



MARGARET L. BERGGREN  
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171 IBLA 297

Decided June 5, 2007

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IBLA 2005-274, 2005-275

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Appeal from decisions of the New Mexico State Office, Bureau of Land Management, rejecting Notices of Intent to Locate mining claims. NMNM 114213, NMNM 114318.

Reversed.

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

BLM does not have the discretion to reject a Notice of Intent to Locate mining claims on Stock-Raising Homestead Act lands under regulations at 43 C.F.R. Part 3838 for the sole reason that it was submitted by the owner of the surface estate.

APPEARANCES: Margaret L. Berggren, Sweet, Idaho, *pro se*, and for Scott Ranch Trust; John L. Gaudio, Esq., Office of the Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Margaret L. Berggren, for herself (IBLA 2005-274) and as Trustee for the Scott Ranch Trust (IBLA 2005-275), appeals from two decisions of the New Mexico State Office, Bureau of Land Management (BLM), rejecting her Notices of Intent to Locate mining claims (NOITLs) on lands the surface of which she, or the Trust, holds an interest. The surface estates of the lands were originally patented to Berggren's (Patent No. 1046937) and the Trust's (Patent Nos. 1097033 and 1085478) predecessors under the Stock-Raising Homestead Act of 1916<sup>1</sup> (SRHA), 43 U.S.C. §§ 291-301 (1970), *repealed in part* by section 702 of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub.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,

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<sup>1</sup> The SRHA is also identified as the Act of Dec. 29, 1916, 39 Stat. 862. *E.g.*, *Brock Livestock Co.*, 101 IBLA 91, 93 n.3 (1988).

1976, 90 Stat. 2787. After Berggren and the Trust obtained interests in the land, Berggren submitted two NOITLs, Berggren's for 640 acres and the Trust's for 960 acres, to prospect and potentially locate mining claims there. The effect of these notices was to segregate a total of 1,600 acres of Federal mineral estate from location by non-surface owners for 90 days. BLM rejected the NOITLs in separate decisions dated August 5 and 18, 2005. Berggren appealed. The appeals were separately docketed and then consolidated by order of this Board dated May 4, 2006.

The question presented by Berggren's actions is whether the private owner of the surface estate, which overlies a Federal mineral estate subject to location under the mining laws, may submit to BLM NOITLs, the segregative term of which is 90 days during which other potential mining claimants cannot explore or locate the mineral estate. The question presented by these appeals is whether BLM was correct to reject Berggren's NOITLs strictly on the basis of her, or the Trust's, ownership interest in the surface. While we find these appeals to be moot, we also conclude that the central question presented by Berggren is capable of repetition yet evading review and thereby address it on the merits. In so doing, we find that BLM has misread its regulations and reverse.

#### *Stock-Raising Homestead Act*

The parties agree, and the three patents in the record confirm, that the surface estates for the lands in question were patented pursuant to the SRHA. Prior to its repeal, public land could be entered for grazing purposes under the SRHA and then conveyed by patent to the entryman. Patents issued under the SRHA were for the surface only, and 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). SRHA patents thus established "split estates" where the surface is privately owned and the reserved minerals are subject to disposal under the public land laws. *Susan J. Kayler*, 162 IBLA 245, 246 (2004).

Reserved minerals in SRHA patented lands are locatable by members of the public. 43 C.F.R. § 3814.1. The right to extract the mineral estate has historically been superior to the right of the surface owner to use the surface. *Susan J. Kayler*, 162 IBLA at 247. The SRHA expressly grants qualified persons the right to "enter" the land for prospecting and to "reenter" for mining and removal of the mineral. 43 U.S.C. § 299(a) (2000); 43 U.S.C. § 299 (1988); *Richard Rudnick*, 143 IBLA 257, 260 (1998), *citing William and Pearl Hayes*, 101 IBLA 110, 114-15 (1988), and *Brock Livestock Co.*, 101 IBLA at 98.

