



Natural Resources Journal

19 Nat Resources J. 1 (*Symposium on Land Use*)

Winter 1979

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Recommended Citation

David N. Whitham, *Initial Geothermal Activities Held Not to Require an EIS*, 19 NAT. RESOURCES J. 187 (1979).
Available at: <http://digitalrepository.unm.edu/nrj/vol19/iss1/11>

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INITIAL GEOTHERMAL ACTIVITIES HELD NOT TO REQUIRE AN EIS

NATURAL RESOURCES LAW: Lessees under the Geothermal Steam Act of 1970 are not required to prepare environmental impact statements for use of existing roads and trails in exploratory activities. *Sierra Club v. Hathaway*, 579 F.2d 1162 (9th Cir. 1978).

Appellants, Sierra Club and the Oregon High Desert Study Group, appeal from a United States District Court's denial of a request for a preliminary injunction against the granting of leases to develop geothermal resources in Oregon's Alvord Desert Known Geothermal Resource Area (KGRA). The environmental groups alleged that the Secretary of the Interior¹ failed to prepare site specific environmental impact statements (EIS)² required under the National Environmental Policy Act of 1969³ prior to the execution of lease agreements. Under the terms of the lease, the lessee could explore and commercially develop geothermal resources within KGRA.

In upholding the denial of the injunction,⁴ the Ninth Circuit Court of Appeals held that in order to succeed, appellants must have shown one of two elements. First, they should have shown that the initial "casual use" surveys utilized by lessees would affect the environment to a degree sufficient to require the preparation of an EIS. Alternatively, appellants should have shown that the administrative agencies concerned would permit the leasing program to proceed to advanced stages without the preparation of the required EIS.⁵

The court first found that casual use surveys did not have any significant effect upon the environment. The activities of lessees were

1. The U.S. Secretary of the Interior is the agency authorized to issue leases for the development of geothermal resources. Geothermal Steam Act of 1970, 30 U.S.C. §1001-1025 (1976).

2. A programmatic EIS addresses the national impact of an entire program and a site specific EIS addresses the impact of federal action on a specific locale.

3. National Environmental Policy Act of 1969, 42 U.S.C. §4321-4347 (Supp. 1975).

4. The court of appeals looked only to whether the district court had abused its discretion or based its decision upon an erroneous legal premise. The grant or denial of an injunction was based upon three elements: 1) whether movants established a strong likelihood of success on the merits; 2) whether the balance of irreparable harm favored the movants; and 3) whether public policy favored granting the injunction. *Sierra Club v. Hathaway*, 579 F.2d 1162, 1167 (9th Cir. 1978).

5. *Id.*

found to be within acceptable levels defined in the programmatic EIS covering the entire Geothermal Leasing Program prepared by the Department of the Interior⁶ and a regulatory scheme administered by the authorized agencies.⁷ The Department of the Interior's programmatic statement described six stages leading to the development and production of geothermal resources. The initial stage is exploratory and encompasses locating and defining commercial geothermal reservoirs and evaluating the impact of possible site specific effects of geothermal development upon a local environment.⁸ Casual use includes activity using only existing roads and trails to conduct geochemical surveys of water and vegetation; stratigraphic, lithographic and structural mapping; and micro gas surveys of the air.⁹

The regulatory scheme defines casual use as the first step in the exploratory phase involving activities which would not normally create any disturbances in or cause damage to the environment.¹⁰ Except for casual use, a lessee is prohibited from entering leased lands without first preparing a detailed plan of operations and obtaining approval of those plans.¹¹ The court noted that although the filing of an EIS should generally precede federal agency action,¹² an agency can only be required to analyze specific actions of known dimensions.¹³ Where agencies are merely allowing casual use activities and it is unclear whether the program will result in a proposal for federal agency action, the preparation of an EIS is not required.¹⁴ The activities of lessees which involved only the casual use of existing roads and trails in the initial stages of exploration did not involve any significant effects upon the environment such that an EIS should be prepared. In striking the second allegation, that the administrative agencies would not require the consideration of an EIS in a timely manner, the court found that the lease provisions and the regulatory scheme established continuing federal control which guaranteed consideration of environmental impact.

6. U.S. Dept. of the Interior, Final Environmental Statement for the Geothermal Leasing Program.

7. The U.S. Dept. of the Interior delegated administration of the Geothermal Leasing Program to the Bureau of Land Management (BLM), 43 C.F.R. §3200-3244.5 (1977), and the United States Geological Survey (USGS), 30 C.F.R. §270-270.90 (1977). Secretary of the Interior's Order No. 2948, October 6, 1972.

8. *Id.*, note 6, at III-2.

9. *Id.*, note 6, at III-3.

10. 43 C.F.R. §3209.0-5(d) (1977).

11. 43 C.F.R. §3203.6 (1977).

12. *Cady v. Morton*, 527 F.2d 786, 794 (9th Cir. 1975).

13. *Kleppe v. Sierra Club*, 427 U.S. 390, 402 (1976).

14. *Id.* 406-407.

The Geothermal Steam Act of 1970 authorized the Secretary of the Interior to issue lease agreements with private parties for development of geothermal resources.¹⁵ Responsibility for administration of this program was delegated to the Bureau of Land Management (BLM) and the United States Geologic Survey.¹⁶ BLM had previously prepared an environmental analysis record (EAR) for the Alvord Desert KGRA from which the necessity of an EIS could be determined.¹⁷ The court was therefore assured that an EIS would be filed when activities reached a certain stage. Further, USGS required a lessee to submit a plan of operation stating proposed measures to be taken to protect the environment, such measures being subject to approval by USGS.¹⁸ The lease agreement specifically required a lessee to protect the environment¹⁹ subject to termination of the lease for failure to exercise this responsibility.²⁰

For the two reasons described above, the Ninth Circuit found that the appellants would not have succeeded on the merits and that the injunction had been properly denied. Lessees in the Alvord Desert KGRA will be able to conduct exploratory activity which will not have an effect upon the environment and which only uses existing roads and trails. The administration of the KGRA leases will follow this result, and following the administrative practices of USGS and BLM, a site specific EIS may be required only where exploratory activities exceed this "casual use" of the environment.

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15. *Supra* note 1.

16. *Supra* note 7.

17. BLM is required to prepare an EAR for all bureau action. BLM Manual, part 1791. The EAR is to serve as the basis for the determination of whether an EIS is required. BLM Manual, parts 1791.06, 1791.25.

18. 43 C.F.R. § 3203.6 (1977).

19. BLM Geothermal Resources Lease, § 14.

20. Geothermal Steam Act of 1970, 30 U.S.C. § 1011 (1976).