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' REPLY BRIEF

Deborah A. Sivas (CA Bar No. 135446)
Alicia E. Thesing (CA Bar No. 211751)
Matthew J. Sanders (CA Bar No. 222757)
Anuja Diwakar Thatte (CA Bar No. 31750)
ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic of Stanford Law School
559 Nathan Abbott Way
Stanford, California 94305-8610
Telephone: (650) 723-0325
Facsimile: (650) 723-4426

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL STATUTES

FEDERAL RULES AND REGULATIONS

INTRODUCTION

Defendants' Answering Brief obscures and substantially conflates the issues on appeal in this case. Below, Plaintiffs attempt to untangle the resulting confusion by clarifying the actual facts and the actual law. We begin by highlighting six incontrovertible points.

1. The Bureau of Land Management ("BLM") did not determine in 1998 (or since) that "diligent efforts are being made toward the utilization of the geothermal steam," as required for a 40-year lease addition under the Geothermal Steam Act ("GSA"). 30 U.S.C. §§ 1005 (a), (d); 43 C.F.R. Part 3203. Nor could it have. As Plaintiffs explain in their Opening Brief – and Defendants do not dispute – BLM concluded, in extending the leases, that Calpine was violating the "diligent effort" requirements imposed by the GSA and its regulations, by the leases themselves, and by the Glass Mountain Unit Agreement. Appellants' Opening Brief ("AOB") at 21-26. Those violations continue unabated to this day. But rather than enforce the law by contracting the Unit and terminating non-producing leases, BLM elected to add 40 years to the leases.

2. Plaintiffs invoked the Administrative Procedure Act ("APA") to challenge BLM's 1998 lease extensions and its continuing non-compliance with the GSA, asserting that the leases should have been terminated, not

extended, in response to Calpine's failure to satisfy the "diligent efforts" and "participating area" requirements. 2 ER 316-17. These claims are reviewable under section 702 of the APA, an "omnibus judicial-review provision" which generously "permits suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review." Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1389 (2014).

3. Plaintiffs never "waived" their GSA claims and arguments. As they explained to the district court, the statute of limitations has run on challenges to agency decisions occurring before May 18, 1998 (e.g., issuance of leases in the 1980s, approval of the Unit Agreement in 1982, extension of leases in the early 1990s, etc.), but facts before and after that date are relevant to Plaintiffs' claims that the 1998 lease additions violated the GSA and that BLM's unlawful conduct continues. 1 ER 45-47. In response to Defendants' Rule 12 motions, Plaintiffs extensively briefed these factual issues below and in their Opening Brief, carefully explaining the basis for their legal claims that BLM unlawfully failed to make the

requisite "diligent efforts" determination. AOB at 21-26, 50-52; Case No. 04-0956, Dkt. 73.[1]

4. Although Plaintiffs filed their GSA claims over a decade ago, those claims have never been adjudicated despite Plaintiffs' efforts. After years of litigation delay beyond Plaintiffs' control, AOB at 27-29; Dkt. 55, 56, Defendants brought motions for judgment on the pleadings, and the district court inexplicably concluded that Plaintiffs "can no longer litigate" compliance with the GSA's diligence requirements because "all of the background information isn't relevant." 1 ER 48-49; see also ER 56 (stating that Plaintiffs are "too late" to challenge the factual question of whether Calpine has satisfied the diligence requirements). The legal and factual bases for this conclusion are unclear, since the challenge to the 1998 decision was timely filed in 2004 and the facts leading to the decision were alleged in the complaint and contained in the decisional record.[2] In any

[1] Ironically, Defendants maintain that Plaintiffs both waived these claims by not arguing them in their Opening Brief, Appellees' Answering Brief ("AAB") at 6, and improperly briefed them on appeal. AAB at 58-60. Neither claim is factually correct. Plaintiffs were unable to affirmatively notice and brief a summary judgment motion because Defendants refused to complete the administrative record until the middle of the Rule 12 briefing. Dkt. 55, 56, 73 at 1-2.

[2] Of course, there is no statute of limitations running on Plaintiffs' contention that BLM's GSA violations are "ongoing and continue[] to this day." 2 ER 316.

event, affirmation of the trial court's holding would ensure that no party will ever be able to challenge BLM's ongoing, seemingly indefinite failure to comply with the GSA's diligence requirements – except possibly Calpine, which has no incentive to do so. Cf. 1 ER 53.

5. Even if this Court were to find, contrary to overwhelming precedent, that Plaintiffs lack APA standing to challenge BLM's compliance with the GSA, the Court still must review the administrative record to resolve Defendants' arguments on Plaintiffs' other claims under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*, and the Indian fiduciary trust doctrine. This is so because even under Defendants' theory of the case, Calpine was "entitled" to 40-year lease additions for non-producing leases only if it was diligently attempting to utilize geothermal steam and only if BLM made a properly supported determination to that effect. These threshold conditions must be satisfied before BLM can invoke GSA section 1005(a). Thus, to entertain Defendants' argument that section 1005(a) applies and deprived BLM of all discretion, the Court must first assess the facts and determine compliance with the statutory "diligent efforts" prerequisites. Only then need the Court turn to Defendants' derivative argument that BLM lacked any discretion over the leases and, therefore, had

no environmental review or consultation obligations when extending them for 40 years.

