ADAMI RANCH LLC

173 IBLA 82 Decided November 28, 2007

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

ADAMI RANCH LLC

IBLA 2006-35 Decided November 28, 2007

Appeal from a decision of the Acting Deputy State Director, Wyoming State Office, Bureau of Land Management, affirming a decision of the Manager, Buffalo Field Office, approving 11 applications for permit to drill and the Imada Plan of Development for coalbed natural gas.

Vacated and remanded in part; affirmed in part; dismissed in part.

1. Act of December 29, 1916--Mineral Lands: Mineral Reservation--Oil and Gas Leases: Stock-Raising Homestead Act of 1916--Stock-Raising Homesteads

   In order to prevail on a motion to dismiss an appeal from a decision addressing bond adequacy on grounds that the appellant failed to comply with 43 C.F.R. § 3814.1(d), BLM must itself have complied with the precise terms of that rule by serving a written decision on the surface owner, addressing the surface owner's objections to a posted bond, and allowing for an appeal.

2. Act of December 29, 1916--Mineral Lands: Mineral Reservation--Oil and Gas Leases: Stock-Raising Homestead Act of 1916--Stock-Raising Homesteads

   In determining the appropriate amount of a bond for the protection of the owner of the surface estate of land patented under the Stock-Raising Homestead Act, 43 U.S.C. § 299(a) (2000), where land is being developed for oil and gas under the Mineral Leasing Act, 30 U.S.C. § 226 (2000), BLM properly considers possible damages to the surface from projected drilling operations, considering the value of crops, tangible improvements and projected lost grazing use; it does not consider the likely cost of reclamation of such lands. Such a bond is

> intended to compensate the surface owner for the costs of possible, not proven, damages to tangible improvements.

APPEARANCES: Dennis M. Kirven, Esq., Buffalo, Wyoming, for Adami Ranch LLC; S. Amanda Koehler, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management; and Randall T. Cox, Esq., Gillette, Wyoming, for Kennedy Oil and Lance Oil & Gas Company, Inc.[1]

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Adami Ranch LLC (Adami or the Ranch) appeals from a decision of the Acting Deputy State Director, Mineral and Lands, Wyoming State Office, Bureau of Land Management (BLM), dated September 29, 2005 (SD decision), affirming a decision of the Field Manager, Buffalo Field Office, BLM, approving 11 applications for permit to drill (APDs) coalbed methane wells and the Imada Plan of Development (POD). Kennedy Oil (Kennedy) had collectively filed the APDs as part of the Imada coalbed natural gas (CBNG) POD. Pursuant to statutory and regulatory authority including the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. § 4332(2) (2000), BLM prepared an environmental assessment (EA) of the Imada POD which it tiered to the Powder River Oil and Gas Project Environmental Impact Statement and Resource Management Plan Amendment Record of Decision approved April 30, 2003. Adami challenged BLM's approval of the APDs and the POD by requesting State Director Review (SDR) in accordance with 43 C.F.R. § 3165.3(b), claiming that several of the subject wells approved would be located on the privately-owned surface that comprised the Ranch. Adami asserted, *inter alia*, that the bond posted by Kennedy to protect interests of the surface owner, under the terms of the Stock-Raising Homestead Act of 1916 (SRHA), 43 U.S.C. § 299(a) (2000), and implementing regulations at 43 C.F.R. § 3814.1, would be inadequate for protection and reclamation of the natural and surface resources. The Acting Deputy State Director considered Adami's arguments in the context of the challenge to the APD and POD decision, and rejected them. This appeal followed.

Adami's arguments fall into three categories. The Ranch argues that (1) the bond posted by Kennedy under 43 C.F.R. § 3814.1 is inadequate; (2) the decision to approve the POD and the APDs was in error as a matter of law, presumably under NEPA; and (3) the State of Wyoming's Split Estate Act, W.S. 30-5-401 through

[1] On Jan. 25, 2007, after all responsive pleadings had been tendered, Randall T. Cox, counsel first for Kennedy Oil and later for Lance Oil & Gas Company, Inc., submitted a Motion for Leave to Withdraw as Counsel, asserting that Lance had acquired other counsel. No other person has made an appearance on behalf of Lance, and Cox's is the only service address of record for Lance.

30-5-410 (effective July, 1, 2005), has been violated, by Kennedy, by BLM, or by both.

BLM has moved to dismiss this appeal on grounds that Adami failed to appeal from a bond approval decision to the Director of BLM, in accordance with the terms of 43 C.F.R. § 3814.1. Given Adami's separate path for review of the approval of the APDs and POD, first to the State Director and then to IBLA, and in the absence of an appeal from approval of the bond, BLM argues that the Board has no jurisdiction over Adami's arguments regarding bond adequacy. Kennedy moved to intervene, and filed a Motion to Dismiss on the same grounds as BLM, as well as an Answer.

According to a Motion to Substitute a Party, filed April 10, 2006, Lance Oil & Gas Company, Inc. (Lance), has acquired all of Kennedy's "right, title, interest, wells, lease operating rights, surface use and other landowner agreements, rights-of-way and permits held or owned by Kennedy Oil in the lands which are the subject of this matter . . . ." We grant Lance's Motion to Substitute a Party, and also Kennedy's Motion to Intervene, though it is no longer a party, for purposes of considering its pleadings and to the extent Lance may have adopted them.

