pushed the starting date for the escrow account forward to November 2018:

> One key next step for the BLM is to affirm the date that RMR would be required to retroactively pay into the account, as you have questioned the need to go back to RMR's acquisition date when they and their predecessors

[1] In addition, based on this BLM statement to RMR, continued operations that resulted in sales of materials for common variety uses would only be authorized "provided that you first establish an escrow account in a form acceptable to BLM and make payments for the in-place value of the materials removed." It does not appear that this was the case, as RMR continued to produce, after March 21, 2019, these types of minerals prior to the establishment of the escrow account. As noted below, however, due to BLM's failure under FOIA to produce any detailed documents regarding when the escrow account was established, its amount, etc., GSCA is unable to ascertain the specific timing of these events. As noted herein, however, it appears that the escrow account was not established at least by the time when BLM changed its position regarding the start date for the account (*See* BLM July 10, 2019 letter to RMR).

> were presumed to be operating under locatable status and RMR's Plan to expand is what triggered the latest DCV. While this is being sorted out, as agreed to during our July 2 meeting, it is important for RMR to move forward with submitting a draft Escrow Agreement and payment going back to the November 2018 Plan of Operations submission.

July 10, 2019 letter from Larry Sandoval/BLM to Gregory Dangler/RMR, at 2.

124. By making this switch, BLM authorized all of RMR's sale of common variety minerals from October 2016 to November 2018 to escape any payment whatsoever, as should have been required under 43 C.F.R. Part 3600 and BLM's previous position.

125. As stated in BLM's Mineral Trespass Handbook noted above, H-9235-1, "Trespass damages should accrue from the onset of operations on the claim(s) and liability of the parties begins from that date." In addition, "Unauthorized users are liable for damages to the United States, and are subject to prosecution for such unlawful acts (see subpart 9239 of this chapter)." 43 CFR § 3601.72.

126. According to BLM, it decided to push back the start of the escrow account payment period based on its view that RMR and its predecessors "were presumed to be operating under locatable status," and that it was RMR's submittal of the current expansion Plan of Operation in 2018 that "triggered the latest DCV." July 10, 2019 letter at 2. But the fact that RMR "presumed" that it was mining and selling only locatable minerals since 2016 does not mean that BLM can simply accede to that belief and allow RMR to avoid the need to submit a Mineral Materials Sales Contract proposal to BLM. BLM's role as public trustee requires it to base its decision on the evidence, not on a mineral claimant's wishes.

127. This is especially troubling based on the evidence before the BLM showing without a doubt that RMR has been selling its Quarry products for common variety construction material uses. As noted above, RMR itself admitted that it

was selling materials from the Quarry for common variety mineral construction projects such as the Glenwood Bridge Project which was ongoing in 2016. RMR also states on its website: "RMR produces a variety of limestone products that are used in everything from underground mine safety, to stream restoration and local infrastructure projects. In fact, RMR was a significant material supplier on the Grand Avenue Bridge project, which was just completed in 2017." https://glenwoodrocks.org/about-us/ (viewed February 5, 2020).

128. Thus, as a factual and legal matter, BLM's position, that it was not aware that RMR was selling rocks for common variety end uses such as for road base, rip-rap, and other construction uses, is directly contradicted by BLM's own admissions and documents.

129. As noted above, in response to GSCA's initial FOIA request in 2018, BLM produced spreadsheets for "RMR Scale Ticket Registers" for each month going back to RMR's purchase of the site in October 2016 (through mid-2018). BLM's evidence shows that RMR was selling, at increased frequencies and amounts, products labeled "roadbase," "rip rap," "boulders" and other materials to various construction companies in the area – including those working on the bridge and other local construction projects.

130. Thus, BLM's excuse for not requiring Mineral Material Sales Contracts for all of these minerals removed from public land – that it was "presumed" that all materials removed and sold from the Quarry were locatable minerals and that the first time the need for a common variety determination was "triggered" was when RMR submitted its expansion Plan of Operations – contradicts the facts and is arbitrary and capricious. As a result, BLM cannot legally authorize continued removal of these materials without a Mineral Materials Sales Contract and compliance with the Part 3600 regulations.

