Case No. 13-16961

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PIT RIVER TRIBE; NATIVE COALITION FOR MEDICINE LAKE HIGHLANDS DEFENSE; MOUNT SHASTA BIOREGIONAL ECOLOGY CENTER; SAVE MEDICINE LAKE COALITION; MEDICINE LAKE CITIZENS FOR QUALITY ENVIRONMENT,

Plaintiffs-Appellants,

v.

BUREAU OF LAND MANAGEMENT; U.S. DEPARMENT OF THE INTERIOR; UNITED STATES FOREST SERVICE; UNITED STATES DEPARMENT OF AGRICULTURE; CALPINE CORPORATION,

Defendants-Appellees.

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

Consolidated Case Nos.
S-04-0956-JAM-JFM
S-04-0969-JAM-JFM
(Hon. John A. Mendez)

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants make the following disclosures. Appellant Pit River Tribe is a federally recognized Indian Tribe and has no parent companies, subsidiaries, or affiliates that have issued stock to the public in the United States or abroad. Appellants Native Coalition for Medicine Lake Highlands Defense, Mount Shasta Bioregional Ecology Center, Save Medicine Lake Coalition, and Medicine Lake Citizens for Quality Environment are not-for-profit organizations and have no parent companies, subsidiaries, or affiliates that have issued stock to the public in the United States or abroad.

DEBORAH A. SIVAS

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STATEMENT OF JURISDICTION

Plaintiffs-Appellants Pit River Tribe ("Tribe"), Native Coalition for Medicine Lake Highlands Defense, Mount Shasta Bioregional Ecology Center, Save Medicine Lake Coalition, and Medicine Lake Citizens for Quality Environment (collectively, "Plaintiffs") invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1346, 1361, and 1362. Plaintiffs alleged violations of the Geothermal Steam Act ("GSA"), 30 U.S.C. §§ 1001-1028; the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347; the National Historic Preservation Act ("Preservation Act"), 16 U.S.C. §§ 470-470x; and the Indian fiduciary trust doctrine, seeking review of these claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2).[1]

On July 30, 2013, the district court granted judgment on the pleadings to Defendants-Appellees Bureau of Land Management ("BLM"), United States Department of the Interior, United States Forest Service, and United States Department of Agriculture ("Federal Defendants"), and to Defendant-Intervenor-Appellee Calpine Corporation ("Calpine"). Plaintiffs filed a timely notice of appeal on September 25, 2013. See ER 1-2; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

[1] Plaintiffs also sought review of BLM's decision to withhold certain geothermal well data under the Freedom of Information Act. The district court granted summary judgment on that claim, and Plaintiffs do not pursue it here.

ISSUES PRESENTED FOR REVIEW

I. Did the district court err in concluding that Plaintiffs, who use, live near, and enjoy the Medicine Lake Highlands, lack prudential standing to challenge BLM's decision extending 26 geothermal leases in violation of the GSA, a statute that expressly seeks to balance geothermal development with the protection of environmental, cultural, and other resources?

II. Did the district court err in holding that BLM could lawfully add 40 years to Calpine's non-producing leases even though BLM had long interpreted the statute to preclude that result and had found Calpine in default of its lease obligations?

III. Assuming BLM could lawfully extend Calpine's non-producing leases for 40 years, did the district court err in holding that the extension was non-discretionary, so as to negate BLM's obligation for environmental review under NEPA and tribal consultation under the Preservation Act and the Indian fiduciary trust doctrine?

STATEMENT OF THE CASE

This case may well decide the fate of the Medicine Lake Highlands, a place of deep religious significance and spiritual renewal for countless generations of Native Americans. This remote forested landscape is tucked into the far northeastern corner of California just south of Lava Beds National Monument, and

is managed by the U.S. Forest Service under the "multiple use" mandate of the National Forest System.[2] Native Americans still actively use Medicine Lake and the surrounding Highlands for spiritual guidance, religious ceremonies, traditional doctoring practices, and the gathering of traditional food and materials, while the larger public enjoys the area's unique recreational, environmental, and aesthetic amenities during the summer season. These activities are profoundly threatened, however, by BLM's decision to lease the Highlands for industrial-scale geothermal energy production.

At issue here are 26 geothermal leases, originally executed by BLM in the 1980s with only cursory environmental review and no tribal consultation. Because the leaseholders did not develop or produce any geothermal resources during the leases' 10-year "primary term," each lease was set to expire in the 1990s. The statute allows BLM to extend, by either 5 or 40 years, the initial term for non-producing leases, but only upon a determination that the lessee (1) is making sufficient progress toward production and use of the resource and (2) in the case of a 40-year extension, has located a potentially viable resource. This Court has concluded that BLM's sufficient progress determination is a discretionary act, triggering federal requirements for environmental review and tribal consultation.

[2] While the Forest Service manages the surface lands, BLM has jurisdiction under the GSA to lease and manage the subsurface resources.

Pit River Tribe v. U.S. Forest Service, 469 F.3d 768, 788 (9th Cir. 2006) ("Pit River I").

After first granting 5-year extensions for most of the leases, BLM concluded that the leaseholder was no longer engaged in diligent exploration, in "default" of its lease obligations. BLM admonished the lessee to implement already-approved exploration plans, which would have led to a contraction of the leased land – from tens of thousands of acres down to the footprint of any commercially viable geothermal resource pool (or "participating area"). Such a contraction would renew the ability of others to fully use and enjoy the released land's amenities. Despite BLM's warnings, Calpine did not complete the necessary exploration work. To this day, two decades later, Calpine still has never drilled another well, documented a commercially viable geothermal pool, or designated a participating area for any of the 26 leases.

Despite Calpine's inaction, BLM did not terminate the leases for noncompliance, let them expire by their own terms, or reduce their footprint, as the law requires. Instead, BLM radically altered course in May 1998 with an administrative decision to add 40 years to the term of each lease, in the hope of coaxing Calpine into future compliance. BLM did not explain why its long-standing interpretation – that the GSA did not allow such additions – was wrong. Nor did it make any finding that Calpine was engaged in sufficient exploration to

justify a 40-year lease addition, or even another 5-year lease extension. By 1998, moreover, BLM was well aware of significant tribal and public concern over industrial development in the Medicine Lake Highlands, an Indian sacred site then under active consideration for listing as a Traditional Cultural District on the National Register of Historic Places (and subsequently determined eligible). Yet BLM dramatically expanded the life of the leases in 1998 without any public notice, environmental review, or tribal consultation.

In response to the 1998 decision and the subsequent approval of a development project on some of the leaseholds, Plaintiffs sought judicial review of BLM's decision as arbitrary, capricious, and contrary to law under the APA. After significant delays, the district court ultimately dismissed the case on the grounds that (1) Plaintiffs lack prudential standing under the GSA to challenge the 1998 lease decision, and (2) the 1998 decision was not a discretionary action triggering environmental review under NEPA or tribal consultation under the Preservation Act and the government's fiduciary Indian trust obligations. This appeal followed.

LEGAL BACKGROUND

I. The Geothermal Steam Act

The GSA of 1970 created a framework by which BLM may enter into leases with private entities for the exploration, development, and production of geothermal resources on federal public lands. Geo-Energy Partners-1983 Ltd. v.

Salazar, 613 F.3d 946, 949 (9th Cir. 2010). "Geothermal resources" refers to "the heat or energy found in steam, hot water, or geothermal formations." Id. Congress intended the Act to spur exploration for alternative energy sources that may, under some circumstances, cause less environmental harm than traditional fossil-fuel sources. Congress strengthened the law's environmental protections in 1988, and as discussed below, the GSA now carefully balances energy development with the protection of environmental resources and other surface users.

This balance is reflected in the strict deadlines imposed on leaseholders. All leases have an initial term of 10 years to either develop the resource or else release the public land for "other purposes." 30 U.S.C. § 1005(a)-(c) (1998).[3] Whether a lease may be extended beyond the primary term depends upon the leaseholder's diligence. Where the lessee does little or nothing to develop the resource, the lease would normally expire by its own terms after 10 years. Where geothermal steam is actually produced or utilized in commercial quantities during the primary term, the lease automatically continues for so long as such production or utilization continues, up to 40 additional years. Id. § 1005(a).

[3] Congress significantly amended the GSA in 2005, and BLM subsequently revised its implementing regulations. Because the decision at issue here occurred in 1998, this brief cites to the provisions of the GSA and its implementing regulations in effect in 1998. Pit River I, 469 F.3d at 781 (2005 amendments do not apply retroactively to 1998 lease decisions). Plaintiffs have filed with this brief a legal addendum containing the versions of the GSA and the regulations in effect in 1998.

Any other scenario requires BLM to first evaluate whether the lessee's conduct warrants expansion of the primary term. If geothermal steam is not being produced or utilized in commercial quantities by the end of 10 years, BLM may extend the lease term by 5 years, but only if it determines that the lessee meets two threshold requirements. Id. § 1005(g). First, the lessee "must submit a report to [BLM] demonstrating bona fide efforts (as determined by the Secretary) to produce or use geothermal steam in commercial quantities" during the primary term of the lease. Id. § 1005(h). Second, the lessee must either make payments to BLM in lieu of commercial production or annually demonstrate significant expenditure toward developing its leasehold. Id. § 1005(g), (i)-(j). BLM may grant one additional 5-year extension, for a total of 10 years, if the lessee continues to meet these two criteria. Id. § 1005(g)(1). At the end of this 10-year extension, the lease either automatically terminates or, if geothermal steam is then being produced in commercial quantities, may continue for up to 30 additional years. Id. § 1005(g)(2). The statute thus authorizes some additional time to locate a viable resource, but makes that extension contingent on BLM's evaluation of the lessee's efforts and conduct.[4]

[4] The holder of a non-producing lease who commences "actual drilling operations" during the primary term and is "diligently prosecut[ing]" those operations is also entitled to a 5-year extension. 30 U.S.C. § 1005(c).

