

HAROLD GREEN
v.
BUREAU OF LAND MANAGEMENT

IBLA 85-453

Decided August 22, 1986

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer accepting a high bid for competitive oil and gas lease C 037443.

Reversed.

1. Oil and Gas Leases: Competitive Leases -- Oil and Gas Leases: Discretion to Lease

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate.

2. Evidence: Burden of Proof -- Oil and Gas Leases: Competitive Leases -- Oil and Gas Leases: Discretion to Lease

When BLM rejects a high bid in a competitive oil and gas lease sale as inadequate and the decision is appealed and later referred for a hearing, at the hearing BLM bears the burden of going forward to establish a prima facie case by showing the prima facie correctness of its minimum acceptable bid value. However, the ultimate burden of persuasion always rests with the competitive high bidder who must show by a preponderance of the evidence not only that BLM's minimum acceptable bid value is erroneous, but also affirmatively show that its high bid correctly reflects the fair market value of the parcel.

APPEARANCES: Lyle K. Rising, Esq., Office of the Solicitor, Denver, Colorado, for appellant, Bureau of Land Management; James E. Bosik, Esq., Denver, Colorado, for appellee, Harold Green.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The Bureau of Land Management (BLM) appeals a February 12, 1985, decision of Administrative Law Judge Harvey C. Sweitzer reversing BLM's rejection of Harold Green's high bid for parcel 19 in the Colorado State Office, BLM,

competitive oil and gas lease sale of February 24, 1983. Parcel 19 is a 40-acre parcel described as the NE 1/4 SW 1/4, sec. 14, T. 7 S., R. 99 W., sixth principal meridian, Garfield County, Colorado. Green bid \$910 for the 40-acre parcel, \$22.75 per acre.

BLM initially rejected Green's bid by decision dated April 19, 1983, finding it to be "inadequate." BLM's analytical framework in rejecting the high bid, as set forth in its decision, consisted of three parts: Comparable sales, geologic data, and discounted cash flow. BLM stated there was no current comparable sales information on land within 6 miles of parcel 19. However, BLM noted the land was within the \$35 to \$200 per acre range of lease values in Garfield County cited in the February 1983 U.S. Lease Price Report prepared by Petroleum Land Data, Inc. ^{1/} As to geologic data, BLM stated information contained in the Kimball Creek Geologic Unit Report on the Albertson Ranches 13-4 well (Albertson 13-4), which is the nearest key well, approximately 7,000 feet from parcel 19, supported the rejection. BLM used the report because the lessee of parcel 19 would be required to join the unit. BLM ran a discounted cash flow analysis on data available from the Albertson 13-4 and factored the results by a 25 percent probability of success value. BLM did not, however, disclose in its decision what it had determined to be the minimum acceptable bid value.

In his appeal, Green stated that the Albertson 13-4 had been shut-in since completion so there was no cash flow attributable to the well and, thus, no data available for a discounted cash flow analysis. Green also argued the generalization of comparable sales was meaningless without specifying any basic facts showing actual comparable sales.

In Harold Green, 75 IBLA 288 (1983), the Board referred the case for a hearing because Green raised substantial questions of fact concerning BLM's methodology in arriving at the valuation of the parcel. The Board stated the explanation for rejection of a high bid must be sufficient for it to determine the correctness of BLM's decision. It stated a hearing should be convened for "presentation of evidence concerning the potential for production from the land in issue and the proper valuation of that land. Appellant, as the party challenging the BLM determination, shall have the burden of showing by persuasive evidence that the valuation determination is incorrect." Harold Green, 75 IBLA at 289.

Following a hearing, Administrative Law Judge Sweitzer issued his decision concluding that BLM should accept Green's bid and issue a lease. Judge Sweitzer stated BLM failed to show in comprehensible terms how it arrived at \$150 as a minimum acceptable bid and failed to establish a rational basis for its decision to reject Green's bid. ^{2/} He stated Green met his burden of showing by persuasive evidence that the valuation determination was incorrect.

^{1/} At the hearing the parties stipulated that this publication actually indicated a range of values from \$5 per acre to \$200 per acre with the most common value for a lease being \$35 per acre (Tr. 4; see Exh. A).

^{2/} The first indication in the record of the disclosure by BLM of its minimum acceptable bid value was at the hearing (Tr. 54).

BLM appealed Judge Sweitzer's decision on the ground it was arbitrary, capricious, and without a rational basis. BLM argues that the Judge erred in holding "the BLM to have the burden of proving every jot and tittle of its case beyond a reasonable doubt without any failure no matter how minor, regarded as a fatal flaw in BLM's case" (Opening Brief at 2). BLM argues Green introduced no evidence showing error in BLM's methodology or data. BLM contends Green merely established a different method of calculating the fair market value of the land. BLM criticized Green's valuation stating it is based on gross averages of sales covering an entire county and is not data of comparable quality to BLM's. BLM also argues:

Both Mr. Green's attorney and the judge thought of questions after the trial which could have clarified the facts even further, but significantly, none of these questions were asked of the Government's expert witness even though he was available to testify. It is incomprehensible and unfair to the BLM to allow questions raising matters not at issue in the hearing, questions which could have been asked, to provide the basis for finding against BLM. [Emphasis in original.]

(Opening Brief at 8). In addition, BLM challenges point-by-point Judge Sweitzer's conclusions.

In response, Green concludes BLM failed to establish the necessary rational basis and reasoned and factual explanation for its conclusion that Green's bid did not represent fair market value for parcel 19. Green states all matters regarding BLM's value determination were very much in issue at the hearing and BLM, not Green, should supply the basis and explanation. Green supports Judge Sweitzer's specific findings and conclusions.

[1] The Secretary of the Interior has discretionary authority to reject a high bid for a competitive oil and gas lease as inadequate. 30 U.S.C. § 226(b) (1982); Michael Shearn, 87 IBLA 168, 169 (1985); Viking Resources Corp., 80 IBLA 245, 246 (1984); Edward L. Johnson, 73 IBLA 253, 254 (1983). This Board has consistently upheld that authority, so long as there was a rational basis for the conclusion that the highest bid does not represent a fair market value for the parcel. Viking Resources Corp., 80 IBLA at 246; Ambra Oil & Gas Co., 75 IBLA 11, 14 (1983); Glen M. Hedge, 73 IBLA 377, 378-79 (1983); Edward L. Johnson, 73 IBLA at 254-55. Departmental policy in the administration of its competitive leasing program is to seek the return of fair market value for the grant of leases, and the Secretary reserves the right to reject a bid which will not provide a fair return. Viking Resources Corp., 80 IBLA at 246; Glen M. Hedge, 73 IBLA at 379; Coquina Oil Corp., 29 IBLA 310, 311 (1977).

The Department is entitled to rely on the reasoned analysis of its technical experts in matters involving geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Viking Resources Corp., 80 IBLA at 246; L. B. Blake, 67 IBLA 103 (1982). However, when BLM relies on that analysis in rejecting a bid as inadequate, it must ensure a reasoned explanation is provided for the record to support the decision. TXO Production Corp., 73 IBLA 258, 261 (1983); Edward L. Johnson, 73 IBLA at 255; Southern Union Exploration Co., 41 IBLA 81, 83 (1979).

BLM quotes our decision in Howell Spear, 86 IBLA 8, 12 (1985), wherein we stated: "Once the Government has presented sufficient documentation establishing the correctness of its fair market value estimate, the burden shifts to appellant to show not only that the Government's estimates do not constitute fair market value, but also that its bids do represent fair market value" (BLM Reply Brief at 1). See also Michael Shearn, 87 IBLA at 169; Burton/Hawks Inc., 85 IBLA 193, 195 (1985); Exxon Company, USA, 85 IBLA 135, 137 (1985); Kevin J. Bliss, 82 IBLA 31, 33 (1985); R. T. Nakoaka, 81 IBLA 197, 200 (1984). ^{3/} Green responds "the burden could not be shifted to Green in the absence of sufficient documentation of the Government's estimate such as would establish its prima facie correctness" * * * In this matter the necessary threshold was never met by BLM" (Reply at 3, quoting Larry White, 81 IBLA 19, 22 n.2 (1984)). In the past, the Board has held that when BLM's decision to reject a high bid is conclusory, without factual basis in the record, and a request for supporting documentation has been refused, the decision may be reversed as arbitrary and capricious, and lease issuance ordered. Steven Lutz, 39 IBLA 386, 389 (1979). However, since the Lutz decision, the Board has determined that a lease may not issue until the high bidder shows BLM's minimum acceptable bid value was erroneous and affirmatively shows its bid represents fair market value for the parcel. Thus, where BLM fails to provide a rational basis for its rejection decision or where the appellant shows BLM has erred in its calculation of a minimum acceptable bid value, the appellant must still prove that its bid represents fair market value in order to be awarded the lease.

