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January 30, 2004
(Our File No. 02-327.00)

VIA HAND-DELIVERY
Lori Wrotenbery, Director
New Mexico Oil Conservation Division
1220 S. Saint Francis Drive
Santa Fe, New Mexico 87504

Re: Application of Valles Caldera Trust to Deny Applications of GeoProducts of New Mexico, Inc. for Permits to Re-Enter Abandoned Geothermal Wells ("APDs"), Sandoval County, New Mexico; OCC Case No. 13215

Dear Director Wrotenbery:

Enclosed please find the original and three copies of Valles Caldera Brief-in-Chief in Support of its Application, along with copies of an Appendix regarding same.

If you have any questions, please feel free to contact our office. Thank you.

Sincerely,

GALLEGOS LAW FIRM, P.C.

SANDRA GALLEGOS

/sg
Enclosures
cc: James G. Bruce
Andrew J. Cloutier

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION COMMISSION FOR THE PURPOSE OF CONSIDERING:

APPLICATION OF VALLES CALDERA TRUST TO DENY APPLICATIONS OF GEOPRODUCTS OF NEW MEXICO, INC. FOR PERMITS TO RE-ENTER ABANDONED GEOTHERMAL WELLS ("APDs"), SANDOVAL COUNTY, NEW MEXICO

CASE 13215

VALLES CALDERA BRIEF-IN-CHIEF IN SUPPORT OF ITS APPLICATION

The Valles Caldera Trust by its counsel submits its Brief-in-Chief herein.

I. INTRODUCTION

The United States Congress passed legislation which was signed by the President and became law on July 25, 2000, authorizing the purchase by the federal government of the some 98,000 acres in the Jemez Mountains known as the "Baca Ranch". PL 106-248, codified at 16 U.S.C.A. 698v.. This pristine high country volcanic caldera was christened by law "Valles Caldera Preserve." The Preserve is a unit of the National Forest System and is comprised of all surface and seventh-eighths of the subsurface as federal domain. The Secretary of Agriculture (via the Forest Service) and a board of trustees share responsibility for administration and operation of the Preserve.

The purposes for which the property was acquired are to protect and preserve for future generations the scientific, scenic, historic, and natural values of the ranch and to provide opportunities for public recreation. In a unique arrangement the Trust provides

"management and administration services for the Preserve" while the Forest Service is authorized to issue orders and enforce prohibitions generally applicable to other units of the Forest System.[1]

The Act recognized that there is an outstanding minor fractional mineral interest and directed the Secretary of Agriculture to negotiate with the owners (the Harrell Group) to purchase their interest "on a willing seller basis for not to exceed fair market value, as determined by appraisal done in conformity the Uniform Appraisal Standards for Federal Land Acquisitions." An appraisal as specified was prepared, but the amount yielded was not sufficient in the eyes of the one-eighth mineral owners. On February 14, 2000, the Harrells granted a Geothermal Lease and Agreement to GeoProducts of New Mexico, Inc. The lease has a primary term of five years.[2] Thus, as of February 2004 GeoProducts has one year remaining on the lease. In December 2003, GeoProducts filed applications for "reentry, completion and production testing" of two abandoned geothermal wells and in doing so seeks to target the same zones in which completion was originally attempted in the 1970s. The selected wells are the Baca 13 and Baca 15 which were abandoned by Union Geothermal Company in the summer of 1984.[3]

The applications of GeoProducts must be denied by the Oil Conservation Commission on the various legal grounds stated in the following Points.

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[1] The full text of the Valles Caldera Preservation Act is at Tab 1 of the Appendix hereto.

[2] A copy is at Tab 2 of the Appendix.

[3] Copies of the Sundry Notices concerning abandonment of those wells appear at Tab 3 of the Appendix.

II. ARGUMENT AND AUTHORITIES

POINT ONE

COMMISSION ACTION ON GEOPRODUCTS' APDS IS PREMATURE

Public lands means any lands the surface of which is owned by the United States without regard to how the United States acquired ownership.[4] Not withstanding GeoProducts' claim that as lessee of a one-eighth mineral interest (a seven-eighths of one-eighth working interest) its rights are superior to those of the federal government who owns 100% of the surface and seven-eighths of the minerals, GeoProducts may not engage in any surface disturbing activities before receiving the approval of the Forest Service for a surface use plan of operations.[5] See affidavits of James Snow in the Appendix at Tab 4 and affidavit of Michael Linden at Tab 5. The result must be the same for GeoProducts' proposed geothermal activities which would require power lines and roads across surrounding public domain in the National Forest and Bandelier National Monument.

In the same way that the State of New Mexico lacks authority to require pooling of federal lands in the absence of concurrence of the federal government, the Commission has acknowledged that it must cooperate with the federal government when it comes to surface usage. In Order R-4860, effective October 1, 1974, the Commission adopted its rules and regulations for geothermal wells declaring:

> "(8) That to prevent the waste of geothermal resources, rules and regulations should be adopted by the Commission, which, among other things, would:

[4] 43 CFR 3045.0-5(d)
[5] 30 U. S. C. 266(g)

> (b) prohibit waste of geothermal resources, making provision for cooperation by the Commission with the federal government and other state agencies, and require geothermal operations to be conducted in such a manner as to afford maximum reasonable protection of human life and health and the environment;"

and, in doing so, adopted

> "Rule G-6 UNITED STATES GOVERNMENT LEASES
>
> It is recognized by the Division that **all persons conducting geothermal operations on United States Government land shall comply with the United State government regulations.**" Emphasis added.

The Preservation Act specifies that the authority for issuance of any rights-of-way over the Preserve of over 10 years duration are to be issued by the Secretary of Agriculture in cooperation with the Trust. 16 U.S.C.A Sec. 698v. Sec. 109(a). The Secretary through the Forest Service also enforces regulations and prohibitions applicable on other units of the National Forest System. *Id.* Accordingly, the Forest Service regulates any actions of GeoProducts to use the federally owned surface of the Preserve. Before any entry on to the Preserve GeoProducts must provide to the Forest Service proof of ownership of minerals and 60 days advance notice of requested occupancy by submitting a proposed operation plan. Unless such plan is submitted and approved, occupancy is not permitted. Among other things the GeoProducts' occupancy plan has the high burden of establishing that it "is consistent with the management plan for the area." Affidavit of Snow ¶¶ 12 and 13, Tab 4.

GeoProducts has simply put the cart before the horse in filing its APDs. Until such time, if ever, that GeoProducts can demonstrate that the Forest Service has approved an occupancy plan and that the Valles Caldera Preservation Act allows

geothermal operations within this National Preserve then any action by the Commission is premature.[6]

POINT TWO

THE COMMISSION LACKS JURISDICTION OVER FEDERAL PUBLIC DOMAIN LANDS

Federal law has preempted New Mexico's Geothermal Resources Conversation Act (NMSA 1978, § 71-5-1 *et seq.)* from affecting federal lands and thereby precludes the Commission from ever approving GeoProducts' APDs. The United States Congress enacted the Valles Caldera Preservation Act creating the Preserve as a unit of the National Forest Service System as an experiment in public-land management with a mandate "to protect and preserve the science, scenic, geologic, watershed, fish, wildlife, historic, cultural, and recreational values of the Preserve." Any attempt by the Commission to approve drilling, including re-entry of abandoned geothermal wells, within the Preserve conflicts with this federal law and is prohibited.[7]

The State's jurisdiction over geothermal activities on federal lands[8] is materially different from the oil and gas activities that the Commission administers on federal lands with the consent of the Bureau of Land Management ("BLM"), pursuant to the Mineral Leasing Act.[9] The purposes of the Valles Caldera Preservation Act do not include

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[6] No oil or gas well drilling or other well operations may occur on federal surface before the BLM approves an application for permit to drill ("APD") or sundry notice. See 43 CFR 3162.3-1(c) and 43 CFR 3162.3-2

[7] Congress has unlimited power to control and regulate all activities on public lands. See *Kleppe v. New Mexico*, 426 U.S. 529 (1976)

[8] Effective August 7, 1947, the 1920 federal Mineral Leasing Act was extended to include lands acquired by the federal government to which the MLA for public lands had not theretofore been applied. See 30 U.S.C. 351-359

[9] Rocky Mt. Min. L. Fdn. Law of Federal Oil & Gas Leases. Volume 1, Chapter 3 including sections 3.02[2][d] Also see Ratification by the Secretary of the Interior is necessary before a state pooling order can affect federal lands. See *Kirkpatrick Oil and Gas Co. v. United States*, 675 F. 2d 1122 (10th Cir. 1982)

exploration, drilling, production or development of any geothermal resources within the Preserve. The Act expresses a clear intent by Congress to preempt New Mexico's Geothermal Resources Act which is hostile to the federal purposes for this National Preserve. Indeed Congress provided that upon acquisition of the minority mineral ownership "the lands comprising the Preserve are thereby withdrawn from disposition under all laws pertaining to mineral leasing including geothermal leasing." 16 U.S.C.A. 698v. Sec. 105(e). Pursuant to the Supremacy Clause of the U.S. Constitution (Art VI, cl. 2) federal laws enacted under the Property Clause (Art. IV, Sec. cl.2.) preempt conflicting state law regarding the management of public domain.

Should the Commission refer to its experience about oil and gas activities on federal lands as an aid to deciding its jurisdiction over the purposed geothermal activities, the Commission will recognize that state law can apply to oil and gas activities on federal lands only to the extent Congress and its designee, the Secretary of Interior, have not fully occupied the field.[10] No state authority can be exercised, absent federal consent. See acquired lands clause of U.S. Constitution. Art I, Section 8, cl. 17.

Arguably, even if Congress has not entirely displaced state geothermal regulation, state law is still pre-empted to the extent it actually conflicts with federal law which can occur (a) when it is impossible to comply with both state and federal law;[11] (b) where the state law stands as an obstacle to the accomplishment of the full purpose and objectives of Congress;[12] or (c) even where federal law is absent, federal courts will

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Also see *Texas Oil & Gas v. Phillips Petroleum*, 406 F. 2d 1303 (W.D. Okla. 1969) and "Oil & Gas Law," William and Myers Vol. 9, page 19-20, Section 905.1 Note 49

[10] Rocky Mt. Min. L. Fdn. 2002. Rocky Mt. Min. L. Fdn. Law of Federal Oil & Gas Leases. Volume 1, Chapter 24, "State and Local Regulations of Activities on Federal Oil and Gas Leases"

[11] *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U. S. 132 (1963)

[12] *Silwood v. Kerr-McGee Corp.* 464 U. S. 238, 248 (1984)

not apply any state rule confiscatory of federal interests, aberrant or hostile to the federal program, or not wholly in accord with the federal purposes pertaining to public land.[13] Because it is impossible to reconcile GeoProducts' proposed geothermal activities with the purposes of the Valle Caldera Preservation Act, the only reasonable conclusion possible is that state law is hostile to this federal acquisition and its purposes. The Act recognized this circumstance and provided a congressionally legislated solution---a process for the acquisition of the Harrells' one-eighth mineral interest. Rather than pursue that relief, however, as the Harrells' lessee GeoProducts seeks from the Commission permits allowing GeoProducts to either circumvent the intent of the federal legislation or to pursue an agenda whose true purpose is to inflate the value to be paid for the minority minerals.

The Commission has precedents that have recognized the State of New Mexico lacks authority to require pooling of federal lands in the absence of concurrence of the federal government.[14] Division Order R-11413, dated July 6, 2000, entered in cases 12393 and 12423 (competing compulsory pooling cases by Santa Fe Snyder Corporation and Southwestern Energy Production Company involving a section composed of two federal leases) denied Southwestern's case based upon BLM's objection to the orientation of the spacing unit.

The split mineral interest in the spacing units for the two wells has not been and will not be pooled by agreement with the Trust. That leaves only forced pooling. Section 71-5-11C, NMSA. While force pooling statutes apply between private parties, the United States cannot be force pooled or force communitized without its specific

[13] *United States v. Little Lake Misere Land Co.*, 412 U.S. 580,595.601,604 (1973).
[14] 43 CFR 3162.3-1 where well spacing established by the state is recognized, provided it is accepted by the BLM's authorized officer.

consent. *Kirkpatrick Oil & Gas Company v. United States*, 675 F.2d 1122 (10th Cir. 1982). *Texas Oil and Gas Corporation v. Phillips Petroleum Company*, 406 F.2d 1303 (10th Cir. 1969). (The Secretary's consent is essential for a state conservation commission order to affect a federal lease or its lessee).

Finally, the fact that the Valles Caldera Preservation Act contains verbiage that the federal acquisition of the Baca Ranch was subject to all valid existing rights of the outstanding mineral interest owners[15] does not constitute consent by the federal government any more than the federal Mineral Lease Act ("MLA") did for oil and gas lands when they were made subject to certain existing laws[16] or prior valid oil and gas interests.[17] That provision is merely a recognition of the existence of a fractional mineral interest and the Congress' desire that it be purchased for market value upon which the Preserve is withdrawn from disposition under all mineral and geothermal leasing.

POINT THREE

FOLLOWING TERMINATION OF A LEASE UNREMOVED CASING AND OTHER WELL EQUIPMENT BELONG TO THE SURFACE OWNER

GeoProducts has requested that the NMOCD issue permits for it to rework two plugged and abandoned wells bores on the Preserve. The wells are known as the Baca Nos. 13 and 15 in Sections 12 and 11 of T19N, R8E. These wells were drilled by Union Geothermal and were plugged and abandoned in 1984. See Sundry Notices at Tab 3.

The former owners of the Preserve (then the "Baca Ranch") Dunigan Enterprises Inc. and Baca Land & Cattle Company, a partnership, on April 19, 1971 issued a lease

[15] 16 U.S.C. Section 698v-3, Part 105(e)(1)
[16] 30 U.S.C. 187, 189, 351, 357 and 358
[17] 30 U.S.C. 189.

to Union Oil of California ("Union") for exploration and development of a possible subsurface geothermal resource. The lease provided in pertinent part that,

> " . . . Lessee shall have the right at any time and from time to time to remove from the Leased Lands any and all casing, machinery, equipment. . . provided that if such removal should occur after termination hereof same shall be completed within twelve months thereafter.

See copy of the Lease Agreement terms at Tab 6. The Union lease has been terminated for about twenty years.

The universally recognized rule of law is that well casing, tubing and any other equipment not removed after termination of a mineral lease becomes the property of the surface owner; that a lessee has the right of removal within the time specified in the lease or absent a time limit must remove such property within a reasonable time. 4 Williams & Meyers, *Oil and Gas Law*, § 674.2.

The seminal case on the issue appears to be *Terry v. Crossway*, 264 S.W. 718 (Tex. Ct. App. Beaumont 1924). There the oil and gas lease granted Terry as lessee the right to remove all fixtures, machinery and improvements . . . at any time thereafter . . . " The lessee drilled seven to ten wells which produced until about 1919 when the lessee abandoned them and his lease terminated. In 1916 and 1917 Terry had pulled the casing from some of the wells but not others. In 1927, Crossway obtained a new lease from the owner of the fee and "repaired" and began operating some of the old wells. Terry sued for, but was denied by the trial court, an injunction to restrain Crossway "from using the casing, tubing and rods" in those wells. The appellate court affirmed the trial court holding at 264 S.W. 720.

> The clause in appellants' contract giving him the right to remove his casing, pipes and rods "at any time" should be construed as giving him only a reasonable time to remove them after the expiration of his lease.

* * *

> [T]he failure of appellant to remove his fixtures within a reasonable time resulted in a forfeiture, making them a part of the realty and vesting the owner of the fee with the title thereto.

Remarkably on point for the case at hand is the decision in *Toles v. Maneikes*, 162 Mich. App. 158, 417 N.W.2d 263 (Ct. App. 1987). Maneikas abandoned an oil and gas lease in 1980 without removing production casing and tubing, storage tanks and separators. Five years later he obtained a permit from the Michigan Department of Natural Resources (corollary to the NMOCD) for "reworking" operations. The plaintiff Toles holding a new lease from the surface and mineral owner obtained a court injunction adjudging that the wells and casing belonged to the surface owner and restraining Maneikas' attempted use.

> The trial court apparently considered six months was a reasonable time [the lease saying "any time"] to remove the casings and equipment. Whether six months was a reasonable time, however, we believe that five years was more than sufficient time . . . The trial court's consequent determination that defendants had forfeited title to the fixtures by failing to remove them within a reasonable time was in accord with the prevailing rule vesting title in the surface owner.

412 N.W.2d 268. Accord, *Newlands v. Ellis*, 131 Kan. 479, 292 P. 754.

The Trust has repeatedly advised GeoProducts that the federal surface ownership includes the wells and that GeoProducts cannot use them. In effect, GeoProducts is asking the Commission to adjudicate a title dispute. The Commission cannot decide property ownership issues.[18] In accordance with long standing precedent established by the Division and the Commission, action on these APDs is premature

[18] See Order R-11700-B, dated April 26, 2002, Cases 12731 & 12744 (TMBR/Sharp v. Arrington) where the Commission ordered the permits issued to Arrington rescinded and the matter of the TMBR/Sharp permits remanded to the District Courts for appropriate action.

until the courts have decided the ownership of the wellbores if GeoProducts persists in an effort to take possession and use of the subject wells.

The casing and any other equipment associated with the Baca No. 13 and No. 15 wells presumptively belongs to the surface owner. GeoProducts is neither the owner nor the operator of such wells and the Trust and Forest Service believe the company has no rights thereto. GeoProducts wrongfully asks the Division to grant permission for it to take possession of property that belongs to another when it has been advised of the ownership position taken by the Preserve and has taken no action to adjudicate that issue in a court of competent jurisdiction.

POINT FOUR

IF PERMITTED, THE OPERATIONS PROPOSED BY GEOPRODUCTS CONSTITUTE WASTE

The Geothermal Conservation Act defines "waste" at Section 71-5-5. The definition includes the following:

> C. the production from any well or wells in this state of geothermal resources in excess of the reasonable market demand therefore, in excess of the capacity of the geothermal transportation facility connected thereto to efficiently receive and transport such geothermal resources, or in excess of the capacity of a geothermal utilization facility to efficiently receive and utilize such geothermal resource.

Moreover, the statute and the Commission's own regulations mandate that upon completion of a geothermal resources well the well must be put to beneficial use, otherwise such non-utilization constitutes prohibited waste. Section 71-5-5 B. NMSA and Rule G-119.

In the case of completion of an oil or gas well it is well known and the Commission is free to assume that in this state and in the United States there is an

established market for such hydrocarbons. There exists an established national infrastructure for the transportation, marketing and utilizing of oil and gas. It is a far different situation when it comes to geothermal resources.

The entire objective of geothermal wells is to produce heated water and steam that will drive turbines that in turn generate electricity. The Commission cannot assume that there is a "market demand" for electricity to be theoretically provided by GeoProducts' wells. The burden is on the proponent of such development to demonstrate to the Commission that such a market exists. A burden that it has not addressed and it cannot carry.

The objectively ascertainable facts, however, are that whether or not there might be a market for electric power from wells on the Preserve, GeoProducts lacks

(a) a source for the large quantities of water that must be injected and circulated in the wells;

(b) there exists no facilities on the Preserve and none will be permitted by which the heated water energy can be converted into electricity;

(c) there exists no transmission lines across the Preserve and adjoining federal lands, and none will be permitted, which could transport the electricity if electricity could be produced. See affidavit of Michael Linden in the Appendix at Tab 5.

Thus, the exercise of seeking reentry of the two abandoned wells is seen for what it truly is: creation of a threat to the scenic and natural character of the Preserve that might serve to increase the price to be paid for the one-eighth interest. Were the Commission to permit such activity it would be in head-on collision with its legal mandate to prohibit "waste".

CONCLUSION

For all of the grounds stated the Commission should decide that the Applications for Permit filed by GeoProducts must be rejected. At this juncture the Commission might postpone or take under advisement decision on the issues raised in Points Two, Three and Four of this brief. The Commission may require that GeoProducts first make a showing that it has taken the steps to submit and obtain approval of an occupancy plan by the Forest Service. If GeoProducts cannot initially show even that it will be permitted to go onto and use the surface of the Preserve, then it is a meaningless exercise for it to seek APDs from the Division. On the other hand the Commission would be prudent to reject the permits on all grounds, avoid piece-meal adjudication and make a final resolution of the matter.

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CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the foregoing Brief-in-Chief and attendant Appendix to be served on this 30th day of January, 2004, to the following counsel of record in the manner shown:

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VIA U.S. MAIL

J.E. Gallegos

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION

IN THE MATTER OF THE HEARING
CALLED BY THE OIL CONSERVATION
COMMISSION FOR THE PURPOSE OF
CONSIDERING:

APPLICATION OF VALLES CALDERA TRUST TO DENY APPLICATIONS OF GEOPRODUCTS OF NEW MEXICO, INC. FOR PERMITS TO RE-ENTER ABANDONED GEOTHERMAL WELLS ("APDs") SANDOVAL COUNTY, NEW MEXICO

CASE 13215

APPENDIX TO VALLES CALDERA BRIEF-IN-CHIEF IN SUPPORT OF ITS APPLICATION

§ 698v. Findings and purposes

(a) Findings

Congress finds that—

(1) the Baca ranch comprises most of the Valles Caldera in central New Mexico, and constitutes a unique land mass, with significant scientific, cultural, historic, recreational, ecological, wildlife, fisheries, and productive values;

(2) the Valles Caldera is a large resurgent lava dome with potential geothermal activity;

(3) the land comprising the Baca ranch was originally granted to the heirs of Don Luis Maria Cabeza de Vaca in 1860;

(4) historical evidence, in the form of old logging camps and other artifacts, and the history of territorial New Mexico indicate the importance of this land over many generations for domesticated livestock production and timber supply;

(5) the careful husbandry of the Baca ranch by the current owners, including selective timbering, limited grazing and hunting, and the use of prescribed fire, have preserved a mix of healthy range and timber land with significant species diversity, thereby serving as a model for sustainable land development and use;

(6) the Baca ranch's natural beauty and abundant resources, and its proximity to large municipal populations, could provide numerous recreational opportunities for hiking, fishing, camping, cross-country skiing, and hunting;

(7) the Forest Service documented the scenic and natural values of the Baca ranch in its 1993 study entitled "Report on the Study of the Baca Location No. 1, Santa Fe National Forest, New Mexico", as directed by Public Law 101–556;

(8) the Baca ranch can be protected for current and future generations by continued operation as a working ranch under a unique management regime which would protect the land and resource values of the property and surrounding ecosystem while allowing and providing for the ranch to eventually become financially self-sustaining;

(9) the current owners have indicated that they wish to sell the Baca ranch, creating an opportunity for Federal acquisition and public access and enjoyment of these lands;

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(10) certain features on the Baca ranch have historical and religious significance to Native Americans which can be preserved and protected through Federal acquisition of the property;

(11) the unique nature of the Valles Caldera and the potential uses of its resources with different resulting impacts warrants a management regime uniquely capable of developing an operational program for appropriate preservation and development of the land and resources of the Baca ranch in the interest of the public;

(12) an experimental management regime should be provided by the establishment of a Trust capable of using new methods of public land management that may prove to be cost-effective and environmentally sensitive; and

(13) the Secretary may promote more efficient management of the Valles Caldera and the watershed of the Santa Clara Creek through the assignment of purchase rights of such watershed to the Pueblo of Santa Clara.

(b) **Purposes**

The purposes of sections 698v to 698v–10 of this title are—

(1) to authorize Federal acquisition of the Baca ranch;

(2) to protect and preserve for future generations the scientific, scenic, historic, and natural values of the Baca ranch, including rivers and ecosystems and archaeological, geological, and cultural resources;

(3) to provide opportunities for public recreation;

(4) to establish a demonstration area for an experimental management regime adapted to this unique property which incorporates elements of public and private administration in order to promote long term financial sustainability consistent with the other purposes enumerated in this subsection; and

(5) to provide for sustained yield management of Baca ranch for timber production and domesticated livestock grazing insofar as is consistent with the other purposes stated herein.

(Pub.L. 106–248, Title I, §102, July 25, 2000, 114 Stat. 598.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–724 and Statement by President, see 2000 U.S. Code Cong. and Adm. News, p. 500.

References in Text

Public Law 101–556, referred to in subsec. (a)(7), is the Baca Location No. 1 Land Acquisition and Study Act of 1990, Pub.L. 101–556, Nov. 15, 1990, 104 Stat. 2762, which is not classified to the Code.

Sections 698v to 698v–10 of this title, referred to in subsec. (b), originally read "this title", meaning the Valles Caldera Preservation Act, Pub.L. 106–248, Title I,

July 25, 2000, 114 Stat. 598, which enacted those sections.

Short Title

2000 Amendments. Pub.L. 106–248, Title I, § 101, July 25, 2000, 114 Stat. 598, provided that: "This title [enacting sections 698v to 698v–10 of this title] may be cited as the 'Valles Caldera Preservation Act'."

§ 698v–1. Definitions

In sections 698v to 698v–10 of this title:

(1) Baca ranch

The term "Baca ranch" means the lands and facilities described in section 698v–2(a) of this title.

(2) Board of Trustees

The terms "Board of Trustees" and "Board" mean the Board of Trustees as described in section 698v–5 of this title.

(3) Committees of Congress

The term "Committees of Congress" means the Committee on Energy and Natural Resources of the Senate and the Committee on Resources of the House of Representatives.

(4) Financially self-sustaining

The term "financially self- sustaining" means management and operating expenditures equal to or less than proceeds derived from fees and other receipts for resource use and development and interest on invested funds. Management and operating expenditures shall include Trustee expenses, salaries and benefits of staff, administrative and operating expenses, improvements to and maintenance of lands and facilities of the Preserve, and other similar expenses. Funds appropriated to the Trust by Congress, either directly or through the Secretary, for the purposes of sections 698v to 698v–10 of this title shall not be considered.

(5) Multiple use and sustained yield

The term "multiple use and sustained yield" has the combined meaning of the terms "multiple use" and "sustained yield of the several products and services", as defined under the Multiple-Use Sustained–Yield Act of 1960 (16 U.S.C. 531).

(6) Preserve

The term "Preserve" means the Valles Caldera National Preserve established under section 698v–3 of this title.

(7) Secretary

Except where otherwise provided, the term "Secretary" means the Secretary of Agriculture.

(8) Trust

The term "Trust" means the Valles Caldera Trust established under section 698v–4 of this title.

(Pub.L. 106–248, Title I, § 103, July 25, 2000, 114 Stat. 599.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–724 and Statement by President, see 2000 U.S. Code Cong. and Adm. News, p. 500.

References in Text

Sections 698v to 698v–10 of this title, referred to in text, originally read "this title", meaning the Valles Caldera Preservation Act, Pub.L. 106–248, Title I, July 25, 2000, 114 Stat. 598, which enacted those sections.

