

**Editor's note: Judicial remand in case arising from Jack J. Bender, 54 IBLA 375, 88 I.D. 550; appealed - remanded to DOI for KGS determination, Civ.No. 81-0682-JB (D.N.M., Dec. 28, 1982); aff'd, remanded to DOI, No. 83-1306 (10th Cir. Sept. 28, 1984); 744 F.2d 1424; vacated on judicial remand, referred to Hearings Division by order dated Feb. 5, 1985 – See 40 IBLA 29A and B below.**

JACK J. BENDER

IBLA 77-495

Decided March 9, 1979

Appeal from decision of the New Mexico State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offer NM 30069.

Set aside; hearing ordered.

1. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Known Geological Structure--Oil and Gas Leases: Noncompetitive Leases

Under 30 U.S.C. § 226(b) (1976) land within the known geologic structure of a producing oil or gas field may only be leased by competitive bidding, and where land is determined to be within such a structure while a noncompetitive lease offer is pending, the offer must be rejected.

2. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Known Geological Structure--Oil and Gas Leases: Noncompetitive Leases

An applicant for a noncompetitive oil and gas lease who challenges a determination by the Geological Survey that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

3. Oil and Gas Leases: Known Geological Structure--Words and Phrases

"Known geologic structure." A known geologic structure is technically the trap in which an accumulation of oil or gas has been

discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive.

4. Evidence: Sufficiency—Hearings—Oil and Gas Leases: Known Geological Structure—Rules of Practice: Evidence

When on appeal a sufficient showing is made to call into question a determination that land lies within a known geologic structure of a producing oil or gas field, and a hearing is requested, the decision may be set aside and remanded for hearing.

APPEARANCES: John F. Wellbom, Esq., Wellbom, Dufford, Cook & Brown, Denver, Colorado, for appellant.

#### OPINION BY ADMINISTRATIVE JUDGE GOSS

Jack J. Bender appeals from the New Mexico State Office, Bureau of Land Management (BLM), decision rejecting his noncompetitive oil and gas lease offer, NM 30069, because the land is within an undefined known geologic structure (KGS), based on a determination by the Geological Survey. Appellant contends that the land in the lease offer is not within a known geologic structure. 1/

[1] Under 30 U.S.C. § 226(b) (1976), land within the known geologic structure of a producing oil and gas field may only be leased by competitive bidding. When land is determined to be within a KGS either before a noncompetitive offer was filed or while such an offer is pending, the noncompetitive offer must be rejected. Curtis Wheeler, 31 IBLA 221 (1977); Geral Beveridge, 14 IBLA 351, 81 I.D. 80 (1974); Solicitor's Opinion, Issuance of Noncompetitive Oil and Gas Leases on Lands Within the Geologic Structures of Producing Oil or Gas Fields, 74 I.D. 285 (1967).

[2] An applicant for an oil and gas lease who challenges a determination by the Geological Survey that the lands are situated within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error. The determination will not be disturbed in the absence of a clear and definite showing of error. Curtis Wheeler, *supra*; Geral Beveridge, *supra*.

[3] "Known geologic structure" is defined in Departmental regulation 43 CFR 3100.0-5(a): "A known geologic structure is technically

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1/ By order of August 17, 1978, the Solicitor's Office was invited to comment on the submissions made by appellant in the course of the appeal, but no such comments have been received.

the trap in which an accumulation of oil or gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive." Geological Survey determined that certain land including the land in appellant's offer was included in an undefined addition to the Scanlon Known Geologic Structure, effective January 24, 1977, the completion date of the Yates Petroleum corporation Well No. 1. Geological Survey determined that one or more Morrow formation reservoirs underlie this undefined addition to the Scanlon KGS. The area geologist states that the determination is based on data regarding other wells outside of the known geologic structure which either produce from or contain one or more Pennsylvania Morrow formation reservoir units, on the structural configuration of the Morrow foundation, and on a subsurface correlation of the wells in the area.

Appellant has submitted a report on this undefined addition to the Scanlon KGS and the surrounding area. The report discusses the geological setting of the area and the five formations which have produced within the area. The report is supplemented with a cross-section and structural contour maps for four of the five areas, including the Morrow formation. The report makes the following observations with respect to the Strawn, Atoka, and Morrow formations:

The Strawn (ref. Map 3), Atoka, and Morrow (ref. Map 4) are Pen[n]sylvanian-age formations with similar structure and depositional environment. They consist of intermixed sandstone, limestone and shale beds deposited during a widespread submergence of the Pennsylvanian-age basin. The northern margin of the Pennsylvanian seas trends southwest through Chaves County around the Pedernal land mass. Therefore, depositional strike is generally northeast-southwest in the area of interest.

The Strawn, Atoka and Morrow show southeast dip with no structural closure. A slight flattening is apparent and is attributed to the Bone Spring flexure.

