



VULCAN POWER COMPANY

178 IBLA 210

Decided November 5, 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

VULCAN POWER COMPANY

IBLA 2008-161

Decided November 5, 2009

Appeal from a decision of the California State Office, Bureau of Land Management (BLM), rejecting five geothermal lease offers (CACA 30351 through CACA 30354 and CACA 37043).

Decision affirmed; request for suspension of effect of Board decision denied.

1. Geothermal Leases: Consent of Agency

Under 30 U.S.C. § 1014(b) (2006) and 43 C.F.R. § 3201.10(a)(2), BLM has no authority to issue a geothermal lease for land within a National Forest without the consent of the Forest Service, an agency of the U.S. Department of Agriculture. When the Forest Service withholds its consent, the Department of the Interior may not issue leases on those lands.

2. Administrative Procedure: Judicial Review--Courts--  
Judicial Review--Rules of Practice: Appeals: Effect of

Under 5 U.S.C. § 705 (2006), when an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. However, the Board itself does not ordinarily suspend the effect of its decisions.

APPEARANCES: Janice M. Schneider, Esq., and Elizabeth Klein, Esq., Washington, D.C., for appellant; Erica L.B. Niebauer, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Vulcan Power Company (Vulcan) has appealed a Bureau of Land Management (BLM) decision rejecting five geothermal lease offers (CACA 30351 through CACA 30354 and CACA 37043) filed by Vulcan in 1992. The offers described land located on the north side of Mt. Shasta within the Shasta-Trinity National Forest. BLM rejected the offers because the Forest Service (FS), the surface management agency within the U.S. Department of Agriculture having administrative jurisdiction over the lands covered by the offers, did not consent to the issuance of the leases.

National Forest land can only be leased by BLM for geothermal development with the consent of FS. Because FS failed to consent, Vulcan cannot establish any error in BLM's decision. Therefore, we must affirm BLM's decision.

Vulcan requests that we suspend the effect of our decision pending judicial review under 5 U.S.C. § 705 (2006). We decline to do so because the Board does not ordinarily suspend the effect of its decisions, and we do not find the circumstances of this appeal so extraordinary as to warrant a departure from our usual practice.

*Background*

During 1992, Vulcan filed geothermal lease offers CACA 30351 through CACA 30354 and CACA 37043<sup>1</sup> with the California State Office, BLM.<sup>2</sup> BLM also requested a report and recommendation from FS concerning various geothermal offers filed by Vulcan, including those five. In 2004, BLM notified Vulcan that its offers had been pending environmental review since 1992; that an environmental report was required from the FS; and that FS had informed BLM that it did not know when it would be able to complete its review and prepare the necessary report. BLM inquired whether Vulcan wanted to maintain its offers. Vulcan responded that it did.

In 2007, Vulcan notified BLM that it had decided to withdraw various geothermal lease offers, but that it would retain the five at issue. Vulcan asserts on

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<sup>1</sup> BLM later rejected portions of CACA 30351 and CACA 30354 for reasons not relevant to this appeal.

<sup>2</sup> Vulcan filed each offer on a form titled "Offer to Lease and Lease for Geothermal Resources." The regulations governing geothermal resource leasing, 43 C.F.R. Part 3200, presently refer to "applications" for leases. *See, e.g.*, 43 C.F.R. Subpart 3204. Although BLM initially refers to Vulcan's filings as "offers" in documents in the case file, its decision identifies them as "applications." In this decision, for consistency, we use the term "offer" or "offers" to describe Vulcan's 1992 filings.

appeal that it withdrew those offers “to streamline the environmental review process that ultimately never occurred.” Statement of Reasons (SOR) at 11.

On January 10, 2008, the Regional Forester, Pacific Southwest Region, FS, informed the California State Director, BLM, that he endorsed an enclosed October 23, 2007, recommendation from the Forest Supervisor, Shasta-Trinity National Forest, relating to the five offers in question.<sup>3</sup> The Forest Supervisor stated that she had examined a Reasonably Foreseeable Development (RFD) scenario prepared by BLM for pending geothermal leasing applications on Mt. Shasta. She concluded that geothermal development as described in the RFD scenario was “*fundamentally incompatible with the cultural and historic values for which Mt. Shasta is managed. Geothermal development would detract from the cultural and historic values of Mt. Shasta Management Area and would in fact be a significant degradation of a place held sacred by many Native American peoples.*”<sup>4</sup> Recommendation at 4.

