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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' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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

INTRODUCTION

Plaintiffs' plain text reading of the Geothermal Steam Act is entirely consistent with Congress' dual objectives of facilitating orderly geothermal development through unit agreements while ensuring that nonproducing leases timely expire. As the Opening Brief explains, leases with a paying well receive an "additional term" of up to 40 years under subsection 1005(a) for "so long as the Secretary determines that diligent efforts are being made toward the utilization of geothermal steam," and leases without a paying well may receive two shorter, successive 5-year "extensions" under subsection 1005(g) "if the Secretary determines that the lessee has met the bona fide effort requirement" during the prior lease term. Under this straightforward, commonsense statutory construction, nonproducing leases within a unit receive the significant benefit of having their annual "diligent exploration" requirements (included in every geothermal lease) satisfied by exploratory or drilling work on other leases in the unit, thereby avoiding the need for activity on each individual lease. And once a paying well is drilled within the unit, the holder of nonproducing leases may elect either to (i) conduct exploratory efforts to demonstrate that the leases belong within the unit's common pool "participating area" or (ii) allow automatic elimination of the leases when the unit contracts in five years pursuant to the terms of the unit agreement. Plaintiffs' plain reading thus harmonizes and gives effect to all of the statutory provisions, consistent with congressional intent.

In contrast, Defendants offer an alternative interpretation of the Steam Act that effectively reads the strict statutory requirements for lease diligence and finite terms for nonproducing leases entirely out of the law. Under Defendants' newly-minted legal theory, BLM has unfettered and unreviewable authority to:

(1) Approve a unit and the "commitment" of dozens of unexplored and nonproducing leases to that unit without evidence that those leases contain commercially viable resources;

(2) Extend the statutory terms of all nonproducing leases in the unit based solely on a determination that a single well on a single lease within the unit is "capable" of producing commercial resources; and then

(3) Decline to "contract" the unit to a demonstrated common pool ("participating area") within the five-year period prescribed by law and by the unit agreement, thereby allowing lessees to hold nonproducing leases for decades past the designated expiration and unit contraction dates without further exploration in the unit.

By permitting lessees to hold nonproducing leases for decades without any exploration activity on the leases or in the unit – as Calpine has done here – Defendants' proffered interpretation jettisons the Steam Act's express deadlines and diligence requirements and thus is "manifestly contrary" to Congress' intent. Accordingly, Defendants litigation position is not entitled to Chevron deference. Presidio Historical Ass'n v. Presidio Trust, 811 F.3d 1154, 1165 (9th Cir. 2016) (citing Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 239 (2004)).

If the Court finds the Steam Act ambiguous, it can look for guidance to Geo-Energy Partners-1983 Ltd. v. Salazar, 613 F.3d 946 (9th Cir. 2010), aff'ing sub nom., Geo-Energy Partners-1983 Ltd. v. Kempthorne, 551 F. Supp. 2d 1210 (D. Nev. 2008). There, BLM's Nevada office made a paying well determination for one lease in the Fish Lake Unit and placed only that one lease "in additional term" under subsection 1005(a). It simultaneously "extended" the primary terms of several nonproducing leases, based on their location in the unit, to match the mandatory 5-year unit contraction period, and it declined to extend the other nonproducing leases that had already received two 5-year extensions. As required by law and the unit agreement, BLM contracted the unit and eliminated the nonproducing leases when the unit operator failed to drill during the contraction period. Like the Fish Lake Agreement, the Glass Mountain Unit Agreement here was of limited duration. BLM could extend the Unit's original 5-year term based on a paying well determination, but only for so long as geothermal resources are produced in "paying quantities." BLM's paying well determination on February 13, 1989 initiated a 5-year unit contraction countdown, with nonproducing leases eliminated at the end of that period unless "diligent drilling operations are in progress on an exploratory well." No drilling operations were in progress in February 1994 or have occurred since. Thus, BLM's only option in 1998 was to determine whether the nonproducing leases satisfied the bona fide efforts criteria for subsection 1005(g) extensions, after environmental review and tribal consultation.

