

SIERRA CLUB, OREGON CHAPTER

IBLA 84-712 Decided May 17, 1985

Appeal from a decision of the Oregon State Office, Bureau of Land Management, denying protest of the issuance of 19 noncompetitive geothermal resources leases and the proposed issuance of an additional 7 noncompetitive geothermal resources leases. OR-24472, et al.

Set aside and remanded.

1. Appeals -- Contests and Protests: Generally -- Geothermal Leases: Cancellation -- Geothermal Leases: Leases and Permits: Generally -- Rules of Practice: Appeals: Generally -- Rules of Practice: Appeals: Effect of -- Rules of Practice: Protests

A decision denying a protest of the contemplated issuance of noncompetitive geothermal resources leases will not be effective during the period of time in which the protestant adversely affected by the decision may file a notice of appeal, and leases issued during this time are subject to cancellation.

2. Bureau of Land Management -- Geothermal Leases: Consent of Agency -- Geothermal Leases: Environmental Protection: Generally -- Geothermal Leases: Noncompetitive Leases -- Public Lands: Jurisdiction Over -- Secretary of the Interior

BLM has the authority to decide whether to issue a noncompetitive geothermal resources lease pursuant to sec. 3 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1002 (1982), for land within a national forest where the Forest Service has consented to leasing, and to impose additional stipulations, in order to protect environmental resources, not inconsistent with those prescribed by the Forest Service. Where BLM has expressly not exercised that authority, the case will be remanded for that purpose, including a consideration of whether BLM has properly provided for staged leasing,

i.e., leasing subject to subsequent approval of specific development activities contingent on a finding that no environmentally unacceptable impact will occur.

APPEARANCES: Betsy Dodd, Esq., and Julie E. McDonald, Esq., San Francisco, California, and Fred Hirsch, Geothermal Coordinator, Sierra Club, Oregon Chapter, for appellant; S. Kyle Huber, Esq., Colleen O'Shea Clarke, Esq., and C. Girard Davidson, Esq., Portland, Oregon, for appellees Sea-Tac Geothermal; John W. Hook & Associates, Inc., Charlotte W. Hook, Sylvia A. Davidson, Daniel L. Goldy, Joan K. Davidson, Genevieve Goldy, and Mixt Bag; John F. Shepherd, Esq., and Jerome C. Muys, Esq., Washington, D.C., for appellee Edward B. Towne, Jr.; Donald P. Lawton, Esq., Portland, Oregon, and R. Timothy McCrum, Esq., Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Sierra Club, Oregon Chapter, has appealed from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated June 1, 1984, denying its protest of the proposed issuance of 28 noncompetitive geothermal resources leases, OR-24472, et al. 1/

This case initially stems from a February 22, 1984, decision by the Forest Service, U.S. Department of Agriculture, to permit leasing of the geothermal resources in the Bend and Crescent Ranger Districts of the Deschutes National Forest, pursuant to section 3 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1002 (1982). In the February 1984 decision, the Regional Forester, Forest Service, adopted alternative B, as modified, which was set forth in an environmental assessment (EA) prepared by the Forest Service. As adopted, alternative B provided for denial of leasing on 7,900 acres, no surface occupancy (NSO) on 94,600 acres, and other protective stipulations "as appropriate" on the remaining 447,200 acres.

In his February 1984 decision, the Regional Forester also concluded that no Environmental Impact Statement (EIS) was necessary in connection with adoption of alternative B, as modified. On April 5, 1984, appellant appealed to the Chief, Forest Service, from the February 1984 decision of the Regional Forester and requested a stay of the Forest Service's consent to the issuance of any geothermal resources leases. 2/ On April 26, 1984, the request

1/ Appendix A constitutes a list of the various lease applicants, the geothermal resources lease applications, the dates the applications were filed, the effective dates of the leases (where issued), and the affected acreage. All of the land is situated within Deschutes County, Oregon. The record indicates that of the 28 lease applications involved herein, BLM has issued 19 noncompetitive geothermal resources leases.

2/ An appeal from a decision by a Forest Service official does not stay the effect of the decision being appealed unless a stay is granted, unlike a decision by an official of the Department of the Interior which is automatically suspended during the pendency of the appeal (unless otherwise provided by law or regulation or given immediate effect by the Director of the Office of Hearings and Appeals or the Board). Compare 36 CFR 211.18(h) and 43 CFR 4.21(a).

for a stay was denied and by letter dated May 14, 1984, the Regional Forester responded to each of appellant's concerns. The Chief, Forest Service, subsequently denied the request for a stay and by decision dated August 28, 1984, affirmed the Regional Forester's February 1984 decision to permit the issuance of geothermal leases in accordance with the February 1984 decision.

On May 24, 1984, during the pendency of the appeal to the Chief, Forest Service, appellant filed a protest with BLM, challenging issuance of geothermal resources leases in the Bend and Crescent Ranger Districts of the Deschutes National Forest. In its June 1984 decision, BLM stated that the issuance of geothermal resources leases "will continue" in accordance with section 15(b) of the Geothermal Steam Act of 1970, as amended, 30 U.S.C. § 1014(b) (1982), and 43 CFR 3201.1-3. ^{3/} BLM further stated: "By law, as stated above, [referring to section 15(b) of the Geothermal Steam Act of 1970, and 43 CFR 3201.1-3] BLM cannot set the terms and conditions for leasing on Forest Service withdrawn lands. Therefore, this office will continue the leasing process with those recommendations received from the Forest Service."

In its statement of reasons for appeal, appellant contends that it was improper for BLM to issue 19 noncompetitive geothermal resources leases on June 4, 1984, 3 days after it denied appellant's protest of the proposed issuance of these leases and during the time when appellant had a right to appeal to the Board from the June 1984 BLM decision.