On April 2, 2008, BLM issued a decision rejecting the five offers, stating only that it had been informed by FS that it did not consent to leasing. There is no indication that copies of the FS documents supporting that determination accompanied BLM’s decision.

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<sup>3</sup> In that recommendation, the Forest Supervisor referenced the requirement of sec. 222(d) of the John Rishel Geothermal Steam Act Amendments of 2005 (amending the Geothermal Steam Act of 1970), codified at 30 U.S.C. § 1003(d) (2006), that FS take actions necessary to process geothermal lease applications pending on the date of passage of the Act, Aug. 8, 2005. The John Rishel Geothermal Steam Act Amendments constitutes Subtitle B of Title II of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594.

<sup>4</sup> In a May 30, 2008, internal e-mail, the District Ranger, Shasta-McCloud Management Unit, Shasta-Trinity National Forest, discounted any reliance on the RFD scenario, stating that the Regional Forester’s determination “did not rely on the RFD,” instead it was “based on the Forest Plan, existing interpretations of LRMP [Land and Resource Management Plan] (most notably the old ski area) and recent published case law on the subject.” Attached to the e-mail was a copy of a court decision issued a few months prior to the Regional Forester’s decision, in which a panel of the United States Court of Appeals for the Ninth Circuit held that the FS’s approval of the proposed expansion of a ski resort on the San Francisco Peaks violated the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-2(4) (2006). *Navajo Nation v. United States Forest Service*, 479 F.3d 1024 (9th Cir. 2007). It was not until after the Regional Forester made her decision that the full court reached the opposite conclusion. See 535 F.3d 1058 (9th Cir. 2008) (*en banc*), *cert. denied*, 129 S. Ct. 2763 (2009).

Vulcan filed a timely appeal of BLM's decision. By order dated June 4, 2008, the Board granted Vulcan's request for a stay and suspended consideration of the appeal at the request of the parties pending the pursuit by Vulcan of its administrative remedies with respect to the FS determination not to consent to lease issuance. On June 11, 2008, the Reviewing Officer for the Chief, FS, dismissed review of Vulcan's appeal of that determination "without review on the merits," concluding Vulcan did not have standing to appeal under 36 C.F.R. § 251.86(a) and (b). See SOR, Ex. 3. She stated that her decision was the final administrative determination for the U.S. Department of Agriculture "unless the Secretary, on his own initiative, elects to review the decision." *Id.* There is no evidence that the Secretary did so.

*Vulcan's Arguments on Appeal Relate Only to the FS Determination*

All of Vulcan's arguments on appeal are addressed to the FS determination, which is not reviewable by this Board. Vulcan states that the land described in the leases is in an area that was previously open to geothermal leasing and is outside areas previously deemed eligible for inclusion in the National Register of Historic Places as traditional cultural properties. It also asserts that it has invested approximately \$1 million to develop a project involving the lands covered by the lease offers. SOR 11-13. Vulcan contends that the FS decision was based on an erroneous RFD assessment that BLM prepared without an opportunity for comment by Vulcan. SOR at 14, 21- 23. Vulcan believes that FS has improperly elevated historical and cultural values above all other uses of the Shasta area. SOR at 23-27. Vulcan also complains of an absence of due process in that FS did not notify it of the decision to withhold consent to lease issuance or provide an opportunity for meaningful administrative review within the Department of Agriculture. SOR at 27-29.

[1] We have no authority to entertain such arguments, whatever their merit. Under the Geothermal Steam Act of 1970, 30 U.S.C. § 1014(b) (2006), geothermal leases for lands administered by the U.S. Department of Agriculture may only be issued with the "consent" of the head of that Department. See 43 U.S.C. § 3201.10(a)(2). In *Earth Power Corporation*, 32 IBLA 357, 359 (1977), we considered that statutory provision as imposing a mandatory requirement, stating that unless FS gave its consent to the geothermal leasing of the National Forest lands in dispute, which were located in the Bridger-Teton National Forest, "the Department of the Interior may not issue leases on those lands." See *Alaska Pacific Oregon, Ltd.*, 137 IBLA 394, 395 (1997). Vulcan has failed to show any error in BLM's rejection of its lease offers. Therefore, BLM's decision is affirmed.

