

OCCIDENTAL GEOTHERMAL, INC.

IBLA 82-173

Decided February 24, 1982

Appeal from decision of the California State Office, Bureau of Land Management, rejecting geothermal lease application CA 6797.

Affirmed.

1. Geothermal Leases: Acreage Limitations -- Geothermal Leases: Applications: Generally -- Geothermal Leases: Discretion to Lease

Under the applicable regulation 43 CFR 3203.2(b), a geothermal resources lease application for less than 640 acres is properly rejected where the applicant intends to use the land for electrical generation.

APPEARANCES: Jay T. Dalton, Esq., Bakersfield, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Occidental Geothermal, Inc., has appealed a November 5, 1981, decision of the California State Office, Bureau of Land Management (BLM), denying a request to issue a geothermal resources lease under application CA 6797. The decision states that portions of the application were initially rejected on July 15, 1981, because the Geological Survey had determined that the land was within East Brawley Known Geothermal Resource Area (KGRA). It states further that the 320.04 acres remaining in CA 6797 were rejected pursuant to 43 CFR 3202.2(b). On August 11, 1981, appellant submitted a letter formally requesting that the lease be issued as an exercise of the Secretary's discretion. The decision denied the request and this appeal followed. According to appellant's letter of August 11, 1981, to BLM, the 320 acres would be used for geothermal electrical development.

43 CFR 3203.2(b) provides in pertinent part: "(b) No lease shall be issued for less than 640 acres, except at the discretion of the

Secretary. The Secretary may issue a lease for less than 640 acres where geothermal resources will be utilized for non-electrical purposes, * * *. 1/ (Emphasis added.)

The appeal is limited to the 320-acre parcel and is premised on 3203.2(d), which provides:

(d) The authorized officer may add isolated tracts of more or less than 640 acres in nearby sections, to a lease application where it is determined that such addition is necessary for the proper management of the resource, provided the additional lands will not cause the lessee to exceed the maximum acreage limitation as provided in § 3201.2(a) of this chapter. However, prior to the issuance of such a lease based on the application as amended by the authorized officer, the applicant shall be given the option to refuse such a lease. Failure of the applicant to execute and return the lease within 30 days after receipt thereof will constitute a withdrawal of the application, as amended, without further notice.

Appellant asserts that the fact that there are no isolated tracts available to link with the 320-acre parcel should not prevent its leasing. It argues, in essence, that the provision in the regulation that less than 640 acres may be leased where geothermal resources will be used for nonelectrical purposes is not an absolute limitation. Appellant states:

* * * * *

10. The linking discussed in subsection (d) of 3203.2 proves without question that the second sentence of subsection (b) is not an absolute limitation on the broad discretionary power of the first sentence of that subsection. The second sentence of subsection (b) merely impliedly expresses that, subject to the broad discretionary power of the Secretary, 640 acres is the minimum average acreage required for electrical generation. However, the number 640 is not sacrosanct. For example, Oxy Geothermal Plant No. 1 will be built on a 540 acre parcel at the Geysers, conclusive proof that 640 acres is merely a benchmark the Secretary should consider pursuant to 3203.2(b).

(Statement of Reasons at 2).

1/ The phrase "except at the discretion of the Secretary" was also used in a predecessor regulation 43 CFR 3203.2(a). The reference to the "Secretary" was a regulatory oversight. The discretion is, in fact, exercised by an authorized officer of BLM. Hassie Hunt Exploration Co., 46 IBLA 161, 163 n.2 (1980).

[1] The regulation, 43 CFR 3203.2(d), provides the authorized officer with discretion to add isolated tracts to lease applications where such action is determined to be in the interest of proper resource management. Subsection (b) gives discretionary authority to issue a lease for less than 640 acres, and in the specific instance where an application for less than 640 acres will be used for nonelectrical purposes. Our reading of these provisions does not compel the result that discretion to lease must be exercised where an application encompasses 320 acres and no isolated tracts are available. In any event, appellant has not met its obligation of showing why discretion to lease should be exercised in this case. Hassie Hunt Exploration Co., *supra*. It appears on the contrary that since it is appellant's stated intention to use the land for electrical purposes, 2/ 3203.2(b) operates to preclude issuance of the lease. We conclude that the decision properly denied the request to issue the lease as to the 320-acre parcel. We do not construe appellant's statement in paragraph 11 of its statement of reasons that "[g]eothermal is a preferred resource and recently Interior Secretary James Watt mandated that America's geothermal resources be developed forthwith," as a showing that discretion should be exercised to issue the lease.

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.

Anne Poindexter Lewis
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Douglas E. Henriques
Administrative Judge

2/ See appellant's Aug. 11, 1981, letter to BLM.

