



GEO-ENERGY PARTNERS-1983 LTD.

170 IBLA 99

Decided September 14, 2006

Editors Note: Appeal filed, Civ. No. 3:06-cv-00612-BES-RAM (D. Nev.) *aff'd*, (March 18, 2008), , [2008 WL 728900](#), 551 F.Supp.2d 1210 (D. Nev. 2008), *appeal filed*, No. 08-16216 (9th Cir. May 15, 2008) *aff'd*, (July 27, 2010) Geo-Energy Partners-1983 Ltd. v. Salazar, 613 F.3d 946 (2010).



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

GEO-ENERGY PARTNERS-1983 LTD.

IBLA 2003-253

Decided September 14, 2006

Appeal from decision of the Nevada State Office, Bureau of Land Management, requiring contraction of a geothermal unit. N 56347X.

Affirmed.

1. Administrative Appeals--Administrative Procedure: Administrative Review--Appeals: Generally

The requirement that there be “a decision of an officer” before an appeal can lie is essential. A *decision* either authorizes or prohibits an action affecting individuals who have interests in the public lands. When an adverse impact on a party is contingent upon some future occurrence, or where the adverse impact is merely hypothetical, it is premature for this Board to decide the matter. Where BLM has stated that it will finally decide certain issues at a future date, and identified factors that could influence its decisionmaking or moot an appeal, there is presently no decision which could be appealed.

2. Geothermal Leases: Extensions--Geothermal Leases: Unit and Cooperative Agreements--Geothermal Resources

If a geothermal lease was eligible for a diligent efforts extension when the extension was granted, the extension was legally effective. If a first or second extension was granted before the lease was committed to a unit, the extension remains effective after commitment to the unit. A lessee need not, but may, request a diligent efforts extension after the lease has been committed to a unit, but once the diligent efforts extension is granted and the lessee fails to appeal the decision granting it, the extension is legally effective. After a lease is committed to

a unit, the lessee need not, but may, request a unit commitment extension instead of a diligent efforts extension, provided the lease term is less than the unit's term and unit development has been diligently pursued.

3. Geothermal Leases: Extensions--Geothermal Leases: Unit and Cooperative Agreements--Geothermal Resources

A geothermal lease may be extended for two successive 5-year periods, provided the request is submitted 60 days before the end of the primary or extended term. *Successive* means consecutive. No provision of the Geothermal Steam Act of 1970, as amended, authorizes these extensions on other than a successive basis.

4. Geothermal Leases: Extensions--Geothermal Leases: Unit and Cooperative Agreements--Geothermal Resources

Where Congress provided for extension of a geothermal lease equal to the period when operations and production are suspended when it enacted the Geothermal Steam Act in 1970, but did not enact a similar provision relating to extensions for leases eliminated from units when it amended the Act in 1988, the omission properly gives rise to the inference that Congress did not intend to provide for an extension of leases so eliminated from units. When the Act contains nothing supporting an assertion that diligent efforts lease extensions are tolled or voided when committed to a unit, this Board properly rejects an interpretation of the Act that would create such a right by implication.

5. Geothermal Leases: Extensions--Geothermal Leases: Unit and Cooperative Agreements--Geothermal Resources

Any lease or portion of a lease eliminated from a unit agreement shall be eligible for an extension under 30 U.S.C. § 1005(c) or (g) (2000) if it separately meets the requirements for such an extension at the point when it is eliminated from the unit.

6. Estoppel--Geothermal Leases: Extensions--Geothermal Leases: Unit and Cooperative Agreements

An undated draft of a decision prepared by the geothermal lessee that was never adopted or issued by BLM is of no practical or legal effect and cannot either serve as a basis for granting a lease extension where no such extension is authorized by the Geothermal Steam Act, as amended, or estop the United States from invoking the terms of the unit agreement or requiring the lessee to comply with applicable law. Where BLM issued a decision reflecting a construction of the Act that is inconsistent with the lessee's interpretation and the lessee did not appeal it, and the lessee was aware that BLM had sought legal advice and direction in interpreting the Act, a subsequent BLM letter stating that, in the future, action would be taken to modify the earlier decision and cancel prior lease extensions does not estop the United States. The letter is not a written decision, it does not constitute a crucial misstatement and/or concealment of material facts, there is no detrimental reliance and it cannot be used to give appellant a substantive right not authorized by the Act.

APPEARANCES: John J. (Jack) McNamara, Esq., Agoura, California, for appellant; Emily Roosevelt, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

GEO-Energy Partners-1983 LTD. (GEO) has appealed a May 12, 2003, geothermal unit contraction decision of the Nevada State Office, Bureau of Land Management (BLM). The decision contracted (reduced) the Fish Lake II Unit (Unit) to the boundaries of the Unit participating area (PA) and declared that the geothermal leases and portions of leases thus excluded had expired. Unit contraction eliminated seven geothermal leases located wholly outside the PA and eliminated portions of five other leases located outside the PA.^{1/} The decision acknowledged receipt of various lease assignments and sundry notices (SNs) requesting approval to abandon 31 wells in the Unit, but postponed action on those assignments and SNs.

^{1/} The following leases are located outside the PA: N-10311, N-17777, N-31992, N-36616, N-36617, N-36618, and N-36619. The following leases are partially outside the PA: N-8421, N-8428, N-9647, N-31991, and N-31993.

The decision also declared that the Fish Lake Power Company (FLPC) remained the Unit operator. Lastly, the decision discussed the adequacy of the Unit bond covering FLPC's Unit operations, but otherwise did not take or prohibit action. (Administrative Record (AR) Vol. IV, Tab 15.)

Statement of Facts

The facts are generally not in dispute and are as follows. The leases committed to the Unit were issued pursuant to the Geothermal Steam Act of 1970, as amended, 30 U.S.C.A. §§ 1001-1028 (West Supp. 2006).^{2/} According to BLM, the first commercial well in northern Fish Lake Valley was completed in 1984 as part of the diligent development required by the Fish Lake I Unit, which terminated in 1988 for lack of diligent development when the unit failed to meet its drilling obligations. GEO acquired the interests of one of the partners in the Fish Lake I Unit at some point between 1982 and 1985. The leases in that defunct unit included all the leases involved in this appeal, and all of them would have expired when the Fish Lake I Unit terminated because they were beyond their primary terms. The leases did not expire, however, because BLM granted extensions.

In January 1987, BLM extended leases N-8421, N-8428, N-8429, N-9647, N-10311, and N-17777 through December 31, 1988, via an Interior Department appropriations bill legislatively authorizing extensions of geothermal leases meeting certain criteria. (AR Vol. IV, Tab 44.) On February 10, 1989, a diligent efforts extension under the Act was granted, extending those five leases through December 31, 1993. BLM's decision expressly advised that extensions "for up to two successive five-year periods" were available if the leases met relevant criteria. (AR Vol. IV, Tab 42.) As will be explained below, the leases did not expire because BLM granted diligent efforts extensions.

By decision dated August 19, 1991, BLM granted a first diligent efforts extension through August 31, 1996, for leases N-31991, N-31992, and N-31993, which otherwise would have expired on August 31, 1991. (AR Vol. IV, Tabs 39, 40.)^{3/}

^{2/} The Geothermal Steam Act was amended on Aug. 8, 2005. Pub. L. 109-58, 119 Stat. 600.

^{3/} Appendix A to BLM's May 12, 2003, decision lists the dates of extensions and identifies lease N-31992 as having been extended on Oct. 15, 1992, apparently an error. For the reader's convenience, Appendix A has been reproduced at the end of this opinion.

In 1992, GEO and Magma Power Company (Magma) formed Magma/GEO-83 JV (the JV), and on August 31, 1992, aggregated their leases to form a second unit and executed the Fish Lake II Unit Agreement (Unit Agreement). (AR Vol. III, Tab DL.) Under the Unit Agreement, FLPC, a Magma subsidiary, was designated the Unit Operator. The JV was designated the working interest owner, but all the rights and responsibilities for Unit operations and exploration, production, and utilization of the unitized resources were delegated to FLPC. *Id.*, Article X, ¶ 10.1. The Unit Agreement provided for automatic contraction 5 years after the initial participating area (PA) was established “unless diligent drilling operations were in progress on an exploratory well on said fifth anniversary.” *Id.*, Article IV, ¶ 4.3. Under Article IV, ¶ 4.3 of the Unit Agreement, all unitized leases or portions thereof that are not entitled to be included within a PA as of the fifth anniversary of the effective date of the establishment of the initial PA are automatically eliminated from the Unit unless diligent drilling operations are underway on an exploratory well. If diligent drilling is in progress on the anniversary date, the lease remains in the Unit “for as long as exploratory drilling operations are continued diligently with not more than four (4) months time elapsing between the completion of one exploratory well and the commencement of the next exploratory well.” *See also* Article IV, ¶ 4.5. (AR Vol. III, Tab DL at 3.)

