

ST. JAMES VILLAGE, INC., ET AL.

IBLA 99-54

Decided February 22, 2001

Appeal from a decision of the Nevada State Office, Bureau of Land Management, issuing a noncompetitive geothermal resources lease. N-52964.

Motion to dismiss denied; decision vacated and case remanded.

1. Geothermal Leases: Applications: Generally--Geothermal Leases: Noncompetitive Leases--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Timely Filing

A motion to dismiss as untimely an appeal from a BLM decision issuing a geothermal resources lease is properly denied where the record demonstrates that the appellant was not served with a copy of the decision; the lease thereafter terminated by operation of law; and the appeal was filed within 30 days from the date of its receipt of the Board's subsequent decision reinstating the lease.

2. Geothermal Leases: Applications: Generally--Geothermal Leases: Noncompetitive Leases--National Environmental Policy Act of 1969: Generally

A BLM decision issuing a geothermal resources lease, pursuant to the Geothermal Steam Act of 1970, as amended, 30 U.S.C. §§ 1001-1028 (1994), will be vacated when BLM failed to prepare, prior to lease issuance, either an EIS or an EA analyzing the potential environmental impacts of leasing, including any likely exploration and development, as required by section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (1994), and its implementing regulations (40 C.F.R. Chapter V).

APPEARANCES: Sylvia Harrison, Esq., Miranda M. Du, Esq., and John Frankovich, Esq., Reno, Nevada, for Appellants; Mark Kester Brown, Esq., Los Angeles, California, for intervenor Zonal Corporation.

## OPINION BY ADMINISTRATIVE JUDGE HUGHES

St. James Village, Inc. (SJV), and two other corporations <sup>1/</sup> (Appellants) have jointly appealed from the July 30, 1991, decision of the Nevada State Office, Bureau of Land Management (BLM), issuing a noncompetitive geothermal resources lease, N-52964, to the Zonal Corporation (Zonal) for lands in western Nevada.

On July 30, 1991, the Chief, Branch of Lands and Minerals Operations, Nevada, BLM, approved an "Offer to Lease and Lease for Geothermal Resources" (N-52964) executed by Zonal on March 22, 1990, and filed May 1, 1990. He thereby issued a geothermal resources lease to Zonal, effective August 1, 1991, pursuant to the Geothermal Steam Act of 1970, as amended, 30 U.S.C. §§ 1001-1028 (1994), and its implementing regulations (43 C.F.R. Part 3200). The lease, which has a primary term of 10 years, covers 2,014.83 acres in sec. 12, T. 17 N., R. 19 E., and secs. 8, 17, 18, and 20, T. 17 N., R. 20 E., Mount Diablo Meridian, Washoe County, Nevada. The lease grants Zonal the "exclusive right to drill for, extract, produce, remove, utilize, sell, and dispose of all the geothermal resources in the [described] lands \* \* \* together with the right to build and maintain necessary improvements thereupon."

Appellants state that they are all part of a larger corporate structure and thus under common control and that their interest in the case stems from ownership of the surface estate of a portion of the lands included in the lease and full ownership of adjacent lands. At the time of Appellants' October 2, 1998, appeal, WP owned the surface estate of 92.85 acres in Washoe County, Nevada. The geothermal resources underlying that land were leased to Zonal under lease N-52964. <sup>2/</sup> There is no

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<sup>1/</sup> The appeal was also filed by the National Land Corporation (NLC) and World Properties, Inc. (WP).

<sup>2/</sup> On Oct. 30, 1985, the United States had conveyed the surface estate of the 92.85-acre tract to the Dahlawi Nevada Corporation by the United States subject to a reservation to the United States of "[a]ll the geothermal steam and associated geothermal resources in the lands subject to this conveyance, including, without limitation, the disposition of these substances under the Geothermal Steam Act [of 1970]." (Answer, Ex. F (Patent No. 27-86-0008, dated Oct. 30, 1986) at 1.) The patent further reserved to lessees of the United States:

"[T]he right to prospect for, mine and remove the minerals owned by the United States under applicable law and such regulations as the Secretary of the Interior may prescribe. This reservation includes all necessary and incidental activities conducted in accordance with the provisions of the geothermal laws in effect at the time such activities are undertaken, including, without limitation, necessary access and exit rights, all drilling, underground, or surface mining operations, storage and transportation facilities deemed necessary and authorized under law and implementing regulations."

