



MARK PATRICK HEATH

181 IBLA 114

Decided May 16, 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

MARK PATRICK HEATH

IBLA 2010-34

Decided May 16, 2011

Appeal from a letter issued by the Field Manager, Royal Gorge (Colorado) Field Office, Bureau of Land Management, offering a right-of-way grant for an access road and parking area. COC-60553.

Affirmed in part, modified in part, and set aside and remanded in part.

1. Rights-of-Way: Revised Statutes Sec. 2477

Although BLM lacks primary jurisdiction to make determinations on the validity of the rights-of-way granted under the Act of July 26, 1866, 43 U.S.C. § 932 (1970), otherwise known as R.S. 2477, it may properly decide the validity of R.S. 2477 rights-of-way for its own administrative purposes.

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

Under section 504(i) of FLPMA, 43 U.S.C. § 1764(i) (2006), and 43 C.F.R. § 2805.12(g), BLM may require a right-of-way holder to post a bond sufficient to secure the expected costs of rehabilitating the affected public lands if construction of the road over the right-of-way is not completed and the right-of-way is abandoned, even if such a bond has not previously been required of other right-of-way holders in the area.

3. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Conditions and Limitations--Rights-of-Way: Federal Land Policy and Management Act of 1976

Where BLM requires a bond to secure rehabilitation costs in the event construction of a road over a right-of-way is abandoned, and an appellant has shown error in the analysis underlying

various elements of the amount of the bond or has shown that elements of the bond amount are not rationally justified, the bond amount will be set aside and the issue remanded to BLM for recalculation of the bond amount.

APPEARANCES: Jack M. Merritts, Esq., Denver, Colorado, for appellant; John S. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Mark Patrick Heath has appealed to this Board an October 15, 2009, letter from the Royal Gorge Field Office (RGFO), Colorado, Bureau of Land Management (BLM) titled "DECISION Right-of-Way Grant Offered, Rental and Monitoring Fees Required" (Grant Offer or Decision). Special stipulation 7 of the Grant Offer required Heath to post a reclamation bond. For a variety of reasons thoroughly discussed below, Heath believes that both the rental and bond amounts relating to the Grant Offer are inappropriate and/or excessive, and requests this Board to vacate portions of those rental and bond amounts.

Synopsis of Our Decision

This matter is approximately 14 years old, has already been in front of this Board twice, and is before us again because the parties cannot agree on the parameters of the right-of-way (ROW). In its latest Grant Offer, BLM offered Heath an ROW comprising 3.37 acres with attendant rental charge for use of that ROW for the next 30 years. Heath believes that 2.4 of those acres constitute a Revised Statute (R.S.) 2477 road that is open to free, public use and, as such, is not subject to rental charges imposed by BLM. It is unclear from the Decision and the record whether BLM considered evidence, including record evidence, of the possible existence of an R.S. 2477 road and made an R.S. 2477 administrative determination when it decided to charge rental for the ROW over the 2.4 acres. Thus, we set aside and remand the Grant Offer to the extent that it overlaps the asserted R.S. 2477 ROW for clarification of whether BLM considered the possible existence of an R.S. 2477 ROW over Segment 1, whether it made an administrative determination as to the existence of such, and, if it did, what that determination is. We also correct and modify the ROW's acreage, as explained below, to aid BLM in appropriately amending the Grant Offer upon remand.

The parties also disagree about the amount of reclamation bond that BLM claims Heath must post before constructing the final portion of the ROW. We find

several errors in the bond amount and reduce it, as discussed in detail below, to conform with the record evidence contained in the extensive administrative case file.

I. Factual and Procedural Background

A. Previous ROW Grant Offers, Administrative Appeals, and a State Court R.S. 2477 Determination

The lands at issue are located in Boulder County, northwest of Boulder, Colorado, in an area of highly fragmented parcels in private, public, or State ownership. BLM identified approximately 3,100 acres of public lands among the fragmented area for eventual disposal because the agency could not effectively and efficiently manage them, categorizing these lands into two disposal projects—one of which, the Gold Hill unit, includes the public lands at issue. These lands are nestled on and around Big Horn Mountain, a County-designated Natural Landmark since 1978.

The Boulder County Commission expressed interest in obtaining the Gold Hill unit lands for its Parks and Open Space program and filed an application with BLM to purchase them.¹ The program is geared toward preserving and protecting important natural resources and enhancing recreational opportunities for the public, with an emphasis on halting residential sprawl. To consolidate and amass its Open Space holdings in the Big Horn Mountain area, the County has purchased hundreds of acres of private land within the Gold Hill unit. The County made an offer to purchase Heath's property for \$100,000 in furtherance of its Open Space program. Heath refused. To date, BLM has not adjudicated the County's R&PPA application.

