

Editor's note: Reconsideration denied by order dated Jan. 19, 1979

STATE OF CALIFORNIA

IBLA 76-757

Decided December 20, 1977

Appeal from decision of the California State Office, Bureau of Land Management, denying application to amend Indemnity Clear List 350, S 5578 and CA 884.

Reversed and remanded with instructions.

1. Geothermal Resources -- Lieu Selections -- Mineral Lands: Mineral Reservation -- School Lands: Indemnity Selections -- School Lands: Mineral Lands -- State Selections

Under 43 U.S.C. § 852(a)(1) (1970), as amended by sec. 25 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1024 (1970), a state may select lands with geothermal potential as indemnity for base lands lost by it from its grant for common schools without a reservation to the United States of the geothermal rights therein, provided that these base lands also have geothermal potential.

2. Geothermal Resources -- Lieu Selections -- Mineral Lands: Mineral Reservation -- School Lands: Indemnity Selections -- School Lands: Mineral Lands -- State Selections

Per sec. 25 of the Geothermal Steam Act of 1970, geothermal resources are treated under 43 U.S.C. § 852(a) (1970) as other leasable minerals, rather than as oil and gas, so that a state need not submit as base for indemnity selection of lands which have been classified by the Geological Survey as being within a "KGRA" (known geothermal resource area) lands which also are classified as

KGRA, but instead need only submit base lands classified by GS as having geothermal potential.

3. Geothermal Resources -- Lieu Selections -- Mineral Lands: Mineral Reservation -- Public Lands: Jurisdiction Over -- School Lands: Indemnity Selections -- School Lands: Mineral Lands -- State Selections

Where BLM has issued a clear list giving a state title to lands selected as indemnity for lost school lands but erroneously reserving to the United States geothermal rights to these selected lands, these geothermal rights are still within the power of the United States to dispose of, and the Department still exercises jurisdiction over them, so that the Board of Land Appeals may correct BLM's error by ordering that these rights be given to the state by deleting the reservation thereof in the clear list.

4. Geothermal Resources -- Lieu Selections -- Mineral Lands: Mineral Reservation -- School Lands: Indemnity Selections -- School Lands: Mineral Lands -- State Selections

Where the record indicates that there may be gross disparity between the value of lands selected by a state as indemnity for lost school lands and the value of base lands submitted by the state in support of the selection, the matter will be remanded to the BLM for revaluation of the lands. If the revaluation reveals a gross disparity, the BLM shall withhold further action until judicial resolution of the propriety of the "grossly disparate value" policy.

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OPINION BY ADMINISTRATIVE JUDGE STUEBING

On July 27, 1976, the California State Office of the Bureau of Land Management (BLM) issued a decision which denied the application of the State of California to amend Indemnity Clear List Number 350,

dated April 21, 1975, by substituting nongeothermal lands for the geothermal base lands presently included therein. BLM denied this application because, it said, the Department was without jurisdiction to revoke or cancel the selection, since title to the selected lands had passed upon the previous approval of the clear list by the State. The State has appealed from this decision.

On October 18, 1972, the State, by and through the State Lands Division (SLD) of the California State Lands Commission (SLC), filed a state indemnity selection application, pursuant to R.S. §§ 2275 and 2276, February 28, 1891, as amended by the Acts of August 27, 1958, September 14, 1960, and June 24, 1966, 43 U.S.C. §§ 851 and 852 (1970), to receive title to certain public lands listed therein and designated as "selected lands," asserted to be unappropriated and nonmineral in character. These lands were selected in lieu of (as indemnity for) certain other lands, listed therein and designated as "base lands," asserted to be lands lost to the State from its grant for common schools. This application was assigned serial number S 5578 by BLM.

On December 27, 1973, SLD filed another state indemnity selection application for a certain 40 acres of public land (the "selected lands") asserted to be nonmineral in character, in lieu of 40 acres of land (the "base lands") asserted to be lands lost to the State from its grant for common schools. This application was assigned serial number CA 884.

