

UNIVERSAL CITY STUDIOS, INC.

IBLA 90-148, 90-149

Decided August 5, 1991

Appeals from decisions of the Folsom, California, Resource Area Office, Bureau of Land Management, assessing costs for unauthorized occupancy of public lands and approving special use permit for moviemaking. CA 25771 and CA 25772.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Generally--Federal Land Policy and Management Act of 1976: Permits--Rent--Special Use Permits--Trespass: Measure of Damages

If payment is required for use of the public lands, either with or without prior approval by the Department, a fair market rental value determination must be made pursuant to 43 CFR Part 2920.

2. Appraisals--Evidence: Burden of Proof--Rent--Special Use Permits--Trespass: Measure of Damages

Fair market rental value may be assessed from a flat rate fee schedule established by Bureau of Land Management appraisal staff.

APPEARANCES: Elizabeth Shaw, Esq., for Universal City Studios, Inc.; Burton J. Stanley, Esq., Office of the Regional Solicitor, Sacramento, California.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Universal City Studios, Inc. (Universal), has appealed from two decisions issued on September 13 and 19, 1989, by the Folsom, California, Resource Area Office, Bureau of Land Management (BLM), both of which assessed fair market rental for occupancy of public lands that occurred when appellant was filming the movie "Back to the Future III." On August 28, 1989, BLM employees investigated a reported trespass on 2 acres of public land in sec. 11, T. 1 S., R. 13 E., Mount Diablo Meridian, Tuolumne County, California, and found there an assortment of mobile

trailers and other temporary facilities belonging to Paradox Pictures. 1/ The equipment and facilities were being used in conjunction with filming at sets located on adjacent private lands. According to their report, the BLM employees met with Paul Pav, Location Manager for Paradox Production (a subsidiary of Universal), who told them the subject land was occupied under a private agreement. He stated that if Paradox was in trespass, it was the fault of the private owner's agent who had informed him all the land he was using was privately owned. 2/

According to Pav, an agreement for use of certain lands, including the lands at issue, for filmmaking purposes was negotiated between Red Hill Investment Company and Paradox. The public lands at issue are enclosed by fences to the north and west (along adjacent Highway 120). The fences were purportedly erected by the owners of the surrounding private lands. The 2-acre tract of public land is traversed by old Highway 120 and a gravel road which intersects Highway 120 at a gate in the fence. On March 6, 1989, Paradox stationed a security guard to control access through the gate to the lands to be occupied by Paradox, including the Federal land. 3/ In April 1989, additional gravel was spread on the existing gravel road and alongside the old paved highway. Equipment and materials for filming were moved into the area in July 1989. During filming in September 1989, BLM reported the equipment located on the public land at issue included 17 support trailers, a security post, and a meal tent with capacity for 150 people. BLM also reported that on one visit inspectors counted 1 large passenger bus, 6 passenger vans, and over 20 other vehicles parked in the parking lots.

On August 29, 1989, BLM notified Pav that Paradox was in trespass on public lands (identified as case file CA 25771) and liable to pay "for fair market value rent of the public lands per an established schedule," rehabilitation of lands damaged, and administrative costs. A meeting between Pav and BLM was held on September 7, 1989, with several county and other officials in attendance. All parties at the meeting agreed that the lands at issue, those occupied by the support trailers and tents (referred to as the "base camp" by Paradox) and not used for filming, are public lands. A rent schedule was proposed for use by BLM for establishment of fair market value for filming activities, assessing \$100 daily for use by less than 50 people and \$200 daily for use by 50 or more. BLM took the position that rent for the trespass period would be assessed using the schedule and such rent should be paid before a special use permit would be issued for further activities. Pav reasserted his position that prior to BLM's inspection on August 28, Paradox had no knowledge that public lands were involved in his

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1/ It seems the trespass was reported by one familiar with the fact that the site had previously been used by a traveling circus with BLM's permission. Apparently site preparation to accommodate the circus resulted in some improvements to the tract that favored use of the site by Universal's crew. See BLM Land Use Report CA-018-TU3-095.

2/ The BLM investigators reported that others involved in the trespass suspected that the subject lands were not private.

