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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

BUREAU OF LAND MANAGEMENT; UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES FOREST SERVICE; UNITED STATES DEPARTMENT OF AGRICULTURE; and CALPINE CORPORATION,

Defendants.

Consolidated Cases

No. CIV. 2:04-00956-JAM-JFM
No. CIV. 2:04-00969-JAM-JFM

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Date: April 19, 2016
Time: 1:30 p.m.
Court: Hon. John A. Mendez

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INTRODUCTION

At issue in this case is the fate of the Medicine Lake Highlands, a place of profound spiritual significance for countless generations of Native Americans, including the Pit River Tribe. For thousands of years, Native Americans have used the lake and surrounding Highlands for spiritual guidance, religious ceremonies, and traditional doctoring practices. Today, the Highlands are part of the National Forest system, where the larger public also enjoys their unique recreational, environmental, and aesthetic amenities. All of these activities are threatened, however, by industrial-scale geothermal energy development on 26 federal leases issued by the Bureau of Land Management ("BLM").

BLM first executed these leases – now held by Calpine Corporation – in the 1980's after only cursory environmental review and without any tribal consultation. In the intervening three decades, Calpine and its predecessors have failed to produce a commercially viable geothermal resource on the leaseholds. Indeed, the record reflects that the lessees effectively abandoned any on-the-ground efforts to explore for geothermal steam after 1991. Given that lack of diligence, the leases were set to expire by their express terms in 1998. But rather than let the leases lapse of their own accord, as mandated by the Geothermal Steam Act and its implementing regulations, BLM bowed to lessee pressure and retroactively extended the leases for 40 additional years.

At the time, BLM explained its decision as a practical way to (1) eliminate uncertainties regarding the legal status of the "unit agreement" to which the leases were committed and (2) bring the lessee back into compliance with the rigorous diligent exploration requirements of the Geothermal Steam Act, the Glass Mountain Unit Agreement, and the 26 leases themselves. After Plaintiffs filed this case challenging the legality of the 1998 decision, however, BLM advanced a different theory. In its motion for judgment on the pleadings and in appellate briefing, BLM argued that all of the leases continued automatically, as a matter of law, and that the agency was powerless to alter that result or to exercise any discretion in overseeing lease compliance.

As demonstrated below, BLM's litigation theory is legally flawed and factually unsupported by the record. The Steam Act does not allow BLM to extend all leases in a unit based on a single exploratory well, as it did in this case. But even if the agency could lawfully do so, BLM was first required to determine that the lessee was making diligent efforts toward producing geothermal steam – a

finding that BLM did not and could not make. In addition to improperly exercising its lease extension discretion, BLM erred in failing to undertake appropriate environmental review and tribal consultation before taking any action on the lease extension request. *Pit River Tribe v. U.S. Forest Service* ("*Pit River I*"), 469 F.3d 768, 780-84, 787-88 (9th Cir. 2006). Accordingly, the 1998 lease extension decision was unlawful, and the extensions must be set aside as invalid. 5 U.S.C. § 706(2).

One final point merits attention: While the Court properly evaluates the legality of the 1998 extensions based on the decision record for that action, time has not stood still. Plaintiffs also allege that the 26 leases and the Unit Agreement to which they are committed remain in ongoing violation of the Steam Act's requirement for continuous diligent efforts. First Amended Complaint, ECF No. 44-1, at ¶¶ 107(a)-(c); *Pit River Tribe v. BLM* ("*Pit River II*"), 793 F.3d 1147, 1154 (9th Cir. 2015). Indeed, the lessee has failed to undertake any additional work on the leaseholds since the early 1990's and has never remedied BLM-identified defaults in Unit Agreement obligations dating back to 1994. Therefore, even if the Court were to conclude that BLM's actions in May 1998 were lawful and supported by the administrative record, it should still find, as a matter of law, that the leases have been automatically eliminated from the Glass Mountain Unit, pursuant to the Agreement, and are now expired.

STANDARD OF REVIEW

Summary judgment must be granted if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). BLM's 1998 decision is subject to review as a "final agency action" under the Administrative Procedure Act ("APA"). 5 U.S.C. § 704. Under the APA, courts must "hold unlawful and set aside agency action, findings, and conclusions" that are, among other things, (i) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," (ii) "in excess of statutory jurisdiction, authority or limitations," or (iii) "unsupported by substantial evidence." *Id.* § 706(2). For an administrative action to withstand judicial review under section 706(2), the agency must have "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). An agency action is arbitrary and capricious if "the agency has 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. *Id.* at 43.

BACKGROUND

I. The Medicine Lake Highlands

In the remote northeast corner of California, just a few miles south of Lava Beds National Monument, Medicine Lake lies cradled in a collapsed 25-square-mile caldera that is part of a broad shield volcano covering approximately 800 square miles. AR 19957-58. The lake is surrounded by Highlands that boast a diversity of landscapes, including freshwater springs, "vast, rugged lava flows, volcanic peaks, fertile marshes and grasslands, and dense forests." AR 11940. The area's mixed conifer forests – interspersed with lava fields, cinder cones, and obsidian rock – support 400 species of wildlife, including bald eagles and northern spotted owls. AR 11940-41, 20985-95, 19958. The Highlands also support a designated old-growth reserve and the 10,800-acre Mount Hoffman Roadless Area on the Modoc National Forest. AR 20987, 19958.

These unique features have made the Highlands a place of sacred power and cultural significance to Native Americans for over 10,000 years. *See* AR 21000, 11940-41. As the ancestral home and spiritual heart of the Pit River people, Medicine Lake is where tribal members return for reconnection and renewal. *See* AR 11941, 11947-50. Many of the tribe's traditions are interwoven with the land. New fathers run to the mountains to dance and swim following the birth of a child. AR 11942. Young girls join ceremonies held in sacred mountain sites to mark their transition into adolescence, while boys journey through the mountains in search of guardian spirits who will bestow them with good fortune in adulthood. *Id.* Shamans embark on "dream quest[s]" in the mountains in search of *tamakumi* – a powerful spirit who will enable them to heal illnesses. AR 11943. Rooted in the earth and waters of the Highlands, these cultural practices tie generations of tribal members together.

Recognizing the natural and spiritual significance 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, AR 15047-56, conferring the same level of protection as actual listing, Exec. Order No. 13,287, 68 Fed. Reg. 10,635 (Mar. 3, 2003). The Keeper found that the caldera,

"an interrelated series of locations and natural features," represents "an area of significant continuing traditional cultural value to several Northern California Indian tribes, including specifically the Modoc and Pit River peoples." AR 15048.

These enduring cultural values are threatened by industrial-scale geothermal development – 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. AR 21117. While the resource is underground, geothermal development involves significant surface disturbance, including the construction and operation of "roads, wells, pipelines, powerlines, powerplants, and by-product facilities." AR 21175. For this reason, BLM previously concluded that geothermal development in the Highlands will "significantly degrade the current value of the cultural sites to the Native American practitioner" and that "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." AR 19960-61.

II. The Geothermal Steam Act

The Geothermal Steam Act of 1970 ("Steam Act") created a framework for BLM to 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 refer to "the heat or energy found in steam, hot water, or geothermal formations." *Id.* (citing 30 U.S.C. § 1001(c) (2000)). Congress intended the Steam Act to spur exploration for alternative energy sources that may, under some circumstances, cause less environmental harm than traditional fossil fuel sources. S. Rep. No. 91-1160, at 3, 27 (1970).

At the same time, Congress made clear that geothermal development should be carried out in a way that "protect[s] the public interest, including protection of the quality of the environment." S. Rep. No. 91-1160, at 10 (1970); *accord* H. R. Rep. No. 91-1544, at 19 (1970) (directing the Secretary of the Interior to prescribe rules to ensure "prevention of waste, conservation of geothermal and other natural resources, and protection of the public interest"). For example, Congress directed BLM to administer the Steam Act "under the principles of multiple use." 30 U.S.C. § 1016 (1970). That is, BLM must manage and lease public lands while "striking a balance among the many competing uses to which land can be put, 'including but not limited to, recreation, range, timber, minerals, watershed, wildlife and

fish, and [uses serving] *natural scenic, scientific and historical values*.'" *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004) (alteration in original; emphasis added) (quoting 43 U.S.C. § 1702(c)). In 1988, Congress strengthened the Steam Act's environmental protections and specifically prohibited BLM from leasing land for geothermal development in important wildlife and recreational 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).

