United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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Memorandum

To: Acting Director
Bureau of Land Management

From: Solicitor

Subject: Disposal of Mineral Materials from Unpatented Mining Claims

I. Introduction

In 1994, the Acting Inspector General completed an audit report regarding the Bureau of Land Management's (BLM) administration of its mineral materials sales program. The report recommended, among other things, that BLM seek legal advice regarding whether BLM has authority to sell mineral materials from unpatented mining claims. Thereafter, you asked me to reexamine previous opinions which concluded that BLM has no authority to dispose of mineral materials from unpatented mining claims. This opinion responds to that request. I apologize for the delay in responding, but as you will see, we have had to plumb intricate and arcane details of Mining Law history, and some inconsistent and unsatisfactory analysis in our own past opinions, to get to the bottom of this issue and provide you with an answer.

For the reasons explained below, I conclude that -- if it changes its regulations to remove the current prohibition -- BLM has the authority to dispose of mineral materials from unpatented mining claims. Once the regulatory prohibition is removed, I recommend that BLM seek an explicitly stated waiver from the mining claimant before taking steps to dispose of these materials. If the claimant refuses to provide the waiver. BLM should consult the Solicitor's Office before deciding whether to proceed with disposition.

II. Evolving Law Regarding Authority to Dispose of Mineral Materials From Unpatented Mining Claims

A. 1872 to 1947

The extent to which mineral materials -- including sand, stone, gravel. pumice, pumicite, cinders, and clay -- were locatable under the Mining Law was a vexing subject for decades following the Law's enactment in 1872. The Mining Law itself did not expressly address the subject, speaking

only of "valuable mineral deposits," and lacking a definition of "mineral." 30 U.S.C. § 22.

The issue of whether these widely occurring substances were locatable was usually, though not always, framed as whether they were "valuable mineral deposits" within the meaning of the 1872 Act, or whether lands that contained these minerals were "mineral lands" and open to the Mining Law, or not mineral in character, and open to homesteading and other nonmineral disposal. Sometimes Congress addressed such questions by special legislation. See. e.g., Building Stone Act. 27 Stat. 348 (1892) (making lands "chiefly valuable" for building stone subject to the Mining Law); Oil Placer Act, 29 Stat. 526 (1897) (making lands "chiefly valuable" for petroleum and other mineral oils subject to the Mining Law); Saline Placer Act, 31 Stat. 745 (1901) (making lands "chiefly valuable" for salt and salt springs subject to the Mining Law).

Where Congress had not resolved the issue, it fell to the Department and reviewing courts to address. The results were not always consistent, causing considerable confusion. In Zimmerman v. Brunson, 39 Pub. Lands Dec. 310 (1910), for example, the Department held that land containing ordinary sand and gravel was not mineral in character, and was therefore open to entry under the homestead laws rather than the Mining Law. In describing this result, Judge Lindley observed that "the courts follow a consistent uniformly recognized principle which establishes the test of profitable marketability. The land department follows this principle as a general rule, but disregards it in the case of the commonplace substances such as ordinary clay, sand and gravel." 2 Curtis H. Lindley, A Treatise on the American Law Relating to Mines and Mineral Lands Within the Public Land States and Territories and Governing the Acquisition and Enjoyment of Mining Rights in Lands of the Public Domain § 424, at 996 (3d ed. 1914).

In Layman v. Ellis, 52 Pub. Lands Dec. 714, 721 (1929), the Department overruled the Zimmerman decision and held that gravel is a mineral subject to the Mining Law if it is found in land "chiefly valuable" for such, and the land contained deposits that can be "extracted, removed and marketed at a profit." The Department followed Layman thereafter, and applied the policy that widely occurring mineral substances could be located under the Mining Law, depending upon the quantity and quality of the deposit and the comparative mineral and nonmineral values of the underlying land. The outcome had to be determined case by case, and no hard and fast rules were possible. To the extent the application of Layman yielded the conclusion that the mineral material in question was not locatable under the Mining Law, no other law authorized disposition of such mineral materials, until 1947.[1]

B. The 1947 Minerals Material Act

In the 1940s the absence of authority to otherwise dispose of mineral materials not locatable

[1] "Certain products of the earth have never been regarded as subject to location under the mining law, despite the fact that they might be marketable at a profit. Among these nonlocatable materials are those used for fill, grade, ballast, and sub-base." United States v. Verdugo & Miller, Inc., 37 IBLA 277, 279 (1978).

under the Mining Law was becoming a problem. In 1946, the Secretary sent a letter to Congress explaining that the Department of the Interior had received numerous requests from railroad companies for permission to take stone, "which is not of such quality or quantity as to permit its acquisition under the mining laws," and also from counties and towns "to acquire sand and gravel, which are not of such quality or quantity as to be subject to the mining laws." S. Rep. No. 79-1402. at 2 (1946).

