MINUTE ITEM
22

6/29/82
W 9649
West

Calendar Item 22 was pulled from the agenda prior to the meeting.

Attachment: Calendar Item 22.

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INFORMATIONAL
CALENDAR ITEM

6/29/82
W 9649
West

22

REQUEST FOR ISSUANCE OF A PROSPECTING PERMIT
OR NON-COMPETITIVE GEOTHERMAL LEASE
FOR STATE FEE LANDS
ON COBB MOUNTAIN IN LAKE COUNTY

This Calendar Item is introduced at the request of California Geothermal, Inc. (see Exhibit "A").

BACKGROUND: Petroleum Leasing and Development Corporation applied for a geothermal prospecting permit on May 9, 1973, for State fee lands in Lake County.

The application was purportedly "assigned" to California Geothermal, Inc. (CAL-GEO) on January 21, 1974. Pursuant to a request by staff CAL-GEO submitted a draft EIR for Cobb Mountain on November 8, 1974. The draft EIR was assigned a State Clearinghouse number and circulated. Several negative comments were received; chief among them was the intention of the United States Fish and Wildlife Service (USFWS) to classify Cobb Mountain as a "critical habitat zone" because of peregrine falcon sightings in the area.

It was not until April 1977 that information was received from USFWS that Cobb Mountain would not be classified as a critical habitat.

In late 1977, consideration of Cobb Mountain as a known geothermal resources area, was raised by the Long Beach staff, which led to the State Lands Commission's approval of such a classification on November 27, 1978.

On October 23, 1981, a letter was sent to CAL-GEO informing them that the State lands they were interested in had been classified as a KGRA, and, therefore, their advance rental payment was being returned.

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CAL-GEO wrote a letter on November 5, 1981 requesting that the State delay any lease sale involving Cobb Mountain.

On April 15, 1982, CAL-GEO's attorney, Mr. Mathew V. Brady, wrote a letter (a copy is attached) to Claire Dedrick, the Executive Officer, requesting that the Commission issue a geothermal prospecting permit or a non-competitive lease based on the following contentions:

1. Violation of CAL-GEO's procedural due process rights.

2. Improper KGRA classification.

3. The operation of Government Code Section 659-20 et seq. (AB 884).

It was also Mr. Brady's request that his client's position be brought before the June 29, 1982 Commission meeting.

It is staff's opinion that all of CAL-GEO's arguments are unsubstantiated, because no prospecting permits may be issued after the Commission has made a KGRA classification pursuant to former P.R.C. Section 6909.

Formal Commission action on CAL-GEO's request of April 15, 1982, may adversely impact on the Commission's legal position should litigation arise. Staff recommends against any formal Commission action on CAL-GEO's request.

In addition, it should be made clear to CAL-GEO that any Commission decision to allow oral or written presentations on this matter does not constitute a waiver of any rights of the State of California, acting by and through the State Lands Commission nor does it constitute a review, opinion, reconsideration of the permit application, admission of fact or consideration of the merits of the alleged claims put forth by California Geothermal, Inc.

CALENDAR ITEM NO. 22 (CONTD)

AB 884: N/A.

EXHIBIT: A. CAL-GEO Request Letter.

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EXHIBIT "A"

MATTHEW V. BRADY
ATTORNEY AT LAW
1314 H STREET SUITE 200
SACRAMENTO, CALIFORNIA 95814
916-442-3268

April 15, 1982

Ms. Claire Dedrick
Executive Officer
California State Lands Commission
1807 13th Street
Sacramento, CA 95814

Subject: California Geothermal, Inc.
Application for Prospecting
Permit W 9649

Dear Ms. Dedrick:

By this letter, California Geothermal, Inc., requests the Commission issue forthwith, a Prospecting Permit with an initial term of two years, effective immediately, or alternatively, a noncompetitive for the area of land encompassing the Geothermal Prospecting Permit Application number 9469 filed with the Commission by California Geothermal in 1973. This lease or prospecting permit should be based upon terms and conditions and royalty rates as they existed on November 26, 1979. The logic and legal authority for this request is outlined in the materials below. We request that this matter be set for hearing before the Commission at its next business meeting. Please advise me of the time and location for this hearing.

Background

On May 9, 1973, Petroleum Leasing and Development Corporation applied for a geothermal prospecting permit for the Cobb Mountain area. On June 1, 1973, the State Lands Division acknowledged receipt of the materials and requested additional environmental information from the applicant in the form of an environmental impact report. On June 21, 1974, the application was transferred to California Geothermal, Inc. During January of 1974, certain additional materials were requested from California Geothermal and the materials were forwarded to the Commission on February 6, 1974 and February 19, 1974. On November 8, 1974, a draft environmental impact report was submitted to the Division. This draft was prepared by ECOVIEW and is dated October 20, 1974. On December 16, 1974, this document was circulated by the Division for comment. The comment period was extended once and according to your files, closed on February 25, 1975.