By decision dated October 16, 1992, a diligent efforts extension was granted for leases N-36616, N-36617, N-36618, and N-36619, through September 30, 1997. Those leases otherwise would have expired on September 30, 1992. (AR Vol. IV, Tab 33.)^{4/} The decision modified the subject leases to reflect the JV’s election to meet the significant expenditures requirement in lieu of production under 43 CFR 3203.1-4(c)(2)(ii) (1993), now codified as 43 CFR 3208.14.

In September 1993, Magma requested a second diligent efforts extension for leases N-8421, N-8428, N-9647, N-10311, and N-17777. As stated, these leases had been extended through December 31, 1993. That request was granted by decision dated November 3, 1993, thereby extending the leases through December 31, 1998; the decision modified the subject leases to reflect the JV’s election to meet the significant expenditures requirement in lieu of production. (AR Vol. IV, Tabs 29, 30.)

On March 3, 1994, BLM determined that the Unit had met its initial diligent development obligation by drilling a well (No. 81-13 on lease N-9647) capable of producing geothermal resources in paying quantities. BLM recommended placing

^{4/} Magma’s July 1, 1992, request for the extension stated that the lease terms would expire on Sept. 1, 1992. (AR Vol. IV, Tab 35.) We note also that Appendix A to BLM’s May 12, 2003, decision identifies leases N-36616, N-36617, N-36618, and N-36619 as having been extended on Oct. 15, 1992.

this lease in *additional term*. (AR Vol. III, Tab CS.)^{5/} Under the Unit Agreement, no further diligent development was required until the Unit contraction date. (AR Vol. III, Tab DL, Articles IV, ¶ 4.3 and XI, ¶ 11.5.)

In a letter dated April 29, 1994, from Magma to the Chief, Branch of Lands and Minerals Operations, of BLM's Reno (Nevada) Office, on behalf of the JV and FLPC, Magma noted that leases N-38842, N-38844, N-39467, N-39468, and N-39469 were approaching the end of their primary terms. (AR Vol. IV, Tab 27.) As a result, Magma stated that the JV was considering whether extensions should be requested, in the course of which the JV had reached several conclusions regarding a construction of the Act and the Unit Agreement. *Id.* Magma expressed its reasoning as follows: The existence of a Unit well that is capable of producing geothermal resources extends a lease for up to 40 years and causes all leases in the Unit to be held by production.^{6/} Actual commercial production eliminates the requirement imposed by the Unit Agreement to diligently explore the leased lands as to all leases in the Unit. Since a commercial producing well relieves the lessee of the requirement of diligent exploration on all of the leases, there is therefore no further obligation to make significant expenditures or payments in lieu of production in commercial quantities during the period of any extensions the JV had previously requested for any of the leases. (AR Vol. IV, Tab 27 at 2-3.) Magma then asserted the following conclusion:

The drilling of a commercial well in a federal unit "tolls" * * * the term of each unitized lease, regardless whether the lease is in its primary term or has been extended under Regs §3203.1-4(b) or (c), such that upon exclusion of a lease from the unit (by contraction of the Unit under the Unit Agreement §4.3, because the Commercial Well is no longer deemed "commercial" or for any other reason), the term of that lease continues (i.e., the clock once again starts running) from the date of such exclusion. (See Act §1017, ¶2; Unit Agreement §17.11). As such, there is no need for the Partnership [the JV] to elect a Steam Act Amendment Extension (or an extension under Regs §3203.1-4(b)) for any BLM lease while it is included in the Unit, since the Partnership will retain the right to elect such extensions if and when that BLM Lease is ultimately excluded from the Unit.

^{5/} The parties refer to this event as a "commerciality determination." See, e.g., Notice of Appeal and Statement of Reasons (NA/SOR) at 4; BLM decision dated Sept. 21, 1994, at 2. (AR Vol. III, Tab CR.)

^{6/} Under 30 U.S.C. § 1005(a) (2000), the presence of a well capable of producing the geothermal resource qualified the lease for continuation for a period not to exceed 40 years.

(AR Vol. IV, Tab 27 at 3.) Applying the foregoing reasoning to its leases, Magma concluded that, for leases for which extensions had been granted and for which either significant expenditures or payments in lieu of production, or both, had been made, the lease terms had been “tolled” so that “[e]xtensions were unnecessary and are therefore revoked (and preserved for future use)” when and if the leases were excluded from the Unit, and there was no further obligation with respect to significant expenditures or payments in lieu of production. *Id.* (Emphasis added.)^{7/}

For leases that had received a first 5-year extension on September 1, 1991, or October 1, 1992, Magma claimed that the extensions had been tolled, and that there was no further obligation to make payments or significant expenditures.^{8/} In addition, it asserted that, as to the December 1, 1993, and February 4, 1994, extensions, they had been unnecessary and therefore were revoked and “preserved for future” use at such time as the leases might be eliminated from the Unit. For those leases still in their primary terms, which were then due to expire on June 30, 1994, or July 31, 1994, Magma contended that their primary terms had been tolled by completion of a well capable of commercial production. (AR Vol. IV, Tab 27 at 3-4.)^{9/}

The letter acknowledged that “there is a lack of consensus at the BLM over conclusions similar to those set forth * * * above,” that BLM had requested legal advice from the Regional Solicitor, and that various discussions between the JV and BLM had occurred. Magma stated that Kurt Mueller of BLM’s Sacramento (California) Office had

concluded that, given the lack of a consensus at the BLM surrounding some of the above questions, it would be appropriate for us to proceed on the basis of our good faith conclusions set forth above (at least during the BLM’s review of these issues (the “BLM Review Period”)), while still reserving the right to take alternative action if the BLM were to ultimately decide on a regulatory interpretation at odds with our interpretation as set forth above.

^{7/} Those leases are N-8421, N-8428, N-8429, N-9647, N-10311, and N-17777.

^{8/} Those leases are N-31991, N-31992, and N-31993, extended on Sept. 1, 1991; N-36616, N-36617, N-36618, and N-36619, extended on Oct. 1, 1992; leases N-38412, N-38413, N-38414, and N-38415, extended on Dec. 1, 1993; and lease N-38843, extended on Feb. 1, 1994. The record apparently does not contain a copy of the decisions granting these first 5-year extensions to which Magma’s letter referred.

^{9/} Those leases are N-38842, N-38844, N-39467, N-39468, and N-39469.

(AR Vol. IV, Tab 27 at 5.) Magma further asserted that Richard Hoops, in the Branch of Lands and Minerals Operations in BLM's Reno Office, in a telephone conversation had "also acknowledged that our approach is appropriate and that we could expect to have a reasonable time to take alternative action to preserve the BLM leases in the event of an adverse BLM determination." Id.

On September 21, 1994, BLM issued a decision declaring lease N-9647 in additional term, and further declaring that all the leases committed to the Unit were held by production as a result of commercial production from well No. 81-13. In addition, the decision warned that, on the fifth anniversary after December 1, 1993, the date of the commerciality determination and the date lease N-9647 was established as the initial PA, all participating leases within the Unit area would be automatically eliminated unless diligent operations were in progress. Accordingly, the decision extended leases N-31991, N-31992, N-31993, N-36616, N-36617, N-36618, N-36619, N-38842, N-38844, N-39467, N-39468, and N-39469 through November 30, 1998. (AR Vol. IV, Tab CR.) Other leases were not extended because they had been granted either a first (leases N-38412, N-38413, N-38415, and N-38843) or second (leases N-8421, N-8428, N-8429, N-9647, N-10311, N-17777) extension by the November 3, 1993, decision. See AR Vol. IV, Tabs 29, 30. BLM determined that, "[a]s a result of that decision, all of the expiration dates of the extended leases will equal or exceed the five year extension afforded by the commencement of production." Id. at 2. The decision listed all the leases by serial number, their effective and expiration dates, as then extended, and their current status following the September 21, 1994, decision, i.e., what term each lease was in, and whether a payment or significant expenditures option had been elected. Id. On its face, the September 21, 1994, decision was thus fundamentally inconsistent with the JV's assertion in its April 29, 1994, letter that the extensions were revoked and preserved for future use.

