No. 17-15616

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PIT RIVER TRIBE, *et al.*,

Plaintiffs-Appellees

v.

BUREAU OF LAND MANAGEMENT, *et al.*,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA
(NOS. 2:04-CV-0956-JAM-AC, 2:04-CV-0969-JAM-AC)

REPLY BRIEF FOR THE FEDERAL APPELLANTS

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TABLE OF CONTENTS

TABLES OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

INTRODUCTION

The issue presented in this appeal is the legal question whether § 1005(a) of the Geothermal Steam Act ("GSA"), 30 U.S.C. § 1005(a), as in effect in 1998, authorized the continuation of all geothermal leases in a unit at the end of their primary terms based on a unit operator's completion anywhere within the unit of a well actually producing or capable of producing steam in commercial quantities. Agreeing with plaintiffs, the district court held that production continuations based on well completion during the primary term were authorized under § 1005(a) only on a lease-by-lease basis—i.e., only for the lease on which the well was drilled—unlike the provisions authorizing production continuations during extended terms (§ 1005(c) and § 1005(g)(2)).

We demonstrated in our Opening Brief that the district court's statutory interpretation was wrong. Section 1005(a)—when read in the context of the GSA as a whole against the backdrop of the unitization principle developed for oil and gas reservoirs, and considering the GSA's legislative history—is properly interpreted to authorize production continuations on a unit basis just like § 1005(c) and § 1005(g)(2). Plaintiffs' Answering Brief fails to show otherwise.

ARGUMENT

Geothermal reservoirs, like oil and gas reservoirs, often underlie multiple leases. Geothermal steam may be efficiently produced to generate electricity (or

utilized for other purposes) without drilling a well on the surface of each lease. In order to "properly conserve[e] the natural resources" of geothermal reservoirs, 30 U.S.C. § 1017 (Add. 65), Congress imported the unitization principle developed for oil and gas leasing—that all leases in a unit are credited with exploration or production on any lease in the unit—into all the GSA's lease-term provisions. Throughout their Answering Brief, plaintiffs characterize geothermal leases as "nonproducing leases" or "nonproductive leases" unless a well is drilled on the surface. That is incorrect: plaintiffs do not dispute, and cannot dispute, that geothermal steam underlying a lease may be efficiently utilized without drilling a well on every lease.

Plaintiffs assert (at 34) that their position is supported by the "plain text" of § 1005(a) (Add. 60), and thus argue (at 39-48) that this Court may decide the statutory question presented at step one of the two-step analysis set out in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984). But while plaintiffs maintain their position that § 1005(a) does not authorize production continuations on a unit basis (at least not based on capable wells), they largely abandon in their Answering Brief the specific arguments they made in the district court (which that court accepted) and offer a series of different, mutually inconsistent arguments. Plaintiffs' "plain text" argument is completely undermined by their shifting positions.

Plaintiffs argue in the alternative that, if this Court finds the GSA ambiguous, this Court should decide at step two of the *Chevron* analysis that the Department of the Interior's implementing regulations support plaintiffs' interpretation rather than BLM's. Plaintiffs are incorrect. BLM's position in this litigation is entirely consistent with the Department of the Interior's implementing regulations. BLM's interpretation—that § 1005(a) authorized the continuation of all leases in a unit based on an actually producing or capable well in the unit—is thus entitled to deference.

I. Plaintiffs' *Chevron* step one arguments lack merit.

Our Opening Brief sets forth a coherent, plain-language interpretation of how § 1005 (Add. 60-62) applied to geothermal leases in units: (1) five-year work extensions could be granted under § 1005(c) and § 1005(g)(1) based on work anywhere within the unit; and (2) production continuations could be granted under § 1005(a), § 1005(c), and § 1005(g)(2) based on a producing or capable well anywhere within the unit. In contrast, plaintiffs' *Chevron* step one arguments are replete with inconsistencies, omissions, and mischaracterizations.

A. Plaintiffs' brief abandons the textual interpretation advanced in the district court and offers a series of inconsistent textual interpretations, all of which lack merit.

In the district court, plaintiffs agreed with our position on work extensions under § 1005(c) and § 1005(g)(1), and with our position on production

continuations under § 1005(c) and § 1005(g)(2), and disagreed only with our interpretation of production continuations under § 1005(a). The distinction plaintiffs drew in the district court focused on the express reference to "unit plan" in § 1005(c) and § 1005(g)(1), and the absence of those words in § 1005(a). *See*, e.g., ER30. The district court so held. ER41-43.