Heath initially filed his ROW grant application with BLM in 1997. Heath requested vehicular access over public lands from Sunshine Canyon Drive to his patented lode mining claim, a distance extending roughly half a mile. The requested ROW was divided into three segments. Segment 1 connects to and runs easterly from Sunshine Canyon Drive² at a granite marker indicating where an old Masonic lodge

¹ The County sought to purchase the public land pursuant to the Recreation and Public Purposes Act (R&PPA), 43 U.S.C. §§ 869 to 869-4 (2006). The R&PPA grants the Department discretionary authority to classify and sell or lease public land to a state, county, or other political subdivision for public or recreational purposes. *See* 43 U.S.C. § 869 (2006) and 43 C.F.R. Part 2740.

² The maps in the Administrative Record (AR) reflect that Segment 1 spurs off of "Sunshine Canyon Road." According to Boulder County's online road map, Sunshine Canyon Road is actually Sunshine Canyon Drive, County Road 52. *See*

once stood. This existing old wagon road, known variously as the Old Road, the Gold Hill Road, the Over the Hill Road, and/or County Road 85 continues along the north slope of Bighorn Mountain. It is navigable by two-wheel drive vehicles. Before 1887, the Old Road originally comprised a thoroughfare from Boulder to the town of Gold Hill, running east and west over the northern slope of Bighorn Mountain. Around the turn of the century, Sunshine Canyon Drive was constructed to provide better access from Boulder to Gold Hill. The Old Road remains the only access route to multiple lode mining claims on Bighorn Mountain. According to Heath, only maintenance of Segment 1 is required and he therefore proposed no construction on this portion of the ROW.

Segment 2 is also a primitive road, referred to in the record as the Spur Road or the Bighorn Road. It runs southwesterly off of the eastern end of Segment 1. Unlike Segment 1, this section requires moderate upgrades. At a minimum, it must be “bladed” and widened slightly to 16 feet, with proper cross drainage and installation of any appropriate culverts. Segment 3, not yet constructed, begins south of a hill crest at the end of Segment 2 and extends to Heath’s patented lode mining claim.

In a cover letter to his ROW grant application, Heath explained that “if I do not apply for access now, I am increasingly concerned that the old public road serving my property will be illegally vacated [by the County], further complicating my dream of building a home.” AR, Letter dated Apr. 1, 1997. The lands Heath sought permission from BLM to use were located in sec. 7, T. 1 N., R. 71 W. and sec. 12, T. 1 N., R. 72 W., Sixth Prime Meridian, Boulder County. BLM responded to Heath’s application by letter dated July 28, 1997. Because Heath’s proposed ROW route crossed patented land as well as public land, BLM informed Heath that he must have legal access across intervening private lands before the agency could grant him an ROW. AR 1.

Heath filed an action in State court to quiet title to the Old Road as against land owners along the Road and in favor of the County. The County intervened. The Federal government was not a party; the litigation involved only portions of the Old Road that crossed private lands. All private landowners but one negotiated an agreement granting one another mutual access easements to the Old Road as it crossed their respective properties. The hold-out land owner and the County sought to have the Road declared privately owned by the owner of the land it traversed.

² (...continued)

http://www.bouldercounty.org/transportation/pdf_files/MAPS/RoadMap2008.pdf.

Applying State law, the Colorado appellate court determined that the Old Road traversing over private property was a public road by virtue of the public's acceptance of a Federal statutory grant under Revised Statute (R.S.) 2477.³ The court specifically found that the Old Road is noted on the official 1937, 1957, and 1978 United States Geological Survey maps as an unimproved dirt road and that, even though it no longer maintains the road, the County had not abandoned it; occasional use of the Road for access purposes, in the absence of an alternative road, precludes a finding of abandonment in Colorado. *See Heath v. Parker*, 30 P.3d 746 (Colo. Ct. App. 2000).

Because Heath could show BLM that he had the right to use the Old Road to cross intervening private lands, BLM offered a 30-year term ROW grant to Heath for 2.41 acres in 2001. Segment 1 included the Old Road as it traversed public lands, which measured 2,222' x 40'. Segment 2 spanned 391' x 30' and Segment 3 extended 626 linear feet. The agency authorized construction of only a 3-foot wide pedestrian trail on Segment 3. BLM perceived that road construction of Segment 3 could cause excessive natural resource damage. BLM also felt that any ROW grant should include "a parking area, 50 feet by 50 feet, to accommodate two vehicles at the terminus of segment 2 . . . to allow users to walk the rest of the route." AR 1, 2001 Environmental Assessment (EA), CO-200-2006-0088, dated August 10, 2006, at unpaginated (unp.) 4; AR 1, 2001 ROW grant offer; AR 5, 2007 ROW grant offer;