On November 30, 1994, BLM issued a decision directing the JV to submit a PA schedule identifying the land regarded as reasonably proved to be productive and the percentage of unitized substances to be allocated to each tract in the PA. (AR Vol. III, Tab CP.) The JV complied with that request with a submission dated February 1995. (AR Vol. III, Tab CO.)

In a letter to Jack Lewis in the Branch of Lands and Minerals Operations in BLM's Reno Office dated December 9, 1994, Magma challenged the propriety of BLM's conclusion in the September 21, 1994, decision that December 1, 1993, was the date when the initial PA was established. Magma alleged an ambiguity in Article XII, ¶ 12.1 of the Unit Agreement with respect to whether "commencement of production of Unitized Substances" meant actual production or a well capable of production in commercial quantities. Advocating the former, Magma argued that the establishment of the initial PA had not yet occurred, and that the leases extended by

the September 21, 1994, decision would be extended to a date that would be 5 years after the establishment of the initial PA. Magma reiterated its interpretation of the Act and Unit Agreement provisions relative to the tolling of lease terms to preserve the prior extensions for use if and when the Unit contracted. (AR Vol. IV, Tab 26.) The letter was signed by Vincent J. Signorotti for Magma, and it enclosed a “proposed form of decision letter” with Signorotti’s expressed hope that Lewis would decide to use it “to supersede the previous [September 21, 1994,] Decision Letter and to memorialize the results of our meeting on November 9th [1994].” (AR Vol. IV, Tab 26 at 4.)

Ultimately, by decision dated April 27, 1995, the PA was established, with an effective date of May 1, 1995, amending the effective date stated in the September 21, 1994, decision. Lands within the PA were declared subject to royalty, while lands outside the PA were declared subject to rental. (AR Vol. III, Tab CJ.)

In 1995, FLPC, the designated Unit Operator, decided to devote the Fish Lake Valley energy sales contract to a Cal Energy geothermal project in California, which caused GEO to sue for breach of contract in 1997. (Answer at 8.)^{10/} As noted above, following the May 1, 1995, commerciality determination, no further diligent development was required until the Unit contraction date, May 1, 2000. It was up to FLPC as Unit Operator and the JV as Working Interest Owner to decide how to pursue diligent development, but they were unable to reach agreement on the issue.

BLM communicated with GEO’s counsel by letter dated December 5, 1997. In that letter, BLM responded to the points Magma had raised on the JV’s behalf as follows:

Since a commercial well has been completed on a lease committed to the unit, all leases committed to the unit will remain in effect as long as they remain part of the unit. All leases in the PA or portions of leases within the PA are in additional term and are paying minimum royalty rather than rental, so they will remain in effect after unit contraction. Leases will be segregated when unit contraction occurs. Any leases, or portions of leases, outside the PA will remain in effect after the unit contraction date only if provided by their individual lease terms. Possibilities for leases to then remain in effect include: 1) the lease is still in its primary period, 2) drilling occurs within the unit over the end of the primary period of any lease committed to the unit, or 3) a five-year extension of lease terms is requested for any lease by the end of its primary period or any other extension. To obtain such an extension,

^{10/} We are informed that Cal Energy now owns FLPC and Magma. (Answer at 8 n.6.)

the request must meet the informational requirements found at 43 CFR 3203.1-4(c) and be received by this office at least 60 days prior to unit contraction. Since this extension may be granted for successive five-year periods, any lease which has already received either the first or the second extension is not eligible for another such extension. Any lease outside the PA, beyond its primary period, and not receiving any extension of its individual terms, will terminate upon contraction of the unit. It is likely that some involved leases already have received at least one five-year extension and so would expire unless additional drilling occurs prior to unit contraction. This office has not had time to research the status of individual leases in the unit. * * *

(Dec. 5, 1997, letter, Appendix B to May 12, 2003, Decision at 2, AR Vol. IV, Tab 15 (emphasis added).) This decision was not appealed.

Eventually, GEO and Magma submitted their dispute regarding Unit operations to formal arbitration. The JV terminated in May 1998. (AR Vol. II, Tab AT at 1.) GEO requested geologic and other information relating to the geothermal resource from Magma, a request Magma very reluctantly complied with in 1998 or 1999. See AR Vol. III, Tab CE. By then, Magma apparently had offered its interests in the enterprise to GEO. Id. Also in May 1999, GEO requested a diligent efforts extension for lease N-10311 and for the non-PA portions of leases N-8421, N-8428, N-31991, and N-31993. Id. at 2. GEO later modified its request, seeking the extension of all leases outside the PA but within the Unit that would otherwise expire when Unit contraction occurred. (AR Vol. III, Tab BY at 3.)

By letter to BLM dated June 3, 1999, FLPC submitted its resignation as Unit Operator. See AR Vol. II, Tab AR at 1 (reference to resignation in 1999).

GEO designated Fish Lake Green Power Company (FLGPC) as the new Unit Operator by instrument dated April 27, 2000. (AR Vol. III, Tab BR.) GEO also proposed a \$50,000 bond and FLGPC submitted a plan of operations dated April 2000. (AR Vol. III, Tabs BU, BV.)

At GEO's request in letters dated April 28 and May 11, 2000, and based on GEO's representations regarding its plan to acquire a new working interest owner and unit operator, and initiate exploration and development on leases outside the PA but within the Unit, BLM postponed the scheduled Unit contraction date of May 1, 2000. (AR Vol. III, Tabs BY, BS, BP, and Vol. II, Tab BK.) On May 25, 2000, BLM agreed to postpone unit contraction until April 30, 2001, provided GEO met certain operational and other conditions. (AR Vol. II, Tabs BJ, BK.)

In a letter to GEO dated January 17, 2001, BLM clarified its position regarding the status of the Unit Operator, stating that the submission of a resignation as Unit Operator did not “automatically relieve the unit operator of any authority or responsibility related to the proper development and production of unitized resources.” BLM advised that FLPC remained in that capacity until the conditions specified in Article VII of the Unit Agreement were met and BLM approved a change in operators. In addition, the letter noted that BLM had proposed to FLPC as Unit Operator a revision to the Unit area, as required by 43 CFR 3283.2-2. (AR Vol. II, Tab AR.) GEO protested the Unit area revision, but nonetheless submitted a proposal for the Unit area revision. (AR Vol. II, Tabs AQ, AO.)

In a letter dated April 12, 2001, BLM expressed continuing concerns regarding the lack of diligent development in the Unit area, the lack of new geologic information, and the need for GEO and FLPC to resolve their dispute to avoid Unit contraction to the PA, as provided by Article IV, ¶ 4.3 of the Unit Agreement. (AR Vol. II, Tab AL.) GEO responded, for purposes relevant here, with a request that BLM take no action to revise or contract the Unit area while GEO and Magma continued to negotiate a sale of Magma’s interests to ORMAT, a Nevada geothermal operator. ORMAT joined in that request, to which BLM acceded informally. (AR Vol. II, Tabs AK, AI, AG.) See generally AR Vol. I, Encl. 1 to Tab 13, Declaration of Richard Hoops, at ¶ 25.)^{11/}

In a letter to Signorotti dated November 7, 2001, BLM stated that, after extending the contraction terms of the Unit Agreement several times in the preceding 2 years to allow the parties time to complete their negotiations and recently learning that they had been unable to conclude an agreement, timely and diligent development of the Unit area appeared “unlikely.” Therefore, absent documentation justifying continuation of the extension, BLM stated that it would contract the Unit to the PA effective December 15, 2001, noting that many leases outside the Unit area would expire. (AR Vol. II, Tab AE.)

At FLPC’s request, BLM agreed to postpone contraction until March 1, 2002, to allow negotiations with ORMAT to continue. (AR Vol. II, Tabs AD, AC.) GEO objected to Unit contraction and to the Unit area revisions proposed by FLPC, but requested an immediate area revision to account for six “expired” leases. (AR Vol. II, Tab Z.) By letter dated February 13, 2002, BLM responded to GEO’s objection and request. BLM adhered to its stated intention to contract the Unit area to the PA on March 1, 2002, should agreement with ORMAT not be achieved, and directed GEO

^{11/} Our citations to Volume I of the administrative record are derived from the Index to that volume, which identifies each document by numbered Tabs. The documents were not separately tabbed, and much of this portion of the record is actually the Notice of Appeal and SOR and its lettered exhibits.

to communicate with FLPC as Unit Operator, since FLPC was BLM's point of contact regarding Unit issues. (AR Vol. II, Tab W.)