In view of the restrictions placed on selection by states of lands which are mineral in character by 43 U.S.C. § 852(a)(1), supra, 1/ BLM,

1/ "§ 852. Selections to supply deficiencies of school lands

"(a) The lands appropriated by section 851 of this title, shall be selected from any unappropriated, surveyed or unsurveyed public lands within the State where such losses or deficiencies occur subject to the following restrictions:

"(1) No lands mineral in character may be selected by a State except to the extent that the selection is being made as indemnity for mineral lands lost to the State because of appropriation before title could pass to the State;

"(2) No lands on a known geologic structure of a producing oil or gas field may be selected except to the extent that the selection is being made as indemnity for lands on such a structure lost to the State because of appropriation before title could pass to the State;

"(3) Land subject to a mineral lease or permit may be selected if none of the land subject to that lease or permit is in a producing or producible status, subject, however, to the restrictions and conditions of the preceding and following paragraphs of this subsection * * * ."

on January 28 and February 6, 1974, requested from the Geological Survey (GS) a report as to the mineral resources of the lands included in state indemnity selection applications S 5578 and CA 884, respectively. On April 2, 1974, GS reported that all of the lands included in state indemnity selection application S 5578, both as base and as selected lands, are "valuable for geothermal steam and associated geothermal resources." GS also reported that the lands selected in application CA 884 are "valuable for geothermal steam and associated geothermal resources," but that the base lands therein are not. Apparently, the contents of these reports were not made known to the State.

On April 17, 1974, BLM sought advice as to whether GS considered the selected lands to be within the limits of a KGRA ("known geothermal resource area") as defined in 43 CFR 3200.0-5(k). 2/ BLM did not inquire about possible KGRA status of the base land. On May 3, 1974, GS reported that it "considers the selected lands * * * to be within an undefined addition of the Geysers Calistoga KGRA." No reference was made to the geothermal potential of the base land.

Also on April 17, 1974, BLM sent a memorandum to the Office of the Field Solicitor of the Department of the Interior seeking to determine whether the geothermal character of the lands selected in these applications prevented their transfer to the State. This memo advised the Field Solicitor that the selected lands are within a de facto KGRA, and that GS had reported that all of the base and selected lands in both applications are prospectively valuable for geothermal steam and associated geothermal resources. 3/ The memo pointed out to the Solicitor that section 25 of the Geothermal Act of 1970, 30 U.S.C. § 1024

2/ 43 CFR 3200.0-5(k) provides as follows:

"Known geothermal resource area' or 'KGRA' means an area in which the geology, nearby discoveries, competitive interests, or other indicia would, in the opinion of the Secretary, engender a belief in men who are experienced in the subject matter that the prospects for extraction of geothermal steam or associated geothermal resources are good enough to warrant expenditures of money for that purpose."

3/ The BLM's representation that all of the base and selected lands are prospectively of geothermal value was incorrect, since GS found that the base lands in CA 884 are not geothermal. BLM's conclusion at this time that the selected lands are "within a de facto KGRA" was based on its unofficial presumption that geothermal lease offers, which had been topfiled by unidentified parties subsequent to the State's application, were "discoveries" pursuant to 43 CFR 3200.0-5(k)(2), rather than on the official determination of their KGRA status by GS, which was not issued until May 3, 1974.

(1970),^{4/} provides that all laws which prevent or restrict the disposal of mineral lands because of their mineral character shall be deemed to include geothermal resources, "which must either be reserved, or [which] must prevent or restrict the disposal of such lands." BLM asked the Field Solicitor whether the State's applications must be rejected because this language dictates that geothermal land cannot be transferred to the states as an indemnity selection under 43 U.S.C. §§ 851 and 852, supra.

On May 3, 1974, the Field Solicitor sent BLM a letter opinion which advised that the State's applications could not be rejected solely because it selected known geothermal lands:

In reviewing your suggestion to reject the State's applications if the USGS reports show that the selected lands are in a "true" KGRA, we are of the opinion that the applications for this reason alone cannot be rejected since KGRA status in and of itself does not prohibit the State's selection under the provision of 43 U.S.C. § 852(a)(1) and (2). State of Utah, 71 I.D. 392 (1964). Nevertheless, in that instance, the State will have to give you KGRA lands as base lands or consent to a reservation of the geothermal resources under the Act of July 17, 1914, or you can then reject the application. [Emphasis added.] (See State of Arizona, A-28752 71 I.D. 49 (1964).)

On June 13, 1974, BLM issued a decision which allowed these applications by authorizing the State to publish notice of its selection, subject to a reservation to the United States of rights to "all geothermal steam and associated geothermal resources" in all the lands

^{4/} This section provides as follows:

"Disposal of land laws: reservation of geothermal resources and restriction on disposal of lands with geothermal resources; conveyances prior to December 24, 1970, unaffected.

