



KENNETH D. SHAYNE

180 IBLA 360

Decided January 31, 2011



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

KENNETH D. SHAYNE

IBLA 2011-12

Decided January 31, 2011

Appeal of a decision by the Acting State Director, California State Office, Bureau of Land Management, denying a request for a reduction or waiver of the rent for a linear right-of-way and demanding payment. CACA-26400.

Affirmed as modified; petition for stay denied as moot.

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

Section 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (2006), requires BLM to charge fair market rental value annually in advance for an ROW grant, although under certain circumstances a grant may issue for less than fair market value when the Secretary finds that doing so would be equitable and in the public interest. Thus, under 43 C.F.R. § 2806.15(c), BLM may waive or reduce an ROW rental payment when it determines that paying the full rental will cause the grantee undue hardship, and it is in the public interest to waive or reduce the rent. The person seeking a waiver or reduction of the rental amount has the burden of showing that it is warranted, and, as a general rule, it will be in the public interest to make an exception only when there is clear evidence of a hardship.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Generally--Rights-of-Way: Federal Land Policy and Management Act of 1976

An individual ROW grantee seeking a waiver or reduction of an ROW rental payment, pursuant to 43 C.F.R. § 2806.15(c), does not establish undue hardship based on a claim that his only

source of income is a monthly Social Security payment, which is inadequate to support his family and pay the rental, when the record shows that the monthly Social Security payment did not commence until more than 7 months after rental was due, and he fails to provide any evidence of his financial circumstances at the time rental was due.

APPEARANCES: Kenneth D. Shayne, Indio, California, *pro se*.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Kenneth D. Shayne has appealed from and petitioned for a stay of the effect of an October 1, 2010, decision of the Acting State Director, California State Office, Bureau of Land Management (BLM), denying Shayne's request for a reduction or waiver of the calendar year 2010 rent for CACA-26400, a linear road right-of-way (ROW) grant, and demanding payment of \$925.95.

Despite deficiencies in BLM's decision, the case record supports denial of Shayne's request. For that reason, we affirm BLM's decision, as modified, and deny the petition for stay as moot.

Background

Shayne owns a 40-acre parcel of land in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 23, T. 3 S., R. 6 E., San Bernardino Meridian (SBM), Riverside County, California. He applied to BLM on March 13, 1990, for an ROW across public land for a road to access his parcel. By letter dated October 8, 1992, Shayne amended his application, requesting that the ROW grant include access for utilities because he intended to build five homes on the parcel, one for himself, two for his sons, one for his daughter, and one for his mother-in-law.

BLM issued Shayne's ROW grant on December 21, 1992, effective January 1, 1993, for a term of 30 years, subject to renewal, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (2006), and its implementing regulations at 43 C.F.R. Part 2800. It granted rights to "construct, operate, maintain, and terminate a road and utility access transportation system."

The ROW consists of two segments. One is 20 feet wide, extending 900 feet to the east from Holman Road at or near the common corner of secs. 23, 24, 25. and 26, T. 3 S., R. 6 E., SBM, and the other is 40 feet wide and 6,000 feet long, running northwesterly from the southern boundary of section 24 to Shayne's parcel. It appears from the record that the two segments are connected by a road over land in

section 25 which, until recently, was privately owned.¹ The two segments authorized by the ROW grant contain a total of 5.9 acres of public land.

An ROW holder is required to pay annually in advance the fair market rental value for the ROW. 43 U.S.C. § 1764(g) (2006). Section 3 of Shayne's ROW grant states that fair market value rental is to be determined by BLM "[p]er 43 CFR 2803.1-2(c)(1)(i), 1991 Edition, Per Acre Rental Fee Zone Value Schedule." The cited regulation included a rental schedule table of eight zone values with corresponding per acre rental fees for various types of linear ROWs. The regulations further stated that a schedule table reflecting values assigned by State, County, and type of linear ROW, which would be updated annually using an index published by the U.S. Department of Commerce, was available in BLM offices. 43 C.F.R. § 2803.1-2(c)(1)(ii) (1991); *see* 52 Fed. Reg. 25811, 25819 (July 8, 1987). BLM adopted this method of evaluation in lieu of conducting an individual appraisal of each ROW.

