



GEO-ENERGY PARTNERS - 1983 LTD. and JACK McNAMARA

177 IBLA 187

Decided May 4, 2009



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. and JACK McNAMARA

IBLA 2009-2

Decided May 4, 2009

Appeal from a Record of Decision of the El Centro Field Office (California), Bureau of Land Management, requiring unitization of geothermal leases to be issued in the Truckhaven Geothermal Leasing Area. BLM/CA/ES-2008-0004+3200; CA-EIS-2007-017-3200.

Affirmed; appeal of Geo-Energy Partners - 1983 Ltd. dismissed.

1. Rules of Practice: Appeals: Standing to Appeal--Geothermal Leases: Assignments or Transfers

A potential future assignee of noncompetitive geothermal leases that may be issued in response to pending applications lacks standing to appeal from a BLM Record of Decision requiring unitization of Federal geothermal leases that may be issued within the leasing area.

2. Geothermal Leases: Applications--Geothermal Leases: Unit and Cooperative Agreements

Section 4(d) of the Geothermal Steam Act of 1970, 30 U.S.C. § 1003(d) (2006), as amended by the Energy Policy Act of 2005, makes applications for noncompetitive geothermal leases that were pending on August 8, 2005 (the date of enactment of the Energy Policy Act), subject to the provisions of that section as in effect on the day before August 8, 2005, unless the applicant elects to be subject to the competitive leasing process prescribed in section 4 as amended by the Energy Policy Act. The amendments to section 4 do not exempt such lease applications from other amendments to the Geothermal Steam Act made by the Energy Policy Act.

3. Geothermal Leases: Unit and Cooperative Agreements

The unitization provisions of section 18 of the Geothermal Steam Act, 30 U.S.C. § 1017 (2006), as amended by the Energy Policy Act of 2005, apply to leases issued in response to applications pending before the Department on August 8, 2005. BLM may require the lessee to operate under a unit agreement, and may prescribe the unit agreement under which the lessee must operate.

APPEARANCES: John J. (Jack) McNamara, Esq., Agoura Hills, California, for Geo-Energy Partners - 1983 Ltd. and *pro se*; Erica L. B. Niebauer, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEATH

Geo-Energy Partners - 1983 Ltd. (Geo-83) and Jack McNamara, Geo-83's general partner, have appealed from a July 2, 2008, Record of Decision (ROD) of the El Centro Field Office (California), Bureau of Land Management (BLM), approving the leasing of geothermal resources within 14,731 acres of BLM-managed public lands in an area known as the Truckhaven Geothermal Leasing Area (Area), located adjacent to the Salton Sea in western Imperial County, California. The ROD implements Alternative 3, as identified in the October 2007 Final Environmental Impact Statement (FEIS), prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2000). Under that alternative, "BLM would approve leases for tracts with pending noncompetitive leasing applications [in] the Truckhaven Geothermal Leasing Area filed between 2000 and 2001 and offer competitive leases for all other Federal mineral resources" FEIS (Administrative Record (AR) Folder 9) at 2-2.¹ Under the FEIS and the ROD, BLM will require the leases to be committed to a geothermal unit. FEIS at 1-2 to 1-5; ROD (AR Folder 6) at unpaginated ii (decision and signature page). Geo-83 and McNamara filed an appeal, challenging the compulsory unitization requirement. For the reasons explained below, we dismiss the appeal as to Geo-83 for lack of standing and affirm the ROD as to McNamara.

¹ The AR is common to both this appeal and the appeal of EcoLogic Partners, Inc., IBLA 2009-3. IBLA 2009-3 concerns geothermal leasing in the Area, but raises entirely unrelated issues.

