

DELBERT D. JONES

IBLA 97-186

Decided January 12, 1999

Appeal from a decision of the Worland (Wyoming) District Office, Bureau of Land Management, denying a request for reduction of the annual rental for right-of-way WYW-81744.

Affirmed.

1. Administrative Procedure: Generally--Res Judicata--Rules of Practice: Appeals: Generally

A party who has availed himself of the opportunity to obtain administrative review of a decision within the Department is precluded from litigating the matter in subsequent administrative proceedings and the Board will not revisit matters previously adjudicated without a showing of compelling legal or equitable reasons.

2. Administrative Procedure: Generally--Rules of Practice: Appeals: Generally

Assertions of BLM harassment or retaliation that do not address whether BLM properly issued the decision on appeal will not be considered.

3. Rent--Rights-of-Way: Generally

The holder of a right-of-way grant must pay fair market rental for the right-of-way. The Secretary has authority to charge less than fair market rental value when the right-of-way holder provides a valuable benefit to the public or the Department without charge, or at reduced rates. However, it is incumbent upon the right-of-way holder to demonstrate that it is qualified to receive a waiver or reduction of rental.

APPEARANCES: Karen Budd-Falen, Esq., and Vance E. Haug, Esq., Cheyenne, Wyoming, for Appellant Delbert D. Jones; Jennifer E. Rigg, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Delbert D. Jones has appealed a December 20, 1996, decision issued by the Worland (Wyoming) District Office, Bureau of Land Management (BLM or Bureau), rejecting Jones' request for a further reduction of the annual rental for right-of-way WYW-81744.

Jones holds a nonexclusive right-of-way, identified as right-of-way WYW-81744, which was issued for a 30-year term, commencing March 5, 1985, pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1994). Jones had applied for the right-of-way to permit reconstruction, operation, and maintenance of the Harrington Reservoir and appurtenant irrigation ditches for delivery of water to Jones' desert land entries. The area encumbered by the right-of-way grant includes a 184.9-acre reservoir site and 20.6 acres of 30-foot right-of-way for ditches, for a total of 205.5 acres. 1/ In October 1984, BLM appraised the land and established a \$1,175 fair market rental value for the right-of-way. In 1985, the Bureau advised Jones that the rental was being reduced by 25 percent to reflect benefits to BLM programs resulting from the project. 2/ Jones appealed, claiming that the charges were excessive. The Board affirmed both the appraisal and the 25-percent reduction in Delbert D. Jones, 100 IBLA 289 (1987).

Jones asked for a meeting with BLM to examine additional benefits the public would derive from his construction, maintenance, and operation of the reservoir. Following that meeting, on May 9, 1989, BLM approved a 50-percent rental reduction to reflect those benefits. The resulting \$587.50 rental was applied through the rental period ending March 4, 1991. In July 1991, BLM approved Jones' application to amend the grant, by adding 9.64 acres to the right-of-way grant, and increased the annual rental to \$672. 3/

1/ The subject reservoir and ditches occupied parts or all of the following land, located in the Sixth Principal Meridian, Big Horn County, Wyoming,

T. 51 N., R. 95 W.,

Sec. 30: Lots 6, 7, and 8, NE 1/4 NE 1/4,
SW 1/4 NE 1/4, E 1/2 SW 1/4, SE 1/4,
NW 1/4, SE 1/4

Sec. 31: Lots 5, 6, and 7, NW 1/4 NE 1/4,
E 1/2 W 1/2, S 1/2 SE 1/4

Sec. 32: Lots 6 and 7

T. 51 N., R. 96 W.,

Sec. 25: Lots 9, 12, and 13, SE 1/4 NE 1/4
Sec. 36: Lot 1.

2/ The rental for the period commencing on Mar. 5, 1985, and ending Mar. 4, 1986, was calculated to be \$1,555 (\$880 rental (75 percent of \$1,175) plus a \$700 monitoring fee, less a \$25 deposit).