3/ BLM employees reported that the security guards actively denied access to anyone without specific permission from Paradox.

operation. Pav challenged the applicability of the rent schedule and BLM's classification of the base camp as "filming and related activities" (Decision dated Sept. 13, 1989, at 2). He described his use of the public lands as being for storage and parking. He also stated that actual use did not begin until August 15. The Folsom Area Manager agreed to reexamine the applicability of the rental schedule to the instant situation. At the conclusion of the meeting, Pav filed an application for a use permit, serialized by BLM as CA 25772. The application seeks use confined to "storage trailers and private cars parking, including provisions for electricity & telephones. Tent used for serving meals to workers and friends" (Application at 1).

In the decision dated September 13, 1989, the Folsom Area Manager determined that Paradox's unauthorized use of public lands constituted a trespass under 43 CFR 2920.1-2(a) and Paradox was assessed \$24,600 fair market value rental for the use it had made of the property, calculated as follows:

March 6 to August 28 @ \$100/day	=	\$18,500
August 29 to October 1		
Filming 6 days week @ \$200/day	=	\$ 5,600
No filming 1 day/week @ \$100/day	=	\$ <u>500</u>
Total		\$24,600

(Decision at 2). Computation of the period of use assumed that (1) from March 6 to August 28 there was always a security guard restricting access to the lands and providing exclusive use to Paradox, and (2) during production after August 29 at least 50 people were involved and on these lands except for 1 day each week. <sup>4/</sup> BLM explained that the rental fee was derived from a schedule established by the California State Office, BLM, to assess value for commercial filmmaking and related activities on public lands. The decision also assessed \$418 for administrative costs.

By decision dated September 19, 1989, BLM approved land use permit CA 25772 for continued occupancy of the approximately 2 acres of public lands used by Paradox in support of its filming activities. The permit was issued for the period of October 2 through November 20, 1989. The rental rate for the permitted use was made coincident with the trespass assessment and used the same fee schedule:

Oct. 2 to Nov. 20, 1989 = 50 days		
50 people or more - 43 days @ \$200/day	=	\$8,600
less than 50 people - 7 days @ \$100/day	=	<u>700</u>
Total fair market value rental		\$9,300

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<sup>4/</sup> The decision assumed that an application for a permit to use these lands would be filed for issuance prior to the last day for timely resolution of the trespass situation.

(Decision at 2). The September 19, 1989, decision provided for adjustment upon proof of actual use and assessed \$375 for administrative and monitoring costs. Further, Paradox was required to provide a \$5,000 performance bond and liability insurance rider. On September 27, 1989, Universal, upon tender of the \$5,000 performance bond and payments of \$25,018 and \$9,300, filed a notice of appeal from both decisions. 5/ Finally, on October 5, 1989, Pav tendered a check for \$1,375, identified as payment for 10 days of filming on public lands in sec. 12, T. 1 S., R. 13 E., Mount Diablo Meridian, to include administrative and monitoring costs. BLM immediately returned the check and informed Universal that permit CA 25772 had been amended to include the described use, and that payment in the amount of \$1,375 was therefore redundant. Universal has objected to this consolidation of separate uses into a single permit, stating it "believes that its uses of these entirely separate areas should be kept separate \* \* \*. [Universal is] ready willing and able to pay the separate use fee for this separate permit" (Statement of Reasons (SOR) at 4-5).

Universal contends that use of the fee schedule for moviemaking to establish rental for the Federal campsite was improper in this case. It is asserted that the public lands occupied were not involved in the actual filming of the movie but were employed as a base camp and therefore the schedule rate for moviemaking activities did not apply. Universal also claims that it was unfair to assess a \$100 daily rental charge for the period from March 1989 until early August 1989, when the only occupant was a security guard and no improvements were made. Universal recites facts it argues evince good faith and reasonable efforts to establish ownership of the subject lands. It contends that BLM failed in its duty to notify Universal at the earliest possible moment of the trespass and that action later taken to compel payment, after 5 months of nonenforcement, was unreasonable. Universal asserts that BLM should have allowed negotiations to determine a reasonable fee and argues that such fee should be a one-time camping fee assessment in the range of \$200, arguing that "the total fee to [Universal] for its use of the parcel as a base camp should be not more than \$200, but probably less on the basis of the fair market value of the parcel, which is suitable for use only as a camp site" (SOR at 2). Universal concludes that BLM has not properly applied the applicable standards set by the agency for computing charges for permits such as this, and has erroneously "insisted on a 'per-person' rental in the aggregate total of \$33,900 which [Universal] has paid." Id.

