NO. 13-16961

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PIT RIVER TRIBE, ET AL.,
PLAINTIFFS-APPELLANTS,

V.

BUREAU OF LAND MANAGEMENT, ET AL.,
DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANSWERING BRIEF FOR THE FEDERAL AGENCY APPELLEES

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STATEMENT OF JURISDICTION

Plaintiffs filed two complaints in district court for review of agency action under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.,* and other federal statutes. The district court had jurisdiction pursuant to 28 U.S.C. § 1331. The cases were consolidated and plaintiffs filed a single First Amended Complaint. The court granted summary judgment on one claim and judgment on the pleadings on all other claims, all in favor of defendants (1 ER[1] 1-88), and entered a final judgment on July 30, 2013 (SER 1). Plaintiffs filed a notice of appeal on September 25, 2013 (1 ER 1), within the sixty days allowed by Fed. R. App. P. 4. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

The Geothermal Steam Act, 30 U.S.C. §§ 1001 *et seq.,* provides, in pertinent part, that a lease for geothermal exploration and development on federal property shall have a primary term of ten years and "shall

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[1] "ER" refers to the Excerpts of Record filed by plaintiffs, "SER" to the Supplemental Excerpts of Record filed by the agencies, "CR" to the Clerk's Record of proceedings in district court as enumerated on the docket sheet, "Addendum" to the Legal Addendum filed by plaintiffs, "Appx." to the appendix attached at the end of this brief, and "AOB" to the Appellants' Opening Brief.

continue for so long thereafter as geothermal steam is produced or utilized in commercial quantities, but such continuation shall not exceed an additional forty years." *Id.* § 1005(a). This appeal raises two issues concerning section 1005(a) and one issue of appellate procedure:

1. Whether plaintiffs' environmental interests in preventing geothermal leasing and development are within the zone of interests protected by section 1005(a), as required to assert a claim that the Bureau of Land Management ("BLM") violated the Geothermal Steam Act when recognizing that certain existing geothermal leases were entitled to continuation.

2. Whether environmental or historical analysis or consultation is required by the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 *et seq.*, or the United States' fiduciary duty to an Indian tribe, before BLM recognizes that existing geothermal leases are entitled to continuation under the mandatory language of section 1005(a).

3. Whether plaintiffs can properly request summary judgment for the first time on appeal, when they did not move for summary judgment

in district court and argued that the record was insufficient for summary adjudication.

STATEMENT OF THE CASE

Plaintiffs filed two complaints in 2004 in the U.S. District Court for the Eastern District of California, *Pit River Tribe v. BLM,* No. 04-0956 *("Pit River II")*, and *Save Medicine Lake Coalition v. BLM,* No. 04-0969 *("SMLC"),* challenging geothermal leases and development projects in the Glass Mountain Known Geothermal Resource Area ("Glass Mountain KGRA") in northern California. Initially, the complaints asserted claims under NEPA, the NHPA, the Geothermal Steam Act, the National Forest Management Act, 16 U.S.C. §§ 1600 *et seq.*, and the United States' fiduciary duty to the Pit River Tribe, and challenged a wide variety of agency actions and inactions over a period of more than twenty years -- from issuance of geothermal leases beginning in 1981; through approval of a geothermal unit agreement, multiple lease extensions, and a lease-continuation decision in the 1980s and 1990s; to approval of geothermal development proposals in 2000 and 2002.

Litigation of the cases stalled in 2005, before any significant progress.[2] In February 2013, the federal agencies filed a motion in both cases to dismiss some claims and for summary judgment on others. CR 41. In response, plaintiffs agreed to narrow their claims. *Pit River II* and *SMLC* were consolidated, and plaintiffs filed a single, First Amended Complaint which only asserted claims challenging a decision by BLM, issued on May 18, 1998, continuing twenty-six existing geothermal leases in an area called Telephone Flat ("the Telephone Flat leases"), plus a new claim under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. 1 ER at 286-88. Thus, although USDA, the Forest Service, and the Advisory Council on Historic Preservation are still nominal parties, no claims are asserted against them.

The agencies then moved for summary judgment on the FOIA claim and for judgment on the pleadings on all other claims. Following

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[2] In 2005, the cases were stayed pending appeal of another case (discussed below at 14-15 and 54-56) and as a result of a bankruptcy petition filed by defendant Calpine Corp. ("Calpine"), the owner of the leases. The appeal was decided in 2006, and Calpine emerged from bankruptcy protection in January 2008, but plaintiffs did nothing to prosecute their claims until defendants filed dispositive motions last year.

a hearing on July 13, 2013, the district court granted the motion in full. In an extensive bench ruling (1 ER at 72-88) and a nineteen-page written order (*id.* at 6-23), the court ruled: (1) that the FOIA claim was barred by the statute of limitations; (2) that plaintiffs' environmental interests are not within the zone of interests protected by 30 U.S.C. § 1005(a), as required for them to assert a claim that the lease continuation violated the Geothermal Steam Act; (3) that NEPA, the NHPA, and fiduciary duty are inapplicable, because the lease continuation was not a discretionary agency action; and (4) that plaintiffs waived all claims challenging acts or omissions by BLM other than the lease continuation.[3]

Plaintiffs expressly state that they do not appeal the FOIA ruling (AOB at 1 n.1), and they have waived appeal of the ruling that they waived any challenge to administrative acts or omissions except lease continuation by failing to argue that issue in their opening brief. Thus, only the second and third rulings on lease continuation are in issue.

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[3] Calpine also moved for judgment on the pleadings, asserting additional arguments, which the district court found mooted by the granting of the agencies' motion. 1 ER 6.

STATEMENT OF FACTS

A. Statutory Background: Leasing of National Forest Lands under the Geothermal Steam Act

The Geothermal Steam Act authorizes the Secretary of the Interior to lease federal lands for exploration and development of geothermal energy resources. *Sierra Club v. Hathaway*, 579 F.2d 1162, 1164 (9th Cir. 1978).[4] Under the original implementing regulations, responsibility for administering the leasing program was divided among BLM, the U.S. Geological Survey (USGS), and the Forest Service. *Id.* at 1165. Consent from the Forest Service is required for BLM to issue geothermal leases for lands in the National Forest System. 30 U.S.C. § 1014; 43 C.F.R. § 3201.1-3. Once the Forest Service consents to leasing, BLM is responsible for issuing and administering the leases, including granting or withholding lease extensions and continuations.

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[4] The Geothermal Steam Act was enacted in 1970, Pub. L. No. 91-581, 84 Stat. 1566 (Appx. 1-9); supplemented in 1974 by the Geothermal Energy Research, Development and Demonstration Act, Pub. L. No. 93-410, 88 Stat. 1079; and substantially amended in 1988 and 2005. Except where otherwise noted, the following discussion is based on the statute and regulations in effect in May 1998, when BLM issued the challenged decision, and all references are to the 1998 edition of the United States Code and the 1997 edition of the Code of Federal Regulations – the editions in effect at that time.

In the event that a commercial resource is found, BLM and the Forest Service both review, and either approve or reject, different aspects of any development proposal.

Title 30 U.S.C. § 1005(a) – the provision of the Geothermal Steam Act at issue in this case[5] – states that a lease "shall be for a primary term of ten years," and "[i]f geothermal steam is *produced or utilized in commercial quantities* within this term, such lease shall continue for so long thereafter as geothermal steam is produced or utilized in commercial quantities, but such continuation shall not exceed an additional forty years." *Ibid.* (emphasis added). The italicized phrase – "produced or utilized in commercial quantities" – is a statutory term of art, defined as including "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." *Id.* § 1005(d). Three other paragraphs of

[5] Section 1005 is set forth in full in the Addendum at 4-6.

Section 1005 authorize BLM to grant an extension of leases that are not entitled to continuation under paragraph (a). *Id.* § 1005(c), (e) & (g).[6]

The statute and regulations authorized BLM to approve operation of multiple leases under a "unit plan" for exploration and development of a common pool or field of geothermal resources, whenever BLM determined this to be in the public interest.[7] Each lease committed to a geothermal unit benefits from drilling and commercial production or efforts toward production on any other lease committed to the same unit, when BLM decides on continuations or extensions of lease terms. *See* 30 U.S.C. § 1005(c), (g). Thus, a Model Unit Agreement set forth in BLM's regulations provides that "drilling or producing operations . . . upon any tract of Unitized Lands will be accepted and deemed to be

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[6] A lease extension granted under 30 U.S.C. § 1005(g) was the subject of this Court's decision in *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768 (9th Cir. 2006) ("*Pit River I*"), discussed below at 14-15 and 54-56.

[7] 30 U.S.C. § 1017; 43 C.F.R. § 3280.0-2. As explained in *Geo-Energy Partners—1983 Ltd. v. Salazar*, 613 F.3d 946 (9th. Cir. 2010), "[m]ultiple geothermal leases … in the same geographic area are typically combined into a single unit through a unit agreement [which] provides for several tracts of land to be explored and developed as if all the tracts were one parcel." *Id.* at 949. The purpose of unitization is to "provide for more efficient development and production of geothermal resources." *Ibid.*

performed upon and for the benefit of each and every tract of Unitized Land," and "development and/or operation of lands subject to this Agreement . . . shall be deemed full performance of any obligations for development and operation with respect to each and every separately owned tract subject to this Agreement, regardless of whether there is any development of any particular tract of the Unit Area." 43 C.F.R. § 3286.1 (Model Unit Agreement) ¶¶ 17.3, 17.4 (Addendum at 88).

B. The Challenged Lease Continuation and Related Events

In the early 1970s, the USGS designated the Glass Mountain KGRA, encompassing parts of the Klamath and Modoc National Forests, as an area with demonstrated geothermal resources. First Amend. Compl. (2 ER 302) ¶ 31. Pursuant to NEPA, the U. S. Department of the Interior ("Interior") published a four-volume environmental impact statement in 1973 on nationwide implementation of the Geothermal Steam Act, including exploration and development in the Glass Mountain KGRA. 3 ER 820-27 (excerpts).

In 1981, following publication of an environmental assessment pursuant to NEPA (3 ER 784-814), the Forest Service consented to leasing on National Forest lands in the Glass Mountain KGRA. BLM

then issued the geothermal leases at issue in this case, beginning in 1982. Consistent with the statutory language quoted above, each lease stated that it "shall be for a primary term of ten (10) years . . . and so long thereafter as geothermal steam is produced or utilized in commercial quantities but shall in no event continue for more than forty (40) years after the end of the primary term." 1 ER 185 (lease section 2).

