

SUSAN J. KAYLER  
TOM TRAW

IBLA 2001-38

Decided July 29, 2004

Appeal from decisions of the Phoenix, Arizona, Field Office, Bureau of Land Management, approving a mining plan of operations for proposed activities constituting recreational mining and prospecting on mining claims located on split estate lands patented under the Stock-Raising Homestead Act. AZA-31090.

Dismissed in part; decision reversed and environmental documents vacated.

1. Rules of Practice: Appeals: Dismissal--Rules of Practice:  
Appeals: Timely Filing

A notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

2. Mining Claims: Special Acts--Stock-Raising Homesteads

Minerals are reserved in patents issued pursuant to the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 299 (1970). Parties holding mineral rights have the right to occupy so much of the surface as may be required for all purposes reasonably incident to mining and removing the minerals. To obtain approval for mining from the Secretary, a qualified person must, inter alia, file a plan of operations which includes procedures for minimizing damage to crops and improvements and for minimizing disruption of grazing and other land uses. The Secretary must serve the plan of operations on surface owners for a 45-day comment period. Patents under the Stock-Raising Homestead Act do not reserve any right in a mining claimant for a recreational opportunity that is superior to the uses the owner of the surface might make of the land.

APPEARANCES: Susan J. Kayler, pro se; Tom Traw, pro se; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Appellants Susan J. Kayler and Tom Traw appeal from September 8 and 13, 2000, decisions of the Phoenix, Arizona, Field Office, Bureau of Land Management (BLM), approving a mining plan of operations (MPO), serialized AZA-31090, for proposed activities constituting recreational mining and/or prospecting on the D. Udder #2-#4 mining claims, AMC 328600, 328601, and 328602. The mining claims were located on September 17, 1993. The BLM decision was based upon environmental assessment (EA) AZ-020-909-11 and a finding of no significant impact (FONSI) for the plan of operations, also issued September 8, 2000.

Susan J. Kayler is one of at least nine land owners who succeeded to ownership of lands within sec. 14, T. 8 N., R. 1 W., Gila and Salt River Meridian, Yavapai County, Arizona. The lands were patented to predecessors-in-interest pursuant to the Stock-Raising Homestead Act of 1916 (SRHA), 43 U.S.C. § § 291-301 (1970), repealed in part by section 702 of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, Title VII, § 702, Oct. 21, 1976, 90 Stat. 2787.<sup>1/</sup> Ownership of all minerals in the lands was reserved to the United States. See Patent 1006503 (Aug. 18, 1927); Patent 844668 (Jan. 23, 1922). Tom Traw is a real estate agent and landowner in the same subdivision in which Kayler is a property owner.

By way of background, public land could be entered for grazing uses under the SRHA prior to its repeal. Patents issued under the SRHA, however, were for the surface only; they reserved to the United States “all the coal and other minerals \* \* \* together with the right to prospect for, mine, and remove the same.” 43 U.S.C. § 299(a) (2000); 43 U.S.C. § 299 (1988). Such patents thus created a “split estate” in such lands, where the surface is privately owned and the reserved minerals are subject to disposal under the public land laws.

<sup>1/</sup> While FLPMA section 702, 92 Stat. 2787, expressly repealed the SRHA, it did not affect the statutory provision concerning reservation of coal and mineral rights in existing SRHA patents, 43 U.S.C. § 299 (1988). That provision was subsequently continued without modification by Congress in 1993, as codified at 43 U.S.C. § 299(a); at the same time Congress also added new provisions at 43 U.S.C. § 299(b)-(p) (2000). Publ. L. No. 103-23, 107 Stat. 60, 65. Notably, prior to FLPMA’s enactment, the Department had long held that the statute had impliedly been repealed by the Taylor Grazing Act, 43 U.S.C. § 315 (2000). See Daniel A. Anderson, 31 IBLA 162, 165 (1977); George J. Propp, 56 I.D. 347, 350 (1938).

The right to extract the mineral estate has historically been superior to the right of the surface owner to use the surface. Qualified persons may enter lands patented under the SRHA for the purpose of prospecting for, mining and removing the relevant mineral; the statute expressly grants such persons a right to “enter” the land for prospecting and to “reenter” for mining and removal of the mineral.

Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this subchapter, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable and shall compensate the entryman or patentee for all damages to the crops on such lands by reasons of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals \* \* \*

43 U.S.C. § 299(a) (2000) (emphasis added). The statute also provides that parties holding mineral rights may therefore exercise the right of reentry to prospect or mine if they (1) obtain written consent or waiver from the patentee; (2) pay for damages to crops and improvements; or (3) in lieu of either of the first two, obtain a “good and sufficient” bond for the benefit of the surface owner. *Id.*; Richard Rudnick, 143 IBLA 257, 260 (1998), citing William and Pearl Hayes, 101 IBLA 110, 114-15 (1988), and Brock Livestock Co., 101 IBLA 91, 98 (1988).<sup>2/</sup> Minerals reserved in lands patented under the SRHA have been locatable, and remain so subject to restrictions described below. 43 CFR 3814.1.

