

WILLIAM J. COLMAN

IBLA 92-296

Decided February 6, 1996

Appeal from a decision of the Bear River, Utah, Resource Area Office, Bureau of Land Management, establishing fair market rental value by appraisal for solar evaporating system right-of-way U 54159.

Set aside and remanded.

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

Generally, the proper appraisal method for determining the fair market value of nonlinear rights-of-way, including rights-of-way for solar evaporation ponds and related facilities, is the comparable lease method of appraisal. An appraisal will be set aside and the case remanded where the record fails to sustain the accuracy of the analysis of comparable leases utilized to determine fair market value.

APPEARANCES: William J. Colman, pro se; David K. Grayson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

William J. Colman has appealed from a decision of the Bear River, Utah, Resource Area Office, Bureau of Land Management (BLM), dated February 21, 1992, assessing \$1 per acre as the fair market annual rental for solar evaporating system right-of-way U 54159.

On September 27, 1984, Colman submitted an application for a right-of-way to augment an existing solar pan circuit by using approximately 7,090 acres of public land in T. 6 N., Rs. 11 and 12 W., Salt Lake Meridian (SLM), Box Elder County, Utah, for the construction of berms to enable him

to channel, move, and concentrate brine from the Great Salt Lake across Federal lands to solar evaporating pan areas located on State lands for the purpose of producing magnesium chloride under various State leases which he held. After reviewing the right-of-way application and supplemental information, 1/ analyzing the environmental impacts of authorizing the requested use, and obtaining Colman's acceptance of the offered grant and incorporated stipulations, BLM issued right-of-way U 54159 to Colman pursuant to section 501(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a) (1988), with an effective date of February 19, 1992. The grant authorized Colman to construct, operate, and maintain a solar evaporating system consisting of 6 berms and a canal on approximately 7,226.86 acres of public lands within secs. 6-8, 17-21, 28-30, and 33-35, T. 6 N., R. 11 W., and secs. 11-14 and 23-24, T. 6 N., R. 12 W., SLM, Box Elder County, Utah.

BLM's February 21, 1992, decision issuing the right-of-way grant also advised Colman that BLM's Utah State Office Appraisal Staff had established \$1 per acre as the fair market annual rental for the grant. According to an Appraisal Report, dated October 25, 1991, which appears in the record, 2/ the appraiser determined the fair market rental value of the grant by directly comparing Colman's right-of-way to other BLM evaporative industry rights-of-way. The appraiser selected three similar BLM leases which he correlated to the subject right-of-way, making adjustments for factors affecting fair market rental value such as rights conveyed, 3/ time, access to raw materials, proximity to rail facilities, highways, and communities, availability of power, zoning restrictions, size, physical suitability, and costs. See Appraisal Report at 8.

1/ Although the application was filed in 1984, processing of the application was delayed due to construction of the Great Salt Lake Pumping Project and by Colman's failure to expeditiously submit additional information requested by BLM.

2/ As will be discussed in greater detail subsequently in the text of this decision, the Appraisal Report appearing in the record was apparently revised, subsequent to its submission, to correct certain errors. While these changes were clearly accomplished sometime after Dec. 23, 1991, the revised appraisal still bears an Oct. 25, 1991, date. No copy of the Appraisal Report as originally submitted was retained in the record.

3/ Both the environmental assessment prepared for the right-of-way and the appraisal indicated that, because the land subject to the right-of-way was located within the return flow path of the overflow from part of the State of Utah pumping project, a stipulation would be attached to the right-of-way granting the State and the pumping project priority status. No such stipulation appears in the copy of the grant contained in the case file.