Id. On Oct. 21, 1992, the tract was conveyed to WP.

Appellants report that NLC is developing this tract and other adjacent lands owned by SJV in the adjacent township as an "integrated residential, golf course, and resort conference center" near Reno, Nevada, and Lake Tahoe. (SOR at 6.) See also St. James Village, Inc., 139 IBLA at 2.

evidence in the record that any of the Appellants or their predecessors-in-interest received a copy of the lease or were otherwise notified by BLM of its issuance.

The record establishes that Zonal paid the annual rental timely from 1992 through 1994, that is, on or before the August 1 anniversary date of the lease, as required by section 5(c) of the Geothermal Steam Act of 1970, 30 U.S.C. § 1004(c) (1994). However, in 1995, Zonal's rental payment was not received by BLM until August 2, 1995, 1 day after the statutory deadline. Accordingly, the lease, which had no well capable of producing geothermal resources in commercial quantities, terminated by operation of law pursuant to section 5(c) of the Geothermal Steam Act of 1970.

BLM interpreted Zonal's August 28, 1995, letter objecting to termination of the lease as a petition for reinstatement of the lease pursuant to section 5(c) of the Geothermal Steam Act of 1970. BLM denied the petition by decision dated October 4, 1995, ruling that Zonal had failed to demonstrate that its failure to pay timely was either justifiable or not due to a lack of reasonable diligence. Zonal appealed to the Board, challenging BLM's decision not to reinstate its lease. On September 23, 1996, SJV sought to intervene in the appeal, opposing reinstatement of Zonal's lease. That request was granted, based on the fact that SJV owned a portion of the surface estate of the land covered by Zonal's lease. Zonal Corp., 145 IBLA 227, 228 (1998).

By decision dated August 21, 1998, we reversed BLM's October 1995 decision. We concluded that Zonal's lease had, in fact, terminated by operation of law on August 1, 1995, when its annual rental payment was received 1 day late, on August 2, 1995. 145 IBLA at 228-29. However, we also concluded that, in accordance with section 5(c) of the Geothermal Steam Act of 1970, Zonal had demonstrated that its failure to pay timely was both justifiable and not due to a lack of reasonable diligence, since the payment had been postmarked on or before the lease anniversary date and was then rejected for payment through the bank's own error. We held that Zonal was entitled to reinstatement of its terminated geothermal resources lease. Id. at 229-31.

SJV received a copy of our August 1998 decision in Zonal Corp. on September 2, 1998. <sup>3/</sup> On October 2, 1998, all three Appellants filed a joint "Notice of Appeal" from BLM's July 30, 1991, issuance of Zonal's lease. They have subsequently also filed a statement of reasons (SOR) for their appeal.

Zonal has sought to intervene in this current proceeding by filing an answer to Appellants' SOR. In view of its obvious interest in the proceeding, which challenges the continued validity of its lease, it is appropriate to grant that request, thus permitting it to participate as a party. Sierra Club ! Rocky Mountain Chapter, 75 IBLA 220, 221! 22 n.2 (1983).

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<sup>3/</sup> The Sept. 2, 1998, date of Zonal's receipt of our August 1998 decision is established by a return receipt card signed by counsel for Zonal on that date.

[1] Zonal asks us to dismiss the appeal from BLM's July 1991 decision because it was assertedly not timely filed as required by 43 C.F.R. § 4.411. Regulation 43 C.F.R. § 4.411(a) establishes the mandatory timeframe within which a party seeking to appeal a BLM decision must file its notice of appeal: "A person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the [BLM] office where it is required to be filed within 30 days after the date of service." (Emphasis added.) It is well established that the failure to file an appeal timely requires that the appeal be dismissed, since the Board is without any jurisdiction to entertain it. 43 C.F.R. § 4.411(c); Gerry Zamora, 125 IBLA 10, 12 (1992); Lew Landers, 109 IBLA 391, 392 (1989); San Juan Coal Co., 83 IBLA 379, 381 (1984); Ilean Landis, 49 IBLA 59, 61 (1980).

