

Editor's note: Appealed -- dismissed, sub nom. Gerald D'Unger v. Hodel, Civ.No. 88-3482 (D.D.C. Sept. 7, 1989), aff'd, sub nom. Stephen Bubala v. Hodel, Civ.No. 88-3420 (D.D.C. Jan. 30, 1991), aff'd by order, No. 91-5099 (D.C. Cir. May 11, 1992), 961 F.2d 963

GERALD F. D'UNGER
STEPHEN E. BUBALA

IBLA 86-233, 86-252

Decided August 31, 1988

Appeal of two decisions of the California State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offers filed for certain lands within the Port Hueneme (California) Naval Reservation. CA 17156, CA 11297.

Affirmed.

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

BLM must reject a noncompetitive oil and gas lease offer if prior to lease issuance the land is determined to be within a known geologic structure of a producing oil or gas field.

2. Oil and Gas Leases: Known Geologic Structure--Oil and Gas Leases:
Noncompetitive Leases

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

APPEARANCES: Lynn M. Cox, Esq., David E. Lindgren, Esq., Office of the Regional Solicitor, Pacific Southwest Region, for the Bureau of Land Management; Vince Tarleton, Esq., Houston, Texas, for Gerald F. D'Unger, and David P. Stang, Esq., Washington, D.C., for Stephen E. Bubala.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Gerald F. D'Unger and Stephen E. Bubala have filed separate appeals from two California State Office, Bureau of Land Management (BLM), decisions, dated December 2 and December 3, 1985, rejecting their noncompetitive acquired lands oil and gas lease offers, CA 17156 and CA 11297, respectively. The conflicting offers were filed for land acquired for the Naval Construction Battalion Center (Naval Reservation) located within the city of Port Hueneme, California. Bubala filed over-the-counter oil and gas lease offer

CA 11297 on August 28, 1981, for 1,658 acres. 1/ D'Unger filed over-the-counter oil and gas lease offer CA 17156 on April 18, 1985, for 1,610 acres. 2/ BLM rejected both of the noncompetitive offers because all the land within the Port Hueneme Naval Reservation was included within the Oxnard Known Geologic Structure (Oxnard KGS). BLM noted that under 43 CFR 3100.3-1, all land within KGS boundaries must be leased competitively to the highest responsible qualified bidder.

By order dated March 13, 1986, the Board granted BLM's request that the Board consolidate the appeals, IBLA 86-233 (D'Unger) and IBLA 86-252 (Bubala) on the ground that they involved common material issues of fact and law.

In subsequent procedural matters, on June 24, 1986, the Board denied D'Unger's motion to bifurcate the issue of priority between the two noncompetitive lease applicants from the issue of whether the land is properly

1/ This appeal is rooted in controversy that began in 1981. On Aug. 28, 1981, Union Oil Company and Stephen E. Bubala filed noncompetitive over-the-counter lease offers on the subject land following a Secretarial order partially lifting a moratorium on oil and gas leasing on acquired lands within military reservations. 46 FR 37250 (July 20, 1981). BLM rejected their lease offers because the Navy did not consent to lease these lands as required by section 3 of the Mineral Leasing Act for Acquired Lands, 30 U.S.C. | 352 (1982). The Board, in Union Oil Company of California, 79 IBLA 86 (1984), affirmed BLM's decision. In its decision, the Board rejected the lease offer because the Navy did not consent to leasing, and, in addition, the Board noted that there was a statutory prohibition against leasing within incorporated cities.

Appellants then petitioned the Board for reconsideration, arguing that the Navy might be willing to consent to leasing the land. The Board granted the petition for reconsideration and set aside its Feb. 16, 1984, decision (Order of May 3, 1984).

2/ On Oct. 14, 1984, Congress enacted P.L. 98-529, 98 Stat. 2697, which amended the Mineral Leasing Act for Acquired Lands to permit leasing within the city limits of Port Hueneme, California, and Corpus Christi, Texas. Thus, as to these lands, the prohibition on leasing acquired lands in incorporated cities was lifted.