We argued in our Opening Brief (at 35-36) that there was no reason that Congress would have precluded the unitization principle when a unit operator completed an actually producing or capable well during the *primary term*, while at the same time incorporating the unitization principle when a unit operator completed such a well during a subsequent *extension period*. We explained that the express references to "unit plan" in § 1005(c) and § 1005(g)(1) did not lead to the conclusion that § 1005(a) precluded the unitization principle. *See* Opening Br. 34-35 (explaining the textual context for the reference to "unit plan" in § 1005(c)); *id*. at 41-42 (explaining the textual context for the reference to "unit plan" in § 1005(g)(1)). Plaintiffs' Answering Brief does not respond to those textual arguments but instead simply offers new statutory interpretations for their desired result, none of which flows from the text of § 1005.

1. Plaintiffs' reliance on Congress's use of the singular number in § 1005(a) is misplaced.

In support of their position that § 1005(a) did not authorize production continuations for all unit leases based on an actually producing or capable well

within the unit, plaintiffs point out (at 40) that § 1005(a)'s "authority to continue a geothermal lease beyond its primary term is phrased in the singular," and they argue that this phrasing "reflect[s] Congress' intent that additional terms may only be granted on a lease-by-lease basis." That argument is unpersuasive.

Under 1 U.S.C. § 1, in "determining the meaning of any Act of Congress," "words importing the singular include and apply to several persons, parties, or things" and "words importing the plural include the singular," "unless the context provides otherwise." There is no contextual reason to depart from that general interpretive rule. Congress also used the singular number in drafting § 1005(c) and § 1005(g), which plaintiffs conceded in the district court authorized both work extensions and production continuations on a unit basis. This Court applied 1 U.S.C. § 1 in rejecting a similar argument that a reference in a statutory subsection to "discharge" in the singular required case-by-case treatment rather than categorical treatment, particularly when related subsections that clearly authorized categorical treatment also referred to "discharge" in the singular. *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832, 874 n.63 (9th Cir. 2003). Plaintiffs' Answering Brief does not explain why the use of the singular should have an effect in § 1005(a) different from that in § 1005(c) and § 1005(g).

The use of the singular in all three of these subsections is entirely consistent with our position that Congress authorized work extensions and production

continuations for all unit leases when the unit operator satisfied the statutory requirements anywhere in the unit. The term of each individual lease still mattered because a lease benefited from the unitization principle only during the period it was in a unit. If the unit agreement terminated, or if the unit area contracted to exclude the lease, the lessee had to satisfy the requirements for work extensions and production continuations based on work or production on that specific lease. In addition, the maximum term of a geothermal lease was 50 years (the 10-year primary term plus the 40-year continued term) whether or not the lease was in a unit.[1] Although a *unit agreement* could continue as long as production continued within the unit, each geothermal lease within the unit expired at the end of its 50-year term, at which time the lessee had to apply for renewal for a second term.[2]

Plaintiffs' argument is also undercut by the fact that although the production-continuation provision of the Mineral Leasing Act ("MLA"), 30 U.S.C. § 226(e) (Add. 3), was similarly phrased in the singular, plaintiffs concede (at 9) that it authorized the continuation of all leases in oil and gas units based on production anywhere in the unit. As we explained (Opening Br. 3, 10-11), the GSA's lease-term provisions were modeled on the MLA's provisions. "The

[1] The GSA differed from the MLA in this regard. Under the MLA, the terms of oil and gas leases in units continued so long as the unit agreement continued to exist.

[2] For the same reasons, plaintiffs' reliance (at 41) on the use of the singular in BLM's regulations implementing § 1005 is unavailing.

guiding principle … is that if it is natural and reasonable to think that the understanding of legislators … is influenced by another statute, then a court construing such an act also should allow its understanding to be similarly influenced." 2B *Sutherland Statutory Construction* § 51:3 (7th ed. Nov. 2018 update).

2. Plaintiffs' new distinction between work extensions and production continuations has no textual basis.

In their Answering Brief (at 21-22, 44-45), plaintiffs change their position on production continuations under § 1005(c) and § 1005(g)(2). They argue that unit leases could be granted five-year work extensions under § 1005(c) and § 1005(g)(1) based on exploratory work anywhere in the unit, but that a unit lease could be continued under § 1005(a), § 1005(c), and § 1005(g)(2) only if an actually producing or capable well was drilled on the surface of that particular lease. That is, plaintiffs distinguish all work extensions from all production continuations. *See* Answering Br. 45 ("The GSA thus consistently treated short extensions and longer continuations differently, for logical reasons.").