"As to any land subject to geothermal leasing under section 1002 of this title, all laws which either (a) provide for the disposal of land by patent or other form of conveyance or by grant or by operation of law subject to a reservation of any mineral or (b) prevent or restrict the disposal of such land because of the mineral character of the land, shall hereafter be deemed to embrace geothermal steam and associated geothermal resources as a substance which either must be reserved or must prevent or restrict the disposal of such land, as the case may be. This section shall not be construed to affect grants, patents, or other forms of conveyances made prior to December 24, 1970."

43 U.S.C. § 1002 (1970) provides that all lands administered by the Secretary of the Interior are "subject to geothermal leasing." The selected lands are under the Secretary's administration and thus are governed by Section 25.

selected in both applications. On July 26, 1974, the State submitted proof that it had published notice of its selection of the land, thus indicating that it had no objection to receiving title containing a reservation of all geothermal rights therein to the United States. However, the State apparently had no notice at this time that GS had indicated that the base lands in S 5578 also have geothermal potential, and thus was not in a position to realize that the imposition of this reservation might be unfair.

Subsequently, BLM requested that the State revise its offered base lands so that their value would be closer to the actual value of the selected lands. The State revised its application accordingly on February 26, 1975, by changing some of the base lands listed therein. The BLM requested that GS report to it concerning the geothermal value of these new base lands, and it responded on April 2, 1975, that most of these new base lands were also potentially valuable for geothermal resources. 5/ The new base lands were not identified as being within a KGRA.

On April 21, 1975, BLM issued Clear List 350, along with an accompanying document setting out the terms and conditions of the transfer of the selected lands to the state. This document contains a reservation to the United States of rights to the geothermal resources in these selected lands:

Excepting and reserving to the United States all the geothermal steam and associated geothermal resources in the land, and to it, or persons authorized by it, the right to prospect for, mine and remove such deposits, from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of December 24, 1970, 84 Stat. 1566 (P.L. 91-581) [The Geothermal Steam Act of 1970].

The document also advises the State for the first time that base lands in its applications have geothermal potential: "Reports have been received from the Geological Survey indicating that both the selected land and the base lands are valuable for geothermal steam. The selected lands are within an undefined KGRA." 6/

5/ The new base lands consisted of 1466.15 acres, of which only 290.94 acres in T. 13 S., R. 21 E., S.B.M., California, were reported by GS to be "without value for leasable minerals," clearly meaning, in the context of the memo, that they have no geothermal value.

6/ This statement is in error as before. Cf. note 3/ supra. All of the base lands (40 acres) included in application CA 884 and 290.94 acres in S 5578, had been found by GS to have no geothermal value.

On October 21, 1975, and again on December 29, 1975, SLD wrote BLM seeking to substitute nongeothermal base lands for those appearing on Clear List 350, in order to prevent "the possible loss of geothermal resources due the State." At this time, the State had apparently realized that it gave up base lands with geothermal potential, but that it was allowed by BLM to receive its selected lands only with a reservation of geothermal resources therein.

BLM responded to SLD's request to amend the clear list to correct this apparent inequity by issuing a decision holding that the State, by approving the clear list, had accepted title to the selected lands, since this approval is equivalent to a patent, thus depriving the Department of the Interior of jurisdiction over the matter. Therefore, BLM held, it was without authority to amend the clear list by substituting new base lands. The State has appealed from this decision.

[1] When states in which there are public lands entered the Union, Congress set aside certain sections in each township for the support of their public schools. Title to these school lands could not pass to the states until after survey of the granted lands. Prior to survey, some of these school lands were appropriated for other uses under the public land laws and title thereto passed irrevocably to parties other than the states or, in some instances, the land was devoted to federal use. Thus, certain of the lands designated as school lands were lost to the states. Congress accordingly enacted sections 2275 and 2276 of the Revised Statutes to give the states the right to select other public lands of equal acreage as indemnity for these lost school lands.