Congress enacted Public Law 103-23 (Publ. L. No. 103-23) on April 16, 1993, for the express purpose of amending the SRHA. Publ. L. No. 103-23 enacted specific protections for the surface owner, while leaving in place the right of persons qualified to do so to reenter the surface for “purposes reasonably incident to the mining or removal” of the mineral. 43 U.S.C. § 299(a) (2000). Publ. L. No. 103-23 required that parties other than the surface owner who locate mining claims on lands patented under the SRHA after the October 13, 1993, effective date of the statute, must first file “a notice of intention to locate” the claim with the Department and give notice to

<sup>2/</sup> The rights to “enter” to prospect and to “reenter” for mining, along with the three options provided the mineral rights holder, were recognized in the original SRHA, and preserved intact after the 1993 amendments. 43 U.S.C. § 299(a) (2000); 43 U.S.C. § 299 (1988).

the surface owner. 43 U.S.C. § 299(b)(1)(A) (2000). The 1993 amendments prohibited prospecting and mining unless the claimant obtains either written consent from the surface owner or authorization from the Secretary. 43 U.S.C. § 299(c) (2000).<sup>3/</sup>

The statute as amended thus effectuated the mineral right holder's right to enter for prospecting or to reenter the surface to mine or remove minerals, notwithstanding the surface owner's objection, by compelling the Secretary to authorize mining subject to particularized requirements attendant on the mining operations. Thus, the Secretary "shall authorize a person to conduct mineral activities \* \* \* without the consent of the surface owner thereof if such person complies with" subsections (e), regarding the posting of a bond, and (f), regarding a plan of operations. 43 U.S.C. § 299(d) (2000).

While thus providing that the mining claimant may mine without the surface owner's consent, the statute imposes unequivocal obligations on the miner to consider surface owner interests in establishing a mine plan for "conduct[ing] mineral activities," and on the Secretary (or her delegate, BLM) to seek surface owner comment on the plan of operations. In the absence of consent by the surface owner, in order to conduct mineral activities, the qualified miner must submit a proposed plan of operations to the Secretary which

shall include procedures for--

(A) the minimization of damages to crops and tangible improvements of the surface owner;

(B) the minimization of disruption to grazing or other uses of the land by the surface owner; and

(C) payment of a fee for the use of surface during mineral activities equivalent to the loss of income to the ranch operation as established pursuant to subsection (g) of this section.

43 U.S.C. § 299(f) (2000). Thus, the plan of operations must expressly include consideration of surface owner uses and ways to minimize impacts on those uses.

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<sup>3/</sup> Publ. L. No. 103-23 also established a separate provision for "mineral activities related to exploration that cause no more than a minimal disturbance of surface resources and do not involve the use of mechanized earthmoving equipment, explosives, the construction of roads, drill pads, or the use of toxic or hazardous materials" for a limited time after a notice of intention to locate is filed. 43 U.S.C. § 299(b)(1)(B) (2000).

Once BLM receives the proposed plan of operations, it must give the surface owner a statutory 45-day period in which to comment.

The Secretary shall provide a copy of the proposed plan of operations to the surface owner at least 45 days prior to the date the Secretary makes a determination as to whether such plan complies with the requirements of this subsection. During such 45-day period the surface owner may submit comments and recommend modifications to the proposed plan of operations to the Secretary.

43 U.S.C. § 299(f)(2) (2000) (emphasis added). However, the Secretary must approve the plan within 60 days if it “is complete and accurate” and complies with other State and Federal requirements. 43 U.S.C. § 299(f)(3)(A). The 60-day period may be extended by the time needed to comply with “other applicable requirements of law.” 43 U.S.C. § 299(f)(3)(C).

Publ. L. No. 103-23 also provides circumstances under which the Secretary may suspend or revoke a plan of operations and establishes required reclamation and inspections. 43 U.S.C. § 299(f)(3)(D), (h), and (j) (2000). The statute affords the surface owner certain rights to recover for damages caused by any mineral activity that is outside that authorized either by the Secretary or by surface owner consent, and also provides a right of action for double damages and costs for willful misconduct or gross negligence of the miner. 43 U.S.C. § 299(k) (2000).

The statutory requirements with respect to a bond also cover impairment of uses of the land by the surface owner. 43 U.S.C. § 299(e) (2000). Specifically, the statute requires the posting of a bond sufficient to ensure the completion of reclamation. Id. To determine the amount of the bond, the Secretary “shall consider \* \* \* the potential loss of value due to the estimated permanent reduction in utilization of the land.” Id. In addition, the bond must ensure

(A) payment to the surface owner, after completion of such mineral activity and reclamation, compensation for any permanent damages to crops and tangible improvements of the surface owner that resulted from mineral activities; and

(B) payment to the surface owner of compensation for any permanent loss of income of the surface owner due to loss or impairment of grazing, or other uses of the land by the surface owner to the extent that reclamation required by the plan of operations would not permit such uses to continue at the level existing prior to the commencement of mineral activities.

Id. (emphasis added).