By Public Law 103-23, enacted on April 16, 1993, Congress added specific protections for the surface owner, but maintained the right of qualified persons (miners) to enter the surface for "purposes reasonably incident to the mining or

removal” of the mineral. 43 U.S.C. § 299(a) (2000). Public Law 103-23 required that prospectors for mining claims on lands patented under the SRHA must file “a notice of intention to locate” the claim with the Department and also give such notice to the surface owner. 43 U.S.C. § 299(b)(1)(A) and (b)(3) (2000). The statute as amended in 1993 effectuates the right of a person to enter the surface for prospecting or to reenter to mine or remove minerals, even over a surface owner’s objection, subject to particularized requirements attendant on mining operations. 43 U.S.C. § 299(d)-(f) (2000); *Susan J. Kayler*, 162 IBLA at 247-48.

The effect of a notice filed under 43 U.S.C. § 299(b) is to segregate the lands described therein from all other mineral entry for the 90-day period following the date of its filing. 43 U.S.C. § 299(b)(2) (2000). During that 90-day period,

no other person (including the surface owner) may—

- (A) file such a notice with respect to any portion of such lands;
- (B) explore for minerals or locate a mining claim on any portion of such lands; or
- (C) file an application to acquire any interest in any portion of such lands . . . .

*Id.* Further, during the 90-day period, the person who submits the NOITL is required to post a bond and submit a plan of operations for proposed activities that exceed more than minimal disturbance of surface resources, subject to notification to the surface owner, for consideration and comment and approval by the Secretary within 60 days. 43 U.S.C. § 299(e) (bonds) and (f) (plans of operation) (2000).

BLM promulgated regulations to implement the portions of 43 U.S.C. § 299 (2000) governing NOITLs. 43 C.F.R. Part 3838; *see also* 43 C.F.R. § 3809.2(a). The rules at Part 3838 “describe how to notify the surface owner before exploring for minerals,” 43 C.F.R. § 3838.3(a), and establish that a “notice of intent to locate mining claims form (NOITL)” must be submitted to BLM and served on the surface owner, 43 C.F.R. § 3838.11. The regulations ensure that the “90-day segregation period” begins when the NOITL is received by BLM, 43 C.F.R. § 3838.14, and that the NOITL gives to the person who submits it the exclusive right to explore for minerals or locate a mining claim during that period, 43 C.F.R. § 3838.15, consistent with the statutory terms quoted above. The prospector submitting the NOITL may cause only minimal disturbance to surface resources, *id.* at (a)(2), or must otherwise submit a plan of operations subject to the requirements of 43 C.F.R. Subpart 3809, *see* 43 C.F.R. § 3838.15(c), approval of which, in general terms, would extend the segregative period of the NOITL through reclamation. *See* 43 U.S.C. § 299(h)

(2000). The surface owner of SRHA lands is free “to explore for minerals and locate a mining claim on the Federally-reserved mineral estate” but “do[e]s not need to follow” the notice requirements of 43 C.F.R. Part 3838. 43 C.F.R. § 3838.3(b).

### *Facts*

The parties are in agreement that the lands in question are SRHA lands, that either Berggren or the Trust owns an interest in the surface estates, and that Berggren is Trustee for the Trust. Berggren submitted an NOITL on May 27, 2005, for the 640 acres of land acquired by Berggren in secs. 13 and 24, T. 8 S., R. 4 W., New Mexico Principal Meridian (NMPM), Socorro County, New Mexico. On behalf of the Trust, on June 20, 2005, she submitted an NOITL for 960 acres in secs. 6-10 and 15, T. 8 S., R. 3 W., NMPM. The effect of such NOITLs would be to initiate the “90-day segregation period” for the benefit of the surface owner, and provide Berggren or the Trust the benefits granted under 43 C.F.R. § 3838.15.