Appellant also contends that, in its June 1984 decision, BLM failed to exercise independent statutory authority to decide whether to issue a geothermal resources lease and the terms and conditions of the lease. Appellant notes that section 15(b) of the Geothermal Steam Act of 1970, provides that BLM may not issue a lease where the Forest Service has not consented to leasing and requires BLM to include terms and conditions prescribed by the Forest Service in a lease. However, appellant argues that BLM is not precluded from denying lease issuance where the Forest Service has given its consent or from imposing additional restrictive lease stipulations.

Appellant also contends that the EA was inadequate because it did not address the environmental impact of development activities under potential geothermal resources leases and that an EIS should have been prepared, citing Sierra Club v. Peterson, 717 F.2d 1409 (D.C.Cir. 1983) and Sierra Club, 79 IBLA 240 (1984). Appellant argues that issuance of leases commits BLM to permit development in some form and that such potential development should be addressed in an EIS. In a reply brief, appellant contends that geothermal

^{3/} Section 15(b) of the Geothermal Steam Act of 1970, provides in relevant part:

"Geothermal leases for lands withdrawn or acquired in aid of functions of the Department of Agriculture may be issued only with the consent of, and subject to such terms and conditions as may be prescribed by, the head of that Department to insure adequate utilization of the lands for the purposes for which they were withdrawn or acquired."

43 CFR 3201.1-3 contains similar language. The land involved herein was withdrawn as part of the Deschutes National Forest by Presidential Proclamation No. 1148, dated June 30, 1911. 37 Stat. 1700 (1913).

development is "intensive industrialization," involving numerous wells, pipelines, roads, power generation facilities, and transmission lines potentially covering 400,000 acres, which would affect the environment so significantly that an EIS is required under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4361 (1982). Appellant notes that courts have required preparation of an EIS with respect to actions "much less drastic than the industrialization of prime recreational forest," citing in part Confederated Tribes and Bands v. FERC, 734 F.2d 1347 (9th Cir. 1984) 4/ (relicensing of existing hydroelectric power project) and Mahelona v. Hawaiian Electric Co., 418 F. Supp. 1328 (D. Hawaii 1976) (construction of cooling water discharge facility for existing power plant).

In the alternative, appellant suggests that BLM should provide for "staged leasing" whereby it retains the authority to preclude development until submission of site-specific proposals and a finding that proposed activities would not have unacceptable environmental impacts. As a second alternative, appellant suggests that BLM issue leases with appropriate NSO stipulations, which also would preclude development until a finding has been made that no unacceptable environmental impacts would occur. Appellant notes that the Forest Service did provide for NSO stipulations, which were incorporated in some of the 19 leases actually issued, but that these stipulations are subject to modification or elimination under "nonexistent" standards and, thus, fall short of precluding development until a finding has been made that no unacceptable environmental impacts would occur. Appellant also asserts that the EA prepared by the Forest Service is inadequate in its evaluation of the impacts of geothermal leasing. Finally, appellant identifies 12 of the leases issued which, it argues, should be invalidated in whole or in part because development would result in unacceptable environmental impacts. For each it suggests either additional protective stipulations or that leasing should be denied.

On August 10, 1984, Sea-Tac Geothermal, John W. Hook & Associates, Inc., Charlotte W. Hook, Sylvia A. Davidson, Daniel L. Goldy, Joan K. Davidson, Genevieve R. Goldy, and Mixt Bag (appellees) filed an answer to appellant's notice of appeal. Appellees contend that BLM has no jurisdiction to alter the Forest Service's decision whether to allow leasing or the terms and conditions it prescribes and retains only the "ministerial function" of issuing leases. Appellees also state that the Board cannot review those questions already properly raised before and decided by the Forest Service. For these reasons, appellees conclude that appellant's appeal should be dismissed. In the alternative, appellees argue that the June 1984 BLM decision should be affirmed because all relevant environmental concerns had been addressed by the Forest Service and leasing was denied or appropriate protective stipulations were applied in sensitive areas. In addition, appellees note, the Forest Service envisions the environmental impact of development will be addressed when specific operating plans are formulated and that additional protective stipulations will be imposed as a part of the operating plans where necessary. 5/

4/ This decision was not printed in the bound volume of 734 F.2d.

5/ Appellees also requested that the appeal be dismissed for failure to comply with certain procedural regulations, specifically 43 CFR 4.412(a) and 4.413. On Nov. 8, 1984, appellees filed an additional answer in which they withdrew this request for dismissal.

On November 8, 1984, appellees filed an answer to appellant's statement of reasons which addresses appellant's contention that, prior to the issuance of geothermal resources leases, BLM should either prepare an EIS focusing on the environmental impact of exploration and development activities, provide for staged leasing, or adopt effective NSO stipulations. Appellees contend that an EIS was not required prior to leasing because the EA properly determined leasing would cause no significant impact on the human environment requiring preparation of an EIS. Appellees argue that the EA was adequate because the Forest Service took a hard look at the environmental consequences of leasing to the extent that leasing would permit casual use activities pursuant to 43 CFR 3203.6, identified relevant areas of environmental concern, and established that significant impacts on the human environment had been reduced to an acceptable level, citing Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982).

Appellees also argue that BLM has, in fact, provided for staged leasing by retaining authority to preclude surface-disturbing activities which would result in unacceptable environmental impacts. As evidence of retention of this authority, appellees point out that any activities other than casual use activities under a lease require preparation of an EA and approval of the lessee's plan of operations by both BLM and the Forest Service (Answer at 19). Appellees further state that such operations will not result in unacceptable environmental impacts given the various lease terms, geothermal resources operational orders (GRO's), regulations, and statutes providing for the protection of environmental resources. In the alternative, appellees contend that, even if the environmental review conducted prior to lease issuance has been inadequate, the leases already issued should not be canceled because no harm can result. Appellees reiterate that BLM and the Forest Service retain the authority to approve any surface disturbing activities. Finally, appellees contend, with respect to the 12 leases specifically challenged by appellant, that the protective stipulations are adequate.

