United States Department of the Interior

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Memorandum

To: Mitchell Leverette
Chief, Division of Solid Minerals

From: Karen Hawbecker
Associate Solicitor, Division of Mineral Resources

Subject: Mineral Materials Sales for Use in Federal-Aid Highway Projects

I. Introduction

In 1988, the Bureau of Land Management (BLM) instituted a policy to deny requests for mineral materials sales under the Materials Act of 1947, 30 U.S.C. §§ 601-604, if the materials would be used for a Federal-aid highway project. This policy has been incorporated into BLM's current mineral materials disposal policy guidance. Mineral Materials Disposal, BLM Manual H-3600-1 (2002) (mineral materials handbook).

As noted in the mineral materials handbook, BLM based its policy regarding sales for Federal-aid highway projects on legal advice from former Associate Solicitor for the Division of Energy and Minerals, Thomas L. Sansonetti, in 1987. BLM requested that we revisit the question of whether the Materials Act limits BLM's sale of mineral materials to operators who plan to use the materials for Federal Aid Highway projects.

II. Background

A. Applicable Law

1. Materials Act of 1947

The Materials Act of 1947, 30 U.S.C. §§ 601-604 (Materials Act), authorizes the BLM to dispose of mineral materials on federal lands provided that the disposal is not otherwise expressly authorized or prohibited by law, and is not detrimental to the public interest. 30 U.S.C. § 601. Congress specifically contemplated that the Materials Act would authorize disposal of materials "not of such quality and quantity as to be subject to the mining laws but which are desired by local governments, railroads, local industries, ranchers, and farmers for the construction and maintenance of highways, secondary roads, railroads, structures of various kinds, and farm and ranch improvements," as well as "[c]ommon earth to be used for road fills, earth dams, stock-watering reservoirs, and similar uses." H.R. Rep. No. 80-867, at 4 (1947).

2. Federal-Aid Highway Act

The Federal-Aid Highway Act authorizes appropriation of lands and interests in lands to state transportation departments or their nominees, provided that the lands are "reasonably necessary" as a highway right-of-way or as a source of materials for the maintenance or construction of the adjacent Federal-aid highway. 23 U.S.C. § 317(a). Until 1982, BLM's regulations governed "appropriation" to state transportation departments under this provision. 43 C.F.R. subpart 2821 (1981) (subpart 2821 regulations); *see also, e.g.*, 43 C.F.R. §§ 244.54 to 244.56 (1954); 56 Interior Dec. 533 §§ 51-53 (1938) (Circular 1237a) (predecessor regulations). The subpart 2821 regulations clarified that the statute intended the grant to be "merely a right-of-way or right to take materials" rather than a transfer of the fee interest to the state. *Id.* § 2821.1 (citing Nevada Dep't of Highways, A-24151 (1945)).[1]

3. BLM's 1981 Subpart 2821 Regulations

Under the 1981 subpart 2821 regulations, state transportation departments would file a right-of-way application with BLM, which would determine whether the use or appropriation of the lands for right-of-way purposes was consistent with the agency's management program. *Id.* §§ 2821.3-1, 2821.3-2 (1981). The state transportation department was also required to file a copy of the right-of-way application with the Department of Transportation, which would determine whether the lands and interests in lands are "reasonably necessary" as a right-of-way or source of materials. *Id.* § 2821.3-3 (1981). Upon consulting with and obtaining a favorable determination by the Department of Transportation, BLM would decide either that issuing the right-of-way would be contrary to the public interest or the purposes for which the lands have been reserved and should be denied, or that the right-of-way could be issued subject to conditions. *Id.* § 2821.4 (1981). Any right-of-way would be issued by BLM. *Id.* § 2821.5 (1981). BLM's administration and enforcement of the right-of-way was consistent with the agency's administration and enforcement of other rights-of-way. *See generally* 43 C.F.R. Part 2800 (1980) (right-of-way regulations promulgated under the Federal Land Policy and Management Act of 1976).