Finally, even if the Court were to defer to Defendants' argument that nonproducing leases receive "additional terms" rather than primary term "extensions" by virtue of their location in a unit, Plaintiffs still prevail. This case challenges BLM's ongoing failure over the last 22 years to contract the unit and eliminate nonproducing leases as an abuse of discretion and inconsistent with law. Defendants do not actually refute this claim or explain why the leases remain valid today. If Defendants have evidence to contradict the undisputed fact that BLM has failed to comply with the requirements of the law and the Unit Agreement, they should have come forward with it. Absent such evidence – or even a marginally plausible explanation for BLM's decades of non-compliance – this Court should find that the 26 nonproducing are invalid and grant Plaintiffs' motion for summary judgment.

ARGUMENT

I. The Plain Language of Steam Act Section 1005 Is Unambiguous.

A. Subsection 1005(a) Only Authorizes Additional Terms for Individual Leases.

On its face, Steam Act subsection 1005(a) limits "additional terms" to individual leases with a producing or paying well:

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

30 U.S.C. § 1005(a) (emphasis added). The singular term "such lease" in this provision refers to the individual lease on which a producing or paying well is drilled. Subsection 1005(a) says nothing about unit agreements or unit-based additional terms. Nor does subsection 1017, which authorizes BLM to approve unit agreements. Id. § 1017. Had Congress intended that nonproducing leases receive a 40-year additional term simply by virtue of unit "commitment," it could and would have said so. Thus, as BLM previously agreed, subsection 1005(a) authorizes additions on a lease-by-lease basis and cannot be invoked for nonproducing leases. SAR 4018-20.

In Geo-Energy, the Ninth Circuit reviewed parallel "such . . . shall" language in Steam Act subsection 1017 and came to the same conclusion. Subsection 1017 requires that the Secretary review units at least once every five years and eliminate any lease that it is not reasonably necessary. 30 U.S.C. § 1017. It then provides: "Such elimination shall be based on scientific evidence." Id. In Geo-Energy, the lessee claimed that the scientific evidence requirement applies any time BLM contracts a unit area for any reason – in that case, for failure to comply with unit diligence requirements. The Court disagreed, holding that the word "such" in subsection 1017 must be read together with the beginning of the paragraph: "'Such' indicates that the requirements are tied only to the elimination described immediately prior, that of the five year revision and review, rather than any elimination from the unit for any reason." 613 F.3d at 956. Similarly here, the use of "such lease" in subsection 1005(a) is tied only to the single lease on which the lessee has produced or utilized commercial quantities of geothermal steam.

Defendants alternative construction of subsection 1005(a) pours expansive substantive content into the phrase "such lease" by defining it to mean "all leases within a unit where geothermal steam is produced or utilized in commercial quantities." But "courts should not read words into a statute that are not there." United States v. Watkins, 278 F.3d 961, 965 (9th Cir. 2002); also Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) ("Congress did not write the statute that way, however, and we decline to say it included the words" that it did not). Indeed, Congress affirmatively considered the very content Defendants suggest, but ultimately declined to include it. S. 1006, 100th Cong. § 3(a) (1987); see also S. Rep. No. 100-283 (1988). This Court should not read into the statute words that Congress chose not to include. United States v. Ressam, 553 U.S. 272, 276-77 (2008) ("Unlike its earlier amendment to the firearm statute, however, Congress did not also insert the [contested] words" in this statute).

B. Plaintiffs' Plain Text Reading Accommodates and Harmonizes the Use of Units, Which Provide a Significant Benefit to Committed Leases.