For the reasons explained below, we deny BLM's and Kennedy's motions to dismiss. We vacate and remand that portion of the decision addressing the adequacy of Kennedy's bond under the SRHA, because no bond approval decision has been issued by BLM that complies with the procedures set forth in 43 C.F.R. § 3814.1. We thus return the record to BLM for action on whatever bond Lance may have submitted or may yet submit, and for compliance with that regulation in association with Lance's bond. To the extent Adami has independently challenged the SD decision affirming BLM's decision to approve the POD and APDs, under NEPA or other law, Adami has not shown legal error in the decision. We therefore affirm that part of the SD decision approving the POD and APDs, while recognizing that, in the absence of a proper bond posted by Lance, the decision may be premature or inoperative. We dismiss that part of the Ranch's appeal regarding the requirements of the Wyoming Split Estate Act. In the absence of a BLM decision on this point, we are without jurisdiction to consider Adami's construction of that statute.

I. The Record Fails To Demonstrate BLM's Compliance With Departmental Bonding Rules Issued Pursuant to Federal Law Governing Split Estates.

Proposed activities for the Imada POD include the drilling of 11 wellsites in secs. 25 and 26, T. 49 N., R. 79 W., Sixth Principal Meridian, Johnson County, Wyoming. Eight of the wells would be situated on 720 acres of surface within secs. 25 and 26 owned by Steve Adami and used, in conjunction with surface owned

by other entities, for grazing as part of the Adami Ranch.[2] According to the parties, Adami's surface estate was patented pursuant to the SRHA, 43 U.S.C. §§ 291-301 (1970). This fact is not verified in the record before us. We proceed under the assumption that the fact that a portion of the Ranch constitutes SRHA lands can be documented because there appears to be no dispute in this regard.

Historically, public land could be entered for grazing and homestead uses under the SRHA and the United States could issue patents for such purposes. SRHA patents created "split estates" with privately-owned surface and reserved minerals subject to disposal under the public land laws. *Susan J. Kayler*, 162 IBLA 245, 246 (2004). SRHA patents 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). The Act of June 21, 1949, 30 U.S.C. § 54 (1988), made holders of mineral rights liable for "any damage that may be caused to the value of the land for grazing," and thus required such persons to obtain bonds to secure the payment of such damages. 43 C.F.R. § 3814.1.

The SRHA was repealed in part by section 702 of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, Title VII, § 702, Oct. 21, 1976, 90 Stat. 2787.[3] This repeal, however, did not affect section 9 of the SRHA governing the exercise of mineral rights on lands covered by existing SRHA patents. 43 U.S.C. § 299 (1988). This provision continued without substantive modification by Congress, but was recodified as 43 U.S.C. § 299(a) when Congress added 43 U.S.C. § 299(b)-(p) (2000), in Pub. L. No. 103-23, 107 Stat. 60, 65, on April 16, 1993, for the purpose of adding protections for surface owners. These added protections apply when the holder of mineral rights prospects or mines for minerals *not* subject to disposition under, *inter alia*, the Mineral Leasing Act (MLA), 30 U.S.C. § 181, *et seq*. 43 U.S.C. § 299(p)(1) (2000). Because this case involves oil and gas leasable under the MLA, 30 U.S.C. § 226 (2000), the only portion of the SRHA relevant to this appeal is the long-standing portion of the SRHA at 43 U.S.C. § 299(a) (2000).

Under this provision, qualified persons may "enter" the land for prospecting and "reenter" for mining and removal of oil and gas. The right to extract the mineral estate is superior to the right of the surface owner to use the surface. Parties holding mineral rights may exercise a right of reentry to mine or extract minerals if they

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[2] All of the wells are identified as "Big Cat Federal No. XXXX-4979." The eight wells to be drilled on Ranch surface are, by the distinct four-digit portion of each number, wells no. 1425, 3225, 4325, 2326, 3226, 3426, 4126, and 4326.

[3] This Department had previously held that the SRHA was impliedly repealed by the Taylor Grazing Act, 43 U.S.C. § 315 (2000). *See Daniel A. Anderson*, 31 IBLA 162, 165 (1977), *citing George J. Propp*, 56 I.D. 347 (1938).

(1) obtain written consent or waiver from the patentee; (2) pay for damages to crops, grazing value, and tangible improvements; or (3) in lieu of either of the first two, obtain a "good and sufficient" bond for the benefit of the surface owner. *Susan J. Kayler,* 162 IBLA at 247; *Richard Rudnick*, 143 IBLA 257, 262 (1998), *citing William and Pearl Hayes*, 101 IBLA 110, 114-15 (1988), and *Brock Livestock Co.*, 101 IBLA 91, 98 (1988). The statute sets forth the above-stated simple principles as follows:

> Any person qualified to locate and enter the . . . 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 . . . for the purposes of prospecting for . . . mineral therein . . . . Any [qualified] person . . . 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, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond . . . to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner . . . in form and in accordance with rules and regulations prescribed the Secretary of the Interior and to be filed with and approved by . . . the local land office of the district wherein the land is situate, subject to appeal to the Secretary of the Interior or such officer as he may designate . . . .