In enacting Publ. L. No. 103-23, Congress envisioned that the Department would promulgate rules to implement its terms within 6 months. Section 1(d) provided that: “The Secretary of the Interior shall issue final regulations to implement the amendments made by this Act [enacting subsections (b) to (p) of this section] not later than the effective date of the this Act.” That date was October 13, 1993. On November 4, 1993, the then-Director of BLM issued guidance in Instruction Memorandum (IM) 94-41 regarding the implementation of Publ. L. No. 103-23. That IM directed BLM State Directors to prepare environmental documentation for plans of operation for SRHA patent lands in accordance with the National Environmental Policy Act (NEPA),<sup>4/</sup> and the rules set forth at 43 CFR Subpart 3809, governing plans of operation on Federal lands, for purposes of implementing the statutory changes to the SRHA, pending the required rulemaking.

As of the issuance of this opinion, however, the only provision of Publ. L. No. 103-23 for which the Department has promulgated express regulations is 43 U.S.C. § 299(b) (2000), governing notices of intention to locate a claim after October 13, 1993. See 43 CFR 3833.0-3(g). Because the mining claims in question were located prior to that date, this rule is not relevant here.

Elsewhere, the regulations acknowledge that Publ. L. No. 103-23 “contains numerous other requirements pre-requisite to a claimant engaging in mineral exploration and development activities on SRHA lands,” but provide only that “[t]hese requirements are administered pursuant to subpart 3814 of this title.” 43 CFR 3833.0-3(g)(3). The regulations at Subpart 3814, governing disposal of reserved minerals under the SRHA, have not been amended since 1976. Although some of the original terms of the SRHA governing protection of the surface owner survived the amendments intact and are therefore addressed at Subpart 3814, none of the “numerous other requirements” recognized in 43 CFR 3833.0-3(g) to implement the protections and procedures codified at 43 U.S.C. § 299(c)-(p) (2000), were ever promulgated into regulation.

The regulatory change at 43 CFR Subpart 3833 also provided that a plan of operations for SRHA lands was to be governed by 43 CFR Subpart 3809. 43 CFR

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<sup>4/</sup> Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2000), requires an agency to prepare an environmental impact statement (EIS) for a major federal action significantly affecting the quality of the human environment. The purpose of an EA is to permit an agency to make an informed decision as to whether environmental impacts are insignificant, can be mitigated to insignificance, or are so significant as to require preparation of an EIS.

3833.0-3(g)(1)(ii) (specifying that the 90-day time period under 43 U.S.C. § 299(b)(2) during which a notice of intent to locate prevents other locations may be extended by the filing of a plan of operations under Subpart 3809). The applicability of 43 CFR Subpart 3809, however, was not clarified by the Department for years. At times relevant here, 43 CFR Subpart 3809 “establish[ed] procedures to prevent unnecessary or undue degradation of Federal lands” resulting from authorized mining operations. 43 CFR 3809.0-1 (2000). “Federal lands” expressly did not include “Stockraising Homestead lands or lands where only the mineral interest is reserved to the United States.” 43 CFR 3809.0-5(c).

Subsequent to the events at issue here, the Department amended 43 CFR Subpart 3809 in two different rulemakings. See 65 FR 69998 (Nov. 21, 2000); 66 FR 54834 (Oct. 30, 2001). Notably, the regulations at 43 CFR Subpart 3809 now govern SRHA lands as well as lands where the mineral interest is reserved to the United States under other statutes. 43 CFR 3809.2(a) (2003). An examination of the regulations, however, makes clear that no other provision has been added regarding the contents of a mining plan of operations on privately-owned surface. The Subpart 3809 regulations do not purport to implement the portion of 43 U.S.C. § 299(f) requiring disclosure and procedures protecting the surface owners’ interests. See, e.g., 43 CFR 3809.111 (discussion of public disclosure contains no requirement regarding notice to a private surface owner). Thus, it appears that the surface protection provisions of the SRHA, as amended, are presently governed only at 43 CFR 3809.420(a)(6) which specifies generally that the miner “must conduct all operations in a manner that complies with all pertinent Federal and state laws.”

Turning to the events relevant here, the Roadrunner Prospectors Club, Inc. (Roadrunner) is “a nonprofit Arizona Corporation consisting of a group of enthusiasts that participate in the operation of suction dredges, dry washers, sluice boxes and other hand methods for the recovery of free gold and other heavy metals.” Its members “prospect and mine in accordance with the approved plan of operation” on, inter alia, mining claims located under the Mining Laws of the United States. See Roadrunner Prospectors Club, rules and regulations, undated; Standard Plan of Operations, Jan. 1995.

According to the record, Roadrunner located the D. Udder #1-#4 mining claims, AMC 328599 through 328602, on September 17, 1993. Because the locations of the mining claims predated the effective date of the 1993 amendments to the SRHA, Roadrunner did not submit a notice of intention to locate to the surface owners on which the mining claims were located. Accordingly, it appears from letters in the record that some or all of the surface owners were unaware either that they owned split estates or that Roadrunner had located mining claims with respect to the underlying mineral estate.