BACKGROUND

A. McNamara's Geothermal Lease Applications

On December 20, 2000, BLM received three executed noncompetitive geothermal lease applications from McNamara, the named applicant and prospective lessee, for identified tracts within the Area. Until the enactment of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (“EPA 2005”) on August 8, 2005, lands outside of known geothermal resources areas (KGRA) could be leased noncompetitively under section 4 of the Geothermal Steam Act (GSA), 30 U.S.C. § 1003 (2000). The lands within the Area were not within a KGRA at the time McNamara filed his applications.²

McNamara used the standard BLM “Offer to Lease and Lease for Geothermal Resources,” Form 3200-24, in his applications, and seeks to lease approximately 5,100 acres in secs. 6, 8, 28, 30, 32, and 34, T. 11 S., R. 10 E., and secs. 4 and 6, T. 12 S., R. 10 E., San Bernardino Meridian, Imperial County, California. Section 4 of the lease terms of BLM Form 3200-24 includes the lessor’s right to “require lessee to subscribe to a cooperative or unit plan . . . if deemed necessary for proper development and operation of the area, field, or pool embracing these leased lands.” Answer Ex. 1. By signing each of the lease offers, McNamara agreed that his “signature to this offer constitutes acceptance of this lease, including all terms conditions and stipulations” *Id.*

B. The Geothermal Steam Act Unitization Provisions and the Energy Policy Act Amendments

During the pendency of McNamara’s lease applications, Congress amended the GSA in a number of respects in the EPA 2005. Before August 8, 2005, section 18 of the GSA, 30 U.S.C. § 1017 (2000), provided in relevant part:

For the purpose of properly conserving the natural resources of any geothermal pool, field, or like area, or any part thereof, lessees thereof and their representatives may unite with each other, or jointly or separately with others, in collectively adopting and operating under a cooperative or unit plan of development or operation of such pool, field, or like area, or any part thereof, whenever this is determined and certified by the Secretary to be necessary or advisable in the public interest. The Secretary may in his discretion and with the consent of

² Section 222 of the EPA 2005, 119 Stat. 660, amended 30 U.S.C. § 1003 (2000) to allow only competitive lease sales for Federal geothermal resources, with exceptions not relevant here.

the holders of leases involved, establish, alter, change, revoke, and make such regulations with reference to such leases in connection with the institution and operation of any such cooperative or unit plan as he may deem necessary or proper to secure reasonable protection of the public interest. He may include in geothermal leases a provision requiring the lessee to operate under such a reasonable cooperative or unit plan, and he may prescribe such a plan under which such lessee shall operate, which shall adequately protect the rights of all parties in interest, including the United States. . . .

Section 227 of the EPA 2005, 119 Stat. 666-67, amended this section to read in relevant part:

(a) Adoption of units by lessees

(1) In general

For the purpose of more properly conserving the natural resources of any geothermal reservoir, field, or like area, or any part thereof (whether or not any part of the geothermal reservoir, field, or like area, is subject to any cooperative plan of development or operation (referred to in this section as a “unit agreement”)), lessees thereof and their representatives may unite with each other, or jointly or separately with others, in collectively adopting and operating under a unit agreement for the reservoir, field, or like area, or any part thereof . . . if determined and certified by the Secretary to be necessary or advisable in the public interest.

. . . .

(3) Initiative of Secretary

The Secretary may also initiate the formation of a unit agreement, or require an existing Federal lease to commit to a unit agreement, if in the public interest.

. . . .

(b) Requirement of plans under new leases

The Secretary may—

(1) provide that geothermal leases issued under this chapter shall contain a provision requiring the lessee to operate under a unit agreement; and

(2) prescribe the unit agreement under which the lessee shall operate, which shall adequately protect the rights of all parties in interest, including the United States.

C. *The Draft EIS, the Final EIS, and the ROD*

BLM issued a draft EIS (DEIS) for geothermal leasing in the Area in February 2007 and solicited public comment. McNamara, on behalf of himself and Esmeralda Truckhaven Geothermal LLC (Esmeralda Geo), commented on the DEIS by letter dated April 30, 2007. Comment letters CD-ROM (attached to FEIS), Document 359. The letter stated that McNamara is the manager of Esmeralda Geo, which is a wholly-owned subsidiary of Esmeralda Energy Company (Esmeralda Energy), which, in turn, is a wholly-owned subsidiary of Geo-83 (in which McNamara is the general partner). *Id.* at 1. The comments concerned better mapping of certain features in the Area, off-road vehicle usage, an alleged overestimate of the amount of land anticipated to be disturbed by geothermal development, and creation of jobs. *Id.* at 1-2. While nothing in these comments related to unitization of geothermal leases within the Area, the DEIS did not specifically discuss unitization.