The Multiple-Use Sustained-Yield Act of 1960, or MUSYA, referred to in par. (5), is Pub.L. 85–517, June 12, 1960, 74 Stat. 215, which is classified to sections 528 to 531 of this title. Definitions for the Act are contained to section 531 of this title.

§ 698v–2. Acquisition of lands

(a) Acquisition of Baca ranch

(1) In general

In compliance with the Act of June 15, 1926 (16 U.S.C. 471a), the Secretary is authorized to acquire all or part of the rights, title, and interests in and to approximately 94,761 acres of the Baca ranch, comprising the lands, facilities, and structures referred to as the Baca Location No. 1, and generally depicted on a plat entitled "Independent Resurvey of the Baca Location No. 1", made by L.A. Osterhoudt, W.V. Hall, and Charles W. Devendorf, U.S. Cadastral Engineers, June 30, 1920–August 24, 1921, under special instructions for Group No. 107 dated February 12, 1920, in New Mexico.

(2) Source of funds

The acquisition under paragraph (1) may be made by purchase through appropriated or donated funds, by exchange, by contribution, or by donation of land. Funds appropriated to the Secretary from the Land and Water Conservation Fund shall be available for this purpose.

(3) Basis of sale

The acquisition under paragraph (1) shall be based on an appraisal done in conformity with the Uniform Appraisal Standards for Federal Land Acquisitions and—

(A) in the case of purchase, such purchase shall be on a willing seller basis for no more than the fair market value of the land or interests therein acquired; and

(B) in the case of exchange, such exchange shall be for lands, or interests therein, of equal value, in conformity with the existing exchange authorities of the Secretary.

(4) Deed

The conveyance of the offered lands to the United States under this subsection shall be by general warranty or other deed acceptable to the Secretary and in conformity with applicable title standards of the Attorney General.

(b) Addition of land to Bandelier National Monument

Upon acquisition of the Baca ranch under subsection (a), the Secretary of the Interior shall assume administrative jurisdiction over those lands within the boundaries of the Bandelier National Monument as modified under section 3 of Public Law 105–376 (112 Stat. 3389).

(c) Plat and maps

(1) Plat and maps prevail

In case of any conflict between a plat or a map and acreages, the plat or map shall prevail.

(2) Minor corrections

The Secretary and the Secretary of the Interior may make minor corrections in the boundaries of the Upper Alamo watershed as depicted on the map referred to in section 3 of Public Law 105–376 (112 Stat. 3389).

(3) Boundary modification

Upon the conveyance of any lands to any entity other than the Secretary, the boundary of the Preserve shall be modified to exclude such lands.

(4) Final maps

Within 180 days of the date of acquisition of the Baca ranch under subsection (a), the Secretary and the Secretary of the Interior shall submit to the Committees of Congress a final map of the Preserve and a final map of Bandelier National Monument, respectively.

(5) Public availability

The plat and maps referred to in the subsection shall be kept and made available for public inspection in the offices of the

Chief, Forest Service, and Director, National Park Service, in Washington, D .C., and Supervisor, Santa Fe National Forest, and Superintendent, Bandelier National Monument, in the State of New Mexico.

(d) **Watershed management report**

The Secretary, acting through the Forest Service, in cooperation with the Secretary of the Interior, acting through the National Park Service, shall—

(1) prepare a report of management alternatives which may—

(A) provide more coordinated land management within the area known as the upper watersheds of Alamo, Capulin, Medio, and Sanchez Canyons, including the areas known as the Dome Diversity Unit and the Dome Wilderness;

(B) allow for improved management of elk and other wildlife populations ranging between the Santa Fe National Forest and the Bandelier National Monument; and

(C) include proposed boundary adjustments between the Santa Fe National Forest and the Bandelier National Monument to facilitate the objectives under subparagraphs (A) and (B); and

(2) submit the report to the Committees of Congress within 120 days of July 25, 2000.

(e) **Outstanding mineral interests**

The acquisition of the Baca ranch by the Secretary shall be subject to all outstanding valid existing mineral interests. The Secretary is authorized and directed to negotiate with the owners of any fractional interest in the subsurface estate for the acquisition of such fractional interest on a willing seller basis for not to exceed its fair market value, as determined by appraisal done in conformity with the Uniform Appraisal Standards for Federal Land Acquisitions. Any such interests acquired within the boundaries of the Upper Alamo watershed, as referred to in subsection (b), shall be administered by the Secretary of the Interior as part of Bandelier National Monument.

(f) **Boundaries of the Baca ranch**

For purposes of section 460*l*–9 of this title, the boundaries of the Baca ranch shall be treated as if they were National Forest boundaries existing as of January 1, 1965.

(g) **Pueblo of Santa Clara**

(1) **In general**

The Secretary may assign to the Pueblo of Santa Clara rights to acquire for fair market value portions of the Baca ranch. The

portion that may be assigned shall be determined by mutual agreement between the Pueblo and the Secretary based on optimal management considerations for the Preserve including manageable land line locations, public access, and retention of scenic and natural values. All appraisals shall be done in conformity with the Uniform Appraisal Standards for Federal Land Acquisition.

(2) Status of land acquired

As of the date of acquisition, the fee title lands, and any mineral estate underlying such lands, acquired under this subsection by the Pueblo of Santa Clara are deemed transferred into trust in the name of the United States for the benefit of the Pueblo of Santa Clara and such lands and mineral estate are declared to be part of the existing Santa Clara Indian Reservation.

(3) Mineral estate

Any mineral estate acquired by the United States pursuant to subsection (e) of this section underlying fee title lands acquired by the Pueblo of Santa Clara shall not be developed without the consent of the Secretary of the Interior and the Pueblo of Santa Clara.

(4) Savings

Any reservations, easements, and covenants contained in an assignment agreement entered into under paragraph (1) shall not be affected by the acquisition of the Baca ranch by the United States, the assumption of management by the Valles Caldera Trust, or the lands acquired by the Pueblo being taken into trust.

(Pub.L. 106–248, Title I, § 104, July 25, 2000, 114 Stat. 600.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–724 and Statement by President, see 2000 U.S. Code Cong. and Adm. News, p. 500.

References in Text

The Act of June 15, 1926, referred to in subsec. (a)(1), is Act June 15, 1926, c. 587, 44 Stat. 745, which is classified to section 471a of this title.

Section 3 of Public Law 105–376, referred to in subsecs. (b) and (c)(2), is section 3 of the Bandelier National Monument Administrative Improvement and Watershed Protection Act of 1998, Pub.L. 105–376, § 3, Nov. 12, 1998, 112 Stat. 3389, which is referenced in a note under section 431 of this title.

§ 698v–3. The Valles Caldera National Preserve

(a) Establishment

Upon the date of acquisition of the Baca ranch under section 698v–2(a) of this title, there is hereby established the Valles Caldera

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National Preserve as a unit of the National Forest System which shall include all Federal lands and interests in land acquired under sections 698v-2(a) and 698v-2(e) of this title, except those lands and interests in land administered or held in trust by the Secretary of the Interior under sections 698v-2(b) and 698v-2(g) of this title, and shall be managed in accordance with the purposes and requirements of sections 698v to 698v-10 of this title.

(b) **Purposes**

The purposes for which the Preserve is established are to protect and preserve the scientific, scenic, geologic, watershed, fish, wildlife, historic, cultural, and recreational values of the Preserve, and to provide for multiple use and sustained yield of renewable resources within the Preserve, consistent with sections 698v to 698v-10 of this title.

(c) **Management authority**

Except for the powers of the Secretary enumerated in sections 698v to 698v-10 of this title, the Preserve shall be managed by the Valles Caldera Trust established by section 698v-4 of this title.

(d) **Eligibility for payment in lieu of taxes**

Lands acquired by the United States under section 698v-2(a) of this title shall constitute entitlement lands for purposes of the Payment in Lieu of Taxes Act (31 U.S.C. 6901-6904).

(e) **Withdrawals**

(1) **In general**

Upon acquisition of all interests in minerals within the boundaries of the Baca ranch under section 698v-2(e) of this title, subject to valid existing rights, the lands comprising the Preserve are thereby withdrawn from disposition under all laws pertaining to mineral leasing, including geothermal leasing.

(2) **Materials for roads and facilities**

Nothing in sections 698v to 698v-10 of this title shall preclude the Secretary, prior to assumption of management of the Preserve by the Trust, and the Trust thereafter, from allowing the utilization of common varieties of mineral materials such as sand, stone, and gravel as necessary for construction and maintenance of roads and facilities within the Preserve.

(f) **Fish and game**

Nothing in sections 698v to 698v-10 of this title shall be construed as affecting the responsibilities of the State of New Mexico with respect to fish and wildlife, including the regulation of hunting,

fishing, and trapping within the Preserve, except that the Trust may, in consultation with the Secretary and the State of New Mexico, designate zones where and establish periods when no hunting, fishing, or trapping shall be permitted for reasons of public safety, administration, the protection of nongame species and their habitats, or public use and enjoyment.

(g) Redondo Peak

(1) In general

For the purposes of preserving the natural, cultural, religious, and historic resources on Redondo Peak upon acquisition of the Baca ranch under section 698v–2(a) of this title, except as provided in paragraph (2), within the area of Redondo Peak above 10,000 feet in elevation—

(A) no roads, structures, or facilities shall be constructed; and

(B) no motorized access shall be allowed.

(2) Exceptions

Nothing in this subsection shall preclude—

(A) the use and maintenance of roads and trails existing as of July 25, 2000;

(B) the construction, use and maintenance of new trails, and the relocation of existing roads, if located to avoid Native American religious and cultural sites; and

(C) motorized access necessary to administer the area by the Trust (including measures required in emergencies involving the health or safety of persons within the area).

(Pub.L. 106–248, Title I, § 105, July 25, 2000, 114 Stat. 602.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–724 and Statement by President, see 2000 U.S. Code Cong. and Adm. News, p. 500.

References in Text

Sections 698v to 698v–10 of this title, referred to in text, originally read "this title", meaning the Valles Caldera Preservation Act, Pub.L. 106–248, Title I, July 25, 2000, 114 Stat. 598, which enacted those sections.

The Payment in Lieu of Taxes Act, referred to in subsec. (d), is the popular name for sections 6901 to 6904 of Title 31.

§ 698v–4. The Valles Caldera Trust

(a) Establishment

There is hereby established a wholly owned government corporation known as the Valles Caldera Trust which is empowered to

conduct business in the State of New Mexico and elsewhere in the United States in furtherance of its corporate purposes.

(b) Corporate purposes

The purposes of the Trust are—

(1) to provide management and administrative services for the Preserve;

(2) to establish and implement management policies which will best achieve the purposes and requirements of sections 698v to 698v–10 of this title;

(3) to receive and collect funds from private and public sources and to make dispositions in support of the management and administration of the Preserve; and

(4) to cooperate with Federal, State, and local governmental units, and with Indian tribes and Pueblos, to further the purposes for which the Preserve was established.

(c) Necessary powers

The Trust shall have all necessary and proper powers for the exercise of the authorities vested in it.

(d) Staff

(1) In general

The Trust is authorized to appoint and fix the compensation and duties of an executive director and such other officers and employees as it deems necessary without regard to the provisions of Title 5, governing appointments in the competitive service, and may pay them without regard to the provisions of chapter 51, and subchapter III of chapter 53, Title 5, relating to classification and General Schedule pay rates. No employee of the Trust shall be paid at a rate in excess of that payable to the Supervisor of the Santa Fe National Forest or the Superintendent of the Bandelier National Monument, whichever is greater.

(2) Federal employees

(A) In general

Except as provided in sections 698v to 698v–10 of this title, employees of the Trust shall be Federal employees as defined by Title 5, and shall be subject to all rights and obligations applicable thereto.

(B) Use of Federal employees

At the request of the Trust, the employees of any Federal agency may be provided for implementation of sections 698v to 698v–10 of this title. Such employees detailed to the

Trust for more than 30 days shall be provided on a reimbursable basis.

(e) Government Corporation

(1) In general

The Trust shall be a Government Corporation subject to chapter 91 of Title 31, (commonly referred to as the Government Corporation Control Act). Financial statements of the Trust shall be audited annually in accordance with section 9105 of Title 31.

(2) Reports

Not later than January 15 of each year, the Trust shall submit to the Secretary and the Committees of Congress a comprehensive and detailed report of its operations, activities, and accomplishments for the prior year including information on the status of ecological, cultural, and financial resources being managed by the Trust, and benefits provided by the Preserve to local communities. The report shall also include a section that describes the Trust's goals for the current year.

(3) Annual budget

(A) In general

The Trust shall prepare an annual budget with the goal of achieving a financially self-sustaining operation within 15 full fiscal years after the date of acquisition of the Baca ranch under section 698v–2(a) of this title.

(B) Budget request

The Secretary shall provide necessary assistance (including detailees as necessary) to the Trust for the timely formulation and submission of the annual budget request for appropriations, as authorized under section 698v–9(a) of this title, to support the administration, operation, and maintenance of the Preserve.

(f) Taxes

The Trust and all properties administered by the Trust shall be exempt from all taxes and special assessments of every kind by the State of New Mexico, and its political subdivisions including the counties of Sandoval and Rio Arriba.

(g) Donations

The Trust may solicit and accept donations of funds, property, supplies, or services from individuals, foundations, corporations, and other private or public entities for the purposes of carrying out its

duties. The Secretary, prior to assumption of management of the Preserve by the Trust, and the Trust thereafter, may accept donations from such entities notwithstanding that such donors may conduct business with the Department of Agriculture o r any other department or agency of the United States.

(h) **Proceeds**

(1) **In general**

Notwithstanding sections 1341 and 3302 of Title 31, all monies received from donations under subsection (g) or from the management of the Preserve shall be retained and shall be available, without further appropriation, for the administration, preservation, restoration, operation and maintenance, improvement, repair, and related expenses incurred with respect to properties under its management jurisdiction.

(2) **Fund**

There is hereby established in the Treasury of the United States a special interest bearing fund entitled "Valles Caldera Fund" which shall be available, without further appropriation for any purpose consistent with the purposes of this title. At the option of the Trust, or the Secretary in accordance with section 698v–8 of this title, the Secretary of the Treasury shall invest excess monies of the Trust in such account, which shall bear interest at rates determined by the Secretary of the Treasury taking into consideration the current average market yield on outstanding marketable obligations of the United States of comparable maturity.

(i) **Restrictions on disposition of receipts**

Any funds received by the Trust, or the Secretary in accordance with section 698v–7(b) of this title, from the management of the Preserve shall not be subject to partial distribution to the State under—

(1) the Act of May 23, 1908, entitled "an Act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and nine" (35 Stat. 260, chapter 192; 16 U.S.C. 500);

(2) section 13 of the Act of March 1, 1911 (36 Stat. 963, chapter 186; 16 U.S.C. 500); or

(3) any other law.

(j) **Suits**

The Trust may sue and be sued in its own name to the same extent as the Federal Government. For purposes of such suits, the resi-

dence of the Trust shall be the State of New Mexico. The Trust shall be represented by the Attorney General in any litigation arising out of the activities of the Trust, except that the Trust may retain private attorneys to provide advice and counsel.

(k) Bylaws

The Trust shall adopt necessary bylaws to govern its activities.

(l) Insurance and bond

The Trust shall require that all holders of leases from, or parties in contract with, the Trust that are authorized to occupy, use, or develop properties under the management jurisdiction of the Trust, procure proper insurance against any loss in connection with such properties, or activities authorized in such lease or contract, as is reasonable and customary.

(m) Name and insignia

The Trust shall have the sole and exclusive right to use the words "Valles Caldera Trust", and any seal, emblem, or other insignia adopted by the Board of Trustees. Without express written authority of the Trust, no person may use the words "Valles Caldera Trust" as the name under which that person shall do or purport to do business, for the purpose of trade, or by way of advertisement, or in any manner that may falsely suggest any connection with the Trust.

(Pub.L. 106–248, Title I, § 106, July 25, 2000, 114 Stat. 603.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–724 and Statement by President, see 2000 U.S. Code Cong. and Adm. News, p. 500.

References in Text

Sections 698v to 698v–10 of this title, referred to in text, originally read "this title", meaning the Valles Caldera Preservation Act, Pub.L. 106–248, Title I, July 25, 2000, 114 Stat. 598, which enacted those sections.

Chapter 51, and subchapter III of chapter 53, Title 5, referred to in subsec. (d)(1), is classified to 5 U.S.C.A. §§ 5101 et seq. and 5331 et seq., respectively. See Tables for complete classification.

Chapter 91 of Title 31, referred to in subsec. (e)(1), is classified to 31 U.S.C.A. § 9101 et seq. See Tables for complete classification.

The Act of May 23, 1908, referred to in subsec. (i)(1), is the Federal Revenue Sharing Act, May 23, 1908, c. 192, 35 Stat. 260, as amended, which is classified as the first and second sentences of section 500 of this title.

Section 13 of the Act of March 1, 1911, referred to in subsec. (i)(2), is Act Mar. 1, 1911, c. 186, 36 Stat. 963, as amended, which is classified as the third and fourth sentences of section 500 of this title.

§ 698v–5. Board of trustees

(a) In general

The Trust shall be governed by a 9–member Board of Trustees consisting of the following:

(1) Voting trustees

The voting Trustees shall be—

(A) the Supervisor of the Santa Fe National Forest, United States Forest Service;

(B) the Superintendent of the Bandelier National Monument, National Park Service; and

(C) seven individuals, appointed by the President, in consultation with the congressional delegation from the State of New Mexico. The seven individuals shall have specific expertise or represent an organization or government entity as follows—

(i) one trustee shall have expertise in aspects of domesticated livestock management, production, and marketing, including range management and livestock business management;

(ii) one trustee shall have expertise in the management of game and nongame wildlife and fish populations, including hunting, fishing, and other recreational activities;

(iii) one trustee shall have expertise in the sustainable management of forest lands for commodity and noncommodity purposes;

(iv) one trustee shall be active in a nonprofit conservation organization concerned with the activities of the Forest Service;

(v) one trustee shall have expertise in financial management, budget and program analysis, and small business operations;

(vi) one trustee shall have expertise in the cultural and natural history of the region; and

(vii) one trustee shall be active in State or local government in New Mexico, with expertise in the customs of the local area.

(2) Qualifications

Of the trustees appointed by the President—

(A) none shall be employees of the Federal Government; and

(B) at least five shall be residents of the State of New Mexico.

(b) Initial appointments

The President shall make the initial appointments to the Board of Trustees within 90 days after acquisition of the Baca ranch under section 698v–2(a) of this title.

(c) Terms

(1) In general

Appointed trustees shall each serve a term of 4 years, except that of the trustees first appointed, four shall serve for a term of 4 years, and three shall serve for a term of 2 years.

(2) Vacancies

Any vacancy among the appointed trustees shall be filled in the same manner in which the original appointment was made, and any trustee appointed to fill a vacancy shall serve for the remainder of that term for which his or her predecessor was appointed.

(3) Limitations

No appointed trustee may serve more than 8 years in consecutive terms.

(d) Quorum

A majority of trustees shall constitute a quorum of the Board for the conduct of business.

(e) Organization and compensation

(1) In general

The Board shall organize itself in such a manner as it deems most appropriate to effectively carry out the activities of the Trust.

(2) Compensation of trustees

Trustees shall serve without pay, but may be reimbursed from the funds of the Trust for the actual and necessary travel and subsistence expenses incurred by them in the performance of their duties.

(3) Chair

Trustees shall select a chair from the membership of the Board.

(f) Liability of trustees

Appointed trustees shall not be considered Federal employees by virtue of their membership on the Board, except for purposes of the

Federal Tort Claims
provisions of chapter

(g) Meetings

(1) Location and

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(2) Public informa

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§ 698v–6. Resource

(a) Assumption of mana

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(b) Management respons

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Federal Tort Claims Act, the Ethics in Government Act, and the provisions of chapter 11 of Title 18.

(g) Meetings

(1) Location and timing of meetings

The Board shall meet in sessions open to the public at least three times per year in New Mexico. Upon a majority vote made in open session, and a public statement of the reasons therefore, the Board may close any other meetings to the public: Provided, That any final decision of the Board to adopt or amend the comprehensive management program under section 698v–6(d) of this title or to approve any activity related to the management of the land or resources of the Preserve shall be made in open public session.

(2) Public information

In addition to other requirements of applicable law, the Board shall establish procedures for providing appropriate public information and periodic opportunities for public comment regarding the management of the Preserve.

(Pub.L. 106–248, Title I, § 107, July 25, 2000, 114 Stat. 606.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–724 and Statement by President, see 2000 U.S. Code Cong. and Adm. News, p. 500.

References in Text

The Federal Tort Claims Act, referred to in subsec. (f), is the popular name for sections 1291, 1346, 1402, 2401, 2411, 2412, and 2671 to 2680 of Title 28.

The Ethics in Government Act, or the Ethics in Government Act of 1978, referred to in subsec. (f), is Pub.L. 95–521, Oct. 26, 1978, 92 Stat. 1824, which is classified to 5 U.S.C.A. App. 4, § 101 et seq.

Chapter 11 of Title 18, referred to in subsec. (f), is classified to 18 U.S.C.A. § 201 et seq. See Tables for complete classification.

§ 698v–6. Resource management

(a) Assumption of management

The Trust shall assume all authority provided by this title to manage the Preserve upon a determination by the Secretary, which to the maximum extent practicable shall be made within 60 days after the appointment of the Board, that—

(1) the Board is duly appointed, and able to conduct business; and

(2) provision has been made for essential management services.

(b) Management responsibilities

Upon assumption of management of the Preserve under subsection (a), the Trust shall manage the land and resources of the Preserve and the use thereof including, but not limited to such activities as—

(1) administration of the operations of the Preserve;

(2) preservation and development of the land and resources of the Preserve;

(3) interpretation of the Preserve and its history for the public;

(4) management of public use and occupancy of the Preserve; and

(5) maintenance, rehabilitation, repair, and improvement of property within the Preserve.

(c) Authorities

(1) In general

The Trust shall develop programs and activities at the Preserve, and shall have the authority to negotiate directly and enter into such agreements, leases, contracts and other arrangements with any person, firm, association, organization, corporation or governmental entity, including without limitation, entities of Federal, State, and local governments, and consultation with Indian tribes and Pueblos, as are necessary and appropriate to carry out its authorized activities or fulfill the purposes of this title. Any such agreements may be entered into without regard to section 321 of the Act of June 30, 1932 (40 U.S.C. 303b).

(2) Procedures

The Trust shall establish procedures for entering into lease agreements and other agreements for the use and occupancy of facilities of the Preserve. The procedures shall ensure reasonable competition, and set guidelines for determining reasonable fees, terms, and conditions for such agreements.

(3) Limitations

The Trust may not dispose of any real property in, or convey any water rights appurtenant to the Preserve. The Trust may not convey any easement, or enter into any contract, lease, or other agreement related to use and occupancy of property within the Preserve for a period greater than 10 years. Any such easement, contract, lease, or other agreement shall provide that, upon termination of the Trust, such easement, contract, lease or agreement is terminated.

(4) Application of procurement laws

(A) In general

Notwithstanding any other provision of law, Federal laws and regulations governing procurement by Federal agencies shall not apply to the Trust, with the exception of laws and regulations related to Federal Government contracts govern-

ing health and safety requirements, wage rates, and civil rights.

(B) Procedures

The Trust, in consultation with the Administrator of Federal Procurement Policy, Office of Management and Budget, shall establish and adopt procedures applicable to the Trust's procurement of goods and services, including the award of contracts on the basis of contractor qualifications, price, commercially reasonable buying practices, and reasonable competition.

(d) Management program

Within two years after assumption of management responsibilities for the Preserve, the Trust shall, in accordance with subsection (f), develop a comprehensive program for the management of lands, resources, and facilities within the Preserve to carry out the purposes under section 698v–3(b) of this title. To the extent consistent with such purposes, such program shall provide for—

(1) operation of the Preserve as a working ranch, consistent with paragraphs (2) through (4);

(2) the protection and preservation of the scientific, scenic, geologic, watershed, fish, wildlife, historic, cultural and recreational values of the Preserve;

(3) multiple use and sustained yield of renewable resources within the Preserve;

(4) public use of and access to the Preserve for recreation;

(5) renewable resource utilization and management alternatives that, to the extent practicable—

(A) benefit local communities and small businesses;

(B) enhance coordination of management objectives with those on surrounding National Forest System land; and

(C) provide cost savings to the Trust through the exchange of services, including but not limited to labor and maintenance of facilities, for resources or services provided by the Trust; and

(6) optimizing the generation of income based on existing market conditions, to the extent that it does not unreasonably diminish the long-term scenic and natural values of the area, or the multiple use and sustained yield capability of the land.

(e) Public use and recreation

(1) In general

The Trust shall give thorough consideration to the provision of appropriate opportunities for public use and recreation that are

consistent with the other purposes under section 698v–3(b) of this title. The Trust is expressly authorized to construct and upgrade roads and bridges, and provide other facilities for activities including, but not limited to camping and picnicking, hiking, and cross country skiing. Roads, trails, bridges, and recreational facilities constructed within the Preserve shall meet public safety standards applicable to units of the National Forest System and the State of New Mexico.

(2) Fees

Notwithstanding any other provision of law, the Trust is authorized to assess reasonable fees for admission to, and the use and occupancy of, the Preserve: *Provided*, That admission fees and any fees assessed for recreational activities shall be implemented only after public notice and a period of not less than 60 days for public comment.

(3) Public access

Upon the acquisition of the Baca ranch under section 698v–2(a) of this title, and after an interim planning period of no more than two years, the public shall have reasonable access to the Preserve for recreation purposes. The Secretary, prior to assumption of management of the Preserve by the Trust, and the Trust thereafter, may reasonably limit the number and types of recreational admissions to the Preserve, or any part thereof, based on the capability of the land, resources, and facilities. The use of reservation or lottery systems is expressly authorized to implement this paragraph.

(f) Applicable laws

(1) In general

The Trust, and the Secretary in accordance with section 698v–7(b) of this title, shall administer the Preserve in conformity with this title and all laws pertaining to the National Forest System, except the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended (16 U.S.C. 1600 et seq.).

(2) Environmental laws

The Trust shall be deemed a Federal agency for the purposes of compliance with Federal environmental laws.

(3) Criminal laws

All criminal laws relating to Federal property shall apply to the same extent as on adjacent units of the National Forest System.

(4) Reports on appli

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References in Text

Section 321 of the Act of June
is one of the Economy Acts.
1932, c. 314, § 321, 47 Stat. 41
is classified to section 303b of

The Forest and Rangeland R
Resources Planning Act of

(4) Reports on applicable rules and regulations

The Trust may submit to the Secretary and the Committees of Congress a compilation of applicable rules and regulations which in the view of the Trust are inappropriate, incompatible with this title, or unduly burdensome.

(5) Consultation with tribes and Pueblos

The Trust is authorized and directed to cooperate and consult with Indian tribes and Pueblos on management policies and practices for the Preserve which may affect them. The Trust is authorized to allow the use of lands within the Preserve for religious and cultural uses by Native Americans and, in so doing, may set aside places and times of exclusive use consistent with the American Indian Religious Freedom Act and other applicable statutes.