In 1947, Congress granted the Secretary broad authority, "under such rules and regulations as he may prescribe," to

> dispose of materials including but not limited to sand, stone, gravel. . . . [and] common clay . . . on public lands of the United States if the disposal of such materials (1) is not otherwise expressly authorized by law, including the United States mining laws, and (2) is not expressly prohibited by laws of the United States. and (3) would not be detrimental to the public interest.

Materials Act of 1947 § 1, 61 Stat. 681 (codified as amended at 30 U.S.C. § 601) (emphasis added).[2] Disposal was further authorized "upon payment of adequate compensation therefor, to be determined by the Secretary," and if the appraised value of the material exceeded $1000. the Secretary must dispose of it "to the highest responsible qualified bidder by competitive bidding." Id.

The 1947 Act did not bring clarity to the question whether mineral materials were locatable. In fact, it only added to the confusion. By referring specifically to sand. stone, gravel, and common clay, it recognized that such materials could be disposed of under its terms, by sale, to the extent disposal was "not otherwise expressly authorized by law, including the United States mining laws." Id. (emphasis added).

As discussed in part II.A., above, the Mining Law did not directly (or "expressly") address mineral materials; specifically, nothing in the Mining Law either expressly authorized or expressly prohibited the disposition of sand and gravel and other common materials. Nevertheless, as a matter of Departmental practice at the time the 1947 Act was passed. the Department followed Layman, and allowed disposition of mineral materials like sand and gravel under the Mining Law in certain circumstances; namely, if the material could be extracted. removed and marketed at a profit and the lands were chiefly valuable for that material. When it could not be so marketed, the Department concluded that those deposits of mineral materials were not locatable under the Mining Law.

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[2] The 1947 Act is similar to a temporary wartime authorization to dispose of "sand. stone, gravel, vegetation, and timber or other forest products" which Congress granted to the Secretary of the Interior in the Act of September 27, 1944, 58 Stat. 745. The 1944 Act expired by its own terms on December 31, 1946. Id.

The 1947 Act was Congress's attempt to give the Secretary authority to dispose of deposits of mineral materials which were not locatable under the Mining Law. The legislative history clearly shows Congress's purpose: in the words of the House report, to authorize the disposal of materials "for the disposal of which no present authority exists. It supplements present disposal methods and does not conflict with them." H.R. Rep. No. 80-867 (1947). Congress did this by defining the nature of the mineral materials which the Secretary could dispose of (that is. any such materials not locatable under the Mining Law), rather than addressing the physical location of the mineral materials and whether the land from which the mineral materials could be disposed was or was not claimed under the Mining Law.[3] Put another way. while Congress did not give the Secretary authority to dispose of mineral deposits which would otherwise be locatable under the Mining Law, there is no evidence on the face of the Materials Act or in its legislative history that Congress intended to restrict the Secretary from disposing of mineral materials which were not locatable from within the boundaries of unpatented mining claims. This is an important point which, as will be discussed below, has been ignored in previous legal opinions.

C. The 1955 Surface Resources Act

Congress came back to the subject of mineral materials eight years later. This time. in section 3 of the Surface Resources Act of 1955, Congress expressly and entirely removed from the purview of the Mining Law "common varieties" of sand. stone, gravel, pumice, pumicite. and cinders. 30 U.S.C. § 611. The Chair of the Committee reporting the bill explained on the floor of the House: "The reason we have done that is because sand, stone, gravel, pumice. and pumicite are really building materials, and are not the type of material contemplated to be handled under the mining laws . . .." 101 Cong. Rec. 8743 (1955) (remarks of Rep. Engle).

The 1955 Act was an amendment to the 1947 Act and left completely intact the authority given in the 1947 Act to the Secretary to dispose of mineral materials. In fact, it filled a gap on this point left by the 1947 Act, and gave the Secretary of Agriculture authority to dispose of mineral materials "where the lands involved are administered by him for national forest purposes or for

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[3] In section 1 of the Surface Resources Act, Congress stated:

> Nothing in this Act shall be construed to apply to lands in any national park, or national monument or to any Indian lands or lands set aside or held for the use of benefit of Indians, including lands over which jurisdiction has been transferred to the Department of the Interior by Executive order for the use of Indians.