In response, BLM asserts that Universal's characterization of the regulations and the rental fee is in error. BLM states that the rental rate was based on fair market value of the use obtained. BLM explains that the fee was calculated from a rate schedule established by the California State Office, BLM, which was derived from a market evaluation that considered situations involving filmmaking in California, Nevada, and Utah. BLM agrees that only one person occupied the lands in question for several months, but argues the guard prevented others from entering public lands,

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5/ A \$375 deficiency in the September 27 payment was tendered on Oct. 2, 1989.

and contends this arrangement provided Universal with sole and exclusive use for purposes which benefitted film production. BLM explains that it met with Universal employees and considered their explanations for the trespass and, as a result, Universal was assessed the standard rental rate without any added penalties.

[1] The single issue raised by this appeal arises from a dispute over the amount to be paid the United States by Universal for use of the identified public lands under both the trespass and the permit. 6/ Section 101(a)(9) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701(a)(9) (1988), provides: "[T]he United States [shall] receive fair market value of the use of the public lands and their resources." Whether this statutory policy was carried out in both the permitting process and trespass resolution is the question we must address in our review.

Section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), authorizes the Secretary of the Interior to regulate the use of public lands "through easements, permits, leases, licenses, published rules, or other instruments as [he] deems appropriate." Special use permits, though not explicitly authorized by any statutory provision, are issued under the general authority of the Secretary to administer the use, occupancy, and development of the public lands. The administration of public lands through "leases, permits, and easements" is controlled by 43 CFR Part 2920:

Any use not specifically authorized under other laws or regulations and not specifically forbidden by law may be authorized under this part. \* \* \* Land use authorizations shall be granted under the following categories: \* \* \* (b) Permits shall be used to authorize uses of public lands for not to exceed 3 years that involve either little or no land improvement, construction, or investment, or investment which can be amortized within the term of the permit. A permit conveys no possessory interest.

43 CFR 2920.1-1. Thus, issuance of a permit for the land-use authorization involved here was proper.

Among the regulations administering the permit process are the following provisions for rentals: "The rental shall be based either upon the fair market value of the rights authorized in the land use authorization or as determined by competitive bidding. In no case shall the rental be less than fair market value." 43 CFR 2920.8(a)(1) (emphasis added).

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6/ Appellant's arguments regarding BLM's unwillingness to negotiate or its purported delay in ascertaining the trespass situation are without merit or effect on the issues of trespass damages and permit rental. Employees of the Department cannot accept the terms of any arrangement or agreement to do what the law does not sanction or permit. 43 CFR 1810.3(c). Further, the authority of the United States to enforce a public right is not vitiated by laches or delay in the performance of duties by public officers. 43 CFR 1810.3(a).

Therefore, BLM administration of valuation for land-use authorizations, such as CA 25772 properly charges fair market value for a special use permit such as this. Under 43 CFR 2920.1-2(a), "[a]ny use, occupancy, or development of the public lands, other than casual use \* \* \*, without authorization under the procedures in [43 CFR 2920.1-1], shall be considered a trespass." Occupation of public lands prior to the issuance of a use permit is unauthorized and constitutes a trespass. The assessment of fair market rental value for the trespass is consistent with the Departmental regulations at 43 CFR 2920.1-2(a):

Anyone determined by the authorized officer to be in trespass \* \* \* shall be liable to the United States for:

(1) The administrative costs incurred by the United States as a consequence of such trespass; and

(2) The fair market value rental of the lands for the current year and past years of trespass; and

(3) Rehabilitating and stabilizing the lands that were the subject of such trespass.

BLM therefore correctly sought compensation, in the form of back rental, for Universal's unauthorized use in trespass CA 25771. <sup>7/</sup>

Nonetheless, Universal argues that it is unfair to assess past rental because there was no consensual agreement to pay such rental (SOR at 3-4). This argument is without merit. Strictly speaking, it is not rental, but damages for unauthorized use that are sought from the trespasser, although rental value is used to calculate the amount. The United States stands as does any other landowner against trespassers, and has the right to collect appropriate damages for unauthorized use of the public lands, and in this case the measure of damages has been established to be fair market rental value. Obviously, it is no defense to a trespass action that the trespasser did not consent to be liable for damages on account of his trespass. It is, however, a mitigating factor that the trespass was unintentional, because a "knowing and willful" trespass would require assessment of additional penalties. See 43 CFR 2920.1-2. Accordingly, BLM is obligated by law to ensure that the compensation paid for use of the public lands, both in rent and trespass damages, represents not less than fair market rental value.