The history of the indemnity selection process is set out, and the restrictions on state selection of mineral lands are discussed in State of Arizona, 71 I.D. 49 (1964). That appeal deals with whether a state may select mineral lands as indemnity for lost school lands (base lands), and, if so, whether rights to these minerals must be reserved to the United States. In that case, some of the decisions appealed from provided that Arizona could select mineral lands as indemnity only if it filed waivers of all mineral rights therein. The basis of this requirement was that the Act of July 17, 1914, 30 U.S.C. § 121 et seq. (1970), 7/ permits surface entries under the nonmineral laws, including

7/ The pertinent portions of sections 1 and 2 of the Act of July 17, 1914, 30 U.S.C. § 121 and 122 (1970), are as follows:

"Section 1. Lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on

State-indemnity selection provisions, on lands containing certain valuable minerals, only if such minerals are reserved to the United States. The other decisions on appeal permitted Arizona to select mineral lands without requiring the imposition of a mineral reservation, where Arizona had offered lost mineral lands as the basis for the indemnity selection. *Id.* at 50. Thus, in State of Arizona, the issue of whether R.S. 2275 and 2276, as amended, 43 U.S.C. §§ 851 and 852, supra, allow the acceptance of mineral base lands for mineral selected lands, or whether instead all mineral rights in selected mineral lands must be reserved to the United States, was squarely presented.

The Arizona decision provides as follows:

Until recently, only nonmineral land could be selected as indemnity school land except as provided in the Act of July 17, 1914, supra. However, sections 2275 and 2276 of the Revised Statutes were amended by the Acts of August 27, 1958 and September 14, 1960 * * * to provide generally that a State may select mineral land as indemnity for numbered school sections if the land for which indemnity is being sought [is] mineral in character. Thus, before mineral land may be granted to a State as indemnity for numbered school sections without a mineral reservation to the United States, it must appear that the base lands for which indemnity is sought are mineral in character.

* * * * *

Almost all of the selected lands in these * * * applications are classified as prospectively valuable for oil and gas, and the * * * decisions required [Arizona] to file a mineral waiver of oil and gas deposits in the lands included in these five applications. This requirement was

fn. 7 (continued)

on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same. * * *

"Section 2. [U]pon satisfactory proof of full compliance with the provisions of the laws under which the location, selection, entry, or purchase is made, the locator, selector, entryman, or purchaser shall be entitled to a patent to the land located, selected, entered, or purchased, which patent shall contain a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same, such deposits to be subject to disposal by the United States only as shall be hereafter expressly directed by law * * *." [Emphasis supplied.]

correct at the time only if the base lands were found to be nonmineral in character.
State of Arizona, A-27743 (August 16, 1961). [Emphasis supplied.]

Id. at 50-52. The decision held that, where Arizona had offered mineral lands as base, it was improper for BLM to reject its applications on the grounds that it had refused to file mineral waivers, since it was entitled to receive title to the selected mineral lands without reservation. The matter was remanded in order to grant the applications without requiring a mineral waiver where GS had reported that the base lands offered by Arizona were potentially valuable for oil and gas, and in order for GS to determine the oil and gas potential of the base lands where it was unknown. Id. at 52-53.

In 1970, Congress enacted the Geothermal Steam Act, 30 U.S.C. § 1001 et seq. (1970), in order to control the leasing and disposal of federal lands with geothermal potential. Section 25 of this Act, 30 U.S.C. § 1024, supra, 8/ provides that all laws which prevent or restrict the disposal of lands administered by the Secretary because of the mineral character of the lands shall also be deemed to embrace geothermal resources as a substance which either must be reserved or which also must prevent or restrict the disposal of such lands. Title 43 U.S.C. § 852, supra, is a law which restricts the disposal of lands administered by the Secretary because of their mineral character. As such, per section 25 of the Geothermal Act, it must also be deemed to restrict the disposal of geothermal federal lands in the same manner as it restricts disposal of mineral lands: "No lands mineral [geothermal] in character may be selected by a State except to the extent that the selection is being made as indemnity for mineral [geothermal] lands lost to the State because of appropriation before title could pass to the State."

It is apparent, as discussed in State of Arizona, supra, that the amendments of 1958 and 1960 changed the previous rule, set out in sections 1 and 2 of the Act of July 17, 1914, supra, that mineral lands could be selected as state indemnity only if the mineral rights were reserved to the United States. Section 25 of the Geothermal Act in turn amended this new rule so that it treats lands with geothermal potential in the same manner as it treats mineral land. Accordingly, under 43 U.S.C. § 872(a)(1), supra, a state may select as indemnity and receive full title to lands which are geothermal in character, provided that it offers geothermal lands as base, just as in State of Arizona, supra, Arizona was entitled under this section to select and receive full title to lands with oil and gas potential since it gave up base lands with oil and gas potential. 9/ If base lands

8/ Cf. note 4/, supra.