3/ The amendment added the following land:

T. 51 N., R. 95 W.,

Sec. 29: SW 1/4 SW 1/4
Sec. 30: S 1/2 SE 1/4
Sec. 31: N 1/2 NE 1/4, SW 1/4 NE 1/4,

On December 12, 1996, Jones met with BLM seeking reconsideration of the 50-percent reduction, asserting that the value of public benefits exceed the rental amount, and that, if others are allowed to use the reservoir, the rent should be reduced to take into account Jones' construction costs. In response, BLM issued a December 20, 1996, decision denying further reduction. This decision stated, in part:

We appreciate the fact the reservoir costs money to construct and there is a cost to agricultural users for irrigation water. But the cost of constructing the right-of-way facilities on public lands, including the cost of environmental mitigation measures, is in the nature of a private business decision. You accepted the right-of-way knowing minimum pool mitigation would be required, and your costs associated with this requirement should have been analyzed as part of your decision to proceed with the project.

Our regulations expressly require private users of the public lands to pay fair market value rental. The regulations do provide for rental reductions if the right-of-way holder is providing a valuable benefit to the public or to the programs of the BLM. Your 50% reduction is based on the benefits to BLM programs or users of the public lands near or adjacent to your facility. These values include the benefits to wildlife, riparian values, and minimum pool benefits to fisheries and waterfowl. The benefits can only be provided if the reservoir is completed, and both the 25% and 50% reductions were based on the assumption the reservoir would provide these benefits. With your completion of the reservoir, these benefits are present. However, we feel the facility was constructed primarily to provide private benefit and that benefit is also being realized. Because of this, we cannot justify further reduction of your rent and allow completely free use of the public lands. In summation, we feel the 50% reduction you are currently receiving is warranted, based on an equal partnership of private and public benefits. We do not feel any further rental reduction is justified. Therefore, the rental reduction of 50% of fair value remains in effect, * * *.

(Decision at 2.) Jones appealed.

In his statement of reasons, Jones advances four reasons for finding error in the BLM decision: the 1984 appraisal was erroneous; the 50-percent reduction approved in 1989 was arbitrary; BLM's denial in the decision on appeal is a blatant attempt to retaliate against him; and BLM failed to properly consider the benefits flowing to the public and BLM from his construction of the reservoir. As will be noted below, we find little merit in the first three arguments.

fn. 3 (continued)

NE 1/4 NW 1/4, N 1/2 SE 1/4
 Sec. 32: Lots 6, 7, NW 1/4 NW 1/4, NW 1/4 SW 1/4
 Sixth Principal Meridian, Wyoming.

On April 10, 1997, BLM filed a Motion asking the Board to dismiss the appeal because it is barred by the doctrine of administrative finality. By Order dated June 9, 1997, we denied the motion because certain of the factual issues in this appeal are distinguishable from those adjudicated in Jones, supra. However, our ruling on the motion to dismiss did not preclude our finding that some of the facts and arguments require no further deliberation.

[1] The doctrine of administrative finality dictates that when a party has availed himself of the opportunity of obtaining administrative review within the Department the party is precluded from litigating the matter in subsequent administrative proceedings, and the Board will not revisit previously adjudicated matters without a showing of compelling legal or equitable reasons. Richard W. and Lula B. Taylor, 139 IBLA 236, 241-242 (1997); Gifford H. Allen, 131 IBLA 195, 202 (1994). Further, application of collateral estoppel necessitates a delineation of those matters in issue and those previously addressed issues not subject to relitigation. State of Alaska, 140 IBLA 205, 211 (1997).