In May 1982, BLM approved and entered into the Glass Mountain Unit Agreement, encompassing all or part of sixteen leases[8] and two un-leased tracts of land. 1 ER 155-83. Consistent with the above-quoted terms of the Model Unit Agreement, the Glass Mountain Unit Agreement states that (a) drilling operations on any land in the unit "will be accepted and deemed to be performed upon and for the benefit of each and every tract of Unitized Land" (*id.*, ¶ 17.4), and (b) that development of any land subject to the agreement "shall be deemed full performance of any obligations" for development of each and every tract

[8] Lease Nos. 1032, 1034, 1036, 1232, 2150, 2160, 6111, 6112, 2500, 12366, 12367, 12368, 12369, 12370, 12371, and 12372. Maps showing the location of the Glass Mountain KGRA, the Glass Mountain Unit, and the leases appear at SER 189-90.

of land subject to the agreement, "regardless of whether there is any development of any particular tract" of land (*id.*, ¶ 17.3). Additional leases were added to the Glass Mountain Unit throughout the 1980s, ultimately bringing the total number to twenty seven.[9]

In 1984, USDA and Interior published a joint environmental assessment pursuant to NEPA for preliminary exploratory activities, including the drilling of exploratory wells. 3 ER 551-614. Five years later, on February 13, 1989, BLM determined that a well on one of the Glass Mountain Unit leases – well 31-17 on Lease 12372 – was capable of producing steam in commercial quantities ("the paying-well determination"). 2 ER 519. In July 1991, BLM issued a decision (a) recognizing that Lease 12372 was entitled to continuation for up to forty years, based on the paying-well determination, and (b) granting five-year extensions for twenty-two additional leases[10] committed to the

[9] Lease Nos. 1032, 1033, 1034, 1036, 1218, 1221, 1223, 1224, 1230, 1233, 6111, 6112, 2500, 12366, 12367, 12368, 12369, 12370, 12371, 12372, 13110, 13802, 13803, 13804, 13958, 21929, and 21933.

[10] Lease Nos. 1032, 1033, 1034, 1036, 1218, 1221, 1223, 1224, 1230, 1232, 2500, 12366, 12367, 12368, 12369, 12370, 12371, 13110, 13802, 13803, 13804, and 13958.

Glass Mountain Unit which were near the end of their primary term. 2 ER 498-99.[11]

In the early 1990s, the unit operator again requested approval to drill temperature gradient wells and exploratory wells, as part of an exploration plan for the Glass Mountain Unit. After publishing another environmental assessment pursuant to NEPA, BLM and the Forest Service approved the exploration plan. SER 171-88.

In 1992, within a year after granting the first five-year *extensions*, BLM undertook consideration of whether all leases committed to the Glass Mountain Unit should have received *continuations* instead, based on the paying-well determination for Lease 12372. 2 ER 481-84. Ultimately, on May 18, 1998, BLM concluded that continuations should have been recognized for them all. Accordingly, BLM announced:

> Based upon the paying well determination and the subsequent granting of an additional term to lease CACA 12372 under 43 CFR 3203.1.3, all leases committed to the

[11] Five-year extensions were also granted in March 1992 for two additional Telephone Flat leases committed to the Glass Mountain Unit (Lease Nos. 6111 and 6112). *Id.* at 485-86. The last Glass Mountain Unit leases (Nos. 21929 and 21933) were issued in 1988, with ten-year primary terms commencing July 1, 1988, and thus did not require an extension at that time.

> Glass Mountain Unit at that time should also have been granted additional terms as a result of Article 17.4 of the Glass Mountain Unit Agreement, which states:
>
> > "*Drilling and/or producing operations performed hereunder upon any tract of Unitized Lands will be accepted and deemed to be performed upon and for the benefit of each and every tract of Unitized Land.*"

2 ER 453 (italics in original). BLM therefore announced that in addition to Lease 12372, the other twenty-six leases committed to the Glass Mountain Unit were "granted an additional term,[12] effective February 13, 1989" (the date of the paying well determination), which would continue for up to forty years after the end of the primary term, so long as the unit operator submitted an annual report describing diligent efforts. 2 ER 453-54. To complete the substitution of lease continuations, BLM announced the same day that the extensions previously granted for the leases were rescinded. SER 146-47.

In 1997, a year before continuation of the leases, the Glass Mountain Unit operator submitted a plan of operations for utilization of

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[12] The BLM decision referred to the continuation as "an additional term" because that was the title of the regulation on lease continuations at the time.

the underlying geothermal resources. SER 148-70. The plan proposed construction of a power plant and related facilities called the "Telephone Flat Geothermal Development Project." Pursuant to NEPA, BLM and the Forest Service published a joint environmental impact statement on the proposal in 1999 (SER 76-145 (excerpts)), and an update in 2002 (SER 26-75), and approved the project later that year (SER 7-25).[13] The events were then largely overtaken by litigation in *Pit River Tribe v. U.S. Forest Service,* 469 F.3d 768 (9th Cir. 2006) ("*Pit River I*"), and the complaints initiating this case.

C. Adjudication of Similar Claims in *Pit River I*

In 2002, some of the plaintiffs here filed a separate complaint in *Pit River I* challenging two geothermal leases (21924 and 21926) in a different area of the Glass Mountain KGRA called Fourmile Hill. The complaint primarily challenged a BLM decision in 1998 granting five-year lease extensions pursuant to 30 U.S.C. § 1005(g). The district

[13] As explained in the record of decision, the agencies initially denied approval in May 2000, but granted approval upon reconsideration in November 2002, due to significantly increased demand for electricity and adoption of the National Energy Policy in May 2001, with increased emphasis on production of renewable energy resources, including geothermal energy on federal lands (SER 10-13).

court granted summary judgment for the federal agencies in 2004. This Court reversed in 2006 and remanded with instructions to enter summary judgment for the plaintiffs.[14]

This Court ruled that BLM violated NEPA, the NHPA, and fiduciary obligations to the Pit River Tribe by failing to prepare an environmental impact statement on whether to grant the lease extensions, and by failing to engage in adequate analysis and consultation on historic and culturally significant sites. 469 F.3d at 784, 787-88. A previous environmental impact statement and environmental assessments prepared for other purposes could not support the lease extension, the Court concluded, because the agencies "never took the requisite 'hard look' at whether the Medicine Lake Highlands should be developed for energy at all." *Id.* at 783-84.[15]

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[14] The implications of *Pit River I* for this case are discussed below at 54-56.

[15] The complaint also challenged decisions by BLM and the Forest Service in 2000 approving the Fourmile Hill Geothermal Development Project and a decision by BLM in 2002 recognizing continuations for the two leases. The Court did not address those claims, however, because it concluded that the invalidity of the 1998 lease extensions required that the subsequent decisions be "undone" and "set aside." *Id.* at 788.

Following that first appellate decision, proceedings on the appropriate remedy continued for four years. In compliance with a remedy order approved by this Court in 2010,[16] the agencies withdrew and vacated all the administrative decisions challenged in *Pit River I* for further environmental analysis and consultation. No decision has been made on whether to replace or reinstate the withdrawn administrative decisions, due in significant part to the pendency of this case in district court and now on appeal.

D. Withdrawal of the Telephone Flat Project Approvals Following *Pit River I*

Although *Pit River I* only addressed the leases and project approval for Fourmile Hill, the agencies also voluntarily withdrew their decisions approving the development project for Telephone Flat, for further environmental analysis and tribal consultation consistent with the principles announced in *Pit River I*. SER 2-6. Interior's withdrawal notice states:

> A [development proposal] for the Telephone Flat development project shall not be approved unless and until

[16] *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069 (9th Cir. 2010).

> further environmental review pursuant to the National Environmental Policy Act, and further identification, analysis and consultation pursuant to the National Historic Preservation Act, consistent with requirements clarified in Pit River Tribe v. Forest Service, 469 F.3d 768 (9th Cir. 2006) is completed. In particular, the project shall not be approved unless the BLM determines, after preparation of an Environmental Impact Statement, that the areas covered by the leases should be developed for geothermal energy.

SER 3. The Forest Service's withdrawal decision states the same in nearly identical terms. SER 2.

Thus, there will be no development on the leases in issue here unless and until the agencies determine, after preparation of a full environmental impact statement, that the area should be developed for geothermal energy. For this reason, plaintiffs' assertion that "[t]his case may well decide the fate of the Medicine Lake Highlands" (AOB at 2) is incorrect. Instead, BLM and the Forest Service, exercising authority conferred by Congress, will decide whether geothermal resources in the Highlands are developed, after thoroughly analyzing the environmental effects – positive as well as negative – of a specific development proposal.

E. The District Court's Decision

In an extensive bench ruling and a nineteen-page written order,[17] the district court granted summary judgment for defendants on the FOIA claim and judgment on the pleadings for defendants on plaintiffs' claims under the Geothermal Steam Act, NEPA, the NHPA, and fiduciary duty.

On the Geothermal Steam Act claim, the court found plaintiffs cannot show, as they must, that their grievance arguably falls within the zone of interests protected by the lease-continuation provision, 30 U.S.C. § 1005(a), because it "do[es] not permit, much less require, consideration of environmental concerns or competing land uses when BLM acts on continuation of an existing lease." 1 ER 33. The court explained:

> Both [the statute and its implementing regulation] state in simple terms that a lease "shall continue" if geothermal steam is produced or utilized in commercial quantities. Neither the statute nor the regulation leaves any discretion

[17] Plaintiffs fault the district court for entering a proposed order "without alteration" (AOB at 28-29), but they fail to acknowledge that before inviting preparation of the proposed order, the court made the same rulings in an extensive bench ruling, running sixteen pages of the hearing transcript (1 ER 72-88).

> for BLM to consider plaintiffs' interests when acting on lease continuation.

Ibid.

The court rejected plaintiffs' reliance on other provisions of the Geothermal Steam Act which protect environmental interests, observing that the Supreme Court has repeatedly held that the zone-of-interests test focuses on the specific statutory provision at issue in the suit. 1 ER 31 (citing cases). After reviewing all the statutory provisions cited by plaintiffs, the court found that "[n]one of [them] allow BLM, contrary to the express mandate of Section 1005, to deny lease continuation in order to protect plaintiffs' environmental concerns." 1 ER 32.

Although BLM considers environmental impacts when making "*discretionary*" decisions under the Geothermal Steam Act on whether to issue "*new*" geothermal leases or to approve development projects, "decisions of that sort are not challenged here." *Ibid.* (emphasis in original). "[P]laintiffs' burden is to show that their anti-development interests are within the zone of interests protected by Section 1005(a)," the court explained, and "[p]laintiffs have not made that showing." *Ibid.*

The court further held that analysis and consultation under NEPA, the NHPA, and fiduciary duty were not required, because lease continuation is not a discretionary agency action. 1 ER 34-38, 83. The court rejected, on two separate grounds, plaintiffs' argument that NEPA would apply if the statutory criteria for lease continuation were not met. First, the court found that is an argument that the Geothermal Steam Act was violated -- which plaintiffs could only assert if they first satisfied the zone-of-interests test. 1 ER 16. And second, the court explained that even if the statutory criteria for lease continuation were not met, "under 30 U.S.C. § 1005(a), lease continuation is never discretionary; it is always either mandatory or unavailable, depending on non-environmental criteria." 1 ER 16, 82.[18]

Finally, the court ruled that plaintiffs "waived" and "abandoned" all claims challenging any administrative acts or omissions except the May 1998 lease continuation, specifically including paragraphs 107(a)-

[18] Contrary to plaintiffs' assertion, the district court did not rule "that the GSA mandates 40-year additional terms for the leases in question" (AOB 46 (emphasis in original)). That would be a decision on the merits, which the court ruled it could not reach.

(c)&(e) of their complaint in the consolidated case.[19] In addition to plaintiffs' formal stipulation that they only challenged the lease continuation (2 ER 285-88), the court noted that their counsel conceded during the hearing that the statute of limitations precludes relief for all other allegations of administrative error (1 ER 9 n.2), and that plaintiffs made no substantive arguments whatsoever on NEPA, the NHPA or fiduciary duty in their written opposition to the agencies' motion. *Id.* at 14, 81. Plaintiffs do not challenge the waiver rulings in their opening brief.