(6) No administrative appeal

The administrative appeals regulations of the Secretary shall not apply to activities of the Trust and decisions of the Board.

(g) Law enforcement and fire management

The Secretary shall provide law enforcement services under a cooperative agreement with the Trust to the extent generally authorized in other units of the National Forest System. The Trust shall be deemed a Federal agency for purposes of the law enforcement authorities of the Secretary (within the meaning of section 559g of this title). At the request of the Trust, the Secretary may provide fire presuppression, fire suppression, and rehabilitation services: *Provided*, That the Trust shall reimburse the Secretary for salaries and expenses of fire management personnel, commensurate with services provided.

(Pub.L. 106–248, Title I, § 108, July 25, 2000, 114 Stat. 607.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–724 and Statement by President, see 2000 U.S. Code Cong. and Adm. News, p. 500.

References in Text

Section 321 of the Act of June 30, 1932, is one of the Economy Acts, June 30, 1932, c. 314, § 321, 47 Stat. 412, which is classified to section 303b of Title 40.

The Forest and Rangeland Renewable Resources Planning Act of 1974, or FRRRPA, referred to in subsec. (f)(1), is Pub.L. 93–378, Aug. 17, 1974, 88 Stat. 476, which is classified to subchapter I of chapter 36 of this title (16 U.S.C.A. § 1600 et seq.).

The American Indian Religious Freedom Act, referred to in subsec. (f)(5), is Pub.L. 95–341, Aug. 11, 1978, 92 Stat. 469, which enacted sections 1996 and 1996a of Title 42.

§ 698v–7. Authorities of the Secretary

(a) In general

Notwithstanding the assumption of management of the Preserve by the Trust, the Secretary is authorized to—

(1) issue any rights-of-way, as defined in the Federal Land Policy and Management Act of 1976, of over 10 years duration, in cooperation with the Trust, including, but not limited to, road and utility rights-of-way, and communication sites;

(2) issue orders under and enforce prohibitions generally applicable on other units of the National Forest System, in cooperation with the Trust;

(3) exercise the authorities of the Secretary under the Wild and Scenic Rivers Act (16 U.S.C. 1278, et seq.) and the Federal Power Act (16 U.S.C. 797, et seq.), in cooperation with the Trust;

(4) acquire the mineral rights referred to in section 698v–2(e) of this title;

(5) provide law enforcement and fire management services under section 698v–6(g) of this title;

(6) at the request of the Trust, exchange land or interests in land within the Preserve under laws generally applicable to other units of the National Forest System, or otherwise dispose of land or interests in land within the Preserve under Public Law 97–465 (16 U.S.C. 521c through 521i);

(7) in consultation with the Trust, refer civil and criminal cases pertaining to the Preserve to the Department of Justice for prosecution;

(8) retain title to and control over fossils and archaeological artifacts found within the Preserve;

(9) at the request of the Trust, construct and operate a visitors' center in or near the Preserve, subject to the availability of appropriated funds;

(10) conduct the assessment of the Trust's performance, and, if the Secretary determines it necessary, recommend to Congress the termination of the Trust, under section 698v–8(b)(2) of this title; and

(11) conduct such other activities for which express authorization is provided to the Secretary by sections 698v to 698v–10 of this title.

(b) Interim management

(1) In general

The Secretary shall
sections 698v to 698v-
from the date of acqu
698v–2(a) of this title
of the Preserve by the
The Secretary may ent
other arrangement on
698v–6(c)(1) of this tit
contract, or other arr
shall not exceed two ye
by the Trust upon its as

(2) Use of the fund

All monies received
the Preserve during the
be deposited into the
section 698v–4(h)(2) o
shall be available to the
for the purpose of man
responsibilities and au
tion 698v–6 of this title

(c) Secretarial authority

The Secretary retains the
Board with respect to the m
the decision is clearly inco
this title. Such authority
Secretary, and may not be
shall be in writing to the Bo
be given to the Committee
shall be referred back to the

(d) Access

The Secretary shall at a
administrative purposes.

(Pub.L. 106–248, Title I, § 109

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2000 Acts. House Report No.
and Statement by President, se
U.S. Code Cong. and Adm. News.

(b) Interim management

(1) In general

The Secretary shall manage the Preserve in accordance with sections 698v to 698v–10 of this title during the interim period from the date of acquisition of the Baca ranch under section 698v–2(a) of this title to the date of assumption of management of the Preserve by the Trust under section 698v–6 of this title. The Secretary may enter into any agreement, lease, contract, or other arrangement on the same basis as the Trust under section 698v–6(c)(1) of this title: *Provided*, That any agreement, lease, contract, or other arrangement entered into by the Secretary shall not exceed two years in duration unless expressly extended by the Trust upon its assumption of management of the Preserve.

(2) Use of the fund

All monies received by the Secretary from the management of the Preserve during the interim period under paragraph (1) shall be deposited into the "Valles Caldera Fund" established under section 698v–4(h)(2) of this title, and such monies in the fund shall be available to the Secretary, without further appropriation, for the purpose of managing the Preserve in accordance with the responsibilities and authorities provided to the Trust under section 698v–6 of this title.

(c) Secretarial authority

The Secretary retains the authority to suspend any decision of the Board with respect to the management of the Preserve if he finds that the decision is clearly inconsistent with sections 698v to 698v–10 of this title. Such authority shall only be exercised personally by the Secretary, and may not be delegated. Any exercise of this authority shall be in writing to the Board, and notification of the decision shall be given to the Committees of Congress. Any suspended decision shall be referred back to the Board for reconsideration.

(d) Access

The Secretary shall at all times have access to the Preserve for administrative purposes.

(Pub.L. 106–248, Title I, § 109, July 25, 2000, 114 Stat. 610.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–724 and Statement by President, see 2000 U.S. Code Cong. and Adm. News, p. 300.

References in Text

Sections 698v to 698v–10 of this title, referred to in text, originally read "this title", meaning the Valles Caldera Preservation Act, Pub.L. 106–248, Title I, July

25, 2000, 114 Stat. 398, which enacted those sections.

The Federal Land Policy and Management Act of 1976, also known as the FLPMA and the Bureau of Land Management Organic Act, referred to in subsec. (a)(1), is Pub.L. 94–579, Oct. 21, 1976, 90 Stat. 2744, which is generally classified to chapter 35 of Title 43 (43 U.S.C.A. § 1701 et seq.). See Tables for complete classification.

The Wild and Scenic Rivers Act, also known as WSRA, referred to in subsec. (a)(3), is Pub.L. 90–542, Oct. 2, 1968, 82 Stat. 906, which is classified to chapter 28 of this title (16 U.S.C.A. § 1271 et seq.).

The Federal Power Act, also known as the FPA, the Esch Water Power Act, the Public Utility Act of 1935, the Water Power Act, the Federal Water Power Act, and the FWPA, referred to in subsec. (a)(3), is Act June 10, 1920, c. 285, 41 Stat. 1063, which is classified to chapter 12 of this title (16 U.S.C.A. § 791 et seq.).

Public Law 97–465, also known as the Small Tract Act of 1983, referred to in subsec. (b)(6), is Pub.L. 97–465, Jan. 12, 1983, 96 Stat. 2535, which is classified to sections 521c to 521i of this title.

§ 698v–8. Termination of the Trust

(a) In general

The Valles Caldera Trust shall terminate at the end of the twentieth full fiscal year following acquisition of the Baca ranch under section 698v–2(a) of this title.

(b) Recommendations

(1) Board

(A) If after the fourteenth full fiscal years from the date of acquisition of the Baca ranch under section 698v–2(a) of this title, the Board believes the Trust has met the goals and objectives of the comprehensive management program under section 698v–6(d) of this title, but has not become financially self-sustaining, the Board may submit to the Committees of Congress, a recommendation for authorization of appropriations beyond that provided under sections 698v to 698v–10 of this title.

(B) During the eighteenth full fiscal year from the date of acquisition of the Baca ranch under section 698v–6(a) of this title, the Board shall submit to the Secretary its recommendation that the Trust be either extended or terminated including the reasons for such recommendation.

(2) Secretary

Within 120 days after receipt of the recommendation of the Board under paragraph (1)(B), the Secretary shall submit to the Committees of Congress the Board's recommendation on extension or termination along with the recommendation of the Secretary with respect to the same and stating the reasons for such recommendation.

(c) Effect of termination

In the event of terminat
all management and adm
it shall thereafter be ma
Forest, subject to all laws

(d) Assets

In the event of terminat
be used to satisfy any outs
shall be transferred to the
priation, for the managem

(e) Valles Caldera Fund

In the event of terminat
of the Trust over funds ur
Valles Caldera Fund shall
the fund shall be available
ation, for any purpose co
to 698v–10 of this title.

(Pub.L. 106–248, Title I, § 11

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and Statement by President, s
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References in Text

Sections 698v to 698v–10 of
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§ 698v–9. Limitation

(a) Authorization of appr

There is hereby authoriz
the Trust such funds as
purposes of sections 698v
full fiscal years after the d
section 698v–2(a) of this ti

(b) Schedule of appropria

Within two years after
shall submit to Congress a
decreasing appropriated f
financially self-sustained
years after the date of ac
698v–2(a) of this title.

(Pub.L. 106–248, Title I, § 11

(c) Effect of termination

In the event of termination of the Trust, the Secretary shall assume all management and administrative functions over the Preserve, and it shall thereafter be managed as a part of the Santa Fe National Forest, subject to all laws applicable to the National Forest System.

(d) Assets

In the event of termination of the Trust, all assets of the Trust shall be used to satisfy any outstanding liabilities, and any funds remaining shall be transferred to the Secretary for use, without further appropriation, for the management of the Preserve.

(e) Valles Caldera Fund

In the event of termination, the Secretary shall assume the powers of the Trust over funds under section 698v–4(h) of this title, and the Valles Caldera Fund shall not terminate. Any balances remaining in the fund shall be available to the Secretary, without further appropriation, for any purpose consistent with the purposes of sections 698v to 698v–10 of this title.

(Pub.L. 106–248, Title I, § 110, July 25, 2000, 114 Stat. 611.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–724 and Statement by President, see 2000 U.S. Code Cong. and Adm. News, p. 500.

References in Text

Sections 698v to 698v–10 of this title, referred to in text, originally read "this title", meaning the Valles Caldera Preservation Act, Pub.L. 106–248, Title I, July 25, 2000, 114 Stat. 598, which enacted those sections.

§ 698v–9. Limitations on funding

(a) Authorization of appropriations

There is hereby authorized to be appropriated to the Secretary and the Trust such funds as are necessary for them to carry out the purposes of sections 698v to 698v–10 of this title for each of the 15 full fiscal years after the date of acquisition of the Baca ranch under section 698v–2(a) of this title.

(b) Schedule of appropriations

Within two years after the first meeting of the Board, the Trust shall submit to Congress a plan which includes a schedule of annual decreasing appropriated funds that will achieve, at a minimum, the financially self-sustained operation of the Trust within 15 full fiscal years after the date of acquisition of the Baca ranch under section 698v–2(a) of this title.

(Pub.L. 106–248, Title I, § 111, July 25, 2000, 114 Stat. 612.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–724 and Statement by President, see 2000 U.S. Code Cong. and Adm. News, p. 500.

References in Text

Sections 698v to 698v–10 of this title, referred to in text, originally read "this title", meaning the Valles Caldera Preservation Act, Pub.L. 106–248, Title I, July 25, 2000, 114 Stat. 598, which enacted those sections.

§ 698v–10. General Accounting Office study

(a) Initial study

Three years after the assumption of management by the Trust, the General Accounting Office shall conduct an interim study of the activities of the Trust and shall report the results of the study to the Committees of Congress. The study shall include, but shall not be limited to, details of programs and activities operated by the Trust and whether it met its obligations under sections 698v to 698v–10 of this title.

(b) Second study

Seven years after the assumption of management by the Trust, the General Accounting Office shall conduct a study of the activities of the Trust and shall report the results of the study to the Committees of Congress. The study shall provide an assessment of any failure to meet obligations that may be identified under subsection (a), and further evaluation on the ability of the Trust to meet its obligations under sections 698v to 698v–10 of this title.

(Pub.L. 106–248, Title I, § 112, July 25, 2000, 114 Stat. 612.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–724 and Statement by President, see 2000 U.S. Code Cong. and Adm. News, p. 500.

References in Text

Sections 698v to 698v–10 of this title, referred to in text, originally read "this title", meaning the Valles Caldera Preservation Act, Pub.L. 106–248, Title I, July 25, 2000, 114 Stat. 598, which enacted those sections.

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GEOTHERMAL LEASE AND AGREEMENT

This GEOTHERMAL LEASE AND AGREEMENT (this "Lease") is made effective as of the 14th day of February, 2000, and is by and between **J.B. Harrell, Jr. and wife, Marie S. Harrell, and Donald F. Harrell and wife, Maryana N. Harrell,** hereinafter collectively referred to as **"Lessors"** and **GeoProducts of New Mexico, Inc.**, hereinafter referred to as **"Lessee"**.

WITNESSETH:

Lessors are the owners of an undivided interest in the mineral estate, including geothermal fluids along with by-products and energy contained in and under the Baca Ranch situated in Sandoval and Rio Arriba Counties in New Mexico and described in Exhibit "A" attached hereto and made a part hereof (the "Baca Ranch")

RECITALS

WHEREAS, Lessors and others have long recognized the possible presence of geothermal energy in commercial quantities on the Baca Ranch,

WHEREAS, prior exploration efforts on the Baca Ranch, including drilling of wells, (the "Prior Efforts"), have evidenced sufficient geothermal resources for energy production to supply an electric power generating station in the Redondo Creek Area of the Baca Ranch ("Redondo Creek Area"), comprising approximately 2,720 acres, more or less, as shown on the plat attached hereto and marked "exhibit "B" and made a part hereto,

WHEREAS, tests and data from certain of the wells drilled during the Prior Efforts indicated they could produce sufficient energy to furnish a generating plant have a capacity of approximately 18 Megawatts, and;

WHEREAS, prior leases have terminated and Lessors and the other undivided mineral interest owners now own the wells, equipment, minerals and resources associated with such Prior Efforts, and;

WHEREAS, Lessee has made a preliminary review of such Prior Efforts, including well drilling and testing information, and;

WHEREAS, Lessee has made a preliminary study of possible markets for electric power in the general area of the Baca Ranch, and;

WHEREAS, Lessee has investigated the availability of technology and equipment that would be suitable for generating electric power on a commercial scale utilizing geothermal energy produced from wells that currently exist on the Baca Ranch and from wells that might be drilled in the future under the terms of this Lease, and;

WHEREAS, Lessee seeks to investigate the opportunities for recompleting some of the wells that currently exist and drilling additional wells on the Baca Ranch, and;

WHEREAS, Lessee now seeks to investigate the opportunities for installing and operating electric power generating facilities, including transmission lines, to serve electric power markets that exist or might be developed in the general area.

TERMS OF LEASE AND AGREEMENT

NOW THEREFORE, Lessor and Lessee agree as follows:

FOR AND IN CONSIDERATION of the sum of ten dollars ($10.00), the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained, Lessor does hereby grant, lease, let, assign, convey and bargain to Lessee, it's grantees, successors and assigns, the exclusive right to explore for, drill for, mine, develop, extract, produce, remove, inject, reinject, and dispose of all the geothermal resources and geothermal fluids (liquid and/or steam), and energy derived therefrom, and the minerals associated therewith, including steam, hot water, brines, and other fluids (the "Lease Substances"), and to lay pipelines, construct transmission lines, utility lines, tanks, electric power generating stations, switching and transformer stations, dams, ponds, roads, storage areas, offices and maintenance buildings, telephone and data communication lines, and such other structures and facilities that assist or Lessee deems beneficial in carrying out the purposes of this Lease, in, on, through and under the Baca Ranch. Together with the right of reworking and recompleting previously drilled wells, drilling new wells, exploring for, mining, extracting, producing and using and selling geothermal fluids (both liquid and steam) along with bi-products and energy, and taking, utilizing, processing, storing, removing, reinjecting and disposing of such Lease Substances, whether for the generation and transmission of electric power, space heating, or other uses. Lessee is further granted the right to construct roads, conduct core hole temperature test drilling, conduct seismic surveys, soil and spring gas surveys, gravity surveys, magneto telluric surveys, and utilize other testing methods which in Lessee's opinion are helpful in further defining any potentially productive areas. Lessee hereby agrees to conduct all of its operations hereunder in accordance with the terms, conditions and provisions of this Lease and the laws of the State of New Mexico.

The terms and conditions of this Lease are as follows, to wit:

1. **Term:** Subject to the other provisions herein contained, this Lease is for a primary term of five (5) years from and after the effective date hereof (the "Primary Term"), and so long thereafter as Lessee in good faith shall conduct continuous drilling operations (as defined below), construct facilities to utilize Lease Substances, or perform any operations associated with the production and/or utilization of Lease Substances, or actually produce Lease Substances.

For purpose of this Lease, continuous drilling operations shall mean the actual drilling of wells or reentering previously drilled wells drilled during Prior Efforts in a bona fide effort to

establish production of geothermal fluids or for the injection of fluids with no more than 150 days elapsing between the completion or termination of drilling or reworking operations on one well and the commencement of actual drilling or reentry of the next succeeding well. Each well must be completed as a productive well, an injection well, or plugged and abandoned within 120 days after commencement thereof.

2. **Well Delay Rentals:** If Lessee does not commence within two years from the date of this Lease reentry and recompletion operations on one or more of the wells previously drilled during Prior Efforts, or commence drilling operations on a new well, this lease shall terminate, unless on or before the third anniversary date, Lessee shall have paid or tendered to Lessors the sum of $10,000.00 as a delay rental payment (a "Well Delay Rental") for the privilege of deferring the commencement of such operations for an additional period of one (1) year. In like manner the commencement of such operations shall be further deferred on a year by year basis for the remainder of the Primary Term, except that subsequent Well Delay Rentals pursuant to this Section 2 shall be in the following amounts:

2nd Well Delay Rental (4th year).....$20,000.00
3rd Well Delay Rental (5th year).....$40,000.00

Provided, however, that Lessee's obligations under this Section 2, including any obligation to make Well Delay Rental payments not already made, shall be canceled at such time as Lessee commences drilling operations as specified.

3. **Royalty:** Lessee agrees to pay Lessors a royalty equal to **12.5% (1/8)** (the"Royalty") of the value (the "Energy Value") of all Lease Substances produced and utilized for the generation of electric power or sold for another purpose. The Energy Value shall be determined as follows:

(a) In the event Lessee sells Lease Substances as such, the Energy Value shall be the gross proceeds received by Lessee for such sale, free of costs.

(b) In the event Lease Substances are used to generate and transmit electric power in facilities owned, or partially owned by Lessee, or owned and operated under an arrangement in which any sale of Lease Substances by Lessee for use in such facilities would not be an "arm's length" sale, the Energy Value shall be equal to forty percent (40%) of the total proceeds received from the sale of electric power from such facilities, reduced by any sales, excise or ad valorem taxes of any nature (excluding income taxes and ad valorem taxes levied with respect to Lessee's property) imposed on the generation, transmission or sale of such electric power.

4. **Advance Royalty:** In the event Royalty payments described in Section 3 above have not commenced by the eighth (8th) anniversary of this Lease, Lessee shall nevertheless make advanced royalty payments (the "Advance Royalty") to Lessor on an annual basis, beginning on said eighth (8th) anniversary, until such actual Royalty payments commence. The Advance Royalty payments

shall be in the following amounts:

1st Advance Royalty	$20,000.00
2nd Advance Royalty	$40,000.00
3rd Advance Royalty	$80,000.00
4th Advance Royalty	$160,000.00
5th Advance Royalty	$320,000.00

If Royalty payments as described in Section 4 above have not commenced by the end of the 13th anniversary of this Lease, Lessors may choose either (a) to require Advance Royalty payments of $320,000.00 per year by Lessee, or (b) to cancel and terminate this Lease. In the event Lessors choose to require the continuation of such Advance Royalty payments, they may nevertheless choose to cancel and terminate the Lease on any such anniversary date prior to the payment of the then next required Advance Royalty.

Any Advance Royalty payments made pursuant to this Section 4 shall be deducted from Royalty payments due Lessors under Section 3 above until all such Advance Royalty payments shall have been fully recovered, without interest, by Lessee.

5. **Royalty on Other Minerals:** Lessee agrees to pay Lessors a royalty (the "Mineral Royalty") equal to 2% of the proceeds received by Lessee from the sale of any minerals extracted or manufactured from Lease Substances. Lessors Mineral Royalty shall be reduced by their pro rata share of any costs to Lessee of transporting such extracted minerals to the point of sale, if sold off the Baca Ranch.

6. **Royalty Exception:** Lessee shall not be required to account to Lessors for, or to pay any Royalty or Mineral Royalty on any Lease Substances which are not utilized, saved or sold, or which are used by Lessee in connection with its operations hereunder, or which are unavoidably lost.

7. **Inability to Market:** Lessee shall not be obligated to produce Lease Substances if it is unable to : (a) market as such, or (b) utilize in a plant from which products, including without limitation electric power, can be marketed economically.

8. **Other Minerals:** Lessee shall have no obligation to save or process minerals or other by-products that may be produced in operations under this lease. Lessors except and reserve unto themselves all pumice, metallic, sulphur, coal, oil, gas and other minerals located upon the Baca Ranch which are not specifically leased hereunder, ie, the Lease Substances and other minerals produced in association with production of the Lease Substances, Lessors reserve the right to lease the mining rights of these minerals by separate lease to other companies or individuals and/or to mine and remove the reserved minerals.

9. **Right to Reasonable Use of the Surface:** To the full extent Lessors own the right of ingress and egress and reasonable use of the surface for exploration, development and production of the mineral

estate either under the specific granting language or reservation language through which Lessors derived their mineral interest or by application of the laws of the State of New Mexico, such rights are likewise conveyed to Lessee to advance the purposes of the Lease. Lessee is hereby granted ingress and egress, as well as easements and rights of way on the Baca Ranch, as reasonably required, for roads, pipelines, electric power transmission lines, and any other uses related to Lessee's rights and obligations hereunder. Lessors reserve the right to be present and to observe any and all activities of Lessee on the leased premises, including but not limited to the floor of any drilling rig or generating facility. At Lessor's option, they may by represented and/or accompanied by their representative or representatives. Neither Lessors nor their representative shall interfere with Lessee's operations hereunder. Lessors further reserve the right, when requested in writing to Lessee, to be supplied with complete copies of all tests, seismic surveys, logs, drilling reports, and all other well data which is gathered as a result of the Lease. If requested by Lessee, Lessors shall receive and hold all such information and data on a confidential basis and treat it as information and data owned by Lessee, not to be disclosed to others except with the express written approval of Lessee.

10. **Water:** Lessee shall have the right to use and utilize such water or water rights (owned by Lessor) in, on, produced from, appurtenant to, or crossing the Baca Ranch, in furtherance of the objectives of this Lease and of Lessee's business and operations hereunder, without payment therefor to Lessors. Any brine, fluid or surplus water resulting from Lessee's activities or operations may be disposed of by reinjection or may be utilized, or dealt with by Lessee in such manner as Lessee shall deem appropriate.

11. **Lesser Interest:** If it should hereafter appear that Lessors, at the time of making this Lease, owned a lesser estate or interest in the Baca Ranch than the entire mineral interest therein and thereto, or less that the entire interest in the Lease Substances in and under the Baca Ranch, then any payments to Lessors accruing hereunder, including, without limitation, the Royalty, Advance Royalty and Well Delay Rentals shall be paid to Lessors only in the proportion which Lessors said lesser interest shall be found to bear to the entire mineral interest in the said land or to the entire interest in the said Lease Substances.

12. **Use of Existing Geothermal Wells:** Subject to the provisions hereof, Lessee shall have the right to reenter wells drilled during the Prior Efforts without any additional consideration and to drill new wells as Lessee may deem desirable for the purposes hereof, including wells for production, injection or reinjection purposes.

13. **Insurance:** Lessee, at its own expense, prior to commencing operations hereunder, shall obtain, and thereafter while this Lease is in effect shall maintain, adequate Workmen's Compensation Insurance and general liability insurance. Lessee shall protect, indemnify and hold harmless Lessors against damages of every kind and character arising out of and caused by operations of Lessee.

14. **Equipment:** Lessee shall have the right at any time and from time to time to remove from the Baca Ranch any and all machinery, equipment, structures, installations and property of every kind and character placed upon said Baca Ranch by Lessee, provided that such removal shall be completed within a reasonable time after termination of this Lease, in the event such removal shall occur after termination of this Lease.

15. **Taxes:** Lessee shall pay all taxes levied against its improvements on the Baca Ranch as well as all production and severance taxes associated with the production of the Lease Substances and any taxes on the generation and sale of electricity. Lessors shall pay or bear their share of production and severance taxes on their Royalty share of production. Lessee is hereby authorized, but not required, to pay on behalf of Lessors, Lessors share of production and severance taxes and may, if it so desires, deduct the amount so paid from royalties or monies due Lessor hereunder.

16. **Assignments:** The rights of Lessors and Lessee hereunder may be assigned in whole or in part. If all or any part of this Lease is assigned, no leasehold owner shall be liable for any act or omission of any other leasehold owner, and failure by one to pay royalty or any other payments hereunder shall not affect the rights of others. No change in ownership of a Lessor's interest, however accomplished, shall be binding on Lessee until the Lessor has furnished Lessee with written notice of such change, and then only with respect to payments thereafter made; such notice shall consist of original or certified copies of all recorded instruments, documents or other information necessary to establish a complete chain of record title from Lessor, and written instructions from Lessor and Lessee's transferee directing the disbursement of any payments which may be made thereafter. No present or future division of Lessor's ownership as to different portions or parcels of said land shall operate to enlarge the obligations or diminish the rights of Lessee.

17. **Right to Surrender:** Lessee may at any time surrender this Lease as to part or all of the Baca Ranch by delivering a quitclaim deed describing the lands surrendered or causing a quitclaim deed to be recorded in the appropriate county records. Lessee shall thereby be released of all obligations hereunder as to the part of the Baca Ranch so surrendered, except as such obligations relate to unsatisfied requirements created hereunder prior to such surrender. Lessee shall have rights of way and easements over the land so surrendered for facilities, pipelines, transmission lines, and roadways necessary or convenient for Lessee's operations on other portions of the Baca Ranch hereunder.

18. **Suspensions and Force Majeure:** The obligations of Lessee hereunder shall be suspended and the terms of this lease shall be extended, as the case may be, while Lessee is prevented from complying therewith, in whole or in part, by strikes, lockouts, riots, actions of the elements, accidents, delays in transportation, inability to secure labor or materials in the open market, laws, rules or regulations of and Federal, state, municipal or other governmental agency, authority or representative, or other matters or conditions beyond the reasonable control of Lessee, whether or not similar to the conditions or matters herein specifically enumerated.

