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Attached is preliminary responses from a 3600 program perspective to the questions posed and supporting background information to assist in the discussion.

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# Mineral Materials

## Considerations for Withdrawals



# Authority

## 43 CFR 3600

- 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) and vegetative materials (including but not limited to yucca, manzanita, mesquite, cactus, and timber or other forest products) on public lands of the United States, including, for the purposes of this subchapter, land described in subchapter V of chapter 28 of title 43, if the disposal of such mineral or vegetative materials
  - (1) is not otherwise expressly authorized by law, including, but not limited to, subchapter I of chapter 8A of title 43, 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.
- Such materials may be disposed of only in accordance with the provisions of this subchapter and upon the payment of adequate compensation therefor, to be determined by the Secretary: 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 subchapter, for use other than for commercial or industrial purposes or resale.
- Where the lands have been withdrawn in aid of a function of a Federal department or agency other than the department headed by the Secretary or of a State, Territory, county, municipality, water district or other local governmental subdivision or agency, the Secretary may make disposals under this subchapter only with the consent of such other Federal department or agency or of such State, Territory, or local governmental unit.
- Nothing in this subchapter 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 or 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.



## Policy

- Discretionary Use: A use for which the BLM retains the discretion to authorize or decline to authorize.
- It is BLM policy to dispose of mineral materials, provided adequate measures are taken to protect the environment and that damage to public health and safety is minimized.
- Since disposal of mineral materials is discretionary, no disposals will be made if it is determined by the Authorized Officer that the total damage to public lands and resources would exceed the expected public benefits derived from any proposed disposal.



## Disposal Prohibited

The BLM will not dispose of mineral materials if any of the following conditions exist:

1. The lands are included in National Parks, National Monuments, National Forests, National Wilderness Areas, or Indian Lands.
2. There are conflicting non-mineral applications or entries pending which involve title to the mineral estate, such as sales or exchanges.
3. Disposal would be in conflict with the current BLM land use plan.
4. Disposal is otherwise prohibited by law.



# Ownership of the Mineral Estate

## Who owns the Mineral Estate

- Valid Existing Rights. Existing rights are defined in Section 701 of FLPMA as any "valid lease, permit, patent, right-of-way, or other land use right or authorization" and must be in existence at the time of designation.
- General Doctrine is the surface is subservient to the mineral estate.
  - "Reasonable" conditions however can be applied
  - Environmental protection is generally a legitimate governmental interest.
- When the mineral estate is severed from the surface, separate and distinct estates are thereby created which are held by separate and distinct titles, and each is a freehold estate.
- A grantee of minerals underlying the land becomes the owner of them; the interest is not a mere mining privilege.
- The owner of the mineral estate has, either by the express terms of the conveyance or by necessary implication therefrom, a right of entry or access to the minerals over or through the surface.
  - See Santa Fe Pacific R.R. Co., 64 IBLA 27 (1982) (holding that a severed mineral estate is a "vested right" subject to even greater protection than a valid existing right)
- Mineral rights may still be subject to reasonable regulation under FLPMA
  - Sierra Club v. Watt; Utah v. Andrus.
    - "Challenging the constitutional or statutory authority of federal land managers to regulate, in any way, the use of federal surface estates by developers of severed minerals is not likely to reap favorable results for mineral-estate owners." Natural Resources Law Center Paper Conclusion 1996



## **§ 3601.22 What rights remain with the United States when BLM sells or issues a permit for mineral materials?**

- Your sale contract or use permit is subject to the continuing right of the United States to issue leases, permits, and licenses for the use and occupancy of the lands, if such use would not endanger or materially interfere with the production or removal of materials under contract or permit.



## **§ 3601.21 What rights does a person have under a materials sales contract or use permit?**

(a) Unless otherwise provided, if you are a purchaser under a sales contract or a free use permittee, you have the right to:

(1) Extract, remove, process, and stockpile the material until the contract or permit terminates, regardless of any rights others acquire later under the provisions of the general land laws; and

(2) Use and occupy the described lands to the extent necessary for fulfillment of the contract or permit.

(b) Users of the lands covered by your materials sales contract or free use permit who acquire their rights later than the date BLM designated the tract for mineral materials disposal will be subject to your existing use authorization, as provided in § 3602.12.

This applies to uses due to any later settlement, location, lease, sale, or other appropriation under the general land laws, including the mineral leasing and mining laws.





## **3604.27**

### **What rights does a free use permit give me against other users of the land?**

- "Permits that BLM issues under this subpart constitute a superior right to remove the materials in accordance with the permit terms and provisions, as against any claim to or entry of the lands made after the date BLM designated the tract for mineral materials disposal. See §3602.12."