Such rental was to be calculated by multiplying the rental per acre taken from the current schedule by the number of acres embraced in the grant, rounded to the nearest whole dollar, unless the rental was reduced or waived as provided in 43 C.F.R. § 2803.1-2(b)(2) (1991). 43 C.F.R. § 2803.1-2(c)(1)(iv) (1991).

Upon issuance, BLM calculated an annual rental rate of \$74.00 for the ROW, charging Shayne a total of \$370.00 for the first 5 years of his ROW term through December 31, 1997.

In a February 2, 2000, letter to Shayne, BLM stated that it had discovered that his ROW had not been entered into the Bureau's automated lease management system. BLM also stated that his rental rate had been determined to be \$83.00 a year and requested payment of \$415.00 for the period January 1, 1998, through December 31, 2002. The record does not establish that Shayne received the letter; nor does it show that he made any payment in that amount.

In fact, there is no indication that BLM attempted to collect a rental payment until 4 years later when it issued a June 21, 2004, Bill for Collection calling for payment of \$72.19 per year for one 5-year period (presumably January 1, 1998, through December 31, 2002) and \$77.41 per year for the next 5 years (January 1, 2003, through December 31, 2007), for a total of \$747.55. Shayne paid that amount

¹ Documents in the record indicate that, at the time BLM granted the ROW, that land in section 25 was owned by Cathton Investments, Inc. However, according to an e-mail in the record, dated July 23, 2008, BLM now owns that land. There is nothing in the record to show whether BLM acquired the land subject to an ROW connecting the two segments of CACA-26400.

on September 23, 2004. There is no indication in the record that BLM billed Shayne for rent for calendar years 2008 and 2009, and no evidence that he paid rent for either year.

BLM amended its Part 2800 regulations effective December 1, 2008, adopting a new per acre rental fee schedule for the determination of rent for linear ROWs. See 43 C.F.R. §§ 2806.20 and 2806.23(a); 73 Fed. Reg. 65040, 65042 (Oct. 31, 2008).² Under those regulations, BLM assigned counties (or other geographical areas) to a “County Zone Number and Per Acre Zone Value” for the years 2006-2010, based on 80 percent of their average per acre land and building value published in the 2002 Census of Agriculture prepared by the National Agricultural Statistics Service (NASS), U.S. Department of Agriculture.³ 43 C.F.R. § 2806.21. Rental was to be calculated by multiplying the rent per acre for the appropriate county zone, taken from the updated rental fee schedule, by the number of acres in the ROW area.⁴ 43 C.F.R. § 2806.23(a).

The casefile does not show any further correspondence regarding rental for Shayne’s ROW until the Palm Springs–South Coast Field Office, BLM, issued Shayne a decision on December 22, 2009, styled as “Bill for Collection,” requiring payment of \$925.95 in advance for rental for calendar year 2010. Shayne appealed that decision to the Board, which docketed the appeal as IBLA 2010-78.

² In its 2008 rulemaking, BLM noted that the amendment was in furtherance of section 367 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 726, which directed the Secretary “to: (1) Update 43 CFR 2806.20, which contains the per acre rent schedule for linear rights-of-way; and (2) Revise the per acre rental fee zone value schedule by state, county, and type of linear right-of-way uses to reflect current values of land in each zone.” 73 Fed. Reg. at 65040. It further noted that the zone values established in 1987 were never updated, even though “land values increased significantly in most areas from 1987 to the present.” *Id.*

³ The 80 percent values were set out in the 2008 rulemaking in the “Adjusted 2002 Per Acre Land and Building (L/B) Value and Rent Schedule Zone,” which provided the 80 percent value and respective rent schedule zone by state and county. 73 Fed. Reg. at 65075 through 65118; see 43 C.F.R. § 2806.20(a).