Alternatively, if the lessee demonstrates progress toward commercial utilization by locating a potentially viable resource, but has not yet commenced production, BLM may add up to 40 years to the lease term. BLM's authority for such 40-year additions comes from reading section 1005(a) and section 1005(d) together:

- Section 1005(a) provides that "[i]f 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).

- Section 1005(d), in turn, defines the term "produced or utilized in commercial quantities" to mean either (i) "the completion of a well producing geothermal steam in commercial quantities" or (ii) "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." Id. § 1005(d) (emphasis added).

So, where a lease is actually producing commercial quantities of geothermal steam, it automatically continues for up to 40 years, as noted above. But where a lease only contains a well deemed capable of producing commercial quantities, generally known as a "paying well" (as opposed to a "producing well"), BLM may grant an additional term after evaluating the lessees' efforts toward utilization.

In sum, where a lease is actually producing or utilizing commercial quantities of geothermal steam by the end of the primary term, the lessee is entitled to continue those operations for up to 40 years. Since no production has ever

occurred in the Medicine Lake Highlands, no leasehold has ever satisfied this requirement. In all other circumstances (5-year or 40-year extensions), BLM must make a determination whether to let the lease expire or to extend it, based on an evaluation of the evidence regarding the lessee's "bona fide" or "diligent" efforts.

The GSA contains one other provision relevant to this lawsuit. For the purposes of conserving common pool resources, the statute allows multiple lessees to voluntarily form a "cooperative or unit plan" of development, if BLM determines that such a plan is "necessary or advisable in the public interest." 30 U.S.C. § 1017. A "unit" consists of leases "held by one or more lessees in the same geographic area." Geo-Energy, 613 F.3d at 949. Vis-à-vis the leaseholders, BLM maintains discretion to manage "the institution and operation of any such cooperative or unit plan as [it] may deem necessary or proper to secure reasonable protection of the public interest." 30 U.S.C. § 1017.

But BLM's discretion vis-à-vis the public interest is not unfettered. In 1988, Congress amended GSA section 1017 to cabin BLM's administration of unit agreements. That amendment mandated that, within 5 years of approving a unit, BLM "shall" review the unit area and "eliminate from inclusion" any lease not "reasonably necessary" to the unit's operations. Pub. L. No. 100-443, § 4, 102 Stat. 1766 (Sept. 22, 1988) (codified at 30 U.S.C. § 1017 (1998)). For unit agreements approved before the 1988 amendment, BLM "shall complete such

review and elimination within 5 years after September 22, 1988 . . . based on scientific evidence." Id. BLM incorporated this statutory requirement into its implementing regulations, which also include a "model unit agreement" requiring unit contraction to a "participating area" within 5 years of approval. 43 C.F.R. § 3286.1 (1997).

A lease that is part of "an approved cooperative or unit plan of development or operation" for which actual drilling has commenced, or bona fide exploration efforts have occurred, may obtain a 5-year extension on the basis of its inclusion in the unit agreement. 30 U.S.C. § 1005(c), (g). In contrast, the GSA provides 40-year continuances or additional terms only where "such lease" itself is producing or utilizing geothermal steam in commercial quantities. Id. § 1005(a).

A. The National Environmental Policy Act

Congress enacted NEPA to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation." 42 U.S.C. § 4332(2)(C). One of NEPA's primary goals is to "preserve important historic, cultural, and natural aspects of our national heritage." Id. § 4331(b)(4). The statute mandates that agencies evaluate and publicly disclose the environmental impacts of their proposed actions. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989).

Federal agencies must prepare an environmental impact statement ("EIS") before undertaking any "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); Montana Wilderness Association v. Connell, 725 F.3d 988, 1001 (9th Cir. 2013). An EIS ensures that an agency carefully considers the potential environmental impacts of its actions, and informs the public of these impacts so they can play a role in the decisionmaking and implementation processes. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

NEPA applies to all discretionary agency actions. Sierra Club v. Babbitt, 65 F.3d 1502, 1512 (9th Cir. 1995); see also Department of Transportation v. Public Citizen, 541 U.S. 752, 770 (2004) (NEPA does not apply "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions").

B. The National Historic Preservation Act

Congress enacted the Preservation Act of 1966 to protect sites and structures "of historic, architectural, or cultural significance." San Carlos Apache Tribe v. United States, 417 F.3d 1091, 1093-94 (9th Cir. 2005) (internal quotation marks omitted). As relevant here, the statute imposes two obligations on federal agencies. First, federal agencies must identify, evaluate, and nominate qualified lands under their control to the National Register of Historic Places. 16 U.S.C.

§ 470h-2(a)(2)(A). Second, agencies must consider the effect of a federal undertaking or agency-approved action on all sites included on, or eligible for inclusion on, the National Register before the undertaking occurs. Id. § 470f. This consultation process requires agencies to gather information from interested or knowledgeable public parties concerning the effects of the undertaking. Id. § 470h-2(a)(2)(E)(ii); 36 C.F.R. § 800.4(a). Indian tribes are interested parties for purposes of consultation, and federal agencies must identify and consult with tribes where a federal action or undertaking may affect "properties of historic value" to tribes, even outside Indian country. 16 U.S.C. § 470a(d)(1)(A)-(B); 36 C.F.R. §§ 800.1(c)(2)(iii), 800.4(a), 800.5(e)(1)(ii).

Like NEPA, the Preservation Act applies to all discretionary federal agency actions. See, e.g., Karst Environmental Education & Protection, Inc. v. EPA, 475 F.3d 1291, 1295-96 (D.C. Cir. 2007); Sac & Fox Nation of Missouri v. Norton, 240 F.3d 1250, 1263 (10th Cir. 2001).

C. The Indian Fiduciary Trust Doctrine

In addition to these statutory obligations, federal agencies must maintain "a general trust relationship" with Indian tribes. "[I]n essence," the government's fiduciary duty established by this Indian trust doctrine "consists of acting in the interests of the tribes." Skokomish Indian Tribe v. FERC, 121 F.3d 1303, 1308 (9th Cir. 1997) (internal quotation marks omitted); see also United States v.

Mitchell, 463 U.S. 206, 225-26 (1983); United States v. Mason, 412 U.S. 391, 398 (1973).

Statutory violations can constitute violations of the fiduciary trust doctrine. See Pit River I, 469 F.3d at 788 ("Because we conclude that the agencies violated both NEPA and NHPA during the leasing and approval process, it follows that the agencies violated their minimum fiduciary duty to the Pit River Tribe when they violated the statutes."). Because Indian tribes are traditionally regarded as "possessing important attributes of sovereignty," any federal action is subject to the trust duty. Nance v. EPA, 645 F.2d 701, 711, 713 (9th Cir. 1981); see also Pyramid Lake Paiute Tribe of Indians v. U.S. Department of Navy, 898 F.2d 1410, 1420 (9th Cir. 1990).

FACTUAL BACKGROUND

A. The Medicine Lake Highlands

Forty miles northeast of Mount Shasta, the cold mountain waters of Medicine Lake lie cradled in a collapsed caldera, part of a broad shield volcano approximately 25 miles in diameter. ER 333-34. The unique landscape of the surrounding Highlands includes "a great variety of elevations, climates, and types of vegetation," including "vast, rugged lava flows, volcanic peaks, fertile marshes and grasslands, and dense forests." ER 421. Mixed conifer forests are interspersed with lava fields, cinder cones, and obsidian rock, which together support 400

wildlife species, including bald eagles and northern spotted owls. ER 421-22, 571-81. Fertile marshes and freshwater springs dot the landscape, and the area supports a designated old-growth reserve as well as the 10,800-acre Mount Hoffman Roadless Area on the Modoc National Forest. ER 334, 580-84.

"This landscape plays an intricate role in Pit River Tribal history, mythology, cultural patterns, and social system." ER 421. The "geologically connected Highland area" contains countless volcanic features "known to hold spiritual value to past and present-day local native people" and "figure prominently in the culture [and] history of the Pit River peoples." ER 422. For over 10,000 years, members of the Tribe have used the Highlands for "vision quests"; "life cycle" ceremonies; traditional shaman/doctoring practices; collection of traditional foods, medicines, and materials; and prayer, quiet contemplation, and spiritual renewal. ER 400-02, 423-29, 585-86. Generations have handed down religious "old stories" intimately and spiritually connected to the landscape. ER 427.

Today, Pit River members continue to be "intimately involved with their physical environment." ER 423. The Highlands form a sacred landscape, with Medicine Lake as its power center. ER 423, 428. As part of the Tribe's ancestral lands, 7 Indian Cl. Comm'n 815, 844-46 (1959), the Lake and adjacent natural features form an integrated whole where tribal members continue to seek moral direction, enhanced longevity, doctoring powers, and living materials, ER 428.

The Tribe also uses the Highlands as a place to hunt, fish, and gather food. ER 431.

Recognizing the natural and spiritual importance of the Highlands, the Keeper of the National Register of Historic Places determined in 1999 that the Medicine Lake Caldera is eligible for listing as a Traditional Cultural Properties District. ER 379-88. The caldera and "an interrelated series of locations and natural features associated with the spiritual benefits and traditional practices" represent "an area of significant continuing traditional cultural value to several Northern California Indian tribes, including specifically the Modoc and Pit River peoples," making the area important "for maintaining their traditional cultural identity." ER 380.

