

**DECISION**

*L. Cambour*  
*GBH*  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

*8034*

**FILE: B-181943****DATE: October 16, 1978****MATTER OF: Use of Government Property by Private Firm for  
Commercial Purpose**

- DIGEST:**
1. Private party wants to microfilm Government records for commercial purpose. Bureau of Land Management (BLM) is currently unable to fulfill duty to make records available to public. License for use of Government property by private party may be granted if use will not injure property and will be beneficial to Government. If license is granted, private party proposes providing copies to public and selling copies to BLM. Because of close connection between private and governmental purposes, license should not be granted.
  2. Under the Federal Land Policy and Management Act of 1976, the Bureau of Land Management (BLM) has a duty to provide copies of mining claim notices to the public for a reasonable fee. BLM should fulfill its duty either by providing the service itself or procuring it in accordance with the Federal Procurement Regulations.
  3. Where contractor will operate on Government property, Government may be potentially liable for damage to privately-owned equipment. Rather than Government incurring possible liability, contract should require contractor to assume risk of such loss. Contract should also establish conditions for contractor's access to Government property without disruption and costs borne by Government should be taken into account in contract price.

This decision to the Secretary of the Interior is in response to an inquiry from the Deputy Assistant Secretary for Policy, Budget and Administration, Department of the Interior (Department) as to whether the Bureau of Land Management (BLM) may, by lease or

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otherwise, make space available in BLM State Offices to a commercial firm which wishes to microfilm public documents which will then be used to provide a filing service for mining claim holders. It also appears that the firm intends to sell copies of the microfilmed documents to the public, upon request. The inquiry states that the BLM:

"\* \* \* has exclusive responsibility for managing around 450 million acres of federally-owned lands. Information on the status of land actions concerning these lands is maintained at the several State Offices of the Bureau.

"Public rooms are maintained at each State Office where the general public has access to certain files and records pertaining to land status and leasing activities of the Bureau. These files and records are furnished upon request for public inspection and are controlled within the confines of the public room by a Bureau employee. Copies of file material and records are available under a fee schedule established pursuant to the Independent Offices Appropriation Act of 1952. (OMB Circular A 25)

"Section 314 of the Federal Land Policy and Management Act of 1976 (P.L. 94-579) requires each locator of a mining claim to file a copy of the notice of location with the BLM State Offices. An estimated 2 million claims will be recorded with us before October 22, 1979. Annual assessment notices must also be filed for record. These location and assessment notices will be incorporated into our existing land title records system and will be subject to the same procedural requirements as all other records. This includes providing copies at nominal cost to members of the public.

"At the present time, a backlog of documents exists. The backlog was created by the time requirements specified in the Act which resulted in 152,000 claims being recorded between October 21, 1976 and December 31, 1977. The Bureau is in the process of obtaining adequate equipment and automated processes to handle the backlog plus expected future filings.

"A private firm has requested permission to install microfilm cameras in various BLM offices. The stated purpose is to act as agents for mining claim locators in filing required documents with the Bureau.

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They wish to photograph all documents filed to date as a means of determining who has recorded claims with BLM and thereby develop a list of who will have to file assessment notices. They will then offer a filing service to those individuals and companies for a fee. Also, they have offered to perform microfilm services, storage and retrieval to BLM for a fee.

"The Bureau has denied this company the use of Government space for a commercial purpose in the absence of specific statutory authority to provide or lease space to private parties. (See 14CG169, A-57020 August 28, 1934) We can find no legal authority that would permit this practice."

The denial has been questioned by the firm on the ground that, since the Government would ordinarily make and sell copies of the mining claim records and notices but lacks current capability to provide this service, the firm should be allowed to do so. The Department advises us that it is:

"actively pursuing all available courses of action within budgetary and procurement procedures constraints, to establish the capability for making copies of mining claim location data available to the public."

As a result of this controversy, this Office has been asked to respond to the following questions:

- "(1) Can we [the Department] legally permit a private firm to use Government owned or leased space for a non-Government commercial purpose in the absence of specific statutory authority?
- "(2) If the answer to question number 1 is in the affirmative, can we limit the number of such operations, the hours of operation and set other limits necessary to avoid disruption of Government business?
- "(3) If the answer to question 1 is in the affirmative, can we recover costs for additional employees to provide and control the records while in the possession of the private firm; costs for utilities; rental of Government furnished space?

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"(4) If the answer to question 1 is in the affirmative, what would be the Government's liability for loss or damage to the private firm's equipment while on Government premises?

"(5) If the Government were to purchase the product from such an operation, would competitive procurement procedures be required before allowing a private firm or firms access to Government space?"