By decision dated August 5, 2005, BLM rejected Berggren’s NOITL NMNM 114213, on grounds that the surface owner “do[es] not need” to submit them, citing 43 C.F.R. § 3838.3(b). By decision dated August 18, 2005, BLM rejected the Trust’s NOITL NMNM 114318, under the same logic and language.

### *Arguments of the Parties*

In the identically worded Statements of Reasons (SOR), Berggren argues for herself and the Trust that, as surface owners, they are entitled like any other person to submit NOITLs, and the fact that they are surface owners should not change this result. She claims that BLM’s decision denies the surface owners “the rights that everyone else has which is to provide me with a 60 day exclusive right to explore for minerals and stake mining claims.” SORs at 1. She states:

Public Law 103-23 was written to insure that the rights o[f] surface owners are not subordinate to individuals wanting to conduct mineral activities. Your decision makes me as the surface owner subordinate to anyone else who files [an NOITL] where I own the surface.

There is no basis in law for your decision and it discriminates against me as the surface owner by denying me the same rights that everyone else has to file [an NOITL].

SORs at 1.

BLM contends that the appeals are moot given that the 90-day segregation periods of the NOITLs, had BLM accepted them, would have expired in

September 2005. BLM Answer at 4. Nonetheless, BLM contends that it had the discretion to reject the NOITLs because an “NOITL’s segregative effect is necessary only to allow a prospector to give this notice without being exposed to competing NOITLs.” *Id.* at 3. Explaining that the surface owner “need not file any sort of notice of [her interest in prospecting] with the BLM that would draw the attention of competing prospectors,” BLM reasons that the upshot of permitting surface owners to submit NOITLs “is to withdraw the lands from mineral entry by others for 90-day increments to stop all potential mining activities from interfering with the surface owner’s non-mining uses of the land. Congress did not intend for SRHA surface owners to abuse a NOITL’s segregative effect to withdraw federal minerals from public entry.” *Id.*

#### ANALYSIS

BLM is correct that all issues are moot. We proceed, as BLM implicitly concedes we must, because the issues in this appeal would always evade our review by virtue of the 90-day period for NOITLs. The test for maintaining an appeal in the face of facts which admittedly moot the issues it presents is whether those issues are “capable of repetition, yet evading review.” *Randall G. Nelson*, 164 IBLA 182, 187 (2004). Where BLM’s rejection of an NOITL will always be moot within 90 days of the original submittal date, it will also always be moot before or soon after an appeal is filed with the Board. Thus, we find such issues to evade review and proceed to consider the merits.

[1] We agree with BLM that it has some discretion to reject an NOITL. We also agree, hypothetically, that BLM has discretion to reject an NOITL where it is filed seemingly for the purposes of evading the statutory effect of the SRHA to establish a split estate. Thus, we reject any implication, if Berggren meant to suggest it, that the surface estate should be superior to the mineral estate. It is not, as we held in *Susan J. Kayler*, 162 IBLA at 247. The surface estate is subject to prospecting and potential mining of the mineral estate, so long as the 1993 SRHA amendments and the rules at 43 C.F.R. Subparts 3809 and Part 3838 are followed.

On the other hand, the records before us present no facts to substantiate BLM’s stated concern that Berggren was attempting to “abuse the NOITL” process or to “withdraw the lands in 90-day increments” from prospecting by others. BLM did not reject the NOITLs submitted by Berggren for herself and the Trust on the basis of any factual finding regarding an improper motive. The record contains a single NOITL for each set of lands owned by the separate surface owners.

Thus, the question presented is whether BLM has discretion to reject an NOITL for the sole reason that it was submitted by the surface owner. We cannot find any justification in the 1993 statutory amendment or the implementing regulations for

permitting such a conclusion. To the contrary, the regulations expressly considered this issue and stated that the surface owner “do[es] not need to” file an NOITL, not that the surface owner cannot do so.