On Apr. 18, 1985, D'Unger filed over-the-counter oil and gas lease offer CA 17156 for the subject lands. On Apr. 26 and June 17, 1985, he filed a contest and an amended contest of lease offer CA 11297. He argued that BLM should reject lease offer CA 11297 because at the time it was filed, the land, which was within the city limits of Port Hueneme, California, was precluded from being leased under 30 U.S.C. | 352 (1982) and 43 CFR 3101.2-1(b)(4) (1982). Contending that the lands only became available for leasing on Oct. 19, 1984, after the enactment of P.L. 98-529, D'Unger argued that Bubala's lease offer was premature. On June 27, 1985, BLM dismissed the contest, holding that neither a protest nor a contest was appropriate because "all parties involved are applicants to a case before this office and an applicant adversely affected by a decision issued by this office has a right to appeal to the Interior Board of Land Appeals."

No further action was taken on the lease offers until BLM issued the December decisions which are the subject of these appeals.

within a known geologic structure (KGS) and, thus, unavailable for noncompetitive leasing. The Board held that the issue of priority was not ripe for review in the absence of a BLM decision on that question and in the absence of a finding that the land is subject to noncompetitive leasing.

One remaining procedural matter must be resolved before we reach the merits of this case. Counsel for Bubala filed on June 6, 1988, a motion to stay consideration of this case. As grounds therefor, appellant has cited the BLM audit of those KGS determinations involved in numerous different appeals pending before the Board. Appellant has requested additional time to prepare comments on the audit. BLM has not responded to the stay request.

By notice published in the Federal Register on February 23, 1988, BLM announced that it had completed an internal review of 32 KGS classifications involved in 92 appeals pending before the Board. 53 FR 5324. ^{3/} The notice advised the public of the availability of the audit report and provided the opportunity for interested parties to file written comments within 45 days. In view of the audit and the comment period provided, by order dated March 10, 1988, the Board allowed appellants in all pending KGS appeals, including the two cases at issue here, until May 1, 1988, to file any further briefing desired.

In consideration of the extensive opportunity for briefing already provided in this case and the exhaustive briefing provided by counsel for appellants and for BLM, it does not appear that any further delay would appreciably aid in resolution of the issue. Accordingly, the motion to stay consideration of this case further is denied.

The issue presently before the Board is whether the subject land is properly included within the Oxnard KGS. If the land is properly included within the Oxnard KGS, both Bubala's and D'Unger's noncompetitive lease offers must be rejected because the land may only be leased by competitive bidding. Only if we determine, contrary to the decision of BLM, that the land is not properly included within a KGS, must the priority of the conflicting offers be determined.

Bubala's challenge of the KGS determination is based primarily on a geologic report written by Ted L. Bear, geologist. D'Unger, who also submitted a cursory report from a geologist, incorporated Bubala's arguments respecting the KGS determination as his own.

The land covered by the lease offers is located in the Port Hueneme Naval Base, which is a part of the city of Port Hueneme, California. According to BLM geologist Kenneth D. Holden, the land is located on the southern flank of the Ventura Basin which is one of the largest most prolific oil producing districts in California. Port Hueneme is about 1 mile south of the southern end of the West Montalvo oil field and 2 miles west of the southern end of the Oxnard oil field (KGS Report at 9).

^{3/} As a result of the audit, BLM requested the Board to remand three of the pending appeals for reconsideration. No remand was sought for the appeals at issue here.

The producing formation on which the KGS is based is described as follows:

Pico Formation. The Pliocene Pico Formation is a marine formation consisting of sandstone, shale, sand, and conglomerate. Along the southern edge of the Ventura Basin, in the vicinity of Port Hueneme, the Pico Formation is deposited above an unconformity (see plate 1). The unconformity truncates the Miocene age Monterey Formation and the Conejo Volcanics at an angle.

A moderately widespread sand body occurs at the base of the Pico Formation beneath the Oxnard Plain and offshore along the southern edge of the Ventura Basin. Within this sand accumulation there occurs a body of tar which is trapped on top of the unconformity (Yeats, 1983).