After reviewing the comments and modifying the EIS where it believed appropriate, BLM issued the FEIS. In the FEIS, BLM explained that if every lessee conducted exploration activities on its lease independent of the other lessees in the immediate area, such activity could “result in greater impacts to both surface and subsurface resources.” FEIS (AR Vol. 9) at 1-5. BLM concluded: “Since unitization can and does reduce the overall impacts to a given area under lease, a requirement for the Federal geothermal lessees to unitize their interests can be consider[ed] an effective tool to help mitigate the potential impact to surface uses” Therefore, the FEIS stated that “BLM will require the lessees to join together under a Unit Agreement prior to the leases becoming effective.” *Id.*

On February 29, 2008, and July 31, 2008, McNamara, on behalf of Esmeralda Energy and Esmeralda Geo, wrote to BLM regarding his concerns about the unitization requirement in the FEIS. McNamara argued that BLM did not have authority to require unitization before enactment of the EPA 2005, and that BLM must apply the pre-EPA 2005 GSA to geothermal lease applications pending on or before the EPA 2005’s effective date, August 8, 2005. AR Folder 7 (Feb. 29, 2008, comments) at 6-8; AR Folder 5 (July 31, 2008, memorandum) at 3, 8. McNamara also argued that compulsory unitization could prevent Geo-83’s subsidiary, Esmeralda Energy, and its subsidiary, Esmeralda Geo—potential assignees of leases issued in

response to McNamara's noncompetitive applications—from fulfilling their agreements with San Diego Gas and Electric Company (SDG&E) to provide electricity to help meet SDG&E's obligations under the California Renewable Portfolio Standard (RPS) program. The RPS program is a State law requiring electric utilities to increase procurement from eligible renewable energy resources to 20 percent by 2010.³ AR Folder 7 at 3-4; AR Folder 5 at 5. McNamara further argued that unitization would be unnecessary because section 6 of the lease terms of BLM Form 3200-24 adequately protects the surrounding lands from individual lease operations. AR Vol. 5 at 6-7.⁴ McNamara also asserted that if BLM unitized operations within the Area, then it could only unitize post-discovery production operations, leaving individual lessees the opportunity to explore and drill upon their own leased lands. *Id.* at 2.

In the July 2, 2008, ROD, BLM decided that “[t]he leasing of lands for geothermal resources would be subject to standard lease stipulations . . . and the requirement that the leases would be fully committed to a geothermal unit acceptable to BLM.” ROD at unpaginated ii. Appellants appealed. As far as the current record reveals, McNamara's lease applications are still pending.

D. *McNamara's Appeal*

In this appeal, McNamara raises essentially the same arguments made to BLM before the agency issued the ROD. McNamara still contends that under the pre-EPA 2005 GSA, BLM has no authority to require unitization of geothermal leases without the agreement of the lessees. By requiring a lessee in the Area to enter into a unitization agreement, McNamara believes that BLM is violating the GSA as it existed at the time McNamara submitted his geothermal lease applications. Notice of Appeal/Statement of Reasons (SOR) at 4-5, 8; Supplemental Statement of Reasons (SSOR) at 2-7, 9-10. McNamara further asserts that under the original GSA before the EPA 2005 amendments, because unitization serves to conserve the geothermal resource, BLM may unitize only post-discovery lease production operations, leaving individual lessees, and not a unit operator, the opportunity to explore and drill for

³ See California Public Utilities Code §§ 399.11 through 399.20, which became effective on Jan. 1, 2003.

