

VALLEY PIONEERS WATER CO., INC.

IBLA 91-125

Decided March 25, 1993

Appeal from a decision of the Area Manager, Kingman Resource Area, Arizona, Bureau of Land Management, notifying right-of-way holder that it is not exempt from rental and increasing the annual rental for right-of-way A-16414.

Affirmed in part, set aside in part, and remanded.

1. Appraisals--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rent--Rights-of-Way: Appraisals--Rights-of-Way: Federal Land Policy and Management Act of 1976

When the right-of-way grant specifically provided for periodic rental adjustments to bring the right-of-way rental in line with fair market rental values it is proper for BLM to increase the annual rental to conform the rental amount to the current fair market rental value of the right-of-way.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rent--Rights-of-Way: Appraisals--Rights-of-Way: Federal Land Policy and Management Act of 1976

When the holder of a right-of-way is a nonprofit municipal utility or cooperative, BLM may consider whether the holder is entitled to a reduction of rental pursuant to 43 CFR 2803.1-2(b)(2)(i) or (ii).

APPEARANCES: John Dodson, Secretary, Valley Pioneers Water Co., Inc., for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Valley Pioneers Water Co., Inc. (Valley), has appealed from a November 20, 1990, decision by the Area Manager, Kingman Resource Area, Arizona, Bureau of Land Management (BLM), that it is not exempt from right-of-way rental charges and directing it to pay an increased annual rental for right-of-way A-16414.

On August 28, 1981, BLM issued a 30-year right-of-way to Valley for a 2.5-acre site in the NW¼ sec. 8, T. 21 N., R. 18 W., Gila and Salt River Meridian, Mohave County, Arizona, within the Sacramento Valley. The site

is 11 miles northwest of Kingman, Arizona, at the intersection of Colorado Road and Chino Drive, in what is known as "Golden Valley." ^{1/} The site is used for a well to draw water from the underlying aquifer for distribution in Valley's residential water system serving the surrounding 7-square mile area. The site contains a well, pump house, storage tank and associated facilities, and is surrounded by a chain link fence.

The grant specifically provided that the lease rental amount was "subject to a subsequent appraisal [by BLM]." Terms and Conditions, Section 13. This section also states that the right-of-way holder "agrees to pay [BLM], upon demand, those fees determined in the appraisal to represent the fair market rental for the use of the public lands."

The rental amount was initially set at the then current minimum charge for a 5-year period (\$25). See 43 CFR 2803.1-2(a) (1981). BLM chose not to conduct an appraisal and set the rental at this amount after determining that the value of similar land (in fee) was from \$150 to \$200 per acre. It reasoned that, if this value were used as the basis for the rental, the rental would not cover the costs of an appraisal and a return greater than the minimum charge. ^{2/}

Near the end of the fifth lease year BLM decided to continue the rental at the "original rental fee," i.e., \$25 for another 5-year period (Memorandum from BLM Appraiser to District Manager, Phoenix District, Arizona, BLM, dated June 25, 1986). This action was in accordance with interim guidance from the Director, BLM, calling for a "moratorium" on rental determinations pending promulgation of new right-of-way regulations. See Instruction Memorandum No. 84-490, Change 1, dated Nov. 28, 1984; Dean R. Karlberg, 98 IBLA 237, 238-39 (1987). In a July 2, 1986, letter to Valley, BLM advised Valley that this rental charge would be "subject to review and revision after the new regulations are established." ^{3/}

A BLM appraisal of the right-of-way was completed in August 1990, which was prior to the end of the second 5-year rental period. The August 17, 1990, Appraisal Report, appraising the land as of August 3, 1990, was approved by the Chief State Appraiser on August 23, 1990. The right-of-way site is within Golden Valley, which was described in that report as an unincorporated community of about 4,000, with "a booming population growth, resulting in the tremendous appreciation of land values" (Appraisal Report at 1). For the most part, the surrounding land is "vacant," with a scattering of houses. Id.

^{1/} Right-of-way A-16414 was issued pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1976).

^{2/} See Oct. 15, 1981, Memorandum from the Chief State Appraiser, Arizona, BLM, to the Chief, Branch of L&M Operations, Arizona, BLM.

^{3/} The applicable right-of-way regulations were amended effective Aug. 7, 1987. See 52 FR 25811 (July 8, 1987); Tucson Electric Power Co., 111 IBLA 69, 74-75 (1989).