Roadrunner submitted an application for a mining plan of operations for the four mining claims to BLM on April 7, 1999.<sup>5/</sup> The plan of operations specifies that “on any given day” approximately 10 of the club’s mining enthusiast members may use a dry washer, a sluice box, a metal detector, and personal vehicles on the mining claims for an otherwise undescribed “operation.” A list of surface owners, including Kayler, was attached to a brief plan of operations, which listed those impacts that assertedly would not be created, permits that would not be needed, and equipment that would not be used. (Apr. 7, 1999, mining plan of operations at Ex. B.) Each surface owner is denominated alphabetically on an attached map. Kayler’s property location is identified by the letter Y, on lands covered by the D. Udder #4 mining claim. *Id.* at Ex. A page 2. The mining plan itself provides no description or information regarding surface use by any of the listed surface owners. To the extent it can be construed to have identified the means by which the club intended to minimize impacts on surface owners, the plan contains the following sentence: “In order to minimize disturbances to local surface owners, the hours of operation will be limited from 8 am to 6 pm MST.” The plan provides no explanation of minerals to be mined, or production anticipated. It is not clearly a prospecting plan or a mining plan. From the club’s description of its purpose, we infer that its members mean to prospect for and mine free gold and other heavy metals.

On August 19, 1999, Roadrunner submitted an amended plan of operations for the D. Udder #2-#4 mining claims, excluding the fourth mining claim which had been part of the April 1999 plan of operations. The same limited description of mining activities was provided. For reasons not clear in the record, the sentence identifying an effort to minimize impacts on surface owners, by conducting activities during daytime hours, was deleted. No additional information regarding surface use or owners was provided with this plan of operations. By cover letter to BLM dated August 18, 1999, Roadrunner stated that it attempted to contact the surface owners, and provided a sample letter. The file contains a letter, dated July 20, 1999, sent to Kayler. The letter, copied to other landowners, advised the surface owners that Roadrunner intended to use the surface for club recreational uses.

[T]he Roadrunner Prospectors’ Club has filed mining claims on the portion of this property which includes a portion of your property. We would like to have an opportunity to discuss with you, the use of our claims that are on your property. Our hopes are that we may come to

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<sup>5/</sup> A letter to Roadrunner from the Department of the Army indicates that the latter received a document dated May 21, 1999, in which Roadrunner proposed similar mining activities for its members in 39 locations in Arizona, including the lands at issue here. Roadrunner sought a Clean Water Act permit for this purpose. (Aug. 20, 1998, letter from Department of the Army to Roadrunner, Enclosure 3.)

an agreement that would benefit the both [of] us. Attached is a map of the areas involved.

The Roadrunner Prospectors' Club is not a commercial mining business. It is a group of individuals that are interested in mining on a recreational level. Our members are restricted to the use of small equipment.

(July 20, 1999, letter from Roadrunner to Kayler (emphasis added).) Service documents indicate that Kayler and other landowners received this letter in the summer of 1999.

Whether BLM demanded any changes by Roadrunner to the mining plan is not reflected in the record; in any event, no changes were made. Instead, BLM proceeded to prepare EA AZ-020-909-11 for a 10-year mining plan. In doing so, it followed guidance set forth in the 1993 IM 94-41. In the EA, BLM identified the surface owners and stated that the land was used for residences in a low density residential subdivision called Pleasant County Ranches. It did not, however, identify any particular use of or improvement on the surface.

On April 13, 2000, BLM sent the EA and FONSI by certified mail for consideration by relevant surface owners, including Kayler, and asked for their comments on the EA by May 30, 2000. It also sent the EA and FONSI to Tom Traw, a local real estate agent. Each of the surface owners or other persons who responded "protested" the EA. Some protests were forwarded to then-Secretary Babbitt and various members of the United States Congress.

Kayler's letter of protest raised various challenges to the authority of BLM to approve such mining operations and to the findings set forth in the EA. She also raised specific and explicit complaints about the uses Roadrunner's members had made on the surface estate including her land. She stated that she had owned the surface for approximately 20 years.

Unfortunately, due solely to the Roadrunners, we have not had peaceful enjoyment of our property for some time. In the recent past, the Roadrunners have come on the property without permission, refusing to leave until law enforcement was called. Several of their members have been armed with guns and have insisted that we leave our own property under threat of violence. (We have videotapes of these events.) They have chopped down trees for fuel, destroyed cacti, and used our land for their waste.

(May 17, 2000, letter of protest from Kayler to BLM.)

Traw sent a protest letter to the governor of Arizona. He claimed to be an “active Real Estate Broker and Owner of property in Pleasant Country Ranches.” (May 24, 2000, Letter from Traw to Honorable Governor Jane Hull.)

BLM proceeded, in July 2000, to establish bond and compensation costs. BLM established reclamation costs of \$2,404, based on a ratio of consumer price indices for 2000 and 1998. BLM chose not to add additional costs for crop or income loss because it concluded that such loss was unlikely.

