

ALASKA PIPELINE COMPANY
ENSTAR NATURAL GAS COMPANY

IBLA 2002-120

Decided December 2, 2004

Appeal from a decision of the Anchorage, Alaska, Field Office, Bureau of Land Management, determining the fair market value rental for natural gas pipeline right-of-way. AA-51647.

Affirmed.

1. Appraisals–Rights-of-Way: Act of February 25, 1920--
Rights-of-Way: Oil and Gas Pipelines

A decision determining rental for a pipeline right-of-way issued pursuant to sec. 28 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 185 (2000), based on an appraisal of fair market value will be affirmed unless the appellant demonstrates error in the appraisal method or result. In the absence of such a showing, a BLM appraisal may be rebutted only by another appraisal.

APPEARANCES: M. Manuel Lopez, Jr., Enstar Natural Gas Company, Anchorage, Alaska, for appellants; Kathryn K. Keenan, Esq., Office of the Regional Solicitor, Alaska Region, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Alaska Pipeline Company and Enstar Natural Gas Company (collectively APC) appeal an October 31, 2001, decision of the Anchorage, Alaska, Field Office, Bureau of Land Management (BLM), which determined the fair market value rental of APC's natural gas pipeline right-of-way crossing lands administered in part by BLM. Based on an appraisal, BLM determined that the rental due from APC is \$13,620 per year.

APC is the holder of natural gas pipeline right-of-way AA-51647 issued pursuant to section 28 of the Mineral Leasing Act of 1920, as amended (MLA), 30 U.S.C. § 185 (2000). The right-of-way was first issued in July 1960 and has been

modified on numerous occasions. The right-of-way is 50 feet in width and, by 2001, crossed 39.21 miles of Federal lands, for which BLM bears a responsibility to collect rental. From 1961 to 2001, APC made annual rental payments, most recently in 5-year increments. On January 8, 1996, APC submitted a payment of \$18,316.80 as an advance payment for 5 years of annual rental calculated at \$3,663.36 per year.

In 2001, BLM contracted with Accuval-Resco Appraisal Company, Inc. (ARAC), for an appraisal of the subject lands. The ARAC Summary Appraisal Report was completed for an effective date of May 1, 2001, and appears in the record as BLM Exhibit (Ex.) D.

The parties agree that the appraisal conducted an analysis of three segments of the subject right-of-way: (Part 1) the initial 2,640 feet of the right-of-way crossing a 160-acre tract of vacant land near Kalifornsky Beach Road approximately 4 miles south of the city of Kenai; (Part 2) 38.14 miles through the Kenai National Wildlife Refuge; and, finally, (Part 3) 2,970 feet across a 730-acre tract of BLM land identified as the "Campbell Tract" and located at the edge of Anchorage where the pipeline delivers the natural gas. (BLM Ex. D, Summary Appraisal Report at 14.) Based upon a comparable sales analysis, the appraiser reached the conclusion that these three segments are valued, respectively, at (Part 1) \$500, (Part 2) \$850, and (Part 3) \$8,500, per acre. The appraiser considered that the total acreage covered by the right-of-way for each segment was (Part 1) 3.03, (Part 2) 231.18, and (Part 3) 3.41 acres. Applying a rate of return of 8%, and determining that the rights conveyed to the right-of-way holder on the subject acres constituted 75% of the use of the subject acreage (use rate), the appraisal concluded that the annual rent for each segment would be (Part 1) \$91, (Part 2) \$11,790, and (Part 3) \$1,739, for a total annual rental of \$13,620. Id. at 21; see also id. at 16-21.

BLM issued its decision establishing fair market value rental at the rate established in the Summary Appraisal Report on October 31, 2001. APC timely appealed and submitted a separate statement of reasons (SOR).

In its SOR, APC limits its objection to a single factor in the appraisal, the 75% use rate established by the Summary Appraisal Report.

The BLM Appraisal utilizes the following formula: Acreage Value X Use Rate X Lease Rate = Annual Rental. APC does not dispute the formula. Nor does APC question the Acreage Value or the 8% Lease Rate used in the appraisal; both appear to be reasonable. APC does contend, however, that a Use Rate of 75% cannot be justified.