The appraiser noted that the two adjacent roads are well maintained county roads and that all utilities are available. He further stated that "[a]lthough there are improvements on the property, the land is being appraised as if vacant." Id.

The appraiser found the highest and best use of the tract to be "residential uses" with the prevailing use in the immediate area being residential development. Id. at 2. He selected five recent sales of similar property in the same neighborhood from a list of 40 sales for comparable site valuation. The comparables were described as "hav[ing] characteristics almost exactly like those of the subject [land]," i.e., in terms of the time of the transaction, size and location of the parcel, access to the parcel, topography, and availability of utilities. Id.

The appraiser found that sales prices of the comparable tracts ranged from \$8,974 to \$13,675 per acre. After a detailed analysis of the right-of-way and comparables, noting applicable characteristics, the appraiser concluded that the right-of-way land was worth \$10,000 per acre. He then calculated the full rental value by multiplying its per-acre value by the number of acres (2.5), an impact factor (1.00), and a rate of return factor (10%) and determined the fair market rental value to be \$2,500.

On August 29, 1990, Valley asked the BLM Area Office to decide whether, as a non-profit corporation, it qualified for exemption from rental charges. Its request was forwarded to the District Office. See Memorandum from the Area Manager, dated Sept. 7, 1990. In a memorandum dated November 15, 1990, the District Manager concluded that, in spite of the fact that Valley is a non-profit corporation, it did not qualify for exemption from the payment of rental because it appeared that its principal source of revenue is customer charges. See 43 CFR 2803.1-2(b)(1)(i).

A copy of this memorandum was sent to Valley by the Area Manager with her November 20, 1990, decision notifying Valley that, based upon the appraisal, the annual rental was being increased to \$2,500 per year. Valley was directed to submit its rental payment for the period from August 28, 1990, through August 27, 1991, at its earliest convenience. Valley appealed and has filed statements of reasons (SOR) addressing the denial of its exemption and the increased rental amount. We will address both issues.

Valley also contends that it has not had a "fair chance" to present its case because BLM failed to respond to its November 27, 1990, letter "in a timely manner" (Letter to BLM "RE: The 5,000 percent increase of rent," dated Dec. 26, 1990). In its November 1990 letter, Valley requested a list of "all other companies or others in Mohave County that have received similar rent increases and * * * those who have been ruled exempt from such fees." It also asked for the "formula used to determine rental fees."

The Area Manager responded to Valley's November 1990 letter in a letter dated December 20, 1990, which was well before the deadline for filing Valley's SOR (Jan. 10, 1991). See 43 CFR 4.411(a). However,

Valley indicates that it did not receive the Area Manager's letter until December 26, 1990, which was just after it submitted its SOR. Nevertheless, Departmental regulations permit filing a supplemental SOR based on the information contained in the Area Manager's response (see 43 CFR 4.414) and Valley has had ample time to do so. ^{4/} Valley has not taken advantage of this opportunity and cannot now complain.

In her December 1990 letter, the Area Manager responded to each of Valley's requests. She stated that BLM appraises land using "comparable sales of land in the same area, if available, with the same characteristics as the subject parcel." She also set out the "formula" used to determine the right-of-way rental and provided a list of "water companies" who had been issued rights-of-way and the annual rental (ranging from \$23 (subject to reappraisal in January 1992) to \$671). Finally, she noted that none of these companies was "rental exempt."

[1] Valley has objected to the increase in its annual rental, and expresses an obvious displeasure regarding the amount of the increase. It states that for the annual rental to go from \$5 to \$2,500 "someone's math is in error." The formula used by the BLM appraiser has long been used by BLM to calculate fair market rental value. See, e.g., Western Field Production, Inc., 116 IBLA 225, 227 (1990). We discern no error in its application in this case. We also find that the record indicates a rental increase resulting from property values having increased from \$150 to \$200 per acre in 1981 to \$9,000 to \$13,500 per acre in 1990. Valley presents no evidence that BLM failed to determine the then current fair market value or properly calculate the annual rental due in 1990, and it raises no objection to any of the factors used in that rental calculation.