The appraiser concluded that the subject right-of-way was inferior to Rental No. 1, which had an annual rental of \$1.83 per acre, because the rental's superiority in rights conveyed, closeness to Grantsville, Utah, and Interstate 80, availability of power, size, and renter motivation ^{4/} outweighed its inferiority in time, access to rail facilities, and physical suitability. The appraiser considered Rental No. 2, with an annual rental of \$1 per acre, as equivalent to Colman's grant based on his opinion that the rental's greater conveyed rights, access to utilities, and nearness to Grantsville offset its lesser timeliness and physical suitability. Rental No. 3, which also commanded \$1 per acre annual rental, was similarly judged to be commensurate with the subject right-of-way, since the downward adjustments necessitated by the rental's broader conveyed rights, availability of utilities, and proximity to Grantsville and Interstate 80 were seen as basically equalling the upward modifications mandated by the rental's reduced timeliness, physical suitability, and access to rail facilities. The appraiser, therefore, established \$1 per acre as the fair market value annual rental for Colman's right-of-way, adding tangentially that the State of Utah's assessment of \$1 per acre annual rental for State land used by Colman in conjunction with the subject right-of-way reinforced the reasonableness of his fair market rental value analysis.

In his statement of reasons for appeal (SOR), as supplemented by a submission filed August 7, 1995, Colman objected to BLM's conclusion that \$1 per acre per annum constituted the fair market rental value of his right-of-way, asserting instead that the reasonable annual rental rate for his grant should be \$0.15 or \$0.20 per acre. While Colman submitted no appraisal which would support his own value assertions, he did assail the BLM appraisal on a number of grounds.

In his original SOR, Colman noted that he leased the adjacent land from the State for only \$0.50 an acre and pointed out that that lease involved lands which were contiguous to the brine source and had established rail spurs and road access as well as access to natural gas and telephone service. In contrast, Colman argued, the leased Federal lands lacked all of the enumerated facilities, were less amenable to solar pond development, and had been isolated from other public domain land by the construction of the West Desert Pumping Project ditch. Moreover, Colman also noted that the rights acquired under the State lease included not merely the right to occupy the surface but also the right to extract mineral compounds from the brine, inferentially contrasting this with the

^{4/} The appraiser considered the rental slightly superior to Colman's right-of-way in motivation because the lessee rented the land to try to protect nearby ponding areas from immediate flooding. See Appraisal Report at 5.

Federal grant which merely permitted occupancy of the surface but contained no grant of mineral rights. Based on these factors, Colman concluded, as noted above, that a reasonable annual rental rate for the Federally-leased lands would be between \$0.15 and \$0.20 per acre.

In its answer to appellant's original SOR, BLM asserted that its appraisal report appropriately considered the rental charged by the State for Colman's State mineral lease and challenged Colman's claim that he leased State land for \$0.50 per acre. Thus, BLM contended that, while the 1978 State mineral lease did set an initial rental of \$0.50 per acre for the first 10 years of the lease, it also provided for an increase in the rental of an additional \$0.50 per acre per year effective 10 years after lease issuance. See Mineral Lease No. 29864, Article III. Furthermore, BLM argued that the passage of time from the date of issuance of the State lease to the present limited the initial rental valuation's usefulness in determining the reasonable rental value of Colman's right-of-way as of 1991, a conclusion BLM bolstered by observing that, since at least 1986, the State of Utah has assessed \$1 per acre as the base rental rate for State mineral leases similar to Colman's lease, with an increase to \$2 per acre after 10 years. See Section 8.a3.(e), Utah Board of State Lands & Forestry Rules & Regulations Governing the Issuance of Mineral Leases, revised effective Jan. 2, 1986, attached to BLM's Answer.

BLM's response also addressed Colman's argument that the annual rental payment of \$0.50 an acre which he paid to the State included extractive rights not conveyed by the Federal leases. BLM noted that under Colman's agreements with the State he was also required to submit a minimum royalty fee as well as royalties on any production in excess of that covered by the minimum royalty payment. While recognizing that the surface lease permitted the crediting of rental fees against actual tonnage royalties, BLM argued that the payments which Colman tendered on his State lease were properly equated with the land rental for the land covered by the lease.

On August 7, 1995, this Board received a supplemental SOR from appellant. Appellant first responded to BLM's contention that the State rental had been increased to \$1 in 1988 by noting that, notwithstanding any language in the State lease which provided for an increase in the rental rate of \$0.50 per acre after 10 years, in point of fact he had continued to pay only a total of \$0.50 per acre for the lands covered by the lease. Appellant also challenged numerous factual assertions contained in the BLM appraisal.