These enduring values are threatened by industrial-scale geothermal development, which "involves the harnessing of the natural heat energy sources in the earth for the generation of electric power" through drilling processes akin to oil and gas production operations. ER 821. While the resource itself is underground, geothermal development involves significant surface disturbance, including the construction and operation of "roads, wells, pipelines, powerlines, powerplants, and by-product facilities." ER 827. For this reason, Federal Defendants previously concluded that geothermal development in the Highlands will "significantly impact the Native American culture" and "the current cultural and

social values associated with the setting of the [M]edicine Lake Caldera area exceed those values obtained by developing the geothermal power." ER 336-37.[5]

B. The History of Geothermal Leasing in the Medicine Lake Highlands

1. BLM Executes 10-year Leases without Environmental or Cultural Review or Tribal Consultation.

BLM began targeting the Medicine Lake area for geothermal exploration in the 1970s, when it identified the "Glass Mountain" area as one of several volcanic sites with development potential. ER 823-24 (programmatic EIS with no site-specific review). In 1981, BLM issued a short "Environmental Assessment" and "Finding of No Significant Impact" for "casual use" geothermal exploration (not including surface-disturbing activities) on 266,800 acres in the Glass Mountain area. ER 785-814. Because the document considered only casual use exploration, BLM clarified that "[f]urther analysis will be required for the later stages of exploration and, if a resource is discovered, development." ER 790. BLM noted that "[a]t each step in the process there are numerous environmental safeguards required by the system, including [environmental assessments] or EISs, and public participation." ER 790. Neither the earlier nationwide EIS nor the 13-page

[5] On this basis, Federal Defendants originally denied development permits for the so-called Telephone Flat development proposal. Calpine responded by suing BLM in the Court of Federal Claims for an alleged uncompensated "taking" of its leases, arguing that it had a vested right to develop the leases. Federal Defendants then reversed course and approved the project. Calpine subsequently withdrew its proposal and has since indicated its intent to propose a far more expansive set of development projects.

environmental assessment addressed the impacts of geothermal leasing on cultural resources in the Highlands.

In 1982 and 1983, BLM executed 24 of the leases at issue in this case, each with a primary term of 10 years. See ER 524-33, 615-22, 626-40, 644-48, 654-69, 699-719, 721-83. Those leases granted Calpine[6] expansive rights, well beyond casual use, including "the exclusive right and privilege to drill for, extract, produce, remove, utilize, sell, and dispose of geothermal steam." E.g., ER 776; see also ER 776-82. BLM did not evaluate whether the leased area was suitable for the geothermal exploration and development or examine the potential environmental and cultural impacts of those activities. Nor did the agency engage in any government-to-government consultation with the Pit River Tribe or evaluate the area's eligibility for National Register listing.

In 1984, BLM issued a "Supplemented Environmental Assessment," which elaborated on the 1981 "casual use" assessment. ER 551-614. In it, BLM considered the cultural significance of the Highlands to tribes in one conclusory but accurate sentence: "Any landscape altering activities have the potential to adversely affect the spiritual significance of natural features important to Native American groups." ER 603. Based on this "assessment," BLM authorized

[6] Various entities have held the leases since their issuance. Calpine is the successor-in-interest and current holder of all the leases. For convenience, Plaintiffs use "Calpine" to refer to all past and present leaseholders.

geothermal leasing on an additional 41,500 acres in the Glass Mountain area, ER 535, and subsequently executed the last two of the 26 leases at issue here, ER 524-30. Again, BLM did not undertake tribal consultation or evaluate National Register eligibility.

2. BLM Approves the Glass Mountain Unit Agreement.

Shortly after the first leases were issued, Calpine proposed a "Unit Agreement for the Development and Operation of the Glass Mountain Area," intended to cover 16 leases across 25,000 acres. ER 158-83. As noted above, GSA section 1017 allows unit agreements for the purpose of efficiently managing pooled resources. Because no exploration had yet occurred at Glass Mountain, BLM could not confirm the existence of a commercially viable "hydrothermal system," but nonetheless approved the proposed Unit Agreement. ER 720. The Unit was subsequently expanded several times and now includes all 26 of the leases at issue here. See ER 496-97, 500, 506, 510, 641-43, 649.

BLM has adopted detailed regulations to implement section 1017. 43 C.F.R. pt. 3280 (1997). They provide:

> No more than 5 years after approval of any cooperative or unit plan of development or operations, and at least every 5 years thereafter, the authorized [BLM] officer shall review each plan and, after notice and opportunity for comment, eliminate from such plan any lease or part of a lease not regarded as reasonably necessary for cooperative or unit operations under the plan.

Id. § 3283.2-2. After contraction of the unit, the remaining "participating area" is "[t]hat part of the Unit Area which is deemed to be productive from a horizon or deposit." Id. § 3280.0-5(h).

The Glass Mountain Unit Agreement largely tracks BLM's model agreement and regulations. It provides that, concurrent with submitting the agreement to BLM, the unit operator also must submit "an acceptable Plan of Operation" that is "as complete and adequate as the [BLM] Supervisor may determine to be necessary for timely exploration and/or development and to insure proper protection of the environment and conservation of the natural resources of the Unit Area." ER 166 (¶ 11.1). The plan of operation must prescribe "a progressive exploratory program" that commences within six months. ER 166 (¶ 11.4). Thereafter, the operator "must continue diligent exploration, per [a prescribed 30-month schedule], until unitized substances shall be discovered which can be produced in paying quantities . . . or until the Unit Operator can establish to the satisfaction of [BLM] that further drilling . . . would be unwarranted or impracticable." ER 167 (¶ 11.4(c)). After the initial 30-month program, the operator must submit subsequent plans of operation requiring initiation of

> a continuous drilling program providing for drilling of no less than one well at a time, and allowing no more than six (6) months time to elapse between completion . . . of one well and the beginning of the next well until a well capable of producing Unitized Substances in paying quantities in completed to the satisfaction of the Supervisor or

> until it is reasonably proved that the Unitized Land is incapable of producing Unitized Substances in paying quantities.

ER 168-69 (¶ 11.5). In other words, like the leases themselves, the Unit Agreement is subject to strict diligent exploration requirements until discovery of commercially viable geothermal resources or abandonment of the effort. And "[u]ntil there is actual production," the failure to timely drill any well required by a plan of operation, if not remedied within a reasonable time after BLM notice, "shall . . . result in automatic termination" of the Unit Agreement. ER 169 (¶ 11.7).

If these mandatory progressive drilling activities identify a commercially viable resource, the diligent exploration requirements recede and lessees enter the development and production phase. Prior to commencing that phase, the lessee must first submit "a schedule . . . of all land then regarded as reasonably proved to be productive from a pool or deposit discovered or developed." ER 169 (¶ 12.1). The lands in that schedule, after BLM approval, "will constitute a Participating Area." ER 169 (¶ 12.1). With BLM approval, the boundaries of the participating area may be adjusted to include or exclude additional leased land if subsequent exploration warrants. ER 169-70 (¶ 12.3). But all leased land that is not part of a designated participating area on the fifth anniversary of its initial establishment "shall be eliminated automatically" from the Unit. ER 162 (¶ 4.3). This last requirement executes Congress's statutory directive in section 1017 and BLM's

implementing regulation. See 30 U.S.C. § 1017 (at least once every 5 years, BLM "shall" review unit agreements and "eliminate from inclusion . . . . any lease or part of a lease not regarded as reasonably necessary"); 43 C.F.R. § 3283.2-2.

The Glass Mountain Unit Agreement became effective for five years from BLM's initial approval in May 1982, but could be extended by production or diligent operations to restore production. ER 174 (¶ 18.1). The record does not reflect either production or diligent efforts to restore production.

3. BLM Grants Calpine 5-year Lease Extensions and Denies Calpine's Subsequent Request for 40-year Extensions.

During the 1980s, Calpine drilled several wells and temperature holes on leases within the Unit, but only one of these showed any potential. In 1988, Calpine drilled a single well (Well 31-17) on Lease CA-12372, which is not at issue in this case, and sought a "paying well" determination from BLM. ER 520. BLM subsequently deemed the well capable of producing in commercial quantities, ER 519,[7] and concluded that Lease CA-12372 was, therefore, entitled to a 40-year additional term under section 1005(a), ER 498-99. Calpine voluntarily

[7] BLM has never released data for the two-week acidization flow test leading to this determination, despite Plaintiffs' repeated attempts over a decade to procure such information through the Freedom of Information Act and requests to complete the record in this case. See ER 93-97, 241-58. Even when Federal Defendants finally produced additional lease-related documents to complete the record, well test data were withheld. ER 290 (lines 3003-04).

"committed" additional non-producing leases to the Unit after the "paying well" determination. See, e.g., ER 513-14.

Separately, as most of the other 26 leases neared the end of their primary terms in 1990, Calpine sought 5-year extensions under GSA section 1005(g) and 43 C.F.R. § 3203.1-4(c). ER 506-12. Because the leases were part of "an approved cooperative or unit plan of development or operation" with one "paying well" determination, 30 U.S.C. § 1005(g), BLM considered total expenditures on the Glass Mountain Unit to satisfy the bona fide effort requirement for these leases and extended each of them by five years. ER 485-86, 498-99, 502.

Soon thereafter, however, Calpine began advocating for 40-year additions to these leases under section 1005(a), in lieu of the 5-year extensions BLM granted under section 1005(g). ER 494-95. Hoping to leverage the "paying well" determination for Lease CA-12372, Calpine argued that all of the other leases "committed" to the Glass Mountain Unit were also entitled to 40-year additional terms. See ER 494-95. Calpine made this argument even though it had not located potentially viable resources on any leasehold or produced evidence of a common pool beyond Lease CA-12372.

BLM properly rejected this request as inconsistent with the GSA. BLM's California State Director noted that "the 40 year extension may only be applied to the lease with the well capable of production and not to the other committed leases

in the Unit." ER 482. He correctly reasoned that the relevant statutory and regulatory provisions for 40-year additions apply only to individual leases, unlike the provisions controlling 5-year extensions, which explicitly apply to entire units. ER 482. The Director also expressed concerns about BLM's recourse if all leases in the unit were continued for 40 years and diligent exploration did not occur. ER 482-83.