GEO replied to BLM's February 13 letter in a letter dated February 25, 2002. In general, GEO complained that BLM had not provided adequate information regarding the proposed contraction to enable GEO to respond, and contended that it was BLM's responsibility to compel diligent development of the Unit from the Unit Operator, regardless of the lack of an agreement between ORMAT and FLPC. GEO requested that BLM postpone action until arbitration proceedings to determine the distribution of leases at Fish Lake Valley resulting from the dissolution of the JV were concluded. (AR Vol. II, Tab V.)

In a letter to FLPC dated March 19, 2002, BLM commented on the parties' lack of action to diligently develop the Unit and the negative impact of that inaction on the public interest, and stated that in 6 months BLM would either contract the Unit to the PA or, given the failure to commence production, terminate all the leases in the Unit area. BLM also requested FLPC's views on the Unit revision described in the letter. GEO was copied. (AR Vol. II, Tab U.)

In a May 6, 2002, letter to FLPC, BLM requested a plan "describing the activities you will conduct this year which will meet the diligent development requirement. The plan should also identify when the activities will be started and completed." BLM cautioned that it expected that any activities identified in the plan would be completed "in the time frame provided," and noted that it would take further action, which could include Unit contraction or termination of all leases in the Unit. (AR Vol. II, Tab Q.) FLPC was given 30 days to submit a plan. GEO received a copy of the letter, and in a May 2002 letter GEO's attorney later complained that BLM had done nothing in 7 years to compel FLPC to undertake diligent development and should have removed FLPC as the operator. In addition, he complained about the "exorbitant" amount of the bond BLM purportedly had demanded for Unit operations, and stated that FLGPC would not agree to succeed as Unit Operator unless FLPC plugged and abandoned wells and reclaimed the land. GEO renewed its requests that FLPC be removed as operator and that BLM require FLPC to plug and abandon the wells and perform surface reclamation. Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (2000), GEO also requested all the geologic, geophysical, and engineering data and information Magma and/or FLPC had submitted to BLM, and GEO advised that it would be posting an operating bond backed by a certificate of deposit in the amount of \$50,000. (AR Vol. II, Tab P.) ^{12/}

^{12/} The date of the letter was obscured by a hand-written note, although BLM's date stamp showing that the letter was received on May 22, 2002, was not.

GEO and FLPC eventually agreed on the proposed revision and, accordingly, in a decision dated July 31, 2002, BLM effected the revision and segregated those leases that were partly within and without the revised Unit area. (AR Vol. II, Tabs R, S, M.) In that decision, BLM stated:

After unit revision and segregation, leases N-8421, N-8428, N-9647, N-10311, N-17777, N-31991, N-31992, N-31993, N-36616, N-36617, N-36618, N-36619, N-58352 are totally within the Fish Lake II Unit Agreement. Lease N-9647 is held by actual production. Leases N-8421, N-8428, N-31991 and N-31993 are held by allocated production. Leases N-10311, N-17777, N-31992, N-36616, N-36617, N-36618, N-36619, and N-58352 are held by location in a producing unit.

This office has not received a timely * * * request detailing what leases are to be extended, along with the informational requirements mandated by regulation (*see* 43 CFR 3208.11(a)(2)). As a result of the unit revision, the leases that were previously held by location within a producing unit are now outside the unit and have expired. The following is a list of leases that have expired as a direct result of the unit revision: N-8429, N-39467, N-39468, N-39469, N-54829, and N-55115. In addition, the following leases are no longer within the unit, but do not expire until December 1, 2002: N-55734, N-55735, and N-55376. * * * In this case, these leases instantaneously expired upon their exclusion from the unit; therefore, no serial numbers were issued.

(AR Vol. II, Tab M at 2.) This decision was not appealed.

In a letter to GEO dated August 21, 2002, ORMAT terminated all negotiations for interests in the Unit. (AR Vol. II, Tab L.)

At a meeting on October 31, 2002, BLM stated that it would terminate the Unit and leases if FLPC did not immediately acquire a sales contract. (AR Vol. I, Encl. 1 to Tab 13 at ¶ 6.)

In November 2002, GEO advised BLM that GEO and Magma/Cal Energy had executed a stipulation in the arbitration proceedings, pursuant to which Magma had agreed to plug and abandon all wells in the Unit and transfer all leases to GEO. GEO stated that it had the option of maintaining only Well No. 81-13 on lease N-9647, the “only true commercially feasible well in the unit.” Alluding to past bonding problems, GEO proposed a \$50,000 bond for the well. (AR Vol. II, Tab I.) As far as we can tell, BLM did not respond to the proposed bond at the time, apparently because, according to the May 2003 decision, in 1993 FLPC, the Unit Operator, had

estimated that costs to plug and abandon Unit wells and reclaim the Unit area would be \$1.5 million, and BLM had previously rejected a \$50,000 bond as inadequate and contrary to the public interest.^{13/}

On November 25, 2002, BLM received FLPC's request to assign the Unit leases to GEO. (Answer at 15.)^{14/} In a decision dated December 20, 2002, BLM declared the Unit terminated, effective December 1, 2002. BLM stated that portions of leases (N-8421, N-8428, N-9447, N-31991, and N-31993) were in additional term, and could remain in additional term only if BLM determined that diligent efforts to utilize the resource were being pursued. The decision provided notice that those leases would terminate 30 days from receipt of the decision unless diligent efforts were commenced. (AR Vol. II, Tab H.) GEO filed its appeal to this Board, which was docketed as IBLA 2003-107. (AR Vol. II, Tabs G, F.) By letter dated February 27, 2003, GEO again demanded that BLM accept its \$50,000 bond for well 81-13 (AR Vol. II, Tab B), a request that BLM was unable to act on because of the pendency of the appeal. (AR Vol. II, Tab A.) Ultimately, BLM moved to vacate the decision and remand the case, having determined that termination at that time was inappropriate. (AR Vol. I, Tab 6.) The Board granted BLM's request by order dated April 14, 2003. (AR Vol. I, Tab 5.)

GEO thereafter submitted letters dated April 24, April 25, and May 7, 2003, seeking approval of lease extensions, lease assignments, a well plugging and abandonment plan, and a \$50,000 bond. On May 12, 2003, BLM issued the decision here appealed, in which BLM declared the Unit contracted to its PA, and determined that the leases eliminated from the contracted Unit were ineligible for extensions either because they had already received two successive extensions or because a second extension would not be successive to the first. (AR Vol. IV, Tab 15.) Additionally, the decision addressed pending lease assignments, Unit operations and a Unit bond, and plugging and abandoning wells in the former Unit area. GEO also filed a petition for stay. By order dated October 13, 2003, the stay was denied.

^{13/} We did not find anything in the record that documents this estimate. However, in a Feb. 8, 2002, letter to Hoops at BLM's State Office, GEO referred to its nomination of FLGPC as successor Unit Operator and BLM's response to the nomination: "your office saw fit to demand, but never put into an actual writing, a new \$750,000 Unit Operator bond from GEO-83's subsidiary [FLGPC] * * * ." (AR Vol. II, Tab X at 4.) Other correspondence from GEO refers to a \$750,000 bond. See AR Vol. II, Tab S at 2; Tab P at 2.

^{14/} We did not locate a copy of this letter in the record.

Applicable Law

The Geothermal Steam Act of 1970, as amended, 30 U.S.C. §§ 1001-1028 (2000), establishes a primary term of 10 years for geothermal leases. 30 U.S.C. § 1005(a) (2000). If geothermal steam is “produced or utilized in commercial quantities” within the primary term, the lease “shall continue for so long thereafter” as the resource is produced or utilized in commercial quantities, but not longer than an additional 40 years. Id. Once the lease goes beyond the primary term by reason of production or utilization of the resource in commercial quantities, it is in *additional term*, which is the period “beyond the primary and any extended term of a producing lease.” 43 CFR 3200.1. The additional term cannot continue past the maximum of 40 years “beyond the end of the primary term, even if BLM grants later extensions.” Id. ^{15/} The additional term continues so long as geothermal resources are produced or utilized in commercial quantities and the lessee is “diligently trying to begin production.” 43 CFR 3207.10(b).

The Act was amended in 1988. ^{16/} As a result of those amendments, the phrase *production or utilization of steam in commercial quantities* was defined to mean “the completion of a well producing geothermal steam in commercial quantities,” and includes “the completion of a well capable of producing geothermal steam in commercial quantities so long as the Secretary determines that diligent efforts are being made toward the utilization of the geothermal steam.” 30 U.S.C. § 1005(d) (2000).