(SOR at 1.) APC explains that the right-of-way, though 50 feet wide, is used by APC for "12-inch and 16-inch steel gas transmission pipelines that are spaced 10 feet

apart.” Id. at 2. APC contends that the use of the right-of-way is nonexclusive, and reserves to the United States the mineral, subsurface and air space rights, the right of reversion and the right of ingress. Id. APC argues that the appraiser should have considered as a “comparable” a separate 20-foot wide right-of-way (AA-80434) for lands leased from the military, in which annual rental was calculated based on a 50% use rate. Id.

Based upon this separate right-of-way rental calculation, APC argues that the Board should compel BLM to adopt a 50% use rate. (SOR at 2.) APC also asks that BLM grant its request to reduce the width of the ROW from 50 feet to 20 feet. Id. Based upon this request, APC states that its use rate beyond the 20 feet width it now requests “must be deemed to be 0%.” Id. Based upon its own calculation of a 20-foot wide right-of-way with a 50% use rate, APC argues that the annual rental should be reduced to \$3,266.52, an annual rate that is less than it paid in 1996. Id. at 3.

BLM submits an Answer in which it argues that APC has not demonstrated error in the appraisal methodology used to calculate the right-of-way rental. BLM attaches the rental calculation decision for right-of-way AA-80434, relied on for comparison by APC, and argues that such a comparison cannot be reliable. BLM explains that in determining rental for that right-of-way, rather than following a commercial appraisal, the BLM State Director set aside an appraisal and adopted a fee calculated by the United States Forest Service on the basis of a fee schedule. Thus, BLM argues that the decision with respect to that right-of-way cannot provide a basis for rejecting the use rate applied by the appraiser here. (Answer at 9, Attachments 1 and 2 (documentation for AA-80434).) BLM cites the Summary Appraisal Report and its adoption of a 75% use rate based upon comparison with other rental calculations made for rights-of-way in Alaska and elsewhere. Id. at 10. With respect to APC’s request that right-of-way AA-51647 be reduced in width to 20 feet, BLM states that the request “is not addressed in this Answer.” Id. at 2 n.1.

[1] Section 28(a) of the MLA, 30 U.S.C. § 185(a) (2000), authorizes BLM to issue right-of-way grants across the Federal lands for “pipeline purposes for the transportation of * * * natural gas.” The grantee must pay to the Department the fair market rental value of the right of way “as determined by the Secretary.” 30 U.S.C. § 185(l) (2000); Western Field Production, Inc., 116 IBLA 225, 226 (1990). Departmental regulations for MLA rights-of-way, 43 CFR 2883.1-2, establish that rental payments shall be calculated in accordance with regulations governing rental payments for rights-of-way issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, as amended (FLPMA), 43 U.S.C. §§ 1761-1771 (2000). Like the MLA, section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (2000), requires the holder of a right-of-way grant to pay rental in advance annually, on the basis of its “fair market value” as determined by BLM. Michael D. Dahmer, 132 IBLA 17, 24

(1995). Regulation 43 CFR 2883.1-2 states the MLA right-of-way holders “shall make rental payments in accordance with §2803.1-2 of this title.”^{1/}

That regulation, 43 CFR 2803.1-2, in turn directs right-of-way holders to pay annually in advance “the 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.” 43 CFR 2803.1-2(a). “Such value represents 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’.” Wesfrac, Inc., 153 IBLA 164, 167 (2000), quoting Questar Service Corp., 119 IBLA 65, 67 (1991); see also Rock Creek Joint Venture, 138 IBLA 6, 12 (1997); American Telephone & Telegraph Co., 25 IBLA 341, 349-50 (1976). We have held that rental value determinations may be made on the basis of “comparable leases, which is the preferred approach and, thus, consistent with ‘comparable commercial practices,’ as required by 43 CFR 2803.1-2(a).” Rock Creek Joint Venture, 138 IBLA at 13.

In Wesfrac, Inc., we set forth the proper method of reviewing a rental value for an MLA right-of-way based upon a BLM appraisal.

An appraisal of fair market rental value for a right-of-way grant will not be set aside unless the appellant demonstrates error in the appraisal method used by BLM or shows that the resulting charges are excessive. 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 Amoco Corp., 139 IBLA 96, 99 (1997); Rock Creek Joint Venture, 138 IBLA at 13 and cases cited; see also 4-H Partnership, 149 IBLA 161, 166 (1999).