⁴ Section 6 of the lease terms requires, *inter alia*, that the lessee “shall conduct operations in a manner that minimizes adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources, and to other land uses or users. Lessee shall take reasonable measures deemed necessary by lessor to accomplish the intent of this section. To the extent consistent with leased rights granted, such measures may include, but are not limited to, modification to siting or design of facilities, timing of operations, and specification of interim and final reclamation measures.”

geothermal steam upon the leased lands. SSOR at 5-7. McNamara continues to argue that section 6 of the lease terms serves to protect the surrounding lands and, therefore, unitization of Federal leases is unnecessary. SOR at 11-12; SSOR at 14-16. McNamara also contends that BLM's decision conflicts with the State's RPS program by preventing implementation of SDG&E's contracts with Esmeralda Geo and Esmeralda Energy. SSOR at 16-18.⁵

BLM seems to accept McNamara's premise that the pre-EPA 2005 GSA applies, but asserts that it allows for compulsory unitization of geothermal leases. Answer at 7; BLM Response to SSOR (Response) at 3-5. BLM further maintains that section 4 of the lease terms expressly states that the Government may require McNamara to subscribe to a unit plan. Answer at 11; Response at 8. BLM disagrees with McNamara's interpretation that the pre-EPA 2005 GSA permits unitizing leases only after discovery of a resource is made and production begun. Response at 5-6. BLM further asserts that it is attempting to coordinate with the State regarding development, including unitization of State-owned geothermal resources in the Area, but it must fulfill its responsibilities under Federal law. Response at 8-9.

ANALYSIS

I. *Geo-83 Lacks Standing to Appeal.*

Before considering the merits, we must address whether Geo-83 has standing to appeal. To appeal a BLM decision, an appellant must have "standing" under 43 C.F.R. § 4.410. Section 4.410(a) requires an appellant to demonstrate that it is both a "party to a case" within the meaning of paragraph (b) of that section, and "adversely affected" by the decision within the meaning of paragraph (d). *The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA 79, 81-86 (2005), and cases cited. An appeal must be dismissed if either element is lacking. *E.g.*, *Colorado Environmental Coalition*, 173 IBLA 362, 367 (2008); *Southern Utah Wilderness Alliance*, 140 IBLA 341, 346 (1997), and cases cited. We have long held that it is the appellant's responsibility to demonstrate the requisite elements of standing. *E.g.*, *Colorado Environmental Coalition*, 173 IBLA at 367; *Colorado Open Space Council*, 109 IBLA 274, 280 (1989).

⁵ Further, McNamara contends that BLM cannot require the commitment of non-Federal lands or leases to a Federal unit. SOR at 8. Both this Board and BLM agree. See 43 C.F.R. §§ 3280.7 (2008), 3281.4 (2004); see also Answer at 8-9; 73 Fed. Reg. 45050 (Aug. 1, 2008) ("The ROD for [the Truckhaven Geothermal Leasing Area] project addresses only BLM's decisions for public lands and resources administered by BLM").

[1] A party to a case is the party who had taken the action which is the subject of the decision on appeal, is the object of that decision, or otherwise actively participated in the decisionmaking process leading to that decision. 43 C.F.R. § 4.410(b); *see, e.g., Stanley Energy, Inc.*, 122 IBLA 118, 120 (1992); *The Wilderness Society*, 110 IBLA 67, 70 (1989). While McNamara is clearly a party to the case, it is not clear that Geo-83 is. The record shows that Esmeralda Geo, the wholly-owned subsidiary of Geo-83's wholly-owned subsidiary Esmeralda Energy, and McNamara, Geo-83's general partner, commented on the DEIS. Further, Esmeralda Energy and Esmeralda Geo submitted comments to BLM on the FEIS' discussion of unitization before the ROD was issued. McNamara appears to treat these various corporate and partnership entities as virtually interchangeable. The question is whether the participation of Geo-83's subsidiary entities and its general partner amount to participation by Geo-83. However, we need not resolve that question to resolve the standing issue, because it is clear that Geo-83 is not adversely affected by the ROD.