131. Further, BLM decided that its Determination of Common Variety (DCV) for the Quarry is part of its review of RMR's large expansion proposal. In BLM's July 10, 2019, letter to RMR, BLM stated that it intended to begin the DCV after RMR submitted an initial payment to cover the cost of the DCV and that "[t]imely submission of these funds is particularly important with mineral examiners set to begin their mapping phase in mid-July."[2]

132. Yet, the "mapping" of RMR's expansion of the Quarry onto other mining claims is irrelevant as regards whether the currently mined/sold minerals are common varieties and irrelevant to BLM's illegal authorization of the continued removal and sale of common variety minerals by the current operations.

133. BLM's current obligations under the 1947 and 1955 Acts, FLPMA, and their implementing regulations cannot be postponed until some time in the future, all the while authorizing RMR to mine and remove common variety minerals.

134. BLM's March 21, 2019 letter to RMR, BLM's July 10, 2019 letter to RMR, and BLM's decision to establish and approve the escrow account agreement, constitute final agency actions under the APA.

135. To date, BLM has yet to submit the expansion proposal to public "scoping" review under the National Environmental Policy Act (NEPA). As BLM has committed to preparing an Environmental Impact Statement (EIS) for the expansion, any review of that proposal will not likely be completed for at least another year or two, at least.

136. BLM has authorized RMR to continue its operations unabated, despite BLM acknowledging that RMR is in violation of its Plan of Operations. In addition

[2] As noted herein, in November 2019, GSCA submitted a Freedom of Information Act request for the documents associated with the escrow account and DCV, but to date BLM has failed to produce them.

1 to the unauthorized removal and sale of common variety materials, operations
2 at the site have violated the provisions of the current 1982/89 PoO. BLM's
3 recent Minerals Inspection Reports of the RMR operations, in 2016 and 2018,
4 detail numerous unauthorized operations that require immediate BLM action.
5 These include: (1) unauthorized exploratory drilling; (2) unauthorized mine
6 bench development; (3) failure to have an approved surface drainage plan
7 (storm water management plan); and (4) unauthorized acreage disturbance in
8 exceedance of the 1982/89 PoO. As BLM stated to RMR President Gregory
9 Dangler in an October 25, 2018 letter: "As you know, the current operations at
10 the Quarry do not comply with the current approved Plan of Operations for the
11 Quarry." Unauthorized operations are not allowed under FLPMA.
12
13 137. In addition, RMR's predecessor constructed/installed a rock dust
14 milling/processing plant at the site in 2009 to process some of the extracted
15 minerals, yet never received the proper occupancy and construction
16 authorization from BLM for this facility, nor has BLM ever conducted any
17 public review of this modification to its approval of the 1982/89 Plan of
18 Operations. In a recent PowerPoint presentation from BLM staff to State
19 Director Connell (obtained via GSCA's FOIA request), on a slide entitled
20 "Non-Compliance Issues," BLM stated that there were "Three areas of non-
21 compliance, all originating with previous owners: Pit expansion with State
22 authorization but not BLM authorization, Unauthorized construction of mill
23 building [and] Incomplete Plan of Operations." Mid-Continent Quarry
24 Briefing, August 17, 2018. In notes included in that PowerPoint slide, BLM
25 stated that: "BLM informed RMR of non-compliance issues before they
26 purchased the quarry."
27 138. In its new Plan of Operations application to BLM for the massive expansion
28 proposal (available on BLM's website), RMR acknowledges that BLM

questioned RMR's continued failure to have the proper occupancy permission for the processing plant: "Mill facility approved under 43 CFR 3809 on June 15, 2009 does not have 43 CFR 3715 occupancy authorization." https://www.blm.gov/sites/blm.gov/files/Mid-Continent%20Quarry%20Plan%20of%20Operations%20190710%20posting.pdf (viewed February 21, 2020). Instead of complying with the BLM occupancy regulations, RMR proposes to receive the proper approval when BLM reviews the mine expansion in the future: "As a part of this plan modification, RMR is requesting occupancy authorization for the mill facility."