# Type of Withdrawal/Conveyance

The Secretary of the Interior delegated to the Bureau of Land Management (BLM) the authority to process all administrative withdrawal actions, regardless of what Federal agency or Federal lands are involved. A major reason for this designation is that BLM has primary jurisdiction over the mineral estate on Federal lands.

**Withdrawal Proclamation:** Does it expressly or implicitly authorize or prohibit mineral material disposal

“Where an Act of Congress authorizes the setting aside of lands for particular public purposes, and does not either expressly continue or prohibit the operation of the general mining laws, the intent of Congress in that respect must be gathered from the Act itself, or by historical interpretation of this Department of that Act and similar Acts relating to lands of the same status.”

Historical interpretation is withdrawn: See *Pathfinder Mines Corp.* 76 IBLA 276 (Oct. 18, 1983); *Appealed, aff'd* IBLA & 9th Cir. March 3, 1987

**Withdrawn Lands:** MM Disposals may be made from lands withdrawn on behalf of another Federal department or agency (other than Interior), State or local government agency, if the other department or agency consents to the disposal. (See 43 CFR 3601.13.)

- Internal to DOI
  - BOR - MOU
  - NPS, BIA, USFWS
- Non DOI Federal
  - FHWA, FERC MOUs
  - DOD
- State or Quasi-governmental
  - Native American Corporation
- Private
  - Conveyance Terms of the Mineral Estate and is it “valuable”
  - Stock Raising Homestead Act, Taylor Grazing Act, Small Tract, Acquired Lands



## Within BLM

- Wilderness Study Area (63 in Nevada)
- Wilderness Area (45)
- National Monument (2)
- National Conservation Area (2)
- Area of Critical Environmental Concern
- Special Interest
  - Sage Grouse
  - Uranium



## Is it a Federal Highway Act ROW?

- No interest granted by the regulations in this part shall give the holder thereof any estate of any kind in fee in the lands. The interest granted shall consist of an easement, license, or permit in accordance with the terms of the applicable statute; no interest shall be greater than a permit revocable at the discretion of the authorized officer unless the applicable statute provides otherwise.
  - A ROW grant allows use of public lands for a materials site; it does not transfer title to the lands. Therefore, the lands remain part of the public domain and under the Secretary's (DOI) jurisdiction.
- Reversion: FHWA's interpretation of Section 317(c) is that such reversion is immediate and effective when the land is no longer used for highway purposes, even if the State fails or refuses to give notice of that fact. States and IBLA decisions may be contrary.
  - Southern Idaho Conference Ass'n. of Seventh Day Adventists v. United States, (9th Cir. 1969)
  - Homestead cases, Alaska 46 IBLA 12 (1980) & IBLA 81-580



# National Monuments/NCAAs

Withdrawal Proclamation: Are mineral material disposal expressly prohibited?

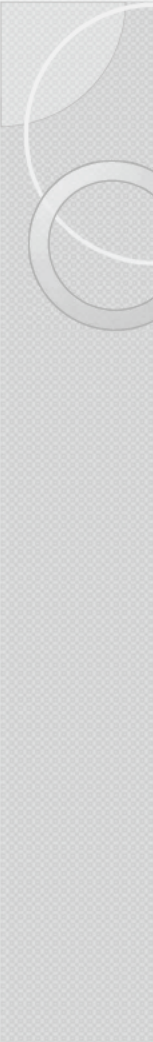
BLM Manual 6220 National Monuments, National Conservation Areas, and Similar Designations

Compatibility of Uses.

1. Site specific activities in Monuments and NCAAs will be managed in a manner that is compatible with the protection of the objects and values for which these areas were designated. Multiple uses may be allowed to the extent they are consistent with the applicable designating authority, other applicable laws, and with the applicable land use plan.
2. Through the NEPA process, the manager with decision making authority for a Monument or NCA will evaluate discretionary uses and will analyze whether the impacts of the proposed use in the Monument or NCA or similarly designated area are consistent with the protection of the area's objects and values. As part of this analysis, the manager will consider the severity, duration, timing, and direct and indirect and cumulative effects of the proposed use. If necessary and appropriate, the BLM may use the land use planning process to consider whether to change discretionary use authorizations.

Management of Newly Designated Monuments and NCAAs: Upon designation of a new Monument or NCA or similar designation, or where the following actions have not been carried out for existing components, the BLM will:

1. Review policies and governing resource management plans for consistency with the designating legislation or proclamation.
2. Subject to valid existing rights, and in accordance with applicable law and regulation, consider suspending or modifying discretionary uses and activities incompatible with the designating legislation or proclamation pending completion or amendment of a land use plan.