Many of the Director's concerns were realized in 1995, when BLM determined that Calpine had failed to achieve reasonable diligence in the Unit. Specifically, BLM observed that Calpine was not proceeding with a continuous drilling program as required by the Unit Agreement and by the previously approved Plan of Operation. ER 472-74. Because Calpine did not drill at all during the 1994-1995 period, it was "in default of meeting reasonable diligence in the Unit," and the subsequent 1995-1996 Plan of Operation improperly failed to include any proposed drilling activities. ER 473. In fact, the existence of the Unit was "actually causing more harm to future geothermal development . . . than good, and [was] no longer of any significant benefit to BLM." ER 473.

The following year, BLM warned that Calpine was also in default of its obligation to designate a participating area. ER 469. The State Director explained that the regulations and the Unit Agreement required Calpine to submit a participating area "reasonably proved to be productive" within 5 years after the

"paying well" determination on Lease CA-12372 – or by February 1994. ER 469 (quotation marks omitted). This legal interpretation was consistent with the BLM Manual on Unitization, which provided that "[t]he initial participating area under an exploratory unit agreement is established by the completion of the first unit well capable of producing substances in paying quantities." ER 544. The Manual explained that, after the first paying well determination for a unit, the operator must establish a participating area of land reasonably proven capable of producing commercial resources within the 5-year timeframe provided by the Unit Agreement. ER 548-50.

Because Calpine failed to designate a participating area by 1996 – and still has not done so 18 years later – BLM determined that the Unit Area should have contracted down to an area drained by Well 31-17, the only well in the Unit deemed capable of producing geothermal resources in commercial quantities. ER 469. Had BLM followed through on this directive, only Lease CA-12372 (which already enjoyed a 40-year addition) would have remained in the Unit.

4. BLM Reverses Course in 1998 and Grants Calpine 40-year Additional Terms.

Although Calpine failed to satisfy its statutory due diligence requirements during the initial 5-year extension of the leases in the early 1990s, BLM did a dramatic about-face in May 1998. As the second lease expiration date approached, Calpine redoubled its pressure for a new decision vacating the prior 5-year

extensions and, in their place, granting 40-year additional terms to all 26 leases. ER 465-67. Frustrated by years of continued lessee non-compliance, BLM ultimately capitulated, apparently in the belief that it might spur Calpine into compliance. The "record" supporting this abrupt reversal is a single internal agency memorandum dated May 13, 1998. ER 456-61. Neither this document nor the actual decision notice issued five days later contains a diligent or bona fide efforts determination of any kind. ER 453-55, 456-61. Indeed, Calpine had not remedied its default or conducted any additional drilling since the 1996 non-compliance notice. ER 464.

The 1998 lease extension decision was based on something else entirely. The decision memo first recounts BLM's long-standing interpretation of the GSA, Calpine's ongoing non-compliance, and the potentially indefinite lifespan of the Unit as a result of BLM's reluctance to enforce the Agreement's terms. ER 457 (noting that the Unit Agreement may not have been legal at the time of its execution); see generally ER 158-83. The memo explained that, to address these concerns, "BLM has now placed a timeframe on the Glass Mountain Unit through the requirement to submit an initial [Participating Area]." ER 461; see also ER 460-61 (noting its demand for submission of a participating area schedule in the 1996 notice, even though that schedule had not been satisfied in the intervening two years). Thus, the basis for BLM's extension decision was not a diligent efforts

determination, but rather BLM's hope that by continuing the leases, Calpine would do what the law required.

The effect of BLM's May 18, 1998, decision was to add 40 years to all 26 leases without any finding that Calpine satisfied its due diligence obligations, without any public process, without any environmental or cultural impacts review, and without any tribal consultation.

5. BLM Rejects Subsequent Geothermal Development in the Highlands and Then Reverses Course Once Again.

In 1997, Calpine applied for approval of its proposed Telephone Flat Geothermal Development Project on six of the Unit leases. It was only upon receiving this application that BLM commenced any environmental review and consultation. In 2000, BLM denied a permit for the Project on the basis of significant adverse impacts to Native American cultural values and other environmental amenities. ER 329; see also ER 336-37. The extensive ethnographic study prepared for the development project revealed that, even if the project did not physically alter Medicine Lake, it "would result in the lake losing its spiritual and cultural value for tribal members." ER 337. Because tribal interactions with Medicine Lake Highlands would be "lost to future generations," BLM determined that "[t]he only appropriate avenue for preserving th[e] culture of the area [was] to deny the development of the Telephone Flat Project," ER 343-44, and simultaneously imposed a five-year development moratorium to allow for

further study, ER 351. Just one year later, however, BLM lifted the moratorium, Pit River I, 469 F.3d at 778, and approved the Telephone Flat project in the face of Calpine's regulatory taking lawsuit, ER 324-36.

PROCEDURAL BACKGROUND

In 2002, Plaintiffs Pit River Tribe, Native Coalition, and Ecology Center filed suit in the Eastern District of California challenging BLM's decision to grant 5-year extensions under section 1005(g) for two similar leases (not at issue here) and its subsequent approval of the Fourmile Hill development project. This Court reversed the district court's summary judgment for Defendants, holding that because BLM had discretion in granting the lease extensions, it had to first comply with NEPA, the Preservation Act, and its fiduciary trust obligations. Pit River I, 469 F.3d at 780-88.

While that case was pending, the same Plaintiffs brought a second action, challenging BLM's 1998 decision to add 40 years to the 26 other non-producing leases. Pit River Tribe v. BLM, Case No. S-04-0956 (E.D. Cal., filed May 17, 2004) ("Pit River II"). Separately, Save Medicine Lake Coalition and Medicine Lake Citizens filed an action in the same court challenging BLM's 1998 lease decision, as well as BLM's subsequent approval of the Telephone Flat development project and its earlier approval of the Fourmile Hill project. See Save

Medicine Lake Coalition v. BLM, Case No. S-04-0969 (E.D. Cal., filed May 18, 2004) ("Save Medicine Lake").

Calpine's filing of a bankruptcy petition in 2005, and a voluntary stay between the parties pending resolution of Pit River I, delayed adjudication of these two lawsuits. Following the resolution of Pit River I by this Court, and after Calpine emerged from bankruptcy in 2008, the parties engaged in unsuccessful settlement talks for four years. In 2012, Defendants inexplicably withdrew the Telephone Flat development project, and the district court consolidated Pit River II and Save Medicine Lake. Pursuant to stipulation, Plaintiffs filed an amended complaint that narrowed the claims in the consolidated case to the 1998 lease decision. ER 294-323. By that time, Federal Defendants had produced a partial administrative record, but Plaintiffs were still awaiting response to a long outstanding request to complete the record.

On April 17, 2013, Federal Defendants and Calpine served Plaintiffs with motions for judgment on the pleadings. ER 124-50, 205-40. During the middle of briefing, Federal Defendants filed a Supplemental Administrative Record containing lease-related documents. See District Court Dkt. No. 67 (May 15, 2013). The district court declined to consider these documents or the earlier record and granted Defendants' motion for judgment on the pleadings. ER 44-91. Defendants' proposed order memorializing the judgment, entered without

alterations by the district court, held in relevant part, that (1) Plaintiffs lacked prudential standing to bring their GSA claims and (2) because the 40-year lease additions were automatically mandated by the GSA, BLM lacked the discretion necessary to trigger its obligations under NEPA, the Preservation Act, and the fiduciary trust doctrine. ER 25-43. Plaintiffs timely appealed. ER 1-2.

STANDARD OF REVIEW

The Court reviews de novo a district court's judgment on the pleadings under Federal Rule of Civil Procedure 12(c). Ileto v. Glock, Inc., 565 F.3d 1126, 1131 (9th Cir. 2009). "Judgment on the pleadings is properly granted when, taking all allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co., 50 F.3d 1486, 1488 (9th Cir. 1995). "We accept all allegations of fact by the party opposing the motion as true, and construe those allegations in the light most favorable to that party." Bagley v. CMC Real Estate Corp., 923 F.2d 758, 760 (9th Cir. 1991). The Court also reviews questions of statutory interpretation de novo. J. & G. Sales Ltd. v. Truscott, 473 F.3d 1043, 1047 (9th Cir. 2007).

The Court reviews BLM's actions under the APA, which authorizes courts to set aside an action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. § 706(2)(A); see also Native Ecosystems Council v. Weldon, 697 F.3d 1043, 1050-51 (9th Cir. 2012). An

agency's decision is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Native Ecosystems Council, 697 F.3d at 1050-51 (quotation omitted).

SUMMARY OF ARGUMENT

The Medicine Lake Highlands are sacred and beloved. And they are endangered. Not only by the possibility of geothermal development itself, but by the federal government's failure to make lawful, informed, and reasoned decisions about whether to allow such development. The GSA authorizes BLM to issue geothermal leases, but requires that lessees make a good faith effort to demonstrate in a timely manner that their leases have real geothermal potential. Meanwhile, NEPA, the Preservation Act, and the fiduciary trust doctrine ensure that BLM takes into account the places and people its geothermal leasing decisions may harm. Plaintiffs sued BLM and Calpine because they have not complied with these requirements. BLM has never fully evaluated the potential consequences of opening the Highlands to geothermal development, despite many opportunities to do so. The most recent opportunity was in 1998, when BLM inexplicably gave

Calpine 40 more years to exploit the Highlands, without meeting the requirements of the GSA or conducting any environmental review or tribal consultation.