The decision now on appeal denied further rental reduction in response to Jones' December 1996 request. The decision did not address the fair market rental amount, which had been determined in 1985. Jones appealed the decision establishing the fair market rental. We found that Jones had not shown error in BLM's method of appraisal and affirmed BLM's fair market rental determination. Jones, supra at 291. There has not been a subsequent appraisal and no new fair market rental rate has been applied to the right-of-way since the 1985 determination. The only modification was the addition of lands to the right-of-way through an amendment approved in 1991 and the supplemental rent for the added lands based on the per acre rental determination made in 1985. Jones did not appeal the 1991 decision. Thus, when Jones challenges BLM's appraisal he is attempting to relitigate an issue addressed by this Board in Jones, supra. We find no compelling legal or equitable reasons for reconsidering this matter.

The decision now on appeal did not address the 50-percent rental deduction currently allowed. In our 1987 decision we found that, based on the evidence presented at that time, the 25-percent reduction applied by BLM to be reasonable and supported by the facts. Jones, supra at 292. In 1989, BLM increased the reduction to 50-percent after reviewing additional evidence presented by Jones. The 1989 decision increasing the reduction to 50-percent was not appealed and it became final for the Department. Jones states that in December 1996, he approached BLM seeking "further rental reduction" because BLM had stated that further reduction "might be warranted once the project was completed." (Statement of Reasons (SOR), at 6 (emphasis added).)

Describing his appeal of the decision now under review, Jones argues that BLM "has violated its own rules, regulations and procedures by arbitrarily and capriciously denying [Jones] a further rental reduction." (SOR at 10.) Thus, the issue is BLM's denial of his request for a further rental reduction, not whether the "50% rental fee reduction is arbitrary."

(SOR at 16.) To reconsider the 50-percent reduction at this time would lead us to scrutinize BLM's 1989 decision. Again, we find no compelling legal or equitable reasons for doing so.

[2] Jones considers BLM's denial "a form of harassment" "based upon posturing and personality conflict." (SOR at 17.) To the extent appellant seeks to transfer liability in this case based upon assertions of harassment or retaliation by BLM, we note that such assertions are not uncommon and have been previously dismissed by the Board. Petro-X Corp., 127 IBLA 111, 114 (1993); C.C.Co., 116 IBLA 384, 387 (1990). In those cases, we held that selective enforcement was not the issue as the question was whether a violation existed. Similarly, in this case the issue is whether BLM properly issued the decision on appeal, not whether BLM has discriminated against appellant.

[3] In his remaining argument, Jones asserts that "BLM failed to properly consider public and BLM benefits created by the construction of the reservoir." (SOR at 13.) Section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1994), directs the Department to assess the fair market rental value for right-of-way use of the public lands. ^{4/} This section also sets out circumstances which allows the Department, as it "finds equitable and in the public interest," to reduce or eliminate the rental. One of those instances is when the holder provides a valuable benefit to the public.

The implementing regulation, 43 C.F.R. § 2803.1-2(b)(2)(ii), states that "[t]he authorized officer may reduce or waive the [right-of-way] rental payment" when "[t]he holder provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary." While the regulations do not depict a format for seeking or granting a reduction or waiver of the fair value rental charges, this Board has noted that it is incumbent upon the right-of-way holder to demonstrate that it is qualified to receive the waiver or reduction. Ruth Tausta-White, 127 IBLA 101, 103 (1993); Voice Ministries of Farmington, Inc., 124 IBLA 358 (1992). This requirement also applies when the right-of-way holder alleges that the reduction is not sufficient. Ingram Warm Springs Ranch, 135 IBLA 77, 83 (1996).

^{4/} The pertinent part of this statute reads:

"(g) The holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way: * * * Rights-of-way may be granted, issued, or renewed to a Federal, State, or local government or any agency or instrumentality thereof, to nonprofit associations or nonprofit corporations which are not themselves controlled or owned by profit making corporations or business enterprises, or to a holder when the holder provides, without or at a reduced charge, a valuable benefit to the public or to the programs of the Secretary concerned, or to a holder in connection with the authorized use or occupancy of Federal land for which the United States is already receiving compensation for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest."