4. 1982 Interagency Agreement

Subpart 2821 was removed from the regulations[2] when BLM and the Federal Highway Administration (FHWA) entered into an interagency agreement in 1982 (1982 Agreement) setting forth new procedures for issuing these rights-of-way. Under the 1982 Agreement, which is still in effect, the FHWA is the lead agency, rather than BLM. Consistent with section 317 of the Federal-Aid Highway Act, the 1982 Agreement allows the FHWA to appropriate public lands for use by states for highways and highway material purposes. The process is initiated when the state transportation department submits a right-of-way application to the FHWA, which then files the request with the BLM. The BLM may either agree to the appropriation or deny the appropriation on the basis that it is "contrary to the public interest or inconsistent with the

[1] This case may be found on the Interior Board of Land Appeals website by searching under the tab "A and M Decisions."

[2] *See* Roads and Highways: Revocation of Regulations Concerning Roads and Highways, 47 Fed. Reg. 42,575 (Sept. 28, 1982).

purposes for which such land or materials have been reserved." 23 U.S.C. § 317(b). The FHWA then makes the decision on whether to issue the right-of-way to the state, subject to BLM's consent (or nonresponse) and any conditions specified by BLM, and will confirm reclamation at the end of the right-of-way term. 1982 Agreement § III.G. If the BLM does not make a determination within four months of having received the request, the lands may be considered appropriated by the FHWA. *Id.* § III.D. The interagency agreement limits the grant of authority to FHWA to administer the right-of-way for highway purposes, *id.* § III.F.2, and reserves to BLM the right to issue additional non-highway use authorizations, subject to FHWA consultation. *Id.* § III.F.3.

B. 1987 Associate Solicitor's Opinion

The 1982 interagency agreement lacked specificity with respect to BLM's continuing jurisdiction and obligations for managing the lands and mineral materials in rights-of-way issued by FHWA. Under the subpart 2821 regulations, the issued right-of-way would be similar to other BLM rights-of way, with BLM retaining administrative jurisdiction and enforcement authority over the lands and minerals subject to the right-of-way. By contrast, the interagency agreement stated that the FHWA would administer the right-of-way, including any conditions specified by BLM, and that BLM would "work with or through FWHA" with respect to any "noncompliance to the appropriation." *Id.* § III.G. This raised several questions about BLM's obligation and authority to monitor and prosecute mineral material trespasses in the course of BLM's retention and management of the underlying fee estate.

Consequently, not long after the interagency agreement was signed, BLM sought legal advice from the Solicitor's Office regarding the FHWA's and BLM's respective obligations and authorities. *See Material Trespass on Title 23 (Federal Aid Highway Act) Rights-of-Way* (Sansonetti, Assoc. Sol, 1987) (1987 Opinion). BLM's questions primarily related to the potential misuse of mineral materials from a 23 U.S.C. § 317 right-of-way administered by the FHWA, but the agency also requested advice regarding the use of mineral materials obtained under free use permits administered by BLM on lands not subject to a right-of-way administered by the FHWA under the 1982 Agreement. Specifically, BLM asked whether mineral materials obtained under a BLM free use permit could be used for a Federal-aid highway project. The agency stated its view that 23 U.S.C. § 317 constituted an "express authoriz[ation] by law" that would bar issuance of a free use permit under the Materials Act where a right-of-way under § 317 had been issued or was possible. 1987 Opinion at 8.

In the 1987 Opinion, the Associate Solicitor quoted BLM's question and then gave his answer to the question:

QUESTION

> 8. Is it legal to use mineral materials from a Title 30 U.S.C. §§ 601 et seq. authorized Free Use Permit site on a Federal Aid Highway project?
>
> NOTE: It is BLM's understanding that if any portion of the mineral materials are to be used in the construction, maintenance, or furtherance of any Federal Aid

Highway project, then they must come from a site authorized under a Title 23 appropriation. Under § 601 of the Materials Act (30 U.S.C. § 601), the Secretary of the Interior may dispose of mineral materials on public lands "if the disposal of such mineral or vegetative materials is not otherwise expressly authorized by law." In as much as a mineral material site is expressly authorized by law, i.e., the Federal Highway Act (23 U.S.C. § 317), when a grant under the Federal Highway Act is legally possible such a grant is a disposal "expressly authorized by law," as mentioned in 30 U.S.C. § 601. Therefore, it is improper to use mineral materials from a Title 30 Free Use Permit site on Federal Aid Highway project.