6. Defendants' "no discretion" litigating position – that section 1005(a) applies and deprived BLM of any discretion – is thoroughly undermined both by the history of the 26 non-producing leases and by BLM's discretionary conduct and legal arguments in the factually identical situation presented by Geo-Energy Partners-1983 Ltd v. Salazar, 613 F.3d 946 (9th Cir. 2010).

ARGUMENT

I. Plaintiffs Have Prudential Standing to Challenge BLM's Compliance with the GSA.

The Supreme Court's very recent decision in Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014), reaffirms Plaintiffs' standing to bring an APA claim challenging Defendants' non-compliance with the GSA. There, the Court reiterated that the "zone of interests" inquiry is not a particularly demanding one and must be carried out in light of the APA's "generous review provisions" and the courts' "virtually unflagging" obligation to hear cases within their jurisdiction. Id. at 1387, 1389. Contrary to the teachings of Lexmark, Defendants seek a highly restrictive application of "prudential standing" jurisprudence that would shield BLM's public resource management decisions from review and

close the courthouse doors to people adversely affected by such decisions. No case supports this argument.

A. Courts Apply the Judge-Made "Zone of Interests" Inquiry Against the Backdrop of the APA's Presumption of Reviewability.

Defendants' arguments ignore 45 years of prudential standing precedent. The Supreme Court first employed the "zone of interests" inquiry – as distinct from constitutional standing analysis – in Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970), and its companion case, Barlow v. Collins, 397 U.S. 159 (1970). In Data Processing, the Court recognized that the APA provides "generous review provisions" for any person "adversely affected or aggrieved by agency action," a phrase that the Court has construed "not grudgingly but as serving a broadly remedial purpose." 397 U.S. at 156. The Court added a judicial "gloss" only to ensure that the interests sought to be vindicated by the adversely affected party are "arguably" within the "zone of interests" protected or regulated by the statute. Clarke v. Securities Industry Association, 479 U.S. 388, 395-6 (1987). Prudential standing, in other words, provides "a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision." Id. at 399.

In articulating the doctrine's contours, the Supreme Court has been keenly aware that "the trend is toward enlargement of the class of people who may protest administrative action" and that Congress set a low bar for judicial review of agency action. Data Processing, 397 U.S. at 154, 156-57 (quoting 1945 House Report – "[t]o preclude judicial review under [the APA,] a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it."). Accordingly, "there is no presumption against judicial review and in favor of administrative absolutism." Id. at 157. To the contrary, "judicial review of administrative action is the rule" and "nonreviewability an exception that must be demonstrated" by "'clear and convincing evidence' of contrary legislative intent" in the underlying statutory scheme. Barlow, 397 U.S. at 166-67; see also Abbott Laboratories v. Gardener, 387 U.S. 136, 140 (1967) ("[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.").

The presumption of reviewability for agency action may only be overcome by "specific language or specific legislative history that is a reliable indicator of congressional intent" to affirmatively preclude suit. Block v. Community Nutrition Institute, 467 U.S. 340, 349 (1984).

"Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." Id. at 345. "[A]t bottom the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed." Clarke, 479 U.S. at 400. Thus, courts "are not limited to considering the statute under which respondents sued, but may consider any provision that helps [them] to understand Congress' overall purposes." Id. at 401 (defendant's argument "focuses too narrowly on 12 U.S.C. § 36, and does not adequately place § 36 in the overall context of the [statute]").

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S.Ct. 2199 (2012), reaffirmed this not-especially-demanding approach to the "zone of interests" inquiry. The Court held that a non-Indian landowner affected by use of neighboring property purchased for an Indian tribe had standing to assert violations of section 465 of the Indian Reorganization Act, which authorizes the Interior Secretary to acquire property rights "for the purpose of providing land for Indians." 25 U.S.C. § 465. No provision of the statute addresses the interests of neighbors; rather, "[t]he intent and purpose of the Reorganization Act was 'to

rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973). "Section 465 thus functions as a primary mechanism to foster Indian tribes' economic development." Patchak, 132 S.Ct. at 2211. Notwithstanding the statute's purpose, the Court easily found that affected neighbors, although not themselves beneficiaries or intended targets of the law, may challenge agency non-compliance with section 465 because future use of the acquired land could impact their economic, environmental, or aesthetic interests. Id. at 2211-12.

The Court's most recent decision in Lexmark goes further, noting as a threshold matter that the prudential standing doctrine "is in some tension with our recent reaffirmation of the principle that 'a federal court's 'obligation' to hear and decide' cases within its jurisdiction 'is 'virtually unflagging.'"" 134 S.Ct. at 1386 (quoting Spring Communications, Inc. v. Jacobs, 134 S.Ct. 584, 591 (2013)); see Excel Willowbrook, LLC v. JP Morgan Chase Bank, Nat'l Ass'n, – F.3d –, 2014 WL 1633508, n.34 (5th Cir. Apr. 24, 2014) ("[T]he continued vitality of prudential 'standing' is now uncertain in the wake of the Supreme Court's recent decision in Lexmark."). As the Court explained, the label of "prudential" is a "misnomer" as applied

to the "zone of interest" analysis, which is really a "statutory standing" inquiry turning on congressional intent. Id. at 1387. Thus, courts must use "traditional tools of statutory interpretation" to determine legislative purposes. Id.

Lexmark reiterated that a "lenient approach" to APA challenges "is an appropriate means of preserving the flexibility of the APA's omnibus judicial-review provision," in contrast to the sometimes narrower inquiry for private rights of action. 134 S.Ct. at 1389 (reiterating from Clarke and Bennett that "what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the 'generous review provisions' of the APA may not do so for other purposes"). This "lenient approach" applies here, where tribal, environmental, and inholder interests adversely affected by BLM's unlawful public resource management actions seek redress under the APA.