SUMMARY OF ARGUMENT

Plaintiffs cannot assert a claim that continuation of a lease violated the Geothermal Steam Act, because their environmental interests are not within the zone of interests protected by 30 U.S.C. § 1005(a). As the district court correctly found, section 1005(a) does not permit BLM to deny a lease continuation based on environmental concerns or competing land uses. The statute states simply and directly

[19] 1 ER 9 n.2, 77. The referenced paragraphs of the complaint allege, *inter alia*, that BLM should have contracted the Glass Mountain Unit, or terminated the leases, or excluded leases from the unit for lack of diligence or bona fide efforts by the operator. 2 ER 316-17.

that a lease "shall continue" if geothermal steam is produced or utilized in commercial quantities (defined as including a well "capable of" commercial production and diligent efforts toward utilization of the resource). Those are the only criteria that the statute allows BLM to consider, and they have nothing to do with plaintiffs' interests.

The core purpose of the statute is to encourage private investment in geothermal energy development. Without some assurance that third-party interests will not prevent continuation of existing leases, leaseholders would be discouraged from investing the many millions of dollars required for exploration. Congress therefore denied BLM discretion to withhold lease continuation based on environmental interests or competing uses.

The zone-of-interests test cannot be satisfied by provisions of the Geothermal Steam Act that do not apply to lease continuations. The Supreme Court has repeatedly held that "the plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint," and has emphatically rejected the argument that the general purposes of a statute can suffice. *Bennett v.*

Spear, 520 U.S. 154, 175 (1997) (punctuation omitted); *see also* cases cited below at 37-38. Plaintiffs therefore must show that their environmental interests are arguably within the zone of interests protected by 30 U.S.C. § 1005(a). Given the mandatory terms of section 1005(a), stating that a lease "shall continue" if geothermal steam is produced in commercial quantities, plaintiffs cannot satisfy their burden.

Plaintiffs argue that the statutory criteria for lease continuation were not met. Even if it had merit, that argument could not show plaintiffs' interests are within the zone of interests protected by section 1005(a). As the district court found, lease continuation is not discretionary even when the statutory criteria for lease continuation are not met: under section 1005(a), BLM must recognize a continuation if non-environmental criteria are satisfied, and it must deny a continuation if the same criteria are not satisfied. Thus, environmental interests and competing land uses can never be a proper basis for decision. Plaintiffs therefore cannot assert a cause of action under the Geothermal Steam Act.

For essentially the same reasons, NEPA, the NHPA, and the United States' fiduciary duty to the Pit River Tribe are inapplicable. It is settled law – and plaintiffs concede – that analysis and consultation are not required when an agency lacks statutory discretion. Under the Geothermal Steam Act, BLM had no discretion to deny lease continuation based on environmental, historical, or tribal concerns. Therefore, analysis and consultation were not required.

For the foregoing reasons, the district court properly granted judgment on the pleadings in favor of defendants. But even if that were not so, plaintiffs' request for summary judgment must be rejected. Apart from the abandoned FOIA claim, the only motion litigated in district court was the agencies' motion for judgment on the pleadings, which necessarily assumed the truth of all allegations of the complaint. Plaintiffs did not move for summary judgment on any claim in their consolidated complaint. Indeed, they argued in district court that the record was not sufficient for summary judgment proceedings. For all these reasons, the issues of diligence and commercial capability were not litigated below. Summary judgment cannot properly be granted on appeal in these circumstances.

ARGUMENT

I. STANDARD OF REVIEW

A judgment on the pleadings is subject to de novo review. *Goldstein v. City of Long Beach*, 715 F.3d 750, 753 (9th Cir. 2013).

Judgment on the pleadings "is properly granted when, accepting all factual allegations in the complaint as true, there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law." *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (alterations omitted).

II. THE ZONE-OF-INTERESTS TEST PRECLUDES PLAINTIFFS FROM ASSERTING A CLAIM UNDER THE GEOTHERMAL STEAM ACT.

The Geothermal Steam Act does not provide for a private right of action. Therefore, to assert a claim under the Act, plaintiffs must invoke the provisions of the Administrative Procedure Act allowing suit by an "aggrieved party" within the meaning of the substantive statute upon which the claim is based. *Nat'l Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (quoting 5 U.S.C. § 702). For decades, the Supreme Court has limited such claims by requiring that "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or

constitutional guarantee invoked in the suit." *Bennett v. Spear,* 520 U.S. 154, 162 (1997). *See also, e.g., Ass'n of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 153 (1970). Where, as here, the plaintiff is not the subject of the contested regulatory action, the zone-of-interests test "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Sec. Indus. Ass'n,* 479 U.S. 388, 399 (1987).

Until recently, the Supreme Court referred to these principles as the doctrine of prudential standing. Just this year, however, the Court explained that the doctrine is not merely prudential but requires a court to determine "whether [a] particular class of persons has a right to sue under [a particular] substantive statute." *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* No. 12-873, Slip Op. at 8 (March 25, 2014) (internal punctuation omitted). Rejection of the "standing" label notwithstanding, the Court reaffirmed that the zone-of-interests test still applies (*id.* at 9), and also reaffirmed that it imposes a "limitation

on the cause of action for judicial review conferred by the Administrative Procedure Act" (*id.* at 10).

As explained below, the zone-of-interests test precludes plaintiffs' claim that BLM violated the Geothermal Steam Act when recognizing continuation of the leases here.

A. Plaintiffs' Interests Are Contrary to the Core Purpose of the Geothermal Steam Act and Are Excluded from Consideration by the Mandatory Terms of the Lease-Continuation Provision.

In district court and on appeal, plaintiffs have asserted that they share an interest in preventing both "exploration and development of geothermal leases," because they consider it inconsistent with their environmental, recreational, cultural, and spiritual uses of the land. First Amend. Compl. ¶¶ 8-12 (2 ER 286-99). That interest is contrary to the core purpose of the Geothermal Steam Act -- "to promote the development of geothermal leases on federal lands." *Geo-Energy Partners*, 613 F.3d at 949. As explained in the House Report at the time of original enactment:

> [G]eothermal power stands out as a potentially invaluable untapped natural resource. It becomes particularly attractive in this age of growing consciousness of environmental hazards and increasing awareness of the necessity to develop new resources to help meet the nation's

> future energy requirements. The Nation's geothermal resources promise to be a relatively pollution-free source of energy, and their *development should be encouraged*.
>
> * * *
>
> In the Committee's judgment, [the Act] will provide the statutory framework needed to encourage private enterprise to invest in and develop this new resource.

H.R. Rep. No. 91-1544 at 4-5 (1970) (reprinted at 1970 U.S.C.C.A.N. 5113, 5115-16) (emphasis added). The Senate Report also confirms a specific Congressional intent to promote development by encouraging private investment:

> [T]he committee is constrained to emphasize that the purpose and thrust of this legislation is to *encourage* the development of the Nation's geothermal power resources – to establish a framework that will make this risk-laden, relatively untried industry an attractive investment in the public interest.

S. Rep. No. 91-1160 at 9 (1970) (emphasis in original).

Consistent with Congress's overriding purpose, the Geothermal Steam Act encourages development by offering an automatic lease continuation as a reward for substantial progress during the primary ten-year term. When the leases in this case were continued, the controlling statutory provision read as follows:

> If geothermal steam is produced or utilized in commercial quantities within [the primary] term, *such lease shall*

> *continue* for so long thereafter as geothermal steam is produced or utilized in commercial quantities, but such continuation shall not exceed an additional forty years.

30 U.S.C. § 1005(a) (emphasis added). The phrase "produced or utilized in commercial quantities" is a statutory term of art, defined in subsection 1005(d):

> Except as otherwise provided for in this section, for purposes of this section the term "produced or utilized in commercial quantities" . . . shall . . . include 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) (emphasis added). Thus, section 1005 mandated continuation when specified criteria were satisfied: (1) if there was commercial production of steam, or (2) if there was a well capable of commercial production and diligent efforts were being made to utilize the steam.

Where, as here, Congress uses the word "shall," it imposes "discretionless obligations"[20] on the administrative agency; and if the

[20] *Lopez v. Davis,* 531 U.S. 230, 241 (2001); *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) (same); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 35 (1998) ("the mandatory 'shall' ... normally creates an obligation impervious to ... discretion").

criteria specified in the statute are satisfied, the agency cannot deny the mandated action for other reasons.[21] Therefore, BLM had no discretion to deny a lease continuation based on plaintiffs' environmental interests. If there was a well capable of commercial production and diligent efforts were being made to utilize the resource, section 1005(a) mandated continuation – irrespective of environmental concerns. If the same criteria were not satisfied, section 1005(a) did not allow continuation – again, irrespective of environmental concerns. Thus, the decision is never discretionary, and environmental interests can never be a proper basis for decision.

Congress denied such discretion. BLM can and does consider competing uses and environmental protection before issuing new geothermal leases, before authorizing exploration, drilling, or construction of power plants, and at various decision points in between.[22] But without some assurance that third-party interests will

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[21] *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007) (discussed below at 35).

[22] As discussed above at 9-16, the agencies published an environmental assessment pursuant to NEPA before issuing leases (3 ER 784-814), and another environmental assessment before approving

not prevent continuation of existing leases, operators would be discouraged from investing the many millions of dollars required for exploration and development, and Congress's intent "to encourage private enterprise to invest in and develop this new resource"[23] would be impeded.

Plaintiffs have never claimed any interest that would be served by drilling of a well capable of commercial production or diligent efforts to utilize geothermal steam – the sole criteria for lease continuation under section 1005(a),(d). They only claim environmental interests which would be harmed by satisfaction of the statutory requirements. Indeed, the unmistakable goal of this lawsuit is to prevent the very drilling and utilization of geothermal steam that Congress enacted section 1005 to encourage. For all these reasons, plaintiffs' interests are outside the

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exploration activities (SER 171-88); and they will prepare a full environmental impact statement, consistent with this Court's decision in *Pit River I,* before deciding whether to approve any development of the Telephone Flat leases (SER 2-6).

[23] H.R. Rep. No. 91-1544 at 5 (quoted more fully above at 27).

zone of interests protected by section 1005(a), and they cannot assert a claim under the Geothermal Steam Act.[24]

B. Section 1005 Allows Consideration of Competing Needs or Uses Only at the End of a Lease Continuation -- Not When BLM Decides Whether to Recognize One.

Plaintiffs rely heavily on two inapplicable paragraphs of section 1005 that allow BLM to consider whether lands are "needed for other purposes" when deciding whether to grant a discretionary lease *extension*. AOB at 37 (citing 30 U.S.C. §§ 1005(b), (c)). Upon examination, those paragraphs confirm that BLM cannot properly consider competing needs or uses when deciding whether to recognize a lease *continuation*.

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[24] Should the merits ever be presented, plaintiffs' claims are weak. On the issue of commercial capability, the Glass Mountain Unit Agreement and the Model Unit Agreement in BLM's duly promulgated regulations (quoted above at 8-10) required BLM to credit all unitized leases with the well found capable of commercial production in 1989. That finding cannot be challenged, as plaintiffs have conceded that the statute of limitations bars any claim challenging administrative acts before 1998. On diligent efforts to utilize the resource, the lessee took the ultimate step of submitting a proposal for construction of a power plant in 1997 – the year before the lease continuations challenged here.