The tar is fairly continuous in extent, but clearly is of variable thickness within the sand. The tar accumulation is known by various names informally or in some restricted sense, for example; Lower Pico Tar, Vaca Tar, Pico Tar, and Base Pico Tar. The strata in the sand body in which the tar has accumulated are facies equivalents rather than stratigraphic equivalents, even within the producing area of the Oxnard field (Dosch, 1965), but are in similar positions relative to the controlling structure which is the unconformity at the base of the Pico Formation.

The "Vaca Tar sands" (Dosch, 1965) and "Lower Pico Tar sands" are at the base of the Pico and are immediately above or near the unconformity in the Oxnard oil field. Dosch (1965) concludes: "The tar accumulations in the sands appear independent of structure, . . ." The current producing area of these Pliocene age tar sands is limited to an area in the Oxnard oil field; however these tar sands are found over an area much larger than the Oxnard oil field. The depth to the Lower Pico Tar beneath Port Hueneme Naval Reservation varies from 3300 ft at the southeast corner to 6200 ft at the northwest corner.

The discovery well in the tar sands of the Pico Formation was Vaca Oil Exploration Co., Inc., No. 1 in Sec. 15, T. 1 N., R. 21 W., SBM. The well was completed in January, 1937, with an initial daily production of 50 barrels of oil and 10 Mcf of gas, but was subsequently abandoned because of production problems (Dosch, 1965). Also according to M.W. Dosch (verbal communication, 1985) many wells currently produce from the tar sands. Production from the tar sands is concentrated in Sec. 5, 6, and 7, T. 1 N., R. 21 W., SBM. Most producing wells are operated by Chase Production Company.

Pico Formation tar sands are also found in the offshore according to Scott Sorensen of the Minerals Management Service (MMS), Los Angeles office, (oral communication, 1985). The "Base Pico Tar" is about 50 feet thick in the Hueneme offshore oil field discovery well, well 202-1A. The Base Pico Tar was tested in well

202-1A, but not produced. The Base Pico Tar is present in some Hueneme offshore field wells, for example 202-2, 202-3, and 203, but tar is not observed in other nearby wells, for example 202-4 and DB-2A (a Texaco core well). The offshore pattern of occurrence of the Pico Base Tar is not unlike that onshore, but the well locations are more widely separated (figure 7). Dosch (1965) stated that the onshore "Lower Tar sands" in the Pico Formation are not stratigraphic equivalents of each other, as is evident from the "onlap" of the Pico Formation onto the unconformity. It is also likely that the offshore "Base Pico Tar" is not the stratigraphic equivalent of the onshore "Lower Tar sands", but is a facies equivalent. Both are immediately above or near the unconformity at the base of the Pico Formation and, therefore, are part of the same accumulation.

(KGS Report at 5-6).

The apparent mechanism for the trapping of oil in the tar sands is explained by Robert S. Yeats, upon whose work Holden relied in part, as follows:

At Oxnard, the Miocene Modelo (Monterey) Formation, which rests unconformably upon Conejo Volcanics, underwent apparent reverse faulting, northwest tilting, and submarine erosion prior to being overlapped by Pleistocene sandstone with local interbeds of conglomerate and sandy siltstone. The overlap produced an up-dip stratigraphic trap for low-gravity oil in fractured Modelo Formation and fractured volcanics. Lateral closure was provided by NW-trending pre-Pleistocene faults and possibly by facies changes between fractured and less-fractured Modelo. The trap was only partially effective, and oil leaked across the unconformity into Pleistocene sediments and accumulated as the Vaca Tar and Lower Tar sands. The paradox at Oxnard is that oil in the fractured Miocene formations migrated upstructure to the unconformity, but in the Pleistocene sands, oil migrated downstructure along bedding and above the unconformity. A suggested explanation is that under certain conditions, low-gravity oil may have a greater density than water. Oil of 7.5 degrees API gravity and gas-oil ratio (GOR) of 100 cu f./bbl. has a lower density than brine of 13,000 ppm NaCl at the depth of the Miocene reservoir, 2500 feet. However, oil of zero GOR has a higher density than does water of 6000 ppm NaCl at the depth of the Vaca Tar sand, 2000 feet. The salinities are those recovered on drill-stem tests from the Miocene and Pleistocene, respectively. Oil of 7.5 degrees API gravity with a moderate GOR could rise through the saline waters in fractures in the Modelo, lose its gas and become reduced in API gravity as it crosses the partial seal at the unconformity, and sink in the less saline waters of the Pleistocene sediments.