A. Duration of Geothermal Leases[1]

To balance energy development with environmental protection and the public interest, the Steam Act requires that leaseholders meet strict deadlines for demonstrating development of geothermal resources. 30 U.S.C. § 1005(b)-(c), (g). The statute limits all geothermal leases to a primary term of 10 years, during which the lessee must attempt to develop commercial quantities of steam. 30 U.S.C. § 1005(a)-(c), (g). What happens at the end of that initial 10-year term depends on the diligent efforts of the lessee and the commercial viability of the resource. The Steam Act provides for three different scenarios.

First, if a lessee has successfully developed a well that is actually producing and utilizing geothermal steam (hereinafter "producing well"), the lease *automatically* continues during production for an additional lease term of up to 40 years to allow the lessee to profit from its investment: "If geothermal steam is produced or utilized in commercial quantities within this term, such lease shall continue for so long thereafter as geothermal steam is produced or utilized in commercial quantities, but such continuation shall not exceed an additional forty years." 30 U.S.C. § 1005(a).

Second, if the lessee has not actually produced geothermal steam, but has drilled a well that BLM deems "*capable* of producing geothermal steam in commercial quantities," BLM may grant an additional term of up to 40 years "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) (defining

[1] Unless otherwise indicated, this Memorandum refers to the Steam Act provisions and regulations as they existed at the time of the May 1998 decision. Both the statute and regulations have since been revised and recodified. For the Court's convenience, copies of the relevant 1998 statute and regulations are included in the Appendix.

and expanding the definition of when a lessee "produced or utilized [steam] in commercial quantities" for a § 1005(a) additional term). A well deemed capable of producing, but not actually producing, commercial steam is sometimes called a "paying well." *See Pit River II*, 793 F.3d at 1151. When amending the Steam Act in 1988 to allow mere paying wells (in addition to full producing wells) to qualify for additional terms under subsection 1005(a), Congress warned that this alternative "does not excuse the lessee from aggressively seeking commitments for the utilization of geothermal steam produced from the lease." H. R. Rep. No. 100-664, at 9 (1988). Thus, the additional term for paying wells is not automatic, but continues *only as long as* the lessee demonstrates to BLM that it is engaged in "diligent efforts" toward actual commercial production.

Third and finally, if the lessee has *not* developed either a producing or paying well on the leasehold during the primary term, BLM may extend the lease for up to two successive 5-year terms, totaling no more than 10 additional years, during which the lessee may continue its efforts to identify and develop a commercially viable steam resource. 30 U.S.C. § 1005(c), (g). Similar to paying well additions, these 5-year extensions are contingent on the lessee's continued exploratory efforts: The Secretary must determine that the lessee has "met the bona fide effort requirement of subsection (h)" and made "in lieu" payments or significant expenditures as defined by subsections (i) and (j). *Id.* § 1005(g)(1).[2]

Before making a discretionary decision to issue a 5-year lease extension, BLM must conduct environmental review under the National Environmental Policy Act ("NEPA") and must consult with affected tribes as required by the National Historic Preservation Act ("Preservation Act"). *Pit River I*, 469 F.3d at 787-78 (holding that the required "bona fide efforts" finding of subsection 1005(g) is a discretionary action that triggers other independent obligations). Compliance with these laws is also necessary to fulfill the federal government's "minimum fiduciary duty" to the tribes. *Id.* at 788.

B. Unit Agreements

Because the exploration requirements, on their own, could lead to duplicative drilling into the same geothermal pool, unnecessarily disturbing leased land, the Steam Act authorizes unit agreements

[2] Subsection 1005(c) also provides for a 5-year lease extension if the lessee has diligently pursued "actual drilling operations" on a lease. 30 U.S.C. § 1005(c).

that allow multiple lessees to "unite" their leases into a single cooperative unit to efficiently explore and develop the resource pool. 30 U.S.C. § 1017; SAR 4020 (public benefit of unit is "to ensure orderly development, minimizing impacts to surface resources, and conserving the geothermal resource"). BLM may approve a unit agreement if it determines that the agreement "is necessary or advisable in the public interest and is for the purpose of properly conserving the natural resources, taking into account the environmental consequences of the action." 43 C.F.R. § 3283.2-1.

While Congress authorized the creation of units, it also imposed limits to ensure that units do not unnecessarily tie up land. Specifically, the Steam Act requires BLM to regularly cull unnecessary leases from units. 30 U.S.C. § 1017. Every five years, BLM must review units and eliminate "any lease or part of a lease not regarded as reasonably necessary to cooperative or unit operations." *Id.*; 43 C.F.R. § 3283.2-2.

In addition to this statutorily-mandated elimination process, BLM has promulgated regulations elaborating on unit requirements, including a model unit agreement between BLM and the leaseholders whose leases make up a unit. 43 C.F.R. § 3286.1. Units are subject to strict diligent exploration requirements until the unit actually produces commercial quantities of geothermal steam. A lessee or "unit operator" must continuously drill in the unit until it discovers a commercially viable geothermal pool and, after drilling a paying well into that common pool, must continue exploratory drilling as prescribed in the unit's plan of operation. *See id.* (art. 11.3-11.5). When a unit is created, the lessee or "unit operator" has five years to explore the unit and drill a paying well *anywhere* in the unit. *Id.* (art. 18.1). If the unit operator fails to drill this paying well within five years, the unit expires. *Id.*

Once the unit operator drills a paying well, it has five more years to identify a smaller area surrounding the paying well that is reasonably proved to produce steam from the discovered geothermal pool ("Participating Area"). 40 C.F.R. § 3286.1 (art. 2.1(d) and 12.1); *see also* SAR 1665 (BLM Manual on Unitization stating that "[t]he initial participating area under an exploratory unit agreement is established by the completion of the first unit well capable of producing unitized substances in paying quantities."). The Participating Area provision of the model unit agreement recognizes that only a sub-area of the unit will actually produce steam from a discovered pool. Thus, the unit operator must identify a smaller area "reasonably proved to be productive" to be their Participating Area. *Id.* (art.

12.1). The unit then contracts to the boundaries of this smaller area. *Id*. Should the unit operator fail to timely submit a Participating Area, the unit automatically contracts down to the area on the single lease drained by the paying well. *Id*. (art. 4.3); SAR 3708. As to any lease eliminated from the unit in this way, the lessee may continue to hold the lease if its primary term has not expired. If a lessee wants to hold such an eliminated lease beyond its primary term, that lease must "separately meet[] the requirements for such an extension" under subsections 1005(c) or (g). 30 U.S.C. § 1017.

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

In the 1970's, BLM identified the Medicine Lake Highlands as one of several volcanic sites with geothermal potential. AR 21119-20. Since BLM could not confirm the existence or extent of geothermal resources in the area, SAR 701, it cleared the way for exploration by conducting two environmental assessments. First, in 1981, BLM released an environmental assessment for "casual use" exploration of the Highlands. AR 21056-86. This assessment did not analyze the surface-disturbing activities related to exploration or the cultural or tribal impacts of geothermal leasing. Because the assessment considered only casual use exploration, BLM clarified that "[f]urther analysis will be required for the later stages of exploration" and "[i]nformation gained in each step will be necessary for decisions on subsequent steps." AR 21062. Second, in 1984, BLM issued a short supplemental environmental assessment. AR 20965-21028. In it, BLM failed to consider the cultural significance of the Highlands to tribes but did conclude accurately with a single sentence: "Any landscape altering activities have the potential to adversely affect the spiritual significance of natural features important to Native American groups." AR 21017.

Between 1982 and 1988, BLM executed numerous geothermal leases on the Highlands – including the 26 leases at issue here – each with a primary term of 10 years.[3] Although these leases convey "the exclusive right and privilege to drill for, extract, produce, remove, utilize, sell, and dispose of geothermal steam and associated geothermal resources," BLM did not undertake any additional environmental or cultural review before granting them. And it neither consulted with Native American tribes in the region nor evaluated the Highlands' potential eligibility for the National Register.