Under 43 C.F.R. § 4.410(d), a party is adversely affected when it “has a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest.” *See, e.g., Board of Commissioners of Pitkin County*, 173 IBLA 173, 178-80 (2007), and cases cited; *Laser, Inc.*, 136 IBLA 271, 274 (1996); *Donald K. Majors*, 123 IBLA 142, 144-45 (1992). Geo-83 is not a party or signatory to McNamara's lease applications, and is not the prospective lessee to whom BLM would issue the leases sought in those applications. McNamara represents that Geo-83 “is the designated ‘Assignee,’ as of October 1, 2007 (from [McNamara] as ‘Assignor’) of as yet unfiled assignments of all right, title, and interest” in the three leases McNamara seeks. SOR at 2-3. McNamara thereby admits that he has not filed any request to transfer record title or operating rights in any lease (if issued), as required under 43 C.F.R. §§ 3216.10, 3216.11, 3216.15, and 3216.16. Indeed, no such request could be filed in view of the fact that no leases have been issued to McNamara. Consequently, he has no interest to assign. Moreover, McNamara has not submitted any assignment agreement between himself and Geo-83 or any other entity.⁶

Being a potential assignee or successor-in-interest to geothermal leases that may be issued in the future as a result of McNamara's applications does not give Geo-83 any legally cognizable interest to which the ROD could cause any injury. *See Stanley Energy, Inc.*, 122 IBLA 118, 121 (1992). Geo-83 therefore lacks standing to appeal from the ROD. Accordingly, we dismiss the appeal as to Geo-83.

⁶ McNamara does not explain why he plans to assign any leases ultimately issued to Geo-83 when SDG&E's contracts apparently are with Geo-83's subsidiary entities, Esmeralda Geo and Esmeralda Energy, and when the Feb. 29, 2008, comments described McNamara as “Esmeralda's predecessor in interest.” AR Vol. 7 at 3.

II. *BLM May Require Unitization of Any Leases Issued to McNamara.*

A. *The Unitization Provisions of 30 U.S.C. § 1017, as amended by the EPA 2005, and the Implementing Rules Apply to Leases that May Be Issued to McNamara.*

In arguing that the pre-EPA 2005 GSA applies to leases that he may obtain, McNamara relies on section 222 of the EPA 2005, 119 Stat. 660-61, which rewrote section 4 of the GSA, 30 U.S.C. § 1003 (2006). *See* SOR at 4-5; SSOR at 2-5, 9-10. The new section 1003(d) provides in relevant part:

(d) Pending lease applications

(1) In general

It shall be a priority for the Secretary . . . to ensure timely completion of administrative actions . . . necessary to process applications for geothermal leasing pending on August 8, 2005.^[7] . . .

(2) Administration

An application described in paragraph (1) and any lease issued pursuant to the application—

(A) except as provided in subparagraph (B), shall be subject to this section as in effect on the day before August 8, 2005^[8]; or

(B) at the election of the applicant, shall be subject to this section as in effect on the effective date of this paragraph.

McNamara's applications were pending on August 8, 2005, and are within the coverage of section 1003(d). As noted previously, BLM does not appear to dispute McNamara's interpretation of this section as meaning that the entire GSA, as it read before the EPA 2005 amendments, applies to his lease applications and to leases issued in response to those applications.

⁷ As enacted at 119 Stat. 661, the last phrase read "pending on the date of enactment of this subsection," but was changed to "pending on August 8, 2005" (the actual date of enactment) in the codified version.

⁸ As enacted at 119 Stat. 661, the last phrase read "the day before the date of enactment of this paragraph," but was changed to "the day before August 8, 2005" in the codified version. *See* the preceding note.

[2] Both parties misread section 1003(d). The title of section 1003 is “Leasing procedures.” As its title suggests, this section describes the procedures used to lease geothermal resources underlying Federal lands. It contains no provisions regarding lease terms. The principal change that section 222 of the EPA 2005 made to this section was to require competitive leasing only, with two exceptions not relevant here. The former distinction between lands within “known geothermal resources areas” (which could be leased non-competitively) and lands not within such areas was eliminated. The clear purpose of the new section 1003(d) was to allow the processing of noncompetitive lease applications filed before the EPA 2005’s enactment to continue without being subjected to competitive leasing unless the applicant elected to be subject to the competitive leasing procedures.

