

RUTH TAUSTA-WHITE

IBLA 91-198

Decided July 29, 1993

Appeal from a decision of the Bakersfield, California, District Office, Bureau of Land Management, adjusting rental for access road right-of-way CACA 8531.

Affirmed.

1. 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

Where an existing FLPMA access road right-of-way grant provided that it was subject to the regulations in 43 CFR Part 2800, BLM properly established the rental for use thereof by utilizing the regulatory rental fee schedule for linear rights-of-way found at 43 CFR 2803.1-2(c) during the course of a periodic adjustment necessary to reflect the current fair market rental value. While the relevant statute and regulations provide for waiver or a reduction in the rental amount under certain circumstances, the right-of-way holder must prove eligibility for such consideration.

APPEARANCES: Ruth Tausta-White, Cave Junction, Oregon, pro se.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Ruth Tausta-White has appealed from a February 5, 1991, decision of the Bakersfield, California, District Office, Bureau of Land Management (BLM), adjusting the rental for access road right-of-way CACA 8531.

BLM issued this right-of-way to White (then Ruth Tausta) on March 11, 1981, under the authority of section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1988). The right-of-way authorized the construction, operation, and maintenance of an access road across lots 3 and 5, sec. 14, T. 9 N., R. 10 E., Mount Diablo Meridian. The grant specified a 30-year term with rental set at \$50 for the first 10-year period and stipulated that it would be subject to the regulations found in 43 CFR Part 2800.

In its February 5, 1991, decision, BLM announced that under Departmental regulations promulgated in 1987 rental for the right-of-way would be \$75 for the period from March 1991 through December 1995. BLM explained

that rental was determined by a fee schedule published in the Federal Register and noted that the billing cycle was changed to coincide with the calendar year. BLM stated that failure to pay would result in termination of the right-of-way.

White appealed asserting that the decision was adverse to her on three grounds. First, she contends that she "was not duly informed of the * * * right-of-way rental regulation" and "had no opportunity to vote on it, to voice an opinion on it, or even to save money for the new expense." She asserts that she is retired on a fixed income and that the additional expense will be a hardship on her. Second, she contends that the access road is used by others and that her rental is incorrect unless the other users are also charged an "equal/equitable" rental fee. Last, she asserts that BLM cannot terminate the right-of-way without adversely affecting her because the subject road is the only access to her property and she alone has maintained it for the past 10 years in accordance with the grant provisions.

[1] Section 501(a)(6) of FLPMA, 43 U.S.C. § 1761(a)(6) (1988), provides that the Secretary is authorized to grant a right-of-way over public lands for "roads." In addition, section 504(g) of FLPMA, requires that the holder of a FLPMA right-of-way "shall pay annually in advance the fair market value thereof as determined by the Secretary granting * * * such right-of-way." 43 U.S.C. § 1764(g) (1988).

The right-of-way grant issued to White stipulated that the holder agreed that the right-of-way would be subject to the applicable right-of-way regulations. In 1981, Departmental regulation 43 CFR 2803.1-2(d)(1) (1981) provided that the rental fees "may be * * * adjusted whenever necessary to reflect current fair market value * * * as a result of reappraisal of the fair market values, which shall occur at least once every 5 years." While no adjustment in the fair market appraisal for this right-of-way occurred after the first 5-year period, prior to the end of the next 5-year period, Congress amended section 504(g) of FLPMA and BLM promulgated new right-of-way regulations. 1/

Section 504(g) continues to require advance payment of the "fair market value" of the right-of-way. However, the right-of-way regulations were substantially revised to provide for fair market rental value determinations for linear rights-of-way based on an established fee schedule, which is adjusted annually to reflect economic changes. See 43 CFR 2803.1-2(c)(1). To compute the annual rental pursuant to this regulation, the acreage subject to the right-of-way is multiplied by the per