[2] The Board has established that appraisal standards for use in cases affecting the public lands under the supervision of BLM should be

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<sup>7/</sup> Prior to promulgation of 43 CFR Subpart 2920 in January 1988, the Departmental regulations at 43 CFR 9239.0-8 controlled in these types of trespass cases. The latter regulations provide that the measure of damages for unintentional trespass is determined by the laws of the state in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized. See Henry Deaton, 101 IBLA 177 (1988), reversed on other grounds, Deaton v. Lujan, No. 88-345 SC (D.N.M. Apr. 25, 1989).

as uniform as practicable. Northwest Pipeline Corp. (On Reconsideration), 77 IBLA 46, 48 (1983); American Telephone & Telegraph Co., 25 IBLA 342, 358 (1976). A BLM appraisal from which the annual rental for a special use permit is calculated will be upheld unless the permittee shows specific errors in the appraisal method or facts on which the appraisal is based. Michael S. Deering, 33 IBLA 142 (1977). Unless a BLM appraisal is shown by a preponderance of evidence to be in error, it may only be rebutted by another appraisal. Denver & Rio Grande Western Railroad Co., 101 IBLA 252, 254 (1988). An appellant before the Department bears the burden of pointing to specific errors to support his appeal. Keith P. Carpenter, 112 IBLA 101, 102 (1989). Further, where BLM assesses trespass damages based on reasonable rental value, extent, and duration of an unauthorized use of public lands, the assessment will not be disturbed unless the trespasser submits evidence of error. See, e.g., Reed Z. Asay, 55 IBLA 157 (1981).

An allegation that there is error in the result reached by BLM is not enough, by itself, to establish that the decision was incorrect or that a different result should have been reached. Gerald H. Murray, 117 IBLA 138 (1990); Keith P. Carpenter, *supra*. Consequently, Universal bears the burden to rebut the rental assessment by BLM by showing either that the method used to determine the rate was flawed or by presenting another appraisal. Universal did not rebut the rental determination with another appraisal. Nor has it shown that the use by BLM of the rental schedule in this case was incorrect or that the schedule itself was inadequate to the purpose for which it was used. It is significant that Universal was willing to accept the use of the schedule for assessment of charges for 10 days of filming on Federal land, but objects to the use of the schedule for the longer period of time when moviemaking was conducted in trespass. Universal has not explained how the inconsistency in this approach to payment can be reconciled with the position it has taken concerning payment for the use it made of the Federal lands. The inconsistency of the arguments raised indicates that the challenge to the schedule is without foundation in fact.

Fee schedules have been accepted by the Department as a proper means by which to determine rental rates. For instance, the administration of special recreation use permits (see 43 CFR Subpart 8372.1) and the fees for the use of public lands under such permits is established by a fee schedule published periodically in the Federal Register. See 43 CFR Subpart 8372.4. Further, rules governing administration of rights-of-way over public lands found in 43 CFR Part 2800 reiterate the statutory requirement that fair market rental value be paid for use of the public lands: "[T]he holder of a right-of-way shall pay \* \* \* the fair market rental value." 43 CFR 2803.1-2(a). In 1987, the Department adopted rental schedules to be applied to linear rights-of-way as a proper method of complying with the fair market rental value requirement. 52 FR 25802, 25817 (July 8, 1987). The Board has approved use of fee schedules for other uses, and has ruled that failure to demonstrate error in a rental established by a schedule requires that the rental determination by BLM be affirmed. Gerald H. Murray, *supra*. A fee schedule, regardless how constituted, will be judged by whether it accomplishes the statutory policies for which fees or rents are assessed. See Timber River Rafting, Inc., 95 IBLA 90, 94 (1986).