⁴ On Feb. 4, 2009, 2007 NASS Census data became available. See <http://www.agcensus.usda.gov> (last visited Jan. 31, 2011). Counties have been reassigned to their appropriate per acre rental zone for 2011-2015 based on that new Census data. See <http://www.blm.gov> (search “rental rates 2009-2015; follow “Grant Issuance;” follow “Excel Spreadsheet for listing State/County Zones and Rental Rates 2009-2015” (last visited Jan. 31, 2011).

On April 6, 2010, the Board issued an order affirming BLM's decision. We stated therein that (1) the ROW was in Riverside County, California, (2) in 2008 BLM had classified all of Riverside County as Zone 7, and (3) the published rental schedule table set the calendar year 2010 rental value for Zone 7 at \$156.94 per acre. *See* 43 C.F.R. §§ 2806.20 through 2806.23; 73 Fed. Reg. at 65051, 65078. Because Shayne's ROW contained 5.9 acres, its total rental value for calendar year 2010 was \$925.946 (rounded to \$925.95).

In our order, we noted that, in addition to appealing the December 22, 2009, decision, Shayne had also requested a waiver or reduction of his rental based on a claim of undue hardship, which had been adjudicated and denied in a February 23, 2010, decision appealed to the Board and docketed as IBLA 2010-197.

Thereafter, the Board issued an order on April 26, 2010, setting aside and remanding BLM's February 23, 2009, decision because it had been issued without offering Shayne an opportunity to provide information to support his claim for relief.⁵

By letter to Shayne dated July 30, 2010, the Field Manager, Palm Springs–South Coast Field Office, posed the following questions, based on the language in 43 C.F.R. § 2806.15(c):⁶

1. Is the information you have stated in the February 1, 2010, letter still your final financial statement regarding your income? Do you want to include any other sources of income or statements regarding your ability to pay the required rent or support your claim of undue hardship? [⁷]

⁵ The regulations provide at 43 C.F.R. § 2806.15(a) that “BLM may require you to submit information to support a finding that your grant qualifies for a waiver or reduction of rent.”

⁶ That regulation provides:

“The BLM State Director may waive or reduce your rent payment if the BLM State Director determines that paying the full rent will cause you undue hardship and it is in the public interest to waive or reduce your rent. In your request for a waiver or rental reduction you must include a suggested alternative rental payment plan or timeframe within which you anticipate resuming full rental payments. BLM may also require you to submit specific financial and technical data or other information that corrects or modifies the statement of financial capability required by [43 C.F.R.] § 2804.12(a)(5) of this part.”

⁷ In his request for waiver or reduction of the rental, Shayne asserted that the rent
(continued...)

2. Is the information you have stated in the March 18, 2010[,] letter to OHA [Office of Hearings and Appeals] still your final Alternative Rental Payment Plan in which you can resume full rental payments? [⁸] Do you want to include any other payment alternatives?

He also required Shayne “to submit specific financial and technical data or other information that corrects or modifies the statement of financial capability required by 43 C.F.R. Section 2804.12(a)(5)” or, alternatively, state that he did not wish to submit the information.

Shayne responded by letter dated August 20, 2010. Initially, he expressed confusion about the Field Manager’s reference to 43 C.F.R. § 2804.12 because it relates to applications for ROW grants. He stated that he had held his grant for 18 years. He also stated that he was confused about the need to provide financial and technical information concerning his capability “to construct, operate, maintain, and terminate the project,” because he was asking for a waiver of his rent and “[t]here is no construction, no buildings, no nothing, just a dirt path that I can drive my truck on to my property.”⁹ In response to the Field Manager’s first question, Shayne stated that his Social Security benefit was \$803 per month, as established by a copy of a statement from the Social Security Administration, which he provided, that “[a]ny other monies needed for me to survive are paid for or given to me by my son,” and that he owned his home. Regarding his suggested Alternative Rental Payment Plan, Shayne stated that the only change he would make would be to exclude his statement that a new owner of his property would have to pay the full rental, explaining that the matter would be between the new owner and BLM.