[3] *See* AR 21248-50, 21251-54, 21287-91, 21308-12, 21323-27, 21385-90, 21420-24; SAR 130-36, 266-73, 321-24, 329-36, 564-71, 596-605, 606-11, 668-72, 750-62, 769-73, 858-63, 873-78, 980-87, 1172-76, 1177-81, 1185-92.

Shortly after executing the first leases, BLM approved a Unit Agreement for the Highlands (the "Glass Mountain Unit Agreement"). AR 19772-97.[4] In doing so, BLM explained that "the proposed unit is based principally on the distribution of surface volcanic features" and that "[t]he area has not been sufficiently studied to indicate neither [sic] the existence nor the extent of a geothermal resource." SAR 701. The Glass Mountain Unit Agreement largely tracked BLM's model unit agreement and contained nearly identical language regarding drilling mandates, participating areas, and unit contraction. *Compare* 43 C.F.R. 3286.1 (art. IV, XI, XII) *with* AR 19776-77, 19780-84. Like the model unit agreement, the Glass Mountain Unit Agreement mandated that the Unit operator "continue diligent exploration" in the Unit until the discovery of a commercially viable geothermal pool, AR 19781, and continue to "timely drill" wells as provided in its plans of operation "[u]ntil there is actual production" of geothermal steam. AR 19783. The Glass Mountain Unit Agreement also required that the Unit operator submit a Participating Area after drilling a paying well, and that all lands excluded from the Participating Area "shall be eliminated automatically" from the unit. AR 19776. The Unit eventually expanded to encompass 134,254 acres and now includes all 26 of the leases at issue. See AR 187-89, 19446-47, 19024, 18848-54; SAR 774, 775-77. While the Glass Mountain Unit Agreement originally united leases held by three leaseholders, AR 19793-95, Calpine[5] is now the sole leaseholder benefiting from the unit. *See* Federal Agencies' Answer to First Am. Consol. Compl. , ¶ 17.

A. The 1989 Paying Well Determination

During the 1980's, Calpine drilled several wells within the Unit, but only one of these showed potential – Well No. 31-17 on Lease CA-12372, a lease not at issue in this case (hereinafter the "27th Lease"). Calpine asked BLM to designate Well No. 31-17 a "paying well" – a well that is not producing, but is potentially capable of producing, commercial steam, SAR 2269-70, and BLM did so, without explanation or analysis, in February 1989. SAR 4023. This paying well determination triggered the five-year countdown to Calpine's deadline to submit a Participating Area for the Glass Mountain

[4] The copy of the Unit Agreement produced by BLM in the administrative record appears to be incomplete.

[5] Various entities have held the leases since their issuance. Calpine is the successor-in-interest and current holder of all 26 leases. For convenience, Plaintiffs use "Calpine" to refer to all past and present leaseholders.

Unit. *See* AR 19783; SAR 3707-08. Calpine thus had until February 13, 1994 to designate productive land surrounding the paying well to be its Participating Area. SAR 3707-08. BLM was then required to contract the unit to the boundaries of the Participating Area. After contraction, Calpine could still hold the leases eliminated from the new, smaller unit, but only according to the terms of the individual leases, independent of activities in the Unit.

As most of Calpine's nonproductive leases neared the end of their primary terms in the early 1990's, Calpine sought 5-year extensions under Steam Act subsection 1005(g). Because the nonproductive leases were committed to the same Unit as the 27th Lease, BLM determined that the 27th Lease's paying well, along with other exploratory efforts "on one or more leases appl[y] to all of the leases within the unit." AR 18838. That is, the prior drilling of a paying well (Well No. 31-17) on one lease in a Unit (Lease 12372) was sufficient evidence of diligent exploration to warrant 5-year extensions for all other leases in the Unit. Thus, in 1991 and 1992, BLM granted 5-year extensions for Calpine's nonproductive leases. SAR 2828-29 (granting 5-year extensions to 22 leases, with new expiration dates in early 1997 or June, 1998); SAR 3038-39 (granting 5-year extensions to 2 more leases, with new expiration date in 1997). With these 5-year extensions, Calpine had until 1998, at the latest, to produce geothermal steam (or at least drill a paying well) on these 26 nonproductive leases.[6]

In the 1991 decision granting 5-year extensions under subsection 1005(g), BLM singled out the 27th lease for separate consideration. Based on the paying well determination on the 27th Lease, BLM granted a 40-year additional term under subsection 1005(a) for *that lease* only. SAR 2828-29. Other than the 27th Lease, not one of the other leases within the Unit – and not one of the 26 leases at issue here – has ever possessed a paying (let alone a producing) well.

B. The Cessation of Any Exploration Activity in 1991

Just months after BLM granted Calpine's 1991 request for 5-year extensions on the non-producing leases, Calpine reversed course and pressed BLM to rescind the 5-year extensions and instead issue 40-year additional lease terms. AR 18829-30. According to Calpine, because one lease in the Unit possessed a paying well, BLM should have credited all leases in the unit with a paying well. *See* AR

[6] The remaining 2 leases (of the 26 at issue here) received their 10-year primary terms in 1988, and accordingly, were set to expire in 1998. AR 21248, 21251.

18829-30. Ironically, 1991 is also the last year that Calpine offered evidence of drilling anywhere within the Unit. *See* AR 21547-49, AR 189. Later reports describe Calpine's maintenance of the lone paying well, its cleaning, capping, and inspection of another well, and its operation of weather stations, but they do not describe any new drilling in the Unit. *See* AR 21505-07, 21526-28.

BLM rejected Calpine's requests for 40-year additions as inconsistent with the Steam Act and its regulations. SAR 4020 (explaining that BLM consistently disagreed with Calpine's interpretation of the regulations). Specifically, in a June 23, 1992, memorandum, BLM interpreted the law as follows: A 40-year additional term "may only be applied to the lease with the well capable of production and not to the other committed leases in the unit." AR 18822. Based on the language of the Steam Act and implementing regulations, BLM explained that the relevant provisions for 40-year additional terms refer only to individual leases, unlike the provisions controlling 5-year extensions, which explicitly apply to entire units. *Id*. BLM also expressed concerns about its ability to enforce the Unit Agreement should the operator fail to diligently explore the Unit after receiving 40-year additional terms. AR 18822-23.

Over the next several years, BLM repeatedly admonished Calpine for its failure to comply with the Unit Agreement's diligence and contraction requirements. After 1991, instead of drilling in the Unit, *see* AR 189, Calpine repeatedly took "the approach of proposing diligent activities, but then failing to follow through with the proposals once approved." SAR 3709. In 1995, BLM notified Calpine that its failure to re-drill a well required by its 1994/1995 drilling plan and its failure to propose any drilling in its 1995/1996 drilling plan placed Calpine "in default of meeting reasonable diligence in the unit." SAR 3525-26. BLM warned Calpine that it would eliminate nonproductive leases from the Unit or terminate the Unit altogether if Calpine failed to cure its default. *See* SAR 3526. Such termination would be based on Calpine's failure to meet its ongoing obligation to make diligent efforts toward utilizing the steam from the paying well on the 27th Lease. SAR 3526-27 ("Termination of the unit will be based on our determination that the diligence requirement . . . associated with wells capable of producing geothermal resources in commercial quantities, has not been met, and therefore, Article 18.1(b) of the Glass Mountain Unit Agreement no longer applies."). Since the 27th Lease's possession of a paying well was the only reason the Unit had not expired in the 1980's, the loss of paying-well status would

terminate the Unit. BLM offered to keep the Unit alive if Calpine remedied its default by "drill[ing] at least one well" within the Unit before May 17, 1996, SAR 3526, which Calpine never did. AR 189.