A geothermal lease in an approved unit plan of development or operation on which actual drilling operations are commenced before the primary term ends, and which are being diligently pursued when the primary term ends, is extended for 5 years and so long as steam is produced or utilized in commercial quantities, up to 35 years. 30 U.S.C. § 1005(c) (2000).

With respect to extensions, the Act as amended in 1988 provides:

(g) Five year extensions; conditions

(1) Any geothermal lease issued pursuant to this chapter for land on which, or for which under an approved cooperative or unit plan of development or operation, geothermal steam has not been produced

^{15/} Manifestly, we are not speaking of *renewals*, which can occur only at the end of the 40-year maximum of an additional term. 30 U.S.C. § 1005(b) (2000).

^{16/} See Geothermal Steam Act Amendments of 1988, Pub. L. 100-443, 102 Stat. 1766 (Sept. 22, 1988).

or utilized in commercial quantities by the end of its primary term, or by the end of any extension provided by subsection (c) of this section, may be extended for successive periods, but totaling not more than 10 years, if the Secretary determines that the lessee has met the bona fide effort requirement of subsection (h) of this section, and either of the following:

(A) [T]he payment in lieu of commercial quantities production requirement of subsection (i) of this section.

(B) The significant expenditure requirement of subsection (j) of this section.

(2) A lease extended pursuant to paragraph (1) shall continue so long thereafter as geothermal steam is produced or utilized in commercial quantities, but such continuation shall not exceed an additional 25 years, for a total of 50 years, if such lease was also the subject of an extension under subsection (c) of this section or an additional 30 years, for a total of 50 years, if such lease is only extended pursuant to paragraph (1).

* * * * *

30 U.S.C. § 1005(g) (2000). ^{17/}

Regulations implementing the Act, as amended, are found in 43 CFR Part 3200 in the question-and-answer format. Part 3200 includes Subpart 3208, which deals with extending the primary term; Subpart 3210, which concerns, inter alia, lease segregation; Subpart 3213, which relates to, among other topics, lease expiration; and Subpart 3214, which concerns bonds.

When geothermal steam is not produced or utilized in commercial quantities within the primary term, there are four opportunities to extend a geothermal lease beyond its primary term of 10 years: by drilling, diligent efforts, production of byproducts, and by commitment to a unit. 43 CFR 3208.10(a). Of these, the diligent efforts and unit commitment extensions are at issue, and are explained in the regulations as follows:

(2) For a diligent efforts extension, if you have not produced geothermal resources in commercial quantities before the primary or

^{17/} Notably, in 2005, Congress amended subsection (g) in ways not inconsistent with, or relevant to, the outcome here.

extended term ends, or before your lease is eliminated from a unit agreement, BLM may still approve up to two successive five-year extensions for your lease. You must have made a good faith effort to produce. To obtain a diligent efforts extension, follow the procedures at 43 CFR 3208.11(a)(2).

* * * * *

(4) For a unit commitment extension, if your lease is committed to a unit agreement and its term would expire before the unit term would, BLM may extend your lease to match the term of the unit. We will do this if you have diligently pursued unit development while your lease is committed to the unit.

(b) During any extension period, if you use or produce geothermal resources in commercial quantities, or if you complete a well capable of producing geothermal resources in commercial quantities on the lease, BLM will place the lease into an additional term.

43 CFR 3208.10(a)(1), (2), (4), and (b).

To obtain a diligent efforts extension, a lessee must comply with 43 CFR 3208.11, which requires a written request “at least 60 days before the primary or first extended term ends” ((a)(2)(i)); a report documenting good faith efforts to produce the resource, given current economic conditions ((a)(2)(ii)); and an election to make either an annual payment-per-acre in lieu of producing the lease pursuant to 43 CFR 3208.13, or “significant expenditures” on the lease on a per-acre basis pursuant to 43 CFR 3208.14 ((a)(2)(iii)). See also 30 U.S.C. § 1005(g)(1) (2000) (quoted above).

Arguments on Appeal

GEO argues that, with respect to the termination of the Unit leases, BLM’s decision is arbitrary and capricious and a violation of GEO’s and the Unit’s rights; that it denies GEO due process because the decision denies GEO an opportunity to comply with the regulations governing Unit development; that the decision “contravenes the letter and spirit” of the Act, implementing regulations, the Unit Agreement, BLM’s September 21, 1994, decision, and “a later undated decision amending said September 21, 1994[,] BLM decision relating to the terms and extensions thereto.” (SOR at 2.) Secondly, GEO argues that the decision “purports to establish a hypothetical bonding requirement based upon some unspecified application, the same is neither ripe nor justiciable.” Id.

In its Supplemental SOR (SSOR), GEO contends that BLM failed to provide “adequate notice” of unit contraction. (SSOR at 3-4.) GEO pursues its argument that, after the Unit commerciality determination, leases within the Unit were held by production, so that the 12 leases within the Unit became ineligible for an extension under 30 U.S.C. § 1005(g)(1) (2000) and remained ineligible until they were eliminated from the Unit. (SSOR at 5-6.) GEO disputes BLM’s conclusion that 7 leases were in their first extension period at the time of the commerciality determination on December 1, 1993, reasoning that the continuing vitality of those leases was derived not from the fact that they were in a 5-year extension, but from the fact they were in the Unit and held by production. GEO therefore further disputes the conclusion that the leases became ineligible for a successive extension when GEO failed to request a second extension within 60 days of the expiration of the first. (SSOR at 8-9.)

With respect to the remaining 5 leases, the first 5-year extension was granted on February 10, 1989, with an effective date of December 31, 1988, before the commerciality determination. A second extension was granted on December 31, 1993. GEO contends that, since the commerciality determination predates the expiration of the first extension period, “the extensions were of no force and effect and were void *ab initio*. Thus, the term of the first extension for all twelve leases expired at a time when all of the leases were held by location [within a Unit containing a productive well] and not eligible for a 1005(g)(1) extension regardless of the timeliness of any notice.” (SSOR at 8.)

In addition to the principal arguments regarding the impact of unit commitment relative to the availability of extensions, GEO assails BLM’s failure to approve nine lease assignments of 100% of the working interest (SSOR at 12-13); it challenges the basis for the bond it alleges BLM has demanded in connection with approving the assignments because there have been no operations on any of the nine leases that would require reclamation (SSOR at 13-17); and GEO challenges the portions of the decision pertaining to bonding, lease assignment, and well plugging and abandonment (SSOR at 18-20).

BLM responded with a Motion to Dismiss Appeal, Response to Petition to Stay and Answer to Statement of Reasons (Answer), contending that its decision was neither arbitrary nor capricious (Answer at 21-22); that the decision is well supported by the Act and implementing regulations (Answer at 22-28); and that Magma’s draft letter was never issued as a BLM decision, and was, in any event, contrary to the statute and regulations (Answer at 28-34). In addition, BLM denies that GEO’s due process rights have been violated, an assertion over which this Board has no jurisdiction. In support of its Motion, BLM argues that GEO has failed to demonstrate error in the decision (Answer at 15-18); that the Board lacks jurisdiction to set aside that portion of the decision relating to bonding, lease assignments, and

well plugging and abandonment because there has been no final, appealable decision (Answer at 18-19); and that, to the extent GEO purports to appeal any decision issued before May 12, 2003, the appeal is barred by the doctrine of administrative finality (Answer at 19-20).^{18/}

In its Reply to the SSOR, BLM further argues that no hearing is necessary to resolve the appeal (Reply at 2-3), maintaining that it correctly interpreted and applied the statute and regulations (Reply at 4-11); and that the pending lease assignments have no bearing on the effectiveness of the leases (Reply at 11-12).

Analysis

We begin with what was actually adjudicated in the decision before us. The decision specifically contracts the Unit Agreement to the PA and notes that the conditions on which contraction had been postponed had not been met. (Decision at 2, AR Vol. IV, Tab 15.) Second, it determines that no second 5-year lease extension is available, because some leases had already received the benefit of two 5-year extensions, because GEO's request was untimely for those leases that had received only one 5-year extension, or because the leases do not qualify for an extension because a producible well is contained within the Unit. (Decision at 2-3, AR Vol. IV, Tab 15.) With respect to pending lease assignments, the decision explicitly states that,

dependent upon final adjudication, BLM anticipates approving the assignment of N-58352, approving in part the assignments which affect portions of leases located within the PA, disapproving in part the assignments for portions of leases outside the PA, and returning unapproved the assignments for the remaining leases entirely outside of the PA.

BLM has begun processing the assignments filed by FLPC. * * * Geo-83, as the potential assignee, will be notified when each assignment is approved, disapproved, or returned unapproved.