Valley states that, if its annual rental charge has increased 50,000 percent (from \$5 to \$2,500), "it seems it is fair to say a land value of \$500 for the 2.5 acres involved in 1981 has suddenly increased to \$250,000 in 1991." It would appear from this statement that Valley is willing to conclude that the fair market value of the 2.5-acre parcel was \$500 (\$200 per acre) in 1981. This amount is at the upper end of the range of values noted in the October 15, 1981, memorandum from the Chief State Appraiser to the Chief, Branch of L&M Operations. However, Valley is incorrect when setting out the percentage of increase in the fair market value of the land between 1981 and 1990.

The \$5 per-year rental charge in 1981 was the minimum rental charge provided for by regulation, and not the fair market rental value. See 43 CFR 2803.1-2(a) (1981); San Miguel Power Association, Inc., 64 IBLA 342, 344 (1982) ("regulatory minimum"). The fair market rental value in 1981 can be determined using the 1981 per-acre fair market value assumed by Valley (\$200) and the formula used by BLM (2.5 acres x \$200/acre x 1.00 x

^{4/} In addition, the case file, which was sent to the Board on Jan. 18, 1991, contained the BLM appraisal and was available for review at the time.

10 percent). ^{5/} If Valley's assumption is correct, the actual fair market rental value was \$50 per year in 1981. By equating the rental increase (\$50 to \$2,500) to the fair market value, the fair market value of the 2.5 acre parcel would have increased from \$500 (\$200 per acre) in 1981 to \$25,000 (\$10,000 per acre) in August 1990. This increase is in line with the fair market values used by the appraiser. Valley's argument does not disclose an error in the BLM appraisal.

BLM's appraisal supports the conclusion that the land in Golden Valley experienced a 5,000-percent increase in the sales price between 1981 and August 1990. It notes that there has been a "tremendous appreciation of land values" (Appraisal Report at 1). This fact is also evident from the five comparable sales BLM used. On the other hand, Valley has provided no evidence contradicting BLM's conclusions, and it has failed to present any evidence which might establish that land values have not substantially increased or that the increase has been of a different magnitude.

Valley has failed to establish error in the appraisal methodology used by BLM or that the resulting rental value does not conform to the fair market rental value of the land, as required by 43 U.S.C. § 1764(g) (1988), and 43 CFR 2803.1-2(a). It has also failed to offer an appraisal or other evidence regarding the fair market value of the land or its fair market rental value which would support another conclusion. Without this evidence we must conclude that BLM properly appraised the fair market rental value of that right-of-way. See, e.g., Idaho Wireless Corp., 120 IBLA 172, 174 (1991); Pacific Power & Light Co., 65 IBLA 50, 53 (1982).

[2] We now consider whether Valley's rental may be waived or reduced. In her November 20, 1990, decision, the Area Manager concluded that Valley is not entitled to an exemption under 43 CFR 2803.1-2(b) because the principal source of its income is customer charges. See Memorandum from the District Manager to the Area Manager, dated Nov. 15, 1990.

Section 504(g) of FLPMA, as amended, 43 U.S.C. § 1764(g) (1988), authorizes the Secretary of the Interior to waive the rental when granting a right-of-way "to a Federal, State, or local government or any agency or instrumentality thereof," if the waiver or reduction is consistent with equity and the public interest. ^{6/} However, § 1764(g) specifically states that "municipal utilities and cooperatives whose principal source of revenue is customer charges" are not eligible for rental waiver.

The term "municipal utility" is not strictly limited to a public utility operated directly by a local government or an agency thereof, but includes a public utility operated for the benefit of a local government

^{5/} BLM would have used a rate of return of 12.25 percent in 1981, rather than 10 percent. See Memorandum from the Chief State Appraiser to the Chief, Branch of L&M Operations, dated Oct. 15, 1981.

^{6/} This statutory provision has been implemented by 43 CFR 2803.1-2(b) (formerly 43 CFR 2803.1-2(c) (1981)).

(or governments). See Metropolitan Water District of Southern California, 109 IBLA 327, 331-32, 332-33 n.6 (1989); City of Redding, 91 IBLA 82, 84 (1986); Wellton-Mohawk Irrigation & Drainage District, 79 IBLA 308, 311-13 (1984). A qualifying public utility constitutes an "instrumentality" of the local government, within the meaning of 43 U.S.C. § 1764(g) (1988), and 43 CFR 2803.1-2(b). 7/