43 U.S.C. § 299(a) (2000).

The Department issued regulations confirming the responsibility of the holder of mineral rights to compensate the surface owner for certain damage to the surface:

> [A]ny person qualified to locate and enter the . . . 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 under the Act, for the purpose of prospecting for the . . . mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on the land by reason of such prospecting. Under the Act of June 21, 1949 (30 U.S.C. 54), a mineral entryman on a stock

> raising or other homestead entry or patent is also held liable for any damage that may be caused to the value of the land for grazing . . . .

43 C.F.R. § 3814.1(b).

Under this Departmental rule, the holder of rights to reenter the mineral estate for the extraction of minerals must seek a surface agreement with the surface owner. In the absence of such agreement, 43 C.F.R. § 3814.1(c) requires the holder of mineral rights to post a bond. The surface owner has 30 days within which to file an objection to the bond with the BLM authorized officer, at which time

> said officer will immediately give consideration to said bond . . . and if, in consequence of such consideration he shall find and conclude that the proffered bond ought not to be approved, he will render decision accordingly and give due notice thereof to the person proffering the bond . . . . If, however, the authorized officer, after full and complete examination and consideration of all the papers filed, is of the opinion that the proffered bond is a good and sufficient one and that the objections interposed as provided herein against the approval thereof do not set forth sufficient reasons to justify him in refusing to approve said proffered bond, *he will, in writing, duly notify the homestead entryman or owner of the land of his decision in this regard and allow such homestead entryman or owner of the land 30 days in which to appeal to the Director of the Bureau of Land Management*. If . . . the homestead entryman or owner of the lands fails to timely appeal from the decision of the authorized officer adverse to the contentions of said homestead entryman or owners of the lands, said authorized officer may, if all else be regular, approve the bond.

43 C.F.R. § 3814.1(d) (emphasis added). To condense this description, the holder of mineral rights posts a bond and serves the appropriate BLM office and the surface owner. The surface owner has 30 days to object to the bond to the BLM office, which must "immediately" provide "full and complete examination and consideration" and advise the surface owner "in writing" of any decision to approve the bond, and also allow 30 days to appeal to the Director. (As discussed below, IBLA has construed this rule to permit an appeal from the decision of the BLM officer to this Board.)

A. The Record Contains No Evidence That Lance Has Posted The Required Bond.

Following Lance's entry into this appeal, Lance has provided no evidence that it has complied with the SRHA and the rule. While Lance claims to have acceded to Kennedy's rights with respect to the mineral estate, Lance mentions no bond, or any effort on its part to "execut[e] a good and sufficient bond or undertaking to the

United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner . . . ." 43 U.S.C. § 229(a) (2000). Lance fails to document that it filed "with the authorized officer of the proper office" a bond and "with such bond evidence of service of a copy of the bond upon the homestead entryman or owner of the land." 43 C.F.R. § 3814.1(c). While it may be that Lance and Kennedy have arranged to substitute Lance for Kennedy on Kennedy's bond, no such evidence has been provided here. Further, the bond is for the benefit of and to "assure compensatory protection" of the surface owner. *A. J. Maurer, Jr.*, 15 IBLA 151, 155, 81 I.D. 139, 141 (1974). The rule requires evidence of notice on Adami. Without evidence that the current holder of rights to enter the mineral estate (Lance) has complied with the SRHA, we must remand this part of the appeal given that we have no authority to affirm BLM's approval of a bond, when we have no evidence one has been posted.

We take no position regarding whether Lance could be substituted for Kennedy on its bond instead of posting a new bond. At a minimum, it would be the burden of the holder of mineral rights to show that proper legal process attended such a substitution; Lance has not done so. But even if we were to speculate that Lance had acquired Kennedy's bond obligation and succeded to all of Kennedy's legal bond obligations, this would not be enough for us to consider BLM's response to Adami's objection to Kennedy's bond.

B. The Record Contains No Evidence That BLM Complied With 43 C.F.R. § 3814.1 In Considering The Adequacy Of Kennedy's Bond.

Kennedy obtained and filed with BLM a surety bond in the amount of $2,176.00 for potential damage to Adami's surface interests, claiming an impasse over a surface use agreement. The Ranch received notice and a copy of the bond by certified mail from Kennedy on December 30, 2004. Adami timely filed its objections to the bond with BLM's Buffalo Field Office on January 18, 2005, and proposed a bond in the amount of $4,751,600. Adami later supplemented its arguments on February 3, 2005. The Buffalo Field Office was obligated to "fully and completely" consider the Ranch's objection and "in writing, duly notify" the Ranch of any decision to approve the bond and allow 30 days in which to appeal. 43 C.F.R. § 3814.1(d).

BLM began this process. The Buffalo Field Office properly took the issue under advisement in a letter to Adami dated February 3, 2005. BLM explained that the POD had been assigned to a review team and that "[f]ollowing a review of all documents, including the Imada POD, . . . *a decision will be issued to either accept or reject the bond. If the bond is accepted, you will have thirty (30) days from receipt of our decision to appeal to the Interior Board of Land Appeals*." Feb. 3, 2005, letter from BLM to the Ranch (emphasis added).