There is no textual basis for this distinction in § 1005(c) (Add. 60). That provision addressed work extensions and production continuations *in the same sentence*:

> Any lease for land on which, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and

> are being diligently prosecuted at that time *shall be extended for five years and so long thereafter, but not more than thirty-five years, as geothermal steam is produced or utilized in commercial quantities.*

§ 1005(c) (emphasis added). Plaintiffs offer no explanation for how this language supports their new distinction. *See* Answering Br. 19-20 (distinguishing § 1005(c) work extensions and production continuations without any explanation); *id*. at 44 (stating that § 1005(c) authorized drilling extensions for all unit leases but not mentioning production continuations). Indeed, in their explanation (at 12-13) of the textual differences between the MLA and GSA, plaintiffs argue inconsistently that § 1005(c) authorized both work extensions and production continuations on a unit basis.

Plaintiffs do suggest a textual basis for their new distinction between § 1005(g)(1) work extensions and § 1005(g)(2) production continuations: "new subsection 1005(g)(1) authorized … an extension for '[a]ny geothermal lease issued pursuant to this chapter for land on which, or for which under [an] approved cooperative or unit plan of development or operation,' " bona fide efforts were undertaken, but "Congress did not employ this same construction for new subsection 1005(g)(2), which provided an alternative path for obtaining a lease continuation, akin to subsection 1005(a)." Answering Br. 44-45; *see also id*. at 17-18 (explaining that § 1005(g)(2) "did not authorize unit-based continuations"). But this argument is unpersuasive. Plaintiffs simply ignore our

explanation (Opening Br. 41-42) that § 1005(g)(1) referenced "unit plan" in a phrase specifying the leases that *were not eligible* for work extensions under § 1005(g)(1) because they *were eligible* for production continuations under § 1005(a) or § 1005(c). And even if the quoted phrase specified the leases that were eligible for extensions under § 1005(g)(1), it is more plausible that Congress intended the unitization principle to be implied—not precluded—in § 1005(g)(2). This is particularly so given that § 1005(g)(2) expressly referred back to § 1005(g)(1): "A lease extended pursuant to paragraph (1) shall continue so long thereafter as geothermal steam is produced or utilized in commercial quantities" not to exceed a total of 50 years.

Plaintiffs may have adopted this new work-extension/production-continuation dichotomy to counter our charge of illogical inconsistency in their prior distinction between production continuations under § 1005(a) and those under § 1005(c) and § 1005(g)(2), but their new distinction makes no more sense than their prior one. Congress could not have intended that unit leases share the *costs* of producing geothermal steam but then have no share of *revenues* unless the unit operator drilled a well on the surface of each individual lease (even if that well was unnecessary for, or detrimental to, efficient production). In fact, plaintiffs' complete rejection of the unitization principle for all production continuations is contrary to the text of § 1017 (Add. 65-66). Section § 1017 provided for "unit

plan[s] of development or *operation*" (emphasis added) in order to "properly conserv[e] the natural resources of any geothermal pool, field, or like area." Plaintiffs' effort to draw a distinction between work extensions and production continuations in Interior's implementing regulations is similarly unpersuasive, as shown in Part II.A below (pp. 22-23).

3. Plaintiffs' new distinction between actually producing wells and capable wells similarly lacks a textual basis.

Plaintiffs suggest yet another interpretation of § 1005's production-continuation provisions based on the capable-well concept in § 1005(d). According to plaintiffs, even if § 1005(a), § 1005(c), and § 1005(g)(2) authorized continuation of all unit leases based on an *actually producing* well in the unit, § 1005(d) precluded unit-based continuations based on a *capable* well in the unit. Answering Br. 12 ("Congress made a deliberate choice, expressed through the GSA's text, to allow 'capable well' continuations only on a lease-by-lease basis."); *id*. at 42 ("a lease-by-lease determination was the only logical way for BLM [to grant an additional term] where there is no actual production"). But plaintiffs do not explain how that distinction in the application of the unitization principle,

which is inconsistent with their other interpretations, is supported by the text of § 1005 or by logic.[3]

Focusing on § 1005(d) as originally enacted in 1970 (Add. 28-29), plaintiffs suggest (at 12) that "[c]oupling the 'capable well' innovation with the 'unitization' concept would allow a single nonproducing but potentially viable well completed on one lease to serve as the basis for continuing all other nonproductive leases in a unit," which "would undermine the requirement that lessees diligently explore and develop resources or, alternatively, timely relinquish their leases for other public uses." Contrary to plaintiffs' suggestion, § 1005(d) as originally enacted authorized lease continuations based on a capable well only if the lessee (or unit operator) had entered into a bona fide sale for utilization of the steam from the capable well at a facility scheduled for installation no later than five years beyond the ten-year primary term. Congress's provision of a modest additional period for

[3] Plaintiffs also purport to see this distinction in the regulations implementing § 1005(d). Answering Br. 42 (citing the definition of "operator" in 43 C.F.R. § 3200.0-5(v) and the requirement in 43 C.F.R. § 3203.1-3(b) that the operator of a lease describe the diligent efforts completed with respect to a capable well for the lease year). But the "operator" for leases in a unit is the unit operator. Nothing in these regulations precludes BLM from making a "diligent efforts" determination for a capable well based on the work of a unit operator on behalf of all unit leases.