Public Law 103-23 [43 U.S.C. § 299(e) (2000)] requires a bond sufficient to provide compensation for permanent damages to crops and tangible improvements, to ensure reclamation, and compensate for permanent loss to income from grazing and other land uses if the required reclamation does not allow the premining use to continue at the premining level. According to on-site observations and no reports of current income from crops from property owners, it is concluded that the proposed MPO will not cause permanent damage to crops in the area to be mined. This is because the proposed mining area is the creek bottom and the adjacent primary flood plain, which consists of unconsolidated river gravel and sand. It contains no growing crops. No evidence suggests that the surface owners will suffer any permanent loss of use, at present, by the Roadrunners’ mining operations or reclamation on the subject lands. The bond will be reviewed on a yearly basis \* \* \*.

(July 11, 2000, Memorandum re: Bond and Compensation Costs.) BLM advised Roadrunner of the bond requirement by letter dated July 19, 2000.

In July 2000, BLM prepared a final EA. The Field Manager of the Phoenix District Office signed the FONSI form sent to the private landowners for their review on July 17, 2000. The EA identifies the purpose of the plan of operations as “mining,” rather than prospecting. (EA at 1.) Roadrunner executed a \$2,404 bond, which was accepted by BLM decision dated August 22, 2000. On September 8, 2000, BLM issued a decision approving the mining plan of operations, and it executed a Decision Record for the EA on September 13, 2000, approving the plan of operations.

Kayler timely appealed. (Oct. 6, 2000, notice of appeal.) Traw sent a letter which BLM has construed to be a notice of appeal. (Oct. 19, 2000, notice of appeal.)

[1] We consider first Traw’s appeal. Traw received notice of the decision by certified mail, return receipt dated September 15, 2000. Traw’s notice of appeal was dated October 16, 2000. Traw’s notice was untimely filed. Departmental regulations require an appeal to be filed “within 30 days after the date of service” or publication

of the decision. 43 CFR 4.411(a). “[N]o extension of time will be granted for filing the notice of appeal.” 43 CFR 4.412(c). A notice of appeal must be timely filed in order for the Board to have jurisdiction over an appeal; the late filing of a notice of appeal deprives the Board of jurisdiction over the matter and mandates dismissal of the appeal. Southern California Sunbelt Developers, Inc., 154 IBLA 115, 117-18 (2001), and cases cited. We note as well that Traw does not allege that he is a surface owner affected by any of the subject mining claims. Thus, even if we could consider his appeal as timely filed, it is not clear that he would have standing to maintain it. Traw’s appeal is dismissed as untimely.

[2] Kayler asserts eight enumerated paragraphs which contain arguments in three categories. She raises a challenge to the sufficiency of BLM’s NEPA consideration. (Notice of Appeal ¶ 4.) She asserts that the impact of the mining on her property will be extreme and devalue and “take” her property rights. Id. at ¶¶ 1, 2. Finally, she raises a series of challenges to the authority of BLM to authorize the mining envisioned by Roadrunner’s plan of operations. Id. at ¶¶ 3, 5-8. Specifically, Kayler asserts that BLM improperly authorized recreational mining, that the authorization granted to a club with “5000 members” is unjustified, that BLM may not permit mining of the subsurface estate because such mining is required to be conducted under State law and mining on the surface estate violates Yavapai County Ordinances, and that the regulations at 43 CFR Subpart 3809 (2000) did not apply to mining plans of operations for split estates.

BLM responds to each of the enumerated paragraphs. BLM argues that its consideration of the mining plan of operations was reasonable under 43 CFR Subpart 3809 and NEPA.<sup>6/</sup>

We find no evidence that BLM actually attempted properly to implement the statutory provisions of 43 U.S.C. § 299(f) (2000). By following only the terms of IM 94-17, BLM chose to adopt the process established in 43 CFR Subpart 3809 (2000) as if the mining plan related to lands where the surface owner was the United States. While BLM’s implementation of Subpart 3809 and its NEPA processes may have been reasonably based on IM 94-14, it was error for BLM to thereby ignore its statutory obligations under the SRHA, as amended. Notwithstanding how the regulations at 43 CFR Subpart 3809, in effect either in 2000 or 2003, apply, BLM nonetheless was obligated to exercise the Secretary’s statutory authority under the amended SRHA.

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<sup>6/</sup> Kayler submitted a request for stay. This Board denied the stay request by order dated Dec. 20, 2000. BLM argues that the appeal should be dismissed for Kayler’s failure to file a statement of reasons in support of her claims. We find that her notice of appeal presents substantial issues and sufficient reason for appeal and deny that motion.

