

JAMES MUSLOW, SR.

(ON RECONSIDERATION)

IBLA 80-378

Decided July 16, 1982

Reconsideration of the Board's decision styled James Muslow, Sr., 51 IBLA 19 (1980), affirming the rejection of oil and gas lease offer U-44213 in its entirety.

James Muslow, Sr., 51 IBLA 19 (1980), affirmed in part; reversed in part.

1. Oil and Gas Leases: Discovery -- Oil and Gas Leases: Known Geologic Structure -- Oil and Gas Leases: Noncompetitive Leases -- Oil and Gas Leases: Production

A determination by Geological Survey that lands are within a known geologic structure (KGS) of a producing oil or gas field will be reversed where appellant has demonstrated, by a clear and definite showing of error, that a permeability pinchout occurs in the lands designated as KGS and the pinchout is so situated as to overcome the presumption that lands included in appellant's oil and gas lease offer are productive.

APPEARANCES: Philip G. Dufford, Esq., S. Kirk Ingebretsen, Esq., Denver, Colorado, for appellant; Reid W. Nielsen, Esq., Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

By order of July 16, 1981, this Board ordered a hearing to resolve certain factual issues set forth in a petition for reconsideration filed by appellant, James Muslow, Sr. This petition sought reconsideration of the Board's decision, styled James Muslow, Sr., 51 IBLA 19 (1980), affirming a decision of the Utah State Office, Bureau of Land Management (BLM), dated January 4, 1980, rejecting oil and gas lease offer U-44213 in its entirety.

Following an offer of proof filed by appellant, the hearing was granted to allow appellant the opportunity to show that the lands in oil and gas lease offer U-44213 should not be included in the Bitter Creek-Red Wash known

geologic structure (KGS). BLM's determination that these lands were a part of this KGS caused the rejection of appellant's drawing entry card, drawn with first priority in the September 1979 drawing of simultaneous oil and gas lease offers.

On November 24, 1981, a hearing was held by Administrative Law Judge Robert W. Mesch in Salt Lake City. Appellant and BLM were each represented by counsel. Thereafter proposed findings of facts were prepared by Judge Mesch, and copies of these proposed findings were sent to the parties. Pleadings were subsequently filed with the Board by both appellant and BLM.

The lands included in lease offer U-44213 are the following:

T. 9 S., R. 24 E., Salt Lake Meridian, Uintah County, Utah
 S 1/2 SW 1/4 sec. 3
 SE 1/4 SE 1/4 sec. 4
 All sec. 11
 N 1/2 NW 1/4 sec. 14

During the course of the hearing, appellant conceded that the lands in secs. 3 and 4 could be properly included within the Bitter Creek-Red Wash KGS if the KGS determination of Geological Survey (Survey) were given "the benefit of the doubt" (Tr. 36). Thus the lands at issue before this Board are limited to approximately 720 acres in secs. 11 and 14, T. 9 S., R. 24 E.

In our order of July 16, 1981, appellant was assigned the burden of showing that Survey's KGS determination was in error; this determination, we stated, would not be disturbed in the absence of a clear and definite showing of error. On the basis of the material evidence set forth in Judge Mesch's proposed findings of fact, attached hereto, we hold that appellant has made a clear and definite showing of error in Survey's inclusion of sec. 11 and N 1/2 NW 1/4 sec. 14, T. 9 S., R. 24 E., in the Bitter Creek-Red Wash KGS. We believe that the evidence adduced at the hearing adequately supports the material facts set forth in Judge Mesch's proposed findings, and we hereby adopt these findings as our own.

In brief, the evidence assembled at the hearing showed that a permeability pinchout or barrier occurs in the lands designated KGS by Survey. This pinchout is established by the presence of dry holes and wells which are no longer in production. The pinchout runs in a north-south direction and indicates an absence of producing horizons in the lands at issue.

We find that Survey's determination was properly made as to lands in secs. 3 and 4, T. 9 S., R. 24 E., within the Bitter Creek-Red Wash KGS. Our decision in James Muslow, Sr., supra, is affirmed as to these lands. Further, we find that Survey erred in including all sec. 11 and N 1/2 NW 1/4 sec. 14, T. 9 S., R. 24 E., in the Bitter Creek-Red Wash KGS. Accordingly, our decision in James Muslow, Sr., supra, is reversed insofar as the above IBLA 80-378 described lands in secs. 11 and 14 are involved. Accordingly, BLM is instructed to disregard the KGS determination as it affects all sec. 11 and N 1/2 NW 1/4 sec. 14,

T. 9 S., R. 24 E., and all else being regular, to issue a noncompetitive oil and gas lease to appellant for these lands.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of this Board in James Muslow, Sr., *supra*, is affirmed in part and reversed in part.

Douglas E. Henriques
Administrative Judge

I concur:

Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While in substantial agreement with the opinions of the majority herein, and Administrative Law Judge Mesch, below, I wish to address a problem which both opinions skirt, namely, to what extent can data obtained after the extension or establishment of a KGS be used to support or undermine the original decision. Since both the majority and Judge Mesch found that the evidence before BLM at the time of the KGS extension was insufficient to establish that the lands embraced by appellant's offer in secs. 11 and 14, T. 9 S., R. 24 E., Salt Lake meridian, were within a KGS, and further, that the subsequent completions in the SE 1/4 SE 1/4 sec. 10, and the NE 1/4 NW 1/4 sec. 19, actually supported the conclusions of appellant, it was not necessary to examine this question. Inasmuch, however, as future cases might well involve a situation wherein subsequently obtained drilling data contradicts the data available on the KGS determination date, I think it behooves us to examine this question now.

The key component in such an analysis must be the recognition that a KGS determination at any time prior to lease issuance requires the Department to lease the lands within the KGS competitively regardless of the pendency of a noncompetitive oil and gas lease offer or application. This has been the consistent ruling of the Department since Solicitor Barry'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). With this in mind, it seems clear to me that, at least to the extent that post KGS activities establish the correctness of the designation, the Department would be required to reject a noncompetitive lease offer or application. Thus, in the instant case, had the subsequent drilling operations clearly established that secs. 11 and 14 were on a known geologic structure of a producing gas field, the fact that there had been no support for the KGS determination when it originally issued would be an irrelevancy. As a present fact, a noncompetitive lease could not issue despite the fact that the original KGS determination was in error.

Similarly, if the converse situation is examined, viz., the record establishes that a KGS determination was supportable based on the information available at the time of its designation but data subsequently developed shows that the land is not on a KGS, I think it must be concluded that the applicant properly is awarded the lease. Just as the Government lacks authority to issue a noncompetitive lease for lands on a KGS so does it lack authority to issue a competitive uplands lease for lands not on a KGS.

The key point in time in determining whether a competitive lease must issue is at the point of lease issuance. Until lease issuance occurs the propriety of the acceptance of either competitive bids or noncompetitive offers must be determined by reference to present facts. Indeed, the only situation in which past facts would be controlling would be in those cases where cancellation of an issued lease is sought on the grounds that it was improperly issued.

See, e.g., Robert B. Ferguson, 9 IBLA 275 (1973). Since, in such cases, the operative question would be whether the lands leased were within a KGS when the lease issued, consideration of the status of the land is properly confined to the knowledge available at the date of lease issuance. In all other cases, however, I think we are required to examine all information "presently" available.

I think that appellant's showings of the status of the land in 1979, together with the confirming data generated by subsequent completions, establishes that the lands in secs. 11 and 14 are not now on a known geologic structure of a producing gas field and accordingly, a lease should issue to appellant all else being regular.

James L. Burski
Administrative Judge

65 IBLA 356