Defendants contend that this plain text reading of the statute somehow "irrationally punishes" leases that become productive within a primary term. Opp'n at 2, 12. Not true. Rather, Plaintiffs' plain text reading gives meaning to, and readily harmonizes, all parts of the Steam Act, including the diligence and lease expiration provisions that Defendants would like to read out of the law. Here is how the logic of the statute works:

First, all leases are subject to annual diligence requirements. 43 C.F.R. § 3203.5 ("Each geothermal lease shall include provisions requiring diligent exploration until there is a well(s) capable of commercial production on the leased lands"); e.g., AR21249 (Sec. 4 of standard geothermal lease). Diligent exploration means such "postlease field operations" as geochemical surveys, heat flow measurements, core drilling or test drilling of test wells," and the diligence requirements increase during the later years of the lease's primary 10-year term. 43 C.F.R. § 3203.5.

Second, a unit is the grouping of leases – without the resource having been proven – that rewards efficient exploration for steam (i.e., diligent efforts) and avoids the undesirable drilling of wells on every lease. Once leases are grouped into a unit, the diligent exploration requirements are essentially transferred to the unit. Unit agreements, which have a 5-year initial term, include their own continuous drilling requirements that mandate the completion of at least one new exploration well every six months until a paying well is established. 43 C.F.R. § 3286.1 (Model Agreement, Art. 11.4/11.5, Art. 18.1); AR 19780-83 (Glass Mountain Unit Agreement Art. 11.4/11.5, Art. 18.1). Drilling performed on any tract within a unit is deemed full performance of obligations for development and operation with respect to each separately owned tract. 43 C.F.R. § 3286.1 (Model, Art. 17.4); AR19787 (Glass Mountain, Art. 17.4). Thus, unit agreements directly benefit individual nonproducing leases committed to the unit by giving them "credit" for diligent efforts elsewhere in the unit.

Finally, a different legal regime applies after BLM makes a paying well determination for the unit. The establishment of a paying well initiates a 5-year countdown to contraction of the unit. At the end of that period, only those leases that are within the demonstrated "participating area" remain in the unit. The participating area is defined as that part of a unit "deemed to be productive from a horizon or deposit and to which production would be allocated." 43 C.F.R. § 3286.1 (Model, Art. 2.1(d)); AR19775 (Glass Mountain, Art. 2.1(d)). Following the paying well determination,[1] the unit operator must prepare a "participating area schedule . . . of all land then regarded as

[1] As BLM recognized, under Steam Act section 1005(d), Congress equated production with drilling a well capable of production and thus "commencement of production" for purposes of triggering the 5-year contraction period under the Glass Mountain Unit Agreement means the date of the paying well determination. SAR 4018-20.

reasonably proved to be productive from a pool or deposit," including lands "necessary to unit operations." Id. (Model, Art. 12.1, 12.3); AR 19784 (Glass Mountain, Art. 12.1, 12.3). Thus, after the establishment of a paying well, holders of nonproducing leases within the unit have five years to demonstrate that the leases are properly part of the participating area. Leases that cannot demonstrate this are automatically eliminated from the unit on the fifth anniversary, unless diligent drilling operations are in progress on an exploratory well on that anniversary. 43 C.F.R. § 3286.1 (Model, Art. 4.3); AR19776 (Glass Mountain, Art. 4.3)

Thus, lease diligence requirements and unit agreements work in tandem. By joining a unit, leaseholders agree to a more strategic and efficient process of exploration and in return they gain the significant benefit of satisfying their individual lease diligent exploration requirements through drilling activity on other leases within the unit. Additionally, drilling on other unitized leases allows nonproducing leases to satisfy the bona fide efforts requirements for 5-year extensions under Steam Act subsection 1005(g). But nonproducing leases are not addressed by and do not receive open-ended "additional terms" under subsection 1005(a). In order to hold such leases in the unit after a paying well is located and the countdown to unit contraction begins, lessees must conduct further exploration to prove that the lease is reasonably part of the common pool and thus properly within the participating area or that the lease is necessary for unit operations. 30 U.S.C. § 1017; 43 C.F.R. § 3286.1 (Model, Art. 12.3).