The provisions of that statute, and in particular 43 U.S.C. 299(f) (2000), went into effect as provided by sec. 1(c) of Publ. L. No. 103-23, 107 Stat. 65, 43 U.S.C. § 299 note (2000), 180 days after the date of enactment, or on October 13, 1993. There is no question that the provisions of Publ. L. No. 103-23, codified at 43 U.S.C. § 299(f) (2000), apply to subject SRHA mining activities after the effective date of the 1993 amendments; that provision itself makes clear that it is to apply to the conduct of “mineral activities on lands subject to this subchapter,” *id.*, which is all remaining SRHA lands under “Subchapter X - Stock-Raising Homestead.”<sup>Z/</sup>

Publ. L. No. 103-23 articulates specific rights and obligations attending two competing interests in a split estate: the interests of the mineral estate owner and the surface owner. It is clear that the SRHA meant to ensure that the interests of the mineral estate owner be protected. The 1993 amendments made clear that, if all statutory provisions are met, the Secretary must permit mining under an approved mining plan of operations. Either the surface owner may agree, or the Secretary may agree to mining on its behalf. The amendments left in place the longstanding rule that the surface owner may not veto the right of the qualified miner to “enter” the lands for prospecting purposes or to “reenter and occupy so much of the surface \* \* \* as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals.” 43 U.S.C. § 299(a) (2000) (emphasis added). On the other hand, the amendments clarified that it is incumbent upon the miner, and the Secretary in approving mining, to ensure that the mining operations constitute an entry for prospecting or “purposes reasonably incident” to mining and removal, and that the impacts on surface uses be minimized. 43 U.S.C. § 299(a) and (f) (2000).

Publ. L. No. 103-23 thus reflects a statutory approach to the competing split estate interests that is distinct from the requirements imposed by NEPA and 43 CFR Subpart 3809. Quite simply, the mineral estate owner must be allowed to prospect and mine insofar as it is reasonably incident to obtaining the mineral. The SRHA patent retains the “right to prospect for, mine, and remove the same.” 43 U.S.C. § 299(a) (2000); Patent 1006503 (Aug. 18, 1927); Patent 844668 (Jan. 23, 1922). At the same time, the right of the surface owner is protected to the extent that activities by the qualified miner exceed what is reasonably incident to obtaining the mineral.

Congress’ approach in Publ. L. No. 103-23 is consistent with decades of consideration of such split estates.

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<sup>Z/</sup> BLM has also recognized as well in its July 2000 memorandum regarding bond and compensation costs that the provision of Publ. L. No. 103-23, 43 U.S.C. § 299(e) (2000), governing bonding, was in effect. In its July 1993 rulemaking at 43 CFR 3833.0-3(g)(3), the Department noted the existence of “numerous other requirements requisite to a claimant engaging in mineral exploration and development,” plainly referring to such requirements enacted in 1993.

It may be taken as a general proposition that where the mineral estate has been severed from the surface estate, the owner of the mineral estate retains, either by the express terms of the conveyance effecting the severance or as a necessary implication therefrom, a right of entry or access to the minerals over or through the surface, absent an expressed intent to the contrary in the document creating the severance. See generally Santa Fe Pacific Railroad Co., 64 IBLA 27 (1982), and cases cited. Such implied rights of entry and development are based on the logical assumption that the mineral estate was reserved for the purpose of retaining the rights to develop the mineral in the grantor. Thus, to the extent that entry on the surface of the land is necessary to effectuate the removal of minerals it is assumed that such right was impliedly reserved in the grantor as a necessary incident of the reserved mineral estate.

Kuugpik Corp., 85 IBLA 366, 371 (1985), aff'd, Civ. No. A85-195 (D.Alaska June 27, 1988) (emphasis added).

The right attendant on the mineral estate is to enter the surface to the extent necessary to remove the mineral.

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. An exception of minerals in a grant of land with a reservation to enter and remove them is valid and not contrary to public policy. A grantee of minerals underlying the land becomes the owner of them; his interest is not a mere mining privilege. Their ownership is attended with all the attributes and incidents peculiar to ownership of land. A grantee of the land other than the minerals, or with the minerals reserved or excepted from the grant, gets title to all of the surface and that part of the subsoil which contains no minerals, and the grantor has a fee simple in the minerals retained by him. 54 Am. Jur. 2d, Mines and Minerals ¶ 108, 116 (1971). 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 Ross Coal Co. v. Cole, 249 F.2d 600 (4th Cir. 1957). Further, as stated in 54 Am. Jur. 2d, Mines and Minerals ¶ 210 (1971):

The right to minerals when separated by grant or reservation in a deed is as much an estate in lands as the right to the surface of the same lands, and unless the language of the conveyance by which the minerals are acquired repels such construction, the

mineral estate carries with it the right to use as much of the surface as may be reasonably necessary to reach and remove the minerals. The right to enter the mineral estate from the surface, which is implied by a deed severing the estate in the mineral from the estate in the surface, is not excluded by the specific reservation in the conveyance of (1) a right of subsidence without damage, (2) the use of passageways and entries to move coal from other lands, and (3) the right to take surface land for other mining purposes at a certain price, the rights so enumerated being in excess of any rights of entry implied by law.

In accordance with the maxim that when anything is granted all of the means of obtaining it and all of the fruits and effects of it are also granted, it has been held that where a mineral deed expressly confers upon the grantee the right to use the surface in any manner that might be deemed necessary and convenient for mining, the grantee has the right to adopt the strip and auger method of coal mining without incurring liability for damages to the surface. [Footnotes omitted.]