Thus, appellant noted that the appraisal described the subject land as located in the "north central portion of Tooele County," when it was in fact located in the southern portion of Box Elder County (Supplemental SOR

at 1-2). Appellant also criticized the appraisal for noting that the subject land "has access from an existing road which originates from Lakeside" without mentioning that the parcel is 48 miles from Interstate 80 and that the last 34 miles are dirt road. Id. at 2. Appellant also suggested that the appraisal's claim that "[r]ail transportation routes are onsite" was disingenuous, since the fact that the northeast corner was traversed by an embankment of the Southern Pacific Railroad line was a practical irrelevancy inasmuch as the nearest loading spurs were over 60 miles to the East in Ogden. Id.

Appellant was also critical of the appraisal's analysis of the relative merits of the comparables vis-a-vis the subject parcel. Appellant noted, for example, that the three comparables had rail loading spurs either on-site or within one-half mile whereas the nearest access to a railhead was 60 miles from the subject site, yet the subject parcel was deemed either equal or superior to the comparables with respect to rail access. Appellant was even more critical with respect to the appraisal's assertion that the subject site was superior to all three of the comparables with respect to "physical suitability and character for some types of evaporative industries use," a conclusion which the appraisal had supported by observing that the comparables were located in Stansbury Basin which was deemed to be generally at a lower elevation than was the subject and was therefore more prone to flooding from higher lake levels. See Appraisal Report at 4, 6, and 7. Appellant argued that, in reality, the subject was inferior to all three of the comparables since the subject contained over 40 sand dunes varying in height from 5 to 25 feet and had a high sand component in the upper 10 feet of surface soil. Furthermore, appellant submitted maps which, he asserted, showed that the comparables were not generally topographically lower than the subject parcel.

Finally, appellant questioned the failure of the appraisal to use the Knolls Solar Evaporative Pond System, which was mentioned in passing on a number of occasions in the appraisal, as a basis for determining fair market value. According to appellant, the Knolls site (which was the subject of a decision of this Board, styled Amax Magnesium, 119 IBLA 281 (1991)), was generally comparable to the subject and appellant implied that the rental would be lower if the Knolls site had been factored in. See Supplemental SOR at 4. Though appellant was directed to serve BLM counsel with a copy of this supplemental SOR, no response was submitted on behalf of BLM.

[1] As an initial matter, we note that under section 504(g) of FLPMA, as amended, 43 U.S.C. § 1764(g) (1988), the holder of a right-of-way is required to pay rental annually in advance for the fair market value of the right-of-way. See Michael D. Dahmer, 132 IBLA 17, 24 (1995); Alaskan M.D.S., Inc., 130 IBLA 13, 15 (1994); see also 43 CFR 2803.1-2(a) (requiring holder to pay "fair market rental value as determined by the authorized officer applying sound business management principles and, so far as practicable and feasible, using comparable commercial practices"). Such value

is considered to be the amount "for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desires but is not obligated to so use." Qwestar Service Corp., 119 IBLA 65, 67 (1991), citing American Telephone & Telegraph Co., 25 IBLA 341, 349-50 (1976).

The preferred method for appraising the fair market value of nonlinear rights-of-way is the comparable lease method, provided there is sufficient comparable rental data and appropriate adjustments are made for differences between the subject site and other leased sites. Michael D. Dahmer, supra; Alaskan M.D.S., Inc., supra; Oregon Broadcasting Co., 119 IBLA at 243, and cases cited; see 43 CFR 2803.1-2(c)(3)(i) (rental for non-linear rights-of-way based on "market survey of comparable rentals"). Under this method, which was the method utilized in the appraisal of appellant's right-of-way, the rentals charged for rights-of-way in the area are reviewed and adjustments are made for variations in the features of the grants and the rights obtained under the leases. See Idaho Wireless Corp., 120 IBLA 172, 174 (1991), and cases cited.