Valley is a public service corporation organized under Arizona State law for the purpose of providing water to the public (specifically a portion of Mohave County). See Amended Articles of Incorporation attached to Valley's Aug. 28, 1990, letter to BLM. It also qualifies as a public service corporation under section 2 of Article 15 of the Arizona Constitution, which defines such a corporation as any corporation (other than municipal) "engaged * * * in furnishing water for irrigation, fire protection, or other public purposes." See Van Dyke v. Geary, 218 F. 111, 125 (D. Ariz. 1914), aff'd, 244 U.S. 39 (1917) ("public utilit[y]"). It is also subject to the Arizona Corporation Commission regulations pertaining to rates for its water service (Letter to BLM "RE: Denial of rent-exempt status," dated Dec. 26, 1990). 8/

Valley does not deny that its principal source of revenue is customer charges, and states that the "bulk of [its] operating money comes from providing potable water service to customers through metered service connections" (Letter to BLM "RE: Denial of rent-exempt status," dated Dec. 26, 1990). This being the case, Valley is not entitled to a waiver of rental under 43 CFR 2803.1-2(b)(1)(i). It is a "municipal utility" whose principal source of revenue is customer charges. See Metropolitan Water District of Southern California, supra at 332. To hold otherwise would result in an unjustified distinction between a government entity operating a public utility funded through customer charges and a government entity providing the same service through a privately

7/ In City of Redding, supra at 84, we noted (quoting from 73B C.J.S. Public Utilities § 2 (1983) at 127)) that the term "public utility" refers generally to "a business organization which regularly supplies the public with some commodity or service, such as * * * water." Accordingly, we have held that the term "municipal utility" includes "public utilities that are public corporations or quasi-governmental entities." Metropolitan Water District of Southern California, supra at 332.

8/ Valley must be a public service corporation to be subject to Corporation Commission regulation of its rate-making. See Van Dyke v. Geary, supra at 125-28. The "Corporation Commission" was created for the express purpose of regulating public service corporations. Article 15 of the Arizona Constitution established the Commission and generally empowered it to "make reasonable rules, regulations, and orders * * * by which [the defined public service] corporations shall be governed in the transaction of business within the State," including prescribing just and reasonable rates. Ariz. Const. art. XV, §§ 1, 3.

owned corporation. ^{9/} It is the policy of the Department that, in both instances, the entity providing the service should not be exempt from rental payment. See 45 FR 44523 (July 1, 1980) (regulations "attempt[] * * * to treat all those who use the public lands for the same purpose in the same way").

The code section permitting waiver of rentals, 43 U.S.C. § 1764(g) (1988), and its implementing regulations also afford the Department the authority to reduce the rental amount if the right-of-way holder is

a "nonprofit corporation * * * which is not controlled by or is not a subsidiary of a profit making corporation or business enterprise."

43 CFR 2803.1-2(b)(2)(i) (formerly 43 CFR 2803.1-2(c)(2) (1981)). ^{10/}

This provision is not limited to municipal utilities and cooperatives whose principal source of revenue is other than customer charges.

In Tri-State Generation & Transmission Association, Inc., 63 IBLA 347, 89 I.D. 227 (1982), the Board held that, when a right-of-way holder is a "municipal utility" or a "cooperative" whose principal source of revenue is customer charges, and thus is not permitted an exemption, it will also be deemed not to qualify for a reduction of its rental charges under any of the other applicable regulatory categories. Id. at 355, 89 I.D. at 231-32; ^{11/} see also Colorado-Ute Electric Association, Inc., 79 IBLA 53,

57 (1984), and cases cited therein. When Tri-State was decided in 1982, the right-of-way holder had to be a Federal, state, or local government or an agency or an instrumentality thereof or a nonprofit corporation providing, without charge or at reduced rates, a valuable benefit to the public

to qualify for a reduction of rental charges. See 43 CFR 2803.1-2(c)(1) through (3) (1981). Municipal utilities and cooperatives whose principal source of revenue is customer charges were specifically excluded from fee waiver, and we concluded that they were also excluded from reduction. Tri-State Generation & Transmission Association, Inc., supra at 355, 89 I.D. at 232. The preamble to the proposed rulemaking which resulted in the promulgation of 43 CFR 2803.1-2(c) (1981) supported this construction of the regulation. It stated that "cooperatives and municipal utilities whose

^{9/} The requirement that municipal utilities and cooperatives pay fair market rental if their principal source of revenue is customer charges was initially promulgated because BLM believed, "[a]s a matter of equity, * * * [that] it is inappropriate to charge lesser fees or grant free use when the holder is engaged in similar business and follows practices comparable to private commercial enterprise." 44 FR 58112 (Oct. 9, 1979).