Article IV, Section 3, Clause 2, of the Constitution of the United States provides that:

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States \* \* \*."

It has uniformly been held in the decisions of the courts and in the opinions of the Comptroller General and the Attorney General that this constitutional provision confers on the Congress exclusive jurisdiction to dispose of the real or other property of the United States. Therefore, without express or reasonably implied statutory authorization, the head of a department or agency, or other agent of the Government is powerless to dispose of the property of the United States. See, e.g., Royal Indemnity Co. v. United States, 313 U.S. 289, 294 (1941); 34 Op. Atty. Gen. 320 (1924) and opinions cited therein; and 50 Comp. Gen. 63 (1970). The transfer of title or the creation of other interests in property of the United States fall within the congressional disposal authority and cannot be effected by the heads of departments or agencies absent authorization by Congress. See, e.g., United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840); 50 Comp. Gen. 63; 22 id. 563 (1942). This prohibition extends to the creation of interests by means of leases, unless otherwise authorized by law. 14 Comp. Gen. 169 (1934).

Authority to lease certain excess Federal real property outside the District of Columbia is vested in the Administrator of General Services. 40 U.S.C. § 304a (1970). BLM has authority to lease public lands under section 302 of the Federal Land Policy and Management Act of 1976 (Act), but that authority would not extend to the office space here involved. Thus, absent any other statutory authority to lease property, BLM has correctly concluded that it is not authorized to lease space to commercial concerns to perform non-Government business.

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The head of a Government department or agency is authorized, in appropriate circumstances, to grant to a private person a nonexclusive, nontransferable, revocable permit or license for the use of Government property for non-Government business, provided that such use does not injure the property in question and serves some purpose useful or beneficial to the Government. 22 Comp. Gen. 563 (1942); 34 Op. Atty. Gen. 320 (1924). (These are determinations which lie within the discretion of the agency official empowered to grant the license.) As noted above, the commercial firm is seeking permission to install its cameras on the Government premises and to photograph BLM documents for two purposes. The first purpose is to facilitate the establishment of a filing service for land claim holders who are required to file annual assessments with BLM. The Government has no duty to provide such a service, and if this were the only use to be made of the property, a license could be granted, assuming that the Secretary made the determinations specified above.

However, the second purpose--to make copies of BLM mining claim notices available to the public for a fee--presents a different kind of problem. The Deputy Assistant Secretary acknowledges that this purpose is a Government function; that is, under the Federal Land Policy and Management Act of 1976, BLM has a duty to provide copies of these notices to the public for a reasonable fee, and is now seeking "to establish the capability for making copies of mining claim location data available to the public." As to this governmental duty, BLM should either provide the service itself or procure it in accordance with the Federal Procurement Regulations.

A third potential purpose exists. The commercial firm has offered to provide microfilm services to BLM for a fee.

Since licenses for the use of Government property, as described above, can only be granted when the property is to be used for non-Government business, a license may not be granted to a private person to provide a service or commodity which the Government needs to procure to carry out its own functions. While, arguably, a license could thus be granted for performance of the first purpose described above, if that were the only purpose of the licensee's activities, the first purpose and the other two, as described by BLM, appear to us to be closely interdependent.

The licensee would photograph BLM documents in order to develop a list of land claim holders. But in doing so, the licensee would be placed in the position of having in its possession the means to provide copies of the photographed documents to the public, a governmental function, at a time when BLM does not have the means

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to do so itself. Similarly, the licensee would then also be in a preferred position to provide microfilm services to BLM.

Under these circumstances, a license should not be granted. Rather, BLM, if it needs the services described above as the second and third purposes, should procure them in accordance with prescribed procedures. Prospective contractors, if they wish, may be allowed to use the documents photographed in carrying out the second and third--governmental--purposes in order to develop a list of claim holders and to offer them the filing service contemplated in the first--non-governmental--purpose.

In sum, it would be unrealistic and artificial in our view to distinguish between the various activities which are here contemplated, and to grant a license to perform one of them when the performance of the others, which should be acquired through prescribed procurement procedures, is so closely linked to the performance of the first.

With regard to the second, third, and fourth questions, if it is decided to procure the various services, as described above, all the matters in those questions should be resolved by contractual agreement. Thus, with reference to questions two and three, a contract should set conditions to avoid disruption of Government business and costs borne by the Government should be taken into account in determining a contract price. With reference to question four, rather than seek to determine in advance what the Government's liability for the equipment of a private firm on Government premises would be, BLM should specify in its contract conditions which protect the Government against potential liability. The contract should provide that the contractor will assume the risk of such loss.

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