[2] The language Green quoted from Howell Spear means BLM bears the burden of going forward and establishing the prima facie correctness of its minimum acceptable bid estimate. However, the high bidder always has the ultimate burden of persuasion to show by a preponderance of the evidence not only that BLM's minimum acceptable bid value is incorrect but also affirmatively show that its high bid correctly reflects fair market value for the parcel. Therefore, while the burden of going forward shifts, the ultimate burden of proof remains constantly with the high bidder, and a lease may not issue until that burden is met.

Judge Sweitzer concluded BLM failed to provide a rational basis for its decision to reject Green's bid. He stated BLM failed to show "in comprehensive terms" how it arrived at \$150 as its minimum acceptable bid (Decision at 6). Therefore, the first question for consideration on appeal will be whether BLM presented sufficient evidence at the hearing to establish the prima facie correctness of its minimum acceptable bid estimate.

At the hearing BLM's expert witness, Richard J. Ryan, a petroleum engineer, disclosed that the basis for the \$150 per acre minimum bid value

^{3/} This requirement that the high bidder affirmatively show that his bid represents fair market value was first stated by the Board 7 days after the hearing in this case. See Viking Resources Corp., 80 IBLA 245 (1984).

determination was the discounted cash flow projection on data from the Albertson 13-4 (Tr. 68). BLM utilized a computerized calculation identified as a "Monte Carlo type system" to determine average values (Tr. 67). ^{4/} The range of values for various parameters was derived in large part from the participating area application of Teton Energy Company, Inc. (Teton), filed May 13, 1982, for the Albertson 13-4 (Tr. 67). Since that well was shut-in, information was derived from projections based on short term production tests (Tr. 49). The average values resulted from running the range of parameters through the computer 5,000 times (Tr. 67).

Ryan explained:

If you take any cash flow program, they should all do the same thing. They all allocate production over a period of time, they all take your investment, they account for taxes, for royalties, for operating expenses and take them from the positive cash flow, deduct them, and come out with a value that would be generated at a time period, and then bring them back to present value or discount them back to present value.

When I refer to discounting it, we are taking -- we say there is a base time, as of today is a base. Any money generated in the future must be brought back to today so that we are comparing the same value dollar. A dollar today is going to be worth less in the future; therefore, you take that dollar and bring it back, how much is it worth today. This is what we're doing when we do the discounted cash flow, we're looking at the flow generated from the well -- revenue generated from the well, paying for its investment, operating cost, then bringing it back to present day dollars.

(Tr. 81-82).

Ryan testified that following the computer run, BLM derived a risk factor, which it utilized in determining the probability of success. He defined the probability of success as being 1 minus the risk factor (Tr. 55). In this case the probability of success was 25 percent (Tr. 55). Thus, the effect of factoring in the probability of success in this case was to reduce

^{4/} These values, and others, as set forth in exhibit 3, are:

Average reserves (MCF):	4,393,286
Average decline rate (year):	12 percent
Average drilling costs:	\$1,515,000
Annual operating cost:	\$16,200
Price (dollars per MCF):	\$5.74
Royalty:	16.7 percent
Taxes:	46 percent
Acres in unit participating area (per well):	678 acres
Present worth (at 100 percent probability of success):	\$4,529,669

the minimum acceptable bid value (Tr. 55). In other words, BLM assumed only one well in four meets its projections (Tr. 88).

BLM considered the positive and negative factors in determining the probability that a well on the parcel in question would produce in paying quantities. The positive factors were that the parcel is within a known geologic structure and in a higher position in the geologic structure than the Albertson 13-4, and, therefore, a well drilled on parcel 19 would be more likely to hit gas than water (Tr. 55, 56). The negative factors considered in determining the probability of success value were the possibility of misjudgments or errors in BLM's valuations, and the unpredictable nature of geology.