Title 30 U.S.C. § 1005(b) (set forth in full in the Addendum at 4) authorizes BLM to extend leases upon the expiration of a continuation. It provides that a lessee shall have a preferential right to further renewal "[i]f, at the end of such forty years," there is commercial production and "the lands are not needed for other purposes." *Ibid.* The first words – "[i]f, at the end of such forty years" – necessarily refer to a lease continuation authorized by the immediately preceding paragraph (a). And as quoted above, paragraph (a) contains no similar reference to "other purposes" but instead states that a lease "shall continue" if other specified criteria are satisfied. Thus, Congress directed BLM to consider competing uses "at the end of" a lease continuation, but not when deciding whether to recognize one.

Title 30 U.S.C. § 1005(c) (Addendum at 4) governs leases that are not entitled to continuation under paragraph (a), for lack of commercial production during the primary term. The first sentence of paragraph (c) contains no reference to "other purposes." It provides that if drilling operations were commenced during the primary term and are being diligently prosecuted, the lease "shall be extended" for five years and, if geothermal steam is produced in that time, for up to thirty-five years.

The second sentence of paragraph (c) directs BLM to consider whether the land is needed for other purposes only "at the end of such extended term."

Title 30 U.S.C. § 1005(g) (Addendum at 5) follows the same pattern. Paragraph (g)(1) provides that a lease without commercial production or drilling may be extended for up to ten years.[25] Paragraph (g)(2) provides that the lease "shall continue" for up to fifty years if commercial production is achieved during the extended term. Paragraph (g)(2) does not contain any reference to other purposes for the leased land. The only reference to other purposes is in paragraph (g)(3), which states that, "at the end of [the] 50-year term referred to in paragraph (2)," another lease term may be granted if the lands are not needed for other purposes. Thus, just as in paragraphs (a) and (b), Congress expressly directed BLM in paragraph (g) to consider other potential uses of leased lands "at the end of" a lease continuation but not when deciding whether to recognize one.

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[25] This is the provision addressed in *Pit River I*, which Congress amended in 2005 to eliminate BLM discretion, as discussed below at 54-56.

As plaintiffs themselves assert, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." AOB at 40 (quoting *Gomez-Perez v. Potter*, 553 U.S. 474, 496 (2008)). Accordingly, paragraphs (b), (c) and (g) demonstrate that Congress expressly authorized consideration of competing uses when such consideration is allowed; that Congress did not authorize consideration of competing uses when stating that a lease "shall continue" or "shall be extended" based on other specified criteria; and that Congress only authorized BLM to consider competing uses "at the end of" a lease continuation and *not* when deciding whether to recognize one.

C. Statutory Fact Finding Does Not Make BLM's Decision Discretionary.

1. Noting that 30 U.S.C. § 1005(d) calls for BLM "to make a factual determination" on diligence (AOB at 47), plaintiffs argue that "[t]hat determination" makes the decision discretionary. *Ibid.* The argument is entirely without merit. Every statutory mandate requires an agency to make a factual determination in order to determine whether the mandate applies. That is not discretion but its opposite, as

the Supreme Court made clear in *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). Applying a provision of the Clean Water Act stating that EPA "shall approve" an application to transfer permitting powers to states "unless [EPA] determines" that a state lacks authority to perform nine functions, the Court held that EPA "does not have the discretion" to deny an application based on considerations not specified in the statute. 551 U.S. at 661. Thus, when a statute provides that an agency "shall" take an action if (or unless) the agency makes a specified factual determination, the statute eliminates discretion to withhold the action based on other considerations.[26]

That is the effect of section 1005 here: by stating that a lease "shall continue" "[i]f geothermal steam is produced in commercial

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[26] *See also Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 766 (2004) (agency had no discretion under a statute stating that it "*shall* register … a motor carrier *if [it] finds*" the carrier is able to comply with safety and financial requirements (second emphasis added)). On discretion and statutory fact finding as opposite categories, *see generally Chi Sheng Liu v. Holton*, 297 F.2d 740, 741 (9th Cir. 1961) ("the question of persecution depends on the Attorney General's discretion rather than an objective finding of fact"); *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 858 (9th Cir. 2003) ("the evaluation involves no discretion: the BIA member merely applies the law to the facts").

quantities," and clarifying that "produced in commercial quantities" "include[s] 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," the statute allows BLM no discretion to deny continuation based on other considerations, including plaintiffs' environmental concerns.

2. Plaintiffs also assert that lease continuation is discretionary because "section 1005(a) states that [a continuation] 'shall' be granted, but only 'so long as' the lessee makes 'diligent efforts' in utilizing geothermal resources." AOB at 33. That is a misquotation of the statute. What section 1005(a) actually says is "such lease shall continue for so long . . . as geothermal steam is produced or utilized in commercial quantities, but such continuation shall not exceed an additional forty years." Thus, accurately quoted, the statutory language is factual, not discretionary; and it addresses how long a continuation will last, not whether one shall be recognized. Plaintiffs have expressly

waived any claim that BLM should have terminated a continued lease term.[27]

D. The Lease-Continuation Provision Is Controlling.

To avoid the mandatory language and limited focus of 30 U.S.C. § 1005(a), plaintiffs are forced to argue that "the statute, not a particular statutory section, determines the applicable zone of interests." AOB at 42. That argument is foreclosed by at least four Supreme Court decisions instructing that "the plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected *by the statutory provision whose violation forms the legal basis for his complaint*."[28] The entire statute may be considered -- but only to

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[27] Relying on the stipulation and order filed March 8, 2013 (1 ER 285-88) and concessions made by plaintiffs' counsel at the hearing, the district court ruled (1 ER 9 n.2, 77) that plaintiffs "waived" and "abandoned" all claims challenging any administrative act or omission except the May 1998 lease continuation – specifically including paragraphs 107(a)-(c)&(e) of the complaint. The referenced paragraphs assert, *inter alia*, that BLM should have terminated leases for lack of diligence or bona fide efforts. 2 ER 316-17. Plaintiffs neither acknowledge nor challenge the waiver ruling in their opening brief.

[28] *Nat'l Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 494 (1998) (emphasis added, internal quotation marks omitted); *Bennett v. Spear*, 520 U.S. 154, 176 (1997); *Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517,

determine whether the provision claimed to have been violated protects plaintiffs' interests.

The Court could not have been more emphatic about this specific focus than it was in the unanimous opinion in *Bennett v. Spear*, 520 U.S. 154 (1997). Reversing the lower court's decision precisely because it focused on "the overarching purpose" of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, the Court explained:

> Whether a plaintiff's interest is "arguably . . . protected . . . by the statute" within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question . . . , but by reference to the particular provision of law upon which the plaintiff relies. It is difficult to understand how [the court of appeals] could have failed to see this from our cases. . . . As we said with

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523-24 (1991); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990). *See also Lexmark Int'l, Inc.*, Slip Op. at 9 ("the question … is whether [the plaintiff] falls within the class of plaintiffs whom Congress has authorized to sue under § 1125(a)"; the court must "determine the meaning of the congressionally enacted provision creating a cause of action").

Plaintiffs resort to an incomplete quotation of *Nat'l Credit Union Admin.* as focusing on "the zone of interests to be protected or regulated by the statute." AOB at 42 (emphasis added by plaintiffs). Just two sentences later, the same opinion states the test in a manner that refutes plaintiffs' position: "we first discern the interests 'arguably . . . to be protected' *by the statutory provision at issue*; we then inquire whether the plaintiff's interests affected by the agency action in question are among them." 522 U.S. at 492 (emphasis added).

> the utmost clarity in *National Wildlife Federation,* "the plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected *by the statutory provision whose violation forms the legal basis for his complaint*."

520 U.S. at 175-76 (emphasis in original).

Without acknowledging this rejection of their position, plaintiffs invite this Court to do precisely what the Supreme Court rejected in *Bennett.* Their argument is therefore foreclosed.

Under *Bennett* and the other decisions cited above, plaintiffs must show their interests are protected by the lease-continuation provision of the Geothermal Steam Act, 30 U.S.C. § 1005(a). That showing cannot be made, when section 1005(a) dictates that a lease "shall continue" if specific, non-environmental criteria are satisfied.

E. The Provisions of the Geothermal Steam Act Argued by Plaintiffs Cannot Save Their Claim.

1. It is true, as plaintiffs assert, that Congress directed BLM to administer the Geothermal Steam Act "under principles of multiple use," which "aims to strike a balance among the many competing uses to which land can be put[.]" AOB at 36 (citing 30 U.S.C. § 1016). But as explained above at 31-34, Congress specifically dictated how BLM must balance competing uses when deciding on lease continuations. In

summary, for lease extensions and continuations, 30 U.S.C. § 1005 authorizes BLM to consider competing uses only in limited circumstances; section 1005 does *not* authorize consideration of competing uses when it states that a lease "shall continue" or "shall be extended" based on other criteria; and it only authorizes BLM to consider competing uses "at the end of" a lease continuation, not when BLM decides whether to recognize one. Those specific terms of section 1005 control the very general direction of section 1016. *See Reynolds v. United* States, __ U.S. __, 132 S. Ct. 975, 981 (2012); *Bloate v. United States,* 559 U.S. 196, 207 (2010).

2. It is also true that the Geothermal Steam Act "contemplates expenditures on environmental studies *as part of the exploration and development process*." AOB at 37 (citing 30 U.S.C. § 1005(j)(2)(A), emphasis added, punctuation omitted). Of course the statute does so: environmental studies are a necessary step toward exploration and development, because BLM conducts full NEPA compliance before approving exploration or development proposals. Section 1005(j) therefore treats expenditures on environmental studies as efforts toward utilization.

In any event, the reference to expenditures on environmental studies cited by plaintiffs has nothing to do with lease continuations. By its terms, section 1005(j) specifies the actions required "[t]o meet the significant expenditure requirement referred to in subsection (g)(1)(B)." 30 U.S.C. § 1005(j)(1). And as explained above at 33, subsection (g)(1)(B) authorizes extensions for leases that are *not* eligible for continuation. Unlike subsections (g) and (j), section 1005(a) mandates lease continuations *without* referring to expenditures or environmental studies of any kind. Thus, the language quoted by plaintiffs is inapplicable here.

3. Plaintiffs also rely (AOB at 37) on 30 U.S.C. § 1023, which directs the Secretary to adopt "such rules and regulations as he may deem appropriate to carry out the provisions [of the Geothermal Steam Act]," and provides that such regulations "may include" environmental concerns.[29] The Secretary has issued such regulations, and plaintiffs do not contend otherwise. Consistent with the mandatory language of 30

[29] The assertion that section 1023 "require[d]" adoption of regulations protecting the environment (AOB at 37) is contradicted by the permissive language of the statute, quoted in text above.

U.S.C. § 1005(a), those regulations contain no suggestion that BLM will deny continuation of an existing lease based on environmental concerns.