139. Despite these findings in 2016 and 2018, BLM has taken no substantive action to correct or stop these unauthorized activities. At most, according to the 2018 Inspection Report, BLM states that: "Any upcoming Plan of Operations modification must include an update to the mining plan and mine bench design." 2018 Report at 2. *See also* previous paragraph where RMR proposes to receive occupancy approval for the 2009 construction of the processing plant sometime in the future when BLM approves the mine expansion.

140. In BLM's July 10, 2019 letter to RMR, BLM stated that the current PoO non-compliance issues "will be addressed in the NEPA that considers your proposed expansion."

141. Thus, instead of suspending operations not in conformance with the approved PoO or that lack all required authorizations, and taking appropriate enforcement actions, BLM is allowing these actions to continue – apparently deferring any action until a revised PoO is approved at some unknown point in the future.

FIRST CAUSE OF ACTION

Violation of FLPMA, the 1947 Materials Act, the 1955 Common Varieties Act, and their implementing regulations.

142. The allegations in the previous paragraphs are reasserted as if fully stated herein.

143. BLM's actions and decisions authorizing RMR to continue the mining, removal, transport, and sale of common variety minerals from the Quarry without requiring a Mineral Materials Sales Contract, without subjecting such mining/removal/transport/sale to the proper applicable statutory and regulatory requirements under the FLPMA, the 1947 Materials Act, the 1955 Common Varieties Act, and their implementing regulations, and without applying the proper applicable requirements to protect the public interest, public lands, health and safety, and the environment in violation of these laws and their implementing regulations, are arbitrary, capricious, an abuse of discretion, not in accordance with law, without observance of procedure required by law, and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the judicial review provisions of the APA. 5 U.S.C. § 706(2).

SECOND CAUSE OF ACTION

Violation of FLPMA, the 1947 Materials Act, the 1955 Common Varieties Act, and their implementing regulations.

144. The allegations in the previous paragraphs are reasserted as if fully stated herein.

145. BLM's failure to act and omissions allowing RMR to continue the mining, removal, transport, and sale of common variety minerals from the Quarry without requiring a Mineral Materials Sales Contract, without subjecting such mining/removal/transport/sale to the proper applicable statutory and regulatory

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requirements under the FLPMA, the 1947 Materials Act, the 1955 Common Varieties Act, and their implementing regulations, and without applying the proper applicable requirements to protect the public interest, public lands, health and safety, and the environment in violation of these laws and their implementing regulations, constitutes agency action that has been unlawfully withheld and unreasonably delayed. 5 U.S.C. § 706(1).

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs pray this court:

A. Enter an order declaring that BLM's actions, omissions, and decisions allowing/authorizing RMR to continue the mining, removal, transport, and sale of common variety minerals from the Quarry without requiring a Mineral Materials Sales Contract, without subjecting such mining/removal/transport/sale to the proper applicable regulations and the proper applicable requirements to protect the public interest, health and safety, and the environment, violates the FLPMA, the 1947 Materials Act, the 1955 Common Varieties Act, their implementing regulations, and the APA.

B. Pursuant to the APA, Set Aside and Vacate BLM's actions and decisions that allowed/authorized RMR to continue the mining, removal, transport, and sale of common variety minerals from the Quarry.

C. Issue an immediate and permanent injunction prohibiting Defendants, their agents, servants, employees, and all others acting in concert with them, or subject to their authority or control, from allowing or authorizing RMR to continue the mining, removal, transport, and sale of common variety minerals from the Quarry pending full compliance with the requirements of federal law;

D. Issue an order granting Plaintiffs their costs and reasonable attorneys' fees incurred in bringing this action, pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412 et seq., and any other applicable statutory or equitable principles; and

E. Issue an order granting such further relief this court deems just and proper.

Respectfully submitted this 10th day of March, 2020.

/s/ Roger Flynn
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