In June 1996, BLM notified Calpine of another default: Calpine had failed to designate a Participating Area by its February 13, 1994, deadline. SAR 3707-08. BLM explained that its regulations and the Unit Agreement required Calpine to identify lands "reasonably proved to be productive" within 5 years after Calpine drilled its paying well. SAR 3708. When Calpine sought more time to explore its nonproductive leases, BLM responded that it had already given Calpine "more than sufficient time" to "prove up" the land in the Unit, and Calpine had failed to do so. SAR 3709. Nevertheless, BLM gave Calpine an additional 60 days to submit a Participating Area that "only include[d] those lands which may be regarded as reasonably proved to be productive." SAR 3708. Calpine did not meet this extended deadline and, to this day, has never submitted a Participating Area. By spring of 1997, the 5-year extensions for most of the 26 nonproducing leases would have expired but for Calpine's request for additional extensions. *See* SAR 3782-83. Because Calpine failed to designate a Participating Area by the Unit Agreement's deadline, BLM determined that the Unit, as of February 13, 1994, "should have contracted down to an area drained by commercial well No. 31-17" – Calpine's lone paying well. SAR 3708. Nevertheless, as Calpine's 26 leases neared the end of their first 5-year extension, Calpine doubled down on its push for all leases in the Unit to receive 40-year additional terms as if they all possessed a paying well. SAR 3782-83

C. BLM's Decision to Extend Rather than Terminate the Leases

BLM ultimately capitulated. On May 18, 1998, BLM rescinded its earlier 5-year extension decisions, made in 1991 and 1992 pursuant to subsection 1005(g), and retroactively granted a 40-year additional term under subsection 1005(a) for each of Calpine's nonproductive leases. AR 3656-57, SAR 4052-54. BLM did not conduct any environmental or cultural review or tribal consultation prior to this decision. The record of BLM's abrupt reversal is a single internal agency memorandum. SAR 4017-22. Neither this memo nor BLM's actual decision notice contains a diligent efforts determination of any kind. *See* SAR 4052-54, SAR 4017-22. Indeed, Calpine had neither remedied its default nor conducted any drilling since 1991. AR 189.

BLM's decision memo first reiterated its consistent position up to that point – that an additional 40-year term is granted only on a lease-by-lease basis and not to all leases committed to the unit. SAR 4018-20. But, in an effort to bring Calpine into compliance, the memo recommended reversing this long-standing position without explaining how it could do so legally. Then, by equating a paying well capable of producing steam with a well actually producing steam, the memo ignored the extra diligence requirement for a paying (as opposed to a producing) well imposed on lease additions by subsection 1005(d). SAR 4018. On this basis, BLM treated all 26 leases as a "producing unit" for purposes of granting 40-year additional terms. SAR 4017. As a result, the sole grounds for the 1998 decision appears to be the decade-old paying well determination from 1991, without any consideration of BLM's own finding that no subsequent exploration had occurred in the Unit and that the Unit was in default.

Accordingly, BLM did not make a diligent efforts determination in adding 40-year terms to the nonproducing leases. Rather, the decision memo reflected BLM's hope that by continuing the leases conditioned on the submission of a Participating Area, the Unit boundary would contract down, and BLM would be able to manage the smaller Unit in the public interest. BLM's decision memo described its struggle to effectively manage the Unit under an unit agreement that was likely illegal at the time it was written. In particular, because the Glass Mountain Unit Agreement might be read to allow indefinite continuation of the Unit once BLM made a paying well determination – in clear contradiction of the Steam Act – BLM searched for a way to bring Calpine into compliance with the diligent exploration requirements. SAR 4018-20; *see generally* AR 19772-97. The practical solution it settled upon included the demand (first made in 1996) that Calpine submit a Participating Area, which would then allow BLM to contract the Unit and enforce the diligence requirements. SAR 4021-22. With this intended safeguard in place, BLM agreed to reverse its long-standing legal position and grant 40-year additions for all leases in the Unit. The decision memo failed to mention that every deadline BLM set for Calpine to remedy its defaults had long since passed – including the 1996 deadline for submission of a Participating Area – and Calpine had failed to comply with all of them.

BLM's 1998 decision added 40 years to the 26 nonproductive leases without any diligent efforts finding, without any public process, without any environmental or cultural review, and without any tribal consultation. In the years since BLM's reversal, Calpine has neither resumed drilling nor

submitted a Participating Area, but the Unit still has not terminated or contracted. Nor has Calpine brought any well into actual production anywhere in the Unit. In short, the exact scenario that BLM feared – the indefinite continuation of both the Unit Agreement and all leases committed to it even though exploration is no longer occuring – has come to pass because BLM has failed to terminate the leases or the Unit Agreement for ongoing noncompliance, as the law requires.

PROCEDURAL HISTORY

In 2004, Plaintiffs Pit River Tribe, Native Coalition, and Ecology Center filed this lawsuit challenging BLM's 1998 decision to continue 26 unproven leases for 40 years. *Pit River Tribe v. BLM*, Case No. S-04-0956 (E.D. Cal., filed May 17, 2004). Separately, Save Medicine Lake Coalition and Medicine Lake Citizens filed a similar action challenging BLM's 1998 lease decision, as well as BLM's subsequent approval of two proposed geothermal projects (Telephone Flat and Fourmile Hill). *See Save Medicine Lake Coalition v. BLM*, Case No. S-04-0969 (E.D. Cal., filed May 18, 2004). The parties agreed to a stand-still of these two cases until the Ninth Circuit addressed related issues in *Pit River I* (relating to the Fourmile Hill leases).

In the meantime, as a result of Calpine's bankruptcy filing in late 2005, both cases were automatically stayed pursuant to the Bankruptcy Code. After Calpine emerged from bankruptcy in 2008, the parties engaged in unsuccessful settlement talks. In 2012, Calpine withdrew its proposed Telephone Flat development project, and the district court consolidated the two cases. Plaintiffs filed an amended complaint that deleted claims related to the withdrawn Telephone Flat development project decision and narrowed the claims in the consolidated cases to the legality of the 1998 lease decision and the continuing validity of the leases. First Amended Complaint, ECF No. 44-1.

In 2013, Defendants and Calpine moved for judgment on the pleadings. ECF No. 51; ECF No. 52. This Court granted the motion and held that (1) Plaintiffs lacked prudential standing and (2) because the Steam Act automatically mandated the 40-year lease additions, BLM lacked the discretion necessary to trigger its obligations under NEPA, the Preservation Act, and the Indian fiduciary trust doctrine. Order on Dispositive Motions, ECF No. 84.

In July 2015, the Ninth Circuit reversed this ruling and remanded the case. *Pit River II*, 793 F.3d at 1149. The Ninth Circuit found that Plaintiffs' lawsuit challenged both BLM's lease continuation

decision under subsection 1005(a) and BLM's decision to "reverse course and decide that the leases could be continued under § 1005(a) as a unit rather than be[] subject to lease-by-lease extensions under § 1005(g)." *Id.* at 1157. Thus, Plaintiffs' claims "implicate[] both § 1005(a) and § 1005(g)." *Id.* at 1149. The Ninth Circuit further noted that if Plaintiffs prevail on their claim that the 26 leases were eligible only for extension under subsection 1005(g), "BLM will be required to comply with NEPA and NHPA, including by consulting with affected tribes." *Id.* at 1159.

ARGUMENT

I. BLM Violated Section 1005 of the Steam Act When It Reversed Its Earlier Decision and Continued Calpine's 26 Nonproducing Leases for 40 Years.

BLM disregarded subsection 1005(a)'s requirements when it continued Calpine's 26 nonproductive leases for 40 years. BLM is authorized by statute to grant an additional term only on the lease that is either producing steam or deemed capable of producing steam in commercial quantities. 30 U.S.C. §§ 1005(a), (d). It is undisputed that no lease in the Unit has ever actually produced steam in commercial quantities. It is also undisputed that Calpine has not drilled a well capable of producing steam on any of the 26 leases at issue here. Since none of the 26 leases possesses a well that was actually producing or capable of producing steam, none were or are eligible for 40-year additional terms.