9546

19. **Notice of Default:** In case of default in performance by Lessee of any of the terms, covenants or conditions contained herein, and the failure to commence to remedy the same within ninety (90)

days after receipt of written notice from Lessors specifying the particulars in which it is claimed Lessee is in default, and thereafter to continue such remedying with reasonable diligence to completion, then at the option of Lessors, all rights of Lessee under this Lease shall forthwith terminate.

20. **Notices:** Lessor may give any notice or deliver any document hereunder to Lessee by mailing to same by registered mail addressed to Lessee at **14254 Herringbone Way, Truckee CA., 96161**, or by delivering the same in person to any officer of Lessee. Lessee may give any notice or deliver any document hereunder to Lessors by mailing the same by registered mail addressed to:

J.B. Harrell, Jr.	Donald F. Harrell
1426 Tanglewood Road	1401 Woodland Trail
Abilene, Texas 79605	Abilene, Texas 79605

or by delivering the same to the respective Lessors in person. For the purposes of this paragraph, either party may change its address by written notice to the other. In case of any notice or document delivered by registered mail, the same shall be deemed delivered when deposited in any United States Post Office, properly addressed as herein provided, with postage fully paid.

21. **Warranty:** Lessors hereby warrant and agree to defend title to their ownership position in the mineral estate and this Lease is made with warranty covenants.

22. **Binding Effect:** This Lease and all its terms, conditions and stipulations shall extend to and be binding upon the heirs, successors and assigns of Lessors and Lessee and shall run with the land. The Recitals and the heading of each Section are for convenience and are not intended to limit, expand or adversely affect the terms, provisions and conditions of this lease.

23. **Multiple Counterparts:** This document may be executed in multiple counterparts, each one of which shall be considered an original and the signature pages may be duplicated with a party signing only one of the multiple signature pages which signature pages may be reassembled into one complete document.

IN WITNESS WHEREOF, the parties hereto have executed this Lease on this the 14th day of February, 2000, but shall be effective for all purposes herein as of the date first above written.

LESSORS:

J.B. Harrell, Jr.

Donald F. Harrell

Marie S. Harrell

Maryana N. Harrell

LESSEE:

GeoProducts of New Mexico, Inc.

Kenneth L. Boren, President

STATE OF NEW MEXICO } SS
COUNTY OF SANDOVAL }
This instrument was filed for record at 3:42 A.M. P.M. on
FEB 25 2000
Recorded in Vol. 403
of records of said county, folio 9547-9553
By: Q. Sherman Clk. & Rscorder, Deputy

STATE OF TEXAS

COUNTY OF TAYLOR

This instrument was acknowledged before me this 21st day of February, 2000, by J.B. Harrell, Jr. and wife, Marie S. Harrell

CAROLYN WOODARD
Notary Public, State of Texas
My Commission Exp 06-04-03

Notary Public

My Commission Expires:

STATE OF TEXAS

COUNTY OF TAYLOR

This instrument was acknowledged before me this 21st day of February, 2000. by Donald F. Harrell and wife, Maryana N. Harrell

CAROLYN WOODARD
Notary Public, State of Texas
My Commission Exp 06-04-03

Notary Public

My Commission Expires:

STATE OF CALIFORNIA
NEVADA D.P
COUNTY OF ~~EL DORADO~~

This instrument was acknowledged before me on this 23 day of FEB, 2000, by Kenneth L. Boren, President of GeoProducts of New Mexico, Inc. , a New Mexico corporation, on behalf of said corporation.

Notary Public

My Commission Expires:

DONALD PAULI
COMM. #1217788
NOTARY PUBLIC - CALIFORNIA
NEVADA COUNTY
My Comm. Expires May 28, 2003

9549

EXHIBIT "A"

All that certain tract of land commonly known as "Baca Location No. 1" as the same is shown and designated on the plat entitled "Independent Resurvey of the Baca Location No. 1" made by L.A. Osterhoudt, W.V. Hall and Chas. W. Devendort, U.S. Cadastral Engineers, June 30, 1920- August 24, 1921, under special instructions for Group No. 107, dated February 12, 1920, in New Mexico, which plat was accepted June 18, 1923, and is on file in the Public Surveys Office at Santa Fe, New Mexico, said tract being more particularly described as follows:

COMMENCING at the initial point which is the quarter corner on the South Boundary Line of Section 34, Township 20 North, Range 4 East, N.M.P.M., and running thence North 6 miles, 18.22 chains to the point of beginning;

THENCE running East 6 miles, 17.10 chains to the Northeast corner of this tract;

THENCE South 12 miles, 35.06 chains to the Southeast corner of this tract;

THENCE West 12 miles, 37.08 chains to the Southwest corner of this tract;

THENCE North 12 miles, 37.08 chains to the Northwest corner of this tract;

THENCE East 6 miles, 17.00 chains to the place of beginning, and being located in Townships 19, 20, and 21 North, Range 3, 4 and 5 East, N.M.P.M., **SAVE AND EXCEPT** such area as may be in conflict with the following tracts of land, to wit;

H.E.S. 76; Hd. 2306, H.E.S. 138; M.S. 553; M.S. 1019, 969.85 acres of land described in a deed dated June 29, 1966, from Baca Land & Cattle Company, et al, to the United States of America, and 1.075 acres of land described in a deed dated March 16, 1970, from Baca Land and Cattle Company, et al, to Hofeins, Inc., leaving 98,253.225 acres of land, more or less.

SAVE AND EXCEPT a tract of land heretofore conveyed to the United States of America situated and lying in Township 15 North, Range 5 East, unsurveyed, New Mexico Principal Meridian, Sandoval County, New Mexico, and more particularly described as follows:

Beginning at a point at the Southeast corner of Baca Location No. 1, said point also being the dividing line between Sandoval and Los Alamos Counties;

Thence Westerly along the South line of said Baca Location No. 1, the following courses and distances, all of which have been surveyed and monumented;

N. 89 deg. 58'16" W.,	88.35 ft.;
N. 89 deg. 56' 58" W.,	1,276.98 ft.;
N. 89 deg. 57' 1" W.,	1,08.44 ft.;
N. 89 deg. 57' 35" W.,	163.49 ft.;
N. 89 deg. 53' 18" W.,	2,645.42 ft.;
N. 89 deg. 53' 15" W.,	487.34 ft.;
N. 89 deg. 53' 11" W.,	255.91 ft.;
N. 89 deg. 53' 6" W.,	484.77 ft.;
N. 89 deg. 53' 11" W.,	823.62 ft.;

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N. 89 deg. 53' 07" W., 354.86 ft.;
N. 89 deg. 53' 20" W., 235.44 ft.;
N. 89 deg. 54' 28" W., 405.83 ft.;
N. 89 deg. 54' 38" W., 363.83 ft.;
N. 89 deg. 54' 51" W., 177.95 ft.;
N. 89 deg. 54' 37" W., 420.82 ft.;
N. 89 deg. 54' 38" W., 344.86 ft.;
N. 89 deg. 45' 39" W., 241.92 ft.;
N. 89 deg. 54' 41" W., 463.79 ft.;
N. 89 deg. 54' 38" W., 508.22 ft.;
thence leaving the South line of the Baca Location No. 1,
N. 00 deg. 05' 57" E., 206.18 ft.;
N. 00 deg. 05' 49" E., 416.57 ft.;
N. 00 deg. 05' 55" E., 443.57 ft.;
N. 00 deg. 05' 52" E., 493.53 ft.;
N. 00 deg. 05' 46" E., 490.13 ft.;
N. 00 deg. 05' 52" E., 414.88 ft.;
N. 00 deg. 05' 39" E., 339.82 ft.;
N. 00 deg. 05' 47" E., 368.68 ft.;
N. 00 deg. 05' 46" E., 412.53 ft.;
N. 00 deg. 05' 43" E., 409.69 ft.;
N. 00 deg. 05' 37" E., 492.54 ft.;
N. 00 deg. 05' 30" E., 496.84 ft.;
N. 00 deg. 05' 36" E., 494.20 ft.;
N. 00 deg. 05' 32" E., 476.16 ft.;
N. 00 deg. 05' 34" E., 487.25 ft.;
N. 00 deg. 05' 36" E., 496.53 ft.;
N. 00 deg. 05' 35" E., 496.85 ft.;
N. 41deg. 43' 48" E., 341.73 ft.;
N. 41 deg. 43' 50" E., 517.61 ft.;
N. 41 deg. 43' 49" E., 440.44 ft.;
N. 41 deg. 43' 48" E., 565.44 ft.;
N. 41 deg. 43' 52" E., 389.12 ft.;
N. 41 deg. 43' 50" E., 632.33 ft.;
N. 41 deg. 43' 48" E., 486.70 ft.;
N. 41 deg. 43' 47" E., 355.17 ft.;
N. 41 deg. 43' 49" E., 492.48 ft.;
N. 41 deg. 43' 53" E., 488.98 ft.;
N. 41 deg. 43' 50" E., 501.88 ft.;
N. 41 deg. 43' 47" E., 464.39 ft.;
N. 41 deg. 43' 49" E., 488.04 ft.;
N. 41 deg. 43' 53" E., 490.98 ft.;
N. 41 deg. 43' 49" E., 2,443.94 ft.;
N. 41 deg. 43' 53" E., 488.44 ft.;
N. 41 deg. 43' 49" E., 490.39 ft.;

N. 41 deg. 43' 48" E., 293.44 ft. to a U.S. Geological Survey Bench Mark at the summit of Cerro Grande;
thence, S. 60 deg. 21' 32" E., 1,455.63 ft.;
S. 60 deg. 21' 36" E., 941.58 ft.;
S. 60 deg. 21' 30" E., 445.24 ft.;
S. 60 deg. 21' 40" E., 382.21 ft.;
S. 60 deg. 21' 31" E., 496.34 ft.;
S. 60 deg. 21' 37" E., 487.81 ft.;
S. 60 deg. 21' 31" E., 398.38 ft. To a point on the East line of said Baca Location No. 1 marked BLI-10M, said East line also being the dividing line between Sandoval and Los Alamos Counties;
thence along said East line of Baca Location No. 1 and said dividing line between Sanvdoval and Los Alamos Counties,
S. 00 deg. 07' 19" W., 178.29 ft.;
S. 00 deg. 07' 10" W., 396.80 ft.;
S. 00 deg. 07' 13" W., 521.73 ft.;
S. 00 deg. 07' 16" W., 444.77 ft.;
S. 00 deg. 07' 17" W., 435.84 ft.;
S. 00 deg. 07' 10" W., 657.79 ft.;
S. 00 deg. 15' 37" W., 445.17 ft.;
S. 00 deg. 15' 40" W., 329.84 ft.;
S. 00 deg. 15' 39" W., 399.87 ft.;
S. 00 deg. 15' 40" W., 533.74 ft.;
S. 00 deg. 15' 41" W., 537.70 ft.;
S. 00 deg. 15' 43" W., 456.67 ft.;
S. 00 deg. 10' 07" W., 488.17 ft.;
S. 00 deg. 10' 09" W., 407.78 ft.;
S. 00 deg. 10' 09" W., 401.85 ft.;
S. 00 deg. 10' 04" W., 363.80 ft.;
S. 00 deg. 10' 12" W., 502.77 ft.;
S. 00 deg. 10' 13" W., 475.80 ft.;
S. 00 deg. 12' 15" W., 735.54 ft.;
S. 00 deg. 12' 18" W., 889.57 ft.;
S. 00 deg. 12' 24" W., 647.62 ft.;
S. 00 deg. 12' 15" W., 363.86 ft.;
S. 00 deg. 15' 10" W., 306.96 ft.;
S. 00 deg. 15' 15" W., 298.84 ft.;
S. 00 deg. 15' 01" W., 329.83 ft.;
S. 00 deg. 15' 18" W., 243.90 ft.;
S. 00 deg. 15' 13" W., 397.78 ft.;
S. 00 deg. 14' 14" W., 363.87 ft.;
S. 00 deg. 15' 16" W., 371.80 ft. To the Point of Beginning

EXHIBIT "B"

9553

Form G-103
Adopted 10/1/74

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Land Office		

NEW MEXICO OIL CONSERVATION COMMISSION
P. O. Box 2088, Santa Fe 87501

SUNDRY NOTICES AND REPORTS ON GEOTHERMAL RESOURCES WELLS

5. Indicate Type of Lease State ☐ Fee ☒
5.a State Lease No.

Do Not Use This Form for Proposals to Drill or to Deepen or Plug Back to a Different Reservoir. Use "Application For Permit –" (Form G-101) for Such Proposals.)

1. Type of well: Geothermal Producer ☒ Temp. Observation ☐ Low-Temp Thermal ☐ Injection/Disposal ☐
7. Unit Agreement Name

2. Name of Operator
Union Geothermal Company of New Mexico
8. Farm or Lease Name
BACA Location No.1

3. Address of Operator
Mountain Route Box 76, Jemez Springs, New Mexico 87025
9. Well No.
BACA-13

4. Location of Well
Unit Letter B 865 Feet From The N Line and 1565 Feet From
The E Line, Section 12 Township 19N Range 3E NMPM.
10. Field and Pool, or Wildcat
Redondo Canyon

15. Elevation *(Show whether DF, RT, GR, etc.)*
9292' Ground
12. County
Sandoval

16. Check Appropriate Box To Indicate Nature of Notice, Report or Other Data

NOTICE OF INTENTION TO:		SUBSEQUENT REPORT OF:	
PERFORM REMEDIAL WORK ☐	PLUG AND ABANDON ☐	REMEDIAL WORK ☐	ALTERING CASING ☐
TEMPORARILY ABANDON ☐		COMMENCE DRILLING OPNS. ☐	PLUG & ABANDONMENT ☒
PULL OR ALTER CASING ☐	CHANGE PLANS ☐	CASING TEST AND CEMENT JOB ☐	
OTHER ☐		OTHER ☐	

17. Describe Proposed or completed Operations *(Clearly state all pertinent details, and give pertinenet dates, including estimated date of starting any proposed work)* SEE RULE 203.

BACA-13 was abandoned 6/23/84 as follows:

Scale was intermittently cleaned out from 1200' to 2060'. Established circulation at 2060'. Set a 9-5/8" Baker model "K" cement retainer at 2060'. Hole standing full with drilling fluid. Displaced 117 cu.ft. "B" cement on top of the plug. Top of cement at 1790'. Displace 56 cu.ft. hi-vis gel pill at 200'. Pumped class "B" cement from 120' to surface. The wellhead equipment was removed and an abandoned hole marker installed. Location reclamation as per landowners specifications will follow this summer.

NOTE: The cement retainer was set higher than originally planned because of the scale encountered and the fact circulation was obtained indicating communication with production zone plug.

18. I hereby certify that the information above is true and complete to the best of my knowledge and belief.

SIGNED Don K. Clark TITLE Div. Drlg. Supt. DATE 7/10/84

APPROVED BY Roy E. Johnson TITLE DISTRICT SUPERVISOR DATE 7-19-84

CONDITIONS OF APPROVAL, IF ANY:

Form G-103
Adopted 10/1/74

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NEW MEXICO OIL CONSERVATION COMMISSION
P. O. Box 2088, Santa Fe 87501

SUNDRY NOTICES AND REPORTS ON GEOTHERMAL RESOURCES WELLS

5. Indicate Type of Lease: State ☐ Fee ☒
5.a State Lease No.

Do Not Use This Form for Proposals to Drill or to Deepen or Plug Back to a Different Reservoir. Use "Application For Permit —" (Form G-101) for Such Proposals.)

1. Type of well: Geothermal Producer ☒ Temp. Observation ☐ Low-Temp Thermal ☐ Injection/Disposal ☐
7. Unit Agreement Name

2. Name of Operator: Union Geothermal Company of New Mexico
8. Farm or Lease Name: BACA Location No.1

3. Address of Operator: Mountain Route Box 76, Jemez Springs, New Mexico 87025
9. Well No.: BACA 13

4. Location of Well: Unit Letter B 865 Feet From The N Line and 1565 Feet From The E Line, Section 12 Township 19N Range 3E NMPM.
10. Field and Pool, or Wildcat: Redondo Canyon

15. Elevation (Show whether DF, RT, GR, etc.): 9292' Ground
12. County: Sandoval

16. Check Appropriate Box To Indicate Nature of Notice, Report or Other Data

NOTICE OF INTENTION TO:		SUBSEQUENT REPORT OF:	
PERFORM REMEDIAL WORK ☐	PLUG AND ABANDON ☒	REMEDIAL WORK ☐	ALTERING CASING ☐
TEMPORARILY ABANDON ☐		COMMENCE DRILLING OPNS. ☐	PLUG & ABANDONMENT ☐
PULL OR ALTER CASING ☐	CHANGE PLANS ☐	CASING TEST AND CEMENT JOB ☐	
OTHER ☐		OTHER ☐	

17. Describe Proposed or completed Operations *(Clearly state all pertinent details, and give pertinenet dates, including estimated date of starting any proposed work)* SEE RULE 203.

BACA-13 is currently suspended. It is proposed to set a bridge plug in the 9-5/8" casing at 3300'±. A 200 linear foot cement plug will be placed on top of the plug. The hole will be filled with drilling fluid and a second cement plug will be placed from 100'± to surface. An abandoned hole marker will be installed. Location clean-up and reclamation will follow the well work. The estimated starting date is early June, 1984.

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MAY 30 1984
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SANTA FE

OIL CONSERVATION COMMISSION TO BE NOTIFIED WITHIN 24 HOURS OF BEGINNING OPERATIONS

18. I hereby certify that the information above is true and complete to the best of my knowledge and belief.

SIGNED Thomas L. Cook TITLE Div. Drlg. Supt. DATE 5/29/84

APPROVED BY Carl Ulvog TITLE DISTRICT SUPERVISOR DATE 5/30/84

CONDITIONS OF APPROVAL, IF ANY:

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SUNDRY NOTICES AND REPORTS ON GEOTHERMAL RESOURCES WELLS

Do Not Use This Form for Proposals to Drill or to Deepen or Plug Back to a Different Reservoir. Use "Application For Permit –" (Form G-101) for Such Proposals.)

5. Indicate Type of Lease: State ☐ Fee ☒
5.a State Lease No.

1. Type of well: Geothermal Producer ☒ Temp. Observation ☐ Low-Temp Thermal ☐ Injection/Disposal ☐
7. Unit Agreement Name

2. Name of Operator
Union Geothermal Company of New Mexico
8. Farm or Lease Name
Baca Location #1

3. Address of Operator
Mountain Route Box 76, Jemez Springs, NM
9. Well No.
Baca 13

4. Location of Well
Unit Letter B 865 Feet From The N Line and 1565 Feet From
The E Line, Section 12 Township 19N Range 3E NMPM.
10. Field and Pool, or Wildcat
Redondo Canyon

15. Elevation (Show whether DF, RT, GR, etc.)
9292 ground
12. County
Sandoval

16. Check Appropriate Box To Indicate Nature of Notice, Report or Other Data

NOTICE OF INTENTION TO:				SUBSEQUENT REPORT OF:			
PERFORM REMEDIAL WORK	☐	PLUG AND ABANDON	☐	REMEDIAL WORK	☐	ALTERING CASING	☐
TEMPORARILY ABANDON	☒			COMMENCE DRILLING OPNS.	☐	PLUG & ABANDONMENT	☐
PULL OR ALTER CASING	☐	CHANGE PLANS	☐	CASING TEST AND CEMENT JOB	☐		
OTHER	☐			OTHER	☐		

17. Describe Proposed or completed Operations *(Clearly state all pertinent details, and give pertinenet dates, including estimated date of starting any proposed work)* SEE RULE 203.

BACA-13 was calipered in late August, 1983. The casing and wellhead were found to be in good condition. Currently the well is shut-in with the wellhead secured.

We request the temporary abandonment of BACA-13 pending further evaluation of the development and marketability of the geothermal resource.

AUTHORIZATION FOR MAINTENANCE IN SHUT-IN OR TEMPORARY ABANDONMENT STATUS EXPIRES 8-14-84

18. I hereby certify that the information above is true and complete to the best of my knowledge and belief.

SIGNED [signature] TITLE Div. Drlg. Supt. DATE 2/3/84

APPROVED BY Carl Ulvog TITLE DISTRICT SUPERVISOR DATE 2-14-84

Form G-103
Adopted 10/1/74

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P. O. Box 2088, Santa Fe 87501

SUNDRY NOTICES AND REPORTS ON GEOTHERMAL RESOURCES WELLS

5. Indicate Type of Lease: State ☐ Fee ☒
5.a State Lease No.:

Do Not Use This Form for Proposals to Drill or to Deepen or Plug Back to a Different Reservoir. Use "Application For Permit —" (Form G-101) for Such Proposals.)

1. Type of well: Geothermal Producer ☒ Temp. Observation ☐ Low-Temp Thermal ☐ Injection/Disposal ☐
7. Unit Agreement Name:
2. Name of Operator: Union Geothermal Company of New Mexico
8. Farm or Lease Name: BACA Location No.1
3. Address of Operator: Mountain Route Box 76, Jemez Springs, New Mexico 87025
9. Well No.: BACA-15
4. Location of Well: Unit Letter H 2035 Feet From The N Line and 85 Feet From The E Line, Section 11 Township 19N Range 3E NMPM.
10. Field and Pool, or Wildcat: Redondo Canyon
15. Elevation (*Show whether DF, RT, GR, etc.*): 9117' Ground
12. County: Sandoval

16. Check Appropriate Box To Indicate Nature of Notice, Report or Other Data

NOTICE OF INTENTION TO:		SUBSEQUENT REPORT OF:	
PERFORM REMEDIAL WORK ☐	PLUG AND ABANDON ☐	REMEDIAL WORK ☐	ALTERING CASING ☐
TEMPORARILY ABANDON ☐		COMMENCE DRILLING OPNS. ☐	PLUG & ABANDONMENT ☒
PULL OR ALTER CASING ☐	CHANGE PLANS ☐	CASING TEST AND CEMENT JOB ☐	
OTHER ☐		OTHER ☐	

17. Describe Proposed or completed Operations (*Clearly state all pertinent details, and give pertinenet dates, including estimated date of starting any proposed work*) SEE RULE 203.

BACA-15 was abandoned as follows:

Two 9-5/8" top rubber plugs, followed by 117 cu.ft. class "B" cement was seated on the 7" liner hanger at 2371'. Top of cement at 2101'. Filled hole with drilling fluid. Displaced 56 cu.ft. of hi-vis gel pill at 210'. Class "B" cement was displaced from 124' to surface. The wellhead equipment was removed and an abandoned hole marker installed. Location reclamation as per landowners specifications will follow this summer.

I hereby certify that the information above is true and complete to the best of my knowledge and belief.

SIGNED [signature] TITLE Div. Drlg. Supt. DATE 7/10/84

APPROVED BY [signature] TITLE DISTRICT SUPERVISOR DATE 7-19-84

CONDITIONS OF APPROVAL, IF ANY:

Form G-103
Adopted 10/1/74

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NEW MEXICO OIL CONSERVATION COMMISSION
P. O. Box 2088, Santa Fe 87501

SUNDRY NOTICES AND REPORTS ON GEOTHERMAL RESOURCES WELLS

5. Indicate Type of Lease: State ☐ Fee ☒
5.a State Lease No.:

Do Not Use This Form for Proposals to Drill or to Deepen or Plug Back to a Different Reservoir. Use "Application For Permit —" (Form G-101) for Such Proposals.)

1. Type of well: Geothermal Producer ☒ Temp. Observation ☐ Low-Temp Thermal ☐ Injection/Disposal ☐
7. Unit Agreement Name:
2. Name of Operator: Union Geothermal Company of New Mexico
8. Farm or Lease Name: BACA Location No.1
3. Address of Operator: Mountain Route Box 76, Jemez Springs, New Mexico 87025
9. Well No.: BACA 15
4. Location of Well: Unit Letter H 2035 Feet From The N Line and 85 Feet From The E Line, Section 11 Township 19N Range 3E NMPM.
10. Field and Pool, or Wildcat: Redondo Canyon
15. Elevation (Show whether DF, RT, GR, etc.): 9117' Ground
12. County: Sandoval

16. Check Appropriate Box To Indicate Nature of Notice, Report or Other Data

NOTICE OF INTENTION TO:		SUBSEQUENT REPORT OF:	
PERFORM REMEDIAL WORK ☐	PLUG AND ABANDON ☒	REMEDIAL WORK ☐	ALTERING CASING ☐
TEMPORARILY ABANDON ☐		COMMENCE DRILLING OPNS. ☐	PLUG & ABANDONMENT ☐
PULL OR ALTER CASING ☐	CHANGE PLANS ☐	CASING TEST AND CEMENT JOB ☐	
OTHER ☐		OTHER ☐	

17. Describe Proposed or completed Operations (*Clearly state all pertinent details, and give pertinenet dates, including estimated date of starting any proposed work*) SEE RULE 203.

BACA-15 is currently suspended. It is proposed to set a bridge plug in the 9-5/8" casing at 2350'±. A 200 linear foot cement plug will be placed on top of the plug. The hole will be filled with drilling fluid and a second cement plug will be placed from 100'± to surface. An abandoned hole marker will be installed. Location clean-up and reclamation will follow the well work. The estimated starting date is early June, 1984.

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OIL CONSERVATION DIVISION
SANTA FE

OIL CONSERVATION COMMISSION TO BE NOTIFIED WITHIN 24 HOURS OF BEGINNING OPERATIONS

I hereby certify that the information above is true and complete to the best of my knowledge and belief.

SIGNED Leon L. Lake TITLE Div. Drlg. Supt. DATE 5/29/84

APPROVED BY Carl Ulvog TITLE DISTRICT SUPERVISOR DATE 5/30/84

CONDITIONS OF APPROVAL, IF ANY:

Form G-103
Adopted 10/1/74

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P. O. Box 2088, Santa Fe 87501

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OIL CONSERVATION DIVISION
SANTA FE

SUNDRY NOTICES AND REPORTS ON GEOTHERMAL RESOURCES WELLS

5. Indicate Type of Lease State ☐ Fee ☒
5.a State Lease No.

Do Not Use This Form for Proposals to Drill or to Deepen or Plug Back to a Different Reservoir. Use "Application For Permit –" (Form G-101) for Such Proposals.)