The stated reasons for the 25-percent reduction in 1985 was that Jones' project would enhance wildlife and fishery habitat by maintaining a reservoir level of at least 12 feet, installation of approved standpipes would decrease hazards, and fences on public lands would be relocated. See July 5, 1995, Letter. No formula for calculating the reduction was identified and no explanation was given for how BLM equated the benefits derived and the amount of reduction.

When Jones challenged the 25-percent reduction as insufficient, he asserted that the benefits could be quantified. He estimated construction costs of raising the water level to 12-feet at \$20,036.55, and claimed an annual \$2,053.75 credit for the water left as inactive storage by maintaining the 12-foot level. BLM rebutted his assertion by estimating construction costs associated with this benefit at \$7,077 (about \$236 per year over the 30-year life of the grant, or 20 percent of the fair market rental value). Jones also contended that it would cost him \$334.50 a year to maintain the "inactive" storage. BLM discounted this notion, responding that those costs associated with maintaining and operating the reservoir and ditches should properly be attributed to Jones' irrigation requirements. Jones sought recognition for \$15,840 as what it would cost him to relocate 3 miles of fence around the reservoir. BLM noted that the right-of-way grant provided for this mitigating measure to protect his private interests as much as to protect the public lands. Finally, Jones argued that the value of the public lands would be enhanced with increased wildlife and recreational opportunities, and that his adjoining lands and crops would be damaged by increased wildlife and human intrusion. BLM replied that those factors were inapplicable because of the increase in value to Jones' property and other considerations. On appeal, we found BLM's appraisal of the benefits derived from the right-of-way reasonable. Jones, supra at 292.

Similarly, no explanation of the basis for the 50-percent reduction can be found in BLM's May 9, 1989, decision:

A 50% reduction in rental has been approved for both rights-of-way as a result of our meeting on March 13, 1989. A further reduction of rental may be considered after the project has been completed and public benefits from the Harrington Reservoir and related ditches have been evaluated. The continued reduction in rental will be subject to compliance with the terms and conditions of the right-of-way grants.

The record contains no report or evaluation of benefits inuring to the Department or the public. A May 2, 1989, memorandum from a Grass Creek Resource Area Realty Specialist summarizes the meeting mentioned in the decision. At the time the reservoir had not been completed and none of the benefits had been realized. The apparent primary purpose of the meeting was to discuss problems Jones had financing the project and completing his desert land entries. 5/ The Realty Specialist reported that

5/ That \$2,529.10 was owing as back rent for the right-of-way was also discussed.

Jones 6/ strongly cautioned that unless a further reduction in rental was granted, he would pursue an alternative plan to build two reservoirs on state lands rather than complete the Harrington project. The Realty Specialist also reported that Jones intimated he would withdraw an appeal he had filed on March 4, 1989, if the reduction were granted. Prior to the meeting, BLM, anticipating that the project would soon be completed, had already constructed 11 goose nesting islands and had provided Jones with the material to fence the reservoir area. At that meeting, BLM offered \$4,000 from a wildlife project account to facilitate completion of the project. 7/ The Realty Specialist concluded that BLM has a considerable investment of time and money in the project warranting cooperation with Jones to ensure completion. The only other justification offered for approving a 50-percent reduction was a comparison of the "linear right-of-way schedules" for Big Horn (\$16.27 an acre) and Washakie (\$5.42 an acre) Counties, Wyoming. Noting that "[t]his is quite a variation in rental value for a comparable land type and similar value," the Realty Specialist opined that a 50-percent reduction would be justifiable. However, he also advised that the fair market rental appraisal for this right-of-way was based on it being a site rather than a linear facility. 8/

Jones now argues that, among the many benefits realized by the Department, the value of BLM lands has increased by approximately \$174,000 as a result of the reservoir. 9/ He further claims that the agricultural

6/ Stanley Jones, Delbert's son, was pursuing a desert land entry on adjoining lands which was dependent on the completion of the Harrington reservoir. Stanley Jones was listed on Delbert's grant application as Delbert's authorized agent and participated in these and other discussions. He is not an appellant because he is not a party-of-record to the right-of-way grant, but his appearances on behalf of his father are recognized. See 43 C.F.R. § 1.3.