69 Stat. 367 (1955). The Materials Act originally included the National Forests in this provision. This language shows that Congress knew how to restrict the application of the Secretary's disposal authority by defining the land to which it would apply. If Congress had intended to disallow the Secretary from disposing of mineral materials from the lands included in unpatented mining claims, it could have said so expressly in this provision.

the purposes of title III of the Bat&head-Jones Farm Tenant Act or where withdrawn for the purpose of any other function of the Department of Agriculture." See 30 U.S.C. § 601, last sentence. The first section of the Surface Resources Act amended section 1 of the Materials Act to read:

> Section 1. The Secretary, under such rules and regulations as he 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. . . . if the disposal of such mineral . . . materials (1) is not otherwise expressly authorized by law, including but not limited to. the Act of June 28, 1934 (48 Stat. 1269), as amended, and the United States mining laws, and (2) is not expressly prohibited by laws of the United States, and (3) would not be detrimental to the public interest.

Surface Resources Act of 1955 § 1, 69 Stat. 367.[4]

The Surface Resources Act also provided that unpatented mining claims could be used only for "prospecting, mining or processing operations and uses reasonably incident thereto." 30 U.S.C. § 612(a). Section 4(c) of the Surface Resources Act further provided that mining claimants may use vegetative and other surface resources of the mining claim only

> to the extent required for . . . prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures . . . or to provide clearance for such operations or uses, or to the extent authorized by the United States.

30 U.S.C. § 612(c). Even before 1955, the courts had long held that the Mining Law itself entitled the mining claimant to use the surface only for purposes reasonably incident to mining. See. e.g., United States v. Etcheverry, 230 F.2d 193, 196 (10th Cir. 1956) ("[G]razing rights of the public domain are not included in the possessory rights of a mining claim."); Teller v. United States, 113 F. 273, 280 (8th Cir. 1901) ("Possession of a mining claim, in accordance with the provisions of the statute, by well-settled authority, confers the right, subject to certain limitations

[4] Section 7 of the Surface Resources Act states that nothing in this subchapter and section 1 and section 3 "shall be construed in any manner to limit or restrict or to authorize the limitation or restriction of any existing rights of any claimant under any valid mining claim heretofore located," except as provided in sections 5 and 6. 30 U.S.C. § 615. To the extent that mining claimants have no right to dispose of common variety mineral materials or to use more of the surface of the claim than is reasonably necessary to develop the discovered valuable mineral deposit, the Secretary's disposal of mineral materials from an unpatented mining claim does not limit or restrict any existing rights of a claimant, so long as the disposal does not endanger or materially interfere with the right of the claimant to develop valuable minerals on the claim.

and conditions, upon a locator, to work the claim for precious metals for all time, if he desires to do so; but confers no right to take timber, or otherwise make use of the surface of the claim, except so far as it may be reasonably necessary in the legitimate operation of mining."); United States v. Rizzinelli, 182 F. 675, 684 (N.D. Idaho 1910) ("the right of a locator of a mining claim to the 'enjoyment' of the surface thereof is limited to uses incident to mining operations"); see also Robert E. Shoemaker, 110 IBLA 39, 52-53 (1989), and Bruce W. Crawford, 86 IBLA 350. 359-362 (1985).

In section 4(b) of the Surface Resources Act, Congress amended the Mining Law by subjecting unpatented mining claims located after 1955

> to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources (except mineral deposits subject to location under the mining laws of the United States).

30 U.S.C. § 612(b). Section 4(b) also subjected unpatented mining claims to the right of the United States to use the surface for other purposes so long as the United States' surface use does not "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto." Id. This provision made clear that the Mining Law's reference to the claimant's "exclusive right of possession and enjoyment" of the surface of the claim did not prevent the United States, as holder of the fee, from managingthe vegetative and other surface resources of the claim and using the surface of the claim for other purposes.

The meaning of section 4(b) of the Surface Resources Act has been explored in several opinions of this office discussed in the next section.

III. Previous Solicitor's Opinions

Taken together, the 1947 Act and its 1955 amendments raise a number of questions. For example, was the 1947 Act's broad authorization to dispose of mineral materials on public lands, including on unpatented mining claims, affected by the 1955 amendments? Did the 1955 amendments' removal of "common varieties" of sand. gravel, etc., from the Mining Law enlarge the disposal authority granted by the 1947 Act? Did the 1955 amendments' continuation of authority to "manage other surface resources" on unpatented mining claims include "mineral materials" as "other surface resources"? If it did, did that restrict the government's ability to "dispose of" (as opposed to simply "manage") such materials? Some of these questions came to be answered, albeit somewhat inconsistently, in several opinions of the Office of the Solicitor issued between 1956 and 1980.

