

FIDELITY TRUST BUILDING, INC.

IBLA 92-273

Decided March 25, 1994

Appeal from a decision of the Idaho State Office, Bureau of Land Management, rejecting geothermal lease application I-19329.

Affirmed.

1. Geothermal Leases: Applications: Generally

An application for a noncompetitive lease of geothermal resources that was filed in the name of two applicants may be rejected where one of the applicants fails to respond to a demand by BLM that she confirm that she intends to take the lease and that she provide her current address.

APPEARANCES: George M. "Wilk" Wilkinson, President, Fidelity Trust Building, Inc.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Fidelity Trust Building, Inc. (FTB; appellant), has appealed from the January 31, 1992, decision by the Idaho State Office, Bureau of Land Management (BLM), rejecting geothermal lease application I-19329. <sup>1/</sup>

Noncompetitive geothermal lease application I-19329 was filed on December 6, 1982, in the names of FTB and Denise Laverty as applicants. The application sought to lease geothermal resources in 640 acres of the Salmon National Forest. It was duly signed both by Laverty and by G. M. Wilkinson, president of FTB.

Processing of the application was delayed by several factors. First, as the lands covered by the application are within a National Forest, it was necessary prior to issuing a lease to seek approval from the Forest Service (USFS), U.S. Department of Agriculture. Francana Resources, Inc., 75 IBLA 125 (1983); Earth Power Corp., 32 IBLA 357 (1977). That review

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<sup>1/</sup> The decision was signed by the Chief, Branch of Solid and Fluid Minerals, BLM.

(and accompanying environmental assessment, report, and recommendation) was not completed until May 1986, at which time BLM took up its own review of the matter. See Sierra Club, Oregon Chapter, 87 IBLA 1, 7 (1985). Although the lease appeared to be ready to issue as early as June 1986, when the Salmon District Office, BLM, generally approved it, BLM did not do so, and, effective October 17, 1986, Congress imposed a 180-day moratorium on geothermal lease issuance. It appears that BLM put the matter aside until January 1989, after the passage of the Geothermal Steam Act Amendments of 1988. It then contacted USFS so that its report and recommendation could be updated to comply with the requirements of those amendments. During this time, applicants were apparently silent as to the status of the lease application.

Instead of immediately undertaking to update the report and recommendations, on January 27, 1989, BLM issued a formal notice to FTB and Lavery. That notice stated:

Your geothermal resources lease application I-19329 was filed in this office on December 6, 1982, subject to the terms and provisions of the [Geothermal Steam Act] and the regulations under 43 CFR 3200. This application is for section 12, T. 18 N., R. 21 E., B.M., Idaho.

A review of our records indicates that Geothermal Lease I-18814, which you held for section 11, T. 18 N., R. 21 E., B.M., Idaho, terminated January 1, 1987. Please let us know if you are still interested in taking a geothermal lease on section 12 in the same township.

In view of the time that has elapsed since you filed your application, we are calling your attention to this information in the event you may wish to withdraw your application. We would appreciate receiving a response within 60 days of your receipt of this Notice.

Upon receipt of your response, we will proceed with the processing of your application by requesting from [USFS] and the BLM Salmon District Office an updated report and recommendations as to the issuance of a geothermal lease.

Certified mail return receipt cards in the record show that both FTB and Lavery received that notice. However, neither party responded.

BLM essentially repeated this process 2 years later. By another formal notice dated February 25, 1991, BLM again directed FTB and Lavery to advise whether they wished to withdraw the lease application:

Your geothermal lease application I-19329 was filed in this office on December 6, 1982, \* \* \*. Because of the time that has elapsed since you filed your application, it will be necessary to request a current report and recommendations from [USFS]. However, [USFS] will have to review and perhaps amend their 1986 EA

in order to comply with the requirements of the Geothermal Steam Act Amendments of 1988 before a geothermal lease may be offered.

If you do not intend to take the lease and in order to eliminate the administrative burden entailed in the above process, you may wish to withdraw your application. For your convenience enclosed are forms you may use to withdraw the application. Both applicants must sign the withdrawal form.

We would appreciate receiving a response from each of the above applicants within 60 days of your receipt of this Notice. Upon receipt of your response, we will either request a report from [USFS], or process your application withdrawal and authorize refund of the \$690.00 advance rental submitted.

