

INTERIOR BOARD OF LAND APPEALS

City of Sparks

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CITY OF SPARKS

IBLA 2004-300

Decided May 31, 2005

Appeal from a decision of the Assistant Manager, Nonrenewable Resources, Carson City Field Office, Nevada, Bureau of Land Management, denying a request for a free use permit for mineral materials. NVN-78915.

Affirmed.

1. Materials Act

BLM is barred from issuing a free use permit to a government entity, pursuant to the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (2000), where the record demonstrates that the entity intends to use mineral materials obtained from public lands for commercial or industrial purposes or for resale.

2. Materials Act

BLM properly denies a request for a free use permit, pursuant to section 1 of the Materials Act of 1947, as amended, 30 U.S.C. § 601 (2000), by a municipality which demonstrates that it intends to provide the mineral materials from public lands to a private party for use in a proposed residential/commercial development project, in exchange for that party's agreement not to remove similar materials from other property the private entity owns and proposes to dedicate to the municipality for a proposed public facility because such an exchange constitutes a use of mineral materials for commercial or industrial purposes, within the meaning of 43 CFR 3604.12(a).

### 3. Materials Act

BLM properly denies a request for a free use permit, pursuant to section 1 of the Materials Act of 1947, as amended, 30 U.S.C. § 601 (2000), by a municipality which demonstrates that it intends to provide the mineral materials from public lands to a private party for use in a proposed residential/commercial development project, in exchange for that party's agreement not to remove similar materials from other property the private entity owns and proposes to dedicate to the municipality for a proposed public facility because such an exchange constitutes a sale or barter of mineral materials within the meaning of 43 CFR 3604.22(a).

APPEARANCES: Tony Armstrong, Mayor, City of Sparks, Nevada, for appellant; Nancy S. Zahedi, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

The City of Sparks (City), Nevada, has appealed from a July 1, 2004, decision of the Assistant Manager, Nonrenewable Resources, Carson City Field Office, Nevada, Bureau of Land Management (BLM), denying its request for a free use permit (FUP), NVN-78915, for mineral materials from the public lands.

In its request, filed May 5, 2004, the City asked BLM to issue an FUP authorizing the City to use approximately 1,000,000 cubic yards of "excess soil materials" from 449.28 acres of public land in Washoe County, Nevada,<sup>1/</sup> which, at the time of the FUP request, were subject to a Recreation and Public Purpose (R&PP) Lease, No. N-55296.<sup>2/</sup> (Letter to BLM from City, dated May 4, 2004, at 1.) The City had entered into the lease with BLM for the construction and operation of a recreation park and planned to remove the soil materials, under the requested FUP, during construction of the park. The City proposed to transfer the soil materials to

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<sup>1/</sup> The lands are situated in sec. 18, T. 20 N., R. 21 E., Mount Diablo Meridian, Washoe County, Nevada, within the Spanish Springs Valley, north of the City.

<sup>2/</sup> In accordance with 43 U.S.C. § 869-1 (2000), the lease had "reserved to the United States all mineral deposits" in the subject lands, "together with the right to mine and remove the same under applicable laws and regulations."

Pioneer Meadows LLC (Pioneer) for its use as fill material for Pioneer’s proposed development project on approximately 640 acres of nearby private land, that would consist of “single family dwellings, [and] general commercial, business park and open space components.” Id. The City hoped that, “as a matter of economy and environmental respect,” it could transfer the materials to the Pioneer development project site to obviate the need for Pioneer to remove fill material from approximately 55 acres of land on its development site that Pioneer agreed, pursuant to an option agreement with the City, to dedicate to the City for use as a municipal golf course. <sup>3/</sup> Id.

Pioneer had originally “intended to use the Golf Course Property as a borrow site from which fill material would be excavated and used to elevate and shape other portions of the [private] development, leaving a hole that would be filled with water as a lake,” rendering the area unusable as a golf course. (Letter to BLM, dated May 4, 2004, at 2.) However, the City entered into an option agreement with Pioneer, which afforded the City the ability to construct the municipal golf course or, in the alternative, a public park, provided that it satisfied Pioneer’s need for the necessary fill material. Id.

