



BRADLEY AND RAMONA HENSPETER

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Decided September 12, 2007



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

BRADLEY AND RAMONA HENSPETER

IBLA 2006-127

Decided September 12, 2007

Appeal from a decision of the Glennallen (Alaska) Field Office, Bureau of Land Management, increasing the annual minimum rental for an individual linear right-of-way. AA-81669.

Affirmed.

1. Rights-of-Way: Generally--Rights-of-Way: Federal Land Policy and Management Act

Under section 504(g) of the Federal Land Policy and Management Act, 43 U.S.C. § 1764(g) (2000), the holder of a right-of-way (ROW) shall pay annually in advance the fair market value thereof as determined by the Secretary. Rent is not an administrative fee, but the price the holder of a ROW pays to use Federal land. The fair market value of the rent is established using sound business management principles and comparable commercial practices. 43 C.F.R. § 2806.10(a). BLM typically bases rental amounts for linear ROWs on a per-acre fee schedule, but may use an alternate means to compute the rent if it is determined by comparable commercial practices or an appraisal would be 10 or more times the rent from the schedule.

2. Rights-of-Way: Generally

Where the annual rent for an individual holding a ROW is greater than \$100, the holder has the option of paying the rent annually or at multi-year intervals. 43 C.F.R. § 2806.23(a)(2)(i). The regulation at 43 C.F.R. § 2806.14 specifies the circumstances under which the holder of a ROW may be exempted from the obligation to pay rent. The regulation at 43 C.F.R. § 2806.15 specifies the circumstances under which BLM may waive or reduce

the rent. No error is shown because BLM did not establish a different payment frequency, exempt appellants from the obligation to pay rent for the ROW, or reduce the rent where appellants have not requested such action.

APPEARANCES: Bradley and Ramona Henspeter, Copper Center, Alaska, *pro sese*; Kenneth M. Lord, Esq., Office of the Regional Solicitor, Alaska Region, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.¹

OPINION BY ADMINISTRATIVE JUDGE PRICE

Bradley and Ramona Henspeter have appealed from the December 15, 2005, decision of the Field Manager of the Glennallen (Alaska) Field Office, Bureau of Land Management (BLM), increasing the annual rental for linear right-of-way (ROW) AA-81669 from \$100 per year to \$250 per year. We affirm.

BACKGROUND

BLM issued ROW AA-81669 to appellants on February 3, 2000, pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (2000). The ROW pertained to a trail 3,744 feet long and 25 feet wide, containing approximately 2.1 acres, which would provide access to appellants' land from an established public easement by foot, small snow machine or all-terrain vehicle only, and would be maintained only by minor "brushing." ROW Grant at 1; *see* Environmental Assessment No. AK 050-EA-00-001 at unnumbered 3. The ROW and appellants' land are located in sec. 33, T. 10 N., R. 4 E., Copper River Meridian, Alaska. The term of the ROW is 20 years from its effective date, and may be renewed. *Id.* Due to the small size of the ROW, the annual rent was not determined based on an appraisal of the land. Instead, the initial annual rent was set at the minimum amount of \$100 in accordance with Instruction Memorandum (IM) No. AK 92-202. Appellants paid a total of \$583.30 within 30 days of the February 2, 2000, decision transmitting the Grant for execution (pro rated rent of \$83.30 for March 1 to December 31, 2000, and the full annual rent of \$100 per year for 2001 to 2005 in advance).

At the end of 2005, with the next billing cycle for the ROW approaching, appellants contacted BLM regarding the rental payment. According to appellants, they were told that the rent for 2006 would remain at \$100. They allege that the BLM employee Brenda Becker, to whom appellants spoke, said they would be permitted to pay only the rent for 2006 "during this transition period, but future

¹ Counsel entered his appearance on Mar. 7, 2006, but did not file a brief.

payments would likely need to be \$500 (for the five years).” SOR, Ex. A (appellants’ explanation of how they learned of the increase). Prior to receiving a bill or invoice, appellants made a \$100 payment on December 14, 2005. The next day BLM informed appellants by telephone that the rent for 2006 was actually \$250.² This telephone call was followed by the December 15, 2005, decision here appealed, which also transmitted an invoice for the \$100 balance on the \$200 due for 2006. The decision explained that the minimum annual rent had been increased pursuant to BLM IM No. AK 2005-028 dated May 20, 2005, which applies to ROWs, leases and permits in Alaska.³ Decision at 1.