On December 17, 1984, the Office of the Regional Solicitor, on behalf of BLM, also filed an answer to appellant's statement of reasons. The Solicitor states that, in deciding to proceed with leasing, BLM reviewed and adopted the Forest Service's EA, reviewed the required stipulations, and independently concluded it was "appropriate to proceed with leasing and that no further special conditions would be required in the leases" (BLM's Answer at 3). The Solicitor also argues that there has been sufficient compliance with NEPA and that an EIS need not be prepared prior to leasing where the EA adequately addressed the general environmental impacts of leasing, including exploration and development, especially in light of the 1973 programmatic EIS prepared by the Department, entitled "Final Environmental Impact Statement for the Geothermal Leasing Program." The Solicitor quotes from Sierra Club v. Hathaway, 579 F.2d 1162 (9th Cir. 1978), where the court stated, at page 1165, that the EIS was "exhaustive in its analysis of the environmental implications of geothermal development," and, at page 1169, note 11, that it is "quite possible * * * that the programmatic EIS is all that need be prepared to cover the geothermal leasing program." 6/

6/ We note the EIS contemplates that further site-specific EIS documents may be necessary for specific leases. See, e.g., pages I-8, I-9, III-2, III-23, III-25, III-27, III-29, III-33, III-41, III-47.

The Solicitor also argues that BLM need not provide for staged leasing where the EA, in light of the programmatic EIS, has "adequately considered and mitigated the foreseeable impacts of development" (BLM's Answer at 22). The Solicitor points out BLM has retained the authority to prevent exploration and development under the terms of a lease and applicable regulations until approval of a satisfactory plan of operations providing for protection of environmental resources.

The Solicitor admits that the 19 leases were erroneously issued and states that, even if the Board finds that there has not been adequate compliance with NEPA, rather than canceling the leases, the Board should remand the case to BLM

with instructions to decide whether to: 1) obtain the lessees['] consent to impose a stipulation reserving to the BLM the discretionary right to deny development; or 2) prepare an adequate environmental document which satisfies NEPA, and then reconsider its decision to lease or impose any additional stipulations on the subject leases determined appropriate to protect the environment.

(BLM's Answer at 23-24). The Solicitor notes that the first approach was adopted by order of the district court on remand in Sierra Club v. Peterson, Civ. No. 81-1230 (D.D.C. Apr. 11, 1984), providing for inclusion of a conditional NSO stipulation in geothermal resources leases which was conditioned on preparation of a site-specific EA. The Solicitor notes that the second approach was adopted in Cady v. Morton, 527 F.2d 786 (9th Cir. 1975), where the court enjoined future operations under coal leases pending preparation of an EIS and reconsideration by the Secretary of the decision to approve the leases. Finally, the Solicitor submits comments to appellant's specific objections to the 12 leases, concluding that the identified environmental resources would be adequately protected under the existing stipulations (Exh. 1 of Answer of BLM).

[1] Departmental regulations provide for the filing of a protest "by any person to any action proposed to be taken in any proceeding before the Bureau." 43 CFR 4.450-2. Denial of a protest constitutes a BLM decision from which an "adversely affected" party "shall have a right to appeal to the Board." 43 CFR 4.410(a); see California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1977). Accordingly, appellant had a right to appeal from the June 1984 BLM decision denying its protest.

The regulations further provide that "a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal." 43 CFR 4.21(a). When an appeal from a decision of a BLM official is properly filed by an adversely affected party, that official loses jurisdiction over the case and has no authority to take any action on the case until jurisdiction is

restored by Board action disposing of the appeal. ^{7/} Any adjudicative action taken by BLM after an appeal has been filed relating to the subject matter of the appeal is a nullity because BLM is acting without jurisdiction. Similarly, any BLM action taken to implement a decision during the period in which a party adversely affected may file a notice of appeal is improper and may be set aside. Petrol Resources Corp., 65 IBLA 104, 108 (1982); James W. Smith, 44 IBLA 275, 281 (1979). Accordingly, the issuance of the geothermal resources leases during the time when appellant had a right to appeal was improper. Thus, the leases are subject to cancellation. Lawrence H. Merchant, 81 IBLA 360 (1984). We will deal later in this opinion with the question of whether such leases should be canceled.

[2] The next question presented is whether, under the provisions of the Geothermal Steam Act of 1970, the Secretary of the Interior and his delegated representative, BLM, have the authority to either refuse to issue geothermal resources leases after the Department of Agriculture has given its consent to leasing land within a national forest or to impose terms and conditions in addition to those prescribed by the Department of Agriculture. We conclude BLM has such authority.

At the outset, we note that in accordance with section 15(b) of the Geothermal Steam Act of 1970, and 43 CFR 3201.1-3, no geothermal resources lease of land subject to the jurisdiction of the Forest Service can be issued by BLM without the consent of the Forest Service. Francana Resources, Inc., 75 IBLA 125 (1983); Earth Power Corp., 32 IBLA 357 (1977). In this respect, the leasing of geothermal resources in national forest lands is similar to the leasing of oil and gas resources in acquired lands subject to the jurisdiction of the Forest Service, or other agency having jurisdiction over the lands, in accordance with section 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (1982). That act contains language almost identical to section 15(b) of the Geothermal Steam Act of 1970. See, e.g., Joe E. Shelton, 73 IBLA 250 (1983); Amoco Production Co., 69 IBLA 279 (1982). Similar language appears in other statutes and has been likewise construed by the Board. See Thomas F. Stroock, 77 IBLA 137 (1983).