9/ It is important to note that the selection by Arizona of these lands was governed by 43 U.S.C. § 852(a)(1) and not by § 852(a)(2).

which have no geothermal potential are offered by a state, the amendments of 1958 and 1960 would not apply, and the terms of sections 1 and 2 of the Act of July 17, 1914, supra, would allow the selection only if the state accepts a reservation of the geothermal resources of the selected lands. 10/

Applying these conclusions to the present case, since GS described the selected lands in both applications as "valuable for geothermal steam and associated geothermal resources," it is apparent that they are geothermal in character. Thus, under 43 U.S.C. § 852(a)(1), they may be selected only as indemnity for geothermal base lands lost to the State unless a geothermal reservation is imposed. Since, in application CA 884, GS reported that the lost base lands are without geothermal value, and thus are not geothermal land within the meaning of 43 U.S.C. § 852(a)(1), supra, as amended by the Geothermal Act, supra, BLM properly reserved to the United States rights to geothermal resources in the lands selected therein. However, it is also apparent that BLM erred by retaining a reservation of geothermal rights in all the lands selected by the State in application S 5578, where it offered in return base lands all of which except 290.94 acres in T. 13 S., R. 21 E., S.B.M., California, were described by GS as "valuable for geothermal steam and associated geothermal resources." Since this description indicates without doubt that most of these base lands are geothermal within the meaning of 43 U.S.C. § 852(a)(1), supra, the State was entitled to receive title to all of the selected lands without a reservation of geothermal resources of the selected lands, except 290.94 acres.

[2] Our conclusion that a state is entitled to select geothermal lands as indemnity without a reservation of the rights to the geothermal assets to the United States, provided that it offers base lands also having geothermal potential, is very close to that of the Field Solicitor in his opinion letter of May 3, 1974, to BLM, supra. The only difference is that the Field Solicitor seems to view 43 U.S.C. § 852(a)(1) as requiring submission of base lands which have been classified by GS as having equivalent geothermal potential to that of the selected lands. The Field Solicitor advised BLM that it should

fn. 9 (continued)

Although they were known to be valuable for oil and gas, they were not "on a known geologic structure of a producing oil or gas field." Their potential for oil and gas was a mineral asset, thus making them "mineral in character" and bringing them within the purview of § 852(a)(1).

10/ Sections 1 and 2 of the Act of July 17, 1914, supra, are laws "which provide for the disposal of land * * * subject to a reservation of any mineral," and therefore, per section 25 of the Geothermal Act, supra, are "deemed to embrace geothermal steam and associated geothermal resources as a substance which must * * * be reserved."

give the State the selected lands, which are within a KGRA, without a geothermal reservation, only if the State offered base lands which are also within a KGRA. We must ascertain whether the Field Solicitor is correct.

Certainly, all lands with geothermal potential are not also within a KGRA. A KGRA, as defined in 43 CFR 3200.0-5(k), supra, only includes specific types of lands with potential geothermal value. GS described the base lands here as "valuable for geothermal steam and associated geothermal resources," without specifying whether they meet the requirements of a KGRA. Lands may fit this description without necessarily being within a KGRA.

However, GS never stated that the base lands are not within a KGRA, and probably has never concerned itself with this possibility, since these lands are and have been for some time held by private owners. Thus, GS has no ready source of information regarding competitive interest in them and/or other indicia of their KGRA status. The original statement by GS was that both the selected and base lands are "valuable for geothermal steam and associated geothermal resources." The only reason that GS later identified the selected lands as being within a KGRA was that BLM sent it an inquiry addressing only the KGRA status of the selected lands. GS had no reason to believe that the possible KGRA status of the base lands was in question, as BLM never asked. Its failure to classify the base lands as such is therefore without significance.

We do not know from the present record whether the base lands submitted by the State are within a KGRA. However, even if GS does not classify the base lands as being within a KGRA, on a purely legal basis this fact would not prevent the State from receiving title to the selected lands without a geothermal reservation under the state indemnity selection laws, since the record clearly indicates that GS regards the base lands as having geothermal potential. Nothing in 43 U.S.C. § 852(a)(1), supra, justifies comparing the degrees of mineral potential of the base and selected lands. The statute requires only that mineral lands be submitted as base if mineral lands are selected as indemnity therefor. If, as here, a state offers base lands which are found by GS to contain the same mineral as contained in the selected lands, it is entitled to receive full title to the selected lands, even if the degrees of mineral potential of the base and selected lands vary.

In contrast, the comparative degrees of oil and gas potential of the base and selected lands do matter, since 43 U.S.C. § 852(a)(2) provides that a state may not select land classified by GS as a "KGS" (known geologic structure of a producing oil or gas field) unless it submits KGS base lands. Congress intended by this section to prevent the states from acquiring lands classified by GS as being on a producing oil and gas structure unless they offer base lands which are similarly classified. Congress could easily have applied this policy to

all minerals. It did not, electing instead to adopt a less restrictive policy concerning the selection of mineral lands other than oil or gas lands.

This view is supported by the opinion of the Attorney General in Utah Indemnity Selections, Cane Creek Potash Area, 70 I.D. 65 (1963). The opinion observes that 43 U.S.C. § 852(a)(2) provides that lands on a KGS may not be selected as indemnity unless the base lands offered are also on such a structure. The opinion notes further that:

[T]his scheme as to oil and gas lands was enacted deliberately and * * * evidences a congressional policy to restrict the number of indemnity selections of known oil and gas lands. Neither the 1958 amendment to [43 U.S.C. § 852] nor anything in the legislative history manifests a parallel policy as to * * * solid minerals.
[Emphasis supplied.]

Id. at 69.

Except for lands which are on the known geologic structure of a producing oil or gas field, a state offering base lands determined by GS to be mineral in character is entitled to selected lands valuable for this mineral, even if the selected lands may have been classified by GS as having greater potential for that mineral than the offered base lands. Interpreting 43 U.S.C. § 852(a)(1) like § 852(a)(2), that is, to allow selection of lands classified as having probable mineral potential only if base lands having an equivalent or similar potential are offered, would render the difference between these sections nugatory and would defeat Congress' purpose in enacting two different sections, one of which relates exclusively to oil and gas lands.

Moreover, such an interpretation would not accord with the purpose of the 1958 amendment, which was to allow the selection of mineral lands by the states as indemnity for lost school grants. It has long been the policy, as announced by the Supreme Court, that legislation of Congress designed to aid the common schools of the states is to be construed liberally rather than restrictively. Wyoming v. United States, 255 U.S. 489, 508 (1921); see Utah Indemnity Selections, supra.

In 1970, Congress, per section 25 of the Geothermal Steam Act, supra, decided to treat geothermal resources as other leasable minerals rather than as it treated oil and gas. Congress passed up the opportunity to establish a section similar to 43 U.S.C. § 852(a)(2) to restrict sharply state selection of lands classified as KGRA land, and chose instead to include geothermal resources under the less restrictive 43 U.S.C. § 872(a)(1) along with the other leasable minerals. In the absence of express legislation establishing different terms to restrict the selection by the states of KGRA land, and in view of the fact that Congress had the opportunity in 1970 to, but did not, enact such

restrictions as it had in 1958 for KGS oil and gas lands, we may not infer that Congress intended special restrictions on state indemnity selection of KGRA lands.

In conclusion, since under section 25 of the Geothermal Steam Act, supra, laws controlling the distribution of mineral lands generally are also deemed to control the distribution of geothermal lands, under 43 U.S.C. § 852(a)(1), a state may select and receive title to geothermal lands without a geothermal reservation if it offers base lands determined by GS to be geothermal in character, even if GS has indicated that the selected lands may have a greater geothermal potential than the base lands by classifying only the selected lands as a KGRA.

[3] Therefore, BLM erred by retaining a reservation to the United States of the geothermal potential of all but 330.34 acres of the lands selected in those applications. In view of the inequities to the State in the current situation, in which it has given up base lands which are valuable for geothermal resources and has received selected geothermal lands with the geothermal rights wrongly reserved, some remedy is appropriate. Since the geothermal rights have been reserved in the United States and are still within its power to dispose of, this Department still exercises jurisdiction over them. It is therefore within our power to correct this inequity by ordering the reformation of Clear List 350 by deletion of the reservation of geothermal rights as to all but 330.94 acres of the selected lands.

The State proposes to correct BLM's error by amending Clear List 350 to substitute for the base lands included therein certain other, allegedly nongeothermal, base lands. In this way, the State would retain the selected lands, with the reservation of geothermal rights in force, but would give up only nongeothermal base land rather than the geothermal base lands previously offered in support of its application. This proposed solution appears to be unacceptable.