Appellants aver that, although none of them was ever served with a copy of BLM's July 1991 decision issuing the lease, they "became aware of the existence of the Lease in July 1996." (Notice of Appeal at 2.) They have explained that, at that time, they inadvertently learned of BLM's issuance of geothermal resources lease N-52313, which covers lands the surface of which is owned by SJV. They searched BLM's records in an effort to determine whether other leases had been issued covering lands the surface of which is owned by SJV or WP, discovering the existence of lease N-52964 in July 1996. (SOR Ex. 1 at 1-2; see Reply Att. 1 at 2.) It is thus clear that Appellants became aware no later than July 1996 of BLM's issuance of the lease on July 30, 1991.

The "date of service" of a BLM decision under 43 C.F.R. § 4.411(a) may be established by the date an appellant or his authorized representative received actual notice of the decision. St. James Village, Inc., 139 IBLA 1, 3-4 (1997); Minchumina Homeowners Association, 93 IBLA 169, 173 (1986); Nabesna Native Corp., Inc. (On Reconsideration), 83 IBLA 82, 84 (1984). Here, in the absence of any proof to the contrary, <sup>4/</sup> Appellants are deemed to have had actual notice of issuance of the lease at issue in July 1996, when they admit to having become aware of issuance.

Thus, in normal circumstances, Appellants would have had only until sometime in August 1996 to challenge BLM's issuance of the lease. <sup>5/</sup>

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<sup>4/</sup> Zonal points out that NLC was aware of the pendency of a geothermal resources lease application (N-52313) on lands nearby the subject lease and actually filed a protest against its issuance. We reject the argument that such knowledge put Appellants on inquiry notice regarding issuance of the subject lease. (Answer at 2.)

We also reject Zonal's argument that Appellants bear the burden of proving that they or their predecessors-in-interest did not have actual knowledge that the lease had been issued, thereby "preclud[ing] the possibility" that they, or any of their officers or employees, had such knowledge. (Answer at 7-8.) That is an impossible burden, and, in any event, we think that the burden lies with BLM or an adverse party to show that the date actual knowledge was acquired was earlier than that asserted by Appellants. They have failed to do so.

<sup>5/</sup> Zonal objects to what it regards as a "free-floating right to appeal from the original issuance of the Lease," which could be exercised whenever Appellants learned or claimed to have learned of issuance, thus potentially

However, these were not normal circumstances. In July and August 1996, Zonal's lease was no longer in existence, having terminated by operation of law on August 1, 1995. Such termination arose automatically by reason of the late payment of the annual rental on August 2, 1995; it did not depend upon any affirmative action by BLM, and could not be avoided by any action. George M. Wilkinson, 130 IBLA 79, 80-81 (1994). Appellants were aware of this situation, having been informed by BLM that the lease had terminated by operation of law and that Zonal had appealed BLM's denial of its reinstatement petition. (SOR Ex. 1 (Affidavit of Du) at 2.) There was accordingly nothing for Appellants to challenge at that time, and any appeal would have been subject to dismissal for mootness (see Southern Utah Wilderness Alliance, 151 IBLA 237, 240-41 (1999)) or lack of standing. See 43 C.F.R. § 4.410(a); Laser, Inc., 136 IBLA 271, 273-74 (1996). All that existed was the possibility that the lease might be reinstated by BLM or the Board on appeal. It was not until the Board reinstated the lease that Appellants can be said to have been adversely affected by BLM's decision to issue the lease, and thus to have standing to appeal therefrom. 6/

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fn. 5 (continued)

upsetting or even chilling the initiation of exploration/development and other lease-related activities. (Answer at 11.) We recognize that where, as here, BLM fails to serve copies of its decision issuing leases to parties who are adversely affected by that decision (such as surface owners), it leaves open the possibility that the decision might be challenged for an indefinite period. Service on adversely affected parties would have afforded Zonal the assurance that such parties could not challenge the decision more than 30 days thereafter.