⁷ (...continued)

should be waived completely or drastically reduced because his “\$900.00 per month social security check does not go very far to take care of my wife and myself.” Letter dated Feb. 1, 2010.

⁸ In the Mar. 18, 2010, letter, Shayne suggested that he could resume full rental payments if his property became revenue generating, or if he built his primary residence on it and lived there. He also stated that “new owners will have to pay the full amount,” if he were to sell the parcel. In his Feb. 1, 2010, letter, Shayne had proposed paying the \$925.95, “if it will take me to the end of my current contract,” *i.e.*, Dec. 31, 2022.

⁹ We understand Shayne’s confusion. His ability to construct, operate, maintain, and terminate the project is not at issue. If it were, such information would be relevant. *See High Country Communications*, 105 IBLA 14, 19 (1988) (“The primary thrust of appellant’s arguments on appeal are directed to the hardship the rental will impose on its ability to operate the translator site”). In this case, however, the only issue is Shayne’s ability to pay the rental.

After receiving the letter, a realty specialist in the BLM Palm Springs-South Coast Field Office called Shayne on August 24, 2010, to follow-up on his response. The realty specialist documented this contact in handwritten notes and a memorandum, both of which are included in the casefile.

In his October 1, 2010, decision, which is the subject of the present appeal, the Acting State Director quotes portions of the Field Manager's July 30, 2010, letter, describes Shayne's written response, and summarizes BLM's record of the telephone conversation. He then finds that Shayne failed to show undue hardship because, while he claimed that Social Security was his only income, "[n]o reason has been submitted to state that he cannot work for compensation. He has chosen not to supplement his social security income; this decision and its consequences are not grounds for undue hardship." Decision at 4.

He also stated that it would not be in the public interest to waive or reduce the calendar year 2010 rental because (1) the two alternatives offered by Shayne for resumption of full rental payments could result in expiration of the ROW without any rental being paid, and (2) because the ROW provides a personal benefit to Shayne because it provides access to a valuable tract of land that could be developed for residential use or some type of revenue generating use.

Discussion

[1] Section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (2006), requires BLM to charge fair market rental value annually in advance for an ROW grant, but it also allows a grant to be issued in certain circumstances "for such lesser charge, including free use" when the Secretary finds that doing so would be "equitable and in the public interest."

BLM originally added an "undue hardship" provision to the ROW regulations in 1987 when BLM adopted a fee schedule for linear ROWs. 43 C.F.R. § 2803.1-2(b)(iv) (1987); 52 Fed. Reg. 25802, 25819 (July 8, 1987); *see Mallon Oil Co.*, 104 IBLA 145, 151-52 (1988). That regulation, which was applicable to all types of ROWs, provided that the authorized officer, "[w]ith the concurrence of the State Director," and "after consultation with the applicant/holder," could reduce or waive the rental payment, based on a findings that the requirement to pay the full rental would cause "undue hardship" and that it was in the public interest to do so. Even though the regulation required consultation by the authorized officer, it further provided that "[i]n order to complete such consultation, the State Director may require" the submission of "data, information, and other written material" to support the claim of hardship.

The preamble to the regulations stated that the provision was added “to cover unique hardship cases.” 52 Fed. Reg. at 25816. Effective June 21, 2005, BLM promulgated the undue hardship regulation, 43 C.F.R. § 2806.15(c), in its present form.¹⁰ 70 Fed. Reg. 20970, 21008 (Apr. 22, 2005).

Although we have mentioned the 1987 hardship provision in a number of Board decisions, we addressed its application in relatively few cases. From the outset, we stated that the person seeking a waiver or reduction of the rental amount had the burden of showing that it was warranted, and “[g]iven the congressional mandate that right-of-way holders pay fair market rental value, as a general rule it will be in the public interest to make an exception only when there is clear evidence of a hardship.” *High Country Communications*, 105 IBLA 14, 20 (1988).