The City wanted to use the material excavated under the FUP to replace the material that would be removed by Pioneer from the Golf Course Property, and proceed to construct a municipal golf course or public park, but that seemed “environmentally noxious and a duplicitous waste of resources,” when it could simply supply Pioneer directly with material excavated under the FUP and avoid removal of material from the Golf Course Property. (Letter to BLM, dated May 4, 2004, at 2-3.) In consideration of the option agreement, the City had entered into an easement agreement with Pioneer in which the City “agreed \* \* \* to pursue obtaining sufficient rights under the BLM [R&PP] lease to use the Section 18 site as a replacement borrow site.” Id. at 3.

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<sup>3/</sup> The City has not provided copies or detailed the specific provisions of any relevant agreements. However, State law provides a mechanism whereby a private developer can dedicate a portion of a proposed commercial development for public use, subject to approval by the governing body of the city or county. See, e.g., Nev. Rev. Stat. Ann. 278.374, 278.378, 278.380, and 278.390 (2004); Carson City v. Capital City Entertainment, Inc., 49 P.3d 632, 635 (Nev. 2002); Charleston Plaza, Inc. v. Board of Education, Las Vegas Union School District, 387 P.2d 99, 101-02 (Nev. 1963); McKernon v. City of Reno, 357 P.2d 597, 599-601 (Nev. 1960). We note that when discussing the proposed municipal golf course, the City refers to the property as “City[-]owned property.” (Statement of Reasons for Appeal (SOR) at 8.)

In the July 2004 decision, BLM denied the City's FUP request, because affording the City free use of mineral materials is inconsistent with the requirements of 43 CFR Subpart 3604:

Although a Free Use Permit would be appropriate if the City proposed to use any excess material from the [R&PP] lease area at another City park or public project, use of this material on private land does not appear consistent with [the] requirements of the regulations [at] 43 CFR 3604.12, specifically, the criteria of nonuse for a commercial or industrial purpose. In addition[,] 43 CFR 3604.22 indicates that materials obtained under a Free Use Permit cannot be bartered or sold. Although we do not dispute the City's claim that the public ultimately would benefit from the private lands being dedicated for public uses, in this case a municipal golf course, BLM believes the City would be supplying Pioneer Meadows with material from the Free Use Permit in exchange or barter for material already under [the] control of Pioneer Meadows. [Emphasis added.]

(Decision at 1.) <sup>4/</sup> However, BLM then offered the City the option of obtaining a "smaller volume of material \* \* \* at market value," under a "noncompetitive sale." <sup>5/</sup> (Decision at 1.)

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<sup>4/</sup> BLM argues on appeal that its decision to deny the City's FUP request constitutes an exercise by BLM of its discretionary authority under section 1 of the Materials Act of 1947 (Materials Act), as amended, 30 U.S.C. § 601 (2000). (Answer at 8.) It asserts that, as such, the decision must be upheld, since the City has failed to carry its burden to demonstrate that the decision is not supported by a rational basis, and thus is arbitrary and capricious. We agree that BLM has discretionary authority under the statute to grant or deny an FUP request. See Moffat County Road Department, 158 IBLA 221, 224 (2003); So. Way Co., 123 IBLA 122, 127 (1992). We do not address whether BLM may properly deny the City's request as a matter of its discretion. The Assistant Manager denied the request based on his conclusion that an FUP was "specifically prohibited by statute and regulation." (Answer at 8.) It is this issue that the Board will examine and decide.

<sup>5/</sup> Noncompetitive sales regulations require that BLM obtain at least market value and limit sales made in any one State for the benefit of a single purchaser, "to a total of 300,000 cubic yards in any 12-month period." (Decision at 1; see 43 CFR 3602.31(b)). So far as we are aware, the City has not pursued a noncompetitive sale of mineral materials from sec. 18.