Moreover, even if the Court were to find that the language of the Steam Act allows BLM to grant 40-year additional terms to nonproducing leases based solely on the existence of a paying well on a different lease in the Unit – that is, that lease additions under subsection 1005(a) may be done on a unit-basis rather than a lease-by-lease basis – the agency still cannot grant additions unless it "determines that diligent efforts are being made toward the utilization of the geothermal steam." 30 U.S.C. § 1005(d). That is so because, as explained above, a producing well is automatically entitled to an additional term of up to 40 years as long as it continues to produce, while a mere paying well (which by definition has never produced) is entitled to an additional term *only* as long as BLM finds that the lessee is making diligent efforts toward production. Here, the record reflects that BLM never made that diligent efforts determination. To the contrary, at the time of the extension decision, BLM knew that the lessee and Unit operator were in continuing noncompliance with the diligent efforts requirements. Without that diligence finding, BLM could not lawfully grant the 40-year additions in 1998.

A. The Steam Act Only Permits BLM to Grant 40-Year Additional Lease Terms Under Subsection 1005(a) to Individual Leases, Not to All Leases As a Unit.

As noted, the May 1998 explanatory memo for the lease extension decision reiterated BLM's long-standing legal position that a single paying well in a unit does not entitle all other nonproductive leases in the unit to a 40-year addition under Steam Act subsection 1005(a), even as it failed to offer any legal justification for reversing that interpretation. In this litigation, BLM now argues the exact opposite – that Calpine's construction of a paying well on a single lease entitled *all* leases within the Unit to additional 40-year terms. BLM was right the first time. The plain language of the Steam Act and BLM's own implementing regulations restrict 40-year additional terms to individually qualifying leases. The Glass Mountain Unit Agreement – which BLM conceded was likely illegal – cannot override Congress' clear intent to limit the availability of 40-year additional lease terms.

1. The Plain Language of the Steam Act Limits 40-Year Additional Terms to Productive Leases, Determined on a Lease-by-Lease Basis.

The plain language of section 1005 makes clear that nonproductive leases – regardless of their commitment to a unit – are ineligible for 40-year additional lease terms. Subsection 1005(a) limits BLM's authority to grant 40-year additional lease terms to individual leases with a producing or paying well: "If geothermal steam is produced or utilized in commercial quantities[,] . . . *such lease* shall continue for so long thereafter as geothermal steam is produced or utilized in commercial quantities, but such continuation shall not exceed an additional forty years." 30 U.S.C. § 1005(a) (emphasis added). The term "such" is defined as "of the character, quality, or extent previously indicated or implied." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/such (last visited Jan. 28, 2016); *Interstate Fire & Casualty Co., Inc. v. Roman Catholic Church of Diocese of Phoenix*, 761 F.3d 953, 955 (9th Cir. 2014) (relying on the plain meaning of "such assured" as referring back to the last mentioned assured in the provision). Here, "such lease" refers back to the lease that meets the requirement in the immediately preceding clause – the lease on which the leaseholder has produced commercial steam. Accordingly, Congress' deliberate use of "such lease" in subsection 1005(a) limits the availability of an additional 40-year term to that particular lease that has produced or been deemed capable of producing commercial steam.

In contrast, subsections 1005(g) and 1005(c) expressly authorize 5-year extensions for nonproductive leases based on the lessee's diligent exploration efforts in the same overall unit area. They provide 5-year extensions for "any lease for land on which, *or for which under an approved cooperative or unit plan of development or operation*," the lessee makes efforts to develop commercial steam. 30 U.S.C. § 1005(c), (g) (emphasis added). Not only do these subsections refer to "any lease" rather than "such lease," they explicitly recognize that exploration efforts elsewhere in a unit will satisfy the diligence requirement for purposes of 5-year extensions on nonproductive leases in the unit.

Subsection 1005(a)'s conspicuous omission of the language "for which under an approved . . . unit plan" demonstrates Congress' intention that subsections 1005(c) and 1005(g) should provide the sole means for extending nonproductive leases on a unit-basis, rather than lease-by-lease. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Granting shorter-term extensions for nonproductive leases, and reserving 40-year additional terms only for individual leases shown capable of steam production, comports with Congress' goal of balancing geothermal development with environmental protection and other land uses. *See* S. Rep. No. 91-1160, at 10 (1970) (declaring that the Steam Act "will protect the public interest, including protection of the quality of the environment, and at the same time . . . encourage development of a new source of energy from public lands."). Leases that do not prove productive during the primary 10-year term and two successive 5-year extensions simply expire, and the land is then returned to the public consistent with multiple use objectives.

The omission of unitized leases from subsection 1005(a) was no accident or drafting oversight on the part of Congress. In 1987, the Senate considered a bill that would have inserted the phrase "or under an approved cooperative or unit plan of development or operation" into subsection 1005(a). S. 1006, 100th Cong. § 3(a) (1987); *see also* S. Rep. No. 100-283 (1988). The final 1988 Steam Act amendments, however, did not include this proposed insertion in subsection 1005(a), but instead reserved the "cooperative or unit plan of development or operation" language *only* for shorter extensions under subsections 1005(c) and 1005(g). The logic behind Congress' legislative choice is entirely consistent with BLM's rationale for resisting Calpine's interpretation: If a single paying well were

sufficient both to extend a unit agreement indefinitely *and* to hold all nonproductive leases in the unit for 40 years, the lessee would be able to sit on the leases for decades without any further exploration – precisely the opposite of what Congress intended. SAR 4020 ("Since the status of well #31-17 would essentially never change from being capable of production, and the fact that the Unit language under Article 18.1(b) would allow the Unit to continue on for so long as a well was capable of production made for some serious concerns over how BLM could manage the Unit.").

In sum, BLM had no statutory authority – let alone a statutory obligation – to grant 40-year additional terms under Steam Act subsection 1005(a) for the 26 nonproductive leases in the Glass Mountain Unit. At best, those 26 leases were each legally entitled to one more 5-year extension under subsection (g), had Calpine demonstrated ongoing "bona fide efforts" (which it did not). BLM's unlawful action in granting the 40-year additions has resulted in precisely the outcome that Congress anticipated and BLM feared – open-ended leases that have tied up public lands for the last 25 years despite the absence of any additional exploration or development activities.[7]

2. BLM's Longstanding Interpretation of the Steam Act Supported the Plain-Text Reading of the Steam Act.

Up to 1998, BLM's longstanding interpretation of the Steam Act supported the plain-language reading of the statute: BLM understood that only individual, productive leases could qualify for 40-year additional terms, and nonproductive leases could only obtain 5-year lease extensions. SAR 4018 (explaining that an "additional term" under the Steam Act "is on a lease by lease basis"). With its 1998 decision, however, BLM abruptly reversed course and granted 40-year additional terms to all of Calpine's nonproductive leases, without offering any legal basis for this sudden about-face. Because BLM contravened its longstanding legal interpretation without justification, this Court should give no deference to BLM's new Steam Act interpretation, articulated for the first time in this litigation.

[7] The precise expiration date(s) of these leases is unclear. Plaintiffs understand that, at Calpine's request, BLM has granted various "suspensions" of the leases over the years, an action that suspends both the required royalty payments and the running of the lease term. 30 U.S.C. § 1010. These periodic suspensions are generally not made public, but based on informal communications, Plaintiffs believe that the suspensions may have added many additional years to the lease terms.

Before May 18, 1998, BLM enforced the plain language of the Steam Act in managing Calpine's leases. In 1991, when the Glass Mountain Unit leases' primary terms were about to expire, BLM affirmed that the 27th Lease could obtain a 40-year additional term because it contained a paying well and because Calpine agreed to submit evidence of its "diligent efforts" to produce commercial steam within one year. SAR 2828-29. For the nonproductive leases in the unit, on the other hand, BLM determined that these leases could only qualify for 5-year extensions under 1005(g). *Id*. The paying well on the 27th Lease could satisfy the "bona fide efforts" diligence requirements of subsection 1005(g) extensions for the nonproductive leases, but could not be used to give the nonproductive leases 40-year additional terms. AR 18838 (BLM eplaining that "we are making an interpretation that bona fide efforts [as required by 1005(g)] . . . on one or more leases applies to all of the leases within the unit").