In 1956, the Acting Associate Solicitor for Public Lands addressed the effect of the 1955 Act on the use of the surface of unpatented mining claims for recreational purposes and for access to adjacent lands for recreation. Effect of Public Law 167, 84th Cong., on the Use of the Surface of Unpatented Mining Claims for Recreational Purposes and for Access to Adjacent Lands,

M-36389 (1956) (1956 Opinion). This opinion pointed out that while section 4(b) of the 1955 Act specifically granted disposal authority to vegetative resources. it did not include authority to "dispose of," but rather simply to "manage," other surface resources. which the Opinion seemed to assume included mineral materials. Id. at 2. This Opinion did not address the 1947 Act's grant of authority to the Secretary to dispose of mineral materials or Congress's reiteration of that authority in the first section of the 1955 Act. And it did not directly address whether sand. gravel, and other mineral materials were "other surface resources" within the meaning of 30 U.S.C. § 612.

Eight months later, the Solicitor issued an Opinion more squarely addressing the issues with which we are here concerned. Disposal of Sand and Gravel From Unpatented Mining Claims. M-36467 (1957) (1957 opinion). The first question was whether holders of unpatented mining claims could extract sand and gravel from their claims. The Solicitor's answer was divided into two parts, depending upon when the claim was located. For claims located before enactment of the 1955 Act, the Solicitor answered in the affirmative, "assuming that the sand and gravel is [sic] a valuable mineral" under applicable law. Id. at 2. But "if the sand and gravel is [sic] not a valuable mineral (see Layman et al. v. Ellis, 52 I.D. 721), [the claimant] has no authority to dispose of it prior to patent." Id. at 4.

For claims located after enactment of the 1955 Act, the claimant could not extract and sell sand and gravel at all, unless it was an "uncommon variety" and thus subject to location under the Mining Law. The claimant could "use the sand and gravel for any mining purpose, but he has no authority to appropriate and sell it." Id. at 6 (emphasis in original).

The 1957 Opinion went on to address whether the United States had authority to sell the sand and gravel from the claim. The Solicitor answered this question in the negative, opining that "[p]rior to a final determination that a mining claim is invalid, the Bureau has no authority to sell the sand and gravel in or on the claim regardless of when the claim was located." Id. at 7. This was because, according to the Solicitor, before enactment of the 1955 Act, the United States "had no authority to dispose of the surface resources on an outstanding, unpatented mining claim."[5] Id. (emphasis in original). While section 4 of the 1955 Act, according to the 1957

[5] The Solicitor cited United States v. Deasy, 24 F.2d 108 (N.D. Idaho 1928), as support for this conclusion. In that case, the United States sought to enjoin mining claimant defendants from interfering with a sales contract for timber to be cut and removed by a third party from defendants' mining claims. The court noted that defendants had filed affidavits contending that they needed all of the timber growing on the claims for their mineral development. The court concluded that if it were to restrain the defendants from cutting the timber which is under the sales contract between the United States and the third party, the third party is

> permitted to deprive the locators of the necessary use of [the timber] in the development of their claims, then we have a situation of the government first, by statute, granting to the defendants, as locators, the exclusive right to the timber, and thereafter conveying it to

Opinion, "confers on the United States the right to manage and dispose of the surface resources." the Solicitor explained that "sand and gravel is not a 'surface resource.' It necessarily extends downward from the surface and is, therefore, a below the surface resource." The Solicitor then concluded that "[i]n those cases where [sand and gravel] is not a valuable mineral within the meaning of the mining law, its status, so far as its availability for sale by the United States is concerned, is identical with that of timber on a mining claim prior to July 23, 1955." Id.[6]

Curiously, the Solicitor failed to address the authority supplied by the 1947 Act, which was retained by the 1955 Act, for the Secretary to dispose of sand and gravel on an unpatented mining claim. This omission is surprising for two reasons. First, earlier in the 1957 Opinion the Solicitor had recognized that sand and gravel "is a material . . . in contemplation of the Materials Act of 1947." Id. at 4. Second, the logical consequence of the Solicitor's holding that sand and gravel are not "surface resources" under section 4(b) of the 1955 Act is that sand and gravel are not subject to Departmental "management" under that section. This would eliminate the argument that section 4(b) of the 1955 Act. by expressly authorizing "management" but, by implication, not authorizing disposal of such surface resources, might limit the authority of the Secretary to sell ordinary sand and gravel from unpatented mining claims under the 1947 Act. as amended by the first section of the Surface Resources Act. The 1957 Opinion was silent on these issues (which are discussed further below).