7/ The funds were offered with certain stipulations attached. The record reflects that \$4,000 was released for the project in August 1989.

8/ Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including reservoir sites, is the comparable lease method of appraisal. This market comparison approach to appraisal, otherwise known as the comparable lease method, is based on a review of the rentals charged for comparable leases, adjusting for any differences between the subject right-of-way and the selected comparable leases. See Thousand Peak Ranches, Inc., 129 IBLA 397 (1994). For the Jones right-of-way BLM compared the Jones right-of-way with comparable leases in the area to establish the rental value and there is no evidence that it represented an excessive charge. It is also worth noting that the appraised fair market rental value (before reductions) equates to \$5.72 per acre, a number quite similar to the linear rental rate the Realty Specialist referred to.

9/ BLM disputes this claim, arguing that the only lands rendered suitable for agricultural purposes by the reservoir were patented to the Joneses pursuant to their desert land entries. According to BLM, the 184.9 acres of BLM-administered lands used as the basis for Jones estimate are not suitable for agriculture because they are under water.

value of the water stored for BLM's benefit (the 3 feet above the 9-foot minimum level) is worth \$30,660 to \$32,865, and states that he could easily sell this water if BLM did not insist on retaining it. To qualify for reduction the holder must provide a valuable benefit to the public or the Department. 43 C.F.R. § 2803.1-2(b)(2)(ii). The purported increase in land value would be realized only by applying the land to agricultural purposes. Under the established management plans the land will not be dedicated to agricultural purposes and the increase will not be realized. Further, the benefit to the public or the Department is not measured by the cost to the holder, especially when the cost is incurred to satisfy the terms of the right-of-way grant. Rather, it is the value of the benefit flowing to the public or the Department that determines the rental reduction.

Jones contends that in a Reservoir Management Plan BLM prepared for the nearby Wardel Reservoir and the Harrington Reservoir, ^{10/} BLM identified substantial benefits to be realized from the reservoir. He refers to BLM's stated anticipation that the reservoir will provide an excellent fishery and its report of ardent public interest in the reservoir for recreational purposes. To illustrate these benefits, Jones refers to a section of the management plan where BLM proposes spending up to \$42,000 to develop recreation sites and opportunities in and around Harrington Reservoir.

When BLM considered this factor in its decision, it concluded that "the facility was constructed primarily to provide private benefit and that benefit is also being realized. Because of this, we cannot justify further reduction of your rent and allow completely free use of the public lands." (Decision at 2.) We disagree with BLM's assessment because it fails to correctly apply the statutory and regulatory intent of the rental reduction provisions, i.e., reduction is offered to recognize the value of a benefit realized, not because the project has been costly to the holder or because the holder also receives a benefit. ^{11/} The value of the private benefit being realized by the right-of-way holder is, or should be, reflected in the fair market rental amount.

Both the statute and the regulations specify that a reduction or waiver of rental is not warranted unless 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. The amount of a rental reduction is a

^{10/} The management plan was developed for the Harrington Reservoir and the nearby Wardel. Many of the recreational qualities and aspects of the Wardel Reservoir were considered applicable to the Harrington Reservoir.

^{11/} We note that Jones has complained to BLM about the hardships he has faced in completing this project. We find no evidence of discussions with BLM about waiver or reduction of rental for hardship. The regulation at 43 C.F.R. § 2803.1-2(b)(2)(iv) authorizes BLM to waive or reduce rental when it determines "that the requirement to pay the full rental will cause undue hardship on the holder/applicant and that it is in the public interest to reduce or waive said rental."

reflection of the value flowing to the public or the Bureau from the grant of the right-of-way or any of the stipulations imposed by BLM as a condition of granting the right-of-way. It therefore follows that free or lesser charges should be used only in those circumstances when the public or the Bureau benefits from the right-of-way grant.