BLM reaffirmed its longstanding interpretation of the Steam Act when it rejected Calpine's later request for additional 40-year terms for all leases in the Glass Mountain Unit. In an October 29, 1991 letter, Calpine argued that, because the Unit Agreement joined the nonproductive leases with the 27th Lease, all of the leases in the unit were entitled to additional lease terms. AR 18829-30. But BLM held its position, stating in a 1992 memorandum,"we believe that the 40 year extension may only be applied to the lease with the well capable of production and not to the other committed lease in the unit." AR 18822. In justifying this conclusion, BLM pointed to the Steam Act and the regulations, which "refer specifically to individual leases (lease by lease basis), not leases within a 'cooperative plan, communitization agreement, or a unit plan of development or operation.'" AR 18822 (quoting 43 C.F.R. § 3203.1-4).

BLM's interpretation of the Steam Act, reflected in its management of Calpine's leases, was enforced not just in California, but throughout the agency. BLM's regulations implementing the Steam Act demonstrate that BLM has long assumed that only individual, productive leases are eligible for 40-year additional lease terms under subsection 1005(a): "If geothermal resources are produced or utilized in commercial quantities within the primary term or any term of a lease, *that lease* shall continue for so long thereafter as" production continues. 43 C.F.R. § 3203.1-3(b). By contrast, the implementing regulations for 5-year extensions under subsections 1005(c) and (g) apply to "*any lease* for land on

which, or for which under an approved cooperative plan, communitization agreement, or a unit plan of development or operation," where there is actual drilling or a paying well. 43 C.F.R. § 3203.1-4(b)-(c).

Contrary to BLM's current litigating position, BLM offices outside California followed exactly the same practice of authorizing additional terms only for the individual lease with a producing or paying well. In Nevada, for instance, BLM approved the "Fish Lake Unit Agreement," which included a series of exploration requirements nearly identical to those in the Glass Mountain Unit Agreement. *Geo-Energy Partners*, 613 F.3d at 950. When the unit operator developed a paying well on one of the leases in the Fish Lake Unit in 1994, BLM approved a 40-year additional term for that lease. *Id.* at 951. Significantly, the other 12 leases in the Fish Lake Unit without paying wells – analogous to Calpine's 26 leases here – were granted only 5-year extensions (or in some instances allowed to expire). *Id.* The Ninth Circuit upheld BLM's interpretation of the Steam Act and explained that "BLM may extend a non-producing lease for two successive five-year periods" if the lessee satisfies its unit diligent efforts requirements. *Id.* at 949. In short, BLM's management of Calpine's leases up until 1998 was consistent not only with the plain language of the statute, but also with the agency's own implementing regulations and practices, as affirmed by the courts.

In May 1998, however, BLM in California abandoned longstanding agency practice and adopted a position the agency had previously rejected, announcing the lease addition decision without offering any legal reasoning. *See* AR 4052-54; *see also Pit River II*, 793 F. 3d at 1152 ("BLM did not explain its legal rationale for this changed statutory interpretation."). Between 1992 and 1998 decision, there were no intervening amendments to the Steam Act or the implementing regulations that would warrant BLM's reversal – or any new exploration efforts to bring the Glass Mountain Unit back into compliance with the law. Apparently BLM hoped that, in capitulating to Calpine's requests for 40-year additional terms, it might finally convince the lessee to comply with the long-overdue Unit obligations. *See* SAR 4021 (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").

Years later, in this lawsuit, BLM offers a *post hoc* rationalization for the reversal – that its California office merely brought its interpretation of the law in line with the Nevada and other offices. That litigation position is not credible. As explained, BLM's governing regulations did *not* provide 40-

year additional terms for nonproductive leases in a unit with a paying well; they expressly allowed additions only for the lease with the well. And *Geo-Energy Partners* makes clear that BLM's Nevada office, in particular, did not take the position attributed to it by litigation counsel; in that case, which arose out of Nevada, the nonproducing wells in the unit were either given 5-year extensions under subsection 1005(g) or terminated by contraction of the unit following a paying well determination on one lease in the unit. The Ninth Circuit affirmed this interpretation of the law.[8]

When 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, 516 (2009). If an agency changes its interpretation of a statute without reasoned justification, judicial deference is not appropriate. *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."). BLM's 1998 explanatory memorandum, which recommended granting the 40-year additions, did not provide a *legal* basis for reversal of its longstanding interpretation. Instead, the memo reiterated the basis for BLM's longstanding statutory interpretation, explained that the vaguely-drafted Glass Mountain Unit Agreement had created some uncertainties and made BLM reticent to enforce the Steam Act, and then articulated what BLM staff thought was a practical recommendation that might bring Calpine back into compliance. SAR 4017-22. The record reflects that BLM made no attempt to reconcile its decision with the strict statutory limits that the Steam Act imposes on lease terms. Accordingly, BLM's 1998 decision should not be afforded deference.

[8] What the two BLM offices apparently disagreed about here was the interpretation and effect of language in the admittedly-flawed Glass Mountain Unit Agreement (*see* SAR 4019), a revocable management arrangement that cannot, of course, override BLM's statutory constraints.

3. The Unit Agreement Cannot Nullify the Strict Lease Term Limits Imposed by the Steam Act.

In announcing its May 18, 1998 decision to grant 40-year additional terms to 26 nonproductive leases, BLM referenced (without further explanation) Article 17.4 of the Unit Agreement, which states that "[d]rilling 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." SAR 4052. This provision means that drilling or production anywhere within the Glass Mountain Unit will satisfy the diligence requirements applicable to all individual leases within the Unit – a result that makes sense given the unit's purpose of minimizing unnecessary surface disturbance and coordinating exploration. Moreover, Article 17.4 comports with Steam Act subsection 1005(g), which allows exploration work anywhere in a unit to satisfy the "bona fide efforts" requirements for 5-year extensions of nonproductive leases.

But nothing in Article 17.4 allows – let alone compels – BLM to grant subsection 1005(a) additions to nonproductive leases. To the contrary, the Glass Mountain Unit Agreement expressly provides that it must be read consistent with the statute: "The [Steam] Act and all pertinent regulations, including operating and unit plan regulations, heretofore or hereafter issued thereunder are accepted and made a part of this Agreement as to Federal Lands." AR 19774 (art. 1.1). Moreover:

> The terms, conditions, and provisions of all leases, subleases, and other contracts relating to exploration, drilling, development, or utilization of geothermal resources on lands committed to this Agreement are hereby expressly modified and amended *only to the extent necessary* to make the same conform to the provisions hereof; otherwise said leases, subleases, and contracts shall remain in full force and effect.

AR 19787 (art. 17.1; emphasis added). In particular, with respect to the term of leases within the Unit, the Agreement provides: "Subject to the lease renewal and readjustment provision of the Act, any Federal lease committed hereto may, as to the Unitized Land, be *continued for the term so provided therein, or as extended by law*." *Id.* (art. 17.7, emphasis added).[9] Article 17.7 thus makes it clear that leases committed to the Unit remain subject to the operation of their own terms and the Steam Act more generally; the Unit Agreement does not alter or independently govern lease extensions or additions.

[9] This provision stands in evident contrast to the immediately preceding provision, which applies to leases for non-federal lands and expressly extends those leases beyond their term to be co-extensive with the term of the Unit Agreement.

In any event, BLM cannot lawfully invoke the Glass Mountain Unit Agreement to override the plain-language limitations of Steam Act subsection 1005(a). While Congress may have empowered BLM to enter into unit agreements to implement the Steam Act, "[a]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *Adams v. U.S. Forest Serv.*, 671 F.3d 1138, 1144 (9th Cir. 2012). In enacting section 1005, Congress spoke clearly: BLM may only grant 40-year additional terms to producing or paying leases on a lease-by-lease basis. Because Congress has set clear limits on lease extensions, BLM cannot ignore those limits and rewrite the Steam Act through a voluntary agreement with idle leaseholders. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) ("[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.").

B. Even if the Steam Act Allowed BLM to Grant Additional 40-Year Terms to All 26 Nonproductive Leases in the Unit, BLM Failed to Make the Requisite "Diligent Efforts" Determination.