completion of a power-generation or other steam-utilization facility evidenced no intent to reject the application of the unitization principle in § 1005(a).[4]

Nor can we discern any textual or logical support for a different application of the unitization principle for actually producing and capable wells in the 1988 amendments to § 1005(d) (Add. 60). Those amendments eliminated the five-year deadline for actual production and provided instead that "the completion of a well capable of producing geothermal steam in commercial quantities" constituted "produc[tion] or utiliz[ation] in commercial quantities" "so long as the Secretary determines that diligent efforts are being made toward the utilization of the geothermal steam." Plaintiffs quote some legislative history explaining this change, but it does not support their assertion (at 18) that the amendment "did not authorize unit-based continuations for nonproductive leases."

B. Congress enacted the GSA against the backdrop of the MLA and incorporated the unitization principle developed for oil and gas production.

We explained in our Opening Brief (at 4-10) that Congress first applied the unitization principle to oil and gas leases in the Mineral Leasing Act in 1930, and that the MLA was thereafter consistently construed to incorporate that fundamental

[4] Plaintiffs fail to understand why, in 1970, "Congress limited the new 'capable well' innovation to § 1005(a)." Answering Br. 13. The answer is that Congress wanted actual production to be achieved in 15 years. Under § 1005(a) and § 1005(d) as originally enacted, Congress afforded a total of 15 years to achieve actual production, the same amount of time afforded by § 1005(c).

principle even when a specific provision did not expressly reference it. Though plaintiffs incorrectly suggest (at 9) that Congress did not incorporate the unitization principle into the MLA until 1960, they did not identify any error in our explanation. Indeed, plaintiffs specifically acknowledge (at 9) that MLA § 226(e) provided for production continuations for all unit leases based on a well anywhere in the unit whether the unit lease was in a primary term or an extended term.

We then demonstrated (Opening Br. 10-12, 13-14) that Congress modeled the GSA on the MLA in significant respects, including its unitization principle. Plaintiffs so acknowledge. Answering Br. 5 (GSA's lease-term provision, 30 U.S.C. § 1005, "borrowed some language from" the MLA's lease-term provision, 30 U.S.C. § 226(e)); *id*. at 8 (Congress "borrowed some concepts" from the MLA); *id*. at 46 (Congress borrowed "some basic ideas," "including the unitization concept," from the MLA). They argue, however, that Congress significantly limited the unitization principle when it incorporated it into the GSA. Their arguments lack merit.

While plaintiffs concede that continuing the terms of oil and gas leases on a unit basis did not discourage diligent exploration and development by oil and gas lessees, plaintiffs repeatedly suggest (at 5, 9-10, 35) that applying the unitization principle to geothermal leasing would somehow discourage diligence and promote

speculation by geothermal lessees. Plaintiffs' distinction appears to be based on a fundamental misconception about how units work:

> As long as [an oil and gas] lessee within the common pool was producing or diligently moving toward production through drilling, all other leaseholders within the same unit had an incentive to continue developing their leases in accordance with the unit agreement. No rational lessee would sit on lease rights for speculative purposes as the common pool was drained by the surrounding leases.

Answering Br. 9-10. Plaintiffs fail to understand that, once a unit is formed (whether an oil and gas unit or a geothermal unit), the designated unit operator undertakes operations on behalf of *all* the lessees, funded by the lessees according to the shares specified in the unit agreement. *See* Opening Br. 15-16. Lessees may monitor the operator's performance but they do not conduct separate operations. Plaintiffs' vision of every unit lessee separately drilling on every lease surface is precisely what unit formation was designed to avoid. Plaintiffs' suggestion (at 55) that inefficient competition among lessees (i.e., unnecessary drilling into a common reservoir) was an issue only with respect to oil and gas reservoirs is also wrong. While it is true that Congress recognized some challenges unique to geothermal development, plaintiffs fail to identify any difference relevant to the unitization principle.

Nor do any textual differences between the MLA and GSA undercut our demonstration that the GSA incorporated the unitization principle. Plaintiffs point out (at 12-13) that Congress incorporated the substance of the first two sentences

of MLA § 226(e) (Add. 3) which did not expressly reference "unit plans" into GSA § 1005(a), but incorporated the substance of the third sentence of MLA § 226(e) which expressly referenced "unit plans" into GSA § 1005(c). They infer from this split of one MLA subsection into two GSA subsections that Congress intended to preclude the application of the unitization principle in § 1005(a). Answering Br. 12-13; *see also id*. at 46 (Congress's "transformation" of the unitization concept "is evident in the plain text and structural organization of the GSA"). But it is more plausible that splitting one MLA subsection into two GSA subsections was merely a stylistic drafting choice, not a substantive repudiation of the unitization principle when a unit operator succeeded in drilling an actually producing or capable well during the unit leases' primary term (the result Congress wanted to achieve). *See*, e.g., *United States v. O'Brien*, 560 U.S. 218, 233-34 (2010) (amending 18 U.S.C. § 924(c) by moving a provision to a separate subparagraph was properly viewed as a stylistic change to improve readability, not a substantive change).