Equally inexplicable, the district court declined to give Plaintiffs their day in court. Rather than decide whether BLM's actions were lawful, the district court held that Plaintiffs lacked prudential standing to challenge them, based on a cramped reading of the GSA. For the claims the court did consider on the merits, the court failed to comprehend how the GSA actually works or to grasp the myriad ways in which BLM's decision to extend Calpine's leases for more than a generation was discretionary, such that BLM had to comply with NEPA, the Preservation Act, and the fiduciary trust doctrine. The district court reached its conclusions not on summary judgment, which would have given Plaintiffs a real opportunity to present their arguments and evidence, but by declining to review the record on which BLM's decision was made.

The district court made three specific errors. First, the court misapplied the prudential standing doctrine to hold that Plaintiffs' interests are not among those the GSA protects. The Supreme Court and this Court have been clear that prudential standing is not an "especially demanding" test and that a statute's zone of interests is defined by the statute as a whole, not the particular provision a plaintiff seeks to enforce. Plaintiffs' diverse spiritual, environmental, and property interests overlap with the GSA's goal of ensuring environmentally responsible

geothermal development that respects other uses and users of public lands. People who pray in, live amidst, and recreate on public lands have as much stake in how BLM administers the GSA as does a company that seeks to exploit those lands' resources.

Second, because the district court held that Plaintiffs lacked prudential standing, it failed to understand that BLM violated the GSA when, in 1998, it extended Calpine's leases by 40 years. Section 1005(a) of the GSA permits BLM to grant such additional terms only where a lease is deemed capable of producing commercial quantities of geothermal steam; otherwise, a lessee can receive at most two 5-year extensions under section 1005(g). Since securing its leases in the 1980s, Calpine has demonstrated that, at most, only one of its leases is so capable, and for years BLM took the position that only that lease was eligible for a 40-year additional term. Then, in 1998, BLM creatively reinterpreted the GSA to bootstrap Calpine's single "capable" lease to 26 leases with no demonstrated geothermal potential. BLM made this decision even though it knew that Calpine was in default of its lease obligations. The result was that all 27 leases were extended by 40 years without any environmental or cultural review or consultation. This about-face was arbitrary and not in accordance with the GSA; BLM's only legal option for further extending Calpine's leases was to grant 5-year extensions, a clearly

discretionary act requiring environmental review and consultation under Pit River I, 469 F.3d at 780.

Third, even if BLM could properly grant a 40-year additional term under GSA section 1005(a), that decision still would be discretionary, meaning that BLM must comply with NEPA, the Preservation Act, and the fiduciary trust doctrine. The plain language of section 1005(a) states that additional terms "shall" be granted, but only "so long as" the lessee makes "diligent efforts" in utilizing geothermal resources. BLM exercises independent judgment in deciding whether a lessee meets this vague "diligent efforts" standard, just as it does in making "bona fide efforts" determinations under section 1005(g). Specifically, BLM's regulations and guidance require lessees to submit detailed environmental and other information to demonstrate diligent efforts, which, the record shows, BLM uses to decide whether to grant an additional term. Consistent with this discretionary process, BLM has explicitly clarified in its regulations that, where there is no actual production, the word "shall" really means "may." Under the case law, where an agency has discretion to make a decision or adopt conditions that could benefit environmental or cultural values, as here, that discretion implicates NEPA, the Preservation Act, and the fiduciary trust doctrine.

ARGUMENT

I. Plaintiffs Have Prudential Standing to Assert Their GSA Claims.

Plaintiffs are dedicated to protecting the Medicine Lake Highlands from industrial development that does not comply with the GSA and is not informed by adequate environmental review or tribal consultation. Their diverse spiritual, environmental, recreational, and economic interests fall squarely within the broad zone of interests the GSA protects. In ruling to the contrary, the district court misinterpreted the prudential standing case law. Indeed, the district court construed the GSA and Plaintiffs' interests so narrowly that it would allow only geothermal lessees to challenge the federal government's actions. Such a narrow construction is contrary to the GSA's plain meaning and the Supreme Court's long-held rule that the prudential standing test "is not meant to be especially demanding." Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2210 (2012) (quotation omitted).

A. The Prudential Standing Doctrine Bars Only Marginal Claimants.

Prudential standing is a judicially-created restraint to ensure that courts hear "real, earnest and vital controvers[ies]" with sufficiently "concrete adverseness." United States v. Windsor, 133 S. Ct. 2675, 2687 (2013) (quotations omitted).[8] The

[8] Article III standing and prudential standing are different. See Windsor, 133 S. Ct. at 2685. The Ninth Circuit has already affirmed that Plaintiffs have Article III standing. Pit River I, 469 F.3d at 778-80.

Supreme Court's and Ninth Circuit's most recent case law re-affirms that the prudential standing test is whether a plaintiff's interests are "arguably within the zone of interests to be protected or regulated by the statute that he says was violated." Match-E-Be-Nash-She-Wish, 132 S. Ct. at 2210 (quotation omitted); accord Association of Public Agency Customers v. Bonneville Power Administration, 733 F.3d 939, 954 (9th Cir. 2013) ("For a plaintiff to have prudential standing under the APA, the interest sought to be protected by the complainant must be arguably within the zone of interests to be protected or regulated by the statute in question.").

Consistent with congressional intent "to make agency action presumptively reviewable," the Supreme Court "ha[s] always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." Match-E-Be-Nash-She-Wish, 132 S. Ct. at 2210. The prudential standing test "do[es] not require any indication of congressional purpose to benefit the would-be plaintiff" and "forecloses suit only when a 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." Id. (internal quotations omitted). Indeed, Congress, in passing a statute delimiting one group's rights and privileges, implicitly puts parties adverse to that group within the statute's zone of interests. See, e.g., Nat'l Credit Union Admin. v. First Nat'l Bank

& Trust Co., 522 U.S. 479, 492-94 (1998) (holding that banks that compete with credit unions for customers were within the zone of interests of a statute defining credit union membership criteria).[9]

B. Plaintiffs' Spiritual, Environmental, Recreational, and Economic Interests in Protecting the Medicine Lake Highlands Fall within the GSA's Zone of Interests.

1. The GSA Protects Environmental and Cultural Interests.

The GSA delimits the rights and privileges of geothermal lessees by establishing strict deadlines for leased lands to be diligently developed and ensuring that they are returned to the public for other uses if they are not developed. The GSA also builds in layers of environmental and cultural protections to ensure that geothermal development is not unduly privileged above other uses of public lands. Together these requirements provide for a broad zone of protected interests.

Specifically, Congress made clear that the GSA protects all uses of public lands by directing BLM to administer the statute "under the principles of multiple use." 30 U.S.C. § 1016. Multiple use aims to "strik[e] a balance among the many competing uses to which land can be put, including but not limited to range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic,

[9] One plaintiff's standing extends to all others. See Massachusetts v. EPA, 549 U.S. 497, 518 (2007) ("Only one of the petitioners needs to have standing to permit [courts] to consider the petition for review.").

scientific and historical values." Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 58 (2004) (internal quotation marks omitted) (alteration in original). Thus, 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. 30 U.S.C. § 1005(b), (c). It contemplates lessee expenditures on "[e]nvironmental studies" as part of the exploration and development process, id. § 1005(j)(2)(A), and authorizes development of other minerals on geothermal leases, id. §§ 1005(e), (f).

Beyond these multiple-use requirements, Congress prioritized environmental and cultural uses of public lands in the GSA by specifically banning geothermal leasing in National Parks, Monuments, Seashores, Recreation Areas, and Wildlife Refuges, in other important wildlife areas, and on "tribally or individually owned Indian trust or restricted lands, within or without the boundaries of Indian reservations." 30 U.S.C. § 1014(c)(1)-(2). The GSA also bans leasing on lands managed or otherwise recognized for their wilderness characteristics, id. § 1027, and protects significant thermal features from harmful development, id. § 1026.

To ensure that BLM administers the GSA in line with these statutory mandates, Congress directed BLM to issue regulations protecting the environment and the public interest. See 30 U.S.C. § 1023(c), (f), (i) (requiring regulations to protect the "public interest," "surface use," "water quality[,] and other

environmental qualities"); accord 43 C.F.R. § 3250.0-3 (1997). BLM's regulations do just this. See, e.g., 43 C.F.R. §§ 3250.0-6, 3262.1, 3283.2-1, 3262.4(h), 3262.4-1(h) (requiring: development "in an environmentally acceptable manner;" operators to "take all reasonable precautions to prevent . . . any environmental pollution or damage;" consideration of "the environmental consequences" of unit agreements; and operation plans to protect against pollution and natural resources damage). Moreover, BLM recognizes the GSA's multiple-use mandate by incorporating environmental and cultural mitigation provisions into individual GSA leases. See, e.g., ER 532 (§§ 6, 7, 9), 533 (¶¶ 1-3), 617 (§§ 14-15, 18), 620 (¶¶ 2-3), 632 (§ 8), 633 (§§ 14-15, 18). Thus, BLM's own regulations and practices show that the GSA is about more than simply developing geothermal resources.

Finally, the GSA's legislative history evidences Congress's intent to marry geothermal development and environmental protection. Congress enacted the GSA in 1970 because it believed geothermal energy to be "particularly attractive in this age of growing consciousness of environmental hazards," S. Rep. No. 91-1160 (1970), and "a relatively pollution-free source of energy," H.R. Rep. No. 91-1544 (1970). Indeed, the environmentally-aware 91st Congress enacted the GSA in the midst of other statutes aimed at environmental protection, among them the Clean Air Act, Pub. L. 91-604, 84 Stat. 1676 (1970); NEPA, Pub. L. 91-190, 83 Stat. 852

(1970); and the Environmental Quality Improvement Act, Pub. L. 91-224 (1970). The 100th Congress that amended the GSA in 1988 was no less environmentally concerned; it explained that the 1988 amendments were a "dovetailing of interests between the environmental community and the geothermal industry." 100 Cong. Rec. H7372-74 (daily ed. Sept. 9, 1988) (statement of Rep. Nick Rahall).