The BLM Manual emphasizes that the objective of all appraisals is to determine the fair market value of property. BLM Manual, § 9310.02A. A fee schedule such as was used here is defined as a "schedule valuation": It is "an estimate of fair market value based upon market-derived information which purports to estimate fair market value for partial or temporary rental interests in public lands, including \* \* \* movie \* \* \* location sites." BLM Manual, § 9310 (Glossary of Terms). BLM may authorize the use of public lands for several purposes, including "motion pictures." BLM Manual, § 2920.11E. As indicated above, it may do so by lease, permit, or easement. BLM may issue a "minimum impact permit" under certain circumstances if it determines the proposed land use "will not cause appreciable damage or disturbance to the public lands, their resources or improvements." 43 CFR 2920.2-2; see also BLM Manual, § 2920.05B. In any event, rental shall not be less than fair market value. 43 CFR 2920.8(a)(1). See also BLM Manual, § 2920.06E stating: "The United States must receive fair market value for use of the public lands as well as resources used, removed, or destroyed in preparing the site for the authorized use." Under "Fees," the Manual, § 2920.81.A, reiterates the statutory requirement that rent must be assessed at no less than fair market value.

Universal argues that the schedule was wrongly applied to this case because the use to which the 2-acre tract was put was camping, not moviemaking, and that the permit issued was for camping, which was the activity conducted on the site. While Universal has made clear that it disagrees with the determination by BLM that it was engaged in moviemaking rather than camping, it has failed to show how BLM's finding on this issue was in error. On the record before us, we cannot find that BLM erred when it found that Universal's use of the Federal tract was activity directly related to moviemaking so that it should be compensated under the movie schedule. Consequently, Universal has failed to carry the burden required of any appellant who alleges error in a decision by BLM, and the decision appealed from is properly affirmed.

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

Franklin D. Arness  
Administrative Judge

I concur:

John H. Kelly  
Administrative Judge

## ADMINISTRATIVE JUDGE IRWIN DISSENTING:

The difficulty in this case is that the Bureau of Land Management (BLM), Folsom Resource Area, seeks to charge rental for use of public land for any activity associated with moviemaking based on a fee schedule developed for the activity of filming only. None of the three Instruction Memoranda (IM) that establish a fee schedule for film-making on public lands issued by the California State Office of BLM supports extending those fees to "related activities."

The "Revised Motion Picture Fee Schedule" contained in Change 1 of IM No. CA-77-306, dated May 17, 1979 (1979 IM), was based on an "appraisal of motion picture, television and commercial filming fees for BLM lands in California in order to alleviate the monitoring of movie shooting in the various Districts." (Emphasis added.)

The market data summarized in the 1979 IM gives information about charges for "filming," "interior shooting," and "commercial filming." <sup>1/</sup>

When the California BLM State Director reaffirmed these rates in his February 23, 1984, IM No. CA-84-193, he explained that "the use of a general 'fixed rate' fee schedule for permits for motion picture filming activities" had been questioned by the Office of Inspector General Report W-LW-BLM-07-83 but that "such standard rate schedules are permissible," citing the BLM Manual 2920.81.A.3. (Emphasis added.) The State Director reported that the Chief Appraiser had "reviewed the filming rate established in 1979" and determined it was still valid (Emphasis added.) He attached the Chief Appraiser's "Updated Report Movie Rates for Filming," which was based on "a thorough re-study of filming rates" and which enclosed the 1979 rates. (Emphasis added.)

The scope of the 1979 and 1984 memoranda is consistent with the original IM No. CA-77-306, issued December 20, 1977 (1977 IM). It established a schedule of charges or fees for "commercial photography on [BLM] property" that "represents the current rates being charged by many city and county entities within the State for use of public property for commercial photographic purposes." For "motion pictures and television," the charges per day (or fraction thereof) were

Property Use	\$200
Each camera	65
Each small vehicle (- 1 ton)	15
Each large vehicle (+ 1 ton)	25
Each person	5

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<sup>1/</sup> It is drawn from the U.S. Forest Service National Media Office and Tuolumne County in California, a national forest in Nevada and the Nevada State Park System, and three privately owned properties in Utah.

For BLM personnel and equipment, the charge was "actual cost plus 25% administrative services overhead."  
2/ An application form was provided with the schedule so that the information needed "to accurately compute the charges" would be obtained.