1/ Section 504(g) of FLPMA was amended by section 2 of the Act of Oct. 27, 1986, P.L. 99-545, 100 Stat. 3048. The regulations were revised effective Aug. 7, 1987. See 52 FR 25811 (July 8, 1987); Tucson Electric Power Co., 111 IBLA 69, 74-75 (1989). In certain circumstances not relevant herein, the regulations provide for an individual appraisal. 43 CFR 2803.1-2(c)(1)(v); Great Co., 112 IBLA 239, 240-41 (1989).

acre rental value established for the region (or zone) in which the right-of-way is found. See 43 CFR 2803.(c)(1)(iv). 2/ Further, the regulations promulgated in 1987 directed that the rental billing period be adjusted to coincide with the calendar year. 43 CFR 2803.1-2(a).

All persons dealing with the Federal Government are presumed to have knowledge of duly promulgated regulations. 44 U.S.C. § 1507 (1988); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Venlease I, 99 IBLA 387, 390-91 (1987). The fee schedule method of determining fair market value was adopted by regulation in accordance with the rule-making requirements following a study of rental rates and the formation of a standard policy determining fair market value. See 50 FR 2697 (Jan. 18, 1985); 49 FR 19049 (May 4, 1984). Notice of the applicability of the schedule to existing right-of-way grants when reviewed was published in the Federal Register, along with the implementing regulatory changes. 52 FR 25818 (July 8, 1987); 51 FR 31889 (Sept. 5, 1986). Appellant had the opportunity to respond to the proposed changes in the regulations at that time. The Board has no authority in this situation to declare the regulations invalid. Duly promulgated regulations have the force and effect of law and are binding on the Department. General Services Administration v. Benson, 415 F.2d 878, 880 (9th Cir. 1969); ANR Production Co., 118 IBLA 338, 343 (1991); Conoco, Inc. (On Reconsideration), 113 IBLA 243, 249 (1990), and cases cited therein. BLM properly applied those regulations in arriving at its fair market rental determination in this situation. See, e.g., Jack C. Gutte, 123 IBLA 295, 299 (1992), and cases cited therein.

Section 504(g) also provides authority for the Secretary to charge less than fair market rental value in certain specified circumstances. 43 U.S.C. § 1754(g); 43 CFR 2803.1-2(b)(2). Included are those situations where 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" or "the requirement to pay full rental will cause undue hardship * * * and it is in the public interest to reduce or waive said rental." Id. Although appellant claims that her maintenance of the right-of-way is beneficial to the public and to BLM and that the increased rental creates a hardship for her, these are mere unsupported allegations. We have held that it is incumbent upon the right-of-way holder to demonstrate that it is qualified to receive a waiver or reduction of the rental charges. Voice Ministries of Farmington, Inc., 124 IBLA 358, 362 (1992). Absent evidence that appellant has requested that BLM waive or reduce her rental payment, supported by proof of her eligibility therefor, and a ruling from BLM thereon, any question of waiver or reduction is, at this juncture, premature.

2/ BLM determined the annual rental by multiplying the right-of-way acreage (0.53 acres) by the \$29.43 per acre annual rental rate for a Zone 6 right-of-way (\$15.60 per year). It then calculated the rental for a 4-year period from Jan. 1, 1992, to Dec. 31, 1995 (4 x \$15.60 or \$62, when rounded), and added a pro-rated rental for the 10 remaining months of 1991 (\$13). The total rental for the 4-year and 10-month period was \$75.

Appellant questions whether others regularly using the subject access road should be required also to pay for use. Whether or not others pay for use or should pay for use is not relevant to this appeal. The issue before us is whether the rental charge assessed appellant constitutes fair market value of the use granted. Appellant has provided no evidence that BLM's establishment of the fair market value for her access road right-of-way is in error. There is nothing to suggest that, if others are required to pay fair market value for the use of the public lands in question, appellant's indebtedness for her own use should be diminished. Cf. Lone Pine Television, Inc., 113 IBLA 264, 265 (1990), and cases cited therein (the appraised value of a communication right-of-way pertains to each individual user and is not to be prorated among site users).

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 is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge