

CORTEX, INC.

IBLA 77-271

Decided March 28, 1978

Appeal from decision of the Montana State Office, Bureau of Land Management, rejecting geothermal lease offer M 30661.

Affirmed.

1. Geothermal Leases: Discretion to Lease—Geothermal Leases: Environmental Protection: Generally

An exercise of the Secretary's discretion to refrain from issuing a geothermal lease for a given tract of land will generally be upheld where the decision is arrived at after detailed study of environmental factors and is based upon considerations of public interest. In such a situation, the Board will not ordinarily substitute its independent judgment for that of the technical experts employed by the Department to make recommendations within their field of expertise.

APPEARANCES: Glen L. Drake, Esq., Keller, Reynolds and Drake, Helena, Montana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Cortex, Inc., has appealed from a March 9, 1977, decision of the Montana State Office, Bureau of Land Management (BLM), rejecting its geothermal lease offer M 30661 for 1,000 acres of public lands and 1,240 acres of acquired lands in Lewis and Clark, and Broadwater Counties, Montana.

The BLM decision was based on an Environmental Analysis Report (EAR) and on the recommendations of the Butte District Manager. Its conclusion to reject the lease offer for the reason that exploration and development of geothermal resources on the subject lands would cause serious and irreversible environmental damage and require unacceptable environmental risks was reached as follows:

1. 860 acres are inundated by Canyon Ferry Lake. The Bureau of Reclamation indicates that no permit allowing drilling for geothermal purposes within the reservoir flowage area should be issued unless sufficient safeguards disclose that pollution will not occur from such operations. Our District Manager has further recommended that the area within the lake should not be included in a geothermal lease since there is no technology known or experienced [sic] for control of accidents, blowouts, or other polluting hazards resulting from offshore or proximate onshore drilling for geothermal resources. Since sufficient safeguards are not currently available, no leasing exploration or production will be allowed in the reservoir area or in adjacent riparian areas which could be the source of pollution of the reservoir.

2. 1,024 acres are identified as the "seen area." Because of its proximity to a high use recreation resource, the Canyon Ferry Reservoir, it has been determined that the foreground or "seen area" be protected from surface disturbance. Therefore, no leasing will be allowed within this identified area.

3. 123.79 acres have been identified as a Bureau of Reclamation sensitive area. The Bureau has indicated that there will be no surface encroachment within a minimum distance of 300 feet horizontal from the normal high water of the Canyon Ferry Reservoir.

4. 210 acres have been identified as crucial big game winter range.

5. Approximately 580 acres have been identified as a buffer zone of 1,000 feet from high water to protect fish and other aquatic life from disaster, such as well blowouts and steamline breaks.

6. Additional areas not defined on the map have been identified as critical wildlife habitat exclusions including a one-mile buffer zone around identified antelope kidding areas; identified winter turkey range, including roost trees and brooding grounds; a onequarter mile buffer between any disturbance and areas of waterfowl nesting, brooding, resting, and/or molting areas; and nesting areas of eagles, osprey and turkey vultures.

7. Due to potential of geologic hazard of mass failure (landslides) within an area identified for its high aesthetic values, no excavations would be allowed in those areas whose

bedding plane and the slope are the same. These areas are not defined on the map.

Although these sensitive areas overlap, the total acreage covered by at least one or more sensitive area classification is approximately 1,902 acres. This acreage is compared to the total lease application area of 2,240 acres. Approximately 338 acres remain as possibly suitable for lease. This 338 acres includes critical wildlife habitat areas as well as areas of potential geologic hazard which can only be identified after an intensive on-the-ground survey.

As stated in the introduction to the EAR, 640 acres or more will be needed in Montana to supply sufficient steam to run one geothermal generating plant. The 338 acres remaining cannot conceivably meet that requirement of or by themselves. Only if the 338 nonexcluded acres were to be combined with private land areas outside the lease application area, could they contribute adequately to production of geothermal power.

In addition, our District Manager points out in his recommendations for this application that there is one more restraint on siting of wells, plants and other improvements which was not originally considered in the environmental analysis record. That constraint is slope. Analysis of watershed factors indicates that these improvements are unacceptable on slopes over 40 percent, due to the difficulty of revegetating disturbed areas on these slopes and the resulting erosion and water pollution problems. The slope factor applied to this application would restrict from surface occupancy an additional 100 acres not previously identified as a sensitive area. This slope restriction also applies to much of the areas identified as sensitive for other reasons.

In its statement of reasons, appellant takes issue with paragraphs 2, 4, and 6, above. Appellant asserts that the determination in paragraph 2 is arbitrary and capricious because despite the fact that two public gatherings were held, no protests of the proposed lease were received from members of the public, residents, and users of the Canyon Ferry Reservoir recreational area. Appellant also points out that a Ten Year Development Plan (EAR, Appendix I)

envisages expansion and improvement of the recreational facilities at the reservoir to the exclusion of other types of development.

With respect to paragraphs 4 and 6, appellant states that the EAR contains no substantial data establishing a crucial big game winter range, antelope kidding areas, or winter turkey range.

According to the EAR, the lands in question are recreational in nature, such activities as hunting, boating, hiking, fishing, and camping being major uses. The report states that "350,000 visitor days per year are spent at the Canyon Ferry Lake recreation area" (p. 50). While data concerning the existence in the area of particular types of wildlife are speculative, observations of numerous species of birds as well as predators such as fox, coyote, and badger are cited. Indications of winter use by deer and elk are also evidenced, pp. 44-47. Rather than a "diatribe of bureaucratic hogwash," as appellant has designated it, we find the EAR to be a valid and well-reasoned study of environmental factors. In addition, the State Director provided concise and responsive explanations, based on the environmental study, to each of appellant's challenges. In a memorandum of December 27, 1977, the State Director stated that "[a]t this time we do not know of any specific areas which would require a restriction because of turkeys or antelope."

[1] We find that the BLM in reaching its decision appropriately referred to the EAR and other data and sufficiently apprised appellant of the reasons for its negative determination. Appellant has not met its burden of showing that exploration and development activities will not adversely affect the subject area. Kirk Greene, 24 IBLA 113 (1976).

The decision of whether or not to issue a geothermal lease for a given tract of public land is within the discretion of the Secretary under the Geothermal Steam Act, 30 U.S.C. § 1002 (1970). A decision to refrain from leasing certain lands will generally be upheld where the record shows it to be based on a study of environmental factors, considerations of public interest, and no reason to disturb the decision is shown. Eason Oil Company, 24 IBLA 221 (1976); Southern Union Production Company, 27 IBLA 54 (1976). Appellant's suggestion that the decision is without basis in fact or reason is unsupported by any input of information on its part. It is not the function of the Board to substitute its judgment for that of Departmental experts, especially where the record is devoid of any indication of error, arbitrariness, or caprice. Eason, supra.

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 affirmed.

Frederick Fishman
Administrative Judge

We concur.

Douglas E. Henriques
Administrative Judge

Joseph W. Goss
Administrative Judge.