We find no reason to deviate from those legal standards in cases involving 43 C.F.R. § 2806.15(c). Thus, Shayne has the burden of showing that his claim for relief is warranted, based on the two regulatory criteria: undue hardship and the public interest.

In only a few cases has the Board discussed what factors are relevant to a determination of undue hardship, and those cases involve companys challenging the individual appraisal of a communications site ROW. In *Gifford Engineering, Inc.*, 157 IBLA 277, 283 (2002), we set aside and remanded decisions denying hardship waivers or reductions, stating “total loss of a business facility to accidental fire is not in the nature of an ordinary unplanned loss or expense, but rather, in our view, approximates exactly the ‘unique’ hardship contemplated by the regulation.” We further stated that on remand “BLM may also request [Gifford Engineering, Inc.] to provide any further information relating to profit and loss that it considers pertinent to an accurate determination of whether a reduction or waiver in rental is justified.” *Id.*; see *Kitchens Productions, Inc.*, 152 IBLA 336, 343, 350 (2000) (prima facie showing of hardship when rents paid by tenants and customers would produce annual gross income less than the appraised annual rent); *Lone Pine Television, Inc.*, 113 IBLA 264, 270 (1990) (tax returns reported losses for 5 of 6 years and evidence showed that the local economy was depressed).

We find no Board decision discussing the relevant factors for determination of individual undue hardship involving the application of 43 C.F.R. § 2806.15(c), or its predecessor regulation.

In our April 26, 2010, order, we remanded this matter to BLM in order to allow Shayne an opportunity to provide information to support his claim for relief. BLM provided that opportunity in July 2010. However, it did not clearly and directly

¹⁰ See n.6, *supra*.

identify any particular information that Shayne needed to provide in order to allow BLM to evaluate his claim of undue hardship, such as tax returns to show family income or evidence of expenses. Nevertheless, it did ask if he wanted to include any other source of income other than his Social Security payments or provide “statements regarding your ability to pay the required rent or support your claim of undue hardship.” Such language clearly put Shayne on notice that he should provide all documentation that might support his claim for relief from the requirement to pay \$925.95 for the 2010 calendar year rental.

In response, Shayne claimed, as he had in this February 1, 2010, letter, that his monthly Social Security benefits were the only source of income for support of his family, noting that his son contributed “[a]ny other monies needed for me to survive.”¹¹ Response at 2.

On appeal, Shayne faults BLM because it “never asked any questions about my health or my ability to work,” and he now claims, for the first time, that his Social Security check is small because he has been disabled for “more than 15 or 20 years” and has problems with his neck and lower back.¹² SOR at 4. Shayne appears to assume that BLM must ask a specific question before he has any obligation to provide information. Clearly, since he is the only one familiar with all the circumstances that might have made payment of the \$925.95 an undue hardship for him, he should have provided BLM with documentation of all matters he considered relevant.

[2] However, even assuming Shayne is disabled, that fact does not equate to a finding that a rental payment of \$925.95 for calendar year 2010 is an undue hardship. Shayne also states on appeal that for a family of three with a gross income of \$9636.00 (\$803.00 x 12) he pays property taxes of \$1,653.78 a year, pays for electricity, water, insurance, food, clothing, and medicine, and still has a child in school. SOR at 6. However, nothing offered by Shayne provides any evidence that the payment of \$925.95 for calendar year 2010 would have presented an undue

¹¹ As noted *supra*, following receipt of that response, a BLM realty specialist telephoned Shayne to discuss it. The problem with such an approach is manifest in the record. Shayne disputes statements made by BLM in the record of that conversation. See Statement of Reasons (SOR) at 1-2. As the record stands, there would be no way for the Board to resolve those disputes, if it were necessary to do so. However, we do not need to do so to decide the appeal. We disregard BLM’s record of the follow-up telephone call to Shayne, and any reliance thereon in its decision. In the future, BLM should reduce its inquiries to writing in order to avoid the risk of misunderstandings.