APPELLANTS’ ARGUMENTS

Appellants make two basic arguments on appeal. First, they contend they did not receive any advance notice of the changed minimum rental amount prior to the December 15 decision. Appellants acknowledge they received a letter from BLM dated June 21, 2005, regarding changes in the ROW regulations in 43 C.F.R. Part 2800. However, appellants point out that the letter did not mention any actual rental amounts and instead addressed changes in payment procedures. Second, appellants argue the increased minimum annual rent is higher than that established for interior roads in a fee schedule that apparently was provided by BLM via an e-mail exchange. SOR at 2. No such fee schedule appears in the record and appellants have not cited the regulation where such schedule is published or authorized or stated whether it applies to linear ROWs. Appellants claim that, according to such schedule, the rent should be \$42 per acre. Thus, according to appellants, the rent should only be \$88.30 per year, well below \$250.

In addition to their principal contentions, appellants claim that an easement running with the land was envisioned when a predecessor in appellants’ chain of title received a homestead patent in 1968, because U.S. Survey plat 4673 depicts a “cat track” to the property. *Id.* at 2. They urge BLM to convert the ROW to an interest that runs with the land for the convenience of all concerned. *Id.* Further, appellants note that their cabin is not used commercially, while IM No. AK 2005-028

² It was explained to appellants that, while the new rental was \$250 per year, appellants would be responsible only for paying \$200 in 2006. Appellants were required to pay only \$200 because the new minimum annual rental amount was more than double the original rental. After 2006, appellants would be responsible for the full \$250. Decision at 1; SOR, Ex. A.

³ By its terms, IM No. AK 2005-028 expired on Sept. 30, 2006. We do not know whether it has since been extended.

purportedly “focuses almost entirely on commercial applications.”⁴ *Id.* They argue the new rent is disproportionately high compared to the value of the cabin, resulting in a high cost-per-use for appellants. In support, they claim to have paid \$10,000 for the land in 1998 and state that it has not appreciated in value.⁵ *Id.* Appellants conclude that the overly high rent is tantamount to an additional tax on the property, which devalues it. *Id.*

The relief appellants seek is a rent-free ROW, reasoning that if the parties’ intentions with respect to creating permanent access had been realized when the homestead patent was executed, appellants would not have to pay an annual rent. Alternatively, appellants advocate a fixed \$100 rent or elimination of the annual rent if it costs BLM more than \$100 to collect it, suggesting that if BLM is “charging a fee just to pay for administrative costs of collecting that same fee, this is ludicrous, and is a waste of everybody’s time and money.” *Id.* Lastly, appellants argue that an advance lump sum payment for 5 years’ rent works a hardship on them and, moreover, weakens the value of the property because the next owner “would be buying property with an unknown mandatory access fee that could be changed at any time, by any amount, without personal notice.” *Id.*

ANALYSIS

1. Notice

Appellants argue they received no advanced personal notice of the increased minimum rent. As an initial matter, we note that when Bradley Henspeter executed the ROW Grant agreement, he agreed to pay the fair market value rental in consideration of the rights granted “unless specifically exempted from such payment by regulation.” ROW Grant ¶ 3, Rental. That ROW term further states that “the rental may be adjusted by the authorized officer, whenever necessary, to reflect changes in the fair market rental value.” *Id.* Appellants were at the beginning of a new 5-year billing period and reasonably should have anticipated a change in the

⁴ We reject this characterization. The stated purpose of the IM is to “establish and implement an administrative determination on *small, non-complex, and routine interests in real estate* under jurisdiction of the [BLM].” IM No. AK 2005-028 at 1. The copy provided in the record appears to contain daily fees for use of the public lands for commercial still photography and motion picture and television locations, but these schedules, if they are a part of this IM, do not negate its stated policy that the “minimum rental value of \$250.00 shall be established for all BLM land use authorizations.” *Id.* at 2.

⁵ Appellants attached pictures of the cabin to the Board’s copy of the SOR to illustrate the rustic nature of the cabin.

minimum annual rental. As stated, appellants received notice of an increase by letter dated June 21, 2005, and on December 15, 2005, BLM telephoned to inform them that the increased minimum rental would be \$250 per year. BLM then mailed the December 15, 2005, decision announcing the change to appellants on December 16.⁶ BLM thus satisfied any requirement to provide notice by notifying appellants of the increase in advance.

2. *The Increased Minimum Annual Rental for ROWs*

[1] Under section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (2000), the holder of a ROW “shall pay annually in advance the fair market value thereof as determined by the Secretary.” Rent is not an administrative fee, as appellants appear to assert in their appeal, but the price ROW holders pay to use Federal land.⁷ That same provision of FLPMA contains separate authority by which the Secretary may require an applicant for, or holder of, a ROW to “reimburse the United States for all reasonable administrative and other costs incurred in processing an application for such [ROW] and in inspection and monitoring, operation, and termination of the facility pursuant to such [ROW].” *Id.*

The fair market value of the rental is established using sound business management principles and comparable commercial practices. 43 C.F.R. § 2806.10(a). BLM typically bases rental amounts for linear ROWs on a per-acre fee schedule determined by comparable commercial practices or appraisal. However, “BLM may use an alternate means to compute [the] rent if the rent determined by comparable commercial practices or an appraisal would be 10 or more times the rent from the schedule.” 43 C.F.R. § 2806.20(c). Thus, in Alaska, BLM has determined to employ the alternative method of a minimal rental where small, non-complex and routine ROWs are involved to avoid the necessity and disproportionate expense of an appraisal. Appellants have not shown that their ROW is anything other than a small, non-complex and routine ROW, nor have they demonstrated error in BLM’s determination to employ an alternate means of setting the annual rental.