(Decision at 4, AR Vol. IV, Tab 15.) It is clear that BLM has yet to adjudicate the pending assignments, and equally clear that GEO, as the assignee, will be served with a copy of the final decision or decisions as they are issued.

^{18/} BLM's Motion to Dismiss, with GEO's stay, was initially taken under advisement. The Motion is premised on GEO's failure to appeal decisions issued prior to 2002. While BLM's contention has merit, we must reject it, given BLM's action in issuing a subsequent decision. BLM's Motion to Dismiss is thus denied.

Lastly, regarding a bond for Unit operations, the decision states that the Unit bond posted by the current Unit Operator, FLPC, “does not need to be revised at this time.” (Decision at 4, AR Vol. IV, Tab 15.) Having verified FLPC’s nationwide coverage, “BLM does not find it necessary to increase the amount of the bond covering the Fish Lake project. However, if at some point the nationwide bond ceases to cover actively producing projects, BLM will require an increase in FLPC’s bond.” (Decision at 5, AR Vol. IV, Tab 15.)

As to the \$50,000 bond offered by GEO, the decision confirms that, under the Unit Agreement, GEO may designate itself or its subsidiary, FLGPC, as successor Unit Operator after the lease assignments are approved. “Should this occur, BLM will not approve the Unit Operator change until Geo-83 demonstrates the company meets the bond requirements at 43 CFR 3214.10 and 3214.14. A \$750,000 bond will be required as a condition of Geo-83 assuming the role of Unit Operator. * * * BLM may reduce the required amount of the bond from \$750,000 should wells in the Unit be properly abandoned and sites reclaimed.” (Decision at 4, AR Vol. IV, Tab 15.) Even though BLM may have chosen to provide an explanation of its reasoning regarding a bond for Unit operations in the decision, BLM has yet to render a final decision on the amount of the bond that would be required if and when GEO or FLGPC succeeds FLPC as Unit Operator.

GEO nonetheless contends that the decision is final and appealable as to the assignments and bond.^{19/} GEO reasons that it is BLM’s failure and refusal to respond to two “protest letters” urging action and its continuing failure or refusal to act on the pending assignments that effectively constitute a final decision that this Board may review. (SSOR at 15-16.) Appellant further relies on the following three statements in the decision to demonstrate that BLM has in fact rendered an appealable decision: “BLM has begun processing the assignments filed by FLPC. An assignment is not effective until the first day of the month after BLM approves it (43 CFR 3216.21).

^{19/} GEO alluded to the decision’s discussion of plugging and abandoning wells, but largely in the context of its arguments regarding bonding. (SSOR at 13, 14, 15, 18.) To the extent that GEO contends that a final appealable decision regarding well plugging and abandonment is contained in the May 12, 2003, decision, it errs. The decision acknowledges that BLM has received SNs which have yet to be approved, and notes questions BLM will want answered before it does act on the SNs. The decision specifically states that BLM “will not make a final decision on the SNs until we have received your explanation as to why it is in the public interest to plug and abandon these wells.” (Decision at 6, AR Vol. IV, Tab 15.) In addition, however, the decision notes that GEO’s submission regarding those wells did not comply with 43 CFR 3263.11, and generally cautions that abandonment of producible wells would result in the expiration of the Unit.

The earliest date these assignments could be in effect is June 1, 2003.” We do not agree with appellant’s construction of this language.

[1] The relevant Departmental appeals regulation, 43 CFR 4.410(a) confers standing to appeal on a party to the case who is adversely affected by “a decision of an officer of the Bureau of Land Management.” The requirement that there be “a decision of an officer” before an appeal will lie is essential. Joe Trow, 119 IBLA 388, 392 (1991). The “decision” referred to by the regulation means a decision either authorizing or prohibiting an action affecting individuals having interests in the public lands. Id., and cases cited. Generally, standing to appeal requires a BLM decision adjudicating the rights of the parties in a given factual context. Blackwood and Nichols, 139 IBLA 227, 229 (1997). When an adverse impact on a party is contingent upon some future occurrence, or where the adverse impact is merely hypothetical, it is premature for this Board to decide the matter. Nevada Outdoor Recreation Center, 158 IBLA 207, 209-10 (2003), and cases cited. Here, BLM has unequivocally indicated that it will finally decide issues relating to the assignments, bonding, and well plugging and abandonment at a future date. It has, moreover, indicated some of the factors that could influence its decisionmaking one way or the other, and those factors could well moot an appeal. Under the circumstances, it is appropriate to await the issuance of those decisions, at which time GEO may appeal to this Board. ^{20/}

What remains are the questions related to notice of unit contraction and the effects of a commitment to a unit and a unit commerciality determination on a lease’s eligibility for diligent efforts lease extensions and on the running of the time for extensions granted in the past for individual leases later eliminated from a unit upon unit contraction. See SSOR at 8-9. Citing 30 U.S.C. § 1017 (2000), GEO argues that BLM failed to give it “adequate notice” of unit contraction so that it could request an extension pursuant to 30 U.S.C. § 1005(c) or (g) (2000). (SSOR at 4-5.) GEO reasons that if a lessee has 60 days before the end of the primary or extended lease term to request an extension under 43 CFR 3208.11(a)(2), BLM must give the lessee

^{20/} We recognize that an element of GEO’s argument is its complaint that BLM has been dilatory in acting on the assignments. Our review of the record convinces us otherwise. From the record, it appears that the difficulties between GEO, Magma, and the JV are largely responsible for the present posture of matters. In any event, however, as an appellate tribunal, the Board of Land Appeals does not exercise supervisory authority over BLM, except in the context of deciding an appeal over which the Board has jurisdiction. Defenders of Wildlife, 169 IBLA 117, 127 (2006); Benton Cavin, 166 IBLA 78, 83 (2005); Nevada Outdoor Recreation Center, 158 IBLA at 210. For the reasons stated above, no appealable decision on the lease assignments has been rendered, therefore in that respect there is presently no appeal over which we have jurisdiction.

more than 60 days notice before unit contraction so that the lessee can timely act to request the extension. GEO charges that BLM has never provided the opportunity to comment on any proposed contraction, that it has not shown any scientific basis for the extent of the contraction, and by immediately contracting the unit, denied GEO the opportunity to renew its request for a second extension. Despite the vigor with which GEO has sought an additional opportunity to extend its leases since they were eliminated from the Unit, it is plain that GEO cannot prevail.

[2] GEO's first problem is the existence of the earlier decisions granting extensions at a time when the leases were eligible to receive them. In its Reply, BLM states that it "agrees the diligent efforts extension was essentially nullified once BLM made a commercial well determination and determined its effective date" because lease N-9647 was placed in additional term and no longer needed an extension, the other leases were held by location within a producing unit, and the leases were ineligible for a diligent efforts extension. (Reply at 7-8.)^{21/} We do not agree that the extensions were *nullified* as a result of the commerciality determination. If the lease was eligible for a diligent efforts extension when it was granted, the extension became legally effective. The question is whether the parties have shown that the effectiveness of the decisions granting the extensions was vitiated in any manner recognized in the Act or the regulations.

In this case, seven leases had reached the end of their primary terms before the Unit was formed, effective August 31, 1992. Therefore, GEO had no choice but to obtain an extension, if it wished to preserve the leases. As a result of decisions issued on February 10, 1989, and August 19, 1991, the lease terms for five of the leases were extended to 1993 and two were extended to 1996, respectively. Lease N-9647 was among those extended by the February 1989 decision. The 5-year extensions therefore were legally effective and remained effective so that the leases persisted to the date when they were committed to the Unit.

The initial term of the Unit was 5 years and, but for the initial 1994 commerciality determination, the Unit term would have otherwise expired on August 30, 1997. For the remaining five leases that were expiring in or near October 1992, shortly after they were committed to the Unit but before the commercial well determination, the JV requested extensions on July 7, 1992. When granted on October 16, 1992, the extensions afforded the leases 2 more months than they would have received if the JV had elected the unit commitment extension. The JV need not have requested the diligent efforts extension, but once it was granted, the leases became ineligible for the unit commitment extension because that extension can be

^{21/} A *nullity* may be defined as "an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no legal force or effect." Black's Law Dictionary (Revised 4th Ed. 1968).

granted only when a lease's term will expire before the unit's term would expire. 43 CFR 3208.10(a)(4). These 5-year extensions therefore were legally effective when granted.