Two decades elapsed before the Solicitor's Office returned to this subject. In January 1978. the Assistant Solicitor for Onshore Minerals, Division of Energy and Resources. reviewed a draft BLM instruction memorandum proposing to authorize disposal of common variety minerals from unpatented mining claims. Proposed Instruction Memorandum: Disposal of Mineral Material from Unpatented Mining Claims (1978) (1978 Opinion). Without extended analysis or citing any previous Opinion, the Assistant Solicitor concluded that the BLM could not dispose of common variety minerals from unpatented mining claims without changing its regulations. BLM's regulations, first adopted in 1960 and reissued in slightly variant forms in 1964, 1970 and 1983, explicitly prohibit such disposal prior to cancellation of the mining claim in appropriate

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another, thus depriving the first locators of their statutory right of use.

Id. at 111.

[6] In effect, the Solicitor seemed to be assuming that mineral materials, though not a "surface resource" under the 1955 Act, had a status similar to surface resources for purposes of the pre-1955 claims. In the 1957 Opinion, the Solicitor also incorrectly described section 4 of the 1955 Act as conferring on the United States the "right to manage the surface and to manage and dispose of the surface resources." In fact, as mentioned earlier, the 1955 Act confers a right to manage and dispose of vegetative surface resources but only to manage other surface resources.

legal proceedings. 43 C.F.R. § 3601.1 (1997).[7] The Assistant Solicitor stated, "If the Bureau wishes to dispose of mineral materials . . . [on unpatented claims], I recommend that it revise the regulations in 43 C.F.R. Part 3600." 1978 Opinion, at 1. This Opinion expressed no doubt about BLM's authority to dispose of these materials from unpatented mining claims.

Six months later, in July 1978, BLM proposed a rulemaking to remove the restriction on the disposal of mineral materials from unpatented lode claims, but not placer claims. 43 Fed. Reg. 29,150 (1978).[8] The preamble to the proposed rule explained that the restriction in the existing regulations "precludes the Secretary of the Interior from effectively managing the surface resources, especially the mineral materials resources, on public lands." The preamble then describes three issues "being reviewed by the Solicitor's Office":

> (1) Does the power to manage other surface resources (i.e., mineral) include the power to dispose: (2) does the term "other surface resources" embrace mineral deposits which extend into the subsurface as well (i.e., sand and gravel deposits. etc.) and (3) is the provision [in the proposed regulation] allowing a mining claimant access to mineral materials located off his mining claim for the purpose of prosecuting his claim authorized by either the Surface Resources Act of 1955 or Materials Act of 1947 as amended 30 U.S.C. 601. [sic]

Id. at 29.151. The preamble explained that if the answer to either of the first two questions is no. the proposed regulation cannot be promulgated under existing authority.[9] The preamble also stated that if the answer to the third question is no. the proposed regulation would have to be redrafted.[10]

The Associate Solicitor for the Division of Energy and Resources held the proposal was not

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[7] None of the preambles to these rules mentioned any Solicitor's Opinions.

[8] BLM did not propose removing the restriction for placer claims "because of the possible conflicts between common varieties of mineral materials and locatable minerals that may be associated with the common varieties of mineral materials" such as placer gold mixed with sand and gravel. 43 Fed. Reg. at 29,151.

[9] The conclusion that there would be no authority for mineral material disposal from unpatented mining claims if mineral materials are not considered a surface resource is not correct. As explained in more detail below, whether or not mineral materials are "surface resources" under section 4(b) of the 1955 Act, they are subject to the 1947 Act disposal authority, as amended by the first section of the Surface Resources Act. See infra, p. 13.

[10] Neither the Materials Act nor the Surface Resources Act authorizes a mining claimant to use off-claim mineral materials unless the claimant enters into a sales contract with BLM for those materials.

lawful. His March 8, 1979 Opinion relied on the 1956 Opinion to conclude that the grant of the power "to manage other surface resources" in section 4(b) of the Surface Resources Act "does not include the authority to dispose of those resources." Disposal of Mineral Materials from Unpatented Mining Claims, at 4 (1979) (1979 Opinion).