On the other hand, where land is withdrawn or reserved for administration by another agency but is public domain land and, thus, subject to oil and gas leasing pursuant to section 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226 (1982), we have long held that BLM must also make an independent determination whether to lease and under what terms and conditions. Western Interstate Energy, Inc., 71 IBLA 19 (1983), and cases cited therein. In Forest Exchanges, 60 I.D. 232 (1948), the Solicitor considered the question of whether the Secretary of the Interior could properly delegate the discretionary authority set forth in section 1 of the Act of March 20, 1922, 42 Stat. 465 (1922), 16 U.S.C. § 485 (1982), to engage in exchanges of national forest

^{7/} The Director, Office of Hearings and Appeals, or the Board may place a decision "in full force and effect immediately" where "the public interest [so] requires." 43 CFR 4.21(a). No request was made by BLM or any other party in the present case.

lands, to the Forest Service, retaining only the ministerial function of issuing patents. The Solicitor concluded that the Secretary could not so delegate, stating:

This language [of the statute] makes it abundantly clear that the functions vested in the Secretary of the Interior by the section are broader than the ministerial task of issuing patents. The opening phrase, "When the public interests will be benefited thereby," provides a broad discretionary standard and imposes upon the Secretary of the Interior the task of determining whether each exchange proposed for consummation under the section will or will not benefit "the public interests." This is emphasized by the statement that the acceptance by the Secretary of the Interior of offered lands is to be "in his discretion," and that he "may" patent Government lands in exchange for the offered lands.

60 I.D. at 233.

We conclude the provisions of the Geothermal Steam Act of 1970 are similarly clear in vesting the discretionary authority with respect to the issuance of geothermal resources leases in the Secretary of the Interior. 8/ Section 3 of the Geothermal Steam Act of 1970 provides, in relevant part:

Subject to the provisions of section 1014 of this title, the Secretary of the Interior may issue leases for the development and utilization of geothermal steam and associated geothermal resources * * * in any national forest or other lands administered by the Department of Agriculture through the Forest Service, including public, withdrawn, and acquired lands * * *. [Emphasis added.]

While this provision is subject to section 15(b) of the Geothermal Steam Act of 1970, and, thus, leasing may only take place with the consent of the Forest Service, BLM has independent discretionary authority under the statute to determine whether to issue a lease after the Forest Service has consented to leasing. 9/ In addition, this authority includes the ability to set additional terms and conditions of a lease not inconsistent with those prescribed by the Forest Service, including more restrictive stipulations deemed necessary by the Secretary of the Interior to protect environmental or other resources identified by BLM. Indeed, this independent authority becomes self-evident when examining the general terms and conditions of a geothermal resources lease set forth in a BLM lease form (Form 3200-21 (May 1974)), to

8/ The jurisdictional delegation of the Geothermal Steam Act of 1970, may be contrasted, for instance, with that set forth in section 1 of the Act of Feb. 28, 1899, as amended, 16 U.S.C. § 495 (1982), where the Secretary of Agriculture is granted authority to lease public land near or adjacent to a hot springs within a national forest. Under that Act, the Secretary of Agriculture is vested with exclusive jurisdiction with respect to the issuance of such leases. Donn Hopkins, 68 IBLA 184 (1982).

9/ An examination of the Geothermal Steam Act of 1970 discloses numerous grounds for denial of a lease which would not be considered by the Forest Service. See, e.g., 30 U.S.C. § 1003 (1982); 30 U.S.C. § 1006 (1982); 30 U.S.C. § 1014 (1982).

which the additional stipulations prescribed by the Forest Service are appended.

Appellant has submitted a December 1981 memorandum of understanding (MOU) between BLM, Geological Survey, and the Forest Service with respect to geothermal leasing. The preliminary statement to the MOU indicates that environmental review prior to lease issuance is to be jointly coordinated between BLM and the Forest Service in the case of national forest lands and that "[t]his is considered necessary in that, although separate decisions must be made on lease issuance by each Agency, the information base for both decisions is virtually the same" (Appellant's Statement of Reasons, Exh. C at 2, emphasis added). Appellant also submits a June 1984 interagency agreement (IA) between BLM and the Forest Service which also applies to geothermal leasing in national forests and supersedes the MOU in relevant part. The IA provides that all BLM decisions subsequent to Forest Service consent decisions are subject to protest and/or appeal under 43 CFR Part 4. That protest/appeal right would be meaningless if BLM did not exercise its own discretion in geothermal leasing decisions. Indeed, appellees would be correct in their allegation that this Board cannot review the issuance of a lease for BLM's exercise of independent judgment if BLM had only a ministerial function. However, BLM's function is clearly greater than ministerial.

It is clear that terms and conditions prescribed by the Forest Service as a condition of approval may not be altered by BLM under section 15(b) of the Geothermal Steam Act of 1970 without Forest Service approval. However, additional terms and conditions may be imposed if BLM, in its independent judgment, deems them to be required. An appeal to this Board would lie from the BLM determination to require additional stipulations or, as in this case, where BLM chooses not to add stipulations requested by a protesting party.

Accordingly, we conclude that BLM is required to independently consider whether to lease geothermal resources in a national forest where the Forest Service has consented to leasing and to independently consider what terms and conditions to impose, consistent with those prescribed by the Forest Service.

Despite the statements of the Solicitor to the contrary, the June 1984 BLM decision indicates that BLM had not undertaken an independent review of the advisability of issuance of geothermal resources leases or the imposition of additional terms and conditions with respect to the individual leases in the Bend and Crescent Ranger Districts of the Deschutes National Forest. In its June 1, 1984, decision denying appellant's protest BLM states that lease issuance "will continue in accordance with [section 15(b) of] the Geothermal Steam Act of 1970 and 43 CFR 3201.1-3," which provide that issuance may only take place with the consent of and subject to the terms and conditions prescribed by the Forest Service. The concluding paragraph of the decision states:

You have correctly appealed to the Forest Service concerning the terms and conditions of geothermal leasing in the Deschutes National Forest and your Request for Stay has been denied. By law, as stated above, BLM cannot set the terms and conditions for leasing on Forest Service withdrawn lands. Therefore, this office will continue the leasing process with those

recommendations received from the Forest Service. [Emphasis added.]