The City appealed the Assistant Manager's July 2004 decision. It contends that BLM's denial of its request for an FUP is contrary to the letter and intent of the applicable statute and regulations, noting that: "To hold otherwise \* \* \* would penalize the City for attempting to engage in a transaction to accomplish a public purpose of building a municipal golf course or public park on City[-]owned property in the most economically and environmentally acceptable manner." (SOR at 7-8.)

[1] Section 1 of the Materials Act generally provides that

[t]he Secretary [of the Interior], 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 \* \* \*, and (2) is not expressly prohibited by laws of the United States, and (3) would not be detrimental to the public interest.

30 U.S.C. § 601 (2000). Such disposal is to occur "only in accordance with the provisions of th[e] [Materials Act] \* \* \* and upon the payment of adequate compensation therefor, to be determined by the Secretary." *Id.* The statute also provides authority to exempt certain entities from the requirement to pay adequate compensation, in specified circumstances:

*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 th[e] [Materials Act], for use other than for commercial or industrial purposes or resale.

*Id.* (Emphasis added.)

The Department's regulations implementing section 1 of the Materials Act (43 CFR Part 3600) incorporate the statutory limitations on obtaining the free use of mineral materials from the public lands in the specific regulations which govern the issuance and administration of FUPs (43 CFR Subpart 3604).<sup>6/</sup> The regulation at

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<sup>6/</sup> When initially promulgated, the regulations expressly prescribed that "[t]he  
(continued...)

43 CFR 3604.12(a) specifically states that “BLM may issue free use permits to a government entity without limitation as to the number of permits or as to the value of the mineral materials to be extracted or removed, provided that the government entity shows that it will not use these materials for commercial or industrial purposes.” (Emphasis added.) Further, 43 CFR 3604.22(a) instructs the government entity that “[y]ou must not barter or sell mineral materials that you obtain under a free use permit.” (Emphasis added.)

Based on the requirements in section 1 of the Materials Act and its implementing regulations, BLM is justified in denying an FUP request when the requesting entity fails to show that it will not use the materials for commercial or industrial purposes or the record demonstrates that the requesting entity intends to sell, resell, or barter the materials.

[2] Neither section 1 of the Materials Act nor its implementing regulations define the phrase “commercial or industrial purposes.” Where the relevant terms are not defined by the applicable statute and regulations and there is no indication that a contrary meaning was intended by Congress or the Department, we may properly turn to the ordinary meaning of the terms. United States v. Locke, 471 U.S. 84, 95 (1985) (“[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that ‘the legislative purpose is expressed by the ordinary meaning of the words used,’” quoting Richards v. United States, 369 U.S. 1, 9 (1962)); Blue Mountain Energy, Inc., 162 IBLA 108, 121 (2004) (“While no express statutory language defines” the terms, “construction must be guided by common sense”), citing Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 548 (1987) (“Although language seldom attains the precision of a mathematical symbol, where an expression is capable of precise definition, we will give effect to that meaning absent strong evidence that Congress actually intended another meaning”).

According to Webster’s Dictionary, “commercial” means “of, in, or relating to commerce” and “commerce” means “the exchange or buying and selling of

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<sup>5/</sup> (...continued)

material applied for must be for the applicant’s own use.” 43 CFR 259.24(c) (1949). That specific requirement was deleted, without explanation, with amendment of the regulations in 1983. See 48 FR 27007 (June 10, 1983).

commodities esp. on a large scale and involving transportation from place to place.” <sup>Z/</sup> (Webster’s Third New International Dictionary at 456.)

In its FUP request, the City stated that the mineral materials are intended to be used “for municipal purpose[s],” specifically facilitating the construction of a municipal golf course or public park. (Letter to BLM, dated May 4, 2004, at 2.) However, such materials are not intended to be used directly in the construction of a municipal golf course or public park, but would be used to satisfy Pioneer’s need to obtain similar materials from the area of the proposed public facility, only indirectly facilitating construction of the municipal golf course or public park.