Congress emphasized that circumstances leading to totally free use would be rare:

[I]t is not the intent of this Committee to allow use of national resource land without charge except where the holder is the Federal Government itself or where the charge could be considered token and the cost of collection would be unduly large in relation to the return to be received.

S. Rep. No. 583, 94 Cong., 1st Sess. 72-73 (1975) (emphasis added). Thus, the discretionary application of absolute waiver of rental fees is not to be exercised capriciously. This concern underscores why it is incumbent upon the right-of-way holder to convincingly demonstrate that waiver of the rental charges is in the public interest.

Jones argues that BLM has failed to properly assess "the true extent of the benefits created for both BLM and the general public in completing the Harrington Reservoir." (SOR at 6.) In doing so he questions BLM's rationale for the 50-percent reduction: "[T]he 50% reduction was merely an arbitrary number pulled 'from thin air' * * *. * * * [BLM] does not explain how it considered those benefits or what monetary values or calculations it placed upon those benefits in order to reach the decision that only a 50% rental reduction was warranted." (SOR at 6, 14.) We agree that there is no justification for a 50-percent reduction in the record. However, the issue is not whether the 50-percent reduction is justified. The issue is whether a further reduction is warranted.

Jones insists that the rental charge is excessive because it fails to "adequately consider the benefits * * * created for BLM and the general public." However, none of the arguments advanced by Jones quantify these benefits in a manner that would support a further reduction. As noted, BLM accounted for the benefit flowing to the public and Bureau from the additional water stored in the reservoir. The only unassessed benefits identified by Jones which may comprise a basis for further reduction are the enhancements to recreational opportunities and wildlife habitat. However, neither the evidence submitted by Jones nor the evidence in the record provides reasonable basis for a conclusion that these benefits warrant a further reduction in the rental rate. Simply stated, Jones has failed to carry the burden of proof.

The project had just been completed and the benefits had not been fully realized when the decision was issued. BLM was unable to tell whether any of the recreational opportunities and improvements to the wildlife habitat would materialize to the extent expected, and the actual value of those benefits has not been established with any degree of certainty. Thus, we must agree with BLM's action denying further reduction at the time of the decision. Recognizing that the record is lacking in

many respects, we do not find that Jones has sufficiently demonstrated error in BLM's assessment of the reasonable amount of a rental reduction at the time of its decision, or that a further rental reduction was warranted at that time.

In its answer, BLM addresses what it considers to be equitable estoppel. There are instances throughout the record and in his SOR that Jones has stated that BLM had verbally assured him that the rental would be insignificant, and possibly waived, when the project was completed. However, we find no basis for the application of estoppel in this case. A precondition for invoking estoppel against the Government is a showing of affirmative misconduct on the part of a Government agent. For a misrepresentation to be affirmative misconduct, the misrepresentation must be in the form of a crucial misstatement in an official written decision. James A. Becker, 138 IBLA 347, 349-50 (1997). In this situation of "he said, I said," BLM denies that it guaranteed the reduction claimed by Jones, but admits that it indicated it would consider the public benefit at the appropriate time. There is certainly no written decision to support Jones' position that the alleged statements are binding on BLM. Our adherence to the requirement that the erroneous advice be in writing recognizes the inherent unreliability of using oral advice or communication as a foundation for future action. Moreover, we find no conclusive evidence that Jones relied on this advice to his detriment. The elements of estoppel are not present. See id. at 349-50; Ptarmigan Co., 91 IBLA 113, 117 (1986), aff'd sub nom. Bolt v. United States, 944 F.2d 603 (9th Cir. 1991).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

R.W. Mullen
Administrative Judge

I concur.

James P. Terry
Administrative Judge