Plaintiffs try to explain why Congress could have intended to import the unitization principle into § 1005(c) but not § 1005(a), but their explanation makes no sense. They assert (at 13) that "[i]mportation of the unit concept into subsection 1005(c) did not raise the same concerns as would have its importation into subsection 1005(a) because subsection (c) required actual drilling or production, whereas subsection (a) did not." But plaintiffs overlook the obvious fact that a unit

operator could not complete an actually producing or capable well during the primary term (the situation covered by § 1005(a)) without "actual drilling." As noted above, moreover, this argument that § 1005(c) authorized both work extensions and production continuations is inconsistent with plaintiffs' argument that each subsection of § 1005 (including § 1005(c)) draws a line between work extensions and *all* production continuations.

Plaintiffs also point out (at 13-14) that the MLA's unitization provision, 30 U.S.C. § 226(j) (Add. 4), was a subsection within the section that also addressed lease terms, whereas the GSA's unitization provision, § 1017 (Add. 65-66), was in a separate section. But that argument is inconsistent with plaintiffs' immediately preceding argument in which plaintiffs treated two GSA subsections (§ 1005(a) and § 1005(c)) as entirely distinct. Once again, plaintiffs offer no persuasive support for their assertion (at 14) that numbering the MLA's provisions in a different way evidenced a "deliberate departure" from the substance of the MLA's unitization framework. Indeed, the MLA's lease-term provision and unitization provision were in separate sections prior to 1960, *see* 30 U.S.C. §§ 226 and 226e (1958), but the 1960 Amendments made them subsections in the same section, 30 U.S.C. §§ 226(e) and 226(j) (Add. 3-4). This restructuring may fairly be considered one of the "stylistic" amendments that Congress made in 1960. *See* Opening Br. 9.

Plaintiffs further note (at 14) that Congress did not incorporate into § 1017 the specific provision of MLA § 226(j) expressly confirming that all unit leases continue based on production anywhere in the unit so long as they remain subject to the unit plan. But under the reasoning of *General Petroleum Corp.*, 59 Interior Dec. 383 (1947), it was unnecessary for Congress expressly to provide that all unit leases continued based on production anywhere in the unit because that result necessarily flowed from the unitization principle. *See* Opening Br. 7-8. That omission is plausibly explained by the fact that Congress in 1970 could not simply copy MLA § 226(j) into the GSA because oil and gas leases continued so long as production continued whereas Congress limited the maximum duration of geothermal leases to 50 years. It is reasonable to infer that Congress left it to Interior to specify exactly how to phrase the authorization of production continuations for unit leases in light of the maximum term, as Interior then did in Articles 17 and 18 of the Model Unit Agreement for geothermal leases (Add. 97-98).

In sum, we demonstrated in our Opening Brief that Congress intended the terms of geothermal unit leases to be extended and continued based on work and production anywhere within the unit just as the terms of oil and gas leases were extended and continued under the MLA (except that the maximum term of a geothermal lease was limited to 50 years). Plaintiffs offer no persuasive textual or

policy basis for concluding that Congress instead wanted a unit operator to drill a well on the surface of every geothermal lease in order for the geothermal lessee to obtain the benefits of the lease through the production phase.

C. Plaintiffs' citation of the GSA's legislative history does not support any of its interpretations.

Plaintiffs invoke (at 53) "the GSA's extensive legislative history" in asserting that interpreting the GSA to authorize continuation of unit leases based on a producing or capable well located anywhere in the unit "would undercut the intent of Congress." But plaintiffs do not back up that assertion with specific relevant references to the legislative history of the 1970 and 1988 statutes.

In our Opening Brief (at 36-37), we pointed to a statement in the 1970 House and Senate Reports that expressly affirmed the unitization principle. The Answering Brief simply ignores that directly relevant legislative history. Plaintiffs' reference (at 7) to the general statement in the 1970 Senate Report that Congress endeavored to "protect[] the quality of the environment" sheds no light on the question at issue.

Nor do plaintiffs point to any language in the legislative history of the 1988 Amendments *as enacted* that supports their restricted view of production continuations. Plaintiffs quote (at 15-18) several statements discussing the amendment of § 1005(d) to allow leases to continue based on a capable well so long as diligent efforts were made to achieve actual production. None of those

statements even remotely suggests that Congress wanted to drastically limit the unitization principle.