The result is the same for the five leases including lease N-9647 that received a second extension to 1998. The JV requested the extension on September 16, 1993, and it was granted by decision dated November 3, 1993, before the well test and before the commercial well determination. The leases were eligible for the extension because they had not produced geothermal steam in commercial quantities in their primary or extended term. Again, the JV need not have requested the extensions, but the second extension afforded 14 months more than the initial 5-year term of the Unit did. Thus, these 5-year extensions were legally effective when granted as well.

The decisions granting the requested extensions are final for the Department. They were granted at the JV's request and were entirely consistent with the statute and regulations. We thus have no basis for overturning them.

As a consequence of the commerciality determination in March 1994, retroactively made effective as of December 1, 1993, the Unit earned a 5-year extension, which continues so long as production or utilization of the resource in commercial quantities is maintained. Lease N-9647 was placed in additional term by the decision dated September 21, 1994, long after the second extension was authorized. Thus, after the commercial well determination, the leases were then subject to diligent efforts extensions at a time when they became subject to the extension afforded by location within a unit containing a producing well, a circumstance that changes nothing regarding the efficacy of the extensions that had been requested and granted: had the Unit terminated before or at the end of its initial term, GEO undoubtedly would have interposed the extensions to save the leases, and BLM undoubtedly would have recognized them.

The question now is whether there is any other basis for concluding that those duly approved extensions lost their vitality. The parties do not cite any statutory or regulatory authority to support their assumption that the consequence of concurrent extensions is that one is rendered a legal nullity by the other, and our examination of the Act, amendments, and legislative history reveals nothing that states or suggests such a result.^{22/} In the absence of authority requiring a conclusion to the contrary,

^{22/} BLM states that it intends to propose new rules for unit administration, including unit contraction, for 43 Subpart 3280. 63 FR 52356, 52361 (Sept. 30, 1998). It has not yet proposed them. In its 2005 amendments, Congress required an additional rulemaking on related topics. 30 U.S.C. § 1005(d) (West Supp. 2006). In finding that nothing in the Act provides for the nullification consequence articulated by the

(continued...)

we find that the diligent efforts extensions in this case remained legally effective after unit commitment.^{23/}

[3] GEO's second obstacle arises from the fact that diligent efforts extensions must be successive. The Act itself authorizes extensions "for successive 5-year periods, but totaling not more than 10 years." 30 U.S.C. § 1005(g)(1) (2000). *Successive terms* means consecutive terms.^{24/} The regulations state that a lessee can obtain "up to two successive five-year extensions," provided the lessee has made a "good faith effort to produce." 43 CFR 3208.10(a)(2). The phrase is further amplified by the language specifying that requests for extensions shall be made "before the primary or first extended term ends." 43 CFR 3208.10(a)(2). Moreover, we note that when BLM revised its geothermal lease regulations in 1998, it explicitly considered and rejected comments suggesting that a 5-year lease extension upon the elimination of a lease from a unit as a result of segregation or unit contraction:

We cannot adopt this suggestion, however, because we believe that unit administration actions should not directly result in lease extensions. The new provisions at subpart 3208 broaden lease extension provisions when a lessee diligently completes unit operations, and also on an individual lease basis once a lease is no longer involved in a unit. These rules give diligent lessees ample opportunities to extend their lease.

63 FR 52356, 52361 (Sept. 30, 1998).

Nothing in the Act, as amended, or its legislative history confers discretionary authority on the Secretary to grant diligent efforts extensions on other than a "successive" or consecutive basis, and appellant has not shown otherwise. Accordingly, if a lessee wishes or intends to preserve a lease at the expiration of its primary or extended term, it must do so in the manner and at the time prescribed in 43 CFR 3208.11. Since the extensions must be successive, BLM correctly denied the request for a second extension as to the seven leases.

^{22/} (...continued)

parties, we do not mean to foreclose the possibility that BLM could reach such a conclusion when it promulgates additional rules for unit administration.

^{23/} Because the decisions are final for the Department, it is not necessary to decide whether and to what extent BLM has the authority to rescind lease extensions once they are granted, and we express no opinion on the matter.

^{24/} *Successive* means "[f]ollowing one after another in a line or series." Black's Law Dictionary (Revised 4th Ed. 1968).

[4] GEO further contends that the extension resulting from commitment to the Unit tolls, negates, or cancels any extension that may have been granted prior to commitment to the unit. GEO argues that BLM's interpretation of the diligent efforts extension as precluding the granting of another extension at the point of elimination from the Unit is inconsistent with Congressional intent in enacting the 1988 Amendments. As BLM correctly notes, the Act provided for an effect like the one GEO advances only in the case of suspensions of operations and production requested by the lessee or imposed by the Secretary on his own motion. In that single circumstance in the geothermal context, Congress has provided that "[the Secretary] may extend the lease term for the period of any suspension." 30 U.S.C. § 1010 (2000); see also 30 U.S.C. § 1010 (West Supp. 2006).

Ordinarily, the plain language of a statute is the most reliable indication of Congress' intent. See Singer, Sutherland Statutory Construction (Sutherland), Vol. 2A § 46:04 at 151 (6th Ed.). Where Congress saw fit to provide for lease extension in the case of suspensions of operations and production when the Act was enacted in 1970 (as it has in the oil and gas context), manifestly it did not enact any such provision for diligent efforts extensions when it enacted the 1988 Amendments. Generally an omission gives rise to the inference that it was intentional. Sutherland, Vol. 2A § 47:25 at 327. More specifically, "[w]here a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions." Sutherland, Vol. 2A § 47:23 at 304-07 (emphasis added). The conclusion that Congress did not intend to provide for an automatic extension for leases eliminated from units must be sustained unless it would lead to an absurdity, a contradiction, injustice, undermine public policy, constitute a derogation of the common law, or the statute is penal. Sutherland, Vol. 2A § 47:25 at 327-29. No such consequences are suggested by taking the omission literally, whereas GEO's interpretation would effectively create a substantive right by implication. While GEO generally cites the letter and spirit of the 1988 Amendments to suggest that Congress intended to provide for the relief it advocates and to create authority to retroactively negate approved extensions because a lease is committed to a unit, it notably cites no particular legislative statement or discussion as evidence. Our review of the scant legislative history for the 1988 Amendments reveals no support for GEO's position. What is disclosed instead, on the subject of extensions, is an intent to encourage serious development of the geothermal resource by authorizing a second extension when only one had been allowed under the 1970 Act. Accordingly, GEO's arguments lack merit and are rejected.

[5] GEO further argues that BLM's position is inconsistent with the following sentence in 30 U.S.C. § 1017 (2000): "Any lease or part of a lease so eliminated shall be eligible for an extension under subsection (c) or (g) of section 6 if it separately meets the requirements for such an extension." (Emphasis added.) GEO apparently

construes this sentence as compelling eligibility for an extension on any lease eliminated from a unit. (SSOR at 9-10.) The difficulty is that GEO's argument ignores the latter portion of the sentence. Properly understood, the quoted sentence states that a lease shall be eligible for an extension, but only if it qualifies for that extension at the point of elimination from the Unit.^{25/}

At the point of elimination in May 2003, none of the 12 leases at issue in this appeal was eligible for an extension under 30 U.S.C. § 1005(c) or (g) (2000). None of the leases produced or utilized geothermal steam in commercial quantities during their primary terms to earn an additional term under subsection (c), which was why GEO requested a first extension in the first place. Subsection (g) applied to individual leases on which geothermal steam has not been produced or utilized in commercial quantities by the end of its primary term or the end of any extension provided by subsection (c), including “[a]ny geothermal lease * * * for land * * * which under an approved * * * unit plan of development or operation, geothermal steam has not been produced or utilized in commercial quantities.” 30 U.S.C. § 1005(g)(1) (2000).^{26/} At the date of contraction, only lease N-9647 contained a well (No. 81-13) capable of producing or utilizing the resource in commercial quantities. Although that status was imputed to all the leases within the Unit for purposes of sustaining the integrity of a unitized plan of development, once a lease is eliminated from the Unit, it stands alone and its status is derived from the facts and circumstances that specifically pertain to it at that juncture. Here, when the unit was contracted, seven of the leases had had one extension and were beyond the point when a successive term timely could be sought. The remaining five leases had had the only two extensions they could obtain, for which GEO had elected either a payment in lieu of production or significant expenditures, and the Act does not provide for a third. Only lease N-9647 had a well capable of producing geothermal steam in commercial quantities and it was in additional term and so did not require

^{25/} The 2005 amendments to this provision retained this principle: “Any land eliminated under this subsection shall be eligible for an extension under section 1005(g) of this title if the land meets the requirements for such an extension.” 30 U.S.C. § 1017(f)(3) (West Supp. 2006).