6/ We also reject any suggestion by Zonal that Appellants lack standing to appeal from BLM's July 1991 decision because they are not "part[ies] to [the] case," as also required by 43 C.F.R. § 4.410(a). Having finally learned of issuance of the lease in July 1996, they intervened timely in Zonal's pending appeal concerning reinstatement of the lease, and have subsequently pursued this appeal, following the Board's August 1998 decision reinstating the lease. We regard their participation before us in that case as sufficient to establish Appellants as parties to the case. Cf. Donald W. Coyer, 50 IBLA 306 (1980) (rev'd 720 F.2d 626 (1983), cert den. sub nom. Easterday v. Coyer, 466 U.S. 972 (1984)) (ruling that where an individual who is the beneficiary of a BLM decision had the opportunity to participate in an appeal seeking reversal of that decision before IBLA but decides not to participate in the proceedings before the Board, the matter becomes res judicata upon the rendering of the Board's decision, and the party may not subsequently challenge the decision by filing a new appeal of his own before the Board seeking readjudication of the same matter.)

We note that Appellants are not seeking readjudication of the issues resolved in Zonal Corp., supra, dealing with whether the lease should have been reinstated, which issues are now res judicata. Instead, they challenge whether the lease should have been issued at all, an issue that has never been litigated.

In this case, BLM took no ministerial action to implement our decision reinstating the lease. <sup>7/</sup> In the absence of such, we regard reinstatement to have occurred on August 21, 1998, when we issued our decision in Zonal Corp., 145 IBLA 227 (1998). Appellants accordingly had until October 2, 1998 (30 days after September 2, 1998, when they received notice of our decision), to file a notice of appeal of BLM's original decision to issue the lease. Thus, Appellants' appeal, which was filed with BLM on October 2, 1998, was timely.

[2] We turn to the substantive issues raised in the appeal from BLM's July 1991 decision issuing geothermal resources lease N-52964. Appellants contend that, in deciding whether to lease the lands at issue here, BLM failed to evaluate the environmental consequences likely to occur from issuing a lease. They note that BLM failed to consider the potential adverse impacts from geothermal exploration and development on their existing and planned residential/recreational development of leased and adjacent lands, especially the impacts on aesthetic and environmental values. They further note that exploration and development may threaten the viability of their entire project and diminish the value of their private land, even rendering it unmarketable. Appellants assert that BLM's failure to prepare an environmental assessment (EA) or environmental impact statement (EIS) violated section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (1994).

BLM is required by section 102(2)(C) of NEPA to consider the potential environmental impacts of a proposed action in an EIS when it intends to engage in a major Federal action which significantly affects the quality of the human environment. See 42 U.S.C. § 4332(2)(C) (1994); Sierra Club v. Marsh, 769 F.2d 868, 870 (1st Cir. 1985). In order to determine whether any potential impacts of a proposed action are likely to rise to the level of significance, thus mandating preparation of an EIS, BLM is required to first prepare an EA. 40 C.F.R. § 1501.4. When BLM determines on the basis of an EA that no significant impact is likely to occur, it is required to prepare a finding of no significant impact (FONSI), and may then proceed to decide whether to approve the proposed action. 40 C.F.R. § 1501.4. However, when it determines that a significant impact may occur, BLM is required by section 102(2)(C) of NEPA to prepare an EIS before making its decision.

BLM's obligation to comply with section 102(2)(C) of NEPA extends to its decision to issue a geothermal resources lease. Eason Oil Company, 24 IBLA 221, 223-26 (1976). However, it is undisputed that BLM did not

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<sup>7/</sup> We have decided that it is not appropriate to remand the matter to BLM to issue a formal, written decision reinstating the lease. Doing so would only delay this matter, as it is apparent that Appellants would immediately file an appeal raising the same issues presented in the context of the present appeal. In such circumstances, where there is no practical benefit in remanding the case, it is appropriate to consider the merits of the appeal. See Robert C. LeFavre, 95 IBLA 26, 28 (1986).

prepare an EIS or an EA considering the environmental effects of the issuance of lease N-52964. Appellants have provided evidence that BLM prepared an EA (NV-030-6-13), entitled "Regional Environmental Analysis Record, Geothermal/Oil & Gas Leasing in the Pyramid Area, Carson City District, Nevada," on August 4, 1975 ("1975 EA"). This EA assessed the proposed leasing of Federally-owned geothermal and oil and gas resources in the "Pyramid Area," which encompasses about 948,000 acres of Federal, State, and private lands in the vicinity of Reno, Nevada, including those at issue here. They have provided a copy of the EA (SOR Ex. 2). Appellants note that there is no evidence that BLM issued a FONSI following preparation of the 1975 EA, and thus never determined whether an EIS was statutorily required. Neither BLM, which has never responded to Appellants' appeal, nor Zonal, which did respond, contradicts Appellants' assertion.