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Numerour comments were filed on the Draft Environmental Impact Report and a joint hearing on it was proposed. The file does not indicate if a hearing was ever held. On March 12, 1975, after the close of the comment period, the State's Resources Agency submitted its comments and discussed at length the presence of the American Peregrine Falcon and the proposed designation of Cobb Mountain as a Critical Habitat Zone for the American Peregrine Falcon. Portions of the Joint U.S. Fish and Wildlife Service and California Department of Fish and Game report on the American Peregrine Falcon are included in the file.

In May of 1975, A.D. Willard of your staff concluded in a memo that not withstanding the existence of the Critical Habitat Zone for the American Peregrine Falcon, that a prospecting permit could be issued.

It appears from the file that until August 13, 1976, little happened regarding the issuance of a prospecting permit, given the proposals by the Federal and State Fish and Wildlife Agencies to declare portions of Cobb Mountain as a Critical Habitat Zone. This was the case even though A.D. Willard concluded that a prospecting permit could be issued.

In October and November of 1976, the Commission commented on the Peregrine Falcon issue and alleged that inclusion of Cobb Mountain was unjustified. In February of 1977, the U.S. Fish and Wildlife Service deleted Cobb Mountain from inclusion as a part of the Critical Habitat Zone.

The next entry in the file is a letter dated September 13, 1977 from Republic Geothermal, Inc., which enclosed a proposed option agreement between California Geothermal, Inc. and Republic Geothermal, Inc. In January of 1978, a follow-up letter was sent by Republic Geothermal asking for some response from the Commission. None was ever received.

In December of 1977, E.J. Everitts wrote a memorandum to J.F. Trout stating that staff desired to offer the parcel covered by the prospecting permit for competitive bid since a "commercial" well was drilled half a mile southwest of Cobb Mountain. This information was never communicated to California Geothermal. It appears, from the file, that during most of 1978, little happened with the proposed prospecting permits on the Cobb Mountain area. However, on November 20, 1978, Eileen Burnett submitted a memorandum proposing to classify the lands under the prospecting permit as being within a known geothermal resources area. On November 27, 1978 the

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Commission voted to classify the area under the prospecting permit as a known geothermal resources area.

At no time was written notice given to California Geothermal nor was any person associated with California Geothermal orally told of the pending action or decision on the part of the Commission to classify the area underlying the prospecting permit as a known geothermal resources area. Nor was a written notice sent to California Geothermal until October 21, 1981, almost three years since the Commission had allegedly classified the land as a known geothermal resources area.

I.

Given that substantial property rights were affected, before the Commission could classify the Cobb Mountain area as a known geothermal resources area, notice and opportunity to be heard must be given.

On November 27, 1978, at the Commission's regular business meeting, the staff submitted, for the Commission's consideration calendar item number 45. This calendar item requested the Commission to take several steps. First, to classify certain lands described in Exhibit C of that item as being a known geothermal resources area. Secondly, to authorize the Commission to lease certain lands described in Exhibit D of that calendar item. The area which is subject to prospecting permit W 9649 was included in the areas described in Exhibit C.

In addition to questioning the sufficiency of the evidenciary presentation and compliance with the statute which is the basis for declaring an area a known geothermal resources area, the Commission's failure to notify California Geothermal of the intended presentation voids the entire determination and classification process. This action is required by virtue of both the U.S. and California Constitutions which guarantee individuals the right to .... "reasonable notice and an opportunity to be heard..." whenever a governmental activity will result in a significant deprivation of a property right. Horn vs. County of Ventura 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P 2d 1134.

It is beyond question that the Commission's actions purports to "void" the existing prospecting permit application on Cobb Mountain by virtue of the application of Public Resources

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Code Section 6912(d). This application is also obviously a significant property right. Given that it has been conveyed by various parties for valuable consideration without objection by the State, twice. Moreover, after November 26, 1978, California Geothermal was entitled to a permit by operation of the law, unless the Commission specifically acted to deny the request.

II.

The classification of Cobb Mountain, as being within a known geothermal resources area is not supported by substantial evidence and not in conformance with the requirements of Public Resources Code Section 6912(d).