Yeats, Heavy Oil Accumulations in the Oxnard Field, Ventura Basin, California, in Petroleum Generation and Occurrence in the Miocene Monterey Formation, California, at 85 (Society of Economic Paleontologists and Mineralogists, Pacific Section, 1983).

Holden bases the Oxnard KGS determination on a finding that the Pico Formation tar sands extend under Port Hueneme. Holden states:

The geologic conditions at Port Hueneme are analogous to those in the adjacent oil and gas fields. East-west trending faults and permeability barriers seem to preclude the extension of the pre-Pico oil and gas zones beneath Port Hueneme. However, the Pico and younger formations are largely unfaulted in the vicinity of Port Hueneme. At the base of the Pico Formation is a sand body deposited on an angular unconformity. Within this sand body, the "Lower Pico Tar" and the "Vaca Tar" are trapped. Individual strata of sands in the basal part of the Pico Formation grade to shale northward, toward the center of the Plio-Pleistocene Ventura Basin. The sand body extends beneath Port Hueneme, and at least as far east as the west as the Hueneme offshore oil field, based on electrical log interpretations and mud log information. The maximum down dip, or northern, limit of the tar is controlled by the deposition of shale instead of sand on the unconformity, or by the disappearance of the unconformity and the associated tar-bearing sand body. The maximum updip, or southern, limit of the tar is controlled by the facies change to the less permeable rocks in the Saugus Formation. Because the tar rose through fractures or small faults, the deposition is uneven and the tar's thickness varies based on the proximity to a permeable fracture or fault as well as to the presence and thickness of a permeable sand body. The thickness of the tar deposit is therefore much more variable than the thickness of the entrapping sand body. The zero isopach in plate 2 is drawn where the periphery of the tar in the Pico Formation is known or can reasonably be inferred. For example, in Shell Oil Co. Well PRC in Sec. 20, T. 1 N., R. 22 W., spudded on Port Hueneme, the almost vertically drilled well did not encounter tar, but the second redrill, a deviated hole, did encounter tar in the Pico Formation.

The actual shape of the tar accumulation in the Pico is probably very complex. Small areas where the sands were impermeable or not present are probably without tar; however, the shape of the tar accumulation resembles a blanket with crenate or lobate edges, random small holes, and variable thickness. The geologic extent of the KGS is the limit of occurrence of tar in the basal part of the Pico Formation, as based on published data, electrical logs, and mud logs. Plate 2 is an isopach of the occurrence of tar in the basal Pico.

(KGS Report at 6-7).

Holden reports that many wells produce from the tar sands, particularly the tar sands located in secs. 5, 6, and 7, T. 1 N., R. 21 W., San Bernadino Meridian (KGS Report at 5). He states that Pico Formation tar sands also are found in the Hueneme offshore oil field, although he does not indicate that the offshore wells produce from the tar sands. Holden reports the tar sand is about 50 feet thick in offshore well 202-1A. Holden noted also that

while the Base Pico tar is present in some Hueneme offshore field wells, 202-2, 202-3, and 203, tar is not observed in other nearby wells, 202-4 and DB-2A (a Texaco core well). Thus, essentially, Holden contends that the fact that the Pico Formation sands are producing in the Oxnard field to the east of Port Hueneme, is evidenced in drilling logs of wells drilled within the zero isopach boundary near Port Hueneme, and are found in the Hueneme offshore wells to the west of Port Hueneme proves that the Pico Formation tar sand structure underlays the subject land as well (KGS Report at 5-6).

The geologic information which formed the basis of the KGS determination included published literature, well logs, and conversations with personnel within BLM and MMS as well as others outside Government. Holden also relied upon electric logs which showed resistivity anomalies at the base of the Pico Formation, indicating the presence of hydrocarbons. Mud logs showed the presence of tar in some zones where the electric log anomalies indicated a presence of hydrocarbons, but not in other cases, according to Holden (KGS Report at 6).