When the 1977 IM is compared to the 1979 IM it seems apparent that BLM was interested in eliminating the involvement of BLM personnel and equipment and in simplifying the way it charged for filming motion pictures on public lands. Indeed, the stated purpose of the revisions in the 1979 IM is "to alleviate the monitoring of movie shooting in various Districts throughout California." No charges are made for BLM personnel or equipment in the 1979 IM. And instead of counting every camera, car, and person involved, the 1979 IM charges \$100/day for less than 50 people and \$200/day for 50 or more people. 3/ It does not appear, however, that there was any broadening of the scope of activities for which charges were to be levied. The 1979 revised motion picture fee charge provides:

No charges should be made to amateur photographers or bonafide newsreel and news photographers and soundmen. \* \* \* [A]ll other commercial movie, television or still photography should be subject to the following schedule:

Motion Pictures: Movies, Television, or Commercials

\$100/day \* for less than 50 people (cast and crew)  
\$200/day \* for 50 or more people (cast and crew)  
\* or fraction thereof

NOTE: (\$100 per day is minimum fee, i.e. prop set ups, etc.) [4/]

BLM significantly extended the scope of the fee schedule in this case. When the Folsom Resource Area Realty Specialist discussed the rate schedule with the BLM State Appraiser on September 8, 1989 -- in response to Universal Studio's (Universal's) questioning its applicability in these circumstances -- the conclusion was "that the schedule applies to all aspects of movie production (base camps, set construction and take-down,

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2/ Insurance requirements for motion pictures and television were \$1 million for public liability, \$300,000 for property damage.

3/ Bonding and insurance are left to the discretion of the BLM District Manager, under the following guidance: "Bonds should be sufficient to cover any possible resource damages, clean up and restoration costs. Insurance should be required only as needed to protect or release the government from any liability claims. (A 'Hold Harmless' clause is suggested.)"

4/ I understand this note to mean that \$100/day is to be charged for preparing a site for filming, e.g., by setting up props, even if there is no actual filming on that day. I do not believe "etc." can reasonably be interpreted to include other related activities, "no matter what the use is of [the] land."

filming, etc.)." (Emphasis added.) <sup>5/</sup> A September 15, 1989, followup note in the record signed by the State Appraiser and entitled "Response to Deane Swickard [Folsom Area Manager] RE: 'Jamestown' Filming" states:

No matter what the use is of our land in this movie: i.e. storage, props, etc., the schedule is based on \$100.00 per day for 50 people or less, and \$200.00 per day for more than 50 people. The key word here is people. The storage crew, prop crew, or whatever kind of crew which is occupying BLM land is considered to be an overall part of the effort to make this movie. [Emphasis added.]

The Area Manager's September 13, 1989, decision concerning the trespass reflects this application of the schedule:

As agreed at our September 7 meeting, I consulted with the Chief Appraiser in Bureau headquarters in Sacramento to confirm our rental rates. He informed me that the current fair market value rate charged for motion picture filming and related activities is \$100 per day for less than 50 people and \$200 per day for more than 50 people. [Emphasis added.]

(Sept. 13, 1989, Decision at 2). Similarly, the Area Manager's decision granting the land use permit charged rental based on "use, using the '50 people, more or less,' standard" (Sept. 19, 1989, Decision at 2).

Applying the fee schedule, BLM's total charge to Universal for use of the 2 acres involved from March 6 to November 20 was \$33,900. I think it is clear BLM took the opportunity to charge Universal as much as it could in this case. This is troublesome in view of the indication submitted by Universal that another BLM District Office in California would have issued a \$50 camp permit, good for a year, under these circumstances "because the company is not actually shooting on the BLM land in question" (Statement of Reasons, Exh. 3, at 2). It is particularly troublesome because the BLM Manual, which is binding on BLM employees, <sup>6/</sup> provides that "rental may be based on flat rate fees" only "where rental on land-use authorizations is estimated to be less than the cost to the United States of conducting an appraisal." BLM Manual § 2920.81.A.3. <sup>7/</sup> I cannot imagine it would cost BLM more than \$33,000 to appraise the fair market value of the use of 2 acres of land in Tuolumne County, California, for 9 months.

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<sup>5/</sup> Sept. 19, 1989, Memorandum to Area Manager from Realty Specialist entitled "Applicability of Fee Schedule for Motion Picture Production."

<sup>6/</sup> See United States v. Kaycee Bentonite Corp., 64 IBLA 183, 214, 89 I.D. 262, 279 (1982).

<sup>7/</sup> BLM Manual, Release 2-147, dated May 27, 1982, section 2920.81 provides that rental is to be determined using the principles contained in the Uniform Appraisal Standards for Federal Land Acquisitions.