The extent of the rights enjoyed by the owner of the mineral estate vis-a-vis the owner of the surface estate are expressed with additional particular[ity] in the following excerpts from 58 C.J.S. Mines and Minerals 159 (1948):

Surface rights incident to mining may be expressly granted in the conveyance of the mineral rights, and, as considered infra subdivision b of this section, even in the absence of an express grant the law implies a grant of certain surface rights. \* \* \* The incidental right of entering, occupying, and making such use of the surface lands as is reasonably necessary exists in the case of a reservation of mineral rights as well as a grant.

\* \* \* \* \*

Where the grant confers on the mineral owner the use of the surface of the land in the prosecution of its business for any purpose of necessity or convenience, the grantee is the judge of the necessity or convenience and, as long as he does not use his power arbitrarily, oppressively, or maliciously, he cannot be held liable in damages to the owner of the surface. Under such a grant the grantee may, where it is necessary or convenient to do so, use and occupy the whole surface of the land, even to

excluding the surface owner and taking his house and garden by making compensation therefor.

\* \* \* \* \*

Particular rights or privileges. In accordance with this general rule an owner of minerals may sink shafts or construct drifts or wells through the surface for the purpose of exploring and opening a way to his underlying minerals; remove or use so much of the containing strata, above and below, as may be reasonably required for the proper mining of the mineral; construct drains and tunnels; construct such roads, passways, or means of ingress and egress as may be necessary to get at and remove the minerals; use such amount of water from the land as is reasonably necessary to develop the mineral rights; construct a tramroad from the mine to be used in connection with the mining operations, if fairly necessary; erect and maintain a tippie; and generally employ all reasonable means and necessary appliances requisite to the proper working of the mine or minerals, except that where the right, granted or reserved, is to mine in a specified manner it does not give the right to mine in a different manner.

Santa Fe Pacific Railroad Co., 64 IBLA at 29-30 (emphasis added, footnotes omitted).

The SRHA of 1916 had announced the above-stated concepts within 43 U.S.C. § 299 (1970), which has survived intact as 43 U.S.C. § 299(a) (2000). The miner may mine and conduct such activities as are reasonably necessary to extract the mineral.<sup>8/</sup> The amendments made in 1993 by Publ. L. No. 103-23 confirm that a miner must prepare a mining plan of operations which “shall include procedures for \* \* \* minimization of damages to crops and tangible improvements of the surface

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<sup>8/</sup> Congress later established a “reasonably incident” statutory standard for mining operations under the Mining Laws of the United States in the Surface Resources Act of 1955, permitting on the Federal surface “prospecting, mining, or processing operations and uses reasonably incident thereto.” 43 U.S.C. § 612 (2000). BLM’s surface management regulations found at 43 CFR Subpart 3715 authorize uses “reasonably incident” to specific mining operations. Congress thus adopted the same “reasonably incident” concept for operations affecting private surface for SRHA lands as for Federal lands. BLM has not purported to apply the regulations at Subpart 3715 to SRHA lands. See 43 CFR 3715.0-1(b) (subpart 3715 does not apply to private lands where the United States owns the reserved mineral estate).

owner and \* \* \* minimization of disruption to grazing or other uses of the land by the surface owner.” 43 U.S.C. § 299(f) (2000).

While we appreciate BLM’s efforts to consider impacts on the surface through the processes of NEPA and 43 CFR Subpart 3809, as a bare procedural issue, BLM did not also require compliance with the SRHA, as amended. Roadrunner did not include such procedures in its plan of operations and BLM did not require them. The only evidence of any effort on Roadrunner’s part to minimize disruption of surface use appears in the April 1999 plan of operations; this was deleted in the later August version. It is not possible to determine that the mining plan of operations otherwise minimized disruption to any surface use, because the plan did not identify any such use. The mining plan is purely a description of general mining activities that Roadrunner’s members might engage in. It does not clearly identify a purpose of entering the lands to prospect, or reentering to occupy and mine. It contains no indication of a consequence for finding, or not finding, any mineral.<sup>9/</sup>

BLM did not then distribute the mining plan of operations to the landowners for their comment. 43 U.S.C. § 299(f) (2000). The EA was a NEPA obligation; it did not substitute for compliance with the SRHA.

A consequence of this lack of compliance was that BLM failed to take into account that the actual use as proposed by Roadrunner does not precisely fit within the purpose and reservation anticipated for SRHA lands, either by statute or by patent. The patent reserves a right in the mineral estate. As the precedent quoted above and Publ. L. No. 103-23 show, the central feature of the retained right to mine is the right to do what is reasonably necessary to mine for or remove the mineral, or in statutory terms, to conduct operations reasonably incident to doing so. How a recreational club’s desires to use the mineral right for the nonprofit, noncommercial enterprise to recreate in the form of performing mining activities fits into this scheme would have been answered more precisely had BLM required compliance with the plain terms of the SRHA. The patents at issue reserve no right to recreate. Had Roadrunner been compelled to comply with the provisions of 43 U.S.C. § 299(f) (2000), it would have been obligated to describe a mining operation that included “purposes reasonably incident to the mining or removal of a mineral,” or a plan to prospect, and to explain how its plan minimized impacts on surface uses.<sup>10/</sup>

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<sup>9/</sup> We note that the statute gives the claimant a right to enter the lands to prospect, and to reenter to mine and extract the mineral. 43 U.S.C. § 229(a) (2000). BLM has treated the Roadrunner mining plan as if it pertains to the latter.