The KGS boundary was drawn to include any Federally owned land included within the zero isopach of the "Lower Pico Tar," according to the KGS report. The boundary of the KGS embraces the entire Port Hueneme Naval Reservation, approximately 1,639 acres, all of which lies within the zero isopach (KGS Report at 7 and plate 2).

Appellant Bubala argues that none of the five wells with shows of tar sands in the area east of Port Hueneme shown on Holden's report was tested in that formation. Bubala states:

It is not reasonable to assume or presume that wells which have not been tested are capable of producing oil or gas from sands or zones which have resistivity on an electric log, along with possible minor tar shows on a mud log or in sidewall samples. The presence of tar often indicates that it is residual and cannot be produced. It is reasonable to assume that the many geologists who reviewed all the data with fresh information and a strong desire to find a productive well would have tested the so-called tar sands if the data supported this contention. [Emphasis in original.]

(Bubala Statement of Reasons (SOR) at 3).

BLM responded:

A more reasonable explanation for the companies' failure to test these wells is suggested by the depth to which most of the wells were drilled. See plate 2, KGS report. The deeper well depths clearly indicate that the companies were interested in deeper light oil targets and not the shallower Pico tar. While a given operator may consider a portion of producing reservoir to be uneconomic, the question for the KGS classifier is whether the trap extends under the lands in question.

(Answer at 7).

In a supplemental brief, Bubala, relying on the report of Bear, disputes Holden's contention that the resistivity readings of the electric logs established tar presence. Bear states that the various resistivity shows did not "conclusively indicate" tar where the electric logs recorded high resistivities. Bear notes that electric logs record high resistivity in trapped fresh water lenses, limestone, conglomerate, pebbly sands, sands with fossil shells, siliceous shales, hard shells, well cemented sandstones and numerous other lithologies (Bubala Supp. SOR, Exh. A at 7).

The BLM answer relates that while electric well log anomalies are open to multiple reasonable interpretations, the vast majority of experienced well log analysts would conclude that an anomaly correlated to the occurrence of petroleum in one well will very reliably indicate the presence of petroleum in a nearby well, assuming similar geology of the lands penetrated by the two wells (BLM Answer at 8).

Appellant Bubala challenges other particulars of the BLM well log interpretations on which the finding of the zero isopach of the tar sand is based as well. Thus, appellant contends the log of the second redrill of the Shell PRC well shows no resistivity value which would indicate tar (Appendix I to geologic report attached to Bubala's SOR at 3). The BLM answer discloses that the BLM analyst Sorensen, who has extensive experience in the offshore Ventura Basin as the well log interpreter in the area, reaches a contrary conclusion (BLM Answer, Exh. B at 7).

With respect to the inference to be drawn from the failure to produce or further test the tar sands within the zero isopach between Port Hueneme and the producing wells of the Oxnard field, Holden notes that the oil being produced from the Pico Formation at Oxnard is a tar which is recovered only through the use of enhanced recovery techniques (BLM Answer, Exh. B at 1). Responding to Bear's contention that the basal part of the Pico Formation might contain only "dead" oil or might only test "gray water," Holden points out that, at least subsequent to enactment of the Combined Hydrocarbon Leasing Act of 1981, 4/ "a hydrocarbon does not have to flow freely into a well bore for the hydrocarbon to be considered an 'oil' 5/ for the purposes of KGS classification" (Id. at 2).

[1] Pursuant to section 17 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. | 226(b) (1982), if lands to be leased are within any KGS of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding. A noncompetitive oil and gas lease application must be rejected if, prior to lease issuance, the land applied for is designated as within a KGS. Hrubetz Oil Co., 93 IBLA 343,

4/ Combined Hydrocarbon Leasing Act of 1981, P.L. 97-78, 95 Stat. 1070 (30 U.S.C. | 181 et seq. (1982)).

5/ Section 1(4) of the Combined Hydrocarbon Leasing Act provided that: "The term 'oil' shall embrace all nongaseous hydrocarbon substances other than those substances leasable as coal, oil shale, or gilsonite (including all vein-type solid hydrocarbons." 30 U.S.C. | 181 (1982).