1. Type of well: Geothermal Producer ☒ Temp. Observation ☐ Low-Temp Thermal ☐ Injection/Disposal ☐
7. Unit Agreement Name

2. Name of Operator
Union Geothermal Company of New Mexico
8. Farm or Lease Name
Baca Location #1

3. Address of Operator
Mountain Route Box 76, Jemez Springs, NM
9. Well No.
Baca 15

4. Location of Well
Unit Letter H 2035 Feet From The N Line and 85 Feet From
The E Line, Section 11 Township 19N Range 3E NMPM.
10. Field and Pool, or Wildcat
Redondo Canyon

15. Elevation (*Show whether DF, RT, GR, etc.*)
9117 ground
12. County
Sandoval

16. Check Appropriate Box To Indicate Nature of Notice, Report or Other Data

NOTICE OF INTENTION TO:				SUBSEQUENT REPORT OF:			
PERFORM REMEDIAL WORK	☐	PLUG AND ABANDON	☐	REMEDIAL WORK	☐	ALTERING CASING	☐
TEMPORARILY ABANDON	☒			COMMENCE DRILLING OPNS.	☐	PLUG & ABANDONMENT	☐
PULL OR ALTER CASING	☐	CHANGE PLANS	☐	CASING TEST AND CEMENT JOB	☐		
OTHER	☐			OTHER	☐		

17. Describe Proposed or completed Operations *(Clearly state all pertinent details, and give pertinenet dates, including estimated date of starting any proposed work)* SEE RULE 203.

BACA-15 was calipered in late August, 1983. The casing and wellhead were found to be in good condition. Currently the well is shut-in with the wellhead secured.

We request the temporary abandonment of BACA-15 pending further evaluation of the development and marketability of the geothermal resource.

AUTHORIZATION FOR MAINTENANCE IN SHUT-IN OR TEMPORARY ABANDONMENT STATUS EXPIRES 8-14-84

18. I hereby certify that the information above is true and complete to the best of my knowledge and belief.

SIGNED Alan L. Ash TITLE Div. Drlg. Supt. DATE 2/3/84

APPROVED BY Carl Wong TITLE DISTRICT SUPERVISOR DATE 2-14-84

Before the
State of New Mexico
Energy, Minerals and Natural Resources Department
Oil Conservation Division

In re: Matter of the Petition of the Valles Caldera Trust Concerning the applications of GeoProducts of New Mexico, Inc. for permits to reenter Geothermal wells, Sandoval County, New Mexico.

Affidavit of James B. Snow

Now comes James B. Snow who, under oath, deposes and states:

1. I am an attorney with 30 years service in the United States Department of Agriculture, Office of the General Counsel, Natural Resources Division, Washington, D.C. My position is Special Counsel for Real Property and, in that capacity, I handle matters relating to real property within the National Forest System administered by the Forest Service. A large portion of my work involves the legislative process with the U.S. Congress.

2. Beginning around 1996, I was the principal attorney representing USDA in negotiations which led to the Federal acquisition of the Baca Ranch and enactment of Public Law 106-248. I was principally responsible for negotiating and drafting the purchase contract and closing procedures by which the Forest Service purchased the $101 million property from Dunigan Enterprises, Inc. I was also one of the drafters of Public Law 106-248, officially referred to as the "Valles Caldera Preservation Act" (which I will refer to below simply as the "Act")

3. The Act provided for the acquisition of the Baca Ranch by the United States, for resolution of various matters concerning the Pueblo of Santa Clara, for additions to Bandelier National Monument, for the establishment of the Valles Caldera Trust, and for management of the newly created Valles Caldera National Preserve.

4. I am very familiar with the issue of the outstanding mineral rights existing on the Baca Ranch. Before and after the enactment of Public Law 106-248, I dealt extensively with J.B. Harrell, Donald Harrell, and their lawyer, Gregory Nibert of

the firm of Hinkel, Hensley, Shanor & Martin of Roswell, New Mexico. I provided legal counsel to the Forest Service during their valuation of the outstanding mineral rights, and the agency's offer to purchase the same. I continue to provide such counsel to the agency today.

5. The Act addressed the issue of outstanding mineral rights in Section 104(e) which provides:

> "The acquisition of the Baca ranch by the Secretary shall be subject to all outstanding valid existing mineral interests. The Secretary is authorized and directed to negotiate with the owners of any fractional interest in the subsurface estate for the acquisition of such fractional interest on a willing seller basis for not to exceed its fair market value, as determined by appraisal done in conformity with the Uniform Appraisal Standards for Federal Land Acquisitions. Any such interests acquired within the boundaries of the Upper Alamo watershed, as referred to in subsection (b), shall be administered by the Secretary of the Interior as part of Bandelier National Monument." (114 Stat. 601).

6. This section 104(e) provided that the outstanding minority minerals would be acquired only through voluntary conveyance for fair market value. In compliance with this provision, the Forest Service appraised the undivided outstanding one-eighth mineral rights, and the agency made bona fide purchase offers to all the fractional owners. The offers were rejected by the mineral owners as too low.

7. Section 105(e) of the Act provides for a future mineral withdrawal of the area which indicates Congress' intent that mineral development should not be a Federal management objective for the Valles Caldera Preserve:

> Upon acquisition of all interests in minerals within the boundaries of the Baca ranch under section 104(e), subject to valid existing rights, the lands comprising the Preserve are thereby withdrawn from disposition under all laws pertaining to mineral leasing, including geothermal leasing. (114 Stat. 603).

8. In some cases, the conflicts between mineral development and resource protection put the government in a difficult position. Mineral owners recognize the government's need for resource protection and capitalize on the threat of development to force a buy-out for a price in excess of what the market might otherwise support.

9. In 1981, the Federal Courts first outlined the parameters of the Forest Service's management obligations with respect to owners of outstanding mineral rights. In *United States of America v. Minard Run Oil Company*, Civil No. 80-129 (U.S.D.C., W.D. Pennsylvania), the Court enjoined the mineral owner from clearing well sites, roads and pipelines without first performing various activities, including: providing the Forest Service with at least 60 days notice of proposed clearing activities, providing the Forest Service with a designated representative, a map showing the location and dimensions of all improvements including well sites and road and pipeline access, a plan of operations setting forth a schedule for construction and drilling, a plan of erosion and sedimentation control, and proof of ownership.

10. Subsequently, in litigation arising on the National Grasslands in North Dakota, the United States Circuit Court of Appeals for the Eighth Circuit ruled in *Duncan Energy Company v. U.S. Forest Service*, 50 F.3d 854 (8th Cir, 1995), that the Forest Service could regulate the occupancy and use of federally owned surface land by outstanding mineral owners and operators. The Court recognized the Forest Service's inherent regulatory authority based on the Property Clause of the Constitution. Art IV, Sect. 3, cl. 2. While the Forest Service cannot veto mineral development, it can require a surface use plan.

11. The Forest Service meets its obligations to reasonably regulate outstanding mineral rights through agency policies stated at Part 2832 of the Forest Service Manual. The policies require the owners of outstanding minerals to provide proof of ownership and 60 days advance notice of surface occupancy by submitting a proposed operating plan. The policies outline the required contents of the plan including: (a) location of roads and facilities, (b) areas to be disturbed, (c) methods of mineral extraction, (d) methods of disposal of mining and other wastes, (e) reclamation plans, (f) methods for control of erosion and prevention of water pollution, and (g) identification of owners's or lessee's agents. Approval of the operating plan is based on three criteria: the proposed uses of the surface are limited to that prudently necessary for the operations, the operation is consistent with rights granted by deed, and is consistent with the management plan for the area.

12. GeoProducts of New Mexico is aware of the requirement for an operating plan but has not yet provided one to the Forest Service.

13. The situation with the outstanding minerals underlying the Valles Caldera Preserve differs from other cases which have arisen on the National Forest System in one

important respect. In previous situations, the minerals were totally outstanding in third parties and the Federal interest was limited to the surface estate. In the case of the Valles Caldera Preserve, the United States is owner of an undivided 7/8th of the mineral estate. Accordingly, any development of mineral assets necessarily affects the rights of the United States. Some of these rights are unresolved or undefined such as rights to use existing bore holes, rights to forced pooling of federal resources, and rights of access for ingress and egress as well as for power lines.

Signed and sworn to this 30th day of January, 2004.

James B. Snow
Special Counsel for Real Property
U.S. Department of Agriculture
Office of the General Counsel
Washington, D.C. 20250

City of Washington,
District of Columbia, s.s.

I, Peter A. MacHare, a Notary Public in and for Washington, D.C., do hereby certify that James B. Snow, personally known to me, did execute and swear to the foregoing affidavit this 30th day of January, 2004.

Peter A. MacHare, Notary Public

My commission expires: January 14, 2009

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION DIVISION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION DIVISION FOR THE PURPOSE OF CONSIDERING THE PETITION OF THE VALLES CALDERA TRUST CONCERNING THE APPLICATIONS OF GEO PRODUCTS OF NEW MEXICO, INC., FOR PERMITS TO RE-ENTER GEOTHERMAN WELLS, SANDOVAL COUNTY, NEW MEXICO.

CASE NO. 13215

AFFIDAVIT OF MICHAEL LINDEN

STATE OF NEW MEXICO)
:ss
COUNTY OF BERNALILLO)

MICHAEL LINDEN, being first duly sworn upon his oath, states as follows:

1. I am employed by the United States Forest Service in the Land and Minerals Department. I am the Regional Geologist for the Southwestern Region, having received my BS degree from State University of New York at Stony Brook in 1978 and a MS degree from the Virginia Polytechnic Institute and State University in 1981. I have the following responsibilities as the Regional Geologist with the Forest Service:

I am the program lead in the Southwestern Region for mineral leasing, permitting, and operating plan approval for all mineral-related activities on the National Forests. I am the Group Leader for all mineral and geology program areas and work directly for the Director of Lands and Minerals for the Southwestern Region.

2. I am familiar with the Valles Caldera Preserve ("Preserve') and have reviewed documents pertaining to the attempt to develop the geothermal wells by the prior owner of the Baca Ranch.

3. Aside from obtaining the necessary governmental permits to re-enter the wells drilled by Unocal, GeoProducts of New Mexico, Inc. may have to obtain sufficient water rights to utilize in the production of steam to generate electricity.

4. No facilities exist on the Preserve by which the heated water or steam from geothermal wells can be used to generate electricity. If there were a generating facility, there would then have to be above ground power lines towers and conductors installed across the Preserve and across adjacent National Forest lands in order to deliver power to points of use.

5. The above ground transmission lines and towers could not be constructed without first obtaining right-of-way from the Forest Service. The consideration of a request by GeoProducts for right of way would implicate adverse affects on the environment of the Preserve and trigger the prerequisite of an Environmental Impact Statement (EIS). It may be that a request by GeoProducts for a use permit from the Forest Service to establish a power generation facility would also require an EIS.

6. I am familiar with the final report prepared for the U.S. Department of Energy by the Lawrence Berkley Laboratory of the University of California in 1982 which reached a conclusion that:

> "Despite the high temperatures encountered at depth, the geothermal resource underlying Redondo Creek has proved to be difficult to develop and exploit because of low permeability, scarcity, and unpredictability of the major production zones, and difficult drilling."

7. Prior drilling of the Redondo Creek area did not sufficiently determine the adverse impact of geothermal well production on the Preserve upon the Jemez and other hot springs downstream from the proposed wells.

8. Before attempting to develop the geothermal wells on the Valles Caldera Preserve, the holder of the outstanding mineral rights would have to comply with the U.S. Forest

Service Manual, Section 2832, which requires the submission and approval of an operating plan containing information as set forth therein. A copy of Section 2832 is attached as Exhibit A.

Executed this 29th day of January, 2004.

Michael Linden

The foregoing instrument, subscribed and sworn to before me this 29th day of January, 2004, by Michael Linden, personally known to me or identified through satisfactory evidence.

Susan Mitchell Ness
Notary Public
Printed Name: SUSAN MITCHELL NESS
My commission expires: September 21, 2004

10761-002

NOTARY PUBLIC
STATE OF NEW MEXICO
SUSAN MITCHELL NESS
My Commission Expires 9-21-2004

FSM 2800 - MINERALS AND GEOLOGY
WO AMENDMENT 2800-90-1
EFFECTIVE 6/1/90

CHAPTER 2830 - MINERAL RESERVATIONS AND OUTSTANDING MINERAL RIGHTS

Contents

2832 - OUTSTANDING MINERAL RIGHTS. Administer the exercise of outstanding mineral rights as follows:

1. The mineral owner or lessee must provide the Forest Supervisor with proof of right to exercise mineral rights.

2. The mineral owner or lessee must provide the Forest Supervisor with 60 days advance written notice of surface occupancy by submitting a proposed operating plan.

3. The mineral owner or lessee must include the following information in an operating plan for the exercise of outstanding mineral rights:

a. Location of roads and facilities.

b. Areas to be disturbed.

c. Methods of mineral extraction.

d. Methods of disposal of mining and other wastes.

e. Reclamation plans.

f. Methods for control of erosion and prevention of water pollution.

g. Identification of owner's or lessee's agent.

2832.1 - Review of Operating Plans. The Forest Supervisor must review the operating plan to determine whether or not it:

1. Uses only so much of the surface as is prudently necessary for the proposed operations.

2. Is consistent with rights granted by deed.

3. Is consistent with the forest land and resource management plan.

If the operating plan meets these three criteria, the Forest Supervisor shall send the owner or lessee a letter stating that:

1. The operating plan is consistent with the forest land and resource management plan.

2. The Forest Service intends to monitor operations to ensure compliance with the operating plan.

3. The owner or lessee must notify the Forest Service 60 days in advance of any major modifications in the operating plan.

4. Any unapproved deviation from the operating plan may be construed as unlawful, and the United States may take appropriate legal action.

2832.2 - Negotiation of an Acceptable Operating Plan. If an operating plan does not meet the three criteria in sec. 2832.1, the Forest Supervisor shall meet with the owner or lessee to negotiate modifications needed to make the plan acceptable. If negotiations are unsuccessful, the Forest Supervisor shall consult with the Regional Forester and the Office of the General Counsel before advising the owner or lessee, by registered letter, of the unacceptable portions of the plan and stating that implementation of these parts of the plan may require appropriate legal action. The Forest Supervisor shall forward a copy of such a letter to the Regional Forester.

2832.3 - Fees and Bonding. Charge fees only for those uses of the National Forest System that are beyond the scope of the outstanding mineral rights. Require bonding only to the extent provided under the deed of severance or applicable Federal or State law.

Exhibit "I"

LEASE AND AGREEMENT

THIS LEASE AND AGREEMENT, made and entered into as of this 19th day of April, 1971, by and between DUNIGAN ENTERPRISES, INC., a Texas corporation, and BACA LAND & CATTLE COMPANY, a co-partnership, composed of James P. Dunigan; J. B. Harrell, Jr., Bubba Spears; F. M. Harrell; George Thompson, III; Nan S. Gullahorn; the James P. Dunigan-J.B.D. Trust, acting by and through its Trustees, George Thompson, III, and J. B. Harrell, Jr.; the James P. Dunigan-T.F.P. Trust, acting by and through its Trustees, George Thompson, III, and J. B. Harrell, Jr.; the James P. Dunigan-W.R.D. Trust, acting by and through its Trustees, George Thompson, III, and J. B. Harrell, Jr.; the James P. Dunigan-J.A.P. Security Trust, acting by and through its Trustees, George Thompson, III, and J. B. Harrell, Jr.; the J.P.D.-1968 Trust, acting by and through its Trustees, J. B. Harrell, Jr., and Jimmy R. Morris; the J.M.D.-Alpha Trust, acting by and through its Trustees, George Thompson, III, and F. M. Harrell; the Andy Dunigan Educational Trust, acting by and through its Trustees, George Thompson, III, and J. B. Harrell, Jr.; the Andy Dunigan Minor Trust, acting by and through its Trustees, Gary J. Willingham and F. M. Harrell; the Andy Dunigan Life Trust, acting by and through its Trustees, George Thompson, III,

and F. M. Harrell; the Brian Dunigan Educational Trust, acting by and through its Trustees, George Thompson, III, and J. B. Harrell, Jr.; the Brian Dunigan Minor Trust, acting by and through its Trustees, Gary J. Willingham and F. M. Harrell; the Brian Dunigan Life Trust, acting by and through its Trustees, George Thompson, III, and F. M. Harrell; the P.A.D.-J.P.D. Life Trust, acting by and through its Trustees, George Thompson, III, and J. B. Harrell, Jr.; the B.A.D.-J.P.D. Life Trust, acting by and through its Trustees, George Thompson, III, and J. B. Harrell, Jr.; the GT-JPD Trust, acting by and through its Trustees, J. B. Harrell, Jr., and F. M. Harrell; the GJW-JPD Trust, acting by and through its Trustees, J. B. Harrell, Jr., and F. M. Harrell; the FH-JPD Trust, acting by and through its Trustees, George Thompson, III, and J. B. Harrell, Jr.; the JBH-JPD Trust, acting by and through its Trustees, F. M. Harrell and Gary J. Willingham; the BS-JPD Trust, acting by and through its Trustees, J. B. Harrell, Jr., and F. M. Harrell; the GFE-JPD Trust, acting by and through its Trustees, J. B. Harrell, Jr., and F. M. Harrell; and the Don Harrell Trust, acting by and through its Trustees, James P. Dunigan and J. B. Harrell, Jr., hereinafter referred to as "Lessor", whether one or more and UNION OIL COMPANY OF CALIFORNIA, a California corporation, hereinafter referred to as "Lessee",

pits, or excavations when no longer being used in connection with the development or operation of the leased land. Upon completion or abandonment of any well on the leased land, and upon termination of this lease, Lessee shall remove all trash and debris and leave the locations or premises used by Lessee in a clean and sanitary condition.

7. Lessee shall protect the leased land against liens of every character arising from its operations thereon. Lessee, at its own expense, prior to commencing operations on the leased land, shall obtain, and thereafter while this lease is in effect shall maintain, adequate Workmen's Compensation Insurance. Lessee shall protect Lessor against damages of every kind and character arising out of the operations or working of Lessee or those under Lessee's control upon the leased land. In the event any building or personal property be damaged or destroyed, or grazing or agricultural lands be destroyed by Lessee's operations, then Lessee shall be liable for, and to the extent of, the reasonable value thereof.

Subject to the further provisions hereof, Lessee shall have the right at any time and from time to time to remove from the leased lands any and all casing, machinery, equipment, structures, installations and property of every kind and character placed upon the leased land by or pursuant to permission of Lessee, provided

that if such removal should occur after termination hereof same shall be completed within twelve months thereafter.

However, if Lessee should elect to abandon this lease during its Primary Term, Lessee will notify Lessor of such intent and Lessor will then have ten (10) days in which to notify Lessee that Lessor will take over the wells drilled by Lessee on the leased land, whereupon the title to the wells and the equipment in and on such wells shall pass to and vest in Lessor and Lessee will thereupon be relieved of all obligation to plug and abandon the wells, and all further liability in connection therewith, and Lessor will indemnify Lessee with respect thereto.

8. Lessor, or its agents, at Lessor's sole risk, may at all times examine the leased land and the workings, installations and structures thereon and operations of Lessee thereon, and may at reasonable times inspect the books and records of Lessee with respect to matters pertaining to the payment of royalties to Lessor.

9. Upon the violation of any of the terms and conditions of this lease by Lessee (including but not limited to payment of advance royalty) and the failure of Lessee to, as to monetary matters, make payment, and as to other violations begin in good faith to remedy the same, within thirty (30) days after written notice from

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURALRESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION

IN THE MATTER OF THE HEARING CALLING BY THE OIL CONSERVATION COMMISSION FOR THE PURPOSE OF CONSIDERING:

APPLICATION OF THE VALLES CALDERA TRUST TO DENY APPLICATIONS OF GEOPRODUCTS OF NEW MEXICO, INC. FOR PERMITS TO RE-ENTER ABANDONED GEOTHERMAL WELLS ("APDS"), SANDOVAL COUNTY, NEW MEXICO

Case No. 13215

GeoProducts of New Mexico, Inc.'s
Brief in Opposition to the Valles Caldera Trust's
Petition to Deny GeoProducts of New Mexico, Inc.'s
Applications for Permits to Drill

COMES NOW the Respondent, GeoProducts of New Mexico, Inc. ("GeoProducts"), by and through its attorneys of record, Hinkle, Hensley, Shanor & Martin, L.L.P. (Andrew I Cloutier and Lucas M. Williams), and James Bruce, Attorney at Law (James Bruce), and in support of Respondent's Applications for Permits to Drill states:

I. INTRODUCTION

On February 14, 2000, GeoProducts leased an undivided one-eighth (1/8) of approximately 96,000 acres of the geothermal mineral estate of the Baca Ranch in order to drill geothermal wells for the purpose of creating a renewable electrical energy resource. Under the lease, GeoProducts has

> the exclusive right to explore for, drill for, mine, develop, extract, produce, remove inject, reinject, and dispose of all geothermal resources and geothermal fluids (liquid and/or steam), and energy derived therefrom, and the minerals associated therewith, including steam, hot water, brines, and other fluids, and to lay pipelines, construct transmission lines, utility lines, tanks, electric power, generating stations, switching and transformer stations, dams, ponds, roads,

> storage areas, office and maintenance buildings, telephone and data communication lines, and such other structures and facilities that assist or lessee deems beneficial in carrying out the purposes of the Lease, in, on, through, and under the Baca Ranch.

Under the lease agreement, and under the well-settled New Mexico law of *Amoco Prod. Co. v. Carter Farms, Co.*,[1] GeoProducts has the right, as the lessee of the dominant mineral estate, to "use as much of the surface area as [is] reasonably necessary for its drilling and production operations."[2]

GeoProducts retained its right to make reasonable use of the surface estate in its pursuit of renewable electrical energy resources after the Federal acquisition of the Baca Ranch on July 25, 2000. Although the Baca Ranch acquisition was initiated "to protect and preserve for future generations the scientific, scenic, historic, and natural values of the Baca Ranch, including rivers and ecosystems and archaeological, geological, and cultural resources,"[3] Congress recognized that the "acquisition of the Baca Ranch . . . shall be subject to all outstanding valid existing mineral interests."[4] At the same time, however, Congress indicated its desire for the acquisition of the outstanding one-eighth mineral interest "on a willing seller basis for not to exceed fair market value."[5] Congress made clear that it did not intend to disturb the right to develop minerals on the Baca Ranch until the Secretary of Agriculture acquired the entirety of the mineral estate.[6] Although the Secretary made an offer to purchase the outstanding mineral estate, that offer was rejected and the pre-acquisition rights of the mineral estate were preserved.

On December 12, 2003, pursuant to its pre-acquisition rights, GeoProducts of New Mexico, Inc. submitted two applications to reenter, complete and produce the Baca 13 and Baca

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[1] 103 N.M. 117, 703 P.2d 894 (1985).
[2] Id. at 119, 703 P.2d at 896.
[3] 16 U.S.C. § 698v(b)(2) (2000).
[4] Id. at § 698v-2(e) (2000).
[5] Id.
[6] Id. at § 698v-3(e)(1).

15 wells located on the Baca Ranch. Despite Congress' clear, unambiguous and complete preservation of GeoProduct's rights, the Valles Caldera Trust (the "Trust") has objected to the exploration for and development of renewable energy resources on the Baca Ranch. Because the Trust is not authorized to prevent GeoProducts from moving forward, it is attempting to use the Commission to do what Congress expressly refused to do—take some of GeoProduct's property rights. The Trust's transparent attempt must be denied and GeoProduct's APDs to explore for renewable energy resources should be granted.

II. THE VALLES CALDERA TRUST IS BOUND BY THE LAWS OF NEW MEXICO AND THE AUTHORITY OF THE OIL CONSERVATION COMMISSION RELATING TO THE DEVELOPMENT OF GEO PRODUCT'S OUTSTANDING VALID EXISTING MINERAL INTERESTS

The Trust cannot "veto" mineral development but may only expect that GeoProducts make reasonable use of the surface estate. This is no different than the well-settled and common-sense law of New Mexico that requires the lessee of the mineral estate to make reasonable use of the surface.[7] Although the Trust has stated that it will deny GeoProducts reasonable use,[8] it has no power to do so. Consequently, the Trust seeks to use this Commission to deny GeoProduct's rights for mineral development despite Congress' express preservation of those rights.

The *Duncan Energy*[9] cases confirm that neither the Trust nor the United States Forest Service has the authority to prohibit GeoProducts from developing the mineral estate. In 1916,

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[7] Amoco Prod. Co. v. Carter Farms, Co., 103 N.M. 117, 119, 703 P.2d 894, 896 (1985).

[8] Trust Brief at 7, stating that "the split mineral interest in the spacing unit for the two wells has not been and will not be pooled by agreement;" Trust Brief at 12, threatening that "there exists no facilities on the Preserve and none will be permitted by which the heated water energy can be converted into electricity; Trust Petition at ¶ 7, stating that the Trust "has expressly informed GeoProducts of its refusal to enter into any pooling or communitization agreement . . . ."

[9] Duncan Energy Co. v. United States Forest Service (Duncan III), 109 F.3d 497, 499 (8th Cir. 1997); Duncan Energy Co. v. United States Forest Service (Duncan II), 50 F.3d 584, 589 (8th Cir. 1997); Duncan Energy Co. v. United States Forest Service (Duncan I), 1993 WL 664644 (D.N.D. 1993).

the Northern Pacific Railroad sold portions of its North Dakota surface estate while reserving the corresponding mineral estate for itself.[10] In 1937, the United States acquired the surface estate pursuant to the Bankhead-Jones Farm Tenant Act,[11] subject to the mineral reservations in the 1916 deeds,[12] and formed the Little Missouri National Grasslands Forest.[13] Operating under the laws of the State of North Dakota and the non-prohibitive reasonable restrictions of the Forest Service, the mineral lessee, Duncan Energy, developed fifteen wells between 1984 and 1992[14] in conjunction with a Memorandum of Understanding with the Forest Service.[15] The Memorandum provided, in part, that the Forest Service would process surface use plans within ten working days.[16] Duncan Energy brought suit against the Forest Service in 1993 to determine the scope of the Forest Service's authority.[17] On appeal, the court held that the Forest Service was subject to North Dakota law and was vested with the authority to determine the reasonable use of the federal surface.[18] Simultaneously, the Forest Service did not have a "veto authority" over mineral development.[19]

The Trust's argument that the Oil Conversation Commission has no authority to regulate fee minerals in New Mexico is unpersuasive in light of the *Duncan* cases. **First**, like Duncan Energy, GeoProducts acquired its interest in the mineral estate before the federal government acquired the surface estate. **Second**, like North Dakota, New Mexico recognizes that the mineral estate is the dominant estate and that mineral developers can make reasonable use of the surface.

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[10] Duncan II, 50 F.3d at 585 n.1.
[11] 7 U.S.C. §§ 1010 et seq.
[12] 7 U.S.C. § 1011(a) (1942) (repealed 1962). The Act provided that "property may be acquired subject to any reservations, outstanding estates, interests, easements, or other encumbrances . . . ."
[13] Id.
[14] Duncan III, 109 F.3d at 500 n.1.
[15] Duncan II, 50 F.3d at 586.
[16] Id.
[17] Duncan I, 1993 WL664644, *1.
[18] Duncan II, 50 F.3d at 588-89.
[19] Id. at 589.