Even if activities related to film-making should be charged according to a fee schedule, the current fee schedule is so remotely related to the fair market value of the use of public lands as to be arbitrary and capricious. The flat rates of the schedule apply no matter what the use of the land is and no matter how much land is used. Consider:

(a) I am a professional scriptwriter. In preparation for Movie X, I need to spend 3 or 4 days on public lands where the movie will be filmed in order to get a sense of the moods of the place, e.g., the September slant of light on the mountains, the deer and the antelope at play, the smell of the land after a summer thunderstorm, the feel of the breeze after sundown. I plan to take my notebook, pocket tape recorder, and sketch pad, pitch my tent, hike around, and absorb as much as I can. If I am an employee of Metro-Goldwyn-Mayer, I should get a permit and it should cost me \$400 for 4 days, according to the schedule in the 1979 IM, assuming the schedule covers "related activities." 8/

(b) I am the producer of "Custer's Last Stand." For filming the Little Big Horn scene, I need 800 people and I will use 600 acres of public lands. I will bus in 750 extras for the days I am filming. My regular cast and film crew number 50 and will use trailers in my 2-acre base camp on other public lands nearby. Under the 1979 fee schedule, I will pay \$200/day to BLM for the 600-acre tract and \$200/day for the 2-acre tract of land, even though the wear-and-tear on the land and the amount of land are quite different. And I will pay only twice as much for 800 people to do battle on 600 acres as I will to pitch my tent and hike around as a scriptwriter.

As indicated in footnote 1, supra, the rates in the 1979 IM were based on contacts with Tuolumne County and the Forest Service National Media Office in California; the Toiyabe National Forest and the Nevada State Park System in Nevada; and three private property owners in Utah. Only "inconsequential differences in the rates presently being charged" were found in 1984, based on a "thorough re-study of filming rates on BLM land in Nevada, Utah, and Colorado," an inquiry to the Forest Service as to its present rates, and contacts with "several communities in California." The BLM

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fn.7 (continued)

Section 2920.81 A. states that the basis of rent must be no less than fair market rental value and that rental may be established by (1) competitive bidding, (2) percentage of gross receipts, or "3. Standard Rental Fees. Where rental on land-use authorizations is estimated to be less than the cost to the United States of conducting an appraisal, rental may be based on flat rate fees established by State Office Appraisal Staffs." The BLM Manual does not say "[r]ental of land for commercial filming, however, may in any case be based on flat rate fees."

8/ If I am self-employed and have been virtually assured I will get a contract but my visit precedes my formal engagement, is my activity still "related," or is it casual use for which I do not need a permit? (See 43 CFR 2920.0-5(k).)

California State Appraiser therefore determined "that the rates estimated in 1979 are still valid." It seems dubious that the market for filming on rural land would be so uniform from California to Colorado. <sup>9/</sup> In the context of reviewing appraisals of non-linear rights-of-way granted for communication sites, we have found that such a multi-state review did not provide "sufficient data and analysis regarding the leases reviewed in the report to enable either the appellant or the Board on administrative review to verify the comparability of the subject leases with those considered in arriving at the appraised value." Mountain States Telephone & Telegraph Co., 109 IBLA 142, 146 (1989), and cases cited. The basis for the California rate schedule seems even less adequate than the report involved in those cases. Even if the rates were valid in 1979 and 1984, those rates are no longer current. We are not bound to apply the fee schedule, see Mobil Producing Texas & New Mexico, Inc., 115 IBLA 164, 169 (1990), and I do not believe doing so results in a charge that is even close to the fair market value of the land involved.

I recognize that there are some areas where there would be no transactions that could be compared for purposes of appraising fair market value of the use of public lands. In such areas, use of a fee schedule, revised to take into account the nature of the use of the land and the amount of land involved, could be justified. In Tuolumne County, however, it is apparent that use of lands for filming movies is quite common. It should therefore be relatively easy to establish the fair market rental value of the 2 acres used for 9 months by Universal for its base camp as well as the acreage used for filming. Indeed, the agreement between Paradox Production and the Red Hill Investment Company for filming on the adjacent lands would be a convenient point of departure.

I would set aside BLM's decision and order an appraisal of the value of renting a comparable piece of land for the period involved as the basis for charging for the trespass and the land use permit.

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Will A. Irwin  
Administrative Judge

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<sup>9/</sup> The 1979 IM states: "The only city and county information obtainable in California was from metropolitan areas such as Los Angeles, San Francisco, and Santa Barbara. The rates these areas charge are not considered comparable."