## National Monument/NCA Handbook Withdrawals and Valid Existing Rights

1. The BLM State Office where a Monument or NCA is located will note any existing withdrawals, including withdrawals pursuant to the designating authority, on applicable Master Title Plats.
2. The land use plan for a Monument or NCA should consider closing the area to mineral leasing, mineral material sales, and vegetative sales, subject to valid existing rights, where that component's designating authority does not already do so.
3. The plan for the Monument or NCA can also be used to evaluate whether a withdrawal of the area from all forms of appropriation under public land laws, including the mining law, 30 U.S.C. 21 et seq., is necessary and warranted.
4. Pursuant to 43 CFR 3809.11(c), project proponents must submit a plan of operations for any operations causing surface disturbance greater than casual use in special status areas, including Monuments and NCAs.



## Nevada National Monuments/NCA

- General Language - Withdrawn for all public laws, mining and leasing laws, silent but implicitly withdrawn on salable
- Gold Butte - Implicitly
- Basin and Range - Implicitly
  - “...other than by exchange that furthers the protective purposes of the monument.”
- Black Rock NCA – Expressly Prohibited
- Red Rock NCA – Implicitly
- Sloan Canyon NCA – Expressly Prohibited





# Within DOI

USFWS, NPS

BOR MOU

Bureau of Indian Affairs SOP

- "...Nothing in this subchapter shall be construed to apply to lands ....or to any Indian lands, or lands set aside or held for the use or 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. ..."
- The rights remain valid until the expiration date of the permit, dependent on the actual contractual stipulations of the Contract or FUP. However, upon conveyance the BIA becomes the responsible Surface Management Agency.
- The related 1947 and 1955 Minerals Acts are not applicable to salable minerals on Indian Lands. Minerals as on Indian lands are most commonly leased and managed through a cooperative arrangement between BIA, BLM and ONRR with Tribal involvement.

Alaska v AHTNA

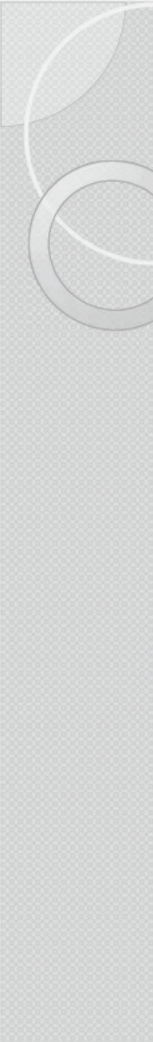
- BLM conveyed land to a Native American Corporation (AHTNA); A Non Federal private entity created under the Alaska Native Claims Settlement Act of 1971 (ANCSA)
- 1961 BLM Granted FHWA Material Site ROW in support of constructing Denali Highway.
  - Once approved, BLM never inspected, Alaska never utilized
- 1982 BLM Conveyed to AHTNA, waiving administration responsibility.
- 2007 AHTNA, "Assumed" active administration and revoked site as abandoned
  - Alaska appealed to IBLA which affirmed BLM decision; Appealed to District Court: Affirmed BLM waiver of administration and held ROW not lost by BLMs or Alaska's "passive abandonment"; Alaska holds a valid interest, construction of the highway sufficient to establish and maintain rights, in this case in perpetuity as no expiration date in the ROW, State must affirmatively abandon for reversion





## Non-DOI

- FHWA
  - Interagency Agreement between BLM and FHWA, February 1982, plus by state MOUs
- FERC
  - FPA or FERC withdrawals are established under the authority of the Federal Power Act of June 10, 1920. Such withdrawals are automatically created upon filing an application for hydroelectric power development with the FERC, formerly the FPC. NOTE: Do not confuse FERC power project withdrawals with power site reserves, power site classifications, waterpower designations, and reservoir site reserves, which are all Administrative withdrawals.
- DOD
  - usually withdrawn from all forms of appropriation under the public land laws, including the mining laws, but not the mineral and geothermal leasing laws and the Materials Act of 1947



## **§ 3601.61 When may BLM cancel my contract or permit?**

BLM may cancel your contract or free use permit if you:

- (a) Fail to comply with the provisions of the Materials Act of 1947, as amended ( 30 U.S.C. 601 et seq.);
- (b) Fail to comply with any applicable regulations; or
- (c) Default in the performance of any material term, covenant, or stipulation in the contract.
  - Santa Fe Sand and Gravel Co. v Rasmussen 1968
  - T. Brown Constructors, Inc. IBLA 87-436
- (d) By mutual consent



## § 3601.62 Cancellation procedure.

(a) BLM will give you written notice of any defaults, breach, or cause of forfeiture, either in person or by certified mail. You have 30 days after receiving the notice:

(1) To correct all defaults;

(2) To request an extension of time in which to correct the defaults; or

(3) To submit evidence showing to BLM's satisfaction why we should not cancel your contract or free use permit.