Third, like the Forest Service, the Trust took possession of the surface of the Baca Ranch subject to "outstanding valid mineral interests." **Fourth**, the Trust is governed by Forest Service special use authorizations which are subject to all outstanding valid rights.[20] The *Duncan* cases are unambiguous: the Trust is subject to New Mexico law regarding the development of GeoProduct's outstanding valid existing mineral interests; the Trust has the right to expect reasonable use of the federal surface estate under New Mexico law; but the Trust does not have the power to prohibit development of the mineral estate.

III. GEOPRODUCT'S APDS SHOULD BE APPROVED IN ORDER TO ALLOW GEOPRODUCTS TO SUBMIT AN ACCURATE AND REASONABLE OPERATING PLAN TO THE FOREST SERVICE'S REVIEW

Point One of the Trust's Brief claims that GeoProduct's APDs are premature because no surface use plan has been approved. In fact, approval of GeoProduct's APDs is not contingent upon an approved surface use plan of operations by the Forest Service or the Trust. To the contrary, GeoProduct's compliance with the mineral reservation regulations[21] of the Trust and the Forest Service is contingent upon the OCD's approval of drilling facility locations,[22] approval of the depth and method of extraction proposed by GeoProducts,[23] and approval of GeoProduct's drilling contractor.[24] Exploration can only begin upon the Commission's issuance of an APD, submission of an operating plan based upon the APD, and subsequent approval of the reasonable use of the surface estate by the Forest Service based upon that submission. The Trust's position should be recognized for what it is – a "boot-strapping" argument designed to prevent their inevitable approval of exploration for renewable energy resources.

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[20] 36 C.F.R. § 251.55(c) (1994).
[21] FRS 2830 (2000) et seq.
[22] FSM 2832(3)(a)-(b) (1990).
[23] Id. at 2832(3)(c).
[24] Id. at 2832(3)(g).

IV. THE VALLES CALDERA TRUST'S ARGUMENT THAT THE TRUST MUST BE POOLED PRIOR TO EXPLORING FOR RENEWABLE NATURAL RESOURCES IGNORES NEW MEXICO LAW AND THE PURPOSES OF THE VALLES CALDERA PRESERVATION ACT

Point Two of the Trust's Brief essentially makes two arguments. First, that the Oil Conservation Commission does not have jurisdiction over mineral rights expressly reserved for State jurisdiction and, second, that GeoProduct's APDs should not be granted because the theoretical (and unnecessary) act of pooling the Trust will not be successful. As discussed above, the *Duncan* cases, as well as the express language of the Valles Caldera Preservation Act, establish that the Commission has jurisdiction over the outstanding valid existing mineral interests underneath the Valles Caldera. Although the Trust invokes the specter of pooling as a prohibition on the Commission's jurisdiction and authority, forced pooling is not required here under any one of the three situations laid out under New Mexico law.

Under New Mexico law, force-pooling of the Trust is unnecessary and GeoProducts has not sought such action. The New Mexico Geothermal Resources Conservation Act provides that

> [w]hen two or more separately owned tracts of land are embraced within a spacing unit, or where there are owners of royalty interests or undivided interests in geothermal resources which are separately owned . . . embraced within [a] spacing unit, the owner or owner thereof may validly pool their interests and develop their lands as a unit.[25]

The Act clearly provides that multiple owners may permissively pool their interests if they so choose. Just as clearly, the Trust has been quite candid regarding voluntary pooling: "[t]he split mineral interest in the spacing units for the two wells has not been and *will not be pooled by agreement with the Trust*."[26] However, neither voluntary nor forced pooling is required to develop the mineral estate.

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[25] NMSA 1978, § 71-5-11(C) (1977).
[26] Trust Brief at 7 (emphasis added).

Forced pooling of geothermal resources is only necessary in one of three scenarios, none of which are implicated in GeoProduct's current APDs. The Geothermal Resources Conservation Act[27] addresses forced pooling, stating that

> [w]here, however, such owner or owners have not agreed to pool their interests, and where one such separate owner, or owners, who has the right to drill *has drilled* or proposes to drill a well on said unit to a geothermal reservoir, the division,
>
> [1] to avoid the drilling of unnecessary wells, or
>
> [2] to protect correlative rights, or
>
> [3] to prevent waste,
>
> shall pool all or any part of such lands or interest or both in the spacing unit as a unit.[28]

Forced pooling is not required for at least three reasons. First, the spacing units established by the Commission prevent the drilling of unnecessary wells. Second, spacing units also protect the correlative rights of the undivided mineral interest, and, under the language of the Valles Caldera Preservation Act, Congress has effectively waived its correlative rights. Third, GeoProduct's renewable natural resource exploration program embodies one of the express purposes of the Geothermal Resources Conservation Act—therefore, exploratory reentry is not "production waste." For these reasons, and for the reasons discussed more fully below, forced pooling is not required to explore for geothermal resources in the Valles Caldera.

A. *New Mexico Statutes Authorize the Commission to Establish Spacing Units that Prevent the Drilling of Unnecessary Wells*

The Oil Conservation Commission is charged with allowing for the exploration for and development of geothermal resources while simultaneously managing its production efficiently. To that end, the Geothermal Resources Conservation Act establishes that

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[27] The Trust alternatively claims that the Geothermal Resources Conservation Act has been preempted by Federal law when it suits their purposes, Trust Brief at 5, and asserts that the Act operates to preclude development on Federal lands. Trust Brief at 7-8, 11.

[28] NMSA 1978, § 71-5-11(C) (1977) (numbering and emphasis added).

> [t]he rules, regulations or order of the [Commission] shall, so far as it is practicable to do so, afford to the owner of each property in a geothermal reservoir the opportunity to produce his just and equitable share of the geothermal resources in the reservoir, being an amount, so far as can be practically determined, and so far as such can be practicably obtained without waste, substantially in the proportion that the quantity of the recoverable geothermal resources under such property bears to the total recoverable geothermal resources in the reservoir, and for this purpose to use his just and equitable share of the reservoir energy.[29]

Recognizing that the mineral interest owner has an absolute right to produce his share of the geothermal resources, the Legislature directed the Commission to establish efficient spacing units for development:

> [t]he [Commission] may establish a spacing unit for each geothermal reservoir, such being the area that can be efficiently and economically drained and developed by one well, and in so doing the [Commission] shall consider the economic loss caused by the drilling of unnecessary wells, the protection of correlative rights, including those of royalty owners, the prevention of waste, the avoidance of the augmentation of risks arising from the drilling of an excessive number of wells and the prevention of reduced recovery which might result from the drilling of too few wells.[30]

The first trigger for forced pooling, the drilling of unnecessary wells, is prevented by the spacing unit established by the Commission—therefore, forced pooling is not required.

B. *The Trust's Correlative Rights, the Right to a "Fair Chance" to Produce Its Share of the Geothermal Resources, is Protected by the Established Spacing Units*

Just as the Oil Conservation Commission's spacing units prevented the drilling of unnecessary wells, spacing units also protect the correlative rights of the Trust. The correlative rights doctrine provides that each owner of minerals in a common source of supply has the right to a fair chance to produce those minerals from the reservoir substantially in proportion that the

[29] NMSA 1978, § 71-5-11(A) (1977).
[30] Id. at § 71-5-11(B).

quantity of recoverable minerals under his or her land bears to the quantity in the reservoir.[31] GeoProducts exploration and development of renewable natural resources within spacing units established by the Commission protects the equitable rights of all mineral interest holders to develop those resources. Here, where Congress has elected to prohibit the exercise of its "fair chance" by limiting the purposes of the Valles Caldera Trust, its correlative rights necessarily cannot be negatively affected. The second trigger for forced pooling, protection of correlative rights, is avoided because (1) the Commission's spacing units are designed and in fact provide each of the mineral owners a "fair chance" to recover their fair share of the geothermal resources, (2) because Congress has prohibited the Trust from participating in geothermal recovery and (3) because the Trust has evidenced its intent not to participate—therefore, forced pooling is not required.

C. *The Geothermal Resource Conservation Act Recognizes that Exploratory Drilling for Geothermal Resources is a Purpose of the Act Itself, and Therefore Cannot be Waste*

Addressing the final trigger for forced pooling and Point Four of the Trust's Brief, GeoProduct's exploration for renewable geothermal resources is not waste under the Geothermal Resources Conservation Act. Specifically, the Act provides that

> [i]t is hereby found and determined that the people of the state of New Mexico have a direct and primary interest in the development of geothermal resources, and that *this state should exercise its power and jurisdiction through its oil conservation commission and division to require that wells drilled in search of . . . geothermal resources be drilled*, operated, maintained and abandoned in such a manner as to safeguard life, health, property, natural resources and the public welfare, and to encourage maximum economic recovery.[32]

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[31] Eliff v. Texon Drilling Co., 210 S.W.2d 558, 582 (Tex. 1948) ("each landowner should be afforded the opportunity to produce his fair share of the recoverable oil and gas beneath his land, which is but another way of recognizing the existence of correlative rights between the various landowners over a common reservoir of oil or gas"); *See also* Yeo v. Tweedy, 34 N.M. 611, 619, 286 P. 970, 974 (1929) (discussing the correlative rights doctrine in the context of water law).

[32] NMSA 1978, § 71-5-2(A) (1977) (emphasis added).

The Trust's assertion that the exploratory reentry of geothermal wells is somehow "waste" fundamentally misrepresents GeoProducts actions. GeoProducts is engaging in exploratory drilling, not production. The third and final trigger for forced pooling, waste, is not involved because GeoProduct's APDs are intended for the purpose of geothermal exploration, one of the enumerated purposes of the Act—therefore, forced pooling is not required.

V. THE CASING OWNERSHIP ISSUE IS IRRELEVANT TO THE COMMISSION'S APPROVAL OF GEOPRODUCT'S APDS AND, THEREFORE, GEOPRODUCT'S APDS MUST BE APPROVED

Regardless of who owns the geothermal casing and other well equipment in place on the Valles Caldera,[33] GeoProducts has the right to make reasonable use of the surface estate.[34]

If the well casing and other equipment is owned by the Trust, the well casing has become real property as part of the surface estate and is subject to the reasonable use requirements of *Carter Farms* and the *Duncan* cases. In *Terry v. Crossway*,[35] cited to in the Trust's Brief, the Court held that a forfeiture of the well casing makes it "a part of the realty and vest[s] the owner of the fee with title thereto.[36] In *Gutierrez v. Davis*,[37] the Tenth Circuit Court of Appeals recognized that, because forfeited well casings become real property, the right to reasonable use of the surface estate allows the mineral interest holder "to drill through any part of the real estate including the plug and casing of the abandoned well when, as here, it was a reasonable use within the stated purpose."[38] GeoProduct's APDs are submitted under a valid outstanding existing mineral lease for the exploration of geothermal resources. They are not, as in *Newlands*

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[33] GeoProducts of New Mexico, Inc. disputes the Valles Caldera Trust's claim of ownership over the casing and other well equipment located on the Baca Ranch.
[34] See Duncan I, Duncan II and Duncan III, *supra*.
[35] 264 S.W. 718 (Tex. Civ. App. 1924).
[36] Id. at 720.
[37] 618 F.2d 700 (10th Cir. 1980).
[38] Id. at 702.

and *Toles*,[39] an attempt by a defunct lessee to take the property of another. GeoProducts, as discussed in *Gutierrez*, is submitting APDs to make reasonable use of the surface estate, including the existing well-bores. It is eminently more reasonable for GeoProducts to use existing well-bores to conduct its exploration activities.

VI. CONCLUSION

The Commission has the authority to issue APDs to fee minerals within the Baca Ranch. The sole issue before the Commission is the issuance of APDs. **First**, there is no issue regarding GeoProduct's timely submission of APDs—the APDs are necessary to comply with Forest Service regulations. **Second**, there is no issue regarding the Commission's jurisdiction over fee minerals in the Baca Ranch—Congress expressly preserved the rights to valid existing outstanding mineral interests in the Act. **Third**, there is no issue regarding forced pooling—New Mexico law does not require forced pooling under these facts. **Fourth**, there is no issue regarding ownership of well casing—the mineral interest holder has the right to make reasonable use of the surface estate. For these reasons, GeoProducts asks the Commission to grant the GeoProduct APDs and reject the arguments put forward by the Trust.

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[39] Newlands v. Ellis, 292 P.754 (Kan. 1930); Toles v. Maneikes, 412 N.W.2d 263 (Mich. Ct. App. 1987).

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of GEOPRODUCTS OF NEW MEXICO, INC.'S BRIEF IN OPPOSITION TO THE VALLES CALDERA TRUST'S PETITION TO DENY GEOPRODUCTS OF NEW MEXICO, INC.'S APPLICATIONS FOR PERMITS TO DRILL was mailed this 6th day of February, 2004, to the following counsel of record:

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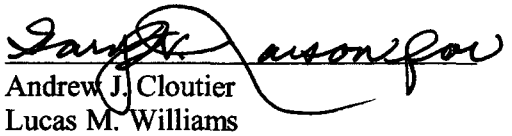
By: 

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STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION COMMISSION FOR THE PURPOSE OF CONSIDERING:

APPLICATION OF VALLES CALDERA TRUST TO DENY APPLICATIONS OF GEOPRODUCTS OF NEW MEXICO, INC. FOR PERMITS TO RE-ENTER ABANDONED GEOTHERMAL WELLS ("APDs"), SANDOVAL COUNTY, NEW MEXICO

CASE 13215

VALLES CALDERA TRUST REPLY IN SUPPORT OF ITS APPLICATION

The Valles Caldera Trust, by its counsel, submits this Reply to GeoProducts of New Mexico Inc.'s Brief in Opposition (Opposition) as follows:

I. REPLY INTRODUCTION

GeoProducts has a geothermal lease from the one-eighth mineral owners with one-year remaining on the primary term. Trust Appdx. Tab 2. That lease can be extended by drilling or reentering wells "in a bona fide effort to establish production of geothermal fluids or for the injection of fluids. . ." Yet, in its Opposition GeoProducts concedes it only wants to engage "in exploratory drilling, **not production**." Opposition p. 10. Emphasis added. If GeoProducts does not want to engage in "production" of the alleged geothermal resource, the Commission must then wonder why the APDs and why this proceeding?

The Introduction in GeoProducts' Opposition makes the outlandish statement that the law authorizing and creating the Valles Caldera National Preserve Congress "made clear that it did not intend to disturb the right to develop minerals on the Baca Ranch . . ." Opposition, at 2. No reading of the Valles Caldera Preservation Act (Pub. L 106-248) could be more erroneous. The exact opposite is true. There is no way to read Congress' findings and stated purposes in that Act except to understand that the Preserve is an absolutely unique and beautiful gem of the mountain west that is to be "protect[ed] and preserv[ed] for future generations," and whose purpose is to provide "public recreation" and "to establish a demonstration area for an experimental management regime." 16 U.S.C.A. 698v(b) Trust Appdx. Tab 1.

The Act provision on which GeoProducts hinges its argument states,

> The acquisition of the Baca ranch by the Secretary shall be subject to all outstanding valid existing mineral interests. The Secretary is authorized and directed to negotiate with the owners of any fractional interest in the subsurface estate for the acquisition of such fractional interest on a willing seller basis for not to exceed its fair market value, as determined by appraisal done in conformity with the Uniform Appraisal Standards for Federal Land Acquisitions. 16 U.S.C.A. 698v-2(e).

This is nothing more than a recognition that the minor mineral interest exists and that the Secretary of Agriculture is "directed" to purchase it for fair market value as set by a described appraisal process (which the Secretary has attempted).[1]

Section 2(e) says nothing about leasing or a lessee of the mineral interest and certainly nothing about development. The language is the antithesis of approving development of the mineral interest. To argue that provision means GeoProducts can

[1] The "subject to valid existing rights" language in such legislation is regularly used by Congress to avoid agencies effecting a taking. See *Utah v. Andrus*, 486 F. Supp. 905, 1010 (D. Utah 1979); *Adams v. United States*, 3 F.3d 1254, 1259 (9th Cir. 1993).

bring in construction equipment to build roads and clear well locations and then introduce to the Preserve a drilling rig, drilling fluid waste pits, and all of the attendant equipment, tool, stimulation and other service companies and their vehicles and activity to rework wells[2] is to say that 698v-2(e) is Congress' permission to destroy some of the very land it has purchased "to protect and preserve for future generations. . ." 698v-(b)(2).

Finally, GeoProducts ignores the critical positioning and context of the language it relies upon. The subject provision is in Section 698v-2 *"Acquisition of lands."* The acceptable programs and uses of the Preserve land, however, are set forth in Section 698v-6 *"Resource management."* The "Resource management" portion of the Act says **absolutely nothing about operating geothermal wells** or developing that resource in any form. The specified programs and public uses under 698v.-6 are, indeed, the absolute contrary of such intrusive and destructive activity. The only meaning that can be given to Section 698v-2(e) is that it authorizes and directs the Secretary of Agriculture to acquire the Harrell's one-eighth mineral interest for fair market value and nothing more.

Besides merely a proper reading of the Act, GeoProducts' reliance on the "subject to" section is negated by such universal statutory interpretation principles as (a) the legislative intent must be given effect by adopting a construction which will not render the statute's application absurd or unreasonable, *State v. Nance*, 77 N.M. 39, 46, 419 P.2d 242, *cert. denied*, 386 U.S. 1039, and (b) a court should accord substantial

[2] The disturbance of building a power generating facility and constructing power lines is omitted here because GeoProducts states it is only "engaging in exploratory drilling, not production." Opposition, p. 10.

weight to the interpretation given a statute by the agency charged with administering it. *Tsoie v. Califano*, 651 F.2d 719, 722 (10th Cir. N.M. 1981).

II. REPLY ARGUMENT AND AUTHORITIES

POINT ONE

THE FOREST SERVICE HAS EXCLUSIVE JURISDICTION OVER THE SURFACE OF THE PRESERVE; COMMISSION ACTION ON GEOPRODUCTS' APDS IS PREMATURE

While the Valles Caldera Trust ("Trust") takes exception to all argument, and conclusions offered by GeoProducts in its Opposition, there are two key points of difference between the parties that are dispositive of this case in regard to prematurity. Those are: (a) whether the Forest Service has exclusive jurisdiction over the surface of the Preserve, and (b) whether GeoProducts must obtain an approved APD from the Commission as a precondition for its submittal of a surface use plan to the Forest Service for approval. The answer to the first question is "yes" and the answer to the second is "no."

The National Forest Management Act of 1976 (NMFA) 16 U.S.C. § 1600 et. seq., directs that the Forest Service develop land and resource management plans "for units of the National Forest System" in order to administer those units properly. 16 U.S.C. § 1604(a). It is clear the Secretary is empowered to make regulations to protect the national forests and that Congress' power to delegate necessarily derives from its ability to regulate the public lands under the Property Clause. The Duncan Energy cases, on which GeoProducts erroneously relies, are consistent with such authorization and indeed are frequently cited for just the opposite of what the Opposition attempts to make of them.

In Duncan I, *Duncan Energy Co. v. United States Forest Service*, 50 F.3d 584 (8th Cir. 1995),[3] a federal district court entered judgment granting Duncan, as owner and aspiring developer of prior existing mineral rights (before acquisition of the surface by the federal government), permission to proceed with mineral exploration on lands in a national forest without Forest Service approval of a surface use plan. The Circuit Court reversed the district court and remanded the case holding: (a) Congress has the power under the Property Clause (U.S. Const. Art. IV Sec. 3, cl. 2.) to regulate federal lands and to regulate conduct occurring on, and even off federal lands, that affect federal lands; (b) the Forest Service has authority to determine reasonable use of the federal surface estate by a developer of the outstanding mineral estate; and (c) federal law preempted North Dakota law that allowed the developer of the mineral estate unrestricted access after 20 days' notice to the surface owner. It is worth noting that, unlike the subject case, the federal government owned only the surface and none of the minerals. The district court had rejected the Forest Service argument that it, as the surface owner, had the power to adopt rules, regulations and enforce permit requirements before allowing ground-disturbing activity.

The case came back to the Court of Appeals because on remand the district court correctly entered an injunction requiring Duncan to file a proposed surface use plan but erroneously specified that the Forest Service must act on the plan within sixty days and should it not do so within that time limit, Duncan could proceed without approval. In Duncan II, *Duncan Energy Company v. United States Forest Service*, 109

[3] A copy of the Court's opinion in Duncan I is attached to this Reply Brief.

F.3d 497 (9th Cir. 1992),[4] the Court of Appeals held that the district court improperly exceeded the Court of Appeals' mandate on the first appeal by imposing the sixty-day limit for the Forest Service to review the mineral developer's surface use plan. The Court of Appeals held that Duncan I did not mandate a time limit that the Forest Service must follow but that "Reasonableness of processing time must be determined on the basis of the totality of circumstances related to each surface use plan and the obligations of the Forest. Service." 109 F.3d 500.

GeoProducts' attempt to counter the Trust's argument that the Commission has no jurisdiction over the Preserve surface and attendant mineral development has relied upon simply misreading the Duncan cases. GeoProducts ignores that Duncan I instructs that the commencement of drilling activities[5] after the North Dakota notice period before issuance of a special use permit "would impede Congress' objective of protecting federal lands and abrogate a congressional-declared policy of national scope" 50 F.2d 591. Duncan I determined that federal law preempted North Dakota's attempt to assert jurisdiction over the surface of the Little Missouri National Grasslands Forest and held that the Forest Service can require submittal of a surface use plan as a prerequisite to any mineral development. Consequently, the North Dakota law was found displaceable in two ways. It either was preempted by federal law or it was inapplicable to the Forest Service under choice-of-law principals, since federal, rather than state, law should govern questions involving Forest Services administered federal surface.

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[4] A copy of Duncan II is attached to this Reply Brief.

[5] Presuming that also includes the issuance of an APD.

When read correctly, Duncan I holds that even where the federal government owns only the surface estate and none of the minerals, the common law rights of the mineral owner and any state statutory regulation are secondary to the Forest Service's authority to determine the reasonable use of the federal surface. 50 F.3d 591.[6]

Given the fragile nature of the high mountain caldera and the enumerated purposes for the Preserve it is probable in this instance that more than an ordinary surface use plan will be required for deep well reworking. Forest Service Regional Geologist, Michael Linden, believes that GeoProducts' proposals will trigger the requirement of an Environmental Impact Statement. Appdx. Tab 5, ¶ 5. Courts have held that approval of access roads across federal lands requires federal agencies to analyze not just impact of the roads but also the activities for which the roads are being constructed. *Save the Yaak Committee v. Block*, 840 F.2d 714, 720 (9th Cir. 1988) ("road reconstruction, timber harvest, and feeder roads are all 'connected actions' that must be analyzed by the Forest Service in deciding whether to prepare an EIS or only an EA"). *Sierra Club v. United States Department of Energy*, 255 F. Supp.2d 1177 (D. Colo. 2002) (the owner of subsurface mineral rights (for gravel mining) was properly denied access roads by DOE on the federal surface because of need for the agency to comply with NEPA and with Endangered Species Act).

GeoProducts does not deny that it has neglected to submit a plan for surface use to the Forest Service for approval, though it passingly acknowledges that it must submit such a plan. GeoProducts argued, however, that Division issued APDs are a prerequisite for its submittal of a surface use plan to the Forest Services: "Exploration

[6] Accord, Williams and Myers, *Oil and Gas Law*, Section 218 n. 8.2 at page 198.8-9.

can only begin upon the Commission's issuance of an APD, submission of an operating plan based upon the APD, and subsequent approval of the reasonable use of the surface estate by the Forest Service based upon that submission." Opposition p. 5, GeoProducts cites no authority nor does it supply any rational for the notion that the Division should issue an APD to a party who has not shown it can make use of it.

In point of fact, the submittal of a surface use plan to the Forest Service is not contingent upon GeoProducts having already obtained an approved APD from the Commission. Of the seven information requirements of the U.S. Forest Service Manual Section 2832[7] for an operating plan none are an approved APD, viz:

> "2832 OUTSTANDING MINERAL RIGHTS:
>
> * * *
>
> 3. The mineral owner or lessee must include the following information in an operating plan for the exercise of outstanding mineral rights:
>
> a. Location of roads and facilities.
> b. Area to be disturbed.
> c. Methods of mineral extraction
> d. Methods of disposal of mining and other wastes.
> e. Reclamation plans.
> f. Methods for control of erosion and prevention of water pollution.
> g. Identification of owner or lessee's agent.

GeoProducts, by asking the Commission's approval of these APDs, has invited the Commission to intrude upon exclusive federal jurisdiction over the surface of the Preserve. Without the Forest Service approval of a surface use plan allowing access by GeoProducts the Commission, were it to grant the request, would at best be performing a useless act and at worst imposing its authority into a region occupied by federal law.

All the Commission needs to decide is whether its statutory obligation can best be exercised by postponing decision on these APDs to await Forest Service action, if

[7] Appendix, Tab 5.

and when, GeoProducts submits and has approved a plan of operation for the federal surface. The APDs were prematurely filed.

POINT TWO

COMMISSION AUTHORITY HAS BEEN PREEMPTED BY FEDERAL LAW

As Duncan I (50 F.2d 591) tells us the Commission's authority based on state law may be preempted by federal law in two ways.

> If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishments of the full purposes and objectives of Congress.
>
> *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615, 621, 78 L.Ed.2d 443 (1984) (citations omitted); *ANR Pipeline Co. v. Iowa State Commerce Comm'n*, 828 F.2d 465, 468 (8th Cir. 1987).

The Trust's Reply Introduction above has addressed this issue at length and need not be repeated. Suffice it to say that if the Commission acting under state law were to give GeoProducts the go ahead to rework geothermal wells that would obstruct "the full purposes and objectives of Congress" in every aspect of the Valles Caldera Preserve legislation.

We all are now enlightened to know that the Division can clear off most of its examiner dockets and that for decades the Division has been unnecessarily hearing thousands of forced pooling cases! GeoProducts has made the remarkable discovery that because well spacing units have been established[8] **there is no need for pooling**

[8] Since GeoProducts wants to engage in exploratory operation, the specified spacing is 40 surface acres per well. Rule G-104B(1).

the divided mineral interests. Since the Division has established spacing units, not only for geothermal wells, but all oil and gas wells in New Mexico it has obviously wasted everyone's time for about fifty years and million of dollars handling forced pooling applications, hearings and orders.

Sarcasm aside, a spacing unit has no such effect. The law clearly mandates

> **[I]t shall be the obligation of the operator**, if two or more separately owned tracts of land are embraced within the spacing unit, or where there are owners or royalty interests or undivided interests in the geothermal resources which are separately owned or any combination thereof, embraced within such spacing unit, **to obtain voluntary agreements pooling said lands or interests or an order of the division pooling said lands . . .**

Emphasis added. Section 71-5-13 NMSA.

Simply put, GeoProducts' creative argument does not overcome the fact that (a) it does not and will not have voluntary agreement by the Trust and (b) the agency cannot force pool federal minerals without consent of the cognizant federal agency. See Brief-in-Chief, p. 7-8.

