MEMORANDUM

TO: File

FROM: Larry Sandoval, Colorado River Valley Field Office Manager

LARRY SANDOVAL Digitally signed by LARRY SANDOVAL Date: 2024.01.12 11:07:30 -07'00'

DATE: 1/12/2024

RE: Mid-Continent Quarry Common Variety Determination Report

Introduction

The Mid-Continent Quarry (Quarry) is located near Glenwood Springs, Colorado, on public lands. Rocky Mountain Industrials (RMI) is the operator of the Quarry and has forty-four unpatented placer mining claims, located for limestone. The Bureau of Land Management (BLM) approved the applicable Plan of Operations in 1982 and an amended Plan in 1989 (Plan). RMI proposed to modify its Plan in November of 2018.

For several years prior to 2018, BLM had expressed concern to RMI that RMI's limestone was not locatable. As part of BLM's review of this proposed modification, therefore, the Bureau prepared a mineral report to aid in determining whether the minerals being removed by RMI are subject to location under the Mining Law of 1872, 30 U.S.C. §§ 22 -54. BLM and RMI thus entered into an escrow agreement to ensure payment for the limestone in the event the mineral report concludes that those minerals are not subject to the Mining Law and are instead subject to disposal under the Materials Act of 1947. RMI makes payments to the escrow account for the minerals that it continues to remove from the mine and provides documentation of the minerals removed.

On August 24, 2023, the BLM mineral examiners provided the mineral report (Report) to BLM's CRVFO for review and approval. (b)(5) Deliberative

[redacted]

Background

The Mining Law authorizes citizens of the United States to acquire and sell the "valuable mineral deposits" they find on public lands open to the operation of the Mining Law. 30 U.S.C. § 22. In the Surface Resources Act of 1955, Congress removed "common varieties" of sand, stone, gravel, pumice, pumicite, or cinders from the Mining Law's ambit. *Id.* § 611. Those materials are instead subject to disposal under the Materials Act of 1947, which, unlike the Mining Law, requires miners to compensate the United States for removal of its minerals. *Id.* § 60. The Surface Resources Act of 1955, which amended the Materials Act, contains an important exception to this rule: "deposits of [common variety] materials which are valuable because the deposit has some property *giving it distinct and special value*" are not common varieties and remain subject to location under the Mining Law. *Id.* § 611 (emphasis added).

BLM typically determines whether mineral materials are common varieties (and thus governed by Materials Act) or uncommon varieties (and thus governed by the Mining Law) by conducting common variety determinations based on the definitions set forth in 43 C.F.R. § 3830.12. Relevant here are two subsections of that regulation: 3830.12(b) and 3830.12(d).

Under 3830.12(b), BLM evaluates whether the mineral materials at issue have a distinct and special value by applying a five-factor "*McClarty*" test, named after the Ninth Circuit opinion upholding Department decisions embodying the test. *See McClarty v. Secretary of the Interior*, 408 F.2d 907 (9th Cir. 1969). Under this test, the BLM determines whether the deposit has a unique property, and, if so, determines whether: the unique property gives the deposit a distinct and special value; if the special value is for uses to which ordinary varieties of the mineral are put, the deposit has some distinct and special value for such use, and; the distinct and special value is reflected by the higher price that the material commands in the marketplace. 43 C.F.R. § 3830.12(b)(3)-(5).

Meanwhile, 43 C.F.R. § 3830.12(d) specifically addresses limestone. It explains that "[l]imestone of chemical or metallurgical grade, or that is suitable for making cement, is subject to location under the mining laws." *Id.*

The phrase "chemical or metallurgical grade" is not defined in statute or regulation. The leading case defining the term is *United States v Chas. Pfizer & Co. Inc.,* 76 I.D. 331 (1969). In *Pfizer*, the Department concluded that "limestone containing 95 percent or more calcium and magnesium carbonates is an uncommon variety of limestone which remains subject to location under the mining laws." *Id.* At 342-343. In reaching that conclusion, the Department reasoned that a Senate Committee Report accompanying the Surface Resources Act had indicated that chemical or metallurgical grade limestone should fall under the Mining Law, that contemporaneous language from *separate* legislation (amendments to the Internal Revenue Code) had contemplated that "chemical or metallurgical grade" should be interpreted according to common usage, and that common usage had long defined "chemical or metallurgical grade" limestone as comprising 95% carbonite. *Id.* At 341. Surveying this analysis, the *Pfizer* tribunal concluded that it had "no reason to believe that the Senate Committee [reporting on the Surface Resources Act] used the terms in its report on the 1955 act in any different sense." *Id.* At 341.

For present purposes, we briefly quote from the 1955 legislative history cited in *Pfizer*. The House Report indicated that "common varieties" "would exclude materials such as limestone, gypsum, etc., commercially valuable because of 'distinct and special' properties." H.R. Rep. No. 730, 84th Cong., 1st Sess. 9 (1955). The Senate Report indicated that the term was

intended to exclude "*for example*, limestone suitable for use in the production of cement, metallurgical or chemical-grade limestone, gypsum, and the like." S. Rep. No. 554, 84th Cong. 1st Sess. 8 (1955) (emphasis added). In short, the legislative history merely indicates that certain types of limestone and gypsum would be among the materials embraced by the "distinct and special value" test, *not* that they would be subject to a special test under the Surface Resources Act.