More recently, on July 17, 1992, BLM, together with the Forest Service, U.S. Department of Agriculture, prepared an EA entitled "Environmental Assessment for Geothermal Lease Application N-52313" ("1992 EA"). That EA assessed the proposed issuance to Zonal of geothermal resources lease N-52313, which would cover 2,346.54 acres in secs. 2, 4, 14, 22, and 25, T. 17 N., R. 19 E., and sec. 18, T. 17 N., R. 20 E., Mount Diablo Meridian, Washoe County, Nevada. <sup>8/</sup> Appellants have provided a copy of that EA (SOR Ex. 4), pointing out that there is no evidence that BLM issued a FONSI following preparation of the 1992 EA, and that it appears that it never determined whether an EIS was statutorily required specifically in connection with leasing the lands sought in lease offer N-52313. Again, neither BLM nor Zonal contradicts Appellants' assertion.

We are persuaded that BLM was required to prepare an EA or EIS assessing the potential environmental impacts of leasing before deciding whether to lease the lands covered by lease N-52964, and, if necessary, an EIS. Conner v. Burford, 836 F.2d 1521, 1529-32 (9th Cir. 1988); Sierra Club v. Peterson, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983); Union Oil Company of California, 102 IBLA 187, 191-93 (1988), and cases cited therein. Such environmental review was required to address impacts of any exploration, development, or other activity which might be authorized by virtue of issuance. See Colorado Environmental Coalition, 149 IBLA 154, 156 (1999). We recognize that BLM may also be required to undertake a specific environmental review prior to approving particular plans for the drilling and production of geothermal resources from the leased lands. See 43 C.F.R. § 3261.3(b) (1991). However, we think that it is clear now that the issuance of a lease constitutes an irreversible and irretrievable commitment of resources, raising a substantial question whether significant impacts might result, thus requiring an appropriate environmental review concerning the leasing decision itself. In the absence of a lease stipulation authorizing it to preclude such activity if environmental review

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<sup>8/</sup> Zonal's lease offer N-52313, which was filed on Dec. 1, 1989, originally overlapped its lease offer N-52964, which was filed on May 1, 1990, with respect to E $\frac{1}{2}$ E $\frac{1}{2}$  and Lot 11, sec. 18. However, the lands in sec. 18 were excluded from the lease prior to issuance. (SOR Ex. 7 (Lease N-52313) at 1.)

discloses unacceptable impacts, BLM has no authority to bar activity on the leased lands following lease issuance. See Conner v. Burford, 836 F.2d at 1527, 1529-32; Sierra Club v. Peterson, 717 F.2d at 1414-15; Union Oil Company of California, 102 IBLA at 191-93, and cases cited therein; compare with Village of False Pass v. Clark, 733 F.2d 605, 608-09, 614-17 (9th Cir. 1984) (Outer Continental Shelf oil and gas leases).

We are not dissuaded from our conclusion by Zonal's assertion that the instant case is akin to Sierra Club v. Hathaway, 579 F.2d 1162 (9th Cir. 1978) (Answer at 14-15), where, despite the absence of a site-specific EIS, the court refused to enjoin geothermal resource lease issuance or any activity thereunder, holding that the complaining parties were unlikely to succeed on the merits of their assertion that BLM had violated section 102(2)(C) of NEPA. In that case, BLM had already prepared a programmatic EIS addressing the environmental impacts of geothermal leasing generally and an EA addressing the impacts of such leasing in the specific area of land at issue. 579 F.2d at 1165-66, 1168-69.