Plaintiffs primarily rely (at 46-47) on language in a bill introduced in 1987 that was never enacted. That bill (H.R. 2794) would have amended the GSA in several respects, including by amending the second sentence of § 1005(a) expressly to provide for production continuations for all leases, including unit leases, whether production was achieved in the primary term or during an extension. Contrary to plaintiffs' argument, this unenacted 1987 bill fails to demonstrate that § 1005(a), as actually enacted in 1970, did not authorize production continuations on a unit basis. "[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress[,] … particularly … when it concerns, as it does here, a proposal that does not become law." *Pension Benefit Guarantee Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks omitted); *accord United States v. Craft*, 535 U.S. 274, 287 (2002); *Fair Housing Council v. Roommate.com, LLC*, 666 F.3d 1216, 1223 (9th Cir. 2012). "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, *including the inference that the existing legislation already incorporated the offered change*." *Pension Benefit*, 496 U.S. at 650 (internal quotation marks omitted and emphasis added). Moreover, while the 1988 Amendments may not have used the specific

language of the 1987 bill, Congress evidenced its understanding that § 1005(a) and § 1005(c) both incorporated the unitization principle through its drafting of the new § 1005(g)(1). *See* Opening Br. 41-42.

* * *

Plaintiffs have failed to offer any coherent interpretation of § 1005 that supports their desired result, let alone an interpretation that is required by that provision's plain text, historical context, and legislative history.

II. Plaintiffs' *Chevron* step two arguments lack merit.

As demonstrated in our Opening Brief, this Court can conclude at *Chevron* step one that § 1005(a) authorized continuations for unit leases based on a producing or capable well in the unit. But if this Court concludes that the statute is ambiguous and proceeds to *Chevron* step two, it should hold that Interior's implementing regulations provided that all unit leases were eligible for continuations based on a producing or capable well drilled anywhere in the unit during their primary terms or during an extended term. Interior's interpretation of the GSA in its implementing regulations is entitled to deference. Plaintiffs' contrary arguments mischaracterize Interior's implementing regulations and erroneously describe the interpretation of those regulations by BLM's Nevada State Office and California State Office.

A. Interior's implementing regulations support BLM's statutory interpretation, not plaintiffs' interpretation.

1. The lease-term regulations

We addressed the original 1973 regulations (Add. 53-55) in our Opening Brief (at 37-40). Those regulations tracked the statutory text, such that the provision for "additional terms" (i.e., continuations) under § 1005(a), 43 C.F.R. § 3203.1-3, did not expressly reference "unit plan" whereas the provision for drilling extensions and subsequent continuations under § 1005(c), 43 C.F.R. § 3203.1-4(c), did so reference. Plaintiffs incorrectly infer from this wording difference that Interior read § 1005(c) but not § 1005(a) to incorporate the unitization principle. *See* Answering Br. 20-21. But plaintiffs ignore our explanation (Opening Br. 34-35) for the specific reference to "unit plan" in § 1005(c) but not § 1005(a), which similarly explains the phrasing of the parallel implementing regulations. Plaintiffs also ignore our explanation (Opening Br. 38-39) that 43 C.F.R. § 3203.1-5(c) (Add. 54) made clear that the completion of an actually producing or capable well in a unit during a lease's primary term served to continue the terms of all leases in the unit. It did so by expressly stating that leases "excluded" from a unit by unit contraction "shall not be extended because of production in commercial quantities or the existence of a producible well on the lands remaining" in the unit plan.

We also explained in our Opening Brief (at 43-46) that the lease-term regulations implementing the 1988 Amendments (Add. 78-81) further support our statutory interpretation. In contrast, plaintiffs' interpretation (at 21) departs from their interpretation of the earlier regulations and *does not match up with any of their statutory interpretations*. Plaintiffs read the regulations to provide that (1) all continuations under § 1005(a), § 1005(c), and § 1005(g)(2) were "on a lease-by-lease basis," 43 C.F.R. § 3203.1-3(a); (2) "actual drilling" extensions under § 1005(c) were on a unitized basis, 43 C.F.R. § 3203.1-4(b); but (3) "bona fide effort" extensions under § 1005(g)(1) were on a lease-by-lease basis, 43 C.F.R. § 3203.1-4(c). Plaintiffs' position (at 21) that "section 3203.1-4(b) was the only regulation that recognized unitized extensions" is apparently based on the fact that the word "unit" expressly appeared in that provision but not in the others, not on consideration of the sense of the text. Plaintiffs offer no explanation for why Interior would have thought that the unitization principle applied to drilling extensions under § 1005(c) but not § 1005(g)(1), nor can we hypothesize a logical or policy reason for this restricted view.