B. APA Prudential Standing Is Not Limited to Those Who Seek to Enforce the "Core Purpose" of a Statute.

In applying its "zone of interests" inquiry, the Supreme Court looks to the "multiple" congressional objectives embodied in a statute, Clarke, 479 U.S. at 416 (concurring opinion), and routinely finds standing even for challengers whose interests are at odds with a statute's overarching objectives. Yet Defendants insist that the only parties with standing to

challenge BLM's leasing decisions are those whose interests support "the core purpose of the Geothermal Steam Act – 'to promote the development of geothermal leases on federal lands.'" AAB at 27. No court has ever held that an affected challenger must align with the "core purpose" of the statute. Indeed, the courts have consistently come to just the opposite conclusion. Clarke, 479 U.S. at 399-400 ("there need be no indication of congressional purpose to benefit the would-be plaintiff" for a challenger to come within statute's "zone of interests"); National Credit Union Admin. v. First National Bank & Trust, 522 U.S. 479, 494 (1998) ("[A]lthough Congress did not intend specifically to protect" competitors with adverse interests, they fall within the "zone of interests.").

Defendants' key case, Bennett v. Spear, 520 U.S. 154, 163 (1997), actually defeats their novel "core purpose" argument. Bennett did not limit the "zone of interests" inquiry to the overarching "purpose" of the statute, but instead found that plaintiffs concerned with their own economic welfare had prudential standing to challenge the Fish and Wildlife Service's biological opinion under the Endangered Species Act, a statute whose primary purpose is indisputably species protection. Ranchers and irrigators argued that the agency failed to use the "best scientific and commercial data available" required by the law. Although plaintiffs' interests were

diametrically opposed to species protection, the Court looked to the statutory text and history to infer "another objective" – "to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives" – and concluded that ranchers, therefore, had standing to challenge the agency's non-compliance with the "best science" provision. 520 U.S. at 176-77.

Similarly here, while the GSA is intended to "encourage" orderly exploration for geothermal resources, the statutory language and history reflect Congress' deep concern for environmental sustainability and for balancing resource development with other tribal, conservational, and recreational interests in the same public lands. See AOB at 36-39. Congress imposed strict timing and diligent exploration requirements on GSA leases to ensure that zealous agency officials do not disregard these other interests and allow lessees to speculatively hold property rights that impede alternative uses of the public lands, which must be managed under a "multiple-use" mandate. See 30 U.S.C. § 1016; 16 U.S.C. § 1604. Just as ranchers in Bennett came within the "zone of interests" to enforce the Endangered Species Act's "best data available" requirement, local tribes, environmental organizations, and inholding landowners with competing interests in the public resources of the Medicine Lake Highlands have

prudential standing to challenge leasing decisions that adversely affect their interests.

Patchak underscores this conclusion. Defendants there argued that because plaintiff "is 'not an Indian or tribal official seeking land' and does not 'claim an interest in advancing tribal development,'" he was not within the "zone of interests" protected or regulated by section 465 of the Indian Reorganization Act. 132 S.Ct. at 2210, n.7. The Supreme Court rejected this argument as "beside the point." Id. "The question is not whether § 465 seeks to benefit Patchak; everyone can agree it does not. The question is instead . . . whether issues of land use (arguably) fall within § 465's scope – because if they do, a neighbor complaining about such use may sue to enforce the statute's limits." Id. Despite the absence of any statutory mention of neighbors' "economic, environmental, or aesthetic" interests, the Court held that the agency acquires land with "an eye toward" its future use and thus "neighbors to the use (like Patchak) are reasonable – indeed, predictable – challengers." Id. at 2212.

Notably, the Court compared the facts in Patchak with a hypothetical scenario where "the Government had violated a statute specifically addressing how federal land can be used"; under that scenario, the Court observed, "no one would doubt that a neighboring landowner would have

prudential standing to bring suit to enforce the statute's limits." 132 S.Ct. at 2211 (emphasis added). That illustrative hypothetical is precisely the situation here – Plaintiffs are neighboring landowners, Native Americans who have used the area for millennia, and local environmental organizations seeking to enforce a statute governing use and management of federal land in which they have an abiding interest.

And this Court has actually faced and decided the very hypothetical scenario posed by Patchak. In National Wildlife Fed. v. Burford, 871 F.2d 849 (9th Cir. 1989), an environmental organization alleged that the agency violated section 201(a)(1) of the Federal Coal Leasing Amendments Act, which requires the Secretary to obtain "fair market value" ("FMV") for federal coal leases. The "basic purpose" of the coal leasing statute is

> 'to provide for a more orderly procedure for the leasing and development' of coal the United States owns, while ensuring its development 'in a manner compatible with the public interest.' . . . Congress's underlying substantive policy concern was to develop the coal resources in an environmentally sound manner. This purpose lays as much stress on the developing [of] the coal resources as it does on the environmental effects of development.

Id. at 853 (quoting Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1156 (9th Cir. 1988)). The Court nevertheless readily found statutory standing, noting that plaintiff's "aesthetic and recreational interests may have suffered in that below-FMV pricing of the leases could have promoted added

development that higher lease costs might have discouraged." Id. Likewise here, Plaintiffs' environmental, recreational, spiritual, and property interests in the Medicine Lake Highlands have suffered as a result of BLM's election to grant 40-year lease additions without a "diligent efforts" determination. See also City of Sausalito v. O'Neill, 387 F.3d 1186, 1204-06 (9th Cir. 2004) (city could enforce compliance with national park concession and housing laws to vindicate its interest in scenic beauty and natural character of area).