It does not appear that BLM completed the process of reviewing Adami's bond objections by following the terms of 43 C.F.R. § 3814.1. Over the ensuing 7 months, the Buffalo Field Office engaged in various communications in anticipation of agreements between Kennedy and Adami over surface use,[4] but did not take a final position with respect to the bond. *E.g.,* May 3, 2005, letter from BLM to Steve Adami (discussing, *inter alia*, water management plan). Ultimately the Buffalo Field Office issued an internal August 16, 2005, memorandum in support of the bond amount to the State Director. Aug. 16, 2005, memorandum at 1-2, ¶ 4. The record contains no indication that this was a decision issued to the surface owner; even if it was conveyed to the Ranch, it does not identify or "allow" a right of appeal, whether to IBLA or to the Director of BLM. Nor does BLM aver, or Adami suggest, that the Ranch received it.[5] Curiously, Adami alleges that BLM approved the bond on September 7, 2005, by some event or document of which we are unaware. Statement of Reasons (SOR) at 8.[6] The record fails to verify any written BLM decision issued to the Ranch in compliance with 43 C.F.R. § 3814.1(d) with respect to the bond posted by Kennedy.

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[4] Interactions apparently began badly between Kennedy and Steve Adami and then soured further. According to the record, when Kennedy first entered the land, Adami believed that "Yates" was the lessee of record and demanded evidence of Kennedy's identity and right to appear on his ranch. Kennedy claimed to be the lessee and refused to provide such evidence without Adami's signature on Kennedy's proffered surface use agreement. Given that Lance is now the mineral rights operator, we need not further detail the interactions between Kennedy and Adami. A more satisfactory process might have resulted, however, had Kennedy been more responsive toward the rancher whose private land it was entering.

[5] Kennedy asserts that BLM provided the memorandum to Adami on Aug. 16, 2005. Kennedy Motion to Dismiss and Answer at unpaginated 2-3. It does not verify this assertion. BLM asserts that it "issued" the Aug. 16, 2005, memorandum which Adami did not then appeal. But BLM never avers, nor documents, that it served Adami in accordance with 43 C.F.R. § 3814.1(d). Nor does BLM or Kennedy address the failure of the memorandum to allow an appeal to a proper Departmental officer.

[6] Adami asserts that the "bond was not approved prior to issuing the permits as stated in the" decision approving the POD and APDs. "The bond was not approved until September 7, 2005." *Id.* We do not understand what Adami is referring to by way of an approval on Sept. 7, and BLM does not identify any event occurring on that date. The Ranch does not claim it received the Aug. 16, 2005, memorandum, and its arguments to the State Director indicate that the Ranch was unaware of the memorandum at the time of the approval of the POD and the APDs.

C. The Decision To Approve The POD And APDs Was Not A Decision To Approve Or Disapprove The Bond.

What the Buffalo Field Office did, instead, was consider and approve the Imada POD and the 11 APDs on August 25, 2005. In the Finding of No Significant Impact & Decision Record (FONSI/DR) BLM noted that "[a] 3814 bond has been provided and determined adequate" but did not identify a landowner for whose benefit the bond was issued. FONSI/DR at Rationale, Item 2. BLM issued this decision to Kennedy, the operator, with a cover letter by that same date. The letter to Kennedy was copied to at least two landowners (including the Ranch), but did not mention bonds. It stated: "[i]n accordance with 43 C.F.R. § 3165.3(b),[[7]] you or any other adversely affected party have the right to request an administrative review before the State Director regarding these decisions . . . ." within 20 business days. Aug. 25, 2005, letter from BLM to Kennedy.

The Buffalo Field Office plainly did not believe it was issuing the bond approval decision required by 43 C.F.R. § 3814.1 when it issued the August 25, 2005, decision to approve the POD and APDs. First, BLM's cover letter provided a 20 business day right of appeal under 43 C.F.R. § 3165.3 to the State Director, in contrast with the 30-day appeal right to the BLM Director from a bond approval decision under 43 C.F.R. § 3814.1. Second, the August 25, 2005, decision was issued to Kennedy, not the Ranch. Third, the decision was a FONSI/DR involving oil and gas development; to the extent it mentioned "a" 3814 bond, it provided no explanation to the reader as to whether the bond related to Adami or another landowner. Nor is it possible to tell from the POD decision what BLM's responses would have been to Adami's arguments.[8]

[1] For the above-stated reasons, we deny BLM's and Kennedy's motions to dismiss the appeal from the September 29, 2005, SD decision. They claim that because Adami failed to appeal a determination of bond adequacy issued "on August 16, 2005," and instead improperly appealed to the State Director from the August 25, 2005, approval of the Imada POD and APDs, Adami cannot contest the adequacy of the bond in an appeal to this Board. Due to the lack of documented issuance of the August 16, 2005, memorandum on Adami, the record fails to

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[7] This rule provides for a 20-day period in which to seek review by the State Director, and is followed by a right of appeal to IBLA at 43 C.F.R. § 3165.4(a). *E.g., National Wildlife Federation*, 169 IBLA 146, 150 (2006).

[8] The record contains a form entitled "Project Approval Checklist" which contains handwritten and dated initials for various issues required to be considered before approval. Under a set of handwritten "notes" signed "RMR," the following words are written, but without explanation: "FYI 3814 Bond."

demonstrate that BLM issued the written decision required by 43 C.F.R. § 3814.1. Even if it was served on Adami, it did not allow for an appeal as required by 43 C.F.R. § 3814.1(d). BLM insists on compliance with precise language of the rule at 43 C.F.R. § 3814.1 for appeal from a bonding decision. To prevail on a motion to dismiss on a theory that Adami has lost its appeal rights by failing to appeal, however, BLM must itself have followed the rule.