153 IBLA at 167-68.

With this background stated, we turn to APC’s arguments. APC has not submitted its own appraisal. Accordingly, the query is whether APC has demonstrated error in the ARAC Summary Appraisal Report. We find that it has not done so. APC’s only argument (that the 75% use rate constitutes error) derives from its statement that BLM has reserved rights in the lands covered by the 50-foot wide right-of-way and therefore APC has only “limited” use and from its assertion that BLM failed to use “the comparable that is most closely related to the subject right-of-way,”

^{1/} The provisions of 43 CFR 2803.1-2(b), providing exceptions to or reductions of the obligation to pay rental for FLMPA rights-of-way, are not available to holders of MLA rights-of-way. 43 CFR 2883.1-2.

which is the 1998 rental determination of AA-80434. (SOR at 2.) Neither of these assertions establishes error in the appraiser's conclusions.

APC asserts that the United States has reserved "the mineral rights, subsurface and air space rights, reversionary rights, and the right of ingress and egress" in the lands subject to the 50-foot right-of-way. (SOR at 2.) However, this factual statement regarding governmental reservations in the right-of-way fails to account for the surface use of the land, and fails to constitute a refutation of the Summary Appraisal Report. By contrast, in order to determine the use rate, the appraisal reasonably examined use rates upon which rentals were calculated for 35 other rights-of-way and easements. Of these comparables, the appraiser examined ten rights-of-way in Alaska for which the use was nonexclusive (8), unknown (1), or both exclusive and nonexclusive (1). In every case examined by the appraiser in Alaska, the use rate exceeded 70% and only one right-of-way use rate was below 75%, at a rate of "70% - 80%." (Ex. D, Summary Appraisal Report, Addendum, Alaska Rent/Fee Summary for Linear Occupancies.) One comparable was a nonexclusive BLM right-of-way where the use rate was 75% and 80% for pipelines and natural gas lines. APC fails to identify how the appraisal's method of determining the use rate was in error.^{2/}

We also reject APC's reliance on the rental value established for ROW AA-80434. BLM is correct that the rental for this right-of-way was not established on the basis of an appraisal. Rather, the decision in that appeal set aside an appraisal of the Forest Service, BLM, and Army Corps of Engineers lands across which APC had a pipeline right-of-way. See Answer Attachment 1, Dec. 22, 1998, Memorandum from Alaska BLM State Director regarding "Rental Determination -- Whittier to Anchorage Gas Pipeline Right-of-Way, BLM Serial Number AA-80434." Instead the State Director adopted, "in the interest of resolving this case in a manner acceptable to all the parties," an annual rental fee of \$980 provided in a fee schedule established by the Forest Service. See Answer Attachment 2, Feb. 4, 1998, Forest Service letter to BLM (calculating "land use fee for the pipeline from Whittier to Anchorage" based upon fee schedule). The decision maker was persuaded by the "specifics of this case," including the fact that pursuant to a separate lease between the Department of the Army and APC, the "United States is collecting annual lease payments in the amount of \$76,000." (Answer Attachment 1, Dec. 22, 1998, Memorandum from Alaska BLM State Director regarding "Rental Determination -- Whittier to Anchorage Gas Pipeline Right-of-Way, BLM Serial Number AA-80434.") That BLM resolved a dispute by setting aside an appraisal to accept a Forest Service's fee schedule for purposes of

^{2/} Of the remaining 25 comparables in other states, only two easements, one for underground use and one for an indeterminate use reflected a "use rate" of 50%. Id. The remaining 23 reflected use rates of 70-100%. We would not find support in the appraiser's comparables for the use rate propounded by APC here.

valuing rental for a right-of-way across Forest Service and military lands, where the military also had a lease and was accepting \$76,000 in lease payments annually, does not control the use rate here, and is not probative in meeting APC's burden of showing error in an actual appraisal. Accordingly, we find that APC failed to demonstrate that the Board should reverse or set aside BLM's decision based upon the appraisal.

Finally, we turn to APC's request that BLM reduce the width of its right-of-way from 50 to 20 feet. (SOR at 2.) APC has been free to make this request in the more than 40 years since its 50-foot right-of-way was originally granted. See Answer Ex. D Addendum, Aug. 24, 1961, Decision granting Right-of-Way Anchorage 051647. That it did so in the context of arguing that the use rate for its rental determination is excessive does not change that its land use for the preceding 40 years has been for a 50-foot wide right-of-way. Certainly, if BLM chooses to reduce the width of the right-of-way, the rental fee might change if shown by the appraisal methodology from the effective date of the right-of-way modification.

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 affirmed.

Lisa Hemmer
Administrative Judge

I concur:

David L. Hughes
Administrative Judge