<sup>10/</sup> To the extent the mining plan implements a claimant’s right to enter lands to prospect, it is nonetheless constrained, after 1993, to set forth procedures minimizing  
(continued \* \* \*)

No such showing was made in the plan of operations because it appears that such efforts would have been antithetical to the club's purpose. Roadrunner's primary goal, as stated in its letters to the landowners is a noncommercial, open-ended, randomly exercised, recreational opportunity for its membership. The plan anticipates that 10 people may enter the mining claims "on any given day" to engage in the process of mining activities any time in the ensuing decade, apparently for fun and not for profit. Its plan presumes that the location of the mining claims provides the claimant with a recreational opportunity that is superior to the uses the owner of the surface might make of the land. No such right was reserved in the patent.

The extent to which Roadrunner's desires for a recreational opportunity for its membership overlaps with the protected mining has not been addressed by BLM. We find no basis, however, for concluding that when the United States patented the surface to private individuals under the SRHA, the reservation of the right to the mineral estate also reserved to anyone locating the mineral deposits thereunder a right to recreate on the surface. Any construction of our precedent governing the rights to use the surface for purposes necessary to extract the mineral, or of the plain language of Publ. L. No. 103-23, would be contrary to such a conclusion.

This decision does not stand as a conclusion regarding the general topic of recreational mining on Federally owned lands. To the extent this Board has addressed such issues, it has stated: "Recreation mining is a legitimate activity on federal land which is open to mining and prospecting, but no property right vests in the miner or prospector until and unless he can demonstrate that he has discovered a valuable deposit of mineral as defined in Castle v. Womble, [19 L.D. 455, 457 (1894).]" United States v. Leslie Horn, 16 IBLA 211, 213 (1974) (emphasis added). This conclusion has not been applied to lands patented to private ownership under the SRHA or other split estate situations. <sup>10/</sup>

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<sup>10/</sup> (\* \* \* continued)

impacts to surface uses. Such a constraint ensures that the reserved right to enter the lands to prospect is something less than an unconstrained recreational opportunity.

<sup>11/</sup> The Board has concluded, however, that where the only use to which a mineral deposit could be put was recreational mining, it did not meet the test for validity of a mining claim. United States v. Virgil and Melina Prowell, 52 IBLA 266, 267 (1981) (mining claim invalid where it does not support "the kind of operation which one would classify as commercial" but supports "the kind of mining that furnishes recreation possibilities"); United States v. Ruth Arcand, 23 IBLA 226, 231 (1976) (where claimants were "mining principally for the recreational value of the activity" and "returns are so meager \* \* \* they don't sell the gold," the mining claim is not valid). Should Kayler believe that the mining claims at issue are not otherwise (continued \* \* \*)

For the foregoing reasons, we reverse BLM's September 13, 2000, decision record and its September 8, 2000, decision approving the mining plan of operations. That mining plan of operations, proposing mining as it did on SRHA lands, did not meet the terms of the SRHA, as amended by Publ. L. No. 103-23. 43 U.S.C. § 299 (2000). Should Roadrunner seek to submit a mining plan of operations for those lands, it is incumbent upon it to identify the actual use of the lands by surface owners and identify how the club intends to minimize impacts on particular surface uses. Further, BLM must ensure that the actual mining plan of operations is disseminated to the surface owners for a 45-day comment period.<sup>11/</sup> Finally, BLM must ensure that the requirements of the statute are met. Roadrunner's rights to enter the lands to prospect and "reenter and occupy so much of the surface \* \* \* as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals" must be protected; it has no presumptive right to recreate on the surface that is superior to the surface owner's rights. BLM's task in considering a mining plan would be to determine when the recreational mining rights of the club coincide with the reserved right of the mining claimant to enter the surface.

Consistent herewith, the FONSI and EA are vacated. New NEPA documentation would be required for any plan of operations that is submitted to meet the requirements of 43 U.S.C. § 299(f) (2000).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Traw's appeal is dismissed, BLM's decision is reversed and its environmental documents are vacated.

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Lisa Hemmer  
Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge

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<sup>11/</sup> ( \* \* \* continued)

valuable for a commercial operation, she is free to bring a private contest against the mining claims. See, e.g., Sedgwick v. Callahan, 9 IBLA 216, 217 (1973).

<sup>12/</sup> BLM is not obligated to consider or adopt the comments of the surface owner. Presumably, BLM's response to such comments would be subject to review under a standard of rationality. Martin S. Chattman, 154 IBLA 64, 69 (2000).