Analysis

As the Report implicitly recognized by citing and applying both 3830.12(b) and 3830.12(d), there is some tension between the blanket test for common varieties in Section 3830.12(b) and the separate language regarding limestone in 3830.12(d). Specifically, the regulations are at least superficially ambiguous regarding the Department's obligations where limestone is arguably of "chemical or metallurgical grade" but may not satisfy the *McClarty* test for non-locatable minerals. (b)(5) Deliberative [redacted] In such a case, a determination that the limestone is locatable would dilute the force of the *McClarty* test and run counter to the text and the purpose of the Surface Resources Act, i.e., to withdraw "building materials" like limestone from the ambit of the Mining Law, 101 Cong. Rec. 8743 (1955). *Accord United States v. Coleman*, 390 U.S. 599, 603-05 (1968) (canvassing legislative history of the Surface Resources Act); *United States v. Pitkin Iron Corp.*, 170 IBLA 352, 356 (Nov. 29, 2006) (recounting that that, historically, "[t]he locatability of limestone, both as a building stone and for other uses, raised particular questions due to its prevalent nature").

In reading the Report and resolving this tension, BLM notes that the Report relied on *Pfizer* and similar Departmental caselaw—not the applicable statutes and regulations themselves—to determine that a 95% carbonate threshold was the appropriate test for "commercial or metallurgical grade limestone" in 43 C.F.R. § 3830.12(d). That caselaw appears to be on questionable footing. As noted above, *Pfizer* reached its conclusion not by examining the language of the Surface Resources Act, but by essentially importing into the Act a test from a Senate Committee Report. Even *that* Report, on its face, was not sufficient to reach the 95% threshold: the *Pfizer* tribunal then *interpreted* the Senate Report by citing unrelated legislative history from a separate statute, then looked to caselaw interpreting *that* legislative history before gesturing towards industry practice. 76 I.D. at 331-333. In short, the link between "chemical or metallurgical grade" and a particular carbonate threshold is extremely attenuated and untethered from the statutory and regulatory language.

BLM doubts that unwavering, inflexible application of the 95% carbonate threshold is consistent with the Surface Resources Act given the Department's obligation to interpret a statute chiefly with reference to its text and its "general purpose," not the loose trail of evidence described in *Pfizer*. *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 580 U.S. 26, 36 (2016). (b)(5) Deliberative [redacted]. *Accord PBBM-Rose Hill, Ltd. V. Comm'r*, 900 F.3d 193, 206 (5th Cir. 2018) (discussing definition of "value"); *Carley Capital Grp. V. Fireman's Fund Ins. Co.*, 877 F.2d 78, 83 (D.C. Cir. 1989) (same). And as a

matter of statutory purpose, strict application of the carbonate threshold could (as in this case) extend the Mining Law to the type of "building materials" that the Surface Resources Act instead meant to exclude. *See Glenwood Springs Citizens' All. V. United States DOI*, 639 F. Supp. 3d 1168, 1172 (D. Colo. 2022) ("A mineral deposit is considered 'common variety' if *it is sold or used for common variety purposes* such as for roadbase, rip-rap, backfill, and boulders for construction projects.") (quotation omitted) (emphasis added).

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. *See McClarty*, 408 F.2d at 908 (adopting Department's test for common variety minerals as "a genuine effort . . . to implement . . . the mining laws"); *cf. Copar Pumice Co. v Tidwell*, 603 F.3d 780, 794-98 (10th Cir. 2010) (deferring to United States Forest Service's reading of its counterpart regulations).

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Negative inferences like these "are often misused because drafters include duplicative language to ensure that the mentioned item is covered—without meaning to exclude the unmentioned ones." *Stand Up for Cal.! V. United States DOI*, 994 F.3d 616, 624 (D.C. Cir. 2021). That is precisely the case here. The Federal Register notice first codifying what is now 3830.12(d) indicated that the Department's goal was to "more clearly define 'common varieties' consistent with" the legislative history of that Act. 27 Fed. Reg. 9137, 9137-38 (Sept. 14, 1962). That history, in turn, clarifies that limestone was to be one example of a single test for common varieties, and not subject to a separate test. Accordingly, we here read 3830.12(d) as merely highlighting one application of the test in 3830.12(b).

BLM is aware that, in reaching this conclusion, it is to some extent departing from certain BLM precedent treating limestone with 95% carbonate as inevitably locatable. Initially, we note that the sweep of Departmental opinions on this score is not uniform. *See* M-36619, *Determination of What Constitutes a "Common" Variety of Limestone Used in the Manufacture of Portland Cement* (Oct. 5, 1961) (declining "to define the exact percentage of calcium carbonate . . . [necessary] for the deposit to be locatable under the mining laws after July 23, 1955" and leaving such determinations "to the adjudicative process, to be determined upon a case-by-case basis"). In all events, BLM has considered its history of limestone-related adjudications under the Mining Law, and, given the unique and aforementioned conclusions of this Report, declines to adopt a strict carbonate threshold for locatability. BLM reaches no explicit conclusions on limestone deposits other than those considered in the Report. BLM further notes that Departmental opinions equating the 95% carbonate threshold with locatability did not squarely address the text and purpose of the Surface Resources Act, and instead relied on potentially dubious techniques of statutory construction.

Conclusion

I have signed the Report on the understanding that—as outlined above—(b)(5) Deliberative

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