Section 1003(d)(2) provides that a pre-August 8, 2005, application and subsequent lease “shall be subject to *this section* as in effect on the day before August 8, 2005 [the date of enactment]” (emphasis added)—*i.e.*, the pre-EPA 2005 section 1003. It then provides that the applicant may elect to be “subject to *this section* as in effect on the effective date of this paragraph” (emphasis added)—*i.e.*, the post-EPA 2005 section 1003. It does not say that the applicant will be subject to “this chapter” or “this Act” as in effect on the day before August 8, 2005, unless the applicant elects otherwise. Congress’ unambiguous use of the term “this section” expressly limits the provision’s scope.

BLM’s regulations implementing the EPA 2005’s amendments to the GSA reflect Congress’ intent. The preamble to the proposed rule explained that proposed 43 C.F.R. § 3204.13 “would implement a portion of the statutory provision at 30 U.S.C. § 1003(d)(2) that allows lease applications pending on August 8, 2005[,] to be processed under then-existing policies and procedures unless the applicant elects for the lease to be subject to the new leasing procedures.” 71 Fed. Reg. 41542, 41546 (July 21, 2006). BLM received no comments on this provision and promulgated section 3204.13 in the final rule virtually without change. 72 Fed. Reg. 24358, 24364, 24407-08 (May 2, 2007). It provides: “Noncompetitive lease applications pending on August 8, 2005, will be processed under policies and procedures existing on that date unless the applicant notifies BLM in writing that it elects for the lease application to be subject to the competitive leasing process”⁹ Thus, the statute and the implementing regulations do not, as McNamara would have us believe, allow applicants who submitted their applications before the EPA 2005 amendments to the GSA to avoid the EPA 2005 provisions entirely.

⁹ In the event the lessee does so elect, the application is considered a nomination for future competitive lease offerings for the lands in the application. 72 Fed. Reg. at 24408.

[3] Following the EPA 2005 amendments, the GSA's unitization provision at 30 U.S.C. § 1017(b) (2006), under the heading "Requirement of plans under new leases," states:

The Secretary may—

(1) provide that geothermal leases *issued under this chapter*¹⁰ shall contain a provision requiring the lessee to operate under a unit agreement; and

(2) prescribe the unit agreement under which the lessee shall operate, which shall adequately protect the rights of all parties in interest, including the United States. [Emphasis added.]

Any leases issued in response to McNamara's pending applications will be leases issued "under this chapter" (or "under this Act")—*i.e.*, under the GSA. Section 1017, as amended by the EPA 2005, therefore applies to such leases.

BLM's regulations again reflect these principles. The regulation at 43 C.F.R. § 3200.8(a) provides: "Any leases issued in response to applications that were pending on August 8, 2005, are subject to this part and part 3280"¹¹ Subpart 3280 contains the provisions regarding geothermal resources unit agreements. In that subpart, 43 C.F.R. § 3280.4(b) provides:

BLM may require that Federal leases that become effective on or after August 8, 2005, contain a provision stating that BLM may require commitment of the lease to a unit agreement, and may prescribe the unit agreement to which such lease must commit to protect the rights of all parties in interest, including the United States.

¹⁰ As enacted by section 227 of the EPA 2005, 119 Stat. 666, this paragraph referred to leases issued under "this Act," but was changed to "this chapter" in the codified version.

¹¹ Section 3200.8(a) also prescribes exceptions to applying the pre-EPA 2005 BLM rules, but only "relating to royalties, minimum royalties, rentals, primary term and lease extensions, diligence and annual work requirements, and renewals." Those matters are not involved here. Under section 3200.8(b), a lessee in McNamara's situation could elect to be subject to the entire Subpart 3200, including the rules on the identified subjects, but that is not necessary or otherwise applicable in this case. *See* 72 Fed. Reg. at 24360.