Lacking any other explanation of this statement, we must draw the conclusion in light of its apparent meaning that BLM interpreted section 15(b) to mean that it could not itself decide whether to deny a lease or impose additional restrictions once Forest Service approval had been granted. Therefore, we must set aside the June 4, 1984, BLM decision to issue the leases, and remand the case to BLM in order that it may consider whether to permit geothermal leasing and the appropriate terms and conditions thereof. BLM should issue a decision, which will be subject to appeal to the Board.

Appellant has also challenged the EA, concluding that it is inadequate to address the environmental impact of exploration and development in connection with the issuance of geothermal resources leases. The Solicitor, on the other hand, supports the adequacy of the EA, especially in light of the programmatic EIS. The Solicitor states the EA analyzed the effects of the proposed action "which can reasonably be considered at this time" (BLM's Answer at 22). Appellees seem to focus on the adequacy of the EA to address only casual use activities, rather than exploration and development activities. We conclude that given the obvious and unresolvable uncertainty regarding the location, nature, and extent of exploration and development activities, the EA, as noted *infra*, properly did not attempt to speculatively assess the site-specific environmental impacts of such activities. Indeed, the Solicitor recognizes that at this time such impacts are "speculative" (BLM's Answer at 25). It is for this reason BLM was not required at the time of the proposed leasing to prepare an EA or EIS addressing the impact of exploration and development. Moreover, we do not consider the 1973 programmatic EIS to have been an assessment of the site-specific environmental impact of geothermal exploration and development with respect to the land involved herein. Compare Environmental Defense Fund, Inc. v. Andrus, 619 F.2d 1368, 1376 (10th Cir. 1980) (programmatic EIS designed to be site-specific), with Natural Resources Defense Council v. Morton, 388 F. Supp. 829, 838-41 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir.), *cert. denied*, 427 U.S. 913 (1976) (programmatic EIS inadequately addressed site-specific environmental impacts). As appellant points out, the EIS recognized that additional environmental statements might have to be prepared with respect to proposed leasing in areas other than the three areas in California covered by the EIS (Clear Lake-Geysers, Mono Lake-Long Valley, and Imperial Valley). See EIS at I-8, I-9.

Appellant argues BLM has issued or would issue geothermal resources leases which commit BLM to allow some development in the absence of a prior meaningful environmental analysis addressing the impacts of development, in violation of NEPA. ^{10/} Appellant cites Sierra Club v. Peterson, *supra* at 1415.

^{10/} Section 102(2)(c) of NEPA, 42 U.S.C. § 4332(2)(c) (1982), requires preparation of an EIS where a proposed action is a major Federal action which will significantly affect the quality of the human environment. In order to determine whether an EIS is required, BLM prepares an EA in accordance with 40 CFR 1501.4(b), and (c). As appellant points out, it has been said that NEPA is an "environmental full disclosure law." Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 759, (E.D. Ark. 1971). In effect, appellant argues BLM has committed itself to development of geothermal resources without a full assessment of the potential impact of that development.

In Peterson the court held that prior to oil and gas leasing within a national forest, where the proposed leases would not have NSO stipulations, the Department, in order to comply with NEPA, "must either prepare an EIS * * * or retain the authority to preclude surface disturbing activities until an appropriate environmental analysis is completed." The court reasoned:

If the Department retains the authority to preclude all surface disturbing activities pending submission of a lessee's site-specific proposal activities as well as the authority to refuse to approve proposed activities which it determines will have unacceptable environmental impacts, then the Department can defer its environmental evaluation until such site-specific proposals are submitted. If, however, it is unable to preclude activities which might have unacceptable environmental consequences, then the Department cannot issue leases sanctioning such activities without first preparing an EIS. [Emphasis in original.]

Id.

We recently relied on Sierra Club v. Peterson, supra, in Sierra Club, 79 IBLA at 246, which also involved the proposed leasing of public land for geothermal resources exploration and development. In that case, we concluded BLM could not defer preparation of an EIS regarding the potential development of geothermal resources until after issuance of a lease unless BLM retained the authority to preclude development if such development was found to have significant impact on the human environment of such nature and extent as to render development unacceptable. The concept of deferral with the retention of the right to exercise such authority is termed "staged leasing" and has been approved by the Department on at least two occasions, i.e., in an opinion of the Associate Solicitor, Energy and Resources, dated June 13, 1979, entitled "'Staged Leasing' of Geothermal Resources," and in BLM Instruction Memorandum No. 80-198, dated January 3, 1980, which provided for leasing subject to a conditional development stipulation. However, in Sierra Club, we stated it was unclear whether BLM had adopted the staged leasing concept in connection with the proposed geothermal leasing, such that it did not have to prepare an EIS in accordance with Peterson. As demonstrated infra, that is the situation herein. 11/

11/ We note that the Chief, Forest Service, in his decision, dated Aug. 28, 1984, specifically concluded that neither Peterson nor Sierra Club was "applicable" in connection with the decision to proceed with geothermal leasing in the Deschutes National Forest. We disagree with this position for the simple reason that, in the present case, leasing itself may commit BLM to development in some form without the prior preparation of an EIS and, moreover, without the ability to preclude such development so as to avoid unacceptable environmental impacts. This is precisely the danger sought to be avoided by the court in Peterson and the Board in Sierra Club. We also note the response of the Regional Forester, dated May 14, 1984, in connection with appellant's appeal within the Forest Service, similarly misses the mark. The Regional Forester states that the "most sensitive resource areas" have either been denied for leasing or subject to NSO stipulations and that other laws permit BLM to deny

What the court in Peterson required is that, when the Department issues leases, it must retain the authority to preclude all surface-disturbing activities pending an environmental assessment of site-specific proposed activities and, once that assessment has taken place, the authority to preclude surface-disturbing activities which would result in unacceptable environmental impacts. The Department has recognized the need for site-specific environmental assessment, and, if deemed warranted, a site-specific EIS. See 43 CFR 3261.3(b). Unless the Department retains the authority to consider the option of no surface occupancy, after preparation of a site-specific EA, this option would be unavailable. In effect, Peterson requires that the Department retain the authority which it had prior to lease issuance. As the court stated in Sierra Club v. Peterson, supra at 1414, the environmental assessment must be made at a time when the decisionmaker "retains a maximum range of options." However, with respect to such authority, it need only be the authority to preclude unmitigable and unacceptable environmental impacts. Impacts which are mitigable are by definition those which do not result in a significant environmental impact, which would require preparation of an EIS. Thus, the Department need not retain the authority to preclude surface-disturbing activities which result in mitigable impacts as an alternative to preparing an EIS prior to lease issuance. The thrust of the standard enunciated in Peterson is to avoid a situation where the Department proceeds with leasing only to find by virtue of a later EA that there are unmitigable and unacceptable environmental impacts which would result from subsequent activities under the lease but which cannot be prevented. Issuance of a lease in such circumstances, with no disclosure of the impact of such activities at the time of issuance and a meaningless disclosure prior to the lessee engaging in such activities, is clearly a violation of NEPA.

In Sierra Club (On Reconsideration), 84 IBLA 175 (1984), the Board, after reexamining the proposed geothermal resources leases involved in that case pursuant to a request by BLM, concluded that BLM had provided for staged leasing, consistent with Peterson. The Board focused on paragraph 6 of the notice of the competitive lease sale, which was binding on a potential lessee. That paragraph stated:

The lessee, in accepting this lease, understands that the surface management agency has reviewed existing information and planning documents and except as otherwise noted in special stipulations, knows of no reason why normal development cannot proceed on the leased lands. However, specific development activities could not be considered prior to lease issuance since the nature and extent of the geothermal resource were not known and specific operations have not been proposed. The lessee is hereby made aware that, consistent with 30 CFR 270.12 [now found

fn.11 (continued)

an activity to protect such aspects of the environment as air, water, endangered species, and historical artifacts. However, the Regional Forester ignores the fact that, as explained infra, the NSO stipulations are inadequate to preclude development and there are not sufficient laws to permit BLM to preclude development activities potentially affecting all aspects of the environment once a lease has issued.

in 43 CFR Part 3260], all post-lease operations will be subject to appropriate environmental review and may be limited or denied, but only if unmitigable and unacceptable impacts on other land uses or resources would result.

Sierra Club (On Reconsideration), supra at 177-78. We held that by virtue of this notice, which clarified BLM's intent, BLM had "properly provided for conditional development of the lease specifying that development would be limited or denied if site-specific environmental reviews disclosed that unacceptable impacts would result." Id. at 179.

In the present case, it is clear that BLM retains the authority to preclude all surface disturbing activities pending preparation of an EA. 43 CFR 3203.6 provides that no activities, other than casual use activities, shall be undertaken until there has been approval of a notice of intent or a plan of operations. Moreover, 43 CFR 3200.0-6 provides that BLM shall complete any environmental review determined to be necessary under NEPA "when the need arises." Thus, BLM is committed, prior to approving surface-disturbing activities not previously addressed, to prepare at least an EA to determine whether any significant environmental impacts can be anticipated and an EIS if it is found that the proposed plan will result in a significant impact on the human environment. Thus, the EA at page 4, states:

Once a lease is issued, the lessee has the right to explore and develop the existing geothermal resource. The BLM conducts an environmental analysis before consenting to significant ground disturbing activities. The FS and the BLM will determine within reason when, where, and how [but not whether] such operations will be conducted by jointly approving the Plan of Operations.

With this in mind, we will now consider whether BLM has, in fact, retained the authority to preclude proposed surface-disturbing activities which would result in unmitigable and unacceptable environmental impacts by lease terms or regulatory authority. Both appellees and BLM rely on the fact that postlease exploration and development is subject to such extensive regulation (a lessee is required to comply with all lease terms and stipulations, pertinent statutes and regulations, and GRO's which provide in part for protection of the environment), that BLM can, in effect, preclude surface-disturbing activities which would have an unacceptable environmental impact. The Board in Sierra Club, supra, considered this system of regulation but could find no clear provision for retention of the appropriate authority. On reconsideration, the Board relied on a separate sale notice, which is not applicable in the present context of noncompetitive leasing.

The lease (Form 3200-21 (May 1974)) used by BLM in issuing the 19 leases on June 4, 1984, states that BLM unequivocally grants to the lessee the "exclusive right and privilege to drill for, extract, produce, remove, utilize, sell, and dispose of geothermal steam and associated geothermal resources." In addition, the form states that BLM grants the right to construct and operate facilities in connection with the production, utilization, and processing of the geothermal resources. On the other hand, there is nothing in the form specifically stating that BLM retains the authority to preclude activities which would result in unacceptable environmental impacts.

The form merely requires that the lessee shall take "all mitigating actions" required by BLM to protect specified environmental, historic, and property resources (section 14). Section 25 states BLM may suspend operations or cancel a lease for failure to comply with the terms of the lease, including section 14.

As previously noted, the Forest Service has designated approximately 94,600 acres for which NSO stipulations must be made a part of geothermal resources leases. With respect to the previously issued leases and proposed leases only portions of the land subject to the leases would be subject to such stipulations. The "special stipulations" of the Forest Service provide, in OR-24472, for example, that the lessee agrees not to occupy or use the surface of certain described lands "until this stipulation is modified or eliminated" (#5); or "except for certain limited use as authorized in writing by the Forest Supervisor until this stipulation is modified or eliminated" (#6); or "except for occupation or uses which will cause no significant surface disturbance, as determined by the Forest Supervisor" (#8); or, finally, on slopes in excess of 50 percent or on designated unstable lands, "without written permission from the Deputy State Director for Mineral Resources, BLM, with the concurrence of the authorized representative of the Forest Service" (#7). Unlike those approved in Sierra Club v. Peterson, supra at 1411-12, these NSO stipulations do not either totally preclude development activities within the leased area or expressly preclude development "unless and until" the environmental impact is determined not to be unacceptable.

Both appellees and BLM contend additional environmental protection is afforded by the GRO's, which are binding on a lessee under 43 CFR 3262.1(a). Appellees and BLM focus particularly on the following language in GRO No. 4 (effective Aug. 1, 1975):

Adverse environmental impacts from geothermal-related activity shall be prevented or mitigated through enforcement of applicable Federal, State, and local standards, and the application of existing technology. Inability to meet these environmental standards or continued violation of environmental standards due to operations of the lessee, after notification, may be construed as grounds for the [Area Geothermal] Supervisor to order a suspension of operations.

In addition, GRO No. 4 provides that the supervisor may specify additional and more stringent requirements for the protection of the environment if he "determines that the degree and adequacy of existing environmental protection regulations in certain areas are insufficient." Finally, appellees and BLM contend that the Departmental regulations governing geothermal leasing require that a lessee conduct operations so as to protect the environment. See, e.g., 43 CFR 3261.3(a).

The regulations, in conjunction with the GRO's, clearly require a lessee to conduct exploration and development activities in an environmentally acceptable manner. Moreover, a lessee's operations are subject to approval at various stages of such activities, and the Department retains the authority to suspend operations or to terminate a lease for a violation of any of these environmental safeguards. Although the control which can be exercised over

operations is so comprehensive that little additional control is actually afforded by staged leasing, neither the regulations nor the GRO's authorize BLM to totally preclude all surface-disturbing activities within the entire leased area if the environmental impact is determined to be unmitigable and unacceptable. Unless there is the specific and express retention of such authority, not only is the Department unable to employ a no surface use option, as required by Peterson, in order to properly act upon such an environmental determination, but also the lessee is not fairly on notice prior to acceptance of the lease that such action may be taken.

In so holding, we recognize the Department has "broad discretion" under NEPA to assure adequate protection for the environment in the setting of lease terms and conditions. Natural Resources Defense Council v. Berklund, 458 F. Supp. 925, 936 (D.D.C. 1978), *aff'd*, 609 F.2d 553 (D.C. Cir. 1979). However, while the Department has authority to place reasonable and justified restrictions on exploration and development under an oil and gas or geothermal resources lease, it does not have the authority to completely deny all beneficial use of the lease area, absent express retention of this authority. *Cf.* Pauley Petroleum, Inc. v. United States, 591 F.2d 1308, 1326-27 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 898 (1979); Sun Oil Co. v. United States, 572 F.2d 786 (Ct. Cl. 1978).

In such circumstances, exploration and development activities might proceed under a lease without prior meaningful preparation of an EA addressing the impact of such activities. This would be inconsistent with Peterson and Sierra Club. Accordingly, on remand, BLM is instructed to consider the question of whether to prepare an EIS to address the environmental impact of exploration and development or, in the alternative, to institute appropriate staged leasing consistent with the dictates of Peterson and Sierra Club.

If BLM chooses the alternative of staged leasing, it should seek to obtain the consent of the holders of already issued leases to an appropriate conditional NSO stipulation and such additional stipulations as BLM deems warranted, if any. If BLM is unable to obtain such consent, it must then cancel the lease, impose the stipulation, and reoffer the lease, or prepare an EIS. If BLM chooses the alternative of preparing an EIS, it may do so and then reconsider its decision to lease. In either case, BLM need not cancel the leases already issued prior to preparation of the EIS. However, during the interim period the leases issued should be suspended and BLM should not approve any exploration or development activities. 12/ Cady v. Morton, *supra*; Lawrence H. Merchant, *supra*.

Finally, we note that appellant has raised specific concerns regarding the suitability of leasing, with respect to 12 leases, or, in the alternative, the need for additional protective stipulations. In each case, the Forest Service has previously assessed the suitability of leasing and the appropriate scope of operations. The Forest Service determination to proceed with leasing encompasses both a determination that operations are acceptable under certain conditions, in order to take into account a perceived conflict

12/ Appellees have filed motions for suspension of the leases during the period of pendency of this appeal which are hereby granted.

with other environmental resources, and a determination that no additional restrictions are required. As noted above, to the extent the Forest Service specified the conditions under which operations are to take place, those conditions cannot be waived or relaxed by BLM. However, to the extent the Forest Service decided to proceed with leasing and did not specify conditions, BLM is not only entitled, but required to review the Forest Service determination, in order to carry out the Department of the Interior's independent responsibility under the Geothermal Steam Act of 1970, applicable Departmental regulations, the Geothermal Leasing EIS, and GRO's.

Nevertheless, we do not hold that BLM is precluded from relying on the expertise of the surface management agency. As a first step in its independent determination, it may review and examine the basis for the surface management agency's decision as to whether to lease and the nature and extent of the protective stipulations to be appended to the lease. If, after this review, BLM determines that the surface management agency's determination was accurate, in accordance with applicable laws and regulations, and sufficiently supported by documentation, the surface management agency findings may be accepted by BLM. ^{13/} However, in addition, BLM must then review the adopted finding and determine whether additional stipulations are necessary to carry out those requirements found in applicable provisions of statutes and regulations which may not have been considered by the surface management agency.