^{10/} This regulation implements that portion of section 504(g) of FLPMA which authorizes the Secretary to reduce the rental when granting rights-of-way to "nonprofit corporations which are not themselves controlled or owned by profit making corporations or business enterprises." 43 U.S.C. § 1764(g) (1988).

^{11/} Tri-State, a nonprofit corporation, argued that it provided a valuable benefit to the public in the form of electrical service and thus qualified for a reduction of rental charges. We held that it could not. See Tri-State Generation & Transmission, Inc., supra at 353, 89 I.D. at 230-31.

principal source of revenue is customer charges will, hereafter, be charged fair market value fees." 44 FR 58112 (Oct. 9, 1979) (emphasis added); see Tri-State Generation & Transmission Association, Inc., supra at 355, 89 I.D. at 231.

The Department subsequently amended the regulations, placing the municipal utilities and cooperatives exclusion in a separate subsection. Subsection 43 CFR 2803.1-2(b)(1) provides for waiver of rental charges for Governmental entities. The other two qualifying circumstances (nonprofit corporations and holders providing a valuable benefit to the public without charge or at reduced rates) are now found in 43 CFR 2803.1-2(b)(2), which permits waiver or reduction of rental charges. Thus the reasoning applied in the Tri-State case no longer holds. It is no longer necessary for the exclusion of municipal utilities or cooperatives to logically relate to each of the three circumstances for the exclusion to have any meaning. It would thus appear that the Department now intends to continue to waive rental charges under 43 CFR 2803.1-2(b)(1) only when the Governmental entity's principal source of revenue is something other than customer charges, and to permit BLM to consider rental charge reduction under 43 CFR 2803.1-2(b)(2), even though the principal source of revenue is customer charges.

This interpretation is supported by statements made during the rulemaking which resulted in the promulgation of the current version of the rental regulations. In the preamble to the final rulemaking, the Department addressed whether public utilities should, as a class, be exempt from or subject to a reduction of rental charges. It was concluded that public utilities "[should] pay for the use of the public lands and resources." 52 FR 25816 (July 8, 1987). However, it was also stated that the rulemaking "provide[s] an opportunity for individual [public utility] holders to have a specific case considered for a waiver or reduction of the rental." Id. We construe this as a Department determination that, although public utilities should not be exempt from rental charges under 43 CFR 2803.1-2(b)(1), they may nevertheless qualify for a reduction of rental charges under 43 CFR 2803.1-2(b)(2).

We find no evidence that BLM considered whether 43 CFR 2803.1-2(b)(2)(i) was applicable when the Area Manager's November 1990 rental increase decision was issued. ^{12/} Similarly, BLM did not address whether

^{12/} When BLM considered whether to grant the right-of-way in 1981 Valley did not qualify for a nonprofit corporation rental exemption under 43 CFR 2803.1-2(c)(2) (1981) (now 43 CFR 2803.1-2(b)(2)(i)), because that regulation only applied if the holder did not collect revenue for its service" (Land-Use Analysis at 4). Thus, BLM concluded that Valley was not entitled to an exemption because it derived its operational revenues from charges assessed its customers. That analysis was proper in 1981 (see, e.g., Big Horn Canal Association, 76 IBLA 283, 286 (1983), and Northern Electric Cooperative, Inc., 66 IBLA 121, 124 (1982)).

43 CFR 2803.1-2(b)(2)(ii), which provides that BLM may reduce rental charges when the right-of-way holder "provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary." ^{13/} See Jim Doering, 91 IBLA 131, 136 (1986). Nor can we determine from the record whether Valley qualifies for a reduction of its rental charge. Thus, we deem it appropriate to set aside the Area Manager's November 1990 decision to the extent that it denied any reduction of the rental amount, and remand the case to BLM for consideration of that question. See Lone Pine Television, Inc., 113 IBLA 264, 269 (1990); William F. Bieber, 82 IBLA 6, 8 (1984).

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 affirmed in part and set aside in part, and the case is remanded to BLM for further action consistent herewith.

R. W. Mullen
Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge

^{13/} This regulation implements that portion of section 504(g) of FLPMA which authorizes reduced rental to a holder who "provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary." 43 U.S.C. § 1764(g) (1988).