Moreover, the Board undoubtedly has jurisdiction of Adami's appeal from the September 29, 2005, SD decision. BLM properly issued a decision on the POD and APDs filed by Kennedy and advised potentially affected parties of their rights to appeal to the State Director. Adami timely filed such an appeal and the Acting Deputy State Director issued a decision. That decision was subject to review by this Board and advised Adami in writing of a right of appeal to IBLA. 43 C.F.R. § 3165.4.

What is awkward is that the SD decision, which advises Adami of its right of appeal to IBLA, is the first written statement served on Adami, as best we can determine, addressing bond issues. It did not directly approve the bond or address all issues raised by Adami. Nor could the SD decision have addressed what Adami might have raised in a challenge to the August 16, 2005, memorandum given that Adami does not appear to have been informed that such a memorandum existed when it requested SDR. Nonetheless, the Acting Deputy State Director addressed the bond in two ways. First, the SD decision presumed that Kennedy's bond had been officially approved and could not then be challenged in the context of SDR with respect to the approval of the POD. SD decision at 2-3. Second, the decision went on to reject Adami's request that the 3814 bond assure financial coverage for damage to Adami's wells in the absence of some verification that they would be damaged. *Id.* at 3.

BLM's claim to the Board that a 3814 bond approval decision can be appealed only to the Director of BLM, under the plain terms of 43 C.F.R. § 3814.1(d), further demonstrates that BLM had no belief that it was issuing such a bond approval when the Acting Deputy State Director rendered his decision. In any event, the SD decision neither met the procedural requirements of that rule nor responded to most of the issues raised in Adami's January and February 2005 submissions.

Nonetheless, BLM's position generates unnecessary confusion over whether an appeal from an SRHA bond decision should lie with IBLA or with the Director.[9] In *Brock Livestock Co.*, 101 IBLA 91, 97 n.6 (1988), we accepted jurisdiction of an

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[9] Despite BLM's assertion now, BLM's description of the process it would follow in response to Adami's objections to the bond explained that any appeal from a bond approval decision must be filed with IBLA. Feb. 3, 2005, letter from BLM to Adami. *See, e.g., Bookcliff Rattlers Motorcycle Club*, 171 IBLA 6, 26 (2006) (application of estoppel).

appeal from such a bond decision on grounds that 43 C.F.R. § 3814.1 had been promulgated prior to the delegation to IBLA of the authority to decide appeals from BLM public land decisions. 35 Fed. Reg. 12081 (July 28, 1970). We held: "It should be noted that 43 CFR 3814.1 provides for appeal to the Director, BLM, rather than to this Board. The regulation codified at 43 CFR 3814.1 was promulgated prior to the creation of this Board and describes an appeals procedure which is no longer in effect." In *William C. Hayes*, 122 IBLA 68 (1992), and later in *Richard Rudnick*, 143 IBLA at 261, we again accepted jurisdiction of appeals from SRHA bond decisions. Thus, we reject BLM's position that such appeals can only be filed with the BLM Director, and that we should dismiss an appeal filed with the Board. Notably, our decision in *Richard Rudnick*, 143 IBLA at 261 n.2, cited proposed regulations mentioning 43 C.F.R. Subpart 3814 (59 Fed. Reg. 44846, 44848, 44859 (Aug. 30, 1994); 60 Fed. Reg. 60108, 60186 (Nov. 28, 1995)) and observed that BLM had not promulgated any modifications. That remains the case. Given the passage of almost a decade with continued silence by BLM as to a rule predating establishment of this Board, we would not permit adverse consequences to an SRHA landowner that filed an appeal to the Director, as opposed to IBLA. Were this to happen, the proper course would be for the Director to forward the appeal to IBLA. Nonetheless, BLM's complaint that an appeal from an SRHA bond decision under 43 C.F.R. § 3814.1(d) lies only with the Director ignores the same Board precedent on which it must have relied in advising the Ranch in February 2005 that any such appeal must be filed with IBLA. The only import of BLM's position is to confirm that the Acting State Director never intended his decision to constitute such a bond decision.

We are left, then, in the curious stance of reviewing an SD decision which affirmed the Buffalo Field Office's approval of the POD and APDs, presumed a bond approval decision had already been issued, and supplied the first written conclusions to Adami addressing any of its reasons for challenging the bond posted by Kennedy (now no longer the holder of mineral rights at issue). Given the many procedural complications in this record, we remand this part of the appeal to give BLM an opportunity to consider whether a bond has been posted by Lance, and, if so, to issue a decision to the Ranch on bond adequacy under 43 C.F.R. § 3814.1, and allow an opportunity for timely and proper appeal.[10]

[2] On the other hand, to the extent that the SD decision purports to address the adequacy of Kennedy's bond, we take jurisdiction of the appeal from that portion of the SD decision. There is no reason for the Board to remain silent with respect to

[10] When it issues a decision on a bond that Lance has posted or does post in the future under 43 C.F.R. § 3814.1(d), BLM should specifically state that an appeal from an approval of such a bond lies with IBLA.

arguments plainly relevant to BLM's actions on remand. Therefore, we briefly address salient points.