4. Plaintiffs also rely on 30 U.S.C. §§ 1014, 1026, and 1027 (AOB at 37), which say nothing about lease continuations but provide that geothermal leases shall not be "issued" on certain classes of protected land. Plaintiffs have expressly waived any claim that BLM should not have issued the leases.[30] Equally important, the lands in issue here are not in any of the protected classes – and plaintiffs have never contended that they are.[31] Because the lands are not protected, the provisions of

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[30] During the hearing on the agencies' motion, plaintiffs' counsel conceded: "we agreed . . . that the Statute of Limitations had run on claims prior to May 18, 1998." 1 ER 47. *See also id.* at 285-88 (stipulation and order that plaintiffs challenge only the 1998 lease continuation).

[31] Plaintiffs invite confusion by stating that leasing is banned on "tribally or individually owned Indian trust or restricted lands" (AOB at 37 (citing 30 U.S.C. § 1014)), without acknowledging that the Telephone Flat leases are not on such land. The Pit River Tribe does not own the National Forest System lands in the Medicine Lake Highlands; it only seeks to control them.

The other protected categories are equally inapplicable: the leases here are not on a "National Park[], Monument[], Seashore[], Recreation Area[], or Wildlife Refuge[]"; nor on "lands managed or otherwise recognized for their wilderness characteristics"; nor on or affecting any listed "significant thermal features." AOB at 37 (citing 30 U.S.C. §§ 1014, 1026, 1027).

the Geothermal Steam Act cited by plaintiffs only show that Congress did not consider them to have such overriding environmental value as to warrant compromising the core statutory policy to "*encourage* the development of the Nation's geothermal power resources." S. Rep. No. 91-1160 at 9 (emphasis in original).

5. Finally, plaintiffs cite 30 U.S.C. § 1005(b)&(c) for the proposition that "the GSA creates strict deadlines for lease development, ensuring that leased lands are quickly returned to the public for 'other purposes' if they are unproductive." AOB at 37. The truth is those paragraphs do precisely the opposite. As explained above at 31-34, subsection (b) only provides a means for land possibly to be removed from geothermal leasing upon the expiration of a forty-year continuation, and subsection (c) provides a means for *a lease that is not eligible for continuation* nonetheless to be extended for up to forty years. Both paragraphs provide for consideration of "other purposes" only "after" those lengthy periods. Manifestly, paragraphs (b) and (c) were intended to preserve existing leases for decades, until every prospect of geothermal development is exhausted.

6. In addition to being inapplicable here, the most fundamental reason that the statutory provisions cited by plaintiffs cannot save their claim is this: none of them authorize BLM, contrary to the express mandate of section 1005(a), to deny lease continuation in order to protect environmental concerns. That is the showing required by *Bennett v. Spear* and the other Supreme Court decisions cited above at 37-38. Therefore, all of plaintiffs' arguments must fail.

F. BLM's Regulations and Actions Offer Plaintiffs No Support.

1. When BLM continued the Telephone Flat leases, the applicable regulation stated, "[i]f geothermal resources are produced or utilized in commercial quantities within the primary term . . . that lease shall continue," and in the absence of production, "the operator shall . . . provide . . . a description of diligent efforts." 43 C.F.R. § 3203.1-3. The word "may" appeared nowhere in the regulation.

Nonetheless, relying on a regulation adopted *after* the decision challenged here, plaintiffs argue that "BLM has explicitly clarified in its regulations that, where there is no actual production, the word 'shall'

really means 'may.'" AOB at 33 (citing 43 C.F.R. § 3207.10 (1998).[32] Of course, BLM has done nothing of the kind. No matter what the regulations say, BLM has no power to change the meaning of unambiguous words in a statute. When Congress uses the word "shall," it imposes "discretionless obligations,"[33] and BLM cannot give itself discretion Congress has denied.

BLM never attempted to do so. Once adopted, the regulation cited by plaintiffs provided as follows:

> If, before the primary or extended term ends, you have a well capable of producing geothermal resources in commercial quantities, BLM may continue your lease for up to forty years beyond the primary term. To continue your lease in an additional term, we must determine that you are diligently trying to begin production.

43 C.F.R. § 3207.10(b) (1998). Notwithstanding the word "may" in the first sentence, the two sentences together do not suggest that lease continuation is discretionary.

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[32] The revised regulations became effective on October 1, 1998 – four months after the challenged lease continuation. *See* Geothermal Resources Leasing and Operation, 63 Fed. Reg. 52356 (Sept. 30, 1998).

[33] *Lopez,* 531 U.S. at 241; *accord Fed. Express Corp.*, 552 U.S. at 400.

The above-quoted language is part of BLM's effort to rewrite the geothermal regulations "in a plain language style." 63 Fed. Reg. at 52356. In common usage, the word "may" means that an action is possible but uncertain,[34] either because it is discretionary or because it is contingent on a fact or event. The regulation uses "may" in the contingent sense: when there is a well capable of commercial production, lease continuation is not discretionary but contingent on diligence. Thus, even if it had been in effect at the time of the challenged BLM decision, the regulation is consistent with the statutory mandate that a lease "shall continue" if commercial capability and diligence are established.[35]

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[34] The primary definition of "may" is "expressing possibility." OXFORD DICTIONARY OF AMERICAN ENGLISH, available at http://www.oxforddictionaries.com/us/definition/american_english/may.

[35] This aspect of the regulations distinguishes *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* __ U.S. __, 132 S. Ct. 2199 (2012), in which the Supreme Court rejected the narrow argument that a federal statute authorizing the Secretary of the Interior to *acquire* property for Indian tribes did not allow suit by a neighboring landowner who objected to the tribe's intended *use* of the property. The Court rejected that argument because the implementing regulations "ma[d]e th[e] statutory concern with land use crystal clear," by "requir[ing] the Secretary to consider, in evaluating any acquisition, both '[t]he purposes for which the land will be used' and the 'potential

2. That BLM has issued Geothermal Resource Operational Orders requiring lessees to "conduct all *operations*" in a manner protecting the environment (AOB at 58 (emphasis added)), and that geothermal leases issued by BLM include provisions for environmental protection (*ibid.),* only shows that plaintiffs' fears are overblown. By issuing such orders and including such terms in leases, BLM does what the statute allows to ensure that *operations* on leased lands respect environmental values. That does not mean, however, that BLM has discretion to deny lease continuation based on environmental interests, contrary to the express mandate of section 1005(a).[36]

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conflicts of land use which may arise.'" *Id.* at 2211. Thus, the zone-of-interests test was satisfied in *Patchak* because the applicable statute and regulation required consideration of the competing interests asserted by the plaintiff. In this case, the applicable statute and regulation do not permit, much less require, consideration of competing land uses when BLM acts on continuation of an existing lease, and BLM has never considered such uses when considering a continuation. *Patchak* is therefore inapposite.

[36] Leasing and operations are addressed in separate chapters of BLM's regulations. For operations, the regulations include 43 C.F.R. § 3262.4 (requiring approval of a plan of operations that includes measures to protect the environment and addressing erosion, water pollution, fish and wildlife, and air and noise pollution); *id.* § 3262.4-1 (requiring approval of a plan of utilization that includes measures to protect the same values); *id.* § 3261.3 (requiring an environmental

3. Plaintiffs observe that, before BLM recognized that Lease 12372 was entitled to continuation, Calpine submitted information regarding a "Subsurface Logging Program," a "Core Analyses Program," "Surface Water Sampling" and "Environmental Activity," and an assessment of nearby spotted owl habitats. AOB at 59. They claim "BLM had no reason to require this type and depth of information if it lacked the discretion to consider and act upon it in deciding whether to continue Calpine's leases" (*ibid.*). But plaintiffs then refute their own argument by noting that the cited studies were "'diligent effort' submissions" (*ibid.*) – meaning the lessee submitted them as evidence "that diligent efforts [were] being made toward the utilization of the geothermal steam," one of the criteria for lease continuation under 30 U.S.C. § 1005(a)&(d). As explained above, BLM needs environmental

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assessment or environmental impact statement before BLM approves any plan of utilization); *id.* § 3261.3 (requiring that all permitted operations protect the environment); *id.* § 3262.6 (requiring compliance with federal and state standards for air, water, noise and other pollution and approval of plans for disposal of effluents, taking into account effects on plants, fish, wildlife, and habitats); *id.* § 3262.7-1 (requiring operations to be performed with due regard for conservation of the environment); *id.* § 3262.1 (requiring operator to prevent pollution and damage to natural resources or the environment).

studies when it later decides whether to approve plans for exploration and development, and therefore considers preparation of such studies as efforts toward utilization of the resource. That does not mean BLM has discretion to deny a continuation based on plaintiffs' environmental interests. Plaintiffs cite no evidence – and the record contains none – that BLM evaluated potential environmental effects as a basis for recognizing or refusing to recognize a lease continuation.

G. BLM Did Not "Reverse Course" When It Recognized that All Leases Committed to the Glass Mountain Unit Were Entitled to Continuation.

Before BLM issued the decision in this case, the agency did not have a uniform approach to lease continuations under 30 U.S.C. § 1005(a). BLM's California Office only recognized continuation if a lease had its own well capable of commercial production. The Nevada Office, by contrast, recognized that BLM's duly promulgated regulations on geothermal unit agreements required that every lease committed to a unit be credited with drilling or operations on any other lease committed to the same unit, and therefore that a continuation must be

recognized for them all.[37] Before recognizing the continuations challenged here, the California Office (1) acknowledged its own prior position, (2) carefully considered the Nevada Office's contrary interpretation of the regulations, and (3) in a five-page, single-spaced explanatory memorandum, concluded that the Nevada Office's position was correct. 2 ER 456-61.

Thus, BLM could not "reverse course," as plaintiffs claim (AOB at 48, 50), because the agency had no uniform position before. And the California Office did not change its position "without providing a reasoned explanation" (AOB at 50), but rather set forth in detail the reasons for reconsidering its prior view.

Moreover, even if BLM had reversed course, it would not allow plaintiffs to assert a claim. As explained above, they must show their environmental interests are within the zone of interests arguably protected by 30 U.S.C. § 1005(a). The baseless assertion that BLM

[37] 2 ER 456-61 (citing paragraphs 17.3 and 17.4 of the Model Unit Agreement, promulgated in 43 C.F.R. § 3286.1 (Addendum at 88)). The Glass Mountain Unit Agreement contains the same requirements. 3 ER 688. The pertinent provisions of both are quoted above at 8-10.

reversed course has nothing to do with that question. Instead, it goes to the merits of their claim, which cannot properly be decided.

III. NEPA, THE NHPA, AND FIDUCIARY DUTY ARE INAPPLICABLE, BECAUSE LEASE CONTINUATION IS NOT A DISCRETIONARY AGENCY ACTION.

Plaintiffs' claims under NEPA, the NHPA, and the United States' fiduciary duty to the Pit River Tribe fail for the same reason they cannot assert a claim under the Geothermal Steam Act: BLM had no discretion to deny lease continuation based on environmental concerns, historical or cultural considerations, or tribal sensitivities.