(b) If you fail to respond to the notice under paragraph (a) of this section, or if delivery of the notice is refused, or not completed as described in § 1810.2 of this chapter, BLM may cancel the contract or permit.

### **Saleable Minerals BARNM (3/1/17)**

The Basin and Range National Monument (BARNM) Proclamation states “All Federal lands and interests in lands within the boundaries of the monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or other disposition under the public land laws, from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing, other than by exchange that furthers the protective purposes of the monument.”

The Materials Act of 1947 is one form of authorization of saleable minerals on public lands. It states “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 or 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.”

Another form of authority for removal of sand and gravel are Title 23 rights-of-way, which continue indefinitely to the Federal Highway Administration. At present, approximately three rights-of-way are currently authorized to Nevada Department of Transportation (NDOT) within the BARNM for the use of sand and gravel for highway purposes.

The Draft RMP for the Cascade-Siskiyou National Monument states that common mineral materials from existing quarries can continue to be used for administrative purposes. It describes BLM use of these types of materials within the monument for administrative use and improvement of facilities (e.g. roads, trails, parking areas, etc.) to reduce environmental effects. Since the BLM is not selling these common materials to the public, use of these materials from the quarries could continue.

The Grand Staircase-Escalante Proposed RMP states that free use permits or contracts for mineral materials authorized under the Materials Act of 1947 would not be renewed. Material sites authorized under Title 23 were addressed differently. The RMP goes on to state “Existing Title 23 rights-of-way within the Monument are inconsistent with the protection of Monument resources. The BLM would request closure of these sites from the Federal Highway Administration and would work with the Federal Highway Administration to find suitable replacement sources of mineral material.”

Most of the roads in Basin and Range National Monument (BARNM) are maintained by Lincoln County through a Road Maintenance Agreement. Very few of the roads in the Monument are designated as BLM-maintained roads. At least three existing gravel pits are currently in place within BARNM, granted to Lincoln County for the purpose of road maintenance. Sand and gravel is needed for road maintenance currently and into the future.

Sand and gravel materials are also an anticipated need into the future for range improvement projects (as part of the ranching lifestyle noted in the Proclamation), upkeep and maintenance of the land artwork *City*, and for private landowners to maintain access.

## Questions regarding saleable minerals in Basin and Range National Monument

- 1) Are saleable minerals considered a valid existing right?
  - a. Yes, see
    - i. § 3601.22 What rights remain with the United States when BLM sells or issues a permit for mineral materials? A: *"Your sale contract or use permit is subject to the continuing right of the United States to issue leases, permits, and licenses for the use and occupancy of the lands, if such use would not endanger or materially interfere with the production or removal of materials under contract or permit."*
    - ii. §3604.27 What rights does a free use permit give me against other users of the land? A: *"Permits that BLM issues under this subpart constitute a superior right to remove the materials in accordance with the permit terms and provisions, as against any claim to or entry of the lands made after the date BLM designated the tract for mineral materials disposal. See §3602.12."*
- 2) Is Basin and Range National Monument (BARNM) completely closed to saleable (sand, gravel, cinder, etc.) minerals? If not, what is the potential range of alternatives regarding saleable minerals?
  - a. Yes, closed to all new disposals.
  - b. Existing disposals terminate upon expiration of contract or permit, renewals are not allowed
  - c. Existing contract/permits can be canceled by mutual consent or for failing to comply with, law or the applicable terms and conditions.
- 3) Can BLM renew permits to Lincoln County for sand and gravel to maintain existing roads within the monument OR somehow authorize this use in the future for administrative purposes?
  - a. Renewal not allowed, see above #2
  - b. BLM can issue a FUP permit or ROW to its self with NEPA & proper justifications that *"furthers the protective purposes of the monument."*
    - i. BLM can contract road maintenance work and supply materials but not issue FUP to the county
- 4) Can BLM keep a pit open for BLM administrative purposes?
  - a. Yes see 3 b
- 5) Could an existing pit be expanded if materials run out in the future?
  - a. Yes see 3 b
- 6) Do expired and closed pits need to be reclaimed OR could they be authorized for use at some point in the future?
  - a. Unless retained by the BLM for monument purposes they need to be reclaimed
- 7) Could new pits be authorized, if they allow for proper care and management of monument resources, objects, and values? For example, if an existing pit has an impact on visual resources, could it be re located to a location that offers better visual screening?
  - a. Yes, only to BLM and only for monument purposes