In addition to denying California Geothermal its due process rights, the Commission has illegally determined that Cobb Mountain is a known geothermal resource area since there is no evidence within the record of the Commission's proceedings to justify its classification as a KGRA. First, Public Resources Code Section 6912(d) provides that a KGRA must include "... at least one well capable of producing geothermal resources in commercial quantities". The KGRA designation of the area encompassing prospecting permit application W 9649 does not contain a well capable of producing geothermal resources in commercial quantities. While wells of unspecified value may be around the area of prospecting permit application W 6949, since the prospecting area itself does not contain a well capable of producing geothermal resources in commercial quantities, the Commission is acting in excess of its jurisdiction in its efforts to classify the area as a KGRA in that it failed to comply with the explicit language of Public Resources Code §6912(d).

Moreover, there is no substantial evidence to support the Commission's conclusion since there is no evidence in the record. All that has been presented for the Commission's consideration are conclusionary statements and heresay. It is well recognized that the Commission cannot base an adjudicatory finding solely on heresay evidence. Layton v. Merit System Commission, (1976) 60 CA 358, 67, Walker v. City of San Gabriel (1942) 20 C 2879.

Lastly, there is a total failure of the Commission to prepare findings that comply with the mandates of Topanga Association For a Scenic Community v. County of L.A. (1974) 11 C 3d 506, 113 Cal. Rptr. 836, 522 P. 2d 12.

III.

California Geothermal is entitled to a prospecting permit and/or a noncompetitive lease by virtue of the Commission's failure to respond to the mandates of Government Code Section 65900 et sec.

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As the Commission is well aware, AB 884, found beginning at 65900 of the Government Code requires the Commission to act on applications for development projects within a specific set of time parameters. In fact, as I recollect, AB 884 was enacted in part as a result of the State Lands Commission's failure, in conjunction with other State agencies, in the Dow Project.

Government Code Section 65924 requires the Commission to make decisions about the acceptability or non-acceptability of applications for projects filed with the Commission prior to January 1, 1978 by no later than November 26, 1978 or these applications will be deemed complete by failure of the Commission to act. (Government Code Section 65950, 65953, 65956.) Since California Geothermal's application was submitted in 1973, the Commission should have responded to California Geothermal's application by November 26, 1978. However, no response was given Geothermal about the acceptability of its application. Interestingly, and somewhat ironically, the Commission decided to declare the area encompassing the prospecting permit a KGRA on November 27, 1978. As described above, this action was done in violation of the Geothermal Resources Act and the Due Process Clause of the U.S. and California Constitution. It is thus void.

When an application is deemed complete or accepted as complete, as California Geothermal's was on the operation of law on November 26, 1978, an agency has one year in which to approve or disprove the application. Government Code Section 65950, 65953. Failure of the agency to act within the one year required by the Act is deemed to be approval of the project. Government Code Section 65956. Since the State Lands Commission failed to act within the one year time period from the date the project application was deemed to be complete, California Geothermal is entitled to the prospecting permit and/or alternatively, a lease.

Pursuant to the Geothermal Resources Act of 1976, the prospecting permit has a term of three years, which might be argued to expire on November 26, 1982. However, we allege that given your failure to prepare and submit a lease or permit, that the prospecting permit can and should be issued for a term of three years, effective immediately.

If it can be argued that the amendments to the Geothermal Resources Act of 1976 which became effective on January 1, 1979, apply to this project, the prospecting permit would have had a term of two years. This permit arguably would have expired on November 26, 1981. However, this ignores the provisions of Public Resources Code Section 6910(d) which tolls the running

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of any time or obligations due to "... wars, riots, acts of God, laws, rules and regulations or any Federal, State, County or Municipal agency or by such other unusual conditions as are beyond the control of the lessee". It is our position that given the Commission's failure to act, that California Geothermal is entitled to a prospecting permit.

Alternatively, California Geothermal asserts that it is entitled to a noncompetitive lease pursuant to Public Resources Code Section 6911 of the Geothermal Resources Act of 1967, or Section 6910(c) of the Geothermal Resources Act as amended in 1979.

We have discussed the above with Mr. Robert C. Hight, Mr. Robert Faber, and Mr. Rick West of your legal staff. We advised them that this letter was coming and that we desire that the permit/lease be issued as soon as possible.

Should you have any additional questions regarding the preceding, or desire to discuss the matter in any greater detail, please do not hesitate to contact me. However, because of our desire to move as expeditiously as possible, we ask that this matter be scheduled for hearing before the Commission on its next business meeting. Should you have any additional questions or should you wish to discuss a possible resolution of this matter, please do not hesitate to contact me.

Pending resolution of this matter, I am returning check number 415679 sent to California Geothermal by C.P. Priddy.

Cordially,

MATTHEW V. BRADY

MVB:sm
cc: Robert C. Hight

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