1. It is settled law that analysis and consultation concerning environmental, cultural, and historical concerns are not required when such concerns could not alter an agency's decision. In *Department of Transportation v. Public Citizen*, the Supreme Court held that NEPA was inapplicable, because environmental analysis could not alter the agency's decision under a statute providing that it "*shall* register … a motor carrier if [it] finds" the carrier is able to comply with safety and financial requirements. 541 U.S. at 752 (emphasis in original). This Court applied the same principle in *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995), explaining that NEPA is only "triggered by a

discretionary federal action," and conversely, nondiscretionary actions are "excus[ed] . . . from the operation of NEPA." *Id.* at 1512 (emphasis added)).[38] Accordingly, the Court held that BLM was not required to prepare an environmental impact statement before approving construction of a logging road – even though the project could affect the threatened spotted owl – because a prior easement agreement only

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[38] *See also Nat'l Ass'n of Home Builders*, 551 U.S. at 662 (no-jeopardy duty under the Endangered Species Act "covers only discretionary agency actions and does not attach to actions . . . that an agency is *required* by statute to undertake once certain specified triggering events have occurred"); *Pit River I,* 469 F.3d at 780 ("NEPA's EIS requirements apply only to discretionary federal decisions"); *Ctr. for Food Safety v. Vilsack,* 718 F.3d 829, 842 (9th Cir. 2013) ("There is no point in consulting if the agency has no choices"); *Sac & Fox Nation of Missouri v. Norton,* 240 F.3d 1250, 1262-63 (10th Cir. 2001) ("no NEPA or NHPA analysis was required" because the Interior Department lacked discretion); *Citizens Against Rails-to-Trails v. Surface Transp. Bd.,* 267 F.3d 1144, 1151 (D.C. Cir. 2001) ("[if] the agency does not have sufficient discretion to affect the outcome of its actions … NEPA is inapplicable"); *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 513 (4th Cir. 1992) ("when an agency has no discretion to consider environmental values implementing a statutory requirement, its actions are ministerial and not subject to NEPA"); *Goos v. ICC,* 911 F.2d 1283, 1296 (8th Cir. 1990) ("Because the ICC has not been granted any discretion … to base its [decision] on environmental consequences, we agree that it would make little sense to force the ICC to consider factors which cannot affect its decision"); *Milo Cmty. Hosp. v. Weinberger,* 525 F.2d 144, 147 (1st Cir. 1975) (no environmental impact statement was necessary because "'environmental considerations' could not have changed the Secretary's decision").

allowed BLM to deny approval based on three specific criteria. *Id.* at 1505-06, 1512.

Likewise, here, the Geothermal Steam Act and the Glass Mountain Unit Agreement denied BLM discretion in the same manner as the statute in *Department of Transportation* and the easement agreement in *Sierra Club*. Therefore, analysis and consultation on environmental, historical, and tribal concerns were not required.

2. Plaintiffs do not, and cannot, argue that analysis or consultation was required even if BLM lacked discretion to deny lease continuation based on their concerns. Their opening brief concedes that NEPA only "applies to . . . *discretionary* agency actions [and] . . . not . . . where an agency has no ability to prevent a certain effect due to its limited statutory authority," and "[l]ike NEPA, the [NHPA] applies to all *discretionary* federal agency actions." AOB at 11, 12 (emphasis added). Plaintiffs have never argued – in district court or in their opening brief – that fiduciary duty to the Pit River Tribe required

analysis or consultation even if it could not alter BLM's decision. Therefore, any such argument is waived.[39]

3. Thus, plaintiffs' sole argument on these claims is that lease continuation was a discretionary decision. AOB at 52-60. With one exception, all particulars of that argument are rebutted above, because they are also pertinent to the zone-of-interests issue. The exception is plaintiffs' argument (AOB at 54) that this Court's decision in *Pit River I* shows BLM had sufficient discretion to trigger NEPA. Fairly read, however, *Pit River I* compels rejection of plaintiffs' claims.

In *Pit River I,* the Court applied NEPA to a BLM decision granting a five-year lease extension under the 1998 version of 30 U.S.C. § 1005(g). The extension clause in section 1005(g) stated that BLM

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[39] *E.g., Padgett v. Wright,* 587 F.3d 983, 986 n.2 (9th Cir. 2009) ("This court will not ordinarily consider matters … that are not specifically and distinctly raised and argued in appellant's opening brief" and "will not ... review an issue not raised below unless necessary to prevent manifest injustice" (internal quotation marks omitted)). Such an argument would also be untenable, since (a) any obligation to consult the tribe or consider properties of religious or cultural significance to them would arise under the NHPA, as plaintiffs themselves state in their complaint (2 ER 318 ¶ 118), and (b) plaintiffs concede that the NHPA only applies to discretionary agency actions (AOB at 12).

"may" grant a lease extension in specified circumstances. However, Congress later amended Section 1005(g) to state that BLM "shall" grant a lease extension in specified circumstances. This Court explained that NEPA would not apply under the amended statute:

> By changing "may" to "shall," the statute eliminated the Bureau's discretion in extending geothermal leases, provided that certain conditions are met by the lessees. NEPA's EIS requirements apply only to discretionary federal decisions. *See Dep't of Transp. v. Pub. Citizen,* 541 U.S. 752, 768, 124 S. Ct. 2204, 159 L.Ed.2d 60 (2004). Accordingly, if the statute's effect is retroactive, effective relief to Pit River would be foreclosed.

469 F.3d at 780.

That analysis is directly applicable here. The lease-continuation provision applicable in this case, 30 U.S.C. § 1005(a), has used the word "shall" ever since its original enactment. *See* Geothermal Steam Act of 1970, Pub. L. No. 91-581, § 6, 84 Stat. 1566, 1568 (Appx. at 3-4). Therefore, under the above-quoted teaching of *Pit River I,* lease continuations are not discretionary, and NEPA does not apply.

Unable to reconcile their position with *Pit River I*, plaintiffs misstate the content of the decision. They claim this Court found the "bona fide efforts" requirement in the pre-amendment version of section 1005(g) "conveys sufficient discretion on BLM to trigger environmental

review and consultation requirements." AOB at 54. But this Court's opinion never once refers to bona fide efforts; even when quoting the 1998 version of section 1005(g), that language is omitted. *See* 469 F.3d at 780. Instead, as quoted above, the Court explicitly held that BLM's decision was discretionary because section 1005(g) used the word "may" instead of "shall," and further held that once Congress substituted the word "shall," NEPA would not apply to extensions granted under the amended statute. *Ibid.*[40]

Under the same reasoning, lease continuations under section 1005(a) are not discretionary. Plaintiffs' argument must therefore fail.

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[40] Plaintiffs also misinterpret *Pit River I* when they claim it holds the "2005 amendments do not apply retroactively to 1998 lease decisions" (AOB at 6 n.3). No party has made any argument based on the 2005 amendments; so there is no reason for the Court to address the issue. However, the ruling in *Pit River I* was narrower than plaintiffs claim: the Court held that the 2005 amendments did not apply *at that time*, because BLM had not yet adopted "transition rules," as specifically authorized by Congress. 469 F.3d at 781. BLM adopted transition rules after *Pit River I*, as the Court observed in a later appeal. *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d at 1084. The transition rules allow lessees to elect application of BLM's post-2005 implementing regulations to pre-2005 leases, and Calpine has made such an election. *Ibid.*

IV. SUMMARY JUDGMENT CANNOT BE ORDERED ON APPEAL ON ISSUES THAT WERE NOT LITIGATED BELOW.

Eleven pages of plaintiffs' argument is a request for summary judgment on their claims under the Geothermal Steam Act, NEPA, the NHPA, and fiduciary duty. AOB 46-60. But plaintiffs did not request summary judgment below on any claims in the consolidated complaint.[41] On all claims except FOIA (which plaintiffs have abandoned), the only motion litigated below was the agencies' motion for judgment on the pleadings.

Indeed, plaintiffs argued below that "summary adjudication" would be "premature and inappropriate." CR 72 at 4. They asserted that "before any summary judgment motions proceed," the district court should consider a future motion to compel supplementation of the record (which they never actually filed). CR 55 at 2. Some of those concerns were allayed when the agencies filed a supplementary record; but even at the final hearing in district court, plaintiffs asserted that

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[41] In 2005, before the two cases were consolidated, the plaintiffs in *SMLC* filed a motion for summary judgment in their separate case. No opposition was filed or ever came due, because the case was stayed, and plaintiffs made no effort to revive the motion before filing a substantially amended complaint in the consolidated cases.

fifty-one documents "going to the heart" of the diligence issue still were not in the record. 1 ER 68-69.

The Supreme Court has twice held that summary judgment cannot properly be ordered in such circumstances. In *Singleton v. Wulff*, 428 U.S. 106 (1976), the Court reversed a summary judgment entered on appeal, because the only motion in district court was for dismissal based on lack of standing. 428 U.S. at 120. Likewise, in *Fountain v. Filson*, 336 U.S. 681 (1949), the Court granted certiorari and summarily reversed because the court of appeals ordered summary judgment on an issue not raised by motion for summary judgment in district court. 336 U.S. at 683.

Similarly, in this case, the only motion litigated below was the agencies' motion for judgment on the pleadings, which was based solely on the legal principle that lease continuation is not a discretionary agency action. Like the motion to dismiss in *Singleton*, a motion for judgment on the pleadings must "accept[] all factual allegations in the complaint as true." *Chavez*, 683 F.3d at 1108. No motion sought a factual determination on diligence or commercial capability; and plaintiffs themselves told the district court that the record was

inadequate for summary adjudication of those issues. Therefore, under *Singleton* and *Fountain*, plaintiffs' request for summary judgment on appeal must be denied.[42]

To the extent plaintiffs' arguments for summary judgment are pertinent to agency discretion, and thus to the judgment on appeal, they are specifically rebutted above. Beyond that, the agencies will not burden the Court with a response to arguments that are so clearly improper. *Cf. Singleton*, 428 U.S. at 120 (the appellee "was justified in not presenting . . . arguments to the Court of Appeals, and in assuming, rather, that he would at least be allowed to answer the complaint, should the Court of Appeals reinstate it"). If the district court's judgment is not affirmed, as it should be for the reasons set forth above, the case must be remanded for proceedings on the merits.

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[42] *See also Kassbaum v. Steppenwolf Prods., Inc.*, 236 F.3d 487, 495 (9th Cir. 2000) ("we should not . . . order judgment for a non-moving party based on an issue that the [opposing party] had no opportunity to dispute in the district court"); *Amadeo v. Principal Mut. Life Ins. Co.*, 290 F.3d 1152, 1164 (9th Cir. 2002) (declining to consider summary judgment for a party that did not move for summary judgment in district court); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1350 (9th Cir. 1984) (same); *Sequoia Ins. Co. v. Royal Ins. Co. of Am.*, 971 F.2d 1385, 1393 n.3 (9th Cir. 1992) (same).

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Dated: March 31, 2014

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no related cases within the meaning of Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   [X] this brief contains 12,388 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

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DATED: March 31, 2014

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NO. 13-16961

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PIT RIVER TRIBE, ET AL.,
PLAINTIFFS-APPELLANTS,

V.

BUREAU OF LAND MANAGEMENT, ET AL.,
DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

APPENDIX

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APPENDIX

Public Law 91-581
91st Congress, S. 368
December 24, 1970

An Act

84 STAT. 1566

To authorize the Secretary of the Interior to make disposition of geothermal steam and associated geothermal resources, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Geothermal Steam Act of 1970". Geothermal Steam Act of 1970.

SEC. 2. As used in this Act, the term— Definitions.