Defendants' suggestion that Plaintiffs would "punish" certain nonproducing leases committed to a unit is a consequence of Defendants' convoluted statutory interpretation, not Plaintiffs' plain text reading. Subsection 1005(c) provides that "[a]ny geothermal lease . . . on which, or for which under [a unit plan], actual drilling operations were commenced prior to the end of the primary term and are being diligently prosecuted" will be extended for five years. Defendants correctly explain that the phrase "or for which" authorizes BLM to grant a 5-year extension to any lease on which actual drilling has occurred or to any unitized lease for which drilling has occurred elsewhere in the unit and is collectively credited to all leases in the unit. Opp'n at 11.[2] Subsection 1005(g)(1) uses the identical "or for which" statutory construction, and Congress presumably meant it to have the same effect. Brown v. Gardner, 513 U.S. 115, 118 (1994) ("there is a presumption that a given term is used to mean

[2] Defendants are incorrect, however, to suggest that a drilling extension necessarily continues for up to 40 years. Subsection 1005(c) authorizes a 5-year extension, but like subsection 1005(a), provides for a continuing term if and only if that drilling results in a producing well. For the same reason, Defendants' confusing discussion of subsection 1005(g)(2) is irrelevant. Opp'n at 12. That provision is triggered only when the 5-year extension under subsection 1005(g)(1) leads to commercial production or a paying well, akin to the continuation provided under subsection 1005(a). At Glass Mountain, BLM never issued any 5-year extension under either subsection 1005(c) or 1005(g)(1) that led to production or a paying well.

the same thing throughout a statute"). That is, subsection 1005(g)(1) authorizes BLM to grant up to two successive 5-year extensions to any nonproducing lease on which bona fide efforts have occurred or to any unitized lease for which bona fide efforts have occurred elsewhere in the unit. So, a lessee can satisfy the bona fide efforts extension criteria either through activity on the individual lease itself or through collective activity on the unit of which the lease is a part. Indeed, that is precisely what BLM allowed in 1991 when it granted 5-year lease extensions under subsection 1005(g)(1) for all nonproducing leases within the Glass Mountain Unit based on exploration efforts that occurred on the 27th Lease, where the paying well was drilled. AR 018838-39. In short, Plaintiffs' textually coherent reading of the Steam Act lease provisions is consistent with BLM's conduct and leads to logical results.

Defendants, on the other hand, are forced to engage in a series of interpretative gymnastics in order to create their "Plaintiffs would punish leases that become productive in the primary term" argument. First, they argue that Congress' consideration and rejection of similar proposed language for subsection 1005(a) – "on a lease, or under an approved cooperative or unit plan . . . in which a lease is included" – does not mean that Congress intended to limit subsection 1005(a) additions to individual leases with a producing or paying well. Opp'n at 10. On the very next page, however, Defendants argue that by actually including the "or for which" language in subsection 1005(c), Congress intended to make clear that BLM can look collectively at unit activity to satisfy a drilling extension for all other unit leases. Opp'n at 11. Finally, one page later, Defendants argue that the identical "or for which" construction in subsection 1005(g)(1) means, instead, that bona fide efforts extensions are prohibited for leases committed to a unit with a paying well determination. Opp'n at 12 (arguing that the absence of production in a unit is a "precondition" for any extension under subsection 1005(g)). Only in Defendants' upside-down world does Congress use (or reject) virtually identical language for three different subsections of the same statutory section to mean three totally different things. And only if the Court accepts this tortured reading does Defendants' "punishment" argument make any sense. But Defendants offer no logical or policy reason why Congress would want to prohibit 5-year extensions on units, when both extensions and units are intended to spur further exploration.[3]

