April 28, 2014

Josephine County Planning Commission
Josephine County Planning
700 NW Dimmick, Suite C
Grants Pass, OR 97526

RE: Sunny Valley Sand & Gravel LLC Application to Josephine County

Dear Josephine County Planning Commission,

Thank you for accepting these comments on behalf of Rogue Riverkeeper, Rogue Advocates, Western Environmental Law Center, and concerned citizens of Sunny Valley.

Rogue Riverkeeper is a non-profit organization whose mission is to protect and restore water quality and fish populations in the Rogue River Basin and adjacent coastal watersheds. Rogue Riverkeeper, our parent organization, the Klamath-Siskiyou Wildlands Center, and our more than 3,000 members use and enjoy the Rogue River, its tributaries and the land encompassed within the Rogue basin, including Grave Creek and Shanks Creek that would be impacted SVSG's proposal.

Rogue Advocates is a non-profit organization dedicated to cultivating livable and sustainable communities in Southern Oregon's Rogue Valley region. Through advocacy, education and outreach around local land use issues, we work to preserve productive rural lands, promote vibrant urban centers and encourage citizen participation. Our members in Sunny Valley are directly impacted by this application proposal and the adverse impacts it will cause in their community.

The Western Environmental Law Center uses the power of the law to defend and protect the American West's treasured landscapes, iconic wildlife and rural communities. We combine our legal skills with sound conservation biology and environmental science to address major environmental issues in the West in the most strategic and effective

manner. We work at the national, regional, state, and local levels; and in all three branches of government.

We request that these comments be submitted into the record for the application by Sunny Valley Sand & Gravel LLC "to allow, with conditions, to add the proposed aggregate site to the County's significant aggregate inventory; change the comprehensive plan map from Forest/Residential to Aggregate and change the zone from Woodlot Resource (WR) /Rural Residental (RR-5 Acre) to (MARZ). In addition, to authorize the mining operation on the subject parcels." Please notify us of any decisions related to this application.

Executive Summary:

Our comments focus on the first step of the Planning Commission's review, the applicant's request to amend the Josephine County comprehensive plan to add the subject parcels to the inventory of significant aggregate sites. The County RLDC and State OAR basic criteria for review requires the applicant to demonstrate the site has a minimum quantity of 500,000 tons of aggregate resource that meets or exceeds specific quality standards.

However, the application materials submitted provide no basic title chain or deed information to demonstrate proof of ownership of the aggregate resource. This led to our research and review of the mineral rights ownership of the subject parcels. We have conducted due diligence on the surface estate and mineral estate ownership, as well as requesting extensive legal research on the findings to reach the following conclusions:

- The current owner of the subject parcels surface estates does not own the underlying mineral estates.
- The applicant has no ownership authority of the mineral estates to extract the proposed mineral resources
- The United States reserved the mineral estate in the original federal land grant under the Morrill Act of 1862
- The United States owns the underlying mineral rights of the subject parcels
- Oregon and Josephine County have no jurisdiction over federal mineral reservations
- Josephine County has no review authority under County or State statutes to grant the requested mining permits or add the proposed aggregate resources to the County Comprehensive Plan of Significant Aggregate Sites
- A Federal mining patent must be granted in order to extract the mineral resources
- Case law has established it is highly unlikely a federal mining patent can be obtained for mineral reservations originated by federal land grants under the Morrill Act

Upon consideration of these facts, we suggest the application be withdrawn. If the applicant chooses to proceed, we strongly suggest that Josephine County deny all requests from Sunny Valley Sand & Gravel LLC regarding this application.

We have requested Western Environmental Law Center (WELC) based in Eugene, Oregon to conduct legal research. They provide the following analysis regarding the implications of this mineral reservation under the Morrill Act by the United States. WELC specializes in federal mining law.

Josephine County Lacks Review Authority to Add the Proposed Tax Lots to the Comprehensive Plan Inventory of Significant Aggregate Sites

The application materials fail to provide a proof of title for all tax lots demonstrating the current owner of the surface estate also owns the underlying mineral estate. We have conducted an extensive title search and find the mineral rights were reserved by the United States of America in the original land grant under the Morrill Act of 1862. Congress reserved all mineral rights for any federal lands granted under the Morrill Act. The parcels in question were sold in 1869 for the benefit of the state of New Hampshire under the Morrill Act of 1862 and the mineral rights were not part of that sale. The United States continues to own the mineral rights and neither Josephine County nor the State of Oregon have jurisdiction over federal property or federal mineral reservations. The OAR and RLDC criteria cited in the staff report are not applicable to federal property.