This Opinion contained what seems to be a serious internal inconsistency. That is, it began by observing that the Secretary "is granted authority to dispose of mineral materials under the Materials Act of 1947 . . .." Id. at 2. Deciding two pages later that the 1955 Act contained no authority to dispose of mineral materials, the Opinion does not go back to explore whether the 1947 Act disposal authority was retained when the 1955 Act amended the 1947 Act. or whether the 1955 Act otherwise affected the 1947 Act authority. Finally, examining whether the phrase "other surface resources" included sand and gravel, the Associate Solicitor noted that "there is some ambiguity in the phrase," but that it was unnecessary to resolve the issue for purposes of that Opinion.

The fifth and last Opinion, in 1980, also came from the Associate Solicitor for Energy and Resources. Disposal of Mineral Materials from Unpatented Mining Claims (1980) (1980 Opinion). This Opinion reaffirmed the 1979 and 1956 Opinions, concluding that BLM has no authority under section 4(b) of the 1955 Act to sell mineral materials from unpatented mining claims. The Associate Solicitor, in footnote 10 of the opinion, further concluded:

> The fact that a claimant might "consent" to such a sale would not operate to invest the Secretary with such disposal authority. In the first place, the mining claimant has no alienable interest in the mineral materials (his "title" or interest being limited to use) and in the second, the action of a third party in concert with the Secretary cannot operate to bestow powers not granted by Congress.

Id. at 6. This 1980 Opinion, like the one eighteen months earlier, did not address whether the Materials Act of 1947 or the first section of the 1955 Act itself provided the authority to dispose of mineral materials from unpatented mining claims. The question posed was only "whether the Secretary is authorized to make sales of mineral materials from unpatented mining claims under the provisions of section 4(b) of the Surface Resources Act of 1955 . . .." Id. at 1. The failure to address the 1947 Act and the first section of the 1955 Act is all the more curious because the 1980 Opinion also recognizes that, "[b]y the Materials Act of 1947, 61 Stat. 681, Congress made mineral materials subject to sale." Id. at 2. Further, in footnote 7 of that Opinion, the following statement is made: "When Congress intends to grant the power of sale or other disposition it knows how to do so. See section 1 of the Mineral Materials Act of 1947, as amended. 30 U.S.C. § 601 ('The Secretary . . . may dispose of mineral materials . . .')." Id. at 5 n.7.

The 1980 Opinion did say that, "[p]rior to passage of the 1955 Act, certainly, the Secretary could not enter a properly located mining claim for the purpose of selling mineral materials since the mining claimant had a right until the invalidity of the claim was established, to all the valuable minerals within the boundaries of the claim." Id. at 3 (footnote omitted). As the discussion early

in this Opinion shows, supra, at 5 and 6, this is a considerable oversimplification of the rights of the mining claimant, and ignores the question of whether mineral materials, which are widely occurring substances, are "valuable minerals" under the Mining Law.

The 1980 Opinion emphasizes that the purpose of the 1955 Act was to confirm and clarify that there were limits on the rights of mining claimants and to confirm and clarify the authority of the United States with regard to mineral materials and other resources found on unpatented mining claims. Yet, in reaching its result, it ignores the irony that it construed that same Act as also placing limits on the right of the United States to dispose of these mineral materials -- a right generally established in the 1947 Act.[11]

Remarkably, this Opinion also concluded, without distinguishing or even referring to the 1957 Opinion, that common varieties of mineral materials are one of the "other surface resources" embraced within section 4(b) of the Surface Resources Act. Id. at n. 1. The Associate Solicitor reasoned that the parenthetical that follows in the statute. which excludes locatable minerals. would be superfluous if the phrase "other surface resources" did not include some mineral deposits.

In sum, past Solicitor's Office analysis of these issues has been marked by inconsistency and, at times, outright errors. While the Office has concluded that BLM lacks authority under section 4(b) of the Surface Resources Act to dispose of mineral materials from unpatented mining claims, in none of these Opinions is there a serious examination of the authority Congress gave the Secretary in the Materials Act of 1947 or in the first section of the 1955 Act to dispose of mineral materials from unpatented mining claims. Specifically, nowhere has there been any attempt to reconcile the conclusion that section 4(b) of the 1955 Act does not provide the Secretary with authority to dispose of mineral materials with the fact that the 1947 Act and the first section of the 1955 Act provide such authority.

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[11] Although the legislative history of the 1955 Act shows concern for protecting the interests of mining claimants, as noted by the Associate Solicitor, see 1980 Opinion, at 6, it also shows a willingness to amend the Mining Law and impose restrictions on mining claimants. A primary motivation behind the 1955 Act was "eliminating the filing of phony mining claims" and dealing with thousands of stale and dormant mining claims. according to Representative Engle. 101 Cong. Rec. 8742 (1955) (remarks of Rep. Engle). He said that "the purpose of the legislation is to amend the general mining laws to permit a more efficient management and administration and to provide for multiple use of the surface of the same tracts of public lands." Id. He explained that the bill would amend the Mining Law by giving the United States authority to manage "other surface resources thereof (except minerals subject to the mining laws)." Id. He concluded by saying, "Now, boiled down in simple terms. that simply means that [the United States] can take timber and use the surface of mining claims for the purpose of disposing of grass and other forage for animals." Id.