C. Both this Court and the Supreme Court Have Rejected Defendants' Argument that the Prudential Standing Inquiry Is Limited to GSA Section 1005(a).

Defendants' other contention – that the "zone of interests" inquiry is limited to the text of GSA section 1005(a) – flies in the face of controlling case law. Defendants argue that because section 1005 does not explicitly protect Plaintiffs' interests in the Medicine Lake Highlands, Plaintiffs lack standing to enforce its leasing requirements. AAB at 38-40. The Supreme Court and this Court have rejected the narrowly-focused inquiry proffered by Defendants.

As noted above, courts use "traditional tools of statutory construction" in assessing prudential standing and must examine not only the plain text of the law, but also the broader statutory context of that language, the

legislative history, the various objectives or purposes of the law, subsequent statutory amendments or adoption of related statutes, the nature of the administrative action at issue, and virtually anything else that helps the court understand Congress' intentions and purposes. Lexmark, 134 S.Ct. at 1387; Clarke, 479 U.S. at 396, 401; Block, 467 U.S. at 345; Data Processing, 397 U.S. at 153. Indeed, Defendants themselves rely on precisely such evidence. AAB at 27-28.

Defendants' "section 1005 only" argument turns on a flawed application of Bennett. There, ranchers had standing to challenge the scientific basis for a biological opinion issued under section 1536(a) of the Endangered Species Act because the Court inferred from the separate and later-adopted "God Squad" exemption in section 1536(h) that Congress was concerned, as well, about economic dislocation. 520 U.S. at 177. Thus, Bennett looked at specific statutory provisions not to limit standing, but to expand it beyond the overarching general purpose of the statute.

Moreover, this Court explicitly rejected Defendants' Bennett-based argument in Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172 (9th Cir. 2000). Environmental plaintiffs challenged BLM's property appraisal methodology for a land transfer under section 206(b) of the Federal Land Management Policy Act ("FLMPA"), 43 U.S.C. § 1716(b). BLM argued

that plaintiffs lacked standing because the "alleged environmental injuries are not within the zone of interests which the equal value provisions of FLPMA Section 206(b) are intended to protect," relying on Bennett's "reference to the particular provision of law upon which the plaintiff relie[d]" as support for this argument. 231 F.3d at 1179. The Court rebuffed BLM's position, noting that erroneous valuation and subsequent transfer of the public lands could deprive plaintiffs of their aesthetic and recreational interests in those lands. Id.; Burford, 871 F.2d at 854 (finding "unpersuasive" the government's argument that plaintiff's "environmental complaints may be sufficient to establish standing under some parts of the [Act] but not section 201(a)(1)" because application of the "zone of interests" test "takes place in regard to the statute as a totality").

In short, where Congress "intertwined strands of environmental with economic concerns into a unified whole" – as it did in both the federal coal leasing statute and the analogous GSA – agencies cannot defeat prudential standing with an "excessively narrow interpretation of the statute." Burford, 871 F.2d at 854. Rather, environmental plaintiffs "can establish standing by relying on the statute as a whole." Id.

D. Defendants' Novel Prudential Standing Theory Would Lead to Untenable Policy Outcomes that Are Inconsistent with the APA's "Generous Review Provisions."

Whether evaluating (1) economic interests under the species protection provisions of the Endangered Species Act; (2) environmental interests under the leasing provisions of the Federal Coal Leasing Amendments Act or the fair-market-value provisions of the Federal Land Policy Management Act; or (3) neighboring landowner interests under the land acquisition provisions of the Indian Reorganization Act, the Supreme Court and the Ninth Circuit have overwhelmingly found prudential standing to challenge agency action, consistent with the "lenient approach" most recently articulated in Lexmark, 134 S.Ct. at 1389.[3] Here, in the absence of any – let alone "clear and convincing" – statutory evidence that Congress intended to limit APA reviewability of BLM decisions under the GSA, this Court should follow the well-trod path of judicial precedent and reverse the trial court's erroneous invocation of "prudential" reasons for abrogating its "virtually unflagging" obligation to hear Plaintiffs' claims.

[3] Defendants cite only one case where the Court found that plaintiffs fell outside the statutory "zone of interests" because mere codification of a two-century old statute creating postal monopoly in an unrelated 1970 Postal Service labor-management law did not confer standing on union to challenge compliance with old law. See Air Courier Conferences of America v. Postal Workers Union AFL-CIO, 498 U.S. 517, 518 (1991).

Leaving the trial decision in place would ensure that BLM remains entirely unaccountable to the public and would allow indefinite continuation of a private speculative monopoly over public resources. BLM's long-time acquiescence in Calpine's dilatory history (e.g., failure to conduct exploratory drilling or identify a participating area, multiple requests for lease "suspensions" that toll the running of the lease period,[4] and failure to commence any commercial production) means that Calpine retains a virtual lock on tens of thousands of acres of public land within the Medicine Lake Highlands.[5] If Plaintiffs cannot challenge this dubious arrangement, no one can.

E. Defendants Improperly Conflate Prudential Standing with Discretion, Confusing the Two Legally Distinct Issues Raised by this Appeal.