In response to a question concerning the possible "pinching out" of stratigraphic traps, Ryan stated:

This is possible and is considered when we risk our discounted cash flow at our 25 percent. This is one of the factors considered in placing a risk on it. Risk factors are very tough to put an exact handle on it, but we believe this was considered in placing the 25 percent probability of success on it.
(Tr. 72).

Ryan also testified in answer to the following question:

Q Yet the possibility exists in this area, being a tight sand, being characterized by low permeability, and that being a factor in pinching out, that we might have a true change in the rock structure from the Albertson 13-4 parcel to the present parcel; is that correct?

A That's correct in that this was considered in placing a 25 percent risk on it. It's part of the consideration. There's always the possibility that you can drill a well any distance away from a producing well and have a significant enough change in rock characteristics to make one well a producer and the other a non-producing well.

It is clear from the record that BLM's assignment of a risk factor to develop the probability of success for a well is not based on any clearly defined formula. As explained by Ryan, it involves the weighing and balancing of various factors which would contribute to the success or failure of a well and then the assignment of a numerical value to the totality of those risks.

Admittedly, BLM could have presented further evidence which would have bolstered its case. 5/ The question, however, is not whether more evidence

5/ In this regard, we note that on May 29, 1985, BLM issued Instruction Memorandum (IM) No. 85-490. Enclosed with that IM was a document styled

would have made a better case, but whether the evidence actually tendered was sufficient to establish the prima facie correctness of BLM's minimum acceptable bid estimate. The Judge found that it was not. We disagree.

Judge Sweitzer cited a number of grounds for finding fault with BLM's evidence. First, regarding comparable sales he stated: "BLM concedes that there are no current comparable sales, but asserts that a listing in the 'U.S. Lease Price Report' is an adequate substitute for comparable sales data" (Decision at 3). Further, he observed that BLM failed to establish a connection between comparable sales and the lease price report. *Id.* However, BLM admitted at the hearing that comparable sales were not utilized in its fair market value determination. ^{6/} Thus, BLM was not obliged to establish that the lease report was a substitute for comparable sales data because the report only served as general background information to show whether BLM's values were in the bonus range reported, not as a source establishing comparable sales values (Tr. 64).

Second, regarding geologic data, Judge Sweitzer stated that BLM failed to offer testimony on "how the geologic factors were assigned numerical figures so that they could be utilized in the mathematical formula which was purportedly used to determine that \$150 was the minimum acceptable bid for the subject parcel" (Decision at 3). The Judge observed that although Ryan testified that geologic factors influenced the probability of success determination, "no adequate explanation was given as to the basis for arrival at this 25 percent figure" (Decision at 4).

Judge Sweitzer assumes that BLM assigned numerical figures to the geologic factors, yet failed to provide such figures at the hearing. It does not appear, however, that this was the case. As set forth, *supra*, BLM weighed and balanced the positive and negative factors in its probability of success analysis. Most of those considerations involved reviewing geologic information and assumptions. The end result of that process was assignment of a numerical value as a risk factor which, after being subtracted from one, resulted in the 25 percent probability of success. Green argues that BLM provided no connection or explanation of how the application of each factor resulted in the 25 percent probability of success. Green does not, however,

fn. 5 (continued)

"Task Force Report on Appraisal and Bid Procedures for Competitive Onshore Oil and Gas Leasing." Therein, BLM sets forth its procedures for economic evaluation of leasing parcels. Clearly, inclusion in the case record of more details of BLM's evaluation, such as the input data worksheet, can only serve to strengthen BLM's position in a high bid rejection case.

^{6/} BLM abandoned any pretense that comparable sales had actually been utilized in the fair market value determination. BLM's witness stated:

"There was no comparable sale in the area that [was] acceptable, within our parameters and which we determined to be of current age. and we are, by the manual that we use for the standards of appraisal, standards handbook we use, you only have your income approach, your comparable sales approach; and, therefore, we were left to run only discounted cash flow or income approach." (Tr. 68)

contend that the 25 percent figure was too high or suggest what that factor should have been. Under the circumstances, we find BLM's explanation was adequate to support its valuation.