ANSWER

8. Section 1 of the Materials Act, as amended, 30 U.S.C. § 601, authorizes the Secretary of the Interior to dispose of mineral materials, including stone, sand, and gravel, if the disposal is not otherwise expressly authorized by law. Title 23 U.S.C. § 317 expressly authorizes State highway departments to obtain materials from federal lands for highway construction and maintenance. Therefore, disposals for these purposes may not be made under section 1 of the Materials Act.

Id. at 8-9.

Although the question was specific to free use permits, the Associate Solicitor's answer did not differentiate between free use permits and mineral materials sales. Consequently, based on the 1987 Opinion, the BLM issued policy guidance in 1988 that applied to both free use permits and sales, stating that 23 U.S.C. § 317 "is the *only* appropriate vehicle to authorize the use of mineral material for Federal Aid Highway Projects (construction and maintenance) or other federally funded highway projects." *Title 23 (Federal Aid Highway Act) Rights-of-Way, Mineral Material Trespass; Use of Title 23 as Mineral Material Authorization*, Instruction Memorandum 88-700 (1988) (emphasis added). The 1988 policy guidance has been incorporated into BLM's current mineral materials handbook. *See* BLM Handbook H-3600-1 § II.3.j. While it appears that the handbook section only addresses free use permits, *see id.* ("A free use permit may not be issued in lieu of a Material Site applied for under the Federal Highway Act."), the remainder of the section is more general and thus, in our view, demonstrates that BLM's current position is to disallow all mineral materials disposals, including sales, under Materials Act authority for Federal-aid highway purposes.

III. Analysis

Because the Associate Solicitor's answer did not differentiate between free use permits and mineral material sales, it is not clear whether his answer pertains only to free use permits in the context of BLM's question or whether his answer was intended to be read more broadly. If the Associate Solicitor's answer is read to apply only to BLM's specific question about free use permits, we believe the answer is correct, given that section 1 of the Materials Act includes the following proviso:

> *Provided, however*, That, *to the extent not otherwise authorized by law*, the Secretary is authorized in his discretion to permit any Federal, State, or Territorial agency, unit or subdivision, including municipalities, or any association or corporation not organized for profit, to take and remove, *without charge*, materials and resources subject to this Act, for use other than for commercial or industrial purposes or resale.

30 U.S.C. § 601 (emphasis added). This proviso addresses the limited circumstances under which free use is authorized. Because 23 U.S.C. § 317 expressly authorizes State highway departments to obtain materials *without charge* for highway construction and maintenance, free use permits for these purposes may not be made under the Materials Act. However, this does not address the question of whether 23 U.S.C. § 317 impedes BLM from *selling* mineral materials for highway construction and maintenance purposes.

If the Associate Solicitor's answer is read to apply more broadly to encompass selling mineral materials, as well as disposal of mineral materials without charge from free use permit sites, the answer does not expressly analyze the question of whether it is legal to sell mineral materials for use in a Federal-aid highway project. Even if we assume that the Associate Solicitor intended to conclude broadly that BLM cannot sell mineral materials for use in Federal-aid highway projects, the answer is conclusory and warrants further analysis.

The threshold question in determining whether BLM may sell mineral materials under the Materials Act where the materials are to be used in a Federal-aid highway is whether the disposal is "otherwise expressly authorized by law." Aside from the proviso discussed previously related to disposal of mineral materials "without charge," the general provision of section 1 of the Materials Act authorizes the Secretary to dispose of mineral materials under the condition that "the disposal of such mineral . . . materials is not otherwise expressly authorized by law, including but not limited to ... the United States mining laws." Aside from the "United States mining laws," the Materials Act does not reference or provide any examples of other laws that "expressly authorize" mineral materials disposal. *See* 30 U.S.C. § 601. The legislative history of the Materials Act indicates that the Materials Act was intended to provide a mechanism to dispose of mineral and vegetative materials for which no disposal authority existed. S. Rep. 80-204, at 3 (1947) ("There are on the public lands many materials and resources which can be used profitably for the benefit of local industries and communities and to the disposition of which there is no real objection. There is, however, no permanent legislation under which these may be utilized.") The "otherwise expressly authorized by law" language was therefore likely intended to disallow the use of this authority in the Materials Act to sell minerals that could be disposed of under other laws that existed at the time, such as the Mining Law of 1872 and the Mineral Leasing Act of 1920. *Id.* at 2 (indicating that because it would not authorize disposal otherwise expressly authorized by law, "the bill would not interfere with or impair the operation of the mining laws..."). Certainly nothing in the legislative history indicates that Congress considered the Federal-aid highway rights-of-way provisions in the Federal Highway Act[3] to be among the