To avoid the overwhelming weight of precedent, Defendants weave the notion of "discretion" through their discussion of prudential standing. But these two doctrines have nothing to do with each other. The central

[4] Just a few weeks ago, Calpine obtained its most recent "suspension" of the leases at issue here. See Attachment hereto. BLM's action suspends all drilling and payment obligations and extends the length of the leases for the period of the suspension. 43 C.F.R. § 3212.13.

[5] Defendants' assurance that BLM will fully analyze environmental impacts before allowing any development is no comfort. AAB at 17. As this Court recognized in Pit River Tribe v. U.S. Forest Service, 469 F.3d 1069 (9th Cir. 2006), failure to conduct environmental review and consultation at the lease extension stage cannot be cured at the development stage.

issue before the Court with respect to the GSA claims is whether Plaintiffs have APA standing to enforce the timing, diligent efforts, and participating area requirements of the statute and the Unit Agreement. If so, the follow-on question is whether Defendants satisfied these legal obligations.

Defendants' "no discretion" question is an entirely different one. Whether BLM retains any discretion after it satisfies "diligent efforts" requirement is a distinct legal issue related solely to Plaintiffs' separate claims for violation of the environmental review and tribal consultation laws, as discussed in Section II below. This issue comes into play only if the Court concludes both that (1) non-producing leases without a "capable well" may, as a matter of law, receive 40-year additions solely by virtue of having been "committed" to a unit and (2) Defendants satisfied the "diligent efforts" condition precedent for such an addition. See, e.g., City of Los Angeles v. U.S. Department of Commerce, 307 F.3d 859, 870 (9th Cir. 2002) (shall/if combination "demonstrates Congress' intent to . . . confer[] meaningful discretion" on agency, and agency may not "skip over" the "critical" discretionary condition precedent step). Otherwise, Calpine was eligible, at most, for another 5-year extension under section 1005(c) or (g), which this Court has already held triggers environmental review and tribal consultation. Pit River Tribe, 469 F.3d at 780-88.

II. Defendants' Contention that BLM Lacked Discretion Concerning the Lease Decision Is a Meritless Litigation Position Unsupported by the Law, Past Agency Practice, or the Record.

Defendants' lengthy discussion of BLM's alleged lack of discretion under the GSA obscures the facts, rewrites the law, and contradicts the prior legal interpretation offered by BLM in Geo-Energy Partners. The Court's factual recitation in that case, taken almost entirely from BLM's appellate brief, is highly instructive here. 613 F.3d at 949-55; BLM Brief at 4-21, 2009 WL 2444213 (June 1, 2009). It demonstrates two things. First, BLM's Nevada Office interprets the GSA lease extension and continuation provisions exactly as the California BLM did in this case before abruptly reversing course and granting 40-year additions for the 26 non-producing leases. Second, BLM has significant discretion in overseeing and managing geothermal leases and unit agreements – in Geo-Energy, ultimately exercising that discretion by amending the non-compliant unit agreement, contracting the unit, and terminating non-producing leases. BLM's actions there were fully consistent with the law outlined in Plaintiffs' Opening Brief and with the facts here. Defendants' newly-minted litigation position to the contrary should be rejected.

A. BLM Has and Had Authority to Contract Units, Deny Lease Extensions, or Otherwise Manage Non-Compliant Lessees and Unit Operators.

Defendants' legal arguments in defense of this lawsuit all turn on the same contention – that BLM had no discretion under the GSA to do anything other than "continue" the 26 leases for 40 additional years, despite the absence of diligent exploratory efforts by Calpine. That position is wrong as a matter of law and fact. BLM retained ample authority under the GSA, its implementing regulations, and the Glass Mountain Unit Agreement to manage leases consistent with congressional directives and requirements, including the authority to terminate or allow expiration of non-producing leases. AOB at 18-21.

To understand why this is so, the Court need look no further than Geo-Energy, which confirms that BLM has, historically, exercised its authority to contract unit agreements and terminate non-compliant leases. There, BLM's Nevada Office approved the "Fish Lake Unit Agreement," which contained a series of progressive "diligent drilling" requirements nearly identical to those in the Glass Mountain Unit Agreement. As here, the Fish Lake agreement provided that once a lessee completed a well deemed capable of commercial production ("capable well"), the unit operator would have five years to identify the "participating area" and

"contract" the unit to match that area. 613 F.3d at 950, 957 ("As the BLM has defined the term, 'contraction' is the refusal to grant a lease extension pursuant to § 1005."). The purpose of this requirement was to incentivize further exploration of "portions of the unit that have not been determined to be commercial." Id. The Court explained that "[i]f a unit contracts, the unit and participating area become the same" and "the leases outside the participating area continue only if they are in their primary term or they qualify for extensions as independently functioning leases." Id.

In 1994, the Fish Lake unit "met its initial diligent development obligation by drilling a well (No. 81–13 on lease N–9647) capable of producing geothermal resources in paying quantities." Geo-Energy, 613 F.3d at 951. In response, "BLM issued a decision declaring lease N–9647 in 'additional term,' and . . . . advised that contraction would occur five years [later], unless diligent drilling occurred at that time." Id. BLM subsequently pushed back the unit contraction date by 17 months, id., and thereafter granted several extensions of the unit contraction date before finally terminating the unit agreement, id. at 952-54.