*Vulcan's Request to Stay the Effect of the Board's Decision pending Judicial Review*

Vulcan has requested that if we affirm BLM's decision, we suspend the effect of such decision pending judicial review under 5 U.S.C. § 705 (2006), which provides: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review."<sup>5</sup> Although the statute provides no specific criteria for an agency to apply in making its finding, both Vulcan and BLM refer to the traditional four-part test courts and this Board use in considering stay requests: (1) likelihood of irreparable harm if the stay is not granted; (2) relative harm to the parties if the stay is granted or denied; (3) the likelihood of success on the merits for the party seeking the stay; and (4) whether the public interest favors granting a stay. See SOR at 32; Answer at 4-5; 43 C.F.R. § 4.21(b)(2). Pointing to its investment in planning for development of these leases, Vulcan is concerned that it will be irreparably harmed if it loses its "longstanding priority" for consideration of its lease offers if FS policies and managers change, at which point the land would be subject to competitive leasing. SOR at 31-33.

In response, BLM states that it has no regulatory process to retain applications pending judicial review and that the initiation of a lawsuit does not itself stay the effectiveness of a challenged decision. Answer at 5-6, citing *Winkler v. Andrus*, 614 F.2d 707, 709 (10th Cir. 1980). If the decision is not stayed, BLM will remove the applications from its statewide list of pending applications, and BLM states that it is unclear whether appellant's priority status would be reinstated if appellant secures a favorable ruling on judicial review. Answer at 7. BLM points out that section 225 of the John Rishel Geothermal Steam Act Amendments of 2005, codified at 42 U.S.C. § 15871 (2006), directs the Secretary to establish a program for reducing the backlog of geothermal lease applications pending on January 1, 2005, by 90 percent within the 5-year period beginning on August 8, 2005, and that keeping these applications active may hinder this objective. Answer at 8.

Although BLM objects to suspending the applications in a way that would cloud records if Vulcan has no obligation to diligently pursue judicial review, BLM is not averse to Vulcan's request if such a "diligence" obligation is imposed, with a time limit for resolution, as a condition for a stay. Answer at 8-9. Vulcan responds that it is willing to initiate litigation within 30 days, but that any other restriction on its pursuit of judicial review would be unreasonable.

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<sup>5</sup> That provision further states: "On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."

The practical effect of the FS decision is that the land described by the offers is not available for leasing, and when BLM determines that an offer must be rejected because the land is not available, BLM is normally required to reject the offer rather than suspend it to await possible future action concerning the availability of the land. See 43 C.F.R. § 2091.1(a); *Learned v. Watt*, 528 F.Supp. 980, 982 (D. Wyo. 1981). The practice of rejecting offers or applications is founded on sound administrative practice in that it prevents the public land records from being burdened with numerous applications or offers on which there is little possibility that action can be taken in the foreseeable future. *Paul C. Kohlman*, 75 IBLA 171, 173 (1983). For example, in *Alaska Pacific Lumber Co.*, 36 IBLA 88, 91 (1978), we affirmed a BLM decision that rejected geothermal lease offers because the applicant would not accept the no surface occupancy stipulation imposed by the FS. Although the applicant had sought modifications from FS and requested BLM to hold the offers in abeyance, BLM concluded that no modification from FS would be forthcoming.

[2] Vulcan argues in essence that we should suspend the effectiveness of our decision under 5 U.S.C. § 705 (2006) to preserve the priority of its offers. This same concern arises in any case when an appellant seeks judicial review of a decision rejecting a mineral lease application, but we are aware of no case in which we took such action on the basis of that statutory provision. Indeed, diligent research discloses only one case over the course of four decades in which the Board even *considered* suspending one of its decisions on the basis of this provision, and in that case we declined to do so. *Eldon L. Smith*, 5 IBLA 330, 342-44, 79 I.D. 149, 154-55 (1972) (request for suspension of decision requiring payment of grazing trespass damages pending judicial review). The Board itself does not ordinarily suspend the effect of its decisions, and we do not find the circumstances of this appeal so extraordinary as to warrant a departure from our usual practice.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed and Vulcan's request that the Board stay the effect of our decision is denied.

\_\_\_\_\_/s/\_\_\_\_\_  
H. Barry Holt  
Chief Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Bruce R. Harris  
Deputy Chief Administrative Judge