Most of the supposedly nongeothermal lands which the State proposes to insert in the clear list as substitute base are also geothermal, according to GS reports in the record. Thus, at best, the State would have to file a new application to amend Clear List 350 listing other nongeothermal lands for proposed substitution. Moreover, the proposed remedy is such that it would require a virtual novation of the state indemnity selection. The State, in effect, would cancel the entire transaction involving Clear List 350 and start again.

We need not consider whether such a remedy is within our legal authority because it is apparent that it would not be desirable or in the interest of the State to impose it. The State indicates in its statement of reasons that it proposes this solution in lieu of simply requesting that the geothermal reservation in the selected lands be

removed only because it erroneously assumed that it would be impossible to do the later:

Since it does not appear that the Bureau of Land Management will issue a clear list for the selected lands without a geothermal reservation, the State desires to retain the base lands prospectively valuable for geothermal resources for future selection either by cancelling Clear List Number 350 in its entirety and returning the parties to their respective positions prior to the selection, or by allowing the State to amend its application to remove the base lands prospectively valuable for geothermal resources. [Emphasis supplied.]

It is thus probable that the remedy we are providing is that which the State also desires, and we need not determine the propriety of the alternate remedy proposed by the State.

The State has maintained in its statement of reasons that it has never accepted Clear List 350, that title to the selected lands has therefore never finally passed to it, and that the Department still has jurisdiction to amend the clear list since the transaction has never been completed. The State also relies on its assertions that SLD was without authority to accept the clear list on its behalf, and alternatively that the clear list was never actually accepted by SLD.

We note that the record reveals that SLD consistently appeared to have authority to negotiate with BLM and to consummate the selection transaction, including the authority to accept the clear list. SLD filed the application and negotiated with BLM at every intermediate step. Further, SLD acquiesced in the conditions imposed by BLM and took affirmative steps to receive Clear List 350, including publishing the list of selected lands, thus opening the way for BLM to issue the clear list. No attempt was made to prevent the issuance of the list. Thus, it also appears that there was actual acceptance by SLD of the clear list, albeit, due to BLM's failure to inform SLD, this acceptance was not made with benefit of knowledge of the geothermal potential of the base lands and perhaps might not have been made had SLD known the true state of affairs.

It is therefore possible that, even if SLD has no actual authority to accept clear lists as an agency of the State, it did have apparent authority to bind the State, and that its actual acceptance of the list, even though made as a result of a mistake, would constitute final acceptance by the State. It is unnecessary to resolve these questions, however, in view of our holding that acceptance by the State of Clear List 350 does not prevent our directing that the clear list be reformed by deleting the geothermal reservations erroneously imposed by BLM.

[4] BLM has already determined that the values of the base lands and of the selected lands, with their geothermal resources reserved, are roughly equal. Therefore, ordering the amendment of Clear List 350 to remove the geothermal reservation may upset this parity of values. Although, as discussed above, nothing in 43 U.S.C. § 852, supra, requires that the base lands be of equal value to the lands selected in lieu thereof, the "grossly disparate value policy," first established on January 18, 1967, by Secretary Udall, and reestablished on February 14, 1974, by Secretary Morton, would prevent the selection if there is a gross disparity between the values of the base and selected lands. Although the United States District Court for the District of Utah has issued a decision voiding this policy, Utah v. Kleppe, No. C-74-64 (D. Utah June 8, 1976), an appeal of that decision is now pending, and it is possible that the "grossly disparate value policy" may eventually be found applicable.

Accordingly, on remand, BLM is directed to determine whether awarding full title to the State by deletion of the geothermal reservation would increase the value of the selected lands so much as to result in gross disparity between their value and that of the base lands. If not, BLM is directed to reform Clear List 350 by deleting this reservation as to the qualifying acreage. If so, BLM is directed to suspend consideration of the matter until judicial resolution of the issue raised in Utah v. Kleppe, supra, concerning the validity of the "grossly disparate value" policy, in accordance with the policy set out in a memorandum from the Associate Director of BLM to the State Directors on May 13, 1974, and upon resolution, to conform its action accordingly.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is remanded for further action by BLM consistent with this decision.

Edward W. Stuebing
Administrative Judge

I concur in the result:

Joseph W. Goss
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

