

KIRK GREENE

IBLA 76-141

Decided March 1, 1976

Appeal from decisions of the Nevada State Office, Bureau of Land Management, rejecting in part geothermal lease offer N-11692 and rejecting in its entirety geothermal lease offer N-11693.

Remanded.

1. Geothermal Leases: Applications: Generally -- Administrative Procedure: Decisions

When the Bureau of Land Management rejects geothermal lease offers on the mistaken basis that the lands embraced within the offers are situated within a particular critical natural area excluded from leasing, but in fact the lease offers are for lands not within that critical natural area but may be in another, the cases must be remanded for further consideration because the decisions fail to disclose a proper basis for rejection of the lease offers.

APPEARANCES: Kirk Greene, pro se.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Kirk Greene has appealed from decisions of the Nevada State Office, Bureau of Land Management (BLM), rejecting either totally or in part his respective geothermal lease offers for lands in T. 33 N., R. 24 E., M.D.M., Pershing County, Nevada.

The State Office rejected appellant's offers for the stated reasons that, "The completed Environmental Analysis Record [EAR] has recommended against leasing the lands described by your application because the lands lie within a critical natural area (Black Rock Desert)."

[1] In June of 1975 the BLM completed its preparation of an EAR for the Buffalo Hills Planning Unit in Nevada. Based on the findings in the EAR, it was determined that a geothermal leasing

program in the Black Rock Desert could adversely affect the area, causing degradation to existing landscape, archeological and historical values. Accordingly, the drafters of the EAR recommended that the area be excluded from leasing. On page 85 of the EAR, the lands within the Black Rock Desert to be excluded from leasing are described. We note that appellant's geothermal lease offers are for lands in T. 33 N., R. 24 E., a township not listed on page 85. Therefore, the cases should be remanded to the BLM because the State Office decisions fail to disclose a proper basis for rejection of appellant's lease offers.

Upon further examination of the EAR, it appears that the lands within appellant's lease offers may be subject to exclusion from leasing based on the fact that the township involved is crossed by historic trails. The EAR recommends that lands extending from 1 mile from the center line of several trails, and from 1 to approximately 3 miles south of the center line for a 13-mile segment of the Fremont Trail, be excluded from mineral leasing activities (EAR at 91, Map 12). If the BLM applies this exclusion to appellant's lease offers on the remand of these cases, we direct the State Office to incorporate into its decisions adequate citations to relevant portions of the EAR which set out the basis for the recommended action. In the event the State Office deems that the EAR does not include all relevant matter on this subject, it may cite such additional material as it considers pertinent. This is necessary in order to properly notify the appellant of the rationale behind the State Office decisions. Should appellant appeal from such decisions, he will have the burden of presenting an affirmative showing that exploration and development activities will not adversely affect the subject area. Rosita Trujillo, 20 IBLA 54, 57 (1975).

Until the State Office acts on remand, it seems premature to discuss the adequacy or inadequacy of the possible factual bases for its decisions.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are remanded for further consideration by the Nevada State Office.

Martin Ritvo
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN CONCURRING:

The purpose of this concurring opinion is hopefully to obviate another appeal record which does not afford an informed factual basis for its resolution.

I do not believe that an appellant should be required to wade through a volume of material to ascertain the true basis of a decision rejecting his applications. If appellant had ferreted the historic trails basis for rejection out of the EAR, however, he might have presented an "affirmative showing" by challenging the reasonableness of the EAR's recommendation (at p. 91):

* * * It is recommended that all the playa area between the trail alignment and the Western Pacific railroad right-of-way be excluded from lease. * * * The excluded area for this segment of the [Fremont Route] varies from one to approximately three miles in width south of its center line.

On the merits, 3 miles seems an excessive protective zone if other facts in the EAR are brought to bear on the issue: in places the trails cannot be located, nor can the exact routes (EAR at 91), so there is no physical remnant of the trails that can be destroyed, eroded or scarred; the playa is so flat (EAR Appendix V at 3) that no runoff or erosion damage to the trails from geothermal development activity should be expected, and certainly not from 3 miles away (e.g., EAR at 77); no wilderness or scenic purity will be lost in an area already containing roads and the railroad line in proximity. It seems that lease operations could proceed well within 3 miles of the trails without adversely affecting the value which the no-lease recommendation was designed to protect.

The 3-mile limit conceivably might be justifiable, and an appellant raising the challenge outlined above might be reasonably denied a lease, even with protective stipulations, on remand, but the justification does not jump out of the EAR. ^{1/} The State Office decisions should discuss the reasonableness of the EAR recommendation and why it is adopted, if it is. Such an exercise in the first instance might have led to the discovery that it was trails and not the critical natural area which was at issue in these applications.

^{1/} Perhaps the 3-mile restriction is based on the EAR's classification of 0-3 miles as "the foreground zone" in which the visual impact of development would be most evident (EAR at 50). This is my speculation, however, and is wholly separate from the issue of whether such a classification for leasing or not leasing would be a reasonable exercise of discretion in the portion of the playa under application here.

I agree with the majority that the State Office's failure to set out a reasoned basis for the no-lease determination on these applications moots the applicant's failure to make an "affirmative showing" that his operations would not adversely affect the value sought to be protected. Cf. Rosita Trujillo, 20 IBLA 54, 57 (1975). Even without such a showing, in this case, however, I feel compelled to remand for the State Office to document the reasonableness of a 3-mile limit on this portion of the playa. Alternatively, the State Office could adjudicate the offers by examining the sections applied for in light of a less restrictive protective area for the trails, whose protection is a legitimate goal embraced within the Bureau's geothermal leasing program.

Such a remand is not a way of substituting this Board's judgment for that of the State Office, but is made with the hope of establishing State Office decisions that represent reasoned and informed treatment of the competing interests involved. See Boulder City Aero Club, 21 IBLA 343 (1975); Apache Oro Co., 16 IBLA 281, 283 (1974); Vern A. Venable, 9 IBLA 294 (1973). The Secretary's discretion is better exercised with the generation of an adequate, explicit record in support of such decisions. If the offers are to be rejected again, hopefully the decisions doing so will reflect fully the reasons why a 3-mile area is required to safeguard the Fremont trail.

Frederick Fishman
Administrative Judge