Judge Sweitzer further found that while "Ryan was requested on cross-examination to explain the calculations which were made to arrive at the \$150 figure (Tr. at 81), no mathematical formula was ever presented which justified the use of \$150 as a minimum bid" (Decision at 4). Judge Sweitzer also stated that Ryan failed to describe how the Monte Carlo system works. Our review of BLM's evidence, set forth supra, reveals that Ryan did, in fact, describe in general terms both the "Monte Carlo type system" and the discounted cash flow program. At the hearing no greater detail was demanded by counsel for Green.

Counsel for Green did not specifically attack the figures set forth in Exhibit 3, see 3/ supra, except for "Price (dollars per MCF)." As Ryan explained BLM utilized two prices in its program, a low of \$4.92 per MCF and a high of \$5.74 per MCF (Tr. 82-83, 85). He stated the high figure was the price at the time of the competitive sale, as derived from a Federal Energy Regulatory Commission publication (Tr. 85). Counsel for Green pointed out, however, that the proper figure from that publication should have been \$5.464, rather than \$5.74 (Tr. 86). While BLM essentially admits this error, it argues that the magnitude of the error is so small that it is inconsequential. The Board has intimated that minor errors in BLM's evaluation will not suffice to establish that the evaluation must be overturned. Only errors which are so great that, if corrected, would lower the evaluation to at or near the bid value will be sufficient to require overturning BLM's decision. See Suzanne Walsh, 75 IBLA 247, 250 n.1 (1983). There is no suggestion in this case that the error pointed out by Green rises to such a level.

Next, Judge Sweitzer registered "serious doubts concerning the propriety of using the Albertson 13-4 well as the sole means of evaluating the subject parcel" because the well was shut-in, so there was no actual production to use as a basis of BLM's projections and the subject parcel would not be included in the "participating area" of the Albertson 13-4 and, thus, not share in any revenue from that well (Decision at 4). The fact that the subject parcel will not benefit financially from the Albertson 13-4 has no bearing on whether or not data concerning the Albertson 13-4 is relevant and reliable. Ryan, the only expert on geology at the hearing, testified that the geology of the subject parcel and the Albertson 13-4, which are approximately 7,000 feet apart, is comparable. He stated:

Well, other than unforeseen changes in natural rock characteristics between the two of them, we are going upstructure approximately, I believe it's 150 feet higher on the structure, which, like I say, unless rock structure changes, you should have a very good chance of getting a well capable of paying for its investment.

(Tr. 57).

Ryan further explained the rationale for using data from a shut-in well as a basis of comparison:

[W]e have approved a paying well determination on that well from the participating area application. Under the requirements within a unit agreement, the operator either has to, once he completes a well capable of production, submit it as a paying well determination, which changes that unit from exploratory unit to a paying -- or to a producing unit or is required to drill wells with, I believe it is, no more than 90 days between completion of one well and commencement of another. And we believe that to be a paying well; therefore, we considered it -- we accept it in justifying converting that unit to a producing unit, we believe it supplies very pertinent data and very valuable data in projecting any kind of cash flow from land -- from that particular parcel, and have related it over to this other one, as we do believe it's [this parcel] a similar and of better quality geologically than Albertson Ranches 13-4.

(Tr. 57-58).

Green's witness, Dennis D. Randleman, a landman, testified that the factors he would take into consideration in determining the value of lease-hold would be proximity to production, geology of the area, proximity to pipelines, general market conditions within a localized area and comparable sales (Tr. 10). Randleman stated that in his opinion, the subject parcel was worth \$22.75 per acre (Tr. 34). Green, however, did not affirmatively establish that BLM's minimum bid determination was erroneous.

In conclusion, based on our de novo review, we find BLM established a rational basis for its decision to reject the high bid and Green failed to affirmatively show that BLM erred in its determination.

Accordingly, 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 reversed.