Josephine County Cannot Legally Issue Mining Permits

The Morrill Act reserved mineral lands to the United States. The purpose of the Morrill Act was to grant states federally owned public lands to be used as agricultural college lands to fund agricultural education. All lands that the United States government granted to the states through the Act did not include mineral lands. Thus, any land granted and sold under the Morrill Act does not include subterranean mineral lands, as the United States reserved mineral lands. The actual mineral content of the reserved lands need not be known at the time of the reservation. Furthermore, because gravel is considered a mineral under the Morrill Act, in order to mine gravel on Morrill Act lands, a miner would need to obtain a federal permit. Until a federal mining permit is sought and issued to a private party, the State of Oregon and Josephine County have no authority to issue permits to any successor in title for minerals reserved by the federal government. However,, the gravel at issue is currently not considered a locatable mineral under the

Mining Law of 1872 as amended in 1947. The questions below might be helpful in framing further discussion.

- *Does the 1862 Morrill Act reserve minerals to the United States?* Yes. The Morrill Act is the federal government's grant of lands to the states for agricultural colleges. The portion of the Act that says no mineral lands fall within the land grant reserves any such mineral lands for the federal government.
- *Do the minerals need to be "known" at the time of the land grant to qualify for the reservation?* No. This is not an issue because knowledge of the actual mineral content of the land need not be shown.
- *Is gravel a mineral?* Yes. Gravel is typically considered to be a mineral, and at the time of the original sale of land and mineral reservation was still considered a locatable mineral.
- *Can a claim be filed under the Mining Law of 1872 for currently reserved minerals?* No. The legitimacy of a mining claim depends on discovery of "valuable minerals", which gravel is no longer considered to be.

For land granted under the Morrill Act, minerals are reserved to the United States

When certain lands passed to the states under the Morrill Act, the federal government reserved the minerals. Congress passed the Morrill Act in 1862, donating public lands to provide for agricultural colleges 7 U.S.C. §§ 301-308 (1862). This agricultural college grant expressly reserved mineral lands to the United States: "There is granted to the several states . . . an amount of public land . . . provided, that no mineral lands shall be selected or purchased under the provisions of this act." 7 U.S.C. § 301. This means that the Act expressly removed mineral lands from its land grant to the states, but it reserved such lands to the federal government.

Even before any general mining law was adopted, this mineral reservation rule was applied to California's Morrill Act land grant based upon a finding of congressional intent to deal separately with mineral lands in California. *Ivanhoe Mining Co. v. Keystone Consolidated Mining Co.*, 102 U.S. 167 (1880). The Court in *Ivanhoe Mining* determined that because the land in controversy was mineral land, it did not pass to the state of California by the school land grant. *Id.* at 175. This meant that the federal reservation of mineral lands prevented the state from transferring mineral extraction rights because they never passed to the state through the grant. *Id.* at 176.

To mine Morrill Act lands, a person must obtain a patent from the United States. *See, e.g., Empire Star Mines Co. v. Grass Valley Bullion Mines*, 99 F.2d 228, 229 (9th Cir. 1938). For example, in *Empire Star Mines*, the plaintiff mining company held three federal mining patents. *Id.* at 230. Defendant owned the land over the mining claims and claimed that it had a right exclude the defendants from mining the subterranean mineral lands. *Id.* The United States granted Texas land through the Morrill Act, and the state transferred the land to defendant's predecessor. *Id.* at 232-33. The Ninth Circuit said

that the United States granted an agricultural patent to the state, and that the grant included only so much land below the surface to satisfy the grant's purposes. *Id.* at 233. Furthermore, the mining veins below the surface remained the property of the United States until it issued mining patents to plaintiff. *Id.* Because of this, the court upheld the plaintiff's mining claims and ability to prevent the defendant from entering the plaintiff's property. *Id.* at 235.

Knowledge of the actual mineral content of the "mineral lands" at the time of the reservation need not be shown

Although two decisions seem to suggest that if the land was not known to be mineral at the time of the land grant it was not reserved to the federal government, it is not necessary to show that the *actual* mineral content of the mineral lands was known. *Ivanhoe* held that because the land in controversy was mineral land, "well known to be so when surveys of it were made," it did not pass to the state of California by the school land grant. *Ivanhoe Mining Co. v. Keystone Consolidated Mining Co.*, 102 U.S. 167, 175 (1880). In 1935, the Department of Interior decided that no title passed to the State of California under the land grant if, at the time, the land was then known to be mineral in character. 55 Interior Dec. 121 (D.O.I.), 1935 WL 2320 (1935).