Adami's contention that the bond as posted by Kennedy was inadequate to cover reclamation and restoration of the surface cannot be sustained. BLM is correct that an SRHA bond, in the case of oil and gas leasing, is not a reclamation bond. As we stated in *William C. Hayes*:

> To the extent that appellants contend that the amount of the bond should also reflect the amount of money it will take to fully reclaim the land, they are in error. That is not the purpose of a surface protection bond. Such a bond is only intended to compensate the surface owner for the costs of possible damages to crops, tangible improvements, and the value of the land for grazing purposes . . . . It is not intended to provide for reclamation of the land in the event that the mine operator fails to reclaim the land. Rather, as the record notes, reclamation is the subject of separate bonding requirements.

122 IBLA at 75-76 (citations omitted). Adami may have been confused by the 1993 amendments to the SRHA which do provide for bonding to cover surface reclamation. 43 U.S.C. § 299(e) through (h) (2000); *Susan J. Kayler*, 162 IBLA at 249; *Richard Rudnick*, 143 IBLA at 262. But these amendments do not apply where the mineral entryman holds mineral rights under the MLA, as here. For clarity purposes, we reiterate that the holding of *Hayes* still applies for purposes of considering oil and gas mineral development on SRHA lands. In determining the appropriate amount of a bond for the protection of the owner of the surface estate of land patented under the SRHA, 43 U.S.C. § 299(a) (2000), where land is being developed for oil and gas under the MLA, 30 U.S.C. § 226 (2000), BLM properly considers possible damages to the surface from projected drilling and production operations, considering the value of crops, tangible improvements and projected lost grazing use; it does not consider the likely cost of reclamation of such lands.

BLM is correct to note that other regulations cover reclamation bonds for oil and gas operations. 43 C.F.R. Subpart 3104.[11] BLM and Kennedy claim that such a bond has been posted in this case for over $83,000, and that this amount will be sufficient to cover reclamation. BLM Answer at Part B; Kennedy Motion to Dismiss and Answer at unpaginated 4. Adami disagrees that $83,000 would be sufficient to cover the cost of its surface reclamation. Once again, however, we cannot render an opinion on the sufficiency of such a bond on the record before us because (a) no such

[11] For reasons that follow, we take no position regarding the scope or coverage of a bond posted under 43 C.F.R. Subpart 3104 or the extent to which it would address privately-owned surface.

bond appears in the record; and (b) neither Lance's substitution for Kennedy on any such bond nor Lance's submission of a new bond is verified. In any event, Adami's arguments, *see* SOR at Part A, relate only to its claims that it is entitled to an increased SRHA bond under 43 U.S.C. § 299(a) (2000) and 43 C.F.R. § 3814.1. In these circumstances, we will not construe the Ranch's arguments to be a challenge to a bond issued under separate authority.

But, to the extent the SD decision addressed adequate bonding to protect Adami from damage to any of its tangible improvements, we must vacate that part of the decision. The Acting Deputy State Director concluded that it was unnecessary for Kennedy to post a bond to cover the Ranch's water wells, on two bases. First, the SD decision concluded that the April 2003 "Powder River Basin Oil and Gas Project Record of Decision" required all CBNG operators to offer surface owners a water well mitigation agreement. SD decision at 3. Second, the SD decision explained that "[since] it is unknown at this time whether Kennedy's CBNG operations will adversely impact Adami's water wells, we do not believe it is reasonable that a 3814 bond should cover damages to tangible improvements that may not even occur." *Id.* at 4. We direct BLM's attention to 43 U.S.C. § 299(a) (2000), 43 C.F.R. § 3814.1, and precedent such as *William C. Hayes*. There, we explained that an SRHA bond is "intended to compensate the surface owner for the costs of possible damages to . . . tangible improvements." 122 IBLA at 75. BLM would be incorrect to require damages to be proven before a bond covers them. To the extent Lance and the Ranch may have entered into a surface well agreement, we do not render any conclusion on this issue.[12]

It is not possible to determine from Adami's SOR what bond it would claim is necessary only to cover losses of crops, grazing value, and damages to tangible improvements, as required for an SRHA bond under 43 U.S.C. § 299(a) (2000). In any subsequent review of a bond that Lance has posted or posts in the future, Adami's arguments, if any, must be limited to its contentions regarding a bond sufficient to protect crops, grazing value, and tangible improvements.

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[12] As noted, Adami was seemingly unaware of the Aug. 16, 2005, memorandum and did not challenge it on SDR; thus, the Acting Deputy State Director did not affirm its specific terms. Nonetheless, the memorandum contains a plain mathematical error. In asserting that the bond must assure compensation of $13.90 per animal unit month (AUM) for 5.7 AUMs, with an annual inflation rate of 5 percent for 10 years, BLM wrongly uses a formula calculating compensation of 5 percent of the total of $13.90 per AUM. The formula reads "5.7 x ($13.90 x 5% x 10) = $997.43. Aug. 16, 2005, memorandum at 2. The formula should read 5.7 x 13.90 = y for the first year, and then 5.7 x 13.90 plus .05 y for the second year, and so on. The mathematical formula used by BLM in the memorandum cannot be employed on remand.