[3] Even putting aside its profound inconsistencies, Defendants' interpretation makes no sense. Units may be composed of many leases that may or may not be drawing from a common pool. The goal of unitized exploration is to allow leaseholders to efficiently investigate whether there is one common pool or many and what the contours of common pool participating areas should be. Both the Glass Mountain and Model Unit Agreements recognize the possibility of multiple common pools and multiple participating areas within a unit. 43 C.F.R. § 3286.1 (Model, Art. 12.2); AR19784 (Glass Mountain, Art. 12.2). If a nonproducing lease in a unit with a paying well cannot demonstrate inclusion in the participating area and cannot obtain a subsection 1005(g)(1) extension, then it may be eliminated from the unit and terminated before it can demonstrate that it is part of a second participating area within the unit. Why would Congress promote that outcome?

II. Defendants' Proffered Interpretation is Manifestly Contrary to the Steam Act.

Even if the language of section 1005 is ambiguous, Defendants' lawsuit-driven interpretation of the lease extension provisions is not entitled to deference because it is "arbitrary, capricious, or manifestly contrary to the statute." Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984); see also Presidio Historical Ass'n, 811 F.3d at 1165. Contrary to Plaintiffs' plain text reading, which harmonizes the unit, diligence, and lease term provisions of the Steam Act, Defendants offer an interpretation that both adds words to subsection 1005(a) which Congress rejected and entirely eliminates any diligence or expiration date for nonproducing leases. This interpretation is impermissible under Chevron because it conflicts with Congress' intent to ensure ongoing diligence until the leases either produce or expire.

To be clear, Defendants' litigation position is that once a well deemed capable of commercial production is drilled anywhere in a unit, all other leases automatically continue for 40 years. As a result, nonproducing leases without any proven connection to the discovered resource[4] can nevertheless be held for decades without further exploration activity or diligence – as happened in this very case. This position not only conflicts with BLM's past practices and legal interpretation at Glass Mountain, as discussed in Plaintiffs' Opening Brief, but also is at odds with BLM's more general practices. For example, in Geo-Energy, as here, the lessees drilled a single paying well on the Fish Lake Unit in 1993. By virtue of BLM's paying well determination, the lease with the paying well was "placed into additional term" under subsection 1005(a) – just as was the 27th Lease at Glass Mountain – and BLM advised the lessees that, pursuant to the unit agreement, the unit would contract in 5 years, or on November 30, 1998. Geo-Energy, 613 F.3d at 951. Of the 12 other, nonproducing leases committed to the unit, seven were in their first subsection 1005(g) extension at the time of the paying well determination and were set to expire in 1996 or 1997, and five were in their second subsection 1005(g) extension and set to expire in 1998. BLM granted each of the expiring seven leases a further short extension to match the unit contraction date of November 30, 1998. Id.[5]

[4] As the Opening Brief explains, BLM made no determination that any leases in the Glass Mountain Unit contained viable – or any – resources. It allowed formation of the Unit in 1982 "based principally on the distribution of surface volcanic features" because the area was not sufficiently studied to determine the existence of geothermal resources. SAR701. The Unit was expanded at the lessees' request throughout the following decades. AR187-189, 19446-47, 19024, 18848-54, SAR 774-77.

[5] As Plaintiff explain in the Opening Brief at 23-24, BLM published "plain text" regulatory revisions in 1998 that the agency said did not include substantive changes. Like the prior regulations, the 1998 plain text regulations parse separate requirements for an "Additional Lease Term" under subsection 1005(a) and "Extending the Primary Lease Term" under subsection 1005(c) or (g). Compare 43 C.F.R. Part 3207 with 43 C.F.R. Part 3208. The revised 1998 regulations explicitly recognize that BLM may authorize a primary term extension – but not an additional term – for unitized leases to match the term of the unit where unit diligence is satisfied. This is precisely what happened in Geo-Energy.