An appraisal of a right-of-way grant will generally not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. See, e.g., Michael D. Dahmer, supra; Oregon Broadcasting Co., supra. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive. See, e.g., Michael D. Dahmer, supra at 25; Oregon Broadcasting Co., supra, and cases cited therein. While appellant's evidentiary submissions are clearly inadequate to support his assertion that the proper range of value is between \$0.15 and \$0.20 per acre, we believe, for reasons set forth below, that he has raised sufficient questions as to the accuracy of the Government's appraisal as to justify our setting aside the rental determination and remanding it to BLM for a reassessment of the fair market rental value.

At the outset, we must note that, while the case file contains two copies of the official Appraisal Report, one of which includes the appraiser's certification dated October 25, 1991, neither of these documents is a verbatim replication of the report originally submitted and initially approved upon review. Apparently, as initially submitted and approved, the appraisal report contained a number of errors, including the location of the parcel in question in Tooele County rather than Box Elder County. These errors were discovered by the Bear River Resource Area realty staff and, as a result, by memorandum dated December 23, 1991, the Salt Lake District Manager returned the appraisal to the Branch of Support Services noting that "some of the data contained in the completed appraisal pertained to Tooele County and not to Box Elder County" and requested that

"the subject appraisal be revised as needed and returned." It seems clear that certain parts were thereafter revised, though the exact extent of these changes is not presently determinable since we do not possess a copy of the original report. Nothing on the face of the appraisal report in the record, however, evidenced that it had been emended after the certification date, though the appraisal reviewer's report does show that a reference to Tooele County was changed to Box Elder County on January 7, 1992.

We recognize, of course, that one of the major reasons for conducting internal reviews is to correct errors before decisions are made based on them. However, where substantial revisions are being made, we believe the best course of action is to ensure that the record reflect the actual course of events. For example, in the instant case, at a minimum, the certification date should have been changed from the date the original appraisal was submitted to the date that the revised appraisal was completed. This was not done here.

Moreover, with respect to the instant appeal, the failure of the case file to accurately reflect what occurred below has engendered a considerable confusion. It is apparent that appellant received a copy of the original unrevised appraisal and has directed his arguments to various misstatements and omissions which appeared therein. Since a number of the statements and omissions which he challenged no longer appeared in the revised appraisal, 5/ the Board found it difficult, initially, to give much credence to appellant's complaints since they did not appear to be borne out by the record. It was only after a substantial degree of analysis that the Board was able to ascertain the cause for the confusion.

Notwithstanding the foregoing, were the only problem with the instant case the failure to accurately record the process by which the final appraisal report was prepared, we would not set aside the rental valuation. Our determination to do so is premised on what we view to be a substantial question as to whether the subject parcel was fairly compared to those leases which were chosen as comparables.

As we noted above, three comparables were chosen for purposes of establishing the fair market value of the subject parcel. While the appraisal report concluded that one of the comparables (Rental No. 1) was superior and the other two were equivalent to the subject, appellant

5/ Thus, appellant had criticized the appraisal for locating the subject parcel in Tooele County and for failing to mention that it was 48 miles from the Interstate. The appraisal report which the Board was transmitted correctly identifies Box Elder County as the location of the parcel and expressly notes that the Interstate highway routes "are approximately 40 mile[s] distant from the southern boundary of the subject" (Appraisal Report at 1).

argues that all three of the comparables were substantially superior to the subject. Our review of the record on appeal convinces us that, contrary to the appraisal analysis, all three of the parcels were, indeed, superior to the subject parcel, though the extent to which they are superior may be open to debate.

Appellant's criticism of the appraisal with respect to the existence of "a rail line on site" is well-taken. Both Rental No. 1 and Rental No. 3 were rated inferior to the subject parcel in this category, despite the fact that both of these comparables had access to rail spurs within a "short distance" of the properties. The fact that the line of a railroad crosses the subject parcel is a functional irrelevancy. It is access to the railroad which is critical. BLM has not disputed appellant's assertion that the nearest rail spur is approximately 60 miles from the subject parcel. The subject is clearly inferior to all three of the comparables with respect to rail access.