This time, both notices, although mailed to applicants' last addresses of record, were returned to BLM by the Postal Service. The one addressed to Laverty was marked "undeliverable as addressed[;] forwarding order expired." The one addressed to FTB was marked "unclaimed" and showed that two attempts at delivery had been made by the Postal Service.

The record indicates that the Salmon District Office, BLM, secured another address for FTB's president Wilkinson. By decision dated May 7, 1991, addressed to both applicants in care of Wilkinson, BLM again sought a response from both applicants as to whether they were still interested in the lease. BLM enclosed forms which the applicants could use to withdraw their application, should they wish to do so, and specified that in that event "both applicants must sign the withdrawal form." BLM also requested the applicants' correct addresses. To this decision, entitled "Additional Requirement," BLM added the following warning: "The information must be submitted to this office within thirty days of receipt of this decision. Failure to respond during this 30-day compliance period will result in the rejection of the offer upon conclusion of this compliance period." The record indicates that Wilkinson received the notice.

By letter of May 23, 1991, Wilkinson responded, but only on behalf of applicant FTB. He advised BLM of FTB's new address and stated that he and FTB "are not interested in eliminating the lease," and that BLM "please continue to process the application as submitted." Wilkinson also stated that "[FTB], F.T.B. Geothermal, and Wilk Wilkinson are not apprised of the Address of Denise Laverty. 2/ Therefore Wilkinson and [FTB], F.T.B. Geothermal request that the lease be issued in their respective names."

On January 31, 1992, BLM issued its decision rejecting the lease offer, stating:

Our decision dated May 7, 1991, requested the submission of the current address of each of the applicants, and statement

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2/ The status of F.T.B. Geothermal is not clear from the record.

from each of the applicants of continued interest in taking a geothermal lease if offered by BLM, and allowed the applicants thirty days from receipt of the decision within which to furnish the required information.

The required information was received from applicant, Fidelity Trust Building Inc. on May 24, 1991. However, we have not received the required information from applicant, Denise Laverty. Therefore, geothermal lease offer I-19329 is hereby rejected.

BLM sent copies to FTB, in care of Wilkinson, and to Laverty at her last address of record. The mailing to Laverty was returned by the Postal Service as unclaimed. FTB received the decision and filed a timely appeal on its own behalf.

On appeal, FTB contends that it should not be deprived of its right to the lease merely because Laverty did not respond to BLM's communications. It asserts that the lease application is an interest in land that may not be unreasonably or unfairly dissolved at the whim of the Interior Department. FTB adverts to "good faith diligent exploration expenditures exceeding [\$952] for the year ending April 30, 1991," as well as "expenditures in excess of [\$50,000] in geological information and research in anticipation of exploration and permits once the lease is issued." Finally, FTB notes that it has been ready to file a surface operations plan, and has expended funds toward doing so.

[1] The decision whether or not to issue a geothermal lease is within the discretion of the Secretary. Thus, contrary to appellant's arguments, the mere filing of an application for a noncompetitive lease for geothermal steam resources creates no vested rights in the applicant. Oxy Petroleum Inc., 36 IBLA 88 (1978); Earth Power Corp., 29 IBLA 37 (1977).

Although she did not actually receive it, Laverty had constructive notice of BLM's May 7, 1991, decision imposing additional requirements on applicants on pain of rejection of the pending offer, as it was mailed to her last address of record. The Department has long followed the rule that transmission of a decision to a party's last address of record by certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. 43 CFR 1810.2(b); Rick Lee McMullen, Jr., 105 IBLA 80 (1988). The Board has held that in accordance with this regulation, when BLM sends a notice or decision, return receipt requested, to a party's last address of record and it is delivered, it is deemed received by the addressee on the service date stated on the return receipt regardless of whether it was in fact received by the addressee. See Lawrence E. Welsh, Jr., 91 IBLA 324 (1986). Under those circumstances where delivery is unsuccessful, the Board has held that, pursuant to the 43 CFR 1810.2, BLM is deemed to have met its obligation to notify the party when it sends a notice or decision, return receipt

requested, to a party's last address of record and it is returned by the Postal Service because there is no forwarding address, or delivery is refused, or no such address exists. See J-O'B Operating Co., 97 IBLA 89, 92 (1987). Sometimes described as implicit in the regulation and sometimes as a separate rule, the Department has long followed the general rule that transmission of a decision to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. Victor M. Onet, Jr., 81 IBLA 144, 146 n.2 (1984), and cases cited; John Oakason, 13 IBLA 99, 102 (1973). In such a case, the imputed date of service is the date the item is received back by BLM. Michele M. Dawursk, 71 IBLA 343, 347 (1983).

In the processing of an application for a geothermal lease, the last address of record for the purposes of 43 CFR 1810.2(b) is the address stated on the application unless the applicant or an authorized representative has filed written notice of a change of address. Victor M. Onet, Jr., 81 IBLA at 146; see 5M, Inc., 109 IBLA 334, 336 (1989). The record contains no change of address from Laverty. Thus, when BLM sent its May 11, 1991, decision to the address on the lease application, it sent it to her last address of record, and when it was returned as undeliverable, she had constructive notice of its contents. The legal effect of constructive notice is exactly the same as actual notice. Victor Onet, *supra*, and cases cited.

Laverty had constructive notice of BLM's demand for additional information, but failed to submit that information as demanded. Appellant, a co-applicant, has appealed BLM's rejection of the application, but has not specifically challenged BLM's decision to reject on account of Laverty's failure to respond as directed. We are thus presented with the question whether BLM may reject an otherwise valid pending noncompetitive geothermal lease application, because a co-applicant fails (after notice) to confirm her continued interest in that application or to provide notice of her current address, as required by BLM.

Under 43 CFR 3202.2, BLM is authorized to issue leases only to qualified applicants, and may require certain proof from applicants for leases "that the party is qualified to hold a geothermal lease." <sup>3/</sup> Implicitly, BLM may require confirmation of vital information, such as the current legal address of an applicant. To hold otherwise would result in BLM's issuing a lease to a person but being unable to contact that person directly. Administration of the lease in those circumstances would be impossible.

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<sup>3/</sup> More specifically, 43 CFR 3202.2(c) lists evidence that the authorized officer may require from would-be lessees, but does not include a statement of continuing interest or of current address.

In any event, as we noted in Vicki D. Gramm, 102 IBLA 38, 40 (1988),

[BLM] need not have a regulation on the books to back up every act it takes. Were the opposite true, 43 CFR would be considerably larger than a three-volume work. This does not mean that the agency has unbridled power to impose requirements on members of the public. Both this Board and the courts will hold BLM to show that in any given case its actions are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Here, since we are dealing with a requirement imposed on a lease offeror by individual notice rather than by regulation, the issue presented is whether the agency action was arbitrary, capricious, or an abuse of discretion. <sup>1/</sup> Clearly it was not.

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<sup>1/</sup> The Board is not limited in its appellate function to ascertaining whether agency action is arbitrary or capricious. Indeed, the Board possesses de novo review authority, consistent with the provisions of 43 CFR 4.1, 5 U.S.C. § 557(b) and 43 U.S.C. § 1705(a)(5).

So it is here. BLM's attempt to ensure that both applicants were still interested in obtaining the lease was motivated by a reasonable desire to prevent the needless expenditure of administrative resources. Even if the land report and recommendation had been updated and the decision reached to offer a lease, BLM would still have had to contact both FTB and Laverty to offer the noncompetitive lease to them. That step involved the completion by both applicants of lease forms and stipulations, and if either failed to execute and return those lease forms, no lease could have been issued. <sup>4/</sup> See Victor M. Onet, Jr., 81 IBLA at 145-46. At the time BLM issued its decision, appellant's representative had admitted that he did not know her whereabouts, and he has failed subsequently to present evidence showing where she can be found. Nor has Laverty come forward to express any interest in receiving the lease. In these circumstances, it was reasonable for BLM to consider the matter closed and simply reject the application.

Appellant does not submit on appeal that the lease should be issued to it and Laverty; it wants a lease issued to it and Wilkinson. Thus appellant does not seek reversal of BLM's decision on behalf of Laverty. The relief requested by appellant is not available: a lease could be issued pursuant to application I-19329, if at all, only to FTB and Laverty. BLM has no authority to alter a geothermal lease application to either add or subtract party applicants. Accordingly BLM properly rejected the application.

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<sup>4/</sup> The record confirms that USFS had determined in 1986 that some protective stipulations would be required.

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.

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David L. Hughes  
Administrative Judge

I concur:

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R. W. Mullen  
Administrative Judge