Bruce R. Harris
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN CONCURRING IN THE RESULTS:

I find high bid rejection cases among the most difficult to resolve. The reason for this difficulty is not a matter of sifting through volumes of evidence but the lack of concrete evidence. This problem is, in no small part, a result of the Bureau of Land Management's (BLM's) reluctance to disclose much more than the methodology of its determination. This case is a textbook example of BLM's present approach to a challenge of its high-bid rejection determination. 1/ - -

At the outset, I find it important to recognize that making a fair market value determination is not an exact science and, to a great extent, these determinations are judgmental. This being the case, we will normally place a great deal of reliance upon the judgment of an employee of the Government regarding the fair market value of the right to extract a depletable commodity from Federal lands. Theoretically, at least, if the evaluator's estimate is high, and no acceptable bids are submitted, the property can be reanalyzed at some future date, a new value determined, and new offers solicited. On the other hand, if the value is low and the bid is accepted, there would not be an opportunity to recoup the losses the Government might incur as a result of accepting the low valuation.

One recourse might be to provide by statute or regulation that there will be no review of high-bid rejections. This course of action has not been taken. I believe the reason it has not is the Department recognizes the inherent danger that the program could become subject to arbitrary or capricious determinations and a BLM adjudicator could become subject to improper pressure to have a reasonable bid rejected in order to allow another party a second opportunity to make a high bid.

With this general philosophy in mind, I will address the matter before us. As stated in the majority opinion, a line of cases has developed which allows this Board to make a determination of whether a high-bid rejection decision should be sustained or overturned. Recognizing such determinations are value judgments and that the Secretary rightfully relies upon the analysis of those he has hired to make the determination, the decision will be upheld if it is found to have been reasoned and accurate. Put another way, it will be overturned only when it can be shown that the determination was arbitrary and capricious or that an error was made in the determination. If an error is shown it must be more than minor or technical. It must be so material as to render the decision suspect.

In the examination of a high-bid rejection case, this Board examines only that evidence before it. It does not, for example, have access to the computer program used when making a discounted cash flow (DCF) analysis. Thus, if an apparent error exists we are unable to recalculate the DCF to

1/ I am pleased to note some effort is now being exerted to overcome a similar problem regarding KGS determinations. See Instruction Memorandum No. 86-603, July 23, 1986.

determine whether the error was minor or material, or if, after adjustment, the fair market value as adjusted falls above or below the bid submitted by an appellant. It is obviously difficult for this Board to conduct a de novo review of a high-bid rejection.

Lacking material with which we might be able to conduct a truly de novo review, this Board has developed a two-pronged approach to analysis of high-bid rejection decisions. As discussed in the majority opinion, the first prong is whether appellant has demonstrated the high bid rejection decision was arbitrary and capricious or a material error in the analysis of the fair market value. See Harold Green, 75 IBLA 288 (1983).

Again, if the appellant demonstrates the existence of error on the part of the evaluator, the error must be shown to be material, rather than technical or inconsequential. If material, the value placed on the tract becomes suspect. This proof of error is sometimes achieved by demonstrating a single error. See Stephen M. Bess, 71 IBLA 122 (1983). It can also be achieved by showing a number of errors or oversights which collectively render the decision suspect. It is my opinion that this is such a case. A number of apparent discrepancies have been demonstrated. Many of these errors were discussed in the majority opinion. While individually they may well be inconsequential, they are additive and render the fair market valuation suspect, especially in light of the lack of specific evidence presented at the hearing.

It was noted, for example, that the DCF analysis was based upon limited production and reserve estimates obtained from a nearby well. However, this well was "shut in" because no facilities existed to transport the natural gas from the well site. The DCF analysis apparently considered neither the delay in return on investment resulting from the inability to transport the product nor the additional cost which would be incurred constructing a 6-mile extension of the pipeline. The market value used for the product was in error because of an apparent transposition of numbers. Further, the natural gas price used was the maximum obtainable value and not the value which could reasonably be expected from a well in the area. The evidence that the sales price was less than the maximum value set by the Department of Energy was not disputed.

As a result of those collective errors, I find the \$150 per acre value to be sufficiently suspect to conclude it is not correct. Had sufficient evidence been presented to permit an analysis of the impact of these errors, a determination might be made that the fair market value was still well above the bid amount. However, we do not have this information. BLM has deliberately chosen to withhold it.