2. Plaintiffs' Interests Are Within the GSA's Zone of Interests.

Plaintiff Pit River Tribe and its members have spiritual, cultural, and religious interests in protecting the Medicine Lake Highlands. The jagged obsidian cliffs, pure mountain lakes, and rugged buttes that make up the Highlands are a "unified cultural property" that has provided the Tribe with ethical and moral direction, and spiritual protection and guidance, for at least 10,000 years. ER 428-29. Preserving the Highlands from industrialization is imperative to the Tribe's spiritual wellbeing. In the Tribe's tradition, it is "imperative that any discord [in the Highlands] be controlled," since disruptions can cause the area to become spiritually hostile. ER 428. Pit River is not alone in deriving spiritual power from the Highlands; other tribes and individual Native American who are members of Plaintiff Native Coalition, including the Modoc, Shasta, and Wintu Tribes, also use the Highlands for spiritual purposes. ER 421-26.

Environmental Plaintiffs, inspired by the Highlands' majestic vistas and pristine wilderness, seek to protect it for environmental and aesthetic reasons. Plaintiffs Ecology Center and Save Medicine Lake Coalition are nonprofits whose members are committed to protecting the environmental integrity of the Highlands ecosystem for current and future generations. See ER 298 (¶¶ 10-11). And members of nonprofit Plaintiff Medicine Lake Citizens for Quality Environment were so compelled by the Highlands' beauty that they have purchased cabins there. As property owners, Medicine Lake Citizens' members have aesthetic and recreational interests in the Highlands, as well as an economic interest in protecting their property values from diminution by unlawful and uninformed industrial development. See ER 398; Match-E-Be-Nash-She-Wish, 132 S. Ct. at 2211 ("If the Government had violated a statute specifically addressing how federal land can be used, no one would doubt that a neighboring landowner would have prudential standing to bring suit to enforce the statute's limits.").

These cultural, spiritual, environmental, recreational, and property interests fall squarely within the broad zone the GSA protects. Indeed, Plaintiffs' desire to use the Highlands for spiritual, environmental, and recreational purposes are a textbook example of the "multiple uses" that GSA section 1016 directs BLM to balance with geothermal development. Ensuring that lands leased for geothermal development remain available for such "other purposes" if they are not being

diligently developed is the reason why Congress enacted strict lease expiration deadlines and rules in section 1005 and incorporated environmental and cultural concerns throughout the GSA.

Given these congruencies, it is not surprising that BLM has, until this litigation, interpreted the GSA as encompassing environmental considerations through its regulations and leases. Cf. Match-E-Be-Nash-She-Wish, 132 U.S. at 2210-12 (using agency's regulations and prior actions as evidence of the zone of interests protected by a statute). Nor is it surprising that this Court has repeatedly recognized that resource development statutes encompass environmental and cultural interests. See, e.g., National Wildlife Federation v. Burford, 871 F.2d 849, 853-54 (9th Cir. 1989) (environmental groups fell within the zone of interests protected by the Federal Coal Leasing Amendments Act); Kunaknana v. Clark, 742 F.2d 1145, 1148 (9th Cir. 1984) (Alaska Native plaintiffs fell within the zone of interests to challenge oil and gas leasing under the Naval Petroleum Reserves Production Act of 1976).

The conclusion here is self-evident: the GSA requires BLM to account for environmental and cultural considerations, and other users of public lands, in making decisions about geothermal exploration and development on the public lands the agency administers. Plaintiffs in this case seek to do precisely the same thing. Their interests therefore fall squarely within the GSA's zone of interests.

3. The Statute, Not a Particular Statutory Section, Determines the Applicable Zone of Interests.

The district court held that Plaintiffs lacked prudential standing because GSA section 1005(a) does not allow BLM to consider their "anti-development interests" when acting on lease continuations. ER 32-33. But the district court misinterpreted the prudential standing doctrine as defining the applicable zone of interests according to the specific subsection of the statute at issue, rather than the statute as a whole. A decision affirming the district court's unduly narrow view of prudential standing would insulate the federal government's decisions under the GSA from review by anyone other than geothermal lessees. See ER 65 (BLM counsel admitting as much at hearing).

To ascertain the GSA's zone of interests, the district court looked only to section 1005(a). Seeing no express mention of Plaintiffs' asserted interests there, the court held that Plaintiffs lacked prudential standing. The court relied primarily on Bennett v. Spear, 520 U.S. 154, 176 (1997), in which the Supreme Court referred to the "zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for [the] complaint." Id. at 176 (emphasis added).

However, the Supreme Court has consistently referred to "the zone of interests to be protected or regulated by the statute." Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970)

(emphasis added); accord Match-E-Be-Nash-She-Wish, 132 S. Ct. at 2210. While the Supreme Court and the Ninth Circuit sometimes refer to or emphasize a particular "statutory provision" when applying the prudential standing test, ER 31, the district court missed that, even in those cases, the Courts actually looked to more than just the particular statutory provision at issue when delineating the applicable zone of interests. For example, in Lujan v. National Wildlife Federation, 497 U.S. 871, 883, 886 (1990), the Supreme Court referred to the zone of interests protected by a specific "statutory provision," but actually defined those interests by looking to the entire statutes at issue (NEPA and the Federal Public Lands Management Act). Similarly, in Ashley Creek Phosphate Company v. Norton, 420 F.3d 934, 942-45 (9th Cir. 2005), the Ninth Circuit cited Bennett to look at the specific statutory provision at issue (NEPA section 102), but found it "impossib[le] [to] divorc[e] § 102 from the overall purpose of NEPA." Id. at 944. The Court explained that "§ 102 of NEPA cannot be separated from the statute's overarching purpose of environmental protection," and accordingly looked to NEPA generally to determine whether plaintiffs had prudential standing. Id. at 945.[10]

[10] See also Nat'l Credit Union Admin., 522 U.S. at 492-94 (holding that banks were within zone of interests protected by statute regulating their competitor credit unions); Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1179-80 (9th Cir. 2000) (looking beyond Federal Lands Policy Management Act section 206(b) to conclude that plaintiffs were within zone of interests protected by statute as a

In short, GSA section 1005(a) cannot be divorced from the statute's overall language and purpose. The GSA provides a framework to develop geothermal resources on public lands while ensuring that lands not being diligently developed are available and protected for other public uses. Plaintiffs accordingly fall within the zone of interests the GSA protects.[11]

If this Court adopts the district court's cramped interpretation of prudential standing, no party other than a lessee would ever have standing to challenge a decision by BLM to extend a geothermal lease for 40 years, and no lessee would ever challenge that favorable outcome. As a result, BLM would be entirely

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whole); Nuclear Info. & Res. Serv. v. NRC, 457 F.3d 941, 950 (9th Cir. 2006) (same with respect to NEPA section 102).

The district court cited (ER 31 n.3) Air Courier Conference of Am. v. Am Postal Workers Union AFL-CIO, 498 U.S. 517, 529-31 (1991), but that case is inapposite. There the Supreme Court refused to use the provisions of one statute to conclude that the plaintiff had standing to sue under another.

[11] Plaintiffs still would have prudential standing even under a more stringent reading of the case law. In Bennett, 520 U.S. at 176-77, the Supreme Court defined the Endangered Species Act's zone of interests by looking to section 7(h), even though the case concerned compliance with only section 7(a)(2). Thus, at a minimum, the district court needed to look not just to GSA subsection 1005(a), but to section 1005 generally. There the court would have seen references to "environmental studies," "lands . . . needed for other purposes," and other language encapsulating Plaintiffs' interests. 30 U.S.C. § 1005(b), (c), (j)(2)(D).

Even looking just at section 1005(a), that subsection allows 40-year additional terms only for geothermal leases that are being, or actually may be, developed; otherwise the lands subject to them are released for other uses. Such limits confer prudential standing to parties who stand to benefit from them. See Nat'l Credit Union Admin., 522 U.S. at 492-94 (holding that banks that compete with credit unions for customers were within the zone of interests of a statute setting limits on who may join a credit union).

unaccountable to the public in making lease decisions under section 1005. That result just cannot be right. Just as untenable, under the district court's approach, Congress must identify in every subsection of every statute every interest it seeks to further. If it does not, plaintiffs whose interests are not expressly referenced in a particular subsection may not sue to enforce it. Plaintiffs would lack prudential standing to challenge compliance with a host of leasing statutes. That is manifestly not the law. See Burford, 871 F.2d at 853-54 (environmental groups fell within interests protected by the Federal Coal Leasing Amendments Act); Kunaknana, 742 F.2d at 1148 (Alaska Native plaintiffs challenging oil and gas leasing fell within interests protected by the Naval Petroleum Reserves Production Act).

In sum, Plaintiffs in this case use and enjoy the Medicine Lake Highlands for spiritual and recreational purposes; some even call the Highlands home. BLM has decided to commit some of these special, public lands to another 40 years of potential industrial development under the GSA, a statute that is designed to ensure that geothermal development makes sense and occurs responsibly. Plaintiffs have as much a stake in the outcome of BLM's decisionmaking process as does a company that is seeking to profit from that development. Any contrary notion is unreasonable and unjust.

II. The Court Should Reverse the District Court's Ruling and Grant Judgment for Plaintiffs on their Four Claims.

The question whether BLM could lawfully extend Calpine's leases by an additional 40 years lies at the center of this case. Although the district court did not reach this question (because of its prudential standing holding), this Court can and should answer it "no." Under the GSA and its implementing regulations, BLM was authorized to grant a 40-year additional term only to Lease CA-12372, the single lease in the Glass Mountain Unit with a well deemed capable of commercial production. The GSA and BLM's regulations do not allow BLM to apply a 40-year additional term to the other leases in a unit, and, even if they did, Calpine's other 26 leases would not be eligible for 40-year additional terms based on the factual record. Accordingly, Plaintiffs, not Defendants, are entitled to judgment on their First Cause of Action.