(a) "Secretary" means the Secretary of the Interior;

(b) "geothermal lease" means a lease issued under authority of this Act;

(c) "geothermal steam and associated geothermal resources" means (i) all products of geothermal processes, embracing indigenous steam, hot water and hot brines; (ii) steam and other gases, hot water and hot brines resulting from water, gas, or other fluids artificially introduced into geothermal formations; (iii) heat or other associated energy found in geothermal formations; and (iv) any byproduct derived from them;

(d) "byproduct" means any mineral or minerals (exclusive of oil, hydrocarbon gas, and helium) which are found in solution or in association with geothermal steam and which have a value of less than 75 per centum of the value of the geothermal steam or are not, because of quantity, quality, or technical difficulties in extraction and production, of sufficient value to warrant extraction and production by themselves;

(e) "known geothermal resources area" means an area in which the geology, nearby discoveries, competitive interests, or other indicia would, in the opinion of the Secretary, engender a belief in men who are experienced in the subject matter that the prospects for extraction of geothermal steam or associated geothermal resources are good enough to warrant expenditures of money for that purpose.

SEC. 3. Subject to the provisions of section 15 of this Act, the Secretary of the Interior may issue leases for the development and utilization of geothermal steam and associated geothermal resources (1) in lands administered by him, including public, withdrawn, and acquired lands, (2) in any national forest or other lands administered by the Department of Agriculture through the Forest Service, including public, withdrawn, and acquired lands, and (3) in lands which have been conveyed by the United States subject to a reservation to the United States of the geothermal steam and associated geothermal resources therein. Leases.

SEC. 4. If lands to be leased under this Act are within any known geothermal resources area, they shall be leased to the highest responsible qualified bidder by competitive bidding under regulations formulated by the Secretary. If the lands to be leased are not within any known geothermal resources area, the qualified person first making application for the lease shall be entitled to a lease of such lands without competitive bidding. Notwithstanding the foregoing, at any time within one hundred and eighty days following the effective date of this Act: Bids. Conversion.

(a) with respect to all lands which were on September 7, 1965, subject to valid leases or permits issued under the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C. 181 et seq.), or under the Mineral Leasing Act of Acquired Lands, as amended (30 U.S.C. 351, 358), or to existing mining claims located on or prior to September 7, 1965, the lessees or permittees or claimants or their successors in interest who are qualified to hold geothermal 41 Stat. 437. 61 Stat. 913.

leases shall have the right to convert such leases or permits or claims to geothermal leases covering the same lands;

(b) where there are conflicting claims, leases, or permits therefor embracing the same land, the person who first was issued a lease or permit, or who first recorded the mining claim shall be entitled to first consideration;

(c) with respect to all lands which were on September 7, 1965, the subject of applications for leases or permits under the above Acts, the applicants may convert their applications to applications for geothermal leases having priorities dating from the time of filing of such applications under such Acts;

Acreage limitation.

(d) no person shall be permitted to convert mineral leases, permits, applications therefor, or mining claims for more than 10,240 acres; and

(e) the conversion of leases, permits, and mining claims and applications for leases and permits shall be accomplished in accordance with regulations prescribed by the Secretary. No right to conversion to a geothermal lease shall accrue to any person under this section unless such person shows to the reasonable satisfaction of the Secretary that substantial expenditures for the exploration, development, or production of geothermal steam have been made by the applicant who is seeking conversion, on the lands for which a lease is sought or on adjoining, adjacent, or nearby Federal or non-Federal lands.

(f) with respect to lands within any known geothermal resources area and which are subject to a right to conversion to a geothermal lease, such lands shall be leased by competitive bidding: *Provided*, That, the competitive geothermal lease shall be issued to the person owning the right to conversion to a geothermal lease if he makes payment of an amount equal to the highest bona fide bid for the competitive geothermal lease, plus the rental for the first year, within thirty days after he receives written notice from the Secretary of the amount of the highest bid.

Lease provisions.

SEC. 5. Geothermal leases shall provide for—

Royalties.

(a) a royalty of not less than 10 per centum or more than 15 per centum of the amount or value of steam, or any other form of heat or energy derived from production under the lease and sold or utilized by the lessee or reasonably susceptible to sale or utilization by the lessee;

(b) a royalty of not more than 5 per centum of the value of any byproduct derived from production under the lease and sold or utilized or reasonably susceptible of sale or utilization by the lessee, except that as to any byproduct which is a mineral named in section 1 of the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C. 181), the rate of royalty for such mineral shall be the same as that provided in that Act and the maximum rate of royalty for such mineral shall not exceed the maximum royalty applicable under that Act;

41 Stat. 437.

Rent.

(c) payment in advance of an annual rental of not less than $1 per acre or fraction thereof for each year of the lease. If there is no well on the leased lands capable of producing geothermal resources in commercial quantities, the failure to pay rental on or before the anniversary date shall terminate the lease by operation of law: *Provided, however*, That whenever the Secretary discovers that the rental payment due under a lease is paid timely but the amount of the payment is deficient because of an error or other reason and the deficiency is nominal, as determined by the Secretary pursuant to regulations prescribed by him, he shall notify the lessee of the deficiency and such lease shall not automatically terminate unless

the lessee fails to pay the deficiency within the period prescribed in the notice: *Provided further*, That, where any lease has been terminated automatically by operation of law under this section for failure to pay rental timely and it is shown to the satisfaction of the Secretary of the Interior that the failure to pay timely the lease rental was justifiable or not due to a lack of reasonable diligence, he in his judgment may reinstate the lease if—

(1) a petition for reinstatement, together with the required rental, is filed with the Secretary of the Interior; and

(2) no valid lease has been issued affecting any of the lands in the terminated lease prior to the filing of the petition for reinstatement; and

(d) a minimum royalty of $2 per acre or fraction thereof in lieu of rental payable at the expiration of each lease year for each producing lease, commencing with the lease year beginning on or after the commencement of production in commercial quantities. For the purpose of determining royalties hereunder the value of any geothermal steam and byproduct used by the lessee and not sold and reasonably susceptible of sale shall be determined by the Secretary, who shall take into consideration the cost of exploration and production and the economic value of the resource in terms of its ultimate utilization.

Term.

SEC. 6. (a) Geothermal leases shall be for a primary term of ten years. If geothermal steam is produced or utilized in commercial quantities within this term, such lease shall continue for so long thereafter as geothermal steam is produced or utilized in commercial quantities, but such continuation shall not exceed an additional forty years.

Limitation.

Renewal.

(b) If, at the end of such forty years, steam is produced or utilized in commercial quantities and the lands are not needed for other purposes, the lessee shall have a preferential right to a renewal of such lease for a second forty-year term in accordance with such terms and conditions as the Secretary deems appropriate.

Extension.

(c) 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. If, at the end of such extended term, steam is being produced or utilized in commercial quantities and the lands are not needed for other purposes, the lessee shall have a preferential right to a renewal of such lease for a second term in accordance with such terms and conditions as the Secretary deems appropriate.

(d) For purposes of subsection (a) of this section, production or utilization of geothermal steam in commercial quantities shall be deemed to include the completion of one or more wells producing or capable of producing geothermal steam in commercial quantities and a bona fide sale of such geothermal steam for delivery to or utilization by a facility or facilities not yet installed but scheduled for installation not later than fifteen years from the date of commencement of the primary term of the lease.

(e) Leases which have extended by reasons of production, or which have produced geothermal steam, and have been determined by the Secretary to be incapable of further commercial production and utilization of geothermal steam may be further extended for a period of not more than five years from the date of such determination but only for so long as one or more valuable byproducts are produced in commercial quantities. If such byproducts are leasable under the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C. 181, et seq.), or under the Mineral Leasing Act for Acquired Lands (30 U.S.C.

41 Stat. 437.

61 Stat. 913. 351–358), and the leasehold is primarily valuable for the production thereof, the lessee shall be entitled to convert his geothermal lease to a mineral lease under, and subject to all the terms and conditions of, such appropriate Act upon application at any time before expiration of the lease extension by reason of byproduct production. The lessee shall be entitled to locate under the mining laws all minerals which are not leasable and which would constitute a byproduct if commercial production or utilization of geothermal steam continued. The lessee in order to acquire the rights herein granted him shall complete the location of mineral claims within ninety days after the termination of the lease for geothermal steam. Any such converted lease or the surface of any mining claim located for geothermal byproducts mineral affecting lands withdrawn or acquired in aid of a function of a Federal department or agency, including the Department of the Interior, shall be subject to such additional terms and conditions as may be prescribed by such department or agency with respect to the additional operations or effects resulting from such conversion upon adequate utilization of the lands for the purpose for which they are administered.

(f) Minerals locatable under the mining laws of the United States in lands subject to a geothermal lease issued under the provisions of this Act which are not associated with the geothermal steam and associated geothermal resources of such lands as defined in section 2(c) herein shall be locatable under said mining laws in accordance with the principles of the Multiple Mineral Development Act (68 Stat. 708; found in 30 U.S.C. 521 et seq.).

Leases, acreage. SEC. 7. A geothermal lease shall embrace a reasonably compact area of not more than two thousand five hundred and sixty acres, except where a departure therefrom is occasioned by an irregular subdivision or subdivisions. No person, association, or corporation, except as otherwise provided in this Act, shall take, hold, own, or control at one time, whether acquired directly from the Secretary under this Act or otherwise, any direct or indirect interest in Federal geothermal leases in any one State exceeding twenty thousand four hundred and eighty acres, including leases acquired under the provisions of section 4 of this Act.

Limitation.

Increase. At any time after fifteen years from the effective date of this Act the Secretary, after public hearings, may increase this maximum holding in any one State by regulation, not to exceed fifty-one thousand two hundred acres.

Readjustment. SEC. 8. (a) The Secretary may readjust the terms and conditions, except as otherwise provided herein, of any geothermal lease issued under this Act at not less than ten-year intervals beginning ten years after the date the geothermal steam is produced, as determined by the Secretary. Each geothermal lease issued under this Act shall provide for such readjustment. The Secretary shall give notice of any proposed readjustment of terms and conditions, and, unless the lessee files with the Secretary objection to the proposed terms or relinquishes the lease within thirty days after receipt of such notice, the lessee shall conclusively be deemed to have agreed with such terms and conditions. If the lessee files objections, and no agreement can be reached between the Secretary and the lessee within a period of not less than sixty days, the lease may be terminated by either party.

Notice.

(b) The Secretary may readjust the rentals and royalties of any geothermal lease issued under this Act at not less than twenty-year intervals beginning thirty-five years after the date geothermal steam is produced, as determined by the Secretary. In the event of any such readjustment neither the rental nor royalty may be increased by more than 50 per centum over the rental or royalty paid during the preceding period, and in no event shall the royalty payable exceed 22½ per centum. Each geothermal lease issue under this Act shall provide

for such readjustment. The Secretary shall give notice of any proposed readjustment of rentals and royalties, and, unless the lessee files with the Secretary objection to the proposed rentals and royalties or relinquishes the lease within thirty days after receipt of such notice, the lessee shall conclusively be deemed to have agreed with such terms and conditions. If the lessee files objections, and no agreement can be reached between the Secretary and the lessee within a period of not less than sixty days, the lease may be terminated by either party. Notice.

(c) Any readjustment of the terms and conditions as to use, protection, or restoration of the surface of any lease of lands withdrawn or acquired in aid of a function of a Federal department or agency other than the Department of the Interior may be made only upon notice to, and with the approval of, such department or agency.