Regardless of whether BLM may, consistent with the law, credit a paying well to every nonproducing lease in a unit for purposes of subsection 1005(a), there is still another requirement that a lessee must satisfy to obtain a 40-year additional term. As explained above, subsection 1005(a) provides: "If geothermal steam is produced in commercial quantities within [the primary] lease term, such lease shall continue for so long thereafter as geothermal steam is produced or utilized in commercial quantities." The term "produced or utilized in commercial quantities" is specially defined by the Steam Act 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). Thus, where the request for an additional term is based on a well merely *capable* of producing steam (a paying well) rather than a well that is actually producing or utilizing the steam, the addition is *not* automatic; BLM may grant such an addition only if it determines that the lessee is making "diligent efforts" toward utilizing that steam at the time of the decision.

As BLM explained in its 1998 "plain language" regulations:[10]

[10] In September 1998, BLM published a new, more accessible edition of its regulations intended to

> 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. We may ask you to describe in writing your efforts to begin production during the lease term, and the efforts you plan for future years. You should also describe negotiations for sales contracts, marketing arrangements, and electrical and generating transmission agreements, and any other information you believe shows diligent efforts.

43 C.F.R. § 3207.10(b) (1998) (emphasis added); *see also* 43 C.F.R. § 3203.1-4 (describing requisite informational submissions necessary to support additional term for a paying well); 43 C.F.R. § 3200.0-5(x) (defining "produced or utilized in commercial quantities" to include completion of a well capable of producing resources in commercial quantities "if the authorized officer determines that diligent efforts are being made towards the utilization of the resources"); AR 3524 (email from BLM Nevada officer to BLM California officer noting that a well can be considered commercial only if there is a determination "that diligent efforts are being made toward the utilization of the resources"). The extra diligence requirement for paying wells (not applicable to producing wells) ensures that lessees do not speculatively hold a potentially viable resource, but instead continue to work toward production.

BLM never made a diligent efforts determination in connection with the 1998 decision – not in the May 13 explanatory memorandum, not in the May 18 decision document, and not anywhere else in the record. And for good reason. Throughout the 1990's, BLM found Calpine continuously in default of its diligence obligations under the Steam Act and the Unit Agreement. *See generally* SAR 3707-10, 3525-27. On July 24, 1995, BLM first notified Calpine that it was no longer meeting its diligence obligations. SAR 3525-27. BLM cited Calpine's failure to drill a well promised in its 1994/1995 drilling plan and its failure to include any drilling proposal in its 1995/1996 drilling plan. SAR 3525-26. BLM offered Calpine the opportunity to remedy these defaults by drilling a well within the unit before May 17, 1996. SAR 3526. Calpine, however, failed to drill a single well before this deadline. *See* AR 189 (1998 BLM memo noting that Calpine had not drilled in the unit since 1991). In fact, by the time

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rewrite the regulations in "plain language style." *See* Geothermal Resources Leasing and Operations, 63 Fed. Reg. 52,356 (Sept. 30, 1998) (codified at 43 C.F.R. pt. 3200). The 1998 regulatory revisions did not effect substantive changes. *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).

BLM made its decision in 1998, Calpine had failed to drill in the Unit for over six years. *See id.* Thus, when BLM made its decision to continue Calpine's 26 leases for 40 years in 1998, it had no basis to find that Calpine was making diligent efforts toward utilizing steam anywhere in the Unit.

Calpine's ongoing violations of the Unit Agreement in the years leading up to BLM's decision made it impossible for BLM to have determined that Calpine met the "diligent efforts" requirement for additional lease terms. Accordingly, even if subsection 1005(a) allowed BLM to grant 40-year additions on nonproductive leases, the agency could not, under the facts here, lawfully grant such additions.

II. The Unit Agreement Should Have Contracted and the 26 Leases Terminated.

Not only did BLM fail to make the necessary "diligent efforts" determination under subsection 1005(a) or the "bona fide efforts" finding under subsection 1005(g), but Calpine's failure to drill in the Unit at all after 1991 foreclosed BLM's ability to rely on the Unit Agreement for lease extensions, either in 1998 or now. The Unit Agreement provides a specific progressive drilling schedule that effectively supplants the diligence requirements for each individual lease in the Unit.[11] Once a paying well determination was made – which occurred on February 13, 1989 – the operator must undertake whatever additional exploration is necessary to establish a Participating Area, which then triggers contraction of the Unit to eliminate nonproducing leases that are not contributing to the Participating Area.

To ensure that the lessee did not stop exploring, the Unit Agreement included two important enforcement mechanisms. First, Article 11.7 provides: "Until there is *actual* production of Unitized Substances, the failure of the Unit Operator to timely drill any of the wells provided for in Plans of Operations . . . or to timely submit an acceptable subsequent Plan of Operations, *shall*, after notice of default or notice of prospective default to Unit Operator by the Supervisor and after failure of Unit Operator to remedy any actual default within a reasonable time . . . *result in automatic termination* of this Agreement effective as of the date of the default." AR 19783 (emphasis added). The Unit

[11] The Glass Mountain Unit Agreement imposed a "progressive exploratory program" requiring the operator to "continue diligent exploration" until discovery of commercially viable unitized substances. AR 19780-81 (art. 11.4). After completion of the initial drilling schedule, the Unit Agreement required a plan of operation that included "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 beginning of the next well until a well capable of producing Unitized Substances in paying quantities is completed." AR 19782-83.

Agreement also provides that lands not entitled to be within a Participating Area "*shall be eliminated automatically* from this Agreement as of the fifth anniversary" of the initial Participating Area. AR 19776 (art. 4.3).

On July 24, 1995, BLM notified Calpine that it was in default of its drilling obligations under the Unit Agreement. SAR 3525-27. Because Calpine never remedied this default, *see* AR 189, the Glass Mountain Unit should have terminated automatically on July 24, 1995 – nearly three years before BLM relied on the unit to justify adding 40-years to Calpine's nonproductive leases. In addition to defaulting on its drilling obligations, Calpine also defaulted on its obligation to submit a Participating Area by the Unit Agreement's deadline. On June 2, 1996, BLM notified Calpine that its failure to submit a Participating Area by the Unit Agreement's deadline (February 13, 1994) triggered "the automatic contraction provision" of the Unit Agreement. SAR 3708. BLM nevertheless offered Calpine an extra 60 days to submit a Participating Area, SAR 3707-08, but Calpine also failed to meet this extended deadline and, 20 years later, still has not submitted a Participating Area. Since Calpine failed to submit a Participating Area before both the Unit Agreement's deadline (February 13, 1994) and BLM's extended deadline (August 2, 1996), the Unit should have contracted down to the area drained by Calpine's lone paying well. *See* SAR 3707 ("[W]ithout the benefit of a P[articipating]A[rea], it is our position that the Glass Mountain geothermal unit, on February 13, 1994, should have contracted down to an area drained by commercial well No. 31-17."). Thus, by BLM's actions and interpretation, the Unit arguably contracted long before BLM considered Calpine's request to continue its 26 leases in 1998.

Whether the Glass Mountain Unit terminated due to Calpine's failure to drill in the Unit or contracted down due to Calpine's failure to submit a Participating Area, one thing is clear: By 1998, the Glass Mountain Unit no longer should have included the 26 leases at issue.[12] Thus, when evaluating Calpine's request for 40-year additional terms in 1998, BLM could not properly use the paying well on the 27th Lease as the basis for granting an additional term. Nor could BLM count exploratory efforts, if

[12] Additionally, BLM never reviewed the Glass Mountain Unit to eliminate unnecessary leases from the unit within five years after September 22, 1988, as required by section 1017 of the Steam Act. 30 U.S.C. § 1017. Had BLM conducted this statutorily mandated review and elimination, BLM likely would have eliminated Calpine's nonproductive leases from the Unit. *See* AR 3524 (email listing the "5 year unit review" as an option for contracting the unit).

any, conducted on other leases within the Unit toward the showing of "diligent efforts" needed to earn an additional term under subsection 1005(a) or the showing of "bona fide efforts" required for a shorter extension under subsection 1005(g) of any specific lease.[13]