Insofar as the category of "Physical Suitability and Costs" was concerned, the appraisal determined that the subject parcel was superior to all three comparables. The analysis for all three comparables supported this conclusion with the observation that "[t]he elevation of the Stansbury Basin is generally lower and more prone to flooding and disruption of production at higher lake levels than the subject area" (Appraisal Report at 4, 6, and 7). While appellant has submitted topographic maps which bring into question BLM's factual assertion as to the relative elevation of the parcels, it is not necessary to have recourse to these maps to determine that the claims of the appraisal report are not sustainable, at least with respect to Rentals Nos. 1 and 2. The appraisal, itself, simply fails to support any claim that these rentals are "generally lower" in elevation than the subject parcel. The Appraisal Report asserted that the average elevation of the subject parcel was 4,215 feet. See Appraisal Report at 2. However, the rental data for Rental Nos. 1 and 2 indicate that Rental No. 1 is at the same elevation (approximately 4,215 feet), while the average elevation of Rental No. 2 varies from "approximately 4,205 feet on the east parcel to 4,225 feet on the west portions." The report does not indicate how much of the total of the 5,417 acres of Rental No. 2 was below the 1986 level of Great Salt Lake. Thus, the data upon which the appraisal analysis relies for its conclusion that the physical suitability of the subject parcel is superior to all three comparables only supports that conclusion unequivocally with respect to Rental No. 3.

In view of the foregoing, the only category in which the rentals can be said to clearly be superior to the subject is the category of "Time," i.e., all the rentals require some upward adjustment to take in the effect of inflation since they were entered into. Notwithstanding this adjustment, however, it also seems clear to us that, taken as a whole, the appraisal supports appellant's assertion that all three of the comparables are fairly deemed to be superior to the subject.

We recognize that both appellant and BLM have cited the adjacent State lease held by Colman as supporting their respective positions. The record would, in fact, appear to indicate that, while the lease terms called for an additional \$0.50 per acre after the initial ten-year period, appellant has never tendered more than \$0.50 per acre. However, both parties' reliance on the rental charged under the terms of the State lease or otherwise statutorily set is substantially misplaced. As we have noted in a number of decisions, most recently in Michael D. Dahmer, supra, where, as here, rental rates are fixed administratively, the prices set do not necessarily reflect values derived from the market place and little weight can be accorded them in ascertaining the fair market value of comparable properties. Id. at 25-26; see also MCI Telecommunications Corp., 115 IBLA 117, 124 (1990). Given the fact that the State land lease is inextricably intertwined with the State mineral lease, 6/ we believe that the State lease is, in this instance, a particularly poor guide for determining fair market value.

We are thus faced with a record that, upon review, fails to either adequately support the rental value ascribed to the subject parcel or to provide sufficient information to permit us to independently ascertain the proper fair market value. We are forced, therefore, to set aside the decision appealed and remand the matter to BLM for a reevaluation of the fair market value of the leasehold estate involved herein.

In remanding the case, however, we wish to take particular note of the Knolls Solar Evaporative Pond System as a potential comparable lease for valuation purposes. Appellant asserted in his supplemental SOR that this site possessed "some degree of similarity" with the subject site and implied that the fact that it was not included as one of the comparables adversely affected the ultimate valuation of his lease. We believe that the likely reason why this site was not selected in the appraisal analysis was the fact that in our decision in Amax Magnesium, supra, which issued on June 6, 1991, we had set aside and remanded a rental assessment of \$1.15 per acre for the lease of the lands involved therein. 7/ It seems probable that the reappraisal required by that decision had not yet occurred at the time that the rental assessment was being conducted with respect to the instant lease and, accordingly, it was unavailable for comparison. This impediment, however, will have been eliminated by the passage of time and we believe that it would be beneficial to include this lease in the comparables analyzed in the reappraisal being ordered herein.

6/ In this regard, we note that the fact that land rental payments may be set off against actual royalties could result in a situation wherein, assuming a high enough level of production, no effective rental would be charged for the land lease, itself.

7/ Appellant in Amax Magnesium, supra, had asserted that the proper rental value for the land involved therein was \$0.70 per acre. Id. at 282.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case file is remanded for a reappraisal of the fair market value of the subject lease.

James L. Burski
Administrative Judge

I concur.

Will A. Irwin
Administrative Judge