SEC. 9. If the production, use, or conversion of geothermal steam is susceptible of producing a valuable byproduct or byproducts, including commercially demineralized water for beneficial uses in accordance with applicable State water laws, the Secretary shall require substantial beneficial production or use thereof unless, in individual circumstances he modifies or waives this requirement in the interest of conservation of natural resources or for other reasons satisfactory to him. However, the production or use of such byproducts shall be subject to the rights of the holders of preexisting leases, claims, or permits covering the same land or the same minerals, if any. Byproducts.

SEC. 10. The holder of any geothermal lease at any time may make and file in the appropriate land office a written relinquishment of all rights under such lease or of any legal subdivision of the area covered by such lease. Such relinquishment shall be effective as of the date of its filing. Thereupon the lessee shall be released of all obligations thereafter accruing under said lease with respect to the lands relinquished, but no such relinquishment shall release such lessee, or his surety or bond, from any liability for breach of any obligation of the lease, other than an obligation to drill, accrued at the date of the relinquishment, or from the continued obligation, in accordance with the applicable lease terms and regulations, (1) to make payment of all accrued rentals and royalties, (2) to place all wells on the relinquished lands in condition for suspension or abandonment, and (3) to protect or restore substantially the surface and surface resources. Relinquishment.

SEC. 11. The Secretary, upon application by the lessee, may authorize the lessee to suspend operations and production on a producing lease and he may, on his own motion, in the interest of conservation suspend operations on any lease but in either case he may extend the lease term for the period of any suspension, and he may waive, suspend, or reduce the rental or royalty required in such lease. Suspension.

SEC. 12. Leases may be terminated by the Secretary for any violation of the regulations or lease terms after thirty days notice provided that such violation is not corrected within the notice period, or in the event the violation is such that it cannot be corrected within the notice period then provided that lessee has not commenced in good faith within said notice period to correct such violation and thereafter to proceed diligently to correct such violation. Lessee shall be entitled to a hearing on the matter of such claimed violation or proposed termination of lease if request for a hearing is made to the Secretary within the thirty-day period after notice. The period for correction of violation or commencement to correct such violation of regulations or of lease terms, as aforesaid, shall be extended to thirty days after the Secretary's decision after such hearing if the Secretary shall find that a violation exists. Leases, termination. Notice.

SEC. 13. The Secretary may waive, suspend, or reduce the rental or royalty for any lease or portion thereof in the interests of conservation and to encourage the greatest ultimate recovery of geothermal

resources, if he determines that this is necessary to promote development or that the lease cannot be successfully operated under the lease terms.

Surface land, use.

SEC. 14. Subject to the other provisions of this Act, a lessee shall be entitled to use so much of the surface of the land covered by his geothermal lease as may be found by the Secretary to be necessary for the production, utilization, and conservation of geothermal resources.

SEC. 15. (a) Geothermal leases for lands withdrawn or acquired in aid of functions of the Department of the Interior may be issued only under such terms and conditions as the Secretary may prescribe to insure adequate utilization of the lands for the purposes for which they were withdrawn or acquired.

(b) Geothermal leases for lands withdrawn or acquired in aid of functions of the Department of Agriculture may be issued only with the consent of, and subject to such terms and conditions as may be prescribed by, the head of that Department to insure adequate utilization of the lands for the purposes for which they were withdrawn or acquired. Geothermal leases for lands to which section 24 of the Federal Power Act, as amended (16 U.S.C. 818), is applicable, may be issued only with the consent of, and subject to, such terms and conditions as the Federal Power Commission may prescribe to insure adequate utilization of such lands for power and related purposes.

41 Stat. 1075; 62 Stat. 275.

(c) Geothermal leases under this Act shall not be issued for lands administered in accordance with (1) the Act of August 25, 1916 (39 Stat. 535), as amended or supplemented, (2) for lands within a national recreation area, (3) for lands in a fish hatchery administered by the Secretary, wildlife refuge, wildlife range, game range, wildlife management area, waterfowl production area, or for lands acquired or reserved for the protection and conservation of fish and wildlife that are threatened with extinction, (4) for tribally or individually owned Indian trust or restricted lands, within or without the boundaries of Indian reservations.

16 USC 1.

Lessees, citizenship requirement.

SEC. 16. Leases under this Act may be issued only to citizens of the United States, associations of such citizens, corporations organized under the laws of the United States or of any State or the District of Columbia, or governmental units, including, without limitation, municipalities.

SEC. 17. Administration of this Act shall be under the principles of multiple use of lands and resources, and geothermal leases shall, insofar as feasible, allow for coexistence of other leases of the same lands for deposits of minerals under the laws applicable to them, for the location and production of claims under the mining laws, and for other uses of the areas covered by them. Operations under such other leases or for such other uses, however, shall not unreasonably interfere with or endanger operations under any lease issued pursuant to this Act, nor shall operations under leases so issued unreasonably interfere with or endanger operations under any lease, license, claim, or permit issued pursuant to the provisions of any other Act.

Cooperative or unit plan.

SEC. 18. 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 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. Any such plan may, in the discretion of the Secretary, provide for vesting in the Secretary or any other person, committee, or Federal or State agency designated therein, authority to alter or modify from time to time the rate of prospecting and development and the quantity and rate of production under such plan. All leases operated under any such plan approved or prescribed by the Secretary shall be excepted in determining holdings or control for the purposes of section 7 of this Act.

When separate tracts cannot be independently developed and operated in conformity with an established well-spacing or development program, any lease, or a portion thereof, may be pooled with other lands, whether or not owned by the United States, under a communitization or drilling agreement providing for an apportionment of production or royalties among the separate tracts of land comprising the drilling or spacing unit when determined by the Secretary to be in the public interest, and operations or production pursuant to such an agreement shall be deemed to be operations or production as to each lease committed thereto.

The Secretary is hereby authorized, on such conditions as he may prescribe, to approve operating, drilling, or development contracts made by one or more lessees of geothermal leases, with one or more persons, associations, or corporations whenever, in his discretion, the conservation of natural products or the public convenience or necessity may require or the interests of the United States may be best served thereby. All leases operated under such approved operating, drilling, or development contracts, and interests thereunder, shall be excepted in determining holdings or control under section 7 of this Act.

SEC. 19. Upon request of the Secretary, other Federal departments and agencies shall furnish him with any relevant data then in their possession or knowledge concerning or having bearing upon fair and adequate charges to be made for geothermal steam produced or to be produced for conversion to electric power or other purposes. Data given to any department or agency as confidential under law shall not be furnished in any fashion which identifies or tends to identify the business entity whose activities are the subject of such data or the person or persons who furnished such information.

SEC. 20. All moneys received under this Act from public lands under the jurisdiction of the Secretary shall be disposed of in the same manner as moneys received from the sale of public lands. Moneys received under this Act from other lands shall be disposed of in the same manner as other receipts from such lands. Moneys.

SEC. 21. (a) Within one hundred and twenty days after the effective date of this Act, the Secretary shall cause to be published in the Federal Register a determination of all lands which were included within any known geothermal resources area on the effective date of the Act. He shall likewise publish in the Federal Register from time to time his determination of other known geothermal resources areas specifying in each case the date the lands were included in such area; and Publication in Federal Register.

(b) Geothermal resources in lands the surface of which has passed from Federal ownership but in which the minerals have been reserved to the United States shall not be developed or produced except under geothermal leases made pursuant to this Act. If the Secretary of the Interior finds that such development is imminent, or that production from a well heretofore drilled on such lands is imminent, he shall so report to the Attorney General, and the Attorney General is authorized

and directed to institute an appropriate proceeding in the United States district court of the district in which such lands are located, to quiet the title of the United States in such resources, and if the court determines that the reservation of minerals to the United States in the lands involved included the geothermal resources, to enjoin their production otherwise than under the terms of this Act: *Provided*, That upon an authoritative judicial determination that Federal mineral reservation does not include geothermal steam and associated geothermal resources the duties of the Secretary of the Interior to report and of the Attorney General to institute proceedings, as hereinbefore set forth, shall cease.

SEC. 22. Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to its exemption from State water laws.

Waste, prevention.

SEC. 23. (a) All leases under this Act shall be subject to the condition that the lessee will, in conducting his exploration, development, and producing operations, use all reasonable precautions to prevent waste of geothermal steam and associated geothermal resources developed in the lands leased.

(b) Rights to develop and utilize geothermal steam and associated geothermal resources underlying lands owned by the United States may be acquired solely in accordance with the provisions of this Act.

Rules and regulations.

SEC. 24. The Secretary shall prescribe such rules and regulations as he may deem appropriate to carry out the provisions of this Act. Such regulations may include, without limitation, provisions for (a) the prevention of waste, (b) development and conservation of geothermal and other natural resources, (c) the protection of the public interest, (d) assignment, segregation, extension of terms, relinquishment of leases, development contracts, unitization, pooling, and drilling agreements, (e) compensatory royalty agreements, suspension of operations or production, and suspension or reduction of rentals or royalties, (f) the filing of surety bonds to assure compliance with the terms of the lease and to protect surface use and resources, (g) use of the surface by a lessee of the lands embraced in his lease, (h) the maintenance by the lessee of an active development program, and (i) protection of water quality and other environmental qualities.

SEC. 25. As to any land subject to geothermal leasing under section 3 of this Act, all laws which either (a) provide for the disposal of land by patent or other form of conveyance or by grant or by operation of law subject to a reservation of any mineral or (b) prevent or restrict the disposal of such land because of the mineral character of the land, shall hereafter be deemed to embrace geothermal steam and associated geothermal resources as a substance which either must be reserved or must prevent or restrict the disposal of such land, as the case may be. This section shall not be construed to affect grants, patents, or other forms of conveyances made prior to the date of enactment of this Act.

30 USC 530.

SEC. 26. The first two clauses in section 11 of the Act of August 13, 1954 (68 Stat. 708, 716), are amended to read as follows:

30 USC 181. 30 USC 281.

"As used in this Act, 'mineral leasing laws' shall mean the Act of February 25, 1920 (41 Stat. 437); the Act of April 17, 1926 (44 Stat. 301); the Act of February 7, 1927 (44 Stat. 1057); Geothermal Steam Act of 1970, and all Acts heretofore or hereafter enacted which are amendatory of or supplementary to any of the foregoing Acts; 'Leasing Act minerals' shall mean all minerals which, upon the effective date of this Act, are provided in the mineral leasing laws to be disposed of thereunder and all geothermal steam and associated geothermal resources which, upon the effective date of the Geothermal Steam Act of 1970, are provided in that Act to be disposed of thereunder;".

Certain mineral rights, retention by U. S.

SEC. 27. The United States reserves the ownership of and the right to extract under such rules and regulations as the Secretary may prescribe oil, hydrocarbon gas, and helium from all geothermal steam and associated geothermal resources produced from lands leased under this Act in accordance with presently applicable laws: *Provided*, That whenever the right to extract oil, hydrocarbon gas, and helium from geothermal steam and associated geothermal resources produced from such lands is exercised pursuant to this section, it shall be exercised so as to cause no substantial interference with the production of geothermal steam and associated geothermal resources from such lands.

Approved December 24, 1970.

LEGISLATIVE HISTORY:

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Oct. 5, Dec. 9, considered and passed House.