Because the remaining five leases were already in their second subsection 1005(g) extension, BLM did not grant extensions for these leases. Id. As the Court explained, during the 5-year countdown to unit contraction, the lessees could have elected to pursue further exploratory drilling to demonstrate that the nonproducing leases were part of the same resource pool and deserved to stay in the unit, or they could have simply let the 5-year contraction period expire with no further exploratory work, in which case the unit would contract and the nonproducing leases would be automatically eliminated and terminated. BLM then contracted the unit to eliminate the nonproducing leases and subsequently terminated the unit itself for non-compliance with the diligence requirements. Id. at 954-55.

If the reasoning of Geo-Energy were applied here, BLM could have, by virtue of the February 13, 1989 paying well determination, extended the 26 nonproducing leases in the Glass Mountain Unit (all of which expired in 1992/1993) to match the unit contraction date of February 13, 1994, or for up to five years under subsection 1005(g). Contemporaneously, BLM chose to give the lessees five full years (until 1997/1998) to further explore the nonproducing leases and demonstrate their proper inclusion in a common pool participating area. But by 1998, when the 26 nonproducing leases were again expiring, the 5-year unit contraction period had already expired without any further drilling to establish the participating area or hold nonproducing leases in the Unit. At that point, BLM could not rely on a non-functioning unit that should have automatically contracted to the paying well leasehold (and any leases necessary for unit operations) on February 13, 1994, as the basis for further "unit commitment" extensions of the kind granted in Geo-Energy. Rather, like the nonproducing Geo-Energy leases, which were temporarily extended for a few years under a "unit commitment" theory and then eliminated from the unit for lack of diligence, the nonproducing Glass Mountain leases were entitled, at best, to another 5-year extension subsection 1005(g) requirements, after appropriate environmental review and tribal consultation.

In sum, Defendants' current position – that Calpine was entitled to an automatic 40-year additional term for all nonproducing leases in the Glass Mountain Unit – is impermissible because it manifestly conflicts with (1) the plain language, statutory structure, and congressional intent of the Steam Act; (2) the regulations, which authorize additional terms only for individual leases (e.g., 43 C.F.R. § 3203.1-3(b)); (3) BLM's long-standing practice, both here and as reflected in Geo-Energy; and (4) the Glass Mountain and Model Unit Agreements, which allow drilling operations to satisfy lease diligence requirements (Art. 17.3 and 17.4), but make clear that unit operations do not change lease terms (Art. 17.1 and 17.7).

Defendants cannot retroactively "legalize" the improper lease additions based on alleged later submissions

by the lessee, for several reasons. Opp'n at 22-23 (claiming that Calpine's submission of confidential participating area schedules in 1996, 1998, and 2015 satisfies the unit and lease diligence requirements).[6] First, the Court should not find that a public agency's actions comply with the law based on documents that the agency refuses to provide to Plaintiffs or the Court. Second, even if the Court could base its ruling on invisible documents, those documents presumably show, at most, that Calpine submitted a participating area schedule years after the mandatory contraction date for the Unit. The unit contraction date of February 13, 1994 came and went without a participating area and without further lease or unit exploration. The belated submission of a participating area schedule did not prevent the timely elimination of nonproducing leases from the unit. Just as BLM concluded at Fish Lake, and as the court affirmed in Geo-Energy, by 1998, the 26 nonproducing leases could no longer tether new extensions to the dormant and shrunken Unit. 43 C.F.R 3286.1, AR 019776 (art. 4.3) (lands not included in an authorized participating area at the fifth anniversary of commencement of production – here, the drilling of a paying well – "shall be automatically eliminated"). Third, even if Defendants could retroactively revive the Unit and retroactively award lease extensions based on a belated participating area determination, no such determination has ever been made. The Glass Mountain Unit Agreement, like the model agreement, has a 5-year initial term, which can be extended upon completion of a capable/paying well only "for so long as Unitized Substances can be produced in paying quantities." ECF Doc. 51-4, at 21 (Art. 18.2). A unit diligence determination for the 1995-96 year and the subsequent submission of three unapproved participating area schedules between 1996 and 2015 cannot satisfy the ongoing diligence criteria for unit extension or stop the unit from automatically contracting.[7]