3. *Appellants’ Request to be Relieved of the Obligation to Pay Annual Rental*

Appellants advance several reasons and arguments why they should be exempt from paying rent or should pay less than the minimum annual rental, beginning with a perceived mutual intention to create a ROW in perpetuity or an easement in a 1968

⁶ Appellants explain that they left the State for a vacation on Dec. 15, 2005, and did not receive the decision until Jan. 3, 2006, as evidenced by the return mail receipt. SOR, Ex. A.

⁷ Annual rental under no circumstances constitutes a tax, nor is it analogous to a tax.

homestead patent that may be in their chain of title, based on the existence of the cat track. Appellants submitted a copy of Patent No. 50-69-006 issued to Duane W. Gross on July 11, 1968, but nothing in it or the record substantiates their claim. We conclude that this argument is unfounded. Appellants would not have applied for a ROW if any such intention had been realized in a patent issued by the United States, and BLM likely would not have approved the ROW if appellants owned a means of access. Appellants have not shown that any such interest was created at any point in their chain of title.

[2] Appellants complain that payment of annual rental in 5-year increments is overly burdensome. However, the June 21, 2005, notice to all holders of ROWs announcing regulatory changes, which appellants admit they received, explained:

The new regulations provide that nonrefundable rent shall be paid for a minimum period of 10 years, not to exceed the remaining term of the ROW. The regulations also allow all Holders an option to pay nonrefundable rent for the entire term of the ROW. *Individuals whose annual rent exceeds \$100.00 may continue to pay nonrefundable rent annually or may opt to pay rent for a number of years, including the remaining term.* [Emphasis supplied in part.]

The notice comports with 43 C.F.R. § 2806.23(a)(2)(i), *Payments by individuals*, which states: “If your annual rent is \$100 or less, you must pay at 10-year intervals not to exceed the term of the grant. *If your annual rent is greater than \$100, you may pay annually or at multi-year intervals that you may choose.*” (Emphasis supplied.) There is no evidence that appellants communicated a desire to avail themselves of the option afforded by the regulation and, accordingly, we cannot find error in failing to allow payment of advance rental on a different payment cycle when appellants never requested it.

Appellants also argue they should be relieved of the obligation to pay rent for the use of Federal land. The regulation at 43 C.F.R. § 2806.14 specifies the circumstances under which the holder of a ROW may be exempted from the obligation.⁸ The regulation at 43 C.F.R. § 2806.15 similarly specifies the circumstances under which BLM may waive or reduce the rental payment. However,

⁸ A ROW grantee may be exempted from the obligation to pay annual rental if the ROW holder is a non-profit organization that benefits the general public or programs of the Secretary; if the holder provides without charge or at reduced rates a valuable benefit to the public or programs of the Secretary; if the holder has a valid Federal authorization in connection with [the] grant and the United States is already receiving compensation; or if the holder’s grant involves a cost share road or a reciprocal ROW agreement. 43 C.F.R. § 2806.15(b).

nothing in the record shows that appellants have applied for the exemption or for a waiver or reduction of the rental payment, or confirms that they are eligible for such exemption, waiver, or reduction. It is incumbent upon the ROW holder to demonstrate that he or she is qualified to receive a waiver or reduction of the rental charges. *Ruth Tausla-White*, 127 IBLA 101, 103 (1993). Where appellants have not applied for an exemption, no error can be shown because BLM did not exempt them from the requirement to pay rent.

Appellants' final argument, that the obligation to pay rent devalues their property because the next owner will purchase an "unknown mandatory access fee that could be changed at any time, by any amount, without personal notice," can be disposed of summarily. A future purchaser of the property need not seek or accept a Federal ROW, and may instead utilize the access that exists in the absence of a ROW grant. Should a future purchaser in this case prefer the upgraded "private driveway" described in appellants' ROW grant rather than the existing cat track, however, he or she will be required to pay fair market rental for the privilege of using Federal land, as FLPMA requires, or demonstrate that he or she qualifies for an exemption.

Therefore, 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.

/s/
T. Britt Price
Administrative Judge

I concur:

/s/
Christina S. Kalavritinos
Administrative Judge