POINT THREE

NON-OWNERSHIP OF THE WELL BORES BY GEOPRODUCTS IS SIGNIFICANT

The legal truism that the abandoned wellbores belong to the federal government as surface owner is not in dispute. GeoProducts contends, however, that the authority of *Gutierrez v. Davis*, 618 F.2d 700 (10th Cir. 1981) supports its right to use those wellbores. Once again GeoProducts' case law does not stand the test of accurate reading.

Gutierrez holds that "under Oklahoma law when the casing is not removed by the lessee within a reasonable time, it becomes property of the landowner." 618 F.2d 702.

In that case, a new lease to *Davis* had issued from the owners of the fee – that is the lessors were the **owners of the surface** as well as the minerals. *Davis* gave notice that he intended to reenter an oil well drilled and P&Aed by a prior lessee. *Davis* proceeded and his lessors sued.

The lease from *Gutierrez* stated that the lessee was granted the right to use the land for exploring and operating for oil. "[A] fair reading of the contract gives Davis the right to drill through any part of the real estate including . . . the abandoned well . . ." 618 F.2d 702. Certainly had the federal government as owner of the Preserve surface and the minerals granted such a lease to GeoProducts it would be a totally different story. GeoProducts, of course, has no rights whatsoever granted by the surface owner. *Gutierrez v. Davis* is inapposite.

The Division's Rule G-102(a) specifies that drilling permits issue to "the owner or operator of a proposed well . . . ". GeoProducts is neither.

POINT FOUR

IF PERMITTED, THE OPERATIONS BY GEOPRODUCTS CONSTITUTE WASTE

There is no rebuttal by GeoProducts to the showing by the Trust that the proposed well rework will constitute waste as proscribed by the Geothermal Resources Conservation Act (GRCA). The Opposition (pp. 9-10) devotes one paragraph to this important issue. It quotes an irrelevant portion of the GRCA and makes the extraordinary assertion that GeoProducts is not to engage in "production" and so by fiat circumvents the accusation of threatened waste.

Division Rule G-119, *Utilization of Geothermal Resources*, requires

> After the completion of a geothermal resources well, all production from said well **shall be put to beneficial use.** Emphasis added.

So to reenter geothermal wells just to do so and not to put the resource to a beneficial use is "waste" in the ordinary meaning and as well as within the statutory definition of waste. Sec. 71-5-5 NMSA. If not for purposes of production, then there must be some other motive behind GeoProducts seeking these APDs. That motive is not hard to infer given the Harrells' and GeoProducts' dissatisfaction with the purchase offer made by the government for the one-eighth interest.

III. REPLY CONCLUSION

The Opposition submitted by GeoProducts does not alter the proper disposition to be made of this matter. The Commission should reject the APDs on all grounds or, in the alternative, postpone action until such time, if ever, GeoProducts can demonstrate that it has obtained Forest Service approval of access by way of an acceptable operating plan.

Respectfully,

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I hereby certify that I have caused a true and correct copy of the foregoing Valles Caldera Trust Reply in Support of its Application to be served on this 9th day of February, 2004, to the following counsel of record in the manner shown:

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VIA FACSIMILE

J.E. Gallegos

vicarious liability claim, and therefore the entire lawsuit. *See Babcock & Wilcox Co. v. Parsons Corp.*, 430 F.2d 531, 537 (8th Cir. 1970).

[7] An insurer that breaches the duty to defend is liable for the costs and expenses reasonably incurred by the insured in defending the suit. *See Prince v. Universal Underwriters Ins. Co.*, 143 N.W.2d 708, 715 (N.D.1966). In the district court, USF & G challenged the damages claimed by Pennzoil, and the district court did not reach damage issues. Accordingly, the judgment of the district court is reversed and the case is remanded with directions to determine the amount of damages to which Pennzoil is entitled on account of USF & G's breach of its duty to defend.

DUNCAN ENERGY COMPANY, a Colorado General Partnership; Meridian Oil, Inc., a Delaware Corporation, Appellees,

v.

UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture; Samuel P. Redfren, in his official capacity as District Ranger for the Medora Ranger District, North Dakota, Appellants.

No. 93-4005.

United States Court of Appeals, Eighth Circuit.

Submitted Oct. 13, 1994.

Decided March 21, 1995.

Owner and developer of mineral rights on land within national forest brought action against Forest Service, seeking declaratory judgment that Service could not prohibit access to or regulate exploration and development of privately owned oil and gas estate. Forest Service counterclaimed, asserting that developer had improperly used federal surface without obtaining necessary authorization, and requested permanent injunction barring further ground-disturbing activity without Forest Service's express written authorization. The United States District Court for the District of North Dakota, Patrick A. Conmy, J., entered judgment against Forest Service, and Service appealed. The Court of Appeals, John R. Gibson, Senior Circuit Judge, held that: (1) although North Dakota law protected property rights of Forest Service, as owner of surface estate, by limiting mineral developer to reasonable use of surface, it did not cloak Forest Service with specific authority to approve surface use plans; (2) Forest Service has authority under special use regulations to determine reasonable use of federal surface estate by developer of underlying mineral estate; and (3) to extent that North Dakota law allows developer of mineral estate unrestricted access after 20 days' notice to surface owner, North Dakota law was preempted or fell under choice-of-law principles.

Reversed and remanded.

1. Woods and Forests ⇨8

Under North Dakota law, developer of mineral estate located beneath national forest did not have unrestricted rights to find and develop minerals but, rather, developer's rights were limited to so much of surface and such use thereof as were reasonably necessary to explore, develop and transport materials, and, thus, North Dakota law did not preclude Forest Service from requiring that only reasonable use be made of federal surface lands.

2. Woods and Forests ⇨8

Although North Dakota law protected property rights of Forest Service, as owner of surface estate, by limiting mineral developer to reasonable use of surface, it did not cloak Forest Service with specific authority to approve surface use plans. NDCC 38-11.1-05.

3. Woods and Forests ⇨8

Forest Service has authority under special use regulations to determine reasonable

use of federal surface estate by developer of underlying mineral estate. The Bankhead-Jones Farm Tenant Act, § 32, 7 U.S.C.A. § 1011; 16 U.S.C.A. § 551; 36 C.F.R. §§ 213.3(b), 251.15, 251.50(a), 251.55(c), 251.110 et seq.

4. Public Lands ⇐7

Congress has power under property clause to regulate federal land, and may regulate conduct occurring on or off federal land which affects federal land. U.S.C.A. Const. Art. 4, § 3, cl. 2.

5. Woods and Forests ⇐8

Special use regulations do not give Forest Service veto authority over mineral development. The Bankhead-Jones Farm Tenant Act, § 32, 7 U.S.C.A. § 1011; 16 U.S.C.A. § 551; 36 C.F.R. §§ 213.3(b), 251.15, 251.50(a), 251.55(c), 251.110 et seq.

6. Woods and Forests ⇐8

Statement in national forest management plan that Forest Service would "through negotiation, develop a memorandum of understanding with large holders of mineral rights" did not mean that Forest Service was implicitly limited to negotiating with mineral rights holders instead of regulating their use of surface.

7. Woods and Forests ⇐8

Forest Service's position in other cases could not be considered as binding authority that special use regulations did not apply to authorize Forest Service to determine reasonable use of federal surface by developer of underlying mineral estate.

8. Woods and Forests ⇐8

Period of approximately two months for approval by Forest Service of mineral holder's surface use plan was time frame consistent with Forest Service's authority to determine reasonable use of federal surface and did not violate mineral holder's dominant right to access and develop mineral estate.

9. Woods and Forests ⇐8

To extent that North Dakota law allows developer of mineral estate unrestricted access after 20 days' notice to surface owner, North Dakota law was preempted or fell under choice-of-law principles as applied to national forest, as it was inconsistent with special use regulations authorizing Forest Service to determine reasonable use of federal surface; allowing unrestricted access after 20 days' notice would impede Congress' objective of protecting federal lands and abrogate congressionally declared program of national scope. The Bankhead-Jones Farm Tenant Act, § 32, 7 U.S.C.A. § 1011; 16 U.S.C.A. § 551; NDCC 38-11.1-05; 36 C.F.R. §§ 213.3(b), 251.15, 251.50(a), 251.55(c), 251.110 et seq.

John T. Stahr, Washington, DC, argued (Robert L. Klarquist, Michael W. Reed, James B. Snow, Jeffrey D. Eisenberg, Christine Everett and Alan J. Campbell, on the brief), for appellants.

Charles L. Kaiser, Denver, CO, argued (Anthony J. Shaheen, John Morrison and Brian R. Bjella, on the brief), for appellees.

Before WOLLMAN, Circuit Judge, JOHN R. GIBSON, Senior Circuit Judge, and HANSEN, Circuit Judge.

JOHN R. GIBSON, Senior Circuit Judge.

The United States Forest Service and its district ranger for the Medora Ranger District, North Dakota, appeal from the district court's entry of summary judgment granting declaratory relief to Meridian Oil, Inc. and Duncan Energy Company, an owner and developer of mineral rights. The district court allowed Duncan to proceed with mineral exploration on land in a national forest without Forest Service approval of the surface use plan. We reverse.

Meridian owns mineral rights on land within the Little Missouri National Grasslands area, which is part of the Custer National Forest in North Dakota. The United States owns the surface estate.[1] Duncan has an exploration agreement with Meridian.

1. The United States originally patented the land in question to Northern Pacific Railroad Company as a part of a railroad land grant. In 1916, the railroad deeded the land to various farmers, reserving "all minerals of any nature whatsoever ... together with the use of such of the surface

Since 1984, Meridian and its predecessor, Milestone Petroleum, have explored for oil and gas within the Custer National Forest without incident. Meridian submitted surface use plans to the Forest Service for review and obtained special use letters of authorization before developing its mineral estates. The Forest Service Regional Office reviews surface use plans by applying the standards and guidelines set forth in the Custer National Forest Land and Resource Management Plan. The Forest Service surveys resources in the area of proposed operations, analyzes potential effects, and determines whether there may be reasonable alternatives and mitigation measures. Following this review, the Forest Service issues a letter of authorization which establishes conditions and protective measures for surface use.

In 1984, the United States Forest Service and Meridian's predecessor, Milestone Petroleum, entered into a Memorandum of Understanding, which provided that the Forest Service would process a surface use plan within ten working days of the receipt of the complete surface use plan. Since 1984, Meridian has submitted fifteen surface plans to the Forest Service before drilling; the Forest Service has processed only two of the plans in fewer than ten days.

On October 15, 1992, the Forest Service and Duncan met to discuss well location, access, and road specifications for Duncan's anticipated drilling. The Forest Service suggested a different access route from that proposed by Duncan, and the access road was staked as the Forest Service suggested. On October 22, the Forest Service and several of Duncan's contractors met for an on-site surface inspection of the well location and staked access route. On December 7, 1992, Duncan submitted a surface use plan for a well site. The Forest Service advised Duncan's contractor that the surface use plan contained an inaccurate map of the proposed access route based on the October 22 meeting, and Duncan submitted a corrected map on December 24, 1992. The Forest Service then conducted an environmental analysis of the well and access route, consisting of a review of reports submitted by Duncan's contractors and consultation with the United States Fish and Wildlife Service and the North Dakota Department of Fish and Game. The Forest Service began to prepare an analysis document, which sets forth terms and conditions for the use of the federal surface.

Over the next two months, Duncan contacted the Forest Service to check the status of the Forest Service's authorization. Duncan wanted to begin drilling, as its contract with Meridian required it to drill seven wells within one year or incur liquidated damages. During this time, Duncan learned that the Forest Service believed that the Memorandum of Understanding did not apply and that the Forest Service was considering whether the more extensive National Environmental Policy Act procedures applied. Under NEPA, Duncan could not drill until the Forest Service completed an area-wide environmental impact study and a site-specific environmental impact statement, which might take two to three years. *See* 42 U.S.C. § 4332(2)(C) (1988).[2]

On March 4, 1993, Duncan sent a letter to the Forest Service stating that it had an absolute right to access and drill the site. Duncan requested that the Forest Service immediately issue a special use permit and comply with the 1984 Memorandum of Understanding. Duncan threatened to access the well as originally proposed if the Forest Service did not immediately approve the staked route. On March 16, 1993, Duncan submitted a revised map for the access route to the Forest Service. Because the new

as may be necessary for exploring for and mining or otherwise extracting and carrying away the same." In 1937, the United States acquired the surface estate pursuant to the Bankhead–Jones Farm Tenant Act, subject to the mineral reservation in the 1916 deed. Meridian eventually acquired the mineral rights and Meridian executed an oil and gas exploration agreement with Duncan on September 30, 1992.

2. NEPA provides that when a federal agency undertakes "major Federal action[] significantly affecting the quality of the human environment," it must prepare an environmental impact statement concerning that action. 42 U.S.C. § 4332(2)(C).

route varied two-tenths of a mile from the staked route, the Forest Service informed Duncan that it must complete the necessary environmental surveys for the new road, but that it would complete its analysis of the original route by the following week.

On Friday, March 19, 1993, at 4 o'clock p.m. Duncan telephoned the Forest Service to say that it would begin constructing the new road the next morning. The Forest Service visited the site the next morning and found that Duncan had begun constructing the road. Duncan completed all road construction by March 27. On April 6, 1993, Duncan placed the drill rig on the site, over the Forest Service's written objection. After Duncan asserted that the Forest Service was bound by the ten-day period stated in the Memorandum of Understanding, the Forest Service formally terminated the Memorandum on April 15, 1993.

Meanwhile, on March 29, 1993, Duncan filed suit against the Forest Service seeking a declaratory judgment that the Service could not prohibit access to or regulate the exploration and development of the privately owned oil and gas estate. The Forest Service filed an answer and a counterclaim asserting that Duncan had improperly used federal surface without obtaining the necessary authorization. The Forest Service requested a permanent injunction barring Duncan from further ground disturbing activity at the well site and on other National Forest System lands without the Forest Service's express written authorization.

After first determining that a justiciable controversy existed because the Forest Service sought a permanent injunction prohibiting Duncan from further work, the district court granted summary judgment to Duncan and Meridian. *Duncan Energy Co. v. United States Forest Service*, No. A1–93–033, slip op. at 3, 6, 1993 WL 664644 (D.N.D. Sept. 30, 1993). The district court reasoned that the mineral estate is the dominant estate and that the surface estate was therefore subservient to the development, mining, and extraction of the minerals. *Id.* at 3. The court held that when the United States owns only the surface estate, it does not have the authority to regulate mineral estate exploration, development, mining or extraction different from or greater than state law. *Id.* at 6. The court stated that the surface owner "cannot prevent the exploration, mining or extraction of the underlying minerals even if that development will completely destroy the value of the surface estate or render it unsuitable for public usage." *Id.* at 3. The court determined that if the mineral estate holder causes damage to the surface estate, the mineral estate holder is liable in damages to the surface owner, and, if this remedy is "illusory," then the damage can only be righted by condemnation and purchase of the mineral estate. *Id.* at 3–4. After considering North Dakota law, the court concluded that an attempt to prohibit the development of mineral interests would constitute an inverse condemnation of the mineral estate. *Id.* at 4. The court rejected the Forest Service's argument that the Forest Service, as owner of the surface estate, had the power to adopt rules, regulations and permit requirements before allowing ground disturbing activity. *Id.* at 4–5.

I.

The Forest Service appeals, arguing that the district court's decision is incorrect because the Forest Service has authority under North Dakota law and federal law to regulate federally-owned surface lands. The Forest Service acknowledges that the mineral estate is dominant, but points out that it is not seeking to deny access to the underlying nonfederal lands, but only to protect federal lands during their use by the mineral holder.

Duncan responds that the district court's decision is consistent with the recognized difference between outstanding mineral rights and reserved mineral rights.[3] Duncan states that this case involves outstanding

3. Reserved rights are mineral rights reserved by the grantor when the federal government acquired its interest in land and are made expressly subject to Forest Service regulations codified at 36 C.F.R. § 251.15 (1994). Outstanding rights are mineral rights owned by third parties that were severed before the government acquired its surface rights, which the government took subject to those outstanding mineral rights.

mineral rights, and, consistent with long-standing law and Forest Service practice, outstanding mineral rights are not subject to the Forest Service's special use permit regulations. Duncan explains that the Forest Service and outstanding mineral rights owners have long conducted mineral activities under the "Negotiation/State Law Paradigm," under which the Forest Service negotiates with outstanding mineral rights holders and utilizes state law to regulate the surface use of federal lands, not the "Full Regulatory Paradigm," found in the special use permit regulations. We do not find these semantic pigeon holes to accurately reflect the complexity of the issues before us. Duncan argues that the Forest Service cannot deviate from established agency precedent and now require compliance with the special use permit regulations.

[1] In ruling that Duncan may "interfere with or even destroy" the surface estate, slip op. at 6, the district court erred in its reading of North Dakota law. *See Salve Regina College v. Russell*, 499 U.S. 225, 231, 111 S.Ct. 1217, 1221, 113 L.Ed.2d 190 (1991) (court of appeals should review de novo, without deference, a district court's determination of state law).

Under North Dakota law, the mineral estate is dominant, carrying "inherent surface rights to find and develop the minerals." *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 135 (N.D.1979). The mineral developer's rights, however, are not unrestricted. The mineral developer's rights "are limited to so much of the surface and such use thereof as are *reasonably necessary* to explore, develop, and transport the minerals." *Id.* Thus, North Dakota law does not preclude the Forest Service from requiring that only reasonable use be made of the federal surface lands. *Hunt Oil* established that the mineral developer's right of access is subject to a standard of reasonableness:

> [I]f the manner of use selected by the dominant mineral lessee is the only reasonable, usual and customary method that is available for developing and producing the minerals on the particular land then the owner of the servient estate must yield. However, if there are other usual, customary and reasonable methods practiced in the industry on similar lands put to similar uses which would not interfere with the existing uses being made by the servient surface owner, it could be unreasonable for the lessee to employ an interfering method or manner of use.

Id. at 136–37 (quoting *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 627–28 (Tex.1971)).

[2] Although North Dakota law protects the surface owner's property rights by limiting the mineral holder to the "reasonable use" of the surface, North Dakota law does not, and could not, cloak the Forest Service with the specific authority to approve surface use plans. Indeed, there is not even specific authority to allow a surface owner to enjoin the unreasonable use of the surface.[4] *Hunt Oil* does not discuss injunctive relief. North Dakota's Oil and Gas Production Compensation Act requires only that the mineral developer "give the surface owner written notice of the drilling operations contemplated at least twenty days prior to the commencement of the operations," and provides a damages remedy. N.D.Cent.Code § 38–11.1–05 (1987).

[3] Nevertheless, the Forest Service contends that federal law gives it the authority to approve surface use plans. Duncan responds that Congress has not enacted and the Forest Service has not implemented by regulations the authority the Forest Service now attempts to invoke. In Duncan's words, "[t]his dispute turns on what the law is, not what the law could be." Duncan points out that Congress has not given the Forest Service the authority to regulate outstanding mineral rights, as it has given the National Park Service. *See* 16 U.S.C. § 1902 (1988); 36 C.F.R. § 9.30(a) (1994).

[4] Congress has the power under the property clause to regulate federal land,

4. The statute provides: "If a mineral developer fails to give notice as provided under this section, the surface owner may seek any appropriate relief in the court of proper jurisdiction and may receive punitive as well as actual damages." N.D.Cent.Code § 38–11.1–05 (1987). The Forest Service does not argue that "any appropriate relief" includes the authority for injunctive relief.

U.S. Const. art. IV, § 3, cl. 2; *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580, 107 S.Ct. 1419, 1424–25, 94 L.Ed.2d 577 (1987). Indeed, Congress may regulate conduct occurring on or off federal land which affects federal land. *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529, 539, 96 S.Ct. 2285, 2291–92, 49 L.Ed.2d 34 (1976); *Minnesota v. Block*, 660 F.2d 1240, 1249 (8th Cir.1981), *cert. denied*, 455 U.S. 1007, 102 S.Ct. 1645, 71 L.Ed.2d 876 (1982). Under the Bankhead–Jones Farm Tenant Act, Congress directed the Secretary of Agriculture "to develop a program of land conservation and land utilization." 7 U.S.C. § 1010 (1988). The Act directs the Secretary to make rules as necessary to "regulate the use and occupancy" of acquired lands and "to conserve and utilize" such lands. 7 U.S.C. § 1011(f) (Supp.V.1993). The Forest Service, acting under the Secretary's direction, manages the surface lands here as part of the National Grasslands, which are part of the National Forest System. *See* 16 U.S.C. § 1609(a) (1988). Congress has given the Forest Service broad power to regulate Forest System land. *See, e.g.*, 7 U.S.C. § 1011 (1988 & Supp.V.1993); 16 U.S.C. § 551 (Supp.V. 1993).

The Forest Service finds its authority to regulate surface access to outstanding mineral rights in the "special use" regulations. The special use regulations provide that "[a]ll uses of National Forest System land ... are designated 'special uses' and must be approved by an authorized officer." 36 C.F.R. § 251.50(a).

Duncan discounts the all inclusive language of 36 C.F.R. § 251.50 by pointing out that reserved mineral rights are governed by their own specific regulations at 36 C.F.R. § 251.15, and that it is illogical that the Forest Service would address outstanding mineral rights in the more general special use regulations. Duncan interprets the "all uses" language of section 251.50 to mean only the uses specified in section 251.53. Duncan also cites to several provisions of the special use regulations which it argues except outstanding mineral rights from the special use regulations.

[5] Contrary to the district court's view, the special use regulations do not give the Forest Service "veto authority" over mineral development. Slip op. at 5. The Forest Service concedes that it cannot deny access to or prohibit mineral development, and only asks for the authority to determine the reasonable use of the federal surface.

Duncan's arguments that the special use regulations do not authorize the regulation of outstanding mineral rights are too broad. The only issue before us is the Forest Service's ability to regulate surface access to outstanding mineral rights. The Forest Service recognizes that it cannot prevent Duncan, as the owner of the dominant mineral estate, from exploring for or developing its minerals. Duncan draws far too much meaning from certain provisions of the regulations. For example, 36 C.F.R. § 251.55(c)[5] defines the type of interest acquired by the special use permit holder, and does not limit the application of the regulations. Likewise, 36 C.F.R. § 251, Subpart D, does not exempt outstanding mineral rights from the special use regulations, but addresses access to non-federal lands. The Forest Service argues that it is not prohibiting access to non-federal lands or diminishing Duncan's rights, but only regulating the use of the federal surface. For this same reason, Duncan's citation to 36 C.F.R. § 213.3(b)[6] is misplaced. The Forest Service is not challenging Duncan's "[e]xisting valid right[ ]" to conduct drilling operations.

Duncan also relies on the Forest Service Manual, the Custer National Forest Management Plan, various Forest Service rulings, agency statements, and congressional testimony as proof that the Forest Service has no regulatory authority and cannot deviate from established agency precedent and require

5. 36 C.F.R. § 251.55(c) (1994) provides: "Special use authorizations are subject to all outstanding valid rights."

6. 36 C.F.R. § 213.3(b) (1994) provides: "Existing valid rights ... affecting [lands acquired under the Bankhead–Jones Act] shall continue in full force and effect so long as they remain valid in accordance with the terms thereof."

compliance with the special use permit regulations.

Duncan states that the Forest Service Manual unambiguously adopts the negotiation and state law approach, citing several provisions. Duncan stresses that the Forest Service Manual "explains to the public" and the Forest Service itself the framework for the management of Forest Service programs, *see Meadow Green–Wildcat Corp. v. Hathaway*, 936 F.2d 601, 605 (1st Cir.1991), and that the Forest Service must follow its own manual as a matter of law. *Morton v. Ruiz*, 415 U.S. 199, 235, 94 S.Ct. 1055, 1074, 39 L.Ed.2d 270 (1974). Duncan points out that the manual does not cite the special use regulations and draws our attention to several provisions of the manual.

Duncan's citation to the sentence in the Manual stating that the Secretary's rules and regulations do not apply to outstanding mineral rights is taken out of context. The sentence simply states and means only that the regulations governing reserved mineral rights in 36 C.F.R. § 251.15 do not cover outstanding mineral rights. The Manual goes on to state that "the exercise of all reserved and outstanding mineral rights is subject to applicable Federal and State laws and regulations pertaining to mining, real property, and environmental protection." Although the Forest Service Manual does not cite the special use regulations, the substance of the manual is consistent with the regulations. For example, the Manual requires the mineral estate owner to submit "an operating plan for the exercise of outstanding mineral rights," including methods for controlling environmental degradation. The Manual authorizes the Forest Service to send a letter of authorization after reviewing the plan to determine whether it "[u]ses only so much of the surface as is prudently necessary for the proposed operations." Although the Manual says that the Forest Service should meet with the mineral owner to negotiate modifications, it provides for "appropriate legal action" if the mineral owner deviates from the operating plan.

Duncan also makes arguments based upon an Administrative Analysis and Finding issued by the Forest Supervisor for the White River National Forest for the Conundrum Marble Quarry Proposal and to litigation and congressional testimony surrounding the exercise of outstanding mineral rights in the Allegheny National Forest. *See United States v. Minard Run Oil Co.*, Civil No. 80–129 (W.D.Pa. Dec. 16, 1980).[7] Duncan argues that the Forest Service's position taken in those two national forests establishes that the Forest Service negotiates with owners of outstanding mineral rights, and that the Forest Service lacks authority to regulate the exercise of such rights unilaterally. We need not develop these arguments in greater detail, as they are simply unconvincing.

[6–8] The Forest Service's position in this case does not violate the Custer National Forest Management Plan and is reconcilable with the Forest Service position in the *Minard Run* case and the Allegheny National Forest hearings. The statement in the Custer National Forest Management Plan that the Forest Service will "through negotiation, develop a memorandum of understanding with large holders of mineral rights," does not mean that the Forest Service is implicitly limited to negotiating with mineral rights holders instead of regulating their use of surface. Although in the *Minard Run* case the government acknowledged that it was not acting as a sovereign, the court ordered that the oil company provide reasonable advance notice of a map of the well sites, road, and pipeline, as well as a plan of operations, and a plan of erosion and sedimentation control. In addition, there are other statements contained in the Allegheny Forest hearings which are consistent with the Forest Service position here, that is, regulating outstanding mineral rights holders use of federal surface while honoring the holder's absolute right to mineral development. Oil and Gas Operations in the Allegheny National Forest, Northwestern Pennsylvania: Oversight Hearing before the Subcommittee on Energy and Environment of the House Committee

7. Although the Rules of our court generally prohibit citation to unpublished opinions, Eighth Cir.R. 28A(k), we acknowledge that Duncan is not citing *Minard Run* as legal authority, but rather as an example of Forest Service action in other cases.

on Interior and Insular Affairs, 102nd Cong. 1st Sess. 75–76 (1991). In any event, the Forest Service's position in other cases cannot be considered as binding authority that the special use regulations do not apply. "[W]hen an agency deviates from established precedent, it must provide a reasoned explanation for its failure to follow its own precedents," but "[t]his requirement does not mean that an agency may not change its policies." *Baltimore Gas & Elec. Co. v. Heintz*, 760 F.2d 1408, 1418 (4th Cir.), *cert. denied*, 474 U.S. 847, 106 S.Ct. 141, 88 L.Ed.2d 116 (1985). The Forest Service's position is entitled to deference. "'[R]egulatory agencies do not establish rules of conduct to last forever,' and . . . an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'" *Motor Vehicle Mfr's Ass'n of the United States, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983) (citations omitted); *see Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863, 104 S.Ct. 2778, 2792, 81 L.Ed.2d 694 (1984) ("The fact that the agency has from time to time changed its interpretation . . . does not . . . lead us to conclude that no deference should be accorded the agency's interpretation of the statute."). For these reasons, we are convinced that the Forest Service has the limited authority it seeks here; that is, the authority to determine the reasonable use of the federal surface.[8]

II.