II. To The Extent The Ranch Has Appealed BLM's Conclusions Approving The POD And APDs, The SD Decision Is Affirmed.

We turn now to issues Adami has raised regarding the adequacy of BLM's approval of the POD and APDs, under NEPA or other authority, outside of its challenge to the SRHA bond. In doing so, we note the Ranch's argument that a final conclusion was required on that bond prior to approval of the POD and APDs. If that proposition is correct, the consequence would be that the August 25, 2005, approval decision was premature and would have to be set aside. We agree that the preferable course would have been for BLM to issue a bond approval decision to Adami prior to approval of the PODs and APDs. Our consideration of the merits with respect to the POD approval is thus complicated by the fact that, based upon facts not clear to us, it may be that the POD approval was premature, in which case our discussion could be an advisory opinion. We find no basis upon which to presume that BLM would issue a different conclusion with respect to the POD and APDs if it had to go through the approval process anew. Moreover, the record includes full briefing by Adami on SDR and again to this Board. As we stated in *BTU Empire Corporation*, 172 IBLA 206, 221 (2007), "[n]o purpose would be served by forcing the parties through a jurisdictional maze to come back to the point where the arguments lie today." Accordingly, we will not set aside BLM's approval of the POD merely because BLM had not issued a final decision on the Ranch's challenge to bond adequacy under 43 C.F.R. § 3814.1(d), and proceed to address Adami's challenge to it, while noting that continued operation under the approved POD and APDs is subject to an approved bond posted by Lance.

Adami challenges the analysis of wastewater disposal impacts set forth in the EA, and, in particular, the fact that the EA considers maximum water production from CBNG development at 30 gallons per minute (gpm). Adami asserts:

> The Kennedy Oil NPDES permit application states that, "Previous pumping of nearby CB[NG] wells drilled into the Big George coal seam showed initial rates of 65 gallons per minute." The Water Management plan states the volume of water discharged will be an average of 30 gpm and a maximum of 60 gpm. However, the EA in 4.4 states that the maximum water production will be only 30.0 gpm.

SOR at 8-9. The Ranch alleges that the EA has failed to "analyze and plan for the volumes of CBM wastewater that will actually be produced," *id.* at 8, and that the document ignored objective data showing that nearby wells produce almost twice as much water as that addressed in the EA. *Id.* at 9.

The SD decision did not address this precise issue because it was not raised in the Ranch's request for SDR. *See* Sept. 15, 2005, Request for State Director Review and Notice of Appeal. Adami cannot raise this issue for the first time on appeal from

the SD decision. In any event, BLM explains that the Kennedy Water Management Plan and water balance/analysis, relying on an average flow of 30 gpm and a maximum flow of 60 gpm, show that there will be no discharges of water from the pits and reservoirs. *See* EA, § 4.4. Therefore, contrary to appellant's assertion, BLM's decision on the impacts of wastewater disposal did have a basis in fact. Without more explanation of the Ranch's arguments, we find no error in BLM's approval of the decision. "Mere differences of opinion" provide no basis for reversal of a FONSI/DR. *Rocky Mountain Trials Association*, 156 IBLA 64, 71 (2001).

Adami presents a number of arguments regarding other CBM permits not in the record before us, alluding to differences in the various applications for permits, the water management plan, and the EA analysis with respect to water wells and impoundments, to claim that the uncertainty in wastewater management from the proposed CBNG development poses a potential significant harm. The Ranch objects to BLM's deference to the Wyoming Department of Environmental Quality (WDEQ), which is responsible for issuing National Pollution Discharge Elimination System (NPDES) permits (required by section 402 of the Clean Water Act (CWA), 33 U.S.C. § 1342 (2000)). BLM contends that it is WDEQ that will issue such NPDES permits and that during this process WDEQ will assess the ability of the various water control reservoirs at issue to function as asserted to contain produced water. Adami objects to this approach and complains of a number of adverse consequences that will flow to the Ranch and other resources if the reservoirs are incapable of containing the water.

The Ranch has failed to show error in BLM's decision to approve the POD and APDs. BLM has explained that water discharge cannot occur until the final, approved NPDES permit has been issued and BLM has had an opportunity to make the appropriate adjustments to its environmental analysis and conclusions. BLM considered this issue in addressing a separate request for SDR submitted by non-parties to this appeal in challenging the POD. BLM explained:

> It is the responsibility of the operator to provide a water balance with their NPDES permit application demonstrating that water losses attributable to infiltration and evaporation are at least equivalent to the predicted discharge rate plus the volume of water that would enter the reservoirs (fall directly onto the surface of the reservoirs and some minor contribution of surface runoff around the reservoirs) during a 100-year/24 hour storm event. WDEQ will review the water balance information and verify that the water will be contained in the reservoirs. If actual field conditions change or are different as predicted in the NPDES permit application, WDEQ will require a permit amendment.

> As previously stated, surface discharge of produced water from Federal oil or gas wells cannot occur until the WDEQ approves the NPDES permit and the operator has submitted a copy of the final permit to BLM as required by Onshore Order No. 7. BLM will then determine if the NEPA document has sufficiently disclosed environmental effects, or if further analysis is required.