However, the Supreme Court in 1919 said that knowledge of actual mineral content need not be shown. *United States v. S. Pac. Co., et al.*, 251 U. S. 1 (1919). The Court said that it would be sufficient if known conditions were shown from which mineral character reasonably could be inferred. *Id.* at 13-14. Furthermore, *Brennan v. Udall* says that an attack upon a mineral reservation by a successor in interest almost fifty years after the reservation "comes too late." *Brennan v. Udall*, 379 F.2d 803, 808 (10th Cir. 1967).

Since 1862 the original purchaser nor any successor has ever challenged the United States mineral reservation for the subject parcels. The land has historically been treated as a non-mineral land including explicit irrigation water rights obtained for agricultural production. The applicant's consultant confirms the present use is for agricultural purposes (Applicant's Appendix A, pg. ii).

Gravel is a mineral

Gravel is a mineral reserved to the United States in the Morrill Act similar in status to other federal land grants. The Supreme Court decided that sand and gravel were minerals for the purposes of the federal reservation in the Stock-Raising Homestead Act of 1916 ("SHRA"). *Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 55 (1983). What was significant, the court said, was that gravel could be excavated and used for commercial purposes. *Id*. Furthermore, the Court reasoned that whether a particular substance is included in the surface estate or the mineral estate depends on the use of the surface estate that Congress contemplated in the Act. *Id.* at 52.

Also in *Watt*, the Court acknowledged two other federal land-grant decisions that

construed gravel as a mineral. *Id.* at 56. First, a Department of the Interior Solicitor's Opinion about an Indian lands allotment reserving the minerals to the Indians, said that gravel is a mineral. *Id.* (*citing* Department of the Interior, Division of Public Lands, Solicitor's Opinion, M-36379 (Oct. 3, 1956)). Second, an Interior Board of Land Appeals decision held that gravel was a mineral reserved to the United States under a statute granting "grazing district land" to states. *Id.* at 56-57 (*citing United States v. Isbell Construction Co.*, 78 Interior Dec., at 394-396 (1971)).

However, the Court has also held that sand and gravel are not "valuable minerals" for the purposes of land grants issued under the Pittman Underground Water Act of 1919. *BedRoc Ltd., LLC v. U.S.*, 541 U.S. 176, 178 (2004). The Pittman Act included a reservation of all the coal and other valuable minerals to the United States. *Id.* at 179. In *BedRoc*, the Court overruled the Ninth Circuit's decision that sand and gravel were valuable minerals within the meaning of the Act's mineral reservation, focusing on the inclusion of the word "valuable." *Id.* at 178.

In addition, lower courts have declined to extend *Watt*, holding instead that sand and gravel are not minerals. *See, e.g., Atwood v. Rodman*, 355 S.W.2d 206, 208-09 (Tex. Ct. App. 1962) (Texas Court of Appeals upheld the trial court's finding that sand and gravel were not minerals within the "ordinary and natural" meaning of the word "minerals.").

Nevertheless, when faced with both the *Watt* and *BedRoc* decisions, the Tenth Circuit determined that sand and gravel are minerals. *Sunrise Valley, LLC v. Kempthorne*,
528 F.3d 1251, 1252 (10th Cir. 2008). The court found that the reservation of minerals under the Stock-Raising Homestead Act of 1916 included sand and gravel because they were "minerals." *Id.*

New Mexico courts have applied a different standard to find that gravel is a mineral. *Prather v. Lyons*, 267 P.3d 78, 84 (N.M. Ct. App. 2011). The New Mexico Court of Appeals said that determining whether a material is included within a general mineral reservation must be done on a case-by-case basis. *Id.* Ultimately, the court examined the language of the state trust land mineral reservation at issue to find that gravel was a mineral. *Id.* The New Mexico Supreme Court indirectly overruled *Trujillo*, which stated that sand and gravel were not minerals. *Champlin Petroleum Co. v. Lyman*, 708 P.2d 319, 322 (N.M. Supp. Ct. 1985).

The legitimacy of a mining claim depends on discovery of "valuable minerals."

Whether a mining claim is legitimate depends on discovery of a valuable mineral deposit. *See* 30 U.S.C. § 22. If the gravel proposed to be mined at the location at issue qualifies as a "valuable mineral," it would be subject to the Mining Law of 1872. If the minerals are valuable, then a federal patent would be proper under 30 U.S.C. § 611. If the minerals are not valuable, meaning if they could not be marketed at a profit, then there is no right to obtain title to the land for mining under the Mining Law. *U.S. v. Coleman*, 390

U.S. 599, 601-02 (1968).