Of particular relevance is the fate of the other 12 leases that were "committed" to the unit but did not have "capable well" determinations – equivalent to the 26 leases at issue in this case. Those 12 leases did not

receive 40-year additions under GSA section 1005(a) when the "capable well" was completed in 1994. Instead, five leases that had already received two prior 5-year extensions were not extended further because they had exhausted their extension opportunities.[6] Seven leases that had previously received one 5-year extension were granted a second short extension. Geo-Energy, 613 F.3d at 951. Thus, Defendants' litigating position in this lawsuit – that other BLM offices in Nevada or elsewhere have interpreted the GSA to mandate 40-year continuances for all leases committed to a unit when a single "capable well" is drilled on any lease in the unit – is incorrect as a matter of fact. Rather, BLM Nevada staff interpreted the GSA and managed the Fish Lake unit in precisely the same way that California staff originally implemented the Glass Mountain unit; both offices continued the single lease with the "capable well" determination "in additional term" under GSA section 1005(a) and extended the remaining leases in the unit without a "capable well" for 5-year terms under GSA section 1005(c) or (g). ER 482-83.

[6] Because these leases were "committed" to a unit, they were effectively held in abeyance without extension pending designation of the participating area and corresponding contraction of the unit. Accordingly, when BLM finally contracted the unit, the non-producing leases were automatically terminated because they had already expired.

As was true at Medicine Lake, the leaseholders in Geo-Energy continually missed deadlines to complete the further exploration necessary to identify a participating area and contract the unit. 613 F.3d at 952-54. After repeated warnings and postponements, BLM eventually "revised the Fish Lake Unit boundaries pursuant to the requirements set out in 30 U.S.C. § 1017, thereby terminating several leases located outside the newly-configured Unit." Id. at 954. Having contracted the unit to the participating area (i.e., to the single lease containing the "capable well"), BLM concluded that the 12 non-producing leases "eliminated from the contracted unit were ineligible for extensions either because they had already received two successive [5-year] extensions or because a second extension would not be successive to the first." Id. at 955; BLM Brief, 2009 WL 2444213, at 21.

Except for the ultimate disposition, the facts of Geo-Energy closely parallel the facts at Medicine Lake. The lessees in both cases chronically ignored BLM-imposed deadlines for additional exploratory drilling, participating area submissions, and unit contraction. AOB at 21-24. In Geo-Energy, BLM repeatedly postponed legal deadlines and ultimately exercised discretion to contract the unit and terminate all leases except the one with the "capable well" – the only lease with a 40-year additional term. At Medicine Lake, BLM also repeatedly postponed legal deadlines, but ultimately took

the very different course of extending the 26 non-producing leases to match the 40-year addition for the one lease with a "capable well." BLM thus made starkly different management choices in response to analogous facts – the very definition of "discretion."

Geo-Energy thus undermines Defendants' central argument – that BLM's abrupt reversal in 1998 was mandated by law and intended to bring the California Office into line with "the Nevada Office's contrary interpretation of the regulations." AAB at 50-51. In fact, during roughly the same time period, the Nevada Office correctly concluded that unitized leases without a "capable well" were only entitled to 5-year extensions under GSA section 1005(c) or (g). California staff took the very same position until May 18, 1998, and it is the only position that can be squared with the plain text of section 1005 and BLM's implementing regulations. See AOB at 48-49, 55-56.[7]

[7] Defendants suggest that Article 17.4 of the "model unit agreement" provides the legal mandate for BLM's "non-discretionary" reversal. That article provides: "Drilling and/or producing operations performed hereunder upon any tract of Unitized Lands will be accepted and deemed to be performed upon and for the benefit of each and every tract of Unitized Land." Addendum at 88. Of course, neither the "model agreement" nor the Glass Mountain agreement can contradict the GSA itself, and both Nevada and California properly interpreted this provision to mean that a "capable well" determination for one lease within the unit could satisfy the "bona fide effort" requirement for 5-year extensions of the other leases within the unit. But lease extensions themselves are actually addressed in Article 17.7,

Indeed, even as it granted blanket 40-year additions, BLM did not claim that it was required by law to do so. In the May 13, 1998, internal memorandum recommending the reversal, the Geothermal Program Lead stated: "The purpose of this memorandum is to suggest a reasonably justified course of action which will: 1) eliminate the uncertainty, 2) maintain the leases committed to the Unit, and 3) protect the public interest." ER 456. As the memo explained, Calpine's request for 40-year additions was inconsistent with the "lease by lease" requirement of section 1005(a) and would allow the leases in the Unit to have "an unending term." ER 459, 482-83. "In order to maintain control of the Unit," BLM strongly admonished the operator to complete additional required exploratory efforts and submit a participating area, ER 460, 469, 472-74, hoping that "this course of action" would end the "indefinite lifespan" problem and thereby allow the Unit to "be managed in the public interest." ER 460. Alternatively, BLM could have followed the course taken in Geo-Energy by revising the Unit Agreement, contracting the Unit, and/or terminating or

---

which provides: "Subject to the lease renewal and the readjustment provision of the Act, any Federal lease committed hereto may, as to the Unitized Lands, be continued for the term so provided therein, or as extended by law." Addendum at 89; ER 173. Thus, while non-producing leases can piggy-back on the "capable well" determination to satisfy exploration obligations for 5-year extensions, they remain subject to the statutory restriction limiting 40-year additions to those leases where the actual "capable well" is completed.

suspending non-producing leases or allowing them to expire by their own terms. E.g., 30 U.S.C. §§ 1007 (10-year readjustment), 1011 (termination for non-compliance), 1017 (unit "reasonably necessary" amendment); 43 C.F.R. §§ 3203.5, 3244.3, 3265.1, 3283.2-2; ER 161 (Art. 3.1), 162 (Art. 4.3), 169 (Art. 11.7, 12.3), 174 (Art. 18.1), 175 (Art. 22.1).