2. The unitization regulations

We explained in our Opening Brief (at 16-17, 38, 47-48) how the various provisions of 43 C.F.R. Part 3280 (Add. 86-104), including the Model Unit Agreement, governed unit operations through the exploration and production

phases. It appears that plaintiffs' discussion of those regulations (at 22-25, 51-53, 55-58) is intended to support their argument that the unitization principle applied during the exploration phase but not during the production phase, as it focuses on references to the exploration phase and often omits references to the production phase. For example, plaintiffs assert (at 22) that "lessees could band together through a unit agreement to more efficiently explore a common geothermal source," citing the definition of "Unit agreement." But that definition (which they did not quote) made it clear that unit agreements allowed for efficient *production* as well as efficient exploration:

> An agreement or plan of *development and operation for the production and utilization* of separately owned interests in the geothermal resources made subject thereto as a single consolidated unit without regard to separate ownerships and which provides for the allocation of costs *and benefits* on a basis defined in the agreement or plan.

43 C.F.R. § 3280.0-5(a) (Add. 87) (emphasis added).

Plaintiffs similarly assert (at 24, 52) that Articles 17.3 and 17.4 of the Model Unit Agreement merely allowed geothermal unit lessees to satisfy their *exploration obligations* on a unit basis. To the contrary, Article 17.3 (Add. 97) covered the entire range of "development and/or operation of lands subject to this Agreement," and Article 17.4 similarly applied to all "[d]rilling and/or producing operations performed hereunder upon any tract of Unitized Lands."

Plaintiffs also misread Articles 17.1, 17.7, and 17.8 as providing that "the individual lease, not the unit agreement, ... established [the lease's] duration." Answering Br. 24-25; *see also id*. at 52 ("unit agreements do not directly address, and cannot legally affect, the lease duration or expiration dates dictated by section 1005"). In fact, Article 17 (Add. 97) is captioned "Leases and Contracts Conformed and Extended." While it is true that an individual lease's issue date, primary-term expiration date, and additional-term expiration date still mattered for various purposes, that does not mean that a unit lease could not continue past its primary term based on unit production so long as it remained in the unit.

Curiously, while relying on the provisions of the Model Unit Agreement to support their *Chevron* step two argument, plaintiffs then undercut themselves by arguing (at 52) that the provisions had no interpretive significance because they were incorporated into a contract (the Glass Mountain Unit Agreement). But none of the cases cited by plaintiffs suggests that duly promulgated regulations are entitled to any less deference because parties incorporate them into a contract.

B. Plaintiffs' concession that § 1005(a) authorized the continuation of unit leases within a "participating area" based on an actually producing or capable well within the participating area supports our statutory interpretation.

In direct conflict with all of their other arguments, plaintiffs argue (at 23, 56-57) that a unit lease continued under § 1005(a) if it was within a "participating area" established in anticipation of actual production from a well in a unit. As we

explained in our Opening Brief (at 16), a participating area is the area, typically including multiple leases or portions of leases, that shares in the revenues from production. *See* 43 C.F.R. § 3280.0-5(h) (Add. 88) (defining "participating area" as that "part of the Unit Area which is deemed to be productive from a horizon or deposit and to which production would be allocated in the manner described in the unit agreement assuming that all lands are committed to the unit agreement"). It is a concept found in Interior's regulations but not in the GSA itself. We pointed out in our Opening Brief (at 48) that this concession completely undermines plaintiffs' categorical position that § 1005(a) precluded the unitization principle and authorized production continuations only on a lease-by-lease basis.

In response, plaintiffs do not withdraw their position but deny (at 57-58) that it constituted a concession because "Defendants agree" that "Congress delegated authority to BLM to carry out GSA leasing through appropriate rules and regulations." That response does not answer our point. Our position is that Congress incorporated the MLA's unitization principle into § 1005(a), and in § 1017 expressly granted Interior authority to promulgate reasonable implementing regulations to manage geothermal unit operations, just as oil and gas unit operations were subject to Interior's reasonable regulation. But if plaintiffs are correct that Congress affirmatively decided to preclude the unitization principle in § 1005(a), Interior would have no authority to prevent the expiration of the

multiple contributing leases in an administratively defined participating area based on a well drilled on one lease.

Plaintiffs apparently believe that the participating area around the capable well in the Glass Mountain Unit will be substantially smaller than the Unit and that many leases therein will expire once they can no longer benefit from the unit well, as plaintiffs desire.[5] But plaintiffs' embrace of the participating area regulations does not advance their cause on the statutory issue presented in this appeal. The regulations did not preclude production continuations during the period between the completion of a capable well and the establishment of a participating area. To the contrary, the regulations presumed that unit leases would continue so long as they remained in the unit, but that other mechanisms (including the potential contraction of a unit for failure to pursue additional exploration outside of an established participating area) would address plaintiffs' concern about the potentially unwarranted commitment of federal land to geothermal development.