Moreover, Calpine's defaults have continued unabated for the last 20 years. Plaintiffs' complaint also alleges that BLM (1) "Unlawfully failed to terminate or eliminate the Leases from the Glass Mountain Unit Agreement when the Unit Operator failed to comply with the reasonable diligence requirements of the approved Plan of Operation in 1995, and *this violation continues to this day*"; (2) "Unlawfully failed to contract the Glass Mountain Unit Agreement to include only Lease CA12372 when the Unit Operator failed to submit a schedule for establishing the Participating Area for Well No. 31-17, as required by the Unit Agreement, by the fifth anniversary of BLM's determination that such well was capable of commercial production, and *this violation is ongoing and continues to this day*"; and (3) "Unlawfully failed to terminate the 26 Leases identified in paragraph 1 hereof for failure to comply with the 'due diligence' and 'bona fide efforts' requirements of the GSA, and *this violation is ongoing and continues to this day*." First Amended Compl., ¶ 107(a)-(c) (emphasis added). Defendants have offered no evidence that any of these continuing violations have ever been remedied. In fact, BLM admits that the defaults identified in its July 24, 1995 and June 2, 1996 letters – for failure to conduct the exploratory drilling required by Plans of Operation and for failure to submit a Participating Area – have not been remedied. *Compare* First Amended Compl. ¶¶ 50, 57 *with* Fed. Defs. Answer ¶¶ 50, 57. Likewise, paying well No. 31-17 has never been developed and Calpine has never demonstrated another paying well in the Unit. *Compare* First Amended Compl. ¶ 54 *with* Fed. Defs. Answer ¶ 54. Thus, whether or not the Unit Agreement actually contracted and the 26 leases terminated before the 1998 decision, the leases remain in noncompliance with the Steam Act's continuing diligent efforts requirements. Thus, the Court should conclude that the 26 leases at issue here are now eliminated from the Unit by operation of law and have subsequently expired by their terms.

[13] Calpine was also not "actual[ly] drilling" in 1998, so the leases could not be extended under subsection 1005(c). 30 U.S.C. § 1005(c) (authorizing a 5-year extension where a lessee commenced and is diligently prosecuting "actual drilling operations").

III. By Mischaracterizing Its Decision as Exempt From Environmental, Cultural, and Tribal Review, BLM Violated Its Duties under NEPA, the Preservation Act, and the Indian Fiduciary Trust Doctrine.

Because there has *never* been a producing well drilled in the Glass Mountain Unit, BLM could not in 1998 – and cannot today – grant an automatic addition to any lease in the unit. Assuming for the sake of argument only that the Unit Agreement remains in effect and that BLM has statutory authority to grant lease extensions or additions based solely on the Unit's sole paying well, BLM must still determine that Calpine satisfied the Steam Act's "diligent efforts" or "bona fide efforts" requirements, under subsection 1005(d) or 1005(g), respectively. *E.g.*, 43 C.F.R. § 3207.10(b) (1998) (BLM "may" continue lease with paying well depending on diligence information). That discretionary determination requires that the agency first conduct additional environmental and cultural review and tribal consultation under NEPA, the Preservation Act, and the Indian fiduciary trust doctrine. *Pit River I*, 469 F.3d at 780, 788. It is undisputed that BLM did not conduct any environmental or cultural review and did not consult with the Pit River Tribe prior to making its 1998 decision. *Compare* First Amended Compl. ¶¶ 71-74 *with* Fed Defs. Answer ¶¶ 71-74. Accordingly, BLM's 1998 decision is unlawful for this additional reason.

BLM attempts to circumvent the Steam Act's diligent efforts requirements by mischaracterizing its 1998 decision as an automatic continuation mandated by Steam Act subsection 1005(a). But an agency cannot mischaracterize an action to avoid triggering additional statutory duties. *See Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 895-99 (N.D. Cal. 2006), *aff'd*, 575 F.3d 999 (9th Cir. 2009); *cf. L.D.G. v. Holder*, 744 F.3d 1022, 1029 (7th Cir. 2014) (noting that mischaracterizing a rule as an "interpretation" would allow an agency to "accomplish an end-run" around its notice-and-comment responsibilities). In *Lockyer*, the Forest Service characterized its adoption of a rule that effectively repealed robust protections for roadless forests as "purely" procedural, thus falling within NEPA's categorical exclusion of administrative procedures from environmental review. *Id.* at 894-95. The court rejected this characterization, finding instead that the agency's action was "substantive[]," and thus, subject to NEPA review. *Id.* at 898. The Forest Service's attempt to exempt the rule from NEPA "stretche[d] the categorical exclusion well past the breaking point." *Id.* at 902. Because the Forest Service failed to conduct environmental review and wildlife consultation as a result of its

mischaracterization, the Forest Service violated its duties under NEPA and the Endangered Species Act. *Id.* at 909, 912.

Like the Forest Service in *Lockyer*, BLM in this litigation has misframed its action as an "automatic" continuation under subsection 1005(a) that involves no discretion whatsoever, in an attempt to avoid triggering its mandatory NEPA and the Preservation Act obligations. As explained above, however, BLM's action in 1998 was highly discretionary – to the point of ignoring its obligation to make a diligence finding or else allow the Unit to contract and the leases to terminate. Had BLM correctly framed its decision in 1998, it would have reviewed Calpine's leases for eligibility under subsection 1005(g) (or even subsection 1005(d)), a discretinary determination that triggers tribal consultation and environmental review. To comply with NEPA, BLM would have taken a "hard look" at the environmental consequences of continued geothermal leasing by preparing an environmental impact statement. *Pit River I*, 469 F.3d at 787; *see also* 42 U.S.C. § 4332(2)(C). To comply with the Preservation Act, BLM also would have consulted with deeply interested parties, including the Pit River Tribe and other Native Americans. *See* 54 U.S.C. § 306102(b)(4)-(5). Had BLM taken these statutorily-mandated steps, it likely would have found that continued geothermal leasing in the Highlands was no longer consistent with the area's environmental and cultural significance, especially given the absence of a viable resource. Indeed, just two years later, BLM denied an application for geothermal development in the Highlands after considering the project's environmental and cultural impacts. AR 19953. It found that that the proposed project would have resulted in "an unacceptable loss of a social value," AR 19963, and concluded that "[t]he national benefit from the development of the geothermal resource . . . does not warrant the potential loss of social and cultural values that would occur if the Project were implemented." AR 19964. If it had properly completed this analysis *before* the 1998 decision, BLM may well have balanced the various public interests by denying the extensions.

REMEDY AND CONCLUSION

This case presents a unique challenge. First filed in 2004 and long delayed by Defendants' various actions over the years, it requires the Court to gaze backwards through the looking glass to review a 20-year-old decision record, frozen in time at 1998. But the real world has not stopped. Since then, the applicable laws and regulations, as well as the facts about the importance of the area and the

viability of energy development, have all changed rather dramatically. In 1999, the Medicine Lake Highlands were determined eligible for listing on the National Register as a Traditional Cultural District. After several years of working together, the tribes and agencies finalized a cultural management plan for the area in 2005. New studies about the importance of the area's water resources have recently emerged. The one thing that has not changed is: The lessee/unit operator has not undertaken any new geothermal exploration on the dormant leases since before the extensions were granted.

The Court could merely find the lease additions unlawful, without reaching the ongoing violations, and remand the matter back to BLM for further proceedings, as it did in *Pit River I.* But that outcome will not resolve the parties' disputes. It will only raise more questions: Can BLM revisit the lease extension decision as if it were 1998 all over again? What law applies, the one that exists today or the one that existed then? What facts may or should be considered? How are the last 30 years of inactivity accounted for under the Steam Act's leasing scheme? The better course is for the Court to declare that the lease extensions were invalid in 1998 and that, for the same reason, they are invalid today: Because the Unit Agreement has been in default for more than two decades, the 26 nonproductive leases should have been eliminated from the Unit long ago. A ruling to that effect would finally allow the Highlands to be freed up for other public purposes, in accordance with applicable multiple use mandates.

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment on the First, Second, Third, and Fourth Causes of Action in their First Amended Complaint, vacate the 40-year additional lease terms that BLM granted in 1998, hold that the Unit Agreement automatically terminated, and declare that the 26 leases have now expired.

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Respectfully submitted,

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