BLM's "reasonably justified course of action" in May 1998 had nothing to do with a "non-discretionary" legal duty and everything to do with choosing among various management options to advance the public interest. Litigation counsel's attempt, years after the fact, to recharacterize BLM's action as a mandatory duty is entitled to no deference. Christopher v. SmithKline Beecham Corp., 132 S.Ct. 2156, 2166 (2012) ("Deference is undoubtedly inappropriate, for example, when the agency's interpretation is 'plainly erroneous or inconsistent with the regulation,' . . . when the agency's interpretation conflicts with a prior interpretation, . . . or when it appears that the interpretation is nothing more than a 'convenient litigating position,' . . . or a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack.").

B. Because BLM Retained Discretion to Manage the Leases, the Trial Court's Judgment on Plaintiffs' Second, Third, and Fourth Claims Constituted Legal Error.

As the foregoing demonstrates, BLM had and contractually retained authority under the GSA to revise the Unit Agreement, contract the Unit, terminate non-producing leases, deny requested extensions, or otherwise enforce the applicable statutory and contractual requirements in the face of Calpine's failure to complete diligent exploration or identify a participating area. BLM could have exercised that authority in a way that balanced Plaintiffs' competing interests in these multiple-use lands and protected some or all of the area covered by the non-producing leases from industrial development. Thus, the "no discretion" case law on which Defendants' arguments rest is inapplicable.

As this Court recently reiterated, a federal agency must comply with environmental review and consultation requirements whenever it "retains 'some discretion'" to act. Natural Resources Defense Council v. Jewell, -- F.3d --, 2014 WL 1465695, *6 (9th Cir. Apr. 16, 2014). That is, "[w]hether an agency must consult does not turn on the degree of discretion that the agency exercises regarding the action in question, but on whether the agency has any discretion to act in a manner beneficial" to the environment, and "[t]he agency lacks discretion only if another legal obligation makes it

impossible for the agency to exercise discretion." Id.; see also Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1024 (9th Cir. 2012) ("the relevant question is whether the agency could influence a private activity . . . not whether it must do so"); National Wildlife Fed. v. National Marine Fisheries Serv., 524 F.3d 917, 928-29 (9th Cir. 2008) (agency may not ignore impacts "by labeling parts of an action nondiscretionary"); Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340 F.3d 969, 977 (9th Cir. 2003); Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1126 (9th Cir. 1998).

Defendants' reliance on Department of Transportation v. Public Citizen, 541 U.S. 752 (2004), and National Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007), is misplaced. The question in Public Citizen was whether the agency's adoption of safety rules for Mexican trucks entering the United States was the "cause" of the resulting pollution and therefore required evaluation of those pollution impacts in the NEPA review. Answering that question in the negative, the Court explained that "the legally relevant cause of the entry of the Mexican trucks is not [the agency's] action, but instead the actions of the President in lifting the [truck] moratorium and those of Congress in granting the President this authority while simultaneously limiting [the agency's] discretion." 541 U.S. at 769.

See Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1213-14 (9th Cir. 2008) (distinguishing Public Citizen on grounds that agency had authority to enforce the law). Here, by contrast, BLM is the sole manager of the leases and Unit Agreement and the sole enforcer of the statute's strict diligence requirements.

Home Builders is equally inapposite, for two reasons. First, there "EPA concluded that Arizona had met each of the nine statutory criteria" established in the Clean Water Act as conditions precedent for delegating permitting authority to the state, and no party "ever disputed that Arizona satisfied each of [the] nine criteria." Id. at 654, 661. Here, the gravamen of Plaintiffs' GSA claims is that BLM did not satisfy the statutory condition precedent – a "diligent efforts" determination – for continuation of the 26 non-producing leases.

Second, the statutory language at issue in Home Builders spells out in intricate detail precisely what a state must show to receive delegation. See 33 U.S.C. § 1342(b). In contrast, the GSA merely requires a determination that "diligent efforts are being made toward the utilization of the geothermal steam," leaving it to the Secretary's discretion to define, implement, and enforce "diligent efforts." 30 U.S.C. § 1005(d). BLM's implementing regulations provide that "[d]iligent exploration operations include, but are

not limited to, descriptions of negotiations for geothermal resources and/or electricity sales contracts, marketing arrangements, electrical generation and/or transmission agreement, and operations conducted or planned to better define the geothermal resource." 43 C.F.R. § 3203.1-3(b). The phrase "include, but are not limited to" affirms that the list of criteria "was not exhausted by" the enumerated items and that BLM retains the discretion to determine what diligent efforts will fulfill its GSA responsibilities. See Turtle Island, 340 F.3d at 975 (congressional directive that agency establish restrictions necessary to carry out international treaty obligations conferred sufficient discretion to trigger ESA consultation). Thus, unlike EPA in Home Builders, BLM exercises considerable judgment in determining what actions are sufficiently "diligent" to satisfy section 1005.

Had Calpine diligently explored and defined commercial resources as directed by Congress, we might not be here today. But those are not the facts of this case. Instead, Calpine failed, year after year, to comply with its obligations. Under those circumstances, BLM retained ample authority to take action that would benefit Plaintiffs' interests. Because Calpine was not entitled to a particular outcome, BLM had no legal obligation that made it "impossible" to do something other than continue the non-producing leases for 40 years. Jewell, 2014 WL 1465695, *6.