In this case, according to BLM's answer, the Forest Service EA was prepared "to insure that any leasing would be consistent with its previous Land Management Plan" (Answer at 2); BLM provided comments on the draft EA which the Forest Service adopted in the final EA; and then BLM "reviewed the required stipulations and concluded that in view of the provisions of the BLM lease form, the regulations, and the GRO orders, it would be appropriate to proceed with leasing and that no further special conditions would be required in the leases" (Answer at 3). Further, in exhibit 1 of its answer, BLM provides its "comments and analysis" on the special stipulations of the Forest Service in light of appellant's objection to particular leases. These comments recite the appellant's objection, the applicable stipulation, the relevant discussion of the subject of the objection in the environmental analysis, and the provisions of the relevant GRO's, and conclude that there is adequate authority to prevent or mitigate appellant's concerns. In some instances the comments indicate that appellant's concerns were not specific enough to be addressed. Appellant did not reply to these comments.

In our view these steps are appropriate analytically. However, they should have been undertaken when determining whether and under what conditions to issue a lease, not in an answer to a statement of reasons in an appeal of the leasing determination, and BLM should have set forth explicitly what additional requirements of statute or regulation BLM considered when explaining why, in BLM's independent judgment, the Forest Service stipulations are adequate.

^{13/} In conducting this study, BLM should satisfy itself that any objections raised by protestants, such as the appellant in this case, have been resolved to BLM's satisfaction, and be prepared to demonstrate how it satisfied itself as to the sufficiency of the answer to the objections.

In the present case, with respect to the 12 leases singled out by appellant, BLM specifically addressed appellant's concerns in its answer to appellant's statement of reasons. We have carefully reviewed appellant's objections and BLM's response and conclude that there is sufficient documentation to support the BLM determination to accept the findings of the Forest Service as to those requirements considered by the Forest Service. However, we find insufficient documentation supporting BLM's determination that the Forest Service findings also meet the additional statutes and regulations applicable to the Department of the Interior, which must also be considered by BLM.

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 set aside and the case is remanded to BLM for further action consistent herewith.

R. W. Mullen
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Will A. Irwin
Administrative Judge.

APPENDIX A

| <u>Applicant</u> | <u>No.</u> | <u>Filed</u> | <u>Issued</u> | <u>Lease Application</u> | <u>Lease</u> | <u>Acreege in</u> | <u>Acreege in</u> |
|-----------------------------|------------|--------------|---------------|--------------------------|--------------|-------------------|-------------------|
| Edward B. Towne, Jr. | OR-24472 | 8/28/80 | 6/1/84 | 2560 | *** | 1877.51 | |
| | OR-24473 | 8/28/80 | 6/1/84 | 2560 | | 2549.06 | |
| | OR-24474 | 8/28/80 | 6/1/84 | 1906.56 | | 1906.56 | |
| | OR-24475 | 8/28/80 | 6/1/84 | 2561.18 | | 2561.18 | |
| | * OR-24477 | 8/28/80 | 6/1/84 | 2560 | | 2560 | |
| | * OR-24478 | 8/28/80 | 6/1/84 | 2560 | | 2560 | |
| | OR-24870 | 9/17/80 | 6/1/84 | 2586.08 | | 2586.08 | |
| Charlotte W. Hook | OR-32703 | 8/28/81 | 6/1/84 | 2605.44 | | 2605.44 | |
| Sea-Tac Geothermal | OR-32705 | 8/28/81 | 7/1/84 | 2561.43 | | 2561.43 | |
| | OR-32706 | 8/28/81 | 7/1/84 | 2560 | | 2560 | |
| | OR-32707 | 8/28/81 | 7/1/84 | 1280 | | 1280 | |
| Sylvia A. Davidson | OR-33205 | 9/24/81 | 7/1/84 | 2560 | ** | 2339.14 | |
| John W. Hook & Assoc., Inc. | OR-33206 | 9/24/81 | 7/1/84 | 2560 | ** | 2363.98 | |
| | OR-33208 | 9/30/81 | | 2560 | | | |
| Sylvia A. Davidson | OR-33209 | 9/30/81 | 7/1/84 | 2560.64 | | 2560.64 | |
| Daniel L. Goldy | OR-33214 | 9/30/81 | 7/1/84 | 2560 | | 2558.08 | |
| Anadarko Production Co. | OR 33376 | 10/30/81 | | 1920 | | | |
| | OR-33377 | 10/30/81 | | 1920 | | | |
| | OR-33378 | 10/30/81 | | 1920 | | | |
| | OR-33379 | 10/30/81 | | 2560 | | | |
| | OR-33381 | 10/30/81 | | 2560 | | | |
| Joan K. Davidson | OR-34898 | 6/23/82 | 7/1/84 | 2581 | | 2581.12 | |
| | OR-34900 | 6/23/82 | 7/1/84 | 2566 | | 2560 | |
| | OR-34901 | 6/23/82 | 7/1/84 | 2560 | | 2560 | |
| | OR-34902 | 6/23/82 | | 2552 | *** | | |
| | OR-34904 | 6/23/82 | 7/1/84 | 2318 | | 2318 | |
| Genevieve R. Goldy | OR-36431 | 8/31/83 | | 1280 | | | |
| Mixt Bag | OR-36439 | 8/29/83 | | 2609 | | | |

* Effective June 1, 1984, geothermal resources leases OR-24477 and OR-24478 were assigned to Andrew S. Towne.

** By decisions dated May 18, 1984, BLM suspended lease applications OR-33205 and OR-33206 in part based on a recommendation of the Forest Service because the land was situated in the Waldo Roadless Area.

*** By decisions dated May 22, 1984, BLM rejected lease applications OR-24472 and OR-34902 in part based on recommendations of the Forest Service.