[3] Section 317 of Title 23 of the U.S. Code was originally enacted as part of the Federal Highway Act of 1921, so it was in existence at the time that Congress enacted the Materials Act of 1947. The form of the original 1921 statute was largely maintained in the 1958 enactment on which we rely today.

existing "express" mineral disposal authorities that would bar mineral material sales under the Materials Act.[4] *See* H.R. Rep. No. 80-867 (1947) (no mention of Federal Highway Act); S. Rep. 80-204 (1947); (no mention of Federal Highway Act); *To Provide for the Disposal of Materials on Public Lands: Hearing on S. 1185 Before the S. Comm. on Public Lands*, 80th Cong. (1947) (no mention of Federal Highway Act).

BLM's regulations governing mineral materials disposal have never interpreted the phrase "otherwise expressly authorized by law." *See* 43 C.F.R. Part 3600 (2016); 43 C.F.R. Part 3600 (2001); 43 C.F.R. Part 3600 (1982); 43 C.F.R. Part 3610 (1970); 43 C.F.R. Part 3610 (1964 Supp.). Consistent with the statements in the legislative history, the current regulations state that the Materials Act authorizes disposal of all materials that are not subject to mineral leasing or location under the mining laws. 43 C.F.R. § 3601.3(a). This regulatory language can be read to reflect BLM's interpretation that the mining and mineral leasing laws are the only laws that "otherwise expressly authorize[]" mineral disposals. In addition, the mineral materials regulations have never cross-referenced the right-of-way regulations as authority for mineral material sales, even when the subpart 2821 regulations were still in force. Taken together, the statutory language of the Materials Act and its implementing regulations support a conclusion that neither Congress nor the BLM regulations consider 23 U.S.C. § 317 to have expressly authorized the sale of mineral materials.

We note that the 1987 Opinion inaccurately characterizes 23 U.S.C. § 317(a) as authorizing state highway departments "to obtain minerals from federal lands," where the language of the Federal-Aid Highway Act refers only to the appropriation of "lands or interests in lands." *Compare* 23 U.S.C. § 317(a) with 1987 Opinion at 8.

Neither the Federal-Aid Highway Act and implementing regulations,[5] nor the interagency agreement, provides for the sale of mineral materials. FHWA policy is to allow appropriations of Federal land to provide materials for Federal-aid highways to occur without compensation to the agency administering the land, unless otherwise required by the agency administering the land. FHWA Manual for Federal Land Transfers for Federal-Aid Projects 21 (2009).

Title 23 and its implementing regulations do not state that materials for Federal-aid highways must be obtained under 23 U.S.C. § 317. Rather, 23 U.S.C. § 317 is merely an optional mechanism for state transportation departments to obtain materials from federal lands for Federal-aid highways if the Secretary of Transportation "determines it reasonably necessary."

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[4] It appears that Congress was aware of the Federal-aid highway rights-of-way provisions in the Federal Highway Act. A Senate report for proposed legislation (S. 2126) that was not enacted includes the transcript of a letter from the Secretary of the Interior stating that the "Department has received applications to acquire sand and gravel, which are not of such quality or quantity as to be subject to the mining laws, from counties and towns for use in road construction or maintenance on non-Federal aid highways and from construction companies for use in making cement." S. Rep. No. 79-1402, at 2 (1946). There is no indication, however, that Congress considered the Federal Highway Act as an authority for mineral material sales. The one mention of Federal-aid highways was in connection with counties and towns, indicating that any consideration Congress gave to Federal-aid highways was squarely in the context of free use. *See Hearing on S. 1185 Before the H. Comm. on Public Lands*, 80th Cong. 2 (1947) (recognizing, in considering the free use permit provision, that "the practice of the Department for quite some time" had been to allow "municipalities to take sand or gravel" without charge).

[5] 23 C.F.R. § 710.601.