[5] The uncertainty caused by plaintiffs' lawsuit resulted in suspensions of various lease obligations and slowed the ordinary process for establishing a participating area. While we do not agree that plaintiffs' selective citations to the administrative record fairly describe the geothermal resource underlying the Glass Mountain Unit, that factual issue need not be resolved in order to decide the legal issue presented in this appeal.

C. The Government's position in this case is not a *post hoc* litigation rationalization.

Plaintiffs charge (at 58) that we adopted our interpretation of § 1005(a) as a "convenient litigation position" after they filed suit in 2004. As explained above, however, they fail to undercut the demonstration in our Opening Brief (at 37-40, 43-46) that our position in this case is entirely consistent with Interior's regulations implementing the GSA as amended in 1988, which stated the definitive position of Interior and its components.

We also explained in our Opening Brief (at 45) that BLM's Nevada State Office interpreted those regulations in 1994 to provide for production continuations based on an actually producing or capable well in a unit. Plaintiffs' argument to the contrary is unpersuasive. Plaintiffs assert (at 52-53 n.13) that we mischaracterized the view of the Nevada State Office, citing this Court's summary of the complex facts in *Geo-Energy Partners-1983 Ltd. v. Salazar*, 613 F.3d 946, 951 (9th Cir. 2010) (explaining that on September 21, 1994, BLM granted an "additional term" to a lease with a capable well and "extended" seven other unit leases). Plaintiffs infer that "extended" referred to § 1005(g)(1) extensions, but they ignored our citation (Opening Br. 45) of the more detailed recitations of facts in the decisions of the Interior Board of Land Appeals and of the district court, which revealed that "extended" in this situation actually referred to production continuations. As of the 1994 decision date, the Nevada State Office had

recognized an "initial participating area" consisting of only the lease on which the capable well had been drilled. That meant that the other unit leases would be "held by [the capable well's] production" (i.e., continued under § 1005(a)) only for five years, at which time the unit would presumptively contract down to the participating area unless "diligent operations were in progress" to maintain the unit (or unless the participating area expanded to include the leases as it later did). *See Geo-Energy Partners-1983 Ltd.*, 170 IBLA 99, 106 (Sept. 14, 2006).

We further explained (Opening Br. 18-20, 46) that BLM's California State Office exhibited a few years of uncertainty about whether a participating area could be established for a capable well as redefined in the 1988 Amendments. After consulting with the Nevada State Office, however, it commenced discussions with the unit operator of the Glass Mountain Unit in 1995 about forming a participating area. Plaintiffs' criticism (at 31) that BLM simply "capitulated" to the unit operator in 1998 is thus unfounded.

* * *

As with their statutory interpretation arguments, plaintiffs have failed to offer any coherent interpretation of Interior's implementing regulations. If this Court proceeds to *Chevron* step two, Interior's reasonable interpretation of the GSA as expressed in its implementing regulations is entitled to deference.

III. Plaintiffs do not dispute that the sole issue to be decided is the narrow statutory question whether § 1005(a) authorized production continuations on a unit basis.

Plaintiffs do not dispute our contention (Opening Br. 49-50) that the sole remaining issue in this case following this Court's 2015 remand is the narrow legal question whether § 1005(a) authorized the continuation of all unit leases for up to 40 years based on a unit operator's completion in the unit of an actually producing well or of a capable well, so long as the leases remained in the unit. The relevant background for understanding the statutory issue to be decided is set forth in our Statement of the Case (Opening Br. 3-25), which plaintiffs do not dispute in any material respect.

Plaintiffs complain throughout their Answering Brief that BLM failed to press the unit operator to continue exploring and developing the geothermal resource, not because they want to hasten geothermal production but because they believe that more pressure would have expedited the expiration of the leases. But BLM's asserted failures to act are irrelevant to the legal issue to be decided, and plaintiffs have forfeited their separate claims based on such asserted failures. Plaintiffs' amended complaint, filed in 2013, claimed that BLM unlawfully failed to act in several ways. ER109-10. The district court held that plaintiffs had waived all of their claims except for their challenge to BLM's May 1998 decisions continuing the leases, and this Court did not disagree. *Pit River Tribe v. BLM*, 793

F.3d 1147, 1154-55, 1157 (9th Cir. 2015). On remand, plaintiffs nonetheless continued to press their failure-to-act claims, but the district court once again held that they were waived. ER35-36, 49. Plaintiffs did not appeal that holding. We thus do not respond to plaintiffs' failure-to-act assertions because they are irrelevant.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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