[9] If North Dakota law is read to allow developers unrestricted access after twenty days' notice and no injunctive relief for the surface owner, North Dakota law is inconsistent with the special use regulations. State law may be pre-empted in two ways:

> If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishments of the full purposes and objectives of Congress.

Silkwood v. Kerr–McGee Corp., 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984) (citations omitted); *ANR Pipeline Co. v. Iowa State Commerce Comm'n*, 828 F.2d 465, 468 (8th Cir.1987).

In addition, under choice-of-law principles, when determining whether to apply federal or state law, federal courts will apply federal law "when the case arises from or bears heavily upon a federal regulatory program." *United States v. Albrecht*, 496 F.2d 906, 910 (8th Cir.1974) (citing *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592, 93 S.Ct. 2389, 2396–97, 37 L.Ed.2d 187 (1973)).

Allowing unrestricted access after twenty days' notice would impede Congress' objective of protecting federal lands and abrogate a congressionally-declared program of national scope. If North Dakota law is read to allow a developer unrestricted access after twenty days' notice, North Dakota law is pre-empted or falls under choice-of-law principles.

Accordingly, the judgment of the district court is reversed, and the case is remanded to the district court with instructions to enter summary judgment for the United States and an order declaring that Duncan violated Forest Service regulations by proceeding with mineral development absent Forest Ser-

8. Duncan explains that it resorted to proceeding without Forest Service authorization because of the Forest Service's delay in processing its surface use plan. Implicit in our conclusion that the Forest Service is authorized to determine the reasonable use of the federal surface is our assumption that the Forest Service's inquiry must be reasonable, and thus, expeditious. Otherwise, the Forest Service's authority could expand to "veto authority" over mineral development. The Forest Service concedes that it cannot prohibit mineral development and recognizes the mineral holder's absolute right to develop its mineral estate. Counsel at oral argument represented that the Forest Service approval of a surface use plan usually takes about two months. We believe such a timeframe is consistent with the Forest Service's authority to determine the reasonable use of the federal surface and does not violate the mineral holder's dominant right to access and develop its mineral estate.

vice authorization of the surface use plan. The Forest Service's request for a permanent injunction is best considered by the district court on remand. We reverse and remand for further proceedings consistent with this opinion.

SHUR-VALUE STAMPS, INC.,
Plaintiff-Appellant,

v.

PHILLIPS PETROLEUM COMPANY,
Defendant-Appellee.

No. 94-2460.

United States Court of Appeals,
Eighth Circuit.

Submitted Jan. 9, 1995.

Decided March 22, 1995.

Buyer brought action against seller for breach of warranties, alleging that resin supplied by seller for manufacture of plastic water bottles tainted taste and odor of water. The United States District Court for the Eastern District of Arkansas, Garnett Thomas Eisele, Senior District Judge, dismissed action, sua sponte, as untimely. Buyer appealed. The Court of Appeals, Bright, Senior Circuit Judge, held that: (1) buyer waived any defect in notice of trial court's sua sponte decision to dismiss buyer's action as untimely; (2) under Texas law, buyer's evidence was not sufficient to rebut presumption that seller mailed purchase order acknowledgement which contained one-year time limitation for bringing breach of contract action; and (3) under Texas law, buyer's breach of contract action was barred by one-year limitation clause in purchase order acknowledgement.

Affirmed.

1. Federal Courts ⇐625

Plaintiff waived any defect in notice of trial court's sua sponte decision to dismiss plaintiff's action as untimely on day before trial, where plaintiff failed to object to lack of notice.

2. Evidence ⇐89

Under Texas law, evidence in buyer's breach of contract action that no one at buyer's workplace saw letter containing purchase order acknowledgement (POA) from seller and that POA was not in buyer's files was not sufficient to rebut presumption that seller mailed POA which contained one-year time limitation for bringing breach of contract action; buyer failed to explicitly deny that it received purchase order acknowledgement, and its circumstantial evidence that acknowledgement was not sent was not sufficient to rebut presumption, absent some evidence that acknowledgement would have been customarily noticed by buyer.

3. Evidence ⇐71

Under Texas law, a letter properly addressed, stamped and mailed to addressee is presumed to have been received by addressee in due course.

4. Evidence ⇐71

Under Texas law, evidence of customary delivery procedures is sufficient to establish that particular letter was sent out.

5. Evidence ⇐89

On motion for summary judgment, to rebut presumption under Texas law that letter was delivered and received and, thus, present fact issue for jury, nonmoving party must present testimonial evidence from interested witness, denying that letter was ever received.

6. Federal Civil Procedure ⇐2546

On motion for summary judgment, in attacking movant's witness' credibility, nonmovant must show concrete evidence; discredited testimony is not normally considered sufficient basis for drawing contrary conclusion.

DUNCAN ENERGY COMPANY, a Colorado General Partnership; Meridian Oil, Inc., a Delaware corporation, Appellees,

v.

UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture; Samuel P. Redfern, in his official capacity as District Ranger for the Medora Ranger District, North Dakota, Appellants.

No. 95-4260.

United States Court of Appeals, Eighth Circuit.

Submitted Nov. 20, 1996.

Decided March 27, 1997.

Owner of mineral estate underlying land within national forest and oil and gas developer brought action against Forest Service, seeking declaratory judgment that Service could not prohibit access to or regulate exploration and development of privately-owned mineral estate. Service counterclaimed, asserting that developer had improperly used federal surface without obtaining necessary authorization, and requested permanent injunction barring further ground-disturbing activity without Service's express written authorization. The United States District Court for the District of North Dakota, Patrick A. Conmy, J., granted summary judgment for developer. Service appealed. The Court of Appeals, John R. Gibson, Senior Circuit Judge, 50 F.3d 584, reversed and remanded. On remand, the District Court granted summary judgment for Service and entered permanent injunction. Service appealed. The Court of Appeals, Wollman, Circuit Judge, held that: (1) district court improperly exceeded Court of Appeals' mandate on prior appeal by imposing 60-day limit on Service review of developer's proposed surface use plan, and (2) district court acted inconsistently with Court of Appeals' mandate by allowing developer to proceed with operations on mineral estate if Service did not act upon developer's proposed surface use plan within 60 days from filing of developer's application, subject only to later damages suit by Service.

Vacated and remanded.

1. Federal Courts ⇐951.1

On remand from prior appeal, district court improperly exceeded Court of Appeals' mandate by imposing 60-day limit on Forest Service review of oil and gas developer's proposed surface use plan for conducting operations on mineral estate underlying land within national forest; Court of Appeals had stated in footnote on prior appeal that Service's inquiry regarding surface use plans had to be reasonable and expeditious and did not mandate per se time limit that Service had to follow but, rather, simply noted Service's representation that approval of surface use plan usually took about two months.

2. Federal Courts ⇐951.1, 956.1

On remand, district court must follow Court of Appeals' mandate, and Court of Appeals retains authority to determine whether terms of mandate have been scrupulously and fully carried out.

3. Woods and Forests ⇐8

Reasonableness of Forest Service's processing time on proposed surface use plan for conducting oil and gas operations on mineral estate underlying land within national forest must be determined on basis of totality of circumstances related to each surface use plan and obligations of Service.

4. Woods and Forests ⇐8

For purposes of determining reasonableness of Forest Service's processing time on proposed surface use plan for conducting oil and gas operations on mineral estate underlying land within national forest, prior course of conduct between parties is one factor to consider, but it is not controlling factor.

5. Woods and Forests ⇐8

For purposes of Forest Service's processing of proposed surface use plan for conducting oil and gas operations on mineral estate underlying land within national forest, Service has only limited authority to regulate use of subservient surface estate by dominant mineral estate, and its processing time

must be reasonable, expeditious, and as brief as possible.

6. Federal Courts ⇐951.1

On remand from prior appeal, district court acted inconsistently with Court of Appeals' mandate by allowing oil and gas developer to proceed with operations on mineral estate underlying land within national forest if Forest Service did not act upon developer's proposed surface use plan within 60 days from filing of developer's application, subject only to later damages suit by Service; this effectively reinstated original judgment Court of Appeals had reversed on prior appeal, and was inconsistent with Court of Appeals' conclusion that Service had authority to require prior approval of surface use plan before a developer uses federal surface.

John T. Stahr, argued, Washington, DC (Edward J. Shawaker, Robert L. Klarquist, Sandra B. Zellmer, Washington, DC, M. Bradley Flynn, James B. Snow, Jeffrey D. Eisenberg, Washington, DC, Christine R. Everett, Alan J. Campbell, Missoula, MT, on the brief), for appellants.

Charles L. Kaiser, argued, Denver, CO (John Morrison, Brian R. Bjella, Bismark, ND, Anthony J. Shaheen, Denver, CO, on the brief), for appellees.

Before FAGG, WOLLMAN, and HANSEN, Circuit Judges.

WOLLMAN, Circuit Judge.

Pursuant to our directions in a prior appeal in this matter, *Duncan Energy Co. v. United States Forest Service*, 50 F.3d 584 (8th Cir.1995) (*Duncan I*), the district court granted summary judgment in favor of the United States Forest Service and entered a permanent injunction. The Forest Service now appeals. We reverse and remand.

This case involves the definition of rights between the United States, the owner of the surface estate on certain tracts of land in the Little Missouri National Grasslands in the Custer National Forest, and Meridian Oil, the owner of the outstanding mineral estate. Duncan Energy has an exploration agreement with Meridian under which it drills exploratory oil and gas wells on those tracts.

Before drilling, Duncan and Meridian submit a surface use plan to the Forest Service and obtain a special use authorization letter. The authorization letter contains conditions and protective measures for surface use. In December of 1992, Duncan submitted a surface use plan for a new drilling site. Processing of this plan took longer than usual, and in March of 1993, Duncan constructed a road and erected a drill rig without Forest Service authorization.

Duncan then sought a declaratory judgment that the Forest Service could not prohibit access to or regulate the exploration and development of the privately owned mineral estate. The Forest Service counterclaimed, alleging that Duncan had improperly used the federal surface without obtaining authorization and requesting a permanent injunction barring Duncan from conducting ground-disturbing activity without the Forest Service's prior written authorization. The district court granted summary judgment for Duncan, ruling that the United States could not regulate the mineral estate in a manner different from or greater than permitted under state law, even if that development would completely destroy the surface estate, with the mineral estate holder being liable for any damage done to the surface estate. The court rejected the Forest Service's argument that it had the power to adopt rules, regulations, and permit requirements before allowing ground-disturbing activity. *See Duncan I*, 50 F.3d at 585–87.

On appeal, we concluded that North Dakota law limited the mineral estate holder to making use of only so much of the surface estate as was reasonably necessary to explore, develop, and transport the minerals. *See id.* at 588. We also concluded that federal law gave the Forest Service the power to regulate Forest System lands and agreed with the Forest Service that it had the limited authority to determine the reasonable use of the federal surface. *See id.* at 589–91. In passing, we stated that:

> Duncan explains that it resorted to proceeding without Forest Service authorization because of the Forest Service's delay

> in processing its surface use plan. Implicit in our conclusion that the Forest Service is authorized to determine the reasonable use of the federal surface is our assumption that the Forest Service's inquiry must be reasonable, and thus, expeditious. Otherwise, the Forest Service's authority could expand to "veto authority" over mineral development. The Forest Service concedes that it cannot prohibit mineral development and recognizes the mineral holder's absolute right to develop its mineral estate. Counsel at oral argument represented that the Forest Service approval of a surface use plan usually takes about two months. We believe such a timeframe is consistent with the Forest Service's authority to determine the reasonable use of the federal surface and does not violate the mineral holder's dominant right to access and develop its mineral estate.

See id. at 591 n. 8.

We reversed and remanded the case with instructions that the district court enter summary judgment for the Forest Service and an order "declaring that Duncan violated Forest Service regulations by proceeding with mineral development absent Forest Service authorization of the surface use plan." We left it to the district court to consider the Forest Service's request for a permanent injunction. *See id.* at 591–92.

On remand, the district court entered summary judgment for the Forest Service. Quoting footnote eight of our opinion, the court stated that we "ha[d] determined that two months for the review process is permissible." Consistent with its summary judgment order, the court entered a permanent injunction incorporating the following conditions: The Forest Service has limited authority to approve reasonable use of the federal surface; a mineral developer must file a proposed surface use plan with the Forest Service prior to development of the mineral estate; the Forest Service's authority must be exercised in an expeditious manner and processing of surface use plans completed within two months; approval could not be withheld if the effect of denying approval was the prohibition of mineral development, nor could it unreasonably restrict the exercise of rights associated with the mineral estate; and mineral developers could proceed without approval after the passage of sixty days from when their application was filed if the application had not been acted upon, subject to a damages suit for any unreasonable damage to the surface estate. The court stated that Duncan had violated Forest Service regulations by proceeding without Forest Service approval, and it enjoined Duncan and other mineral developers from surface usage unless they complied with the limited authority of the Forest Service as outlined in the injunction.

[1] On appeal, the Forest Service concedes that its review of proposed surface use plans must be reasonable and expeditious, but argues that the inflexible sixty-day limit is improper. It also argues that the district court erred in holding that after sixty days the Forest Service's authority to regulate lapses and its remedy is an after-the-fact damages suit. We agree.

[2] On remand, the district court must follow our mandate, and we retain the authority to determine whether the terms of the mandate have been scrupulously and fully carried out. *See Jaramillo v. Burkhart*, 59 F.3d 78, 80 (8th Cir.1995); *Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456–57 (8th Cir.1990).

The district court correctly recognized and incorporated our conclusions that the Forest Service has the limited authority to determine the reasonable use of the federal surface, that Duncan must obtain Forest Service approval prior to proceeding, and that Duncan improperly proceeded without Forest Service approval in this case. The district court erred, however, in construing footnote eight to mandate an inflexible time limit for Forest Service action. We stated in footnote eight that the Forest Service's inquiry regarding surface use plans must be reasonable and expeditious, a conclusion with which the Forest Service agrees and one that should be part of the injunction in this case. We did not, however, mandate a per se time limit that the Forest Service must follow. Footnote eight simply noted the Forest Service's representation at oral argument in *Duncan I*

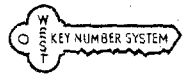
that approval of a surface use plan usually takes about two months, a time frame supported by the record.[1] To read a mandatory two-month requirement into our statement that this time frame was consistent with the Forest Surface's authority, however, reads footnote eight too broadly.

[3–5] Reasonableness of processing time must be determined on the basis of the totality of circumstances related to each surface use plan and the obligations of the Forest Service. The prior course of conduct between the parties is one factor to consider, but it is not the controlling factor. The Forest Service has only limited authority to regulate use of the subservient surface estate by the dominant mineral estate, and its processing time must be reasonable, expeditious, and as brief as possible. Should future developments reveal a pattern of unwarranted delay by the Forest Service in processing proposed surface use plans, it may be necessary to revisit our determination that the imposition of a sixty-day limitation is too rigid a schedule for the Forest Service to meet.

[6] The provision of the district court's order allowing Duncan to proceed without Forest Service authorization after the sixty-day limit, subject only to a later damages suit, was also incorrect. This provision effectively reinstates the original judgment we reversed in *Duncan I*, and is inconsistent with our conclusion that the Forest Service has the authority to require prior approval of a surface use plan before a developer uses the federal surface. Our mandate in *Duncan I* directed the district court to enter an order declaring that Duncan violated Forest Service regulations by proceeding absent Forest Service authorization of its surface use plan. Allowing unrestricted access after sixty days, or any specific period of time, would be inconsistent with our mandate in the first appeal.

Accordingly, we vacate the summary judgment order and permanent injunction. We remand for entry of summary judgment in favor of the Forest Service and for the entry of a permanent injunction consistent with both of our opinions in this case.

1. Between 1984 and 1992, Meridian submitted fifteen surface use plans to the Forest Service: thirteen were processed in less than sixty days, one in seventy-four days, and one in ninety days. The plan Duncan submitted in December of 1992 had been under review for approximately 100 days before Duncan improperly took unilateral action.



Brian Anthony CROWLEY, Sr., Appellant,

v.

Paul HEDGEPETH; John Emmett; Unknown/Unnamed Defendants, Appellees,

Houn, also known as Chip, sued as Mr. Houn; Lester Houn, Defendants.

No. 96–1550.

United States Court of Appeals, Eighth Circuit.

Submitted Dec. 9, 1996.

Decided March 28, 1997.

Inmate filed § 1983 action for alleged violation of his Eighth Amendment rights arising from delay in provision of sunglasses following eye surgery. The United States District Court for the Southern District of Iowa, Harold D. Vietor, J., granted summary judgment against inmate. Appeal was taken. The Court of Appeals, Magill, Circuit Judge, held that lack of verifying medical evidence that delay in provision of sunglasses had any adverse affect on inmate's prognosis precluded claim for deliberate indifference to medical needs.

Judgment affirmed.

1. **Criminal Law** ⇐1213.10(3)

In order to succeed on § 1983 claim for deliberate indifference to medical needs in

> fund payments on forms provided therefore under the contract and paid its employees working under the contract the wage scale called for or even higher pay."

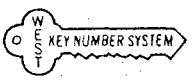
The actions taken as a whole convince us that Arco considered itself bound by the contract for a period of over 15 months after it became effective, and may not unilaterally repudiate its assent and the contract. See *Paint Power Inc.*, 230 N. L. R. B. 758, n. 1, and *Vin James Plastering Company*, 226 N.L.R.B. 125, 129.

[3] Arco's arguments to escape the effect of its conduct do not impress us. It attacks the ALJ's holding that it stopped compliance because of financial hardship. Reasonable inferences from the testimony support the ALJ. Arco's president testified that he told a Union representative: "I can't go along with these assessments, these dues and this Union business any more and stay in business." Economic need does not justify contract repudiation. *Oak Cliff-Golman Baking Company*, 207 N.L.R.B. 1063, 1064.

[4, 5] Arco says that its contract repudiation was proper because it had good faith doubt of majority Union status. The record shows no Board certification of the Union as the bargaining representative of the Arco employees. By its assents to the bargaining contracts between the Local Union and NECA, Arco voluntarily recognized the Union. Thereby a presumption was created that a majority of the employees desired Union representation. *N. L. R. B. v. Rogers I. G. A., Inc.*, 10 Cir., 605 F.2d 1164, 1165. This is not a case of refusal to bargain because of a good faith doubt of majority status, see *N. L. R. B. v. Burns International Services, Inc.*, 10 Cir., 567 F.2d 945, 950, and *N. L. R. B. v. King Radio Corp.*, 10 Cir., 510 F.2d 1154, 1156, cert. denied 423 U.S. 839, 96 S.Ct. 68, 46 L.Ed.2d 58. Arco claims the right to repudiate because of a good faith doubt of majority status. Approval of an employer's right to terminate unilaterally a contract in mid-term would have chaotic consequences. In any event, the Board's holding that in July, 1977, the Union represented a majority has substantial record support.

Arco says that the 1977 contract amendments, which increased employers' contributions to Union funds, were invalid because Arco did not approve them. The contract permits amendments with the consent of the parties, who were NECA and the Union. Nothing in the contract requires notice of an amendment to Arco or any other employer. The question is whether Arco was bound by the contract, not whether it was entitled to notice or could disapprove an amendment. Arco's contention that continued payments to Union funds would violate NLRA § 302, 29 U.S.C. § 186, relating to financial transactions of an employer or Union is frivolous because it assumes that Arco is not bound by the 1976–1978 contract. We hold that Arco is bound.

The petition for review is denied and the award enforced.



Edmund F. GUTIERREZ, Mildred J. Gutierrez and Larry G. Gabel, Plaintiffs-Appellants,

v.

Edward Mike DAVIS, Individually and d/b/a Tiger Oil Company, and Tiger Oil Company, Defendants-Appellees.

No. 78–1501.

United States Court of Appeals, Tenth Circuit.

Submitted March 14, 1980.

Decided April 4, 1980.

Lessors brought action against oil and gas lessee for conversion of casing left in abandoned well on lessors' property. The United States District Court for the Western District of Oklahoma, Luther B. Eubanks, J., granted summary judgment in

favor of lessees, and lessors appealed. The Court of Appeals, Logan, Circuit Judge, held that under Oklahoma law, lessors could not maintain conversion action against lessees who drilled through concrete plug in casing of abandoned oil well and who, after failing to find oil, replugged the hole without removing any part of the casing or harming it in any way.

Affirmed.

1. **Fixtures** ⇐15

Oil well casings are "trade fixtures."

See publication Words and Phrases for other judicial constructions and definitions.

2. **Fixtures** ⇐31

Trade fixtures can be removed by oil lessee within reasonable time after termination of the lease.

3. **Mines and Minerals** ⇐80

Under Oklahoma law, oil well casing which is not removed by lessee within reasonable time becomes property of landowner.

4. **Mines and Minerals** ⇐80

Oil well casing which had been abandoned by prior oil lessee belonged to landowners. 60 O.S.1971, §§ 5, 7.

5. **Trover and Conversion** ⇐2

Tort of conversion will lie only for wrongful deprivation of personal property.

6. **Trover and Conversion** ⇐2

Under Oklahoma law, lessors could not maintain conversion action against lessees who drilled through concrete plug in casing of abandoned oil well and who, after failing to find oil, replugged the hole without removing any part of the casing or harming it in any way.

7. **Mines and Minerals** ⇐78.1(6)

Where oil lease contained no restrictions on exploration and drilling, except that well could not be drilled within 200 feet of house or barn, lessees had right to drill through plug and casing of abandoned well.

Charles W. Stubbs, Oklahoma City, Okl., for plaintiffs-appellants.

R. Dean Rinehart of Rinehart, Rinehart & Rinehart, El Reno, Okl., for defendants-appellees.

Before McWILLIAMS, DOYLE and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

This is a diversity suit by Edmund F. Gutierrez and Mildred J. Gutierrez, fee owners and lessors, and Larry G. Gabel, tenant, against Edward Mike Davis d/b/a Tiger Oil Company, oil and gas lessee. The suit is for conversion of casing left in an abandoned well on the Gutierrezes' land from a prior oil well drilled by another lessee.[1] The district court awarded summary judgment in favor of Davis, ruling that use of the casing was within his rights under the lease, and that plaintiffs were estopped from seeking additional payment for this use because they had failed to include such a provision in the lease. Plaintiffs argue on appeal these rulings were erroneous and summary judgment was inappropriate. The case was submitted on the briefs by agreement of the parties.

The facts are simple. The Gutierrezes and Davis entered into a standard form oil and gas lease in April 1974, for which the Gutierrezes received a bonus of $7,750. The lease contained no restrictions on exploration and drilling, except that a well could not be drilled within 200 feet of the house or barn.

A few months later Davis notified plaintiffs that he intended to re-enter an oil well drilled by a prior lessee who, after the well proved to be dry, had plugged the hole with concrete and left the well casing in the ground. Plaintiffs informed Davis by return letter that the lease did not give him

1. The complaint also stated a claim for crop damage, but this issue is not before us on appeal.

permission to enter the abandoned well, and that they would consider re-entry an act of conversion. Davis proceeded to drill through the concrete plug and casing; when this new drilling also failed to find oil, he replugged the hole and abandoned the site.

Plaintiffs sue for conversion of the casing, claiming damages in the amount of its fair market value. They make no allegation that Davis removed any part of the casing or harmed it in any way.

[1–4] Oil well casings are trade fixtures. *See Luttrell v. Parker Drilling Co.*, 341 P.2d 244, 246 (Okla.1959). As an exception to the general rule that personal property attached to the land becomes part of the real estate, trade fixtures can be removed by the lessee within a reasonable time after termination of the lease. *Id. See also* 3 W. Summers, Oil & Gas Law § 526 (1958). Under Oklahoma law, when the casing is not removed by the lessee within a reasonable time, it becomes property of the landowner. *Garr-Woolley v. Martin*, 579 P.2d 206 (Okla.Ct.App.1978). Casings, as objects "imbedded" in land, are by statutory definition real property. *See* Okla.Stat.Ann. tit. 60, §§ 5, 7 (West 1971). Therefore the abandoned casing here was real property belonging to the Gutierrezes.

[5, 6] Oklahoma courts have consistently held that the tort of conversion will only lie for wrongful deprivation of personal property. *Davidson v. First State Bank & Trust Co., Yale*, 559 P.2d 1228, 1231 (Okla.1976); *Benton v. Ortenberger*, 371 P.2d 715, 716 (Okla.1962). This rule has been specifically applied to deny an action for conversion of fixtures not severed from the real estate. *Etchen v. Ferguson*, 59 Okl. 253, 159 P. 306, 308 (1916). Plaintiffs cannot maintain the present action under Oklahoma law.

[7] Even if we read the pleadings expansively to state a claim for breach of contract, we must affirm the denial of any relief. The lease gives Davis the right to use the land for the "purpose of exploring . . . mining and operating for oil" and other minerals. We agree with the trial court that, without express language to the contrary, a fair reading of the contract gives Davis the right to drill through any part of the real estate including the plug and casing of the abandoned well when, as here, it was a reasonable use within the stated purpose.

Affirmed.

UNITED STATES of America, Respondent-Appellee,

v.

James George SHEPHERD, Petitioner-Appellant.

No. 79–1323.

United States Court of Appeals, Tenth Circuit.

Submitted March 20, 1980.

Decided April 8, 1980.

Defendant, who had pled guilty, moved to vacate sentence. The United States District Court, Olin Hatfield Chilson, J., 467 F.Supp. 71, denied motion, and defendant appealed. The Court of Appeals held that when sentencing court asked defendant directly if he was to plead guilty, informed him of possible sentence, then asked him again if he wished to plead guilty and defendant replied in the affirmative both times, and where if in fact defendant was told he would receive probation or a maximum six-year sentence, he was clearly advised by someone other than his attorney, the United States Attorney or the trial judge, technical violation of Rule 11 by court which failed to personally determine that plea was made voluntarily would not support collateral attack on guilty plea.

Affirmed.