III. Analysis

As previous Solicitor's Office opinions have noted, section 4(b) of the Surface Resources Act explicitly subjected unpatented mining claims to the rights of the United States to manage and dispose of vegetative resources and to manage all other surface resources. Regardless of whether mineral materials are a surface resource, we agree with those previous Solicitor's Office opinions concluding that section 4(b) of the Surface Resources Act does not give the Secretary authority to dispose of "other surface resources" from unpatented mining claims. However, that does not mean the Secretary lacks authority to dispose of mineral materials from unpatented mining claims.

The Secretary obtains this authority elsewhere. The 1955 Act did not repeal, expressly or by implication, the disposal authority granted to the Secretary in the 1947 Act. Indeed, it expressly retained that authority in the first section of the 1955 Act. It confirmed it further by giving the Secretary of Agriculture disposal authority also.[12] See 30 U.S.C. § 601, last sentence.

As noted above, the Materials Act of 1947 and the first section of the Surface Resources Act of 1955 give the Secretary of the Interior a broad grant of authority to dispose of mineral materials from the public lands if the disposal (1) "is not otherwise expressly authorized by law," (2) "is not expressly prohibited by the laws of the United States" and (3) "would not be detrimental to the public interest." 30 U.S.C. § 601. Disposal of common varieties of mineral materials by the Secretary from unpatented mining claims is neither expressly authorized nor expressly prohibited by any of the laws we have been discussing or any other law. Indeed, rather than prohibiting mineral materials disposal by the Secretary, the Surface Resources Act merely disallows surface use by the United States which would "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto." 30 U.S.C. § 612(b). Congruently, the claimant's interest in the surface and vegetative or other surface resources of a valid mining claim is limited to use for "prospecting, mining or processing operations or uses reasonably incident thereto," or "for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, or to the extent authorized by the United States." 30 U.S.C. § 612 (a) and (c).[13]

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[12] The legislative history indicates that the 1955 Act was drafted in a joint conference between representatives of the Department of the Interior, the Department of Agriculture, and various conservation groups, the National Lumber Association. the American Mining Congress and representatives of the lumber industry. Id. at 8743 (remarks of Rep. Engle).

[13] The 1980 Opinion places some emphasis on the fact that the 1955 Act does not provide the mining claimant with "free use" of off-claim mineral materials resources useful in mining operations, even though it does provide the claimant with free use of off-claim timber resources necessary for mining operations on the claim, when the United States has entered the claim and disposed of timber resources on the claim under authority granted in the 1955 Act. 1980 Opinion, at 4. Congress's failure to treat mineral materials in the same way it treated

Disposal of common varieties of mineral materials from unpatented mining claims would not be detrimental to the public interest. As mentioned in the Associate Solicitor's 1979 opinion. at 1, mineral materials are often waste from mining operations which the claimant does not need. In many instances, contract disposal of mineral material overburden could be both a service to a mining claimant and the surrounding community, as well as a financial benefit to the United States.

Consequently, for all of the foregoing reasons, I construe the Materials Act and the first section of the Surface Resources Act to grant to the Secretary sufficient authority to dispose of mineral materials from unpatented mining claims.[14] The disposition must not "endanger or materially interfere with [the claimant's] prospecting, mining or processing operations or uses reasonably incident thereto." 30 U.S.C. § 612(a).

The Secretary's authority to dispose of mineral materials from unpatented mining claims should be exercised judiciously. A mining claimant has a right to use the claim surface for prospecting. mining or processing operations and uses reasonably incident thereto. Id. The claimant may try to assert that mineral materials are part of the surface or a surface resource and may try to assert a right to use so much of the mineral materials as is necessary for development of the valuable mineral deposit on the unpatented mining claim.