We find appellant’s reliance on the decision by the Federal circuit court in Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), cert. denied, 411 U.S. 917 (1973), misplaced, given that the case is distinguishable on the facts. In that case, the court found that issuance of FUPs to the State of Alaska was valid when the State’s intention was to construct public facilities, *i.e.*, a public highway and airports, notwithstanding resulting benefits to private commercial or industrial interests. In contrast, the proposal at issue in this appeal reveals a singular purpose for use of the mineral materials from the public lands - to serve as fill on Pioneer’s commercial development project. Thus, the present situation is readily distinguishable from Wilderness Society and the decision in that case does not support appellant’s claim.

We find that, since the mineral materials will be used as fill material for Pioneer’s commercial development project, the proposed use has a commercial purpose within the explicit language of the statute and the ordinary meaning of the words and we conclude that the City has failed to meet the requirement of 30 U.S.C. § 601 (2000) and 43 CFR 3604.12(a) that the use be for “other than \* \* \* commercial or industrial purposes.”

This holding is sufficient to decide the case. However, because the parties briefed the question of whether the City intends to engage in a resale, sale or barter of the mineral materials from the public lands, contrary to section 1 of the Materials

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<sup>Z/</sup> “[B]uy” means “to get possession or ownership of by giving or agreeing to give money in exchange,” and “sell” means “to give up (property) to another for money or other valuable consideration.” (Webster’s Third New International Dictionary 306, 2061 (1966).) “[C]ommodity” is defined as “an economic good; *esp* : a product of agriculture, mining or, sometimes[,] manufacture as distinguished from services,” or “an article of commerce; *esp* : one delivered to a transportation company for shipment.” Id. at 458.

Act and 43 CFR 3604.22(a) and because this too is a matter of first impression, we address this additional issue.

[3] The regulations implementing section 1 of the Materials Act do not define the terms “resale,” “sale” or “barter.” The City argues that the term “barter” should be interpreted to mean “the trade of one commodity for a commodity of a different type.”<sup>8/</sup> (SOR at 7.) We find this meaning overly restrictive and believe the proper interpretation is the ordinary meaning of “to trade by exchanging one commodity for another.” (Webster’s Third New International Dictionary at 180.)

We find that the City intends to use the mineral materials obtained from the public lands to acquire from Pioneer “material[s] already under [the] control of Pioneer Meadows,” in the sense that the City will, by agreeing to provide replacement materials, be able to control their disposition. (Decision at 1; see SOR at 7 (“[T]he soil material[s] obtained from the Section 18 site will be substituted for the same quantity and type of soil materials located on the Golf Course Property”).) The City proposes to engage in a “trade by exchanging one commodity for another,” and thus to “barter” the materials at issue here. (Webster’s Third New International Dictionary at 180.)

We also are persuaded that the City intends to remove mineral materials from the public lands for the purpose of sale, within the meaning of 43 CFR 3604.22(a). We find nothing in the statute or regulations restricting a sale to a transaction involving a monetary payment. We find that the City intends to “sell” the mineral materials because it proposes to transfer such materials, and thus “give up (property),” to Pioneer, in return for “valuable consideration.” (Webster’s Third New International Dictionary at 2061.) Such consideration consists of an agreement by Pioneer not to remove similar mineral materials from the area of the proposed municipal golf course/public park. The City will receive considerable value in return for the materials, specifically, the ability to construct a public facility on the dedicated private lands, unaffected by any prior removal of mineral materials. See SOR at 7.

Since the City intends to sell or barter the mineral materials from the public lands, contrary to section 1 of the Materials Act and 43 CFR 3604.22(a), it is not entitled to an FUP. Therefore, we conclude that BLM, in its July 2004 decision,

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<sup>8/</sup> Although the City admits that it intends to exchange the materials from the public lands in return for control over the disposition of the materials under Pioneer’s control, it contends that its proposed use of the materials is, nonetheless, not a “barter,” within the meaning of 43 CFR 3604.22(a), since the materials are of the same type.

properly denied the City's request for a free use permit for mineral materials, pursuant to section 1 of the Materials Act.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Christina S. Kalavritinos  
Administrative Judge

I concur:

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H. Barry Holt  
Chief Administrative Judge