Each of these formations produces from stratigraphic traps in discontinuous sandstone bodies. The H. E. Yates # 1 Stebbins-Federal Deep tested non-commercial quantities of gas in the Strawn and Morrow (ref. Table 1, #2), and the well has been shut in.

These Pennsylvanian formations have prospective value below the lease acreage based generally on the precedent of stratigraphic production set in several downdip wells (ref. Table 1, #3). There are no Pennsylvanian tests northwest of the H. E. Yates #1 Stebbins-Federal Deep well. Since the updip limits of stratigraphic production can only be determined by drilling, no stratigraphic trap has been defined on the subject acreage. This

acreage could not be presumed to be productive, nor could it be presumed to have any accumulations previously tapped by a downdip well.

Appellant concludes that the land cannot be presumed to be productive from any oil or gas trap which has been discovered by drilling.

In essence, appellant argues that a KGS boundary can never extend updip of a productive well; only acreage which is downdip of a producing well is "presumptively productive" within the meaning of 43 CFR 3100.0-5(a). This argument is not tenable; clearly, it is more reasonable to presume that productive acreage would extend a certain distance beyond the last updip well than it would be to assume that any updip well necessarily defines the outer edge of the structure. The applicable regulation makes clear that a KGS includes not only land "determined to be productive" but also land which is "presumptively productive."

[4] In the past we have sustained KGS determinations even on the basis of the conclusory opinions in the absence of a clear and definite showing of error by one who challenges the KGS determination. On the basis of the data submitted, however, it is not clear whether the land herein should be classified KGS. Further, some disagreement exists between the map accompanying the status report and appellant's map of the Morrow Formation, as to the status of the wells upon which the KGS determination was presumably based. Appellant has asked that a hearing be ordered pursuant to 43 CFR 4.415 to resolve the issue as to whether this land was properly included within a known geologic structure, which request should be granted under the circumstances. 2/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1 and 43 CFR 4.415, the decision appealed from is set aside and the case is referred to the Hearings Division, Office of Hearings and Appeals, for hearing and recommended decision.

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Joseph W. Goss  
Administrative Judge

We concur:

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Douglas E. Henriques  
Administrative Judge

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Anne Poindexter Lewis  
Administrative Judge.

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2/ The hearing would, of course, not be determinative of any subsequent change of status prior to issuance of the lease.

February 5, 1995

IBLA 80-146	:	NM 30069
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JACK J. BENDER :		Oil and Gas
(ON JUDICIAL REMAND)	:	
	:	Previous Decisions Vacated;
	:	Case Referred to Hearings
	:	Division

ORDER

By decision dated March 9, 1979, this Board set aside a decision of the New Mexico State Office, Bureau of Land Management (BLM), rejecting Jack J. Bender's noncompetitive oil and gas lease offer NM 30069 because the lands applied for were within an undefined known geologic structure (KGS). We ruled determination, it was not clear whether the lands should be classified as a KGS. Accordingly, we referred the matter to the Hearings Division for hearing and recommended decision on the question. Jack J. Bender, 40 IBLA 26 (1979).

On August 15, 1979, Administrative Law Judge Robert W. Mesch held a hearing in Albuquerque, New Mexico, at which the parties presented evidence whether these lands are within a KGS. Following the filing of post-hearing briefs, on December 3, 1979, Judge Mesch issued his recommended decision, holding that Bender had not met his burden of proof and ruling that he therefore could not disturb the KGS determination despite some uncertainty surrounding it. On May 19, 1981, the Board issued a decision concluding that the Government established a prima facie case of the existence of a KGS and Bender failed to show by "clear and definite" evidence that the Government erred in its determination. Jack J. Bender, 54 IBLA 375, 88 I.D. 550 (1981).

On September 28, 1984, the United States Court of Appeals for the Tenth Circuit issued a decision holding that an incorrect standard of proof had been applied in reviewing the evidence presented by the parties concerning the KGS proceedings. Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984). Accordingly, our earlier decisions (Jack J. Bender, 40 IBLA 26 (1979), and Jack J. Bender, 54 IBLA 375, 88 I.D. 550 (1981)) are hereby vacated.

40 IBLA 29A

The matter is once again referred to the Hearings Division for assignment to Judge Mesch, who is familiar with the evidence presented by the parties concerning the KGS determination. Judge Mesch is directed to issue a decision which, in the absence of appeal, will be final for the Department. This decision should consider the evidence in light of the "preponderance of the evidence" standard imposed by the decision of the Tenth Circuit in Bender v. Clark, supra. 1/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the matter is referred to the Hearings Division for further proceedings as described above.

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Bruce R. Harris  
Administrative Judge

We concur.

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C. Randall Grant, Jr.  
Administrative Judge

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Will A. Irwin  
Administrative Judge

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1/ On February 4, 1985, counsel for Bender filed a "Motion to Assign Case to Administrative Law Judge Robert W. Mesch and for Expedited Review." Our order refers the case to Judge Mesch for consideration. Counsel should direct his request to expedite to Judge Mesch.

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