But even if the Court were to conclude that Plaintiffs lack prudential standing to pursue a GSA violation, the district court erred in dismissing the Second, Third, and Fourth Causes of Action (for NEPA, Preservation Act, and Indian fiduciary trust violations, respectively). The court's judgment turned on the erroneous conclusion that the GSA mandates 40-year additional terms for the leases in question; BLM, the court reasoned, therefore lacked the discretion needed to trigger its environmental review and tribal consultation obligations.

This conclusion is incorrect. The GSA automatically continues leases only where actual production or utilization has occurred during the primary term. No lease in the Medicine Lake Highlands – not even Lease CA-12372, with its "paying well" determination – has ever satisfied this condition. For Calpine's other leases, BLM needed to make a factual determination that Calpine was making diligent progress. That determination, and with it the discretionary decision to grant or deny a 40-year additional term, triggers BLM's environmental review and consultation requirements. Pit River I, 469 F.3d at 780, 787, 788.

A. Plaintiffs Are Entitled to Judgment on Their GSA Claim.

Plaintiffs should prevail on their First Cause of Action under the GSA for two reasons. First, the GSA does not authorize 40-year additional terms for individual leases that do not have either a producing well or a "paying well" deemed capable of commercial production. BLM therefore erred in granting 40-year additions for the 26 leases where no "paying well" has been drilled. Second, even if leases without paying wells can obtain 40-year extensions, the facts show that Calpine did not satisfy the diligent efforts requirement of either the GSA or the Unit Agreement and that BLM did not make any diligent efforts determination. To the contrary, BLM had a mandatory duty to contract the Unit and terminate the Agreement for Calpine's failure to comply with the diligence requirements. Inexplicably, the agency elected to expand the leases rather than terminate them.

1. The GSA and BLM's Regulations Permit BLM to Grant 40-year Additional Terms Only to Individual Leases with Demonstrated Geothermal Potential.

Until it dramatically reversed course in May 1998, BLM correctly interpreted GSA section 1005(a) to apply only to individual leases, on a lease-by-lease basis: "[W]e believe that the 40 year extension may only be applied to the lease with the well capable of production and not to the other leases committed to the unit" because "the Act and the implementing regulations refer specifically to individual leases (lease by lease basis), not leases within" a unit agreement. ER 482 (rejecting Calpine's contrary interpretation). Because there has never been a "paying well" determination for any of the 26 leases, section 1005(a) simply does not apply to them.

BLM's long-standing interpretation is supported by the statutory language. Section 1005(a) provides: "If geothermal steam is produced or utilized in commercial quantities within [the primary] term, such lease shall continue . . . ." 30 U.S.C. § 1005(a) (emphasis added). In contrast, sections 1005(c) and 1005(g), both of which authorize shorter 5-year extensions, apply to "[a]ny lease for land on which, or for which under an approved cooperative or unit plan of development or operation . . . ." Id. § 1005(c), (g) (emphasis added). Section 1005(a)'s use of "such lease," and the conspicuous absence of the phrase "any lease . . . under an approved cooperative or unit plan," support BLM's long-held "lease by lease"

interpretation. Had Congress intended 40-year additions to apply to every lease "committed" to a unit agreement, it would have said so. See Gomez-Perez v. Potter, 553 U.S. 474, 496 (2008) ("Where 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." (quotation and alteration omitted)).

Notably, BLM embraced this statutory distinction in its own regulations. 43 C.F.R. subpt. 3203 (1997). The regulation governing "additional terms" under GSA sections 1005(a) and (d) provides: "If geothermal resources are produced or utilized in commercial quantities within the primary term or any extended term of a lease, that lease shall continue for so long thereafter as geothermal resources are produced or utilized in commercial quantities or so long thereafter as the operator is making diligent efforts to commence production or utilization of geothermal resources in commercial quantities." Id. § 3203.1-3(a) (emphasis added). In contrast, the regulation governing "extensions" under GSA sections 1005(c) and (g) provides: "Any lease for land on which, or for which under an approved . . . unit plan of development or operation, actual drilling operations were commenced . . . shall be extended a period of 5 years." 43 C.F.R. § 3203.1-4(b) (emphasis added). Taking its direction from Congress, BLM properly interpreted section 1005(a) to require lease-by-lease evaluation.

Where an agency changes its prior position, it must provide "a reasoned explanation" for "disregarding facts and circumstances that underlay or were engendered by the prior policy." FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); cf. Humane Society of U.S. v. Locke, 626 F.3d 1040, 1049 (9th Cir. 2010) (agencies must explain disparate findings in the record). In this case, BLM did not offer a reasoned analysis, or even a coherent explanation, for its changed statutory interpretation. Rather, BLM ultimately relented to continuous industry pressure for a different interpretation, apparently as a practical way to resolve enforcement issues with a recalcitrant lessee. See ER 460 (BLM noting that 1996 directive to submit a participating area schedule within 60 days, which never happened, would address BLM's concern over the Unit's "indefinite lifespan"). But the failure of a lessee to satisfy its statutory and contractual obligations does not justify rewriting the law, and rewriting the law to accommodate a lessee's non-compliance is not a reasonable rationale for departing from a long-standing (and correct) statutory interpretation.

2. BLM Did Not Make Any "Diligent Efforts" Determination, nor Could It Have Based on the Factual Record.

Having concluded that Plaintiffs could not pursue a GSA claim, the district court refused to review the factual record supporting that claim. The record demonstrates only one thing: Calpine was in chronic default of its diligent efforts obligations under the GSA and the Unit Agreement during the 1990s. Calpine

failed, for instance, to implement the approved 1994/95 exploration plan. ER 473. It failed to submit an adequate 1995/96 exploratory drilling plan. ER 472. It failed to submit a participating area schedule by the 1994 deadline. ER 469. And, despite BLM's 1996 directive to remedy this non-compliance within 60 days, Calpine still had failed to comply by 1998. Yet BLM responded to Calpine's ongoing violations not with contraction of the Unit or termination of leases, as the law required, but with 40-year additions to the non-compliant, non-producing leases. ER 453-55.

Given this history of default, BLM did not even pretend to make the "diligent efforts" determination required by sections 1005(a) and (d). The May 13, 1998, memorandum justifying the 40-year additions did not discuss the diligent efforts requirement, let alone demonstrate its satisfaction. Instead, the memo focused entirely on Calpine's ongoing non-compliance and BLM's efforts to coax Calpine into completing the exploration work necessary to define and contract the Unit to a rational participating area. ER 456-61.

The district court concluded that none of these facts mattered because even parties like Plaintiffs, who have a deep and abiding interest in the Medicine Lake Highlands, have no standing to hold BLM accountable under the GSA. The real-world implications of the court's conclusion are startling: More than three decades after the 10-year leases were issued, Calpine continues to speculatively hold these

public assets without any fear of meaningful enforcement by an absentee landlord. In the meantime, other users deeply connected to the area remain hostage to each new development scheme. Had BLM properly contracted the Unit to the participating area drained by Lease CA-12372, much of the leased land would have long ago been freed for those "other purposes." Unless interested citizens can enforce the mandatory provisions of the GSA, Calpine's long-stagnant leases will continue to lock up these valuable public lands for decades to come.

B. Plaintiffs Are Entitled to Judgment on Their NEPA, Preservation Act, and Indian fiduciary Trust Claims.

Even if BLM could grant 40-year additions for Calpine's 26 non-producing leases, or the Court declines to consider the issue on prudential standing grounds, the Court can and should find for Plaintiffs on their NEPA, Preservation Act, and Indian fiduciary trust claims. Defendants argued, and the district court held, that BLM had no discretion in granting the 40-year additional terms, i.e., that the leases continued "automatically" by statutory mandate. ER 34-38, 224, 231. This conclusion flouts (1) the GSA's plain language, (2) BLM's long-standing regulations and guidance, and (3) BLM's conduct in this case.[12]

[12] The Court examines these things to assess an agency's discretion. See Karuk Tribe of California v. U.S. Forest Service, 681 F.3d 1006, 1025-26 (9th Cir. 2012) (en banc) (Forest Service's regulations and formulation of mandatory criteria in Notices of Intent indicated discretion); Turtle Island Restoration Network v. NMFS, 340 F.3d 969, 975-76 (9th Cir. 2003) (same conclusion based on

1. The Plain Language of the GSA Requires the Exercise of Agency Discretion for All Lease Additions or Extensions Except Where There Is Actual Production or Utilization.

"The starting point for . . . interpretation of a statute is always its language." U.S. v. Gallegos, 613 F.3d 1211, 1214 (9th Cir. 2010). The district court concluded that the "shall continue" language in section 1005(a) rendered the 40-year lease additions mandatory and, therefore, any environmental review or tribal consultation "would have been superfluous." ER 35-36, 82-83. That conclusion ignored a key clause in the statute and is erroneous as a matter of law.

No geothermal steam "is produced or utilized in commercial quantities" – or has ever been produced or utilized in any amount – anywhere in the Medicine Lake Highlands. Thus, section 1005(a) alone does not govern any of Medicine Lake leases, including Lease CA-12372. The only way section 1005(a) can apply to any of Calpine's leases is through section 1005(d), which defines the phrase "produced or utilized in commercial quantities" to mean either (1) "the completion of a well producing geothermal steam in commercial quantities," or (2) "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). That is, for a non-producing lease, the completion of a well deemed capable of commercial

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Endangered Species Act's plain language and purpose and agency's protections in permits).

production allows the lease to continue, but only if and "so long as" BML makes the requisite diligent efforts determination.

