

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D. C.

M-36554

March 24, 1959

Memorandum

Director, Bureau of Land Management

Solicitor

Subject: Mining locations on Federal Aid Rights-of-Way

In your memorandum of January 9, 1959, you ask whether the inclusion of land in a highway right-of-way granted under the Federal Highway Act of November 9, 1921 (42 Stat. 216; 23 U. S. C. sec. 18) now section 1 of the act of August 27, 1958 (72 Stat. 916; 23 U. S. C. sec. 317(a)(b) and (c)) withdraws it from location under the United States mining laws.

It appears that your question is prompted by the fact that the question as first propounded by the State Supervisor, Boise, Idaho, has been answered in the affirmative by an opinion of a Field Solicitor, dated May 15, 1958. That opinion appears to be based on the fact that the Department has held that a material site right-of-way provided for by the same law in identical terms is not subject to mining location. Sam D. Rawson, 61 I.D. 255.

The general rule is that mining locations may be made over right-of-way easements but the locator takes subject to the easement. See Amador Medeau Gold Mining Co. v. South Spring Hill Mining Co., 13 Saw. 523, 36 Fed. 668, 670; Welch v. Garret, (Ida.) 51 Pac. 405; Mary G. Arnett, 20 L.D. 131; Eugene McCarthy, 14 L.D. 105; 2 Lindley on Mines, 3rd ed. 531. The highway rights-of-way here are easements. 43 CFR 244.54(a)(2), note; Nevada Department of Highways, A-24151, September 17, 1945 (unreported).

The question then is: Do the decisions of the Department holding that material sites are not subject to mining location for

the materials covered by the material site profit^{1/} establish a new and different rule with respect to right-of-way easements than formerly obtained? The answer is that they do not. Those decisions are grounded on a different proposition, i.e. that two persons may not have valid co-existent rights to convert the same thing to possession. It is also probably true that the possessory title to the land held by a mining locator would bar the removal of any of it by a stranger to the mining title and hence that a prior appropriation of the right to take and remove a portion of the estate would prevent the valid location of a mining claim. The rule that an easement does not prevent the disposal subject thereto of the land and its application to disposals under the mining law is too well grounded to be overthrown by implication, especially when the later cases can be distinguished, as above.

(Sgd) Edmund T. Fritz
Acting Solicitor

1/ Nevada Department of Highways, supra, merely held "the appropriation and transfer* * * of materials for road purposes would* * * bar the subsequent initiation of a placer claim for similar materials* * * while it was outstanding. Rawson, supra, cited that case to support a conclusion that material rights are not subject to location at all, but the only issue there was whether cinders appropriated for road building were subject to location. However, the dictum in that case might well become a rule in a proper case. Since a mining location entitles a locator to the exclusive possession of the land for mining purposes it probably could not co-exist with a prior valid right to take anything from the land. Compare Filtrol Co. v. Brittan and Echart, 51 L.D. 649.

March 24, 1959

M-36554

MINING LOCATIONS ON FEDERAL AID RIGHTS-OF-WAY

Rights-of-way: Act of November 9, 1921--Mining Claims: Location

Consistent with the rule long sanctioned by the Courts and the Department that mining locations may be made over right-of-way easements, such locations may be made over highway rights-of-way acquired under the act of November 9, 1921, as amended, which grants an easement.

A material site under that act is more in the nature of a profit than an easement and is not subject to the same rule, because it confers the right to take and remove a part of the realty which is inconsistent with the rights inuring to the locator of a mining claim.

RECEIVED
APR 30 1959

OPERATIONS SUPERVISOR OF ICE
FAIRBANKS ALASKA