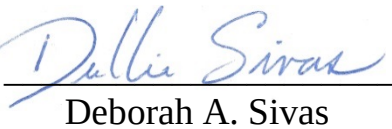
CONCLUSION

For the foregoing reasons and the reasons set forth in the Opening Brief, Plaintiffs respectfully request that the Court reverse the district court's judgment on the First, Second, Third, and Fourth Causes of Action.

Dated: May 19, 2014

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

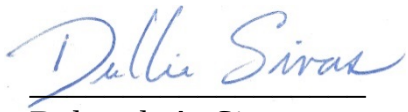
By: 
Deborah A. Sivas

Attorneys for Plaintiffs-Appellants

.

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 6,974 words, exclusive of tables and cover sheet.



Deborah A. Sivas

Addendum

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
California State Office
2800 Cottage Way, Suite W1623
Sacramento, CA 95825
www.blm.gov/ca

Reply Refer To:
CACA-1032 et.al
CACA-13109X
3200 (CA-920) **P**

April 30, 2014

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
7012 0470 0002 2815 4683
7012 0470 0002 2815 4690

DECISION

Calpine Siskiyou Geothermal Partners L.P. 10350 Socrates Mine Road Middletown, California 95461	:	
	:	Geothermal Leases - Geothermal Unit
CPN Telephone Flat, Inc 10350 Socrates Mine Road Middletown, California 95461	:	

SUSPENSION OF OPERATIONS AND PRODUCTION

Calpine Siskiyou Geothermal Partners, L.P., and CPN Telephone Flat, Inc., hereafter referred to as Calpine, has made a request under 43 Code of Federal Regulations (CFR) 3212.11(a) that the Bureau of Land Management (BLM) grant a suspension of lease operations and production on all 40 geothermal leases held by Calpine within the Glass Mountain Geothermal Unit (CACA13109X). The request for suspension of lease operations and production was contained within a letter from Calpine dated November 12, 2013 to Tim Burke, Field Manager, in our Alturas Field Office.

Based upon the request and the acknowledgment by Calpine that lease activities to protect human health and the environment are necessary, and in accordance with the authority under 30 United States Code 1010 and 43 CFR 3212.11(a), we hereby grant a suspension of lease operations and production for 31 geothermal leases held by Calpine within the Glass Mountain Geothermal Unit, CACA-13109X. The following geothermal leases will be suspended:

CACA 1032	CACA 1230	CACA 12368	CACA 23738
CACA 1033	CACA 1232	CACA 12369	CACA 39725
CACA 1034	CACA 6111	CACA 13802	CACA 39726
CACA 1036	CACA 6112	CACA 13804	CACA 39727
CACA 1218	CACA 13110	CACA 13958	CACA 39728
CACA 1221	CACA 39724	CACA 21925	CACA 40830
CACA 1223	CACA 12366	CACA 21929	CACA 40831
CACA 1224	CACA 12367	CACA 21932	

The effective date of the lease suspension of operation and production is May 1, 2014 and will continue until there is an order issued by the U.S. Ninth Circuit Court of Appeals regarding the Pit River 2 and Save Medicine Lake litigation. During the pendency of the suspension, Calpine will not be required to pay annual lease rentals on the 31 leases identified above.

However, in order for Calpine to conduct necessary lease and well maintenance activities, including but not limited to well integrity testing, by request of Calpine or as ordered by the BLM, we are not suspending the following 9 geothermal leases:

CACA 2500	CACA 12372	CACA 21926
CACA 12370	CACA 13803	CACA 21933
CACA 12371	CACA 21924	CACA 39729

Additional well integrity testing needs to be completed this year on 5 existing wells in the Glass Mountain area. A Written Order addressing the specific information needed on each of the 5 wells will follow shortly from our Alturas Field Office. Access to the wells and the well areas by Calpine or associated contractors/ representatives requires that these leases remain in a non-suspended condition.

This Decision may be appealed to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR 4.400 and the enclosed Form 1842-1. If an appeal is taken, Notice of Appeal must be filed in the BLM California State Office at the above address within 30 days from receipt of this Decision. A copy of the Notice of Appeal and of any statement of reasons, written arguments, or briefs must also be served on the Office of the Solicitor at the address shown on Form 1842-1. It is also requested that a copy of any statement of reasons, written arguments, or briefs be sent to this office. The appellant has the burden of showing that the Decision appealed from is in error.

As provided under 43 CFR 3200.5, this Decision is effective immediately and will remain in effect while an appeal is pending unless a petition for a stay of Decision is granted in accordance with 43 CFR 4.21(b). The provisions of 43 CFR 4.21(b) defines the standards and procedures for filing a petition to obtain a stay pending appeal.

Debra Marsh

Debra Marsh,
Supervisor, Branch of Adjudication
Division of Energy and Minerals

1 Enclosure

Cc: w/o enclosure
Mitchell Weinberg, Calpine
Tim Burke, Alturas FO
Leona Riley, ONRR
Klamath NF
Modoc NF
Shasta-Trinity NF
Klamath Tribe
Pit River Tribe
Shasta Nation
Shasta Tribe, Inc.
Medicine Lake Citizens for Quality Environment
Mount Shasta Bioregional Ecology Center

9th Circuit Case Number(s) 13-16961

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) May 19, 2014 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/ Deborah A. Sivas

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)