The phrase "shall continue . . . so long as the Secretary determines that diligent efforts are being made" is simply not the same as "shall continue." The due diligence language of section 1005(d) is nearly identical to the statutory language of section 1005(g), which authorizes 5-year extensions "if the Secretary determines that the lessee has met the bona fide effort requirements." 30 U.S.C. § 1005(d)(1). This Court already found in Pit River I that section 1005(g) conveys sufficient discretion on BLM to trigger environmental review and consultation requirements. 469 F.3d at 788. The nearly identical language in section 1005(d) should be read to convey the same discretion. See In re Consolidated Freightways Corp. of Delaware, 564 F.3d 1161, 1165 (9th Cir. 2009) ("[W]hen language is used in one section of a statute and the same language is used in another section, we can infer that Congress intended the same meaning.").

2. BLM's Implementing Regulations Underscore that Decisions to Grant or Deny Non-producing Leases 40-year Additional Terms Are Discretionary.

The regulations BLM has promulgated to implement the GSA undercut the agency's litigating position that 40-year additions for non-producing leases are automatic and mandatory. The regulations in effect in May 1998 provided that producing leases "shall continue" for up to 40 years. 43 C.F.R. § 3203.1-3(a). But

they also provided that "[i]f a lease is not actually producing or utilizing geothermal resources at the end of its primary or extended term, but has a well capable of producing or utilizing geothermal resources in commercial quantities, the operator shall, at least 60 days prior to the anniversary date of the lease, provide the authorized officer a description of diligent efforts completed for the lease year and planned for the following year." 43 C.F.R. § 3203.1-3(b).

This "description of diligent efforts" might include, for example, "descriptions of negotiations for geothermal resources and/or other electricity sales contracts, marketing arrangements, electrical generating and/or transmissions agreements, and operations conducted or planned to better define the geothermal resource." Id. The regulations required very similar submissions to support the "bona fide efforts" determination for 5-year lease extensions that were held discretionary in Pit River I. Id. § 3203.1-4(c) (description of operations conducted and planned, actions taken to secure permits, actions taken "to negotiate marketing arrangements, sales contracts, drilling agreements, financing for electrical general and transmissions projects," and current economic factors and conditions). If 40-year lease additions were "automatic" or "mandatory," as BLM claims, the agency would have no reason to collect and scrutinize such detailed information.

A few months after the May 1998 decision, BLM published a new, more accessible edition of its regulations. Pursuant to presidential directive, these

revisions were intended to rewrite the regulations in "plain language style." 63 Fed. Reg. 52,356, 52,356 (Sept. 30, 1998). The restructured regulations addressed 40-year lease additions and 5-year lease extensions in two separate sections. For 40-year additions under section 1005(a), BLM confirmed:

- "If you produce or use geothermal resources in commercial quantities during the primary term, your lease **will** continue in additional term for as long as you produce or use geothermal resources in commercial quantities for up to forty years beyond the primary term."

- "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(a)-(b) (1998) (emphasis added). With no change in the underlying GSA, the 1998 regulatory revisions simply clarified in more understandable language BLM's correct view that non-producing leases "may" continue, based on BLM's discretionary decision on the facts before it, while producing leases "will" continue. See Pope v. Shalala, 998 F.2d 473, 483-84 (7th Cir. 1993) (applying clarifying regulations retroactively because they "[do] not change the law, but restate[ ] what the law according to the agency is and has always been"), overruled on other grounds by Johnson v. Apfel, 189 F.3d 561 (7th Cir. 1999); cf. FHA v. Darlington, Inc., 358 U.S. 84, 90 (1958) (subsequent legislation is not conclusive of legislative intent, but a "later law is entitled to weight when it comes to the problem of construction"). In fact, BLM regulations

continued to articulate this "will/may" distinction between producing and non-producing leases at least through 2005, when Congress rewrote the GSA. See, e.g., 43 C.F.R. § 3207.10 (2004) (using same language).

3. As Evidenced by Past Agency Practices and GSA Guidance, BLM's Discretion Here Extends to Environmental Concerns.

Defendants will likely argue, as they did below, that whatever discretion the GSA conveys, that discretion does not extend to consideration of environmental resources or other users of the leased lands. This Court already rejected this argument in Pit River I, where Defendants claimed that section 1005(g) deprived BLM of discretion to consider environmental concerns in connection with the similar "bona fide efforts" determination for the 5-year extensions: "NEPA and NHPA procedures do not apply when an agency has no discretion to deny or condition an action based on environmental or historic property concerns. . . . The BLM regulations confirm that the criteria for granting extensions do not extend beyond the simple documentation of Calpine's efforts with regard to geothermal development and related lease payments and expenditures. . . ." Defendants' Answering Brief, 2004 WL 2919534, at *34-35 (Nov. 4, 2004) (citing 30 U.S.C. § 1005(g); Babbitt, 65 F.3d at 1512). The Court disagreed before and should do so again.

Environmental and cultural protection pervades BLM's decisions about how to administer geothermal leases. For instance, all lessees must comply with BLM's 1976 "Geothermal Resources Operational Orders" ("GRO Orders"). See 43 C.F.R. § 3204.1 (1997). GRO Order No. 4, which covers "General Environmental Protection Requirements," requires that lessees conduct all operations "in a manner that provides maximum protection of the environment," maintain the aesthetics of the lease site, "afford reasonable protection of fish, wildlife, and natural habitat," replace destroyed fauna or flora, protect "significant . . . historical, cultural, . . . and unique geological sites," prevent pollution, and protect water quality, among other requirements. GRO Order No. 4 at 18-30.[13]

Similarly, BLM's standard geothermal lease requires mitigation to prevent "the pollution of land, air or water;" "damage to aesthetic and recreational values;" and "damage to or destruction or loss of fossils, historic or prehistoric ruins, or artifacts." See, e.g., ER 532 (§§ 6, 7, 9), 617 (§§ 14-15, 18), 632 (§ 8), 633 (§§ 14-15, 18). Many of the specific leases at issue in this case include stipulations to protect environmental and cultural resources. See, e.g., ER 533 (prohibiting surface disturbances near water sources), 620 (requiring cultural clearance for surface disturbing operations), 669 (allowing denial of operations that would

[13] *Available at* http://www.blm.gov/pgdata/etc/medialib/blm/nv/minerals/geothermal.Par.87807.File.dat/BLM%20GEOTHERMAL%20ORDERS%201970%20Order%204.pdf (last visited Feb. 3, 2014).

adversely impact recreational uses), 708 (prohibiting surface occupancy that could damage lava fields). BLM has the authority to cancel any lease for non-compliance with diligence or other requirements. 43 C.F.R § 3244.3. Even when a lease has been lawfully extended, BLM may periodically readjust its terms and conditions. Id. § 3203.9. Given its multiple use mandate on these National Forest lands, BLM surely has discretion to consider and balance competing interests before making a new decision to dramatically expand the leaseholds. See 16 U.S.C. § 1604 (articulating multiple use mandate for National Forests); 30 U.S.C. § 1016 (incorporating "principles of multiple use of lands and resources" into GSA).

Notably, before BLM granted a 40-year addition for Lease CA-12372, Calpine submitted, and BLM reviewed, information regarding a "Subsurface Logging Program," a "Core Analyses Program," "Surface Water Sampling" and "Environmental Activity," and an assessment of nearby spotted owl habitats. ER 478-80; see also ER 475-77, 491-93 (other "diligent effort" submissions addressing environmental concerns). 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 for 40 years. Thus, environmental review and tribal consultation were required for BLM's 1998 decision to do so. See, e.g., Karuk Tribe, 681 F.3d at 1030 (holding Forest Service's issuance of "Notices of

Intent" sufficiently discretionary to trigger the ESA's consultation requirement because the agency's actions "could" benefit endangered species); Turtle Island Restoration Network, 340 F.3d at 977 (holding that Fisheries Service's issuance of fishing permits triggered ESA consultation requirement because agency's actions "could" protect endangered species).

The argument for discretion is especially strong here, where the lessee failed to demonstrate any commercial development potential over 15 years, but demanded a 40-year expansion for leases that have never undergone environmental review or tribal consultation. In the three decades since lease issuance, while Calpine has done little or nothing, mounting evidence has revealed that development will have devastating impacts on deeply-held religious views and practices, traditional cultural values, pristine environmental resources, and rare opportunities for recreation. Had BLM either enforced the contractual termination provisions or exercised its independent judgment to determine that Calpine's efforts did not warrant extension, Plaintiffs and other users of the leased lands would have reaped the environmental and cultural benefits they hold so dear. See Karuk Tribe, 681 F.3d at 1025-26.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's judgment and remand the case for entry of judgment in Plaintiffs' favor.

Date: February 3, 2014

Respectfully submitted,

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By: _____
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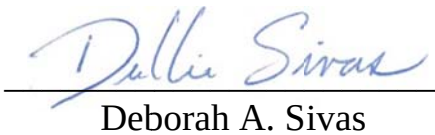
STATEMENT OF RELATED CASES

Counsel for Plaintiffs-Appellants represent that Pit River Tribe v. Bureau of Land Management, Ninth Cir. No. 14-15123, is related to this case.

On July 30, 2013, the district court entered judgment for Defendants-Appellees Bureau of Land Management, et al. on July 30, 2013. See District Court Dkt. No. 85. The instant case is an appeal from that judgment. On November 26, 2013, the district court entered an order overruling Plaintiffs-Appellants' objection to the Federal Defendants bill of costs. See District Court Dkt. No. 96. Appeal No. 14-15123 is an appeal from that November 26, 2013, order.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 13,989 words, exclusive of tables and cover sheet.



Deborah A. Sivas

9th Circuit Case Number(s) 13-16961

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