SDR WY-2006-02 (Decision addressing SDR Request of Aug. 25, 2005, Decision issued for Imada POD, submitted by Powder River Basin Resource Council and EarthJustice at unpaginated 5). Adami has not shown that this approach is insufficient to ensure appropriate reservoir management. While we would not normally cite a decision on a separate SDR request in support of BLM's conclusion, we do so here given that Adami did not sufficiently address the issue in its own SDR request and because BLM's analysis there supports our logic in affirming the SD decision before us.

Finally, Adami repeats several arguments raised in its request for SDR. *See* SDR Request at 4-5. There, the Ranch claimed that the decision allows two trenches for one-quarter of a mile down "Schoonover Road," which could be avoided by a "road bore" to eliminate one of the trenches. *Id.* at ¶ 1. Second, the Ranch claimed that the decision allows a trench along a steep portion of Indian Creek, instead of along a road corridor. *Id.* at ¶ 2. Adami claimed that both decisions created unnecessary resource damage. Third, the Ranch argued that "wildlife friendly" fences envisioned in the POD approval would be harmful to calves. *Id.* at ¶ 3. Finally, the Ranch claimed that there "is no provision for monitoring the well with telemetry" which would minimize surface disturbance. *Id.* at ¶ 4.

As to the first paragraph, Kennedy responded to this point by submitting, as its Exhibit 15, a pipeline agreement between the Ranch and Kennedy. Kennedy Motion to Dismiss and Answer at unpaginated 5. Kennedy states "we do not understand the allegation that there are pipelines in locations other than as agreed." *Id.* Adami has not responded to this explanation regarding the trenches along Schoonover Road, and in the absence of further information we have no basis on which to overturn the SD decision.

The SD decision substantively responded to the points raised in ¶¶ 2-4. BLM explained that it required Kennedy to place erosion blankets on the steep slopes of Indian creek to control erosion. SD decision at 4. BLM also explained the need for wildlife-friendly fences around the water-collection reservoirs, and denied knowledge of danger to livestock, or incidence of harm to calves from such fences. *Id.* Finally, BLM explained that the use of telemetry "is an option when facilities are located in sensitive wildlife habitat areas" not present on the Adami Ranch. *Id.*

Adami has repeated these three arguments, largely verbatim, without any explanation of error in or response to BLM's SDR decision on these topics. SOR at 12-13. It is not enough for an appellant to repeat a complaint to which BLM has responded; the appellant must affirmatively describe the error in the decision from which it appeals. *In re Stratton Hog Timber Sale*, 160 IBLA 329, 332 (2004); *see also Edward C. Faulkner*, 164 IBLA 204, 209 (2004). Accordingly, we consider the Ranch's repetition of its arguments, to which it has received a response from the Acting Deputy State Director, no further.

When an agency issues a Decision Record and Finding of No Significant Impact based on an EA, that decision will be deemed to comply with NEPA if the record demonstrates that the agency has considered all relevant matters of environmental concern, taken a hard look at potential environmental impacts, and made a convincing case that any potentially significant impact will be reduced to insignificance by imposing appropriate mitigation measures. *National Wildlife Federation*, 170 IBLA 240, 244 (2006). To the extent the Ranch's arguments meant to be a challenge to the SD decision under NEPA, we affirm that decision for the reasons stated. Otherwise, the Ranch has not met its burden to show error in the decision on appeal. *Rainer Huck*, 168 IBLA 365, 394 (2006).

III. We Have No Jurisdiction Over Adami's Arguments Regarding The Wyoming Split Estate Act.

Finally, we briefly address the Ranch's claims that Kennedy, or BLM, violated the State of Wyoming's Split Estate Act, W.S. 30-5-401 through 30-5-410 (2005). Adami argues that the Act requires good faith negotiations to reach a surface use agreement and that failure to secure an agreement requires the operator to post appropriate bonds with the Wyoming Oil and Gas Conservation Commission. The legislation enacted by the 58th Wyoming Legislature, known as the "Split Estates-Procedures for Oil and Gas Operations" Act, SEA0045, imposes bonding obligations on oil and gas operators. It does not impose obligations on BLM and we have before us no allegation of error on BLM's part in implementing it. We have no jurisdiction to consider Adami's complaints about compliance with that law. Any commentary by IBLA at this point would surely constitute advisory opinion. *AZ Spectrum Wireless*, 161 IBLA 311, 316 (2004).

Moreover, Adami and Lance, to the extent they have grievances against each other under the Wyoming statute, have recourse to the Wyoming Oil and Gas Conservation Commission. An undated *Casper Star Tribune* news article in the file, entitled "State Hears First Split-Estate Case," indicates that Adami and Kennedy were pursuing their rights in that forum prior to Lance's acquisition of Kennedy's operating rights. We would not interfere in that proceeding on behalf of any party, be it Kennedy, Lance, or the Ranch.

Conclusion

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 decision appealed from is vacated to the extent it addressed the adequacy of Kennedy's SRHA bond. The decision appealed from is affirmed to the extent the appeal is a challenge to the merits of the SD decision approving the Imada POD and APDs. The part of the appeal based on an alleged failure on BLM's part to implement the Wyoming Split Estate Act is dismissed. The matter is remanded to BLM for consideration of an SRHA bond that Lance has posted or posts in the future in compliance with 43 C.F.R. § 3814.1.

/s/
Lisa Hemmer
Administrative Judge

I concur:

/s/
Geoffrey Heath
Administrative Judge