It would seem that the NOITL procedure protects a number of interests, including: (a) the surface owner’s privacy interest in precluding prospectors from appearing on his or her property without notice; (b) the miner’s interest in shielding his investment in prospecting and mining from competition from other prospectors notified of a potential mining claim by an NOITL; and (c) the surface owner’s privacy interest in avoiding the public attention to and entry of the surface potentially generated by an NOITL. BLM is correct to point out that the surface owner has no need to follow procedures to protect herself from herself and, likewise, “need not file any sort of notice of [her interest in prospecting] with the BLM that would draw the attention of competing prospectors.” Where we must side with Berggren, however, is that we see no basis in the rules for holding that the surface owner cannot protect herself from competition from other prospectors when she thinks a valuable mineral justifying the filing of a mining claim may be present.

Thus, a non-surface owner prospector may enter land under an NOITL, his interest, in locating a mining claim and even operating under a subsequently filed plan of operations pursuant to 43 C.F.R. Subpart 3809, protected for months (or longer). Once he files the NOITL, his right to prospect and mine is exclusive for the 90-day effective period of the NOITL or longer (if he files and obtains approval for a plan of operations). Under 43 U.S.C. § 299(b)(2), this exclusive right is superior to, and protected from interference from, even the surface owner’s interest in mining her own lands. Yet, if we were to affirm BLM on grounds that it has the discretion to reject an NOITL submitted by the surface owner simply because she owns the surface estate, then the surface owner would not be able to obtain an exclusive right to explore for minerals, locate a claim, and submit a plan of operations afforded by the regulations for the effective period of the NOITL. Thus, a surface owner seeking to discover, or who discovers, a valuable mineral could not submit an NOITL and would be at risk, while prospecting, of another person’s entry of the lands and submittal of an NOITL for the superior and exclusive prospecting rights it confers. We agree with Berggren that the regulations were not drafted so as to give anyone *except* the surface owner such an opportunity, or to provide less protection for her interests in exploring the mineral estate than any other person may have.

We are not unmindful of BLM’s concerns that surface owners could effectively withdraw or segregate the mineral estate by filing NOITLs to prevent others from entry onto the surface. To accomplish such a result for more than 90 days, however, would require a series of NOITLs, something that is not in evidence here. Moreover, BLM’s regulations were drafted to protect the mineral estate from private appropriation by non-miners, whether surface or non-surface owners. Any NOITL

not followed by a plan of operations within the 90-day period expires 90 days after it is submitted. 43 C.F.R. § 3838.13(c). No person who has submitted an NOITL may “submit another NOITL for the same lands until 30 days after the expiration of the previously-filed NOITL.” 43 C.F.R. § 3838.12(d). If a person submits a plan of operations under 43 C.F.R. Subpart 3809, the plan is subject to approval by BLM, and the operation is subject to inspection by BLM. BLM’s rules thus protect the Federal mineral estate from the sort of perpetual withdrawal for non-mineral purposes alluded to by BLM.<sup>2</sup>

We conclude that BLM had no reasonable basis upon which to reject Berggren’s NOITL’s in the consolidated appeals. Its decisions rejecting them constituted an abuse of its discretion.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decisions appealed from are reversed.

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Lisa Hemmer  
Administrative Judge

I concur:

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Christina S. Kalavritinos  
Administrative Judge

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<sup>2</sup> In addition, under 43 C.F.R. § 3838.13(a), a person (or his or her affiliates) cannot hold NOITLs for more than 1,280 acres owned by a single surface owner. While this rule looks to affiliations among holders of NOITLs, it does not define affiliations for purposes of surface ownership, and therefore does not clearly prohibit Berggren from submitting NOITLs for 1,600 acres where the surface estates are owned separately by herself and by the Trust. *See also* 43 C.F.R. § 3838.13(b) (person may not hold NOITLs for more than 6,400 acres in one state). We need not resolve any issue presented by this rule because our reversal of BLM’s decisions moots such questions at this time.