Consequently, BLM may require unitized geothermal operations pursuant to the post-EPA 2005 GSA because the current statutory and regulatory provisions regarding unitization apply to any lease ultimately issued to McNamara. In this case, BLM found that unitization of the Area is necessary to allow for the efficient use of the geothermal resources while minimizing the surface impacts from such utilization. See FEIS at 1-2. Requiring unitization for that reason is well within BLM's authority.¹²

We disagree with McNamara's theory that geothermal leases may be unitized only after production begins. By definition, a unit agreement means "an agreement to *explore for*, produce and utilize separately owned interests in geothermal resources as a single consolidated unit." 43 C.F.R. § 3200.1 (2007) (emphasis added). In turn, "exploration operations" means "any activity relating to the search for evidence of geothermal resources, where you are physically present on the land and your activities may cause damage to those lands." *Id.*¹³ Exploration operations include geophysical operations and various types of drilling. *Id.* BLM therefore may require unitization at the exploratory phase.

B. Unitization Is Not Inconsistent with or Rendered Superfluous by Other Provisions in the Lease Terms.

According to McNamara, as noted previously, other lease terms found in BLM Form 3200-24 adequately protect the surface from impacts resulting from geothermal activities, and the unitization requirement should be rejected as unnecessary. We disagree. Section 6 of the lease terms contains no provisions regarding cooperative exploration or development among different lessees. McNamara ignores section 4 of the lease terms, quoted above, which expressly provides for the lessor's right to

¹² Even if the pre-EPA 2005 GSA applied, as McNamara argues, the outcome would still be the same. Before the EPA 2005 amendment, 30 U.S.C. § 1017 (2000) permitted the Secretary to "prescribe such a [unit] plan under which such lessee shall operate . . ." We disagree with McNamara's interpretation that the consent of the lessees was required in all circumstances under this provision. BLM promulgated rules and regulations that historically have provided for compulsory unitization. See former 43 C.F.R. § 3280.0-2 (1983-2005), formerly 30 C.F.R. § 271.1 (1974-1983) (second sentence), promulgated at 38 Fed. Reg. 35068, 35073 (Dec. 21, 1973), and redesignated at 48 Fed. Reg. 44792 (Sept. 30, 1983) ("[Unitization] agreements may be initiated by lessees, or where in the interest of conserving natural resources they are deemed necessary they may be required by the Director").

¹³ These definitions are unchanged from the rules in effect before enactment of the EPA 2005. See 43 C.F.R. § 3200.1 (1999-2004). Thus, McNamara's theory is invalid under either version of the statute.

“require lessee to subscribe to a cooperative or unit plan . . . if deemed necessary for proper development and operation of the area, field, or pool embracing these leased lands.” McNamara’s inference from certain lease terms of authority that somehow effectively would prohibit the assertion of authority expressly provided for elsewhere in the lease, statute, and regulations is a *non sequitur*.

C. *California’s RPS Program Does Not Invalidate the Unitization Requirement.*

McNamara does not show how unitizing Federal leases in the Area undercuts California’s RPS program. BLM believes the opposite to be true—that unitizing leases would accelerate exploration and ultimate production in the Area and thereby help meet the goal of California’s RPS program for 20 percent of California’s energy to be generated from renewable sources by 2010. FEIS at 1-10. *See also* FEIS at 1-5. McNamara’s allegation that unitization may frustrate or delay the ability of Esmeralda Energy and Esmeralda Geo to fulfill purchase agreements with SDG&E concerns private contracts between parties that are not parties to this appeal, a matter beyond the purview of this Board. Any such complications for private contractual arrangements that McNamara or his affiliated entities may have entered into even before leases are issued are not relevant to BLM’s authority to require unitization.¹⁴

To the extent not specifically addressed herein, McNamara’s other arguments have been considered and rejected.

CONCLUSION

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Geo-83’s appeal is dismissed, and the decision appealed from is affirmed as to McNamara. With the issuance of this decision, BLM’s January 8, 2009, Request for Expedited Review is moot.

¹⁴ Even if unitization somehow were contrary to California law, that conflict would not invalidate BLM’s action. Under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, § 2, Federal law overrides conflicting state laws with respect to Federal public lands. *E.g.*, *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976), and cases cited; *United States v. Gardner*, 107 F.3d 1314, 1320 (9th Cir. 1997).

_____/s/_____
Geoffrey Heath
Administrative Judge

I concur:

_____/s/_____
T. Britt Price
Administrative Judge