III. Even if the Court Accepts BLM's New Statutory Interpretation, Plaintiffs Claims Should Prevail.

Plaintiffs' claims in this case arose out of Defendants' failure to comply with the lease and unit diligence provisions of the Steam Act and Unit Agreement when Calpine sought and BLM granted the 1998 lease extensions. As explained, the law and consistent prior agency practice simply do not support BLM's 1998 decision to grant open-ended continuations for 26 leases on which there has never been any significant diligent exploration and in a

[6] Defendants' listing of "diligent effort" findings in the early to mid-1990s is curious, but ultimately unhelpful to their case. Opp'n at 18-19. Curious because Defendants fail to explain how annual paying well lease diligence findings for 1993-94, 1994-95, and 1995-96 – all made in the same two-week period, apparently – could satisfy BLM's duty to ensure ongoing unit diligence when it made the 1998 extension decision. Unhelpful because, as the record demonstrates, the lessee "continued to take the approach of proposing diligent activities, but then failing to follow through with the proposals once approved." SAR3709. And after 1996, there is not even a pretense of exploratory efforts on the unit.

[7] If Defendants were concerned about the confidentiality of these documents, they could have filed them pursuant to a protective order or confidentiality stipulation. A "trust us" declaration, however, does not constitute admissible evidence.

unit that has been effectively dormant since the early 1990s. But even if the Court were to accept every novel and awkward reading that Defendants now impart to the Steam Act and to their own actions, Plaintiffs are entitled to challenge BLM's ongoing failure to comply with the law in light of Calpine's ongoing failure to undertake exploratory efforts. Indeed, in addition to the Unit Agreement stipulations and requirements, the Steam Act itself imposes an independent mandatory obligation on BLM to review unit agreements at least once every five years and to eliminate leases not necessary to the unit's operation. 30 U.S.C. § 1017. That requirement persists today, even after significant intervening statutory amendments, and there is no evidence of Defendants' compliance.

Defendants do not seriously address Plaintiffs' ongoing abuse of discretion claims. Instead, they offer a few half-hearted retorts. For instance, Defendants seem to suggest that Calpine's 2015 submission of a secret participating area schedule somehow equates to ongoing unit diligence. But the filing and refiling of a piece of paper does not demonstrate that "Unitized Substances can be produced in paying quantities" – the criteria for a unit extension. ECF Doc. 51-4, at 21 (Art. 18.2). Next, Defendants claim that Plaintiffs' "waived" any claim to ongoing violations of law after the May 1998 lease decision, relying on Plaintiffs' stipulation, in filing an amended complaint for the two consolidated cases, agreeing to dismiss and not pursue legal claims accruing before May 1998. Opp'n at 21-22. There was no such waiver. Declaration of Deborah Sivas. As the Ninth Circuit correctly recognized, "neither the stipulation nor the amended complaint expressly limited Pit River's claims to any particular provision of the Geothermal Steam Act, and Pit River never limited its claims only to § 1005(a)." Pit River Tribe v. Bureau of Land Mgmt., 793 F.3d 1147, 1157 (9th Cir. 2015). Defendants' repeated mischaracterization of the facts of, and prior holding in, this case is nothing but a spurious attempt to shield public agencies from any judicial scrutiny for ongoing or future illegal conduct. Finally, Defendants complain that they should not have to respond to this claim because the decision was made in 1998 and the Administrative Record ends there – even though Defendants themselves cite many later-generated documents. But a claim for ongoing violation of law is not an administrative record claim. If Defendants have rebutting evidence, they should have put it forward. In the absence of such evidence, Plaintiffs are entitled to declaratory judgment in their favor.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant its motion for summary judgment and declare that the 26 nonproducing leases are null and void.

Dated: March 17, 2016

Respectfully submitted,

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