At this point one must make a determination of the effect of this finding. The groundwork for this second-prong determination was set forth in Viking Resources Corp., 80 IBLA 245 (1984). It would not be enough for an appellant to prevail merely by showing that an error was made when determining the fair market amount prior to the sale which was not corrected in a post-sale review. If this were the case, a party could submit a spurious bid in hopes of later finding error in the BLM calculations. Therefore, this Board must also be satisfied that the bid represents the fair market value for the tract.

What proof is necessary? Appellant has answered this question. The proof necessary to support the appellant's case is the same as that appellant has deemed necessary for presentation of the Government's case. The proof must demonstrate that the specific bid for the specific tract is a result of a reasoned analysis of the physical and market conditions and that the calculations used in making the determination are free from material error. An examination of the record and testimony presented by appellant at the hearing does not impress me as being any better than that presented by the Government. Appellant has objected strenuously to the sufficiency of the Government evidence and Judge Sweitzer has specifically found BLM failed to show in comprehensible terms how it arrived at the specific fair market value determination. I am left with a conclusion that, based upon the evidence presented, the appellant's fair market value determination was little more than an educated ball park guess. Appellant, like the Government witness, presented evidence of the process used when making the fair market value determination but presented no specific evidence of why the bid submitted represents a reasoned determination of the fair market value for the tract in question and that his calculations are free from error.

R. W. Mullen,
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN CONCURRING IN THE RESULT

Once upon a time the Board required the Bureau of Land Management (BLM) to justify its rejections of high bids to lease lands competitively for oil and gas. See, e.g., M. Robert Paglee, 68 IBLA 231 (1982). As a result, BLM's explanations for its decisions were reasonably complete and relatively comprehensible, at least by the stage it filed an answer to a statement of reasons on appeal to the Board. See, L. B. Blake, 67 IBLA 103 (1982). Then, quite properly, we re-emphasized that a person wishing to use the public's resources must demonstrate that fair market value was being given for doing so. Viking Resources Corp., 80 IBLA 245 (1984). In that case we stated a two-part test for an appellant in a high bid rejection appeal: show that BLM erred, *i.e.*, that its pre-sale evaluation does not represent fair market value, and show that your bid does. We did not, however, abandon the requirement that BLM establish a rational basis for its initial decision. See, e.g., Mesa Petroleum Co., 81 IBLA 194 (1984). If BLM demonstrated a rational basis, we said that the burden of proof shifted to the appellant to show BLM error and to show its own bid was fair market value. Burton/Hawks, Inc., 85 IBLA 193 (1985).

Recently, there has been an erosion of what BLM must show to establish a rational basis for its decision. See, e.g., Read & Stevens, Inc., 93 IBLA 61 (1986); Billy Krumbein, 92 IBLA 362 (1985). 1/ In my view, this trend is regrettable, both because the bidder is not provided much information about why his bid was rejected and because the Board is not provided much basis for determining whether BLM's decision was correct or not. This case adds to the pattern: here BLM's decision survives only because Judge Harris rehabilitated it and because, although Judge Mullen concluded that BLM's estimate of fair market value was incorrect, he found appellant offered too little to show its bid represented fair market value. So the message to appellants from this trend seems clear: if BLM does a poor job of explaining its decision, give the Board as firm a basis as possible for accepting your bid as representing fair market value. See Read & Stevens, supra, at 67, n.4. Even if this is done, the prospects are that the Board will simply send the case back for BLM to buttress its decision. See, e.g., Michael Shearn, 87 IBLA 168 (1985). Maybe it really is not worth appealing these cases in the first place, since any doubts are routinely resolved in support of BLM's exercise of the Secretary's discretion under 30 U.S.C. 226(b) (1982). See Read & Stevens, supra at 67; Read & Stevens, 93 IBLA 84, 87 (1986). 2/

1/ "The record need only be sufficient to establish that the decision was neither arbitrary or capricious." Read & Stevens, Inc., supra at 66.

2/ "If the record indicates a decision to reject a bid has been made in careful and systematic manner utilizing the advice of [technical] experts, that decision will not be reversed, even though the determination may be subject to reasonable differences of opinion." (Emphasis added.) Read & Stevens, supra at 67; Id. at 87.

Will A. Irwin
Administrative Judge