"Common," or non-valuable gravel cannot be mined through a federal permit under the Mining Law of 1872. An amendment to the Materials Act of 1947 removed from the Mining Law the authority to locate and remove common varieties of sand and gravel. 30 U.S.C. § 611 (1955). Once the Materials Act went into effect in 1955, these common materials were subject to disposal under the Materials Act and could not be located or removed under the general mining laws. *U.S. v. Coleman*, 390 U.S. 599, 604 (1968). Common sand and gravel are saleable minerals, and they are sold without disposing of the land on which they are found. *Id.* Thus, they are unlike "valuable mineral deposits" that serve as a basis for land patents under the U.S. mining laws. 30 U.S.C. § 22.

Tests for whether mineral is valuable are the complimentary "prudent man test" and the "marketability test."

The Supreme Court has used two complimentary tests to determine whether a mineral is valuable: the "prudent man test" and the "marketability test." In 1905, the Supreme Court adopted the "prudent man test" that asks whether the discovered minerals are 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." *Chrisman v. Miller*, 197 U.S. 313, 322 (1905) (quoting *Castle v. Womble*, 19 L.D. 455, 457 (1894)). The Supreme Court has affirmed this test on subsequent occasions, and the Ninth Circuit has repeatedly applied it. *Cole v. Ralph*, 252 U.S. 286, 296 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); *Adams v. United States*, 318 F.2d 861, 870 (9th Cir. 1963). In applying the prudent man test, the fact finder can consider whether the claims are in an area producing valuable minerals, are adjacent to or near successful mines, and are of similar character. *Converse v. Udall*, 399 F.2d 616, 620 (9th Cir. 1968).

In 1968, the Supreme Court refined the test. In *U.S. v. Coleman*, the Court approved the prudent man test alongside the complimentary "marketability test." 390 U.S. at 600. Essentially, the marketability test requires showing that the minerals can be "extracted, removed and marketed at a profit" in order to qualify as "valuable minerals" under 30 U.S.C. § 22. *Id.* Put differently, if no prudent man would extract the minerals because there is not a demand for them at a price higher than the costs of extraction and transportation, the minerals are not valuable. *Id.* Essentially, profitability is an important consideration in applying the prudent-man test, and the marketability test merely recognizes this consideration. *Id.* at 602-03. The "marketability" and "prudent man" tests are not distinct standards, but rather are complementary because the marketability test refines the prudent man test. *Id.*

The Ninth Circuit affirmed this refined test, as applicable to all mining claims. *Converse v. Udall*, 399 F.2d 616, 621-22 (9th Cir. 1968) ("When the claimed discovery is of a lode or vein bearing one or more of the metals listed in 30 U.S.C. § 23, the fact finder, in applying the prudent man test, may consider evidence as to the cost of extraction and

transportation as bearing on whether a person of ordinary prudence would be justified in the further expenditure of his labor and means. But this does not mean that the locator must prove that he will in fact develop a profitable mine.").

Courts apply the refined test with varying degrees of strictness, depending upon: (1) the relative positions of the parties to the case, and (2) the type of minerals involved. *Chrisman v. Miller* 197 U.S. 313, 322 (1905) (court focused on "against whom" and "for what purpose" the discovery claim is asserted); *Coleman v. United States*, 390 U.S. at 603 (court focused on whether the metals were precious metals, base metals, or minerals of widespread occurrence). When there is a claim contest between a person asserting discovery on national forest lands and the government, the test is strictly applied. *Id.* at 622. Courts apply the test less strictly where there is a combination of minerals containing small values in precious metals, but principally base metals. *Id.*

Conclusion

Considering that the minerals on the subject parcels belong to the federal government and cannot be claimed under any legally sound basis, it would appear to be impossible to lawfully operate a gravel mining operation at this site. Josephine County lacks legal authority to issue permits for gravel extraction on the subject parcels as that resource was reserved by the federal government by the original land grant under the 1862 Morrill Act. Until the parcel owner obtains a federal patent granting mining authority the mineral rights are the property of the federal government.

In light of these facts, we suggest the application be withdrawn. If the applicant chooses to proceed, we strongly suggest that Josephine County deny all requests from Sunny Valley Sand & Gravel LLC regarding this application.

We look forward to your response, and thank you for careful consideration of the issues presented.

Forrest English
Program Director
Rogue Riverkeeper
PO Box 102, Ashland, OR 97520
541-488-9831

Steve Rouse
President
Rogue Advocates
PO Box 443, Williams, OR 97544
541-846-1083

Western Environmental Law Center
1216 Lincoln Street, Eugene, OR 97401
541-485-2471