344-45 (1986). The Department has no authority to issue a noncompetitive lease for lands within a KGS. McDonald v. Clark, 771 F.2d 460 (10th Cir. 1985); McDade v. Morton, 353 F. Supp. 1006 (D.D.C. 1973), aff'd, 494 F.2d 1156 (D.C. Cir. 1974).

[2] An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are situated within the KGS of a producing oil and gas field has the burden of showing by a preponderance of the evidence the determination is in error. Carolyn J. McCutchin, 93 IBLA 134, 136-37 (1986); see Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984). The "preponderance of the evidence" standard has been defined as:

To establish the preponderance of the evidence means to prove that something is more likely so than not so; in other words, the "preponderance of the evidence" means such evidence, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely to be true than not true.

Thunderbird Oil Corp., 91 IBLA 195, 201 (1986), 6/ quoting South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767, 778 (6th Cir. 1970).

It is well established that this Board may rely on reports of the Secretary's technical experts. Ronald C. Agel, 87 IBLA 255 (1985); Woods Petroleum Co., 86 IBLA 46, 52 (1985); John P. Brogan, 85 IBLA 379, 383 (1985). In Champlin Petroleum Co., 86 IBLA 37, 40 (1985), we noted that "[w]hile the conclusions drawn from geological data are subject to different interpretations, the Secretary is entitled to rely upon the reasoned opinion of his technical expert in the field," citing Bruce R. Anderson, 63 IBLA 111 (1982). A determination by Departmental technical experts will normally not be set aside where it is not arbitrary and capricious, and is supported by competent evidence. Woods Petroleum Co., supra at 52 (1985); Davis Oil Co., 53 IBLA 62, 67 (1981).

A KGS is defined as "technically the trap in which an accumulation of oil and gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive" 43 CFR 3100.0-5(l). Thus, delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent stratigraphic as well as structural traps. Thunderbird Oil Corp., supra at 202. It has been recognized that a KGS designation of certain land may be made on the basis of drill stem tests, not just completed producing wells, which indicate that a reservoir which extends under such land is productive. Lloyd Chemical Sales, Inc., 82 IBLA 182 (1984). In the circumstances of the tar sand involved in this case, we find a KGS determination may be supported by an analysis of drill logs indicating the presence of the productive formation under the lands in question notwithstanding the fact the wells were not tested in that formation.

6/ Aff'd, sub nom., Planet Corp. v. Hodel, CV No. 86-679 HB (D.N.M. May 6, 1987).

In Thunderbird Oil Corp., 91 IBLA at 202, we addressed the concept of presumptively productive. We stated:

It has occasionally been argued that since, by definition, all acreage included in a KGS is "presumptively productive," it is necessary to show that acreage is "presumptively productive" before it can be included within a KGS. This is not correct. Acreage included in a KGS is presumptively productive by the mere fact of its inclusion. In other words, when land is placed within a KGS the effect of the placement is to give rise to a presumption of productivity. Such land is presumptively productive because it has been properly included in a KGS rather than having been included because it is presumptively productive. While this may be a fine point it has a major effect on consideration of KGS appeals. Thus, BLM is not required to show that land included in a KGS is presumptively productive. Rather, it must merely establish that a producing structure exists which extends to the land in question. By establishing this fact, BLM necessarily establishes that the land is presumptively productive. An appellant challenging such a determination must either show that the producing structure does not underlie the land or affirmatively establish, as a fact, the land involved is not productive from the structure in question.

Upon review of the record, we are unable to conclude that appellants have shown by a preponderance of the evidence that the land within the naval reservation is not underlain by the tar sand structure at the base of the Pico Formation and that the lands are not presumptively productive. The tar sand structure is clearly productive in the wells of the nearby Oxnard Field. Upon examination of well logs both for wells situated between Port Hueneme and the producing wells and wells situated offshore beyond Port Hueneme, BLM geologists have concluded the structure is present beneath the lands within the KGS. Although appellants have disputed BLM's interpretation of the well log data in finding the tar sand is present, they have not presented evidence which persuades us that the tar sand structure is not present and is not presumptively productive.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

—
C. Randall Grant, Jr.
Administrative Judge

I concur:

John H. Kelly
Administrative Judge