However, the Secretary's authority to dispose of mineral materials from unpatented mining

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timber could mean nothing more than that Congress did not believe claimants had a similar right to use mineral materials which it needed to protect. Or it could mean that Congress knew the Secretary already had authority to dispose of mineral materials and claimants could not expect to be compensated for mineral materials disposed of by the Secretary. Since the Mining Law is a land grant statute, albeit one that grants property interests on a self-initiated basis, the principle still applies "that land grants are to be construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are any doubts. they are resolved for the Government, not against it." United States v. Union Pacific R. Co.. 353 U.S. 112, 116 (1957). Nothing in the Mining Law specifically grants mining claimants a right to mineral materials which are not locatable under the Mining Law. Moreover, nothing in the Mining Law states that mineral materials are part of the surface to which claimants were granted "the exclusive right of possession and enjoyment."

[14] The 1947 Act, as amended by the 1955 Act. also authorizes the Secretary, at 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. Consequently, the Secretary may also dispose of mineral materials from unpatented mining claims under this provision.

claims does not depend on whether mineral materials are considered a surface resource.[15] Nothing in the Materials Act or the Surface Resources Act expressly states that mineral materials are among the "other surface resources." In addition, whether or not mineral materials are part of the "other surface resources" at issue in section 4(b) of the Surface Resources Act, the Materials Act of 1947, as amended by section 1 of the 1955 Act, still authorizes the Secretary to dispose of mineral materials from unpatented mining claims. Interestingly. the legislative history of the 1955 Act indicates that Congress's intent in using the term "other surface resources" was to protect the "right of trespass" for "recreationists, sportsmen, and others to use the national forests for hunting, fishing, and recreation." 101 Cong. Rec. 8746 (June 20. 1955) (remarks of Rep. Ellsworth). In framing the bill, "the language of subsection (b) of section 4 was very, very carefully considered and carefully written with this thought in mind." Id. This purpose had nothing to do with mineral materials disposition and thus suggests that the reference in section 4(b) to managing surface resources was not intended to affect mineral materials disposition at all.

In order to avoid disputes with claimants over BLM's disposal of mineral materials from unpatented mining claims. BLM should seek from the holder of the unpatented mining claims an explicitly stated waiver of all rights to use any mineral materials on all or any defined part of the unpatented mining claims. The waiver should state that BLM does not acknowledge that the claimant has the rights being waived. The claimant's waiver serves only to free the common variety mineral materials on a claim from any perceived encumbering interest (and a possible damages claim, however unfounded) and does not serve to invest the Secretary with any authority he does not already have.[16] The Secretary would not be disposing of the materials under section 4(b) of the Surface Resources Act but would do so under the broad grant of authority under the Materials Act, as retained in the first section of the Surface Resources Act.

Where such a waiver is not obtained, and BLM determines that it can proceed without endangering or materially interfering with the right of the claimant to develop valuable minerals

[15] The question of whether mineral materials are a surface resource contemplated by section 4(b) of the Surface Resources Act need not be decided here. However, it is interesting to note that in case law regarding the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1611, 1613, sand and gravel are considered part of the subsurface. See, e.g., Tyonek Native Corn. v. Cook Inlet Region, Inc., 853 F.2d 727 (9th Cir. 1988); Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723 (9th Cir. 1978); and Aleut Corn. v. Arctic Slope Regional Corn., 421 F. Supp. 862 (D. Alaska 1976). In addition, under the Stockraising Homestead Act. gravel is considered part of the mineral estate reserved to the United States, as opposed to the surface estate conveyed to the homesteader. Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983).

[16] This waiver should not be confused with the waiver referenced in section 6 of the Surface Resources Act by which a claimant who holds a pre- 1955 Act claim can relinquish all rights that conflict with the limitations in section 4 of the Surface Resources Act.

on the claim, BLM should consult closely with the Solicitor's Office on how to proceed."

IV. Conclusion

The Secretary may dispose of mineral materials from unpatented mining claims. However, BLM must first amend 43 C.F.R. § 3601.1 to allow such dispositions. This Opinion supersedes all previous Solicitor's Office opinions which conflict with this Opinion. This Opinion was prepared with the substantial assistance of Karen Hawbecker of the Division of Mineral Resources, Office of the Solicitor.

John D. Leshy
Solicitor

I concur: _____ 6/11/99
Secretary of the Interior Date

[17] In Cliff Gallaugher, 140 IBLA 328 (1997), the Interior Board of Land Appeals concluded that absent evidence that a specific surface management action under section 4(b) of the Surface Resources Act endangers or materially interferes with actual, established prospecting. mining, or processing operations or reasonably related uses. BLM's approval of the specific surface management action will be approved despite allegations that the action will impede future, potential mining and related activities on the claims. Although mineral materials disposal is not governed by section 4(b), BLM may nevertheless be guided by this decision in determining whether disposal will endanger or materially interfere with the right of a claimant to develop the valuable minerals on a claim.