Neither the 1975 EA nor the 1992 EA assessed the site-specific environmental impacts of issuing lease N-52964. We note that the 1975 EA included a comprehensive analysis of the environmental impacts of leasing Federally-owned geothermal resources in the 948,000-acre Pyramid Area, including the impacts of exploration, development, and ongoing operations on other land uses and on aesthetic and recreational values. (1975 EA at 100, 103-05, 108, 112-13, 120, and 126-27.) Although it generally outlined these impacts, it did not offer the detail necessary to address impacts on any particular site within that larger area. Further, the 1975 EA clearly could not have considered the impacts of exploration and development on the residential/recreational development now planned and being undertaken by Appellants, since no such development was taking place or even planned back in 1975. The 1992 EA did not consider the site-specific impacts of issuing a lease for the great majority of the lands covered by lease offer N-52964.<sup>9/</sup> Nor did it specifically assess the impacts on the residential/recreational development which was then planned and is now being undertaken by Appellants. See 1992 EA at 15-17. It remains to be seen whether such EA will reveal significant impacts, such that an EIS would be required.

BLM is required by section 102(2)(C) of NEPA to consider the reasonably foreseeable consequences of its actions. Thus, BLM must consider the likely impacts of residential or other development which might be spawned by its approval of a proposed action. Howard B. Keck, Jr., 124 IBLA 44, 47-50 (1992), *aff'd*, Keck v. Hastey, No. S92! 1670-WBS! PAN (E.D. Cal. Oct. 4, 1993). By the same token, it is required to consider the likely impacts on nearby development which might be affected by such approval. We recognize that BLM's environmental analysis (and thus the foreseeable consequences for the environment) depends upon the degree to which the

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<sup>9/</sup> The only lands addressed in the EA that are included in lease offer N-52954 are the E $\frac{1}{2}$ E $\frac{1}{2}$  sec. 18, T. 17 N., R. 20 E., Mount Diablo Meridian. (SOR Ex. 4 (1992 EA) at 15-16.)

scope of such development can be reasonably ascertained. Howard B. Keck, Jr., 124 IBLA at 48-50. Nonetheless, absent any evidence contradicting Appellants' assertions that their plans were sufficiently formulated at the time of the July 1991 decision to have permitted BLM to undertake some environmental analysis, we are not persuaded that BLM has fulfilled its obligation under section 102(2)(C) of NEPA.

Whether an EIS must be prepared instead of an EA is a question to be addressed by BLM upon return of the case. <sup>10/</sup> BLM's decision on this point would be subject to appeal to the Board pursuant to 43 C.F.R. Part 4. Nor do we consider whether, as maintained by Appellants (SOR at 15), BLM violated the Geothermal Steam Act of 1970 and implementing regulations by failing to make an express determination that leasing here is in the public interest. See 43 C.F.R. § 3201.1-1(a) (1991). In determining whether to re-issue the lease in question following completion of environmental review, BLM must, of course, abide by all governing statutes and regulations.

In summary, we conclude that, in the absence of compliance with the procedural requirements of section 102(2)(C) of NEPA, BLM should not have issued geothermal resources lease N-52964 to Zonal. Its July 1991 decision is hereby vacated, and the case remanded to BLM for compliance with 43 C.F.R. § 3213.23(a) and other governing regulations, as well as with NEPA and the Geothermal Steam Act of 1970. See St. James Village, Inc., 139 IBLA at 5; Clayton W. Williams, Jr., 103 IBLA 192, 208-10, 95 I.D. 102, 111-12 (1988) (lease issued absent compliance with NEPA is voidable); Sierra Club, 79 IBLA 240, 247-50 (1984) (decision to deny protest to lease issuance set aside where it was unclear whether BLM had complied with NEPA by properly engaging in staged leasing); see also Davis v. Morton, 469 F.2d 593, 596-98 (10th Cir. 1972).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Zonal's motion to dismiss Appellants' appeal is denied, the decision appealed from is vacated, and the case is remanded to BLM for further action consistent herewith.

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David L. Hughes  
Administrative Judge

I concur:

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T. Britt Price  
Administrative Judge

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<sup>10/</sup> We note that Zonal retains priority to receive any lease that is reissued by BLM following compliance with NEPA.