¹² In addition, Shayne makes reference in his SOR on page 4 to “[a] man in a wheel chair,” but it is unclear whether he means he is confined to a wheelchair.

hardship.¹³ He has failed to satisfy his burden to show that his claim for relief is warranted.

BLM's December 22, 2009, decision styled as a "Bill for Collection," stated that the "DATE DUE" for payment of the 2010 calendar year fair market rental was "01/06/2010," subject to the late payment provisions of 43 C.F.R. § 2806.13. While Shayne asserts that Social Security is his only income, the evidence he provided to BLM in August 2010 in support of that assertion shows that his Social Security retirement payments started with a payment of \$692.50 for July 2010 to be paid "around August 11, 2010," with his full benefit to be \$803.00 month thereafter. Social Security Administration Retirement, Survivors and Disability Insurance Notice of Award, dated May 8, 2010. Shayne has not provided any evidence of the total family income prior to August 2010. Thus, even assuming his present income is as asserted, such evidence is not probative regarding his ability to have paid \$925.95 for his ROW grant on or before January 6, 2010, the due date for such payment.¹⁴ He has failed to show that the payment of \$925.95 on or before January 6, 2010, would have been an undue hardship.¹⁵

Shayne also renews his argument that the 43 C.F.R. Part 2800 regulations do not apply because his ROW is within a designated wilderness area. *See* 43 C.F.R. § 2801.6(b)(3). He offers two documents to support his assertion.¹⁶ The first is an undated form letter to ROW holders in California, informing them of enactment of the California Desert Protection Act of 1994 (CDPA), Pub. L. No. 103-433, 108 Stat. 4471, and that the recipient "may hold a right(s)-of-way grant across federally administered lands located within either a BLM wilderness area or a NPS [National Park Service] addition," referencing an enclosed map. SOR, Ex. D. Shayne has not submitted a copy of that map. The second is an August 27, 2010, letter from Friends of the Desert Mountains offering to purchase Shayne's parcel of land "in the Edom Hill Conservation Area," which is, as the letter states, "a conservation area under the Coachella Valley Multiple Species Habitat Conservation Plan." That

¹³ In making this finding, we do not rely on BLM's analysis in its decision. Thus, while we affirm that decision, we do so on the basis of a modified rationale, and, accordingly, affirm the decision, as modified.

¹⁴ Ability to pay would be affected by total family income (as verified by tax returns) less family expenses.

¹⁵ Absent evidence of undue hardship, a public interest determination is unnecessary.

¹⁶ He adds: "I am also looking for the letter I got from the President telling me such." SOR at 2.

conservation area is not a Federally-designated wilderness area. See <http://www.cvmshcp.org/> (last visited Jan. 31, 2011).

Joshua Tree National Monument was established by Presidential Proclamation on August 10, 1936. Proclamation No. 2193, 50 Stat. 1760 (1937), modified by Pub. L. No. 837, 64 Stat. 1033 (1950). The CDPA redesignated the Monument as Joshua Tree National Park, expanded the boundaries, and transferred its administration to the NPS. 16 U.S.C. §§ 410aaa-21 through 410aaa-27 (2006). Almost the entire park is designated as wilderness. See <http://www.nps.gov/jotr/naturescience/wilderness.htm> (last visited Jan. 31, 2011).

The Board's April 26, 2010, order addressing IBLA 2010-97 rejected Shayne's claim that the ROW was in a designated wilderness area because maps in the casefile showed the boundary of Joshua Tree National Park to be north of his private parcel and the ROW. April 26, 2010, Order at 3 n.3. The same maps are in the current file. Therefore, there is no basis in the record to conclude that the ROW is within a designated wilderness area.

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 is affirmed as modified. The petition for a stay of the decision is denied as moot.

/s/
Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

/s/
H. Barry Holt
Chief Administrative Judge