^{26/} The 2005 amendments deleted the version of subsection (g) we are applying in this appeal. Subsection (g) now provides in material part as follows: “Any lease for land on which, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time shall be extended for five years and so long thereafter, but not more than thirty-five years, as geothermal steam is produced or utilized in commercial quantities.” 30 U.S.C. § 1005(g) (West Supp. 2006).

an extension. None of the others was the subject of diligent exploration operations, which would have avoided elimination from the Unit. ^{27/}

[6] GEO points to the so-called “undated decision” (SOR at 2) to support the assertion that a contrary conclusion is warranted. The “undated decision” is merely a draft of a decision that GEO submitted to BLM with the hope that the agency would adopt it and issue it as official action. On its face, it lacks the indicia of an agency decision: it is undated, it contains no Department logo or routing code, no signature, no agency stamps, no certified mail tracking number, and no statement of appeal rights. See also Hoops Declaration, Ex. 2 to Reply. BLM obviously did not adopt the reasoning set forth in the draft letter and it obviously did not issue the letter. GEO therefore cannot rely upon it as an agency decision for any purpose.

In addition, however, GEO relies on a letter from BLM’s Lewis to Signorotti at Magma with two date stamps, one of which shows Signorotti received it on December 16, 1994. (Ex. K to SOR.) ^{28/} Among other things, the Lewis letter states that “the decision issued by this office on November 3, 1994, extending leases for a second 5-year term will be cancelled once we have a date for the PA. In addition, the decision dated September 21, 1994, will also require modification once the date of the PA is determined. * * * All the above actions will be taken once we have a reply to our Notice of November 30, 1994.” ^{29/} GEO suggests that this letter shows that Lewis had concluded that the second extensions were of “no force or effect and were void *ab initio*” because the commerciality determination was made before the first

^{27/} An extension for diligent “exploratory drilling operations” was always available as an additional opportunity to preserve the leases. Under Article IV of the Unit Agreement, for any lease or portion of a lease not entitled to be within a PA as of the fifth anniversary of the effective date of the Unit Agreement, GEO could have avoided automatic elimination from the Unit by engaging in exploratory drilling. (AR Vol. III, Tab DL, Article IV, ¶¶ 4.3-4.8.) Leases would have remained in the Unit for so long as exploratory drilling operations were diligently pursued, with not more than 4 months between the completion of one exploratory well and the next. (AR Vol. III, Tab DL, Article IV, ¶¶ 4.5, 4.8.) This was explained at length in BLM’s letter dated Dec. 5, 1997. (Appendix B to Decision, AR Vol. IV, Tab 15.)

^{28/} The Lewis letter appears to be responsive to the points of agreement reached in a Nov. 9, 1994, meeting. A similar letter from Signorotti to Lewis dated Dec. 9, 1994, was received in the Nevada State Office on Dec. 19, 1994. It enclosed his draft of the decision he and the JV hoped BLM would issue. (AR Vol. IV, Tab 26.)

^{29/} The latter date is a reference to BLM’s Notice of the PA determination. (AR Vol. III, Tab CP.) The reference to a Nov. 3, 1994, extension is an error. According to Appendix A to the decision before us, five of the leases received a second extension on Nov. 3, 1993. See AR Vol. IV, Tab 15, and Tab 30 at 2.

extension had expired. (SSOR at 8, n.9.) In constructing this argument based on Lewis' letter, GEO implicitly invokes equitable estoppel.

Even assuming *arguendo* that GEO correctly characterizes the import of the Lewis letter, the Board has repeatedly held that, to invoke estoppel, a party must show detrimental reliance on a written decision issued by an authorized officer, Continental Land Resources, 162 IBLA 1, 6 (2004), and a crucial misrepresentation and/or concealment of material facts. United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978); Dan Adelman, 169 IBLA 13, 17 (2006); Continental Land Resources, 162 IBLA at 6; Mineral Hill Venture, 155 IBLA 323, 329 (2001). Oral statements made by a BLM employee do not suffice to support a claim of estoppel. William H. Shepherd, 157 IBLA 134, 137-38 (2002); Mineral Hill Venture, 155 IBLA at 330. Additionally, estoppel cannot result in a party obtaining rights to which he is not entitled by law. William H. Shepherd, 157 IBLA at 138. Lewis' letter does not constitute a decision, because it indicates that a decision to take the enumerated actions would be forthcoming after GEO replied to the initial PA determination on November 30, 1994, and after the date of the PA determination was finally established. In correspondence with BLM, GEO acknowledged that there was a "lack of consensus at the BLM over conclusions similar to those" advocated by it and Magma; its attorneys had intervened in the discussions, and it was known that BLM had requested advice from the Solicitor's Office. (AR Vol. IV, Tab 27 at 4-5.) GEO could not have failed to understand that the Solicitor's Office and/or BLM might ultimately reach conclusions different from those discussed over time. Nor can GEO escape the fact that the September 21, 1994, decision, which espoused a position that is plainly inconsistent with GEO's interpretation, had been lawfully issued and had become final when it was not appealed. GEO therefore cannot now claim that it relied on Lewis' letter to its detriment. Accordingly, there is no basis for estopping the Government in this case.

Our final comments concern the Unit Agreement. Although there is no requirement to use the model form unit agreement set forth in 43 CFR Subpart 3286, the Unit Agreement in this case appears to be a version of the model form. It provides that the Act and all applicable regulations "heretofore or hereafter issued" are accepted and incorporated as part of the parties' agreement. (AR Vol. III, Tab DL, Art. I, ¶ 1.1 at 1.) The Unit Agreement explicitly establishes that leases that are not part of the PA shall be eliminated automatically if no further drilling in the Unit occurs. No further drilling in the Unit has taken place, and therefore the PA is properly defined as lease N-9647 containing Well No. 81-13. The Unit Agreement thus disposes of GEO's arguments regarding the notice it was entitled to receive before the Unit was contracted to the PA. (AR Vol. III, Tab DL, Art. IV, ¶ 4.3.) Further, the Agreement states that a lease included in the Unit is "continued for the term so provided therein, or as extended by law. This subsection shall not operate to extend any lease or portion thereof as to lands excluded from the Unit Area by

contraction thereof.” (Article XVII, ¶ 17.7.) The Agreement provides, moreover, that “[u]pon termination of this Agreement, the leases covered hereby may be maintained and continued in force and effect in accordance with the terms, provisions, and conditions of the Act, the lease or leases, and amendments thereto.” (Article XVII, ¶ 17.11.)

Under the circumstances, we find that BLM’s decision is not arbitrary and capricious or an abuse of discretion, nor is it violative of applicable law and regulations. We also find no basis for holding that the commerciality determination tolled or nullified the commencement of any diligent efforts extension so as to “preserve” them for the date on which the leases were eliminated from the Unit, and conclude that BLM properly determined that 5-year extensions are available only on a successive basis. GEO moves the Board to postpone Unit contraction to create a further opportunity for it to request the second 5-year extensions. Even if we had the general supervisory authority to direct BLM to postpone Unit contraction, we would refuse to do so for two reasons. First, the requirement that the second 5-year extension must be consecutive to the first is not discretionary and in the circumstances here presented cannot be met. Second, GEO in fact has had the benefit of a long-postponed Unit contraction that obviously included notice and many opportunities to comment on or avoid it.

GEO also requested a hearing. There are no significant issues of fact raised by the appeal that cannot be answered on the record before us. The request for a hearing is properly denied. Celeste C. Grynberg, 169 IBLA 178, 183 (2006); Frank Robbins, 167 IBLA 239, 246 n.6 (2005).

Any arguments not expressly addressed in this opinion have been considered and rejected as contrary to the law or inconsistent with the facts.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM’s Motion to Dismiss is denied, the request for a hearing is denied and the decision appealed from is affirmed.

T. Britt Price
Administrative Judge

I concur:

Lisa Hemmer
Administrative Judge

APPENDIX A

Dates Leases Received Extensions

<u>Lease</u>	<u>First Extension</u>	<u>Second Extension</u>
N-8421	2/10/1989	11/03/1993
N-8428	2/10/1989	11/03/1993
N-9647	2/10/1989	11/03/1993
N-10311	2/10/1989	11/03/1993
N-17777	2/10/1989	11/03/1993
N-31991	8/19/1991	
N-31992	10/15/1992	
N-31993	8/19/1991	
N-36616	10/15/1992	
N-36617	10/15/1992	
N-36618	10/15/1992	
N-36619	10/15/1992	