23 U.S.C. § 317(a). The FHWA regulations generally require that a contractor involved with a Federal-aid highway project must furnish all materials and require that the contractor be permitted to select the sources from which the materials are obtained.[6] 23 C.F.R. § 635.407(a). Even if the state transportation department designates a material source that has been determined to meet specification requirements, the use of that designated source is not mandatory unless there is a finding that it would otherwise be in the public interest. 23 C.F.R. § 635.407(b). FHWA policy guidance underscores that that use of 23 U.S.C. § 317 to obtain materials is optional, noting that state transportation departments "can sometimes deal directly with the [Federal agency] under other statutory authorities" and that an agency "may grant a permit, license, right of entry, or similar document to the state DOT, with conditions, in lieu of granting a land transfer." FHWA Manual for Federal Land Transfers for Federal-Aid Projects 1, 12. *See also, Right-of way provisions of the Federal Aid Highway Act of November 9, 1921 and the Federal Aid Highway Act of 1956*, M-36366, (1956) (underscoring that applying for a Federal-aid highway right-of-way is completely discretionary).

There is a colorable argument that because 23 U.S.C. § 317 does not require state transportation departments to compensate FHWA (or, previously, BLM) for the use of the lands and materials subject to the right-of-way, that rights-of-way under § 317 are analogous to a free use permit under the Materials Act. These similarities provide a basis for the Department's finding that 23 U.S.C. § 317 expressly authorizes the free use permit disposals for Federal-aid highway projects.[7] Title 23 U.S.C. § 317, however, does not authorize the disposal of mineral materials through a mineral material sales contract. Furthermore, no Departmental or other authority serves as a basis for interpreting 23 U.S.C. § 317 to preclude the BLM from selling mineral materials even if the materials are for use in a Federal-aid highway and there is no other legal authority expressly authorizing the BLM to sell mineral materials. Therefore, a material sale is not "otherwise expressly authorized by law" in 23 U.S.C. § 317, so as to deprive the BLM of its authority to sell mineral materials under the general provision of section 1 of the Materials Act, even if the materials will be used for a Federal-aid highway.

The Interior Board of Land Appeals (IBLA) has never addressed this question directly, although it was raised indirectly in State of Oregon, 6 IBLA 72 (1972). In that case, BLM had rejected the Oregon State Highway Department's right-of-way application for the use of mineral materials without charge under the subpart 2821 regulations in order to protect resource values in the lands. *Id.* at 72. In the decision rejecting the application, BLM offered instead to issue a free use permit to Oregon under the Materials Act for mineral materials from another site. *Id.* at 73. Although the IBLA's decision to vacate and remand to BLM turned on whether the agency had adequately "consider[ed] the State's application under the law and regulations under which it was filed," the Board also stated its view that the mineral materials disposal in this instance was "expressly authorized by the Federal Highway Act." *Id.* The IBLA thus apparently believed, albeit in dicta, that free use disposal under the Materials Act would be barred in this instance

[6] Exception to this requirement may be made if the state transportation department determines that it is in the public interest to use material furnished by the state transportation department or from sources designated by the state transportation department. 23 C.F.R. § 635.407(a).

[7] Title 23 U.S.C. § 317, its implementing regulations, and FHWA guidance do not state that materials that are to be used for Federal aid highways must be derived through section 317, leaving open the possibility of using materials obtained under other statutory authorities.

because of the Federal Highway Act's provision for transfer of materials to the State without charge.

However, the IBLA's view appears to be limited to the question of free use, as expressed in the 1987 Opinion, which forms the basis of BLM's current policy guidance related to free use permits. Mineral Materials Handbook §§ I.A, at I-2 (listing the Federal Highway Act as one of the handbook's authorities), II.A.3.j, at II-14 to II-15 (discussing limitations on issuing free use permits and directing BLM to the interagency agreement for "[p]rocedures for the appropriation of materials for Federal-aid Highway purposes"). Even if the IBLA's dicta is correct, it does not address the question of whether mineral material sales are allowed under the Materials Act, even if the materials will be used for Federal-aid highway project purposes. *See* 6 IBLA at 72.

IV. Conclusion

We advise BLM that it may authorize a disposal of mineral materials through a sales contract under the authority of the Materials Act of 1947, even if the material will be used for a Federal-aid highway project, subject to the BLM's determination that the material sale is in the public interest. To the extent the 1987 Associate Solicitor's opinion can be read to conflict with this opinion, that opinion is superseded.