³ R.S. 2477 was formally known as the Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253 and was codified as section 2477 of the 1875 *Revised Statutes*, subsequently becoming 43 U.S.C. § 932 (1970). The statute was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579 § 706(a), 90 Stat. 2743, 2793, effective Oct. 21, 1976, but valid existing rights were preserved. *See* 43 U.S.C. § 1701 note (a) (2006). Pursuant to R.S. 2477, Congress granted to state and local governments "[t]he right of way for the construction of highways over the public lands, not reserved for public uses." No application or notice needed to be filed or recorded to perfect the grant. *See* 43 C.F.R. § 2822.1-1 (1979); 43 C.F.R. § 244.55 (1939); *see also Kane County v. Salazar*, 562 F.3d 1077 (10th Cir. 2009); *San Juan County v. United States*, 503 F.3d 1163, 1168 (10th Cir. 2007) (en banc); *Southern Utah Wilderness Alliance v. Bureau of Land Management (SUWA v. BLM)*, 425 F.3d 735, 741 (10th Cir. 2005); *Sierra Club v. Hodel*, 848 F.2d 1068, 1078 (10th Cir. 1988) (*overruled in irrelevant part by Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970, 973 (10th Cir. 1992)); *see generally County of San Bernardino*, 181 IBLA 1 (2011) (a thorough historical and analytical framework for consideration of judicial rulings and Departmental policy pertaining to R.S. 2477); *see* 43 C.F.R. § 2801.6 ("What don't these [FLPMA ROW] regulations apply to? The regulations in this part do not apply to: . . . (5) Public highways constructed under the authority of [R.S. 2477].").

AR 8, 2009 ROW Grant Offer. BLM assessed rent and reclamation costs associated with all three segments and the parking area. Without supporting documentation, BLM charged Heath a \$20,000 reclamation bond to be used to rehabilitate the area in the event Heath abandoned the ROW, and calculated rent at \$69.87 per year for 5 years.⁴

Primarily taking issue with BLM's limitation of Segment 3 to a pedestrian trail, which was contrary to Heath's application for a vehicle-accessible road (it would be a challenge to construct a home using only a footpath to access patented land), Heath appealed the 2001 ROW grant offer to this Board. We found that BLM had included no meaningful evidence supporting the conclusion that a road cannot be built on Segment 3. We therefore set aside that offer and referred the case to an Administrative Law Judge (ALJ) for an evidentiary hearing. *See Mark Patrick Heath*, 163 IBLA 381, 388 (2004). During the hearing's pendency, Heath submitted to BLM road construction drawings. BLM accepted them and agreed to allow vehicle access over Segment 3. The ALJ remanded the case to BLM.

On May 10, 2007, BLM issued to Heath a revised ROW grant offer to allow vehicular access over Segment 3. The bond and rental amounts also changed: BLM required Heath to post a reclamation bond for Segments 2 and 3 in the amount of \$230,000 (\$61,400 for Segment 2 and \$168,600 for Segment 3),⁵ to be paid before Heath began use of the ROW. This time, BLM included as an attachment to the 2007 ROW grant offer an itemized list of the probable costs purportedly associated with rehabilitating the public lands traversed in Segments 2 and 3. BLM also included a "Rental Schedule Worksheet" for each segment, which documented the agency's 30-year rental costs calculations. As shown on the worksheets, the agency multiplied the per-acre annual rental rate for Zone 5 and the total rent due for the

⁴ For background purposes, the record does not show how BLM derived the \$20,000 reclamation bond amount. As for the rent, we presume that BLM multiplied the acreage for all three segments (2.41 acres) by the \$28.99 per-acre annual rental rate for a Zone 5 *energy related* ROW for the 2001 calendar year. *See* Information Bulletin 2000-170 (Sept. 13, 2000), and attachments. The appropriate per-acre rental rate for 2001 was actually \$25.35. *Id.*

⁵ "The County recognized the public road status of segment 1, as does the BLM, and no bond has been requested for segment 1." AR 7, Affidavit of RGFO's Staff Supervisor, Jan S. Lownes, dated Dec. 3, 2007.

30-year term came to \$3,265.36.⁶ All else in the grant offer remained the same as the original grant offer.

Heath appealed again to this Board,⁷ claiming, among other things, that the amount of the required reclamation bond attached to the grant offer was again calculated in error. He argued that the inclusion of a 25 percent fee for a contractor's "Profit and Overhead Premiums" exceeded any compensation expected in private industry; that BLM failed to appropriately justify the 25 percent "Remote Site Premium" it attached to the total construction costs; that the 15 percent added to the total construction price for construction administration was excessive and not supported by the record; that the 15 percent of the total costs added for "unforeseen contingencies" was unnecessary because the itemized cost breakdown was comprehensive; and that the 19 percent "service charge" was unexplained. Heath also averred that BLM's 50' x 50' parking loop was unreasonable, asserting that a 20 foot' by 20' turnout would allow vehicles to safely maneuver around each other without disturbing more of the natural surroundings than necessary.

We decided the merits of the appeal in *Mark Patrick Heath*, 175 IBLA 167 (2008). As to his reclamation bond calculation contentions, we found that BLM's documentation in support of its calculations was lacking, and that the agency did not rationally justify "contractor overhead," "contractor profit," "remote site premium," "construction contract administration," "unforeseen contingencies," or "service charge" costs within its itemized performance bond invoice. We set aside the bond amount and remanded the case to BLM so that it could recalculate the ROW's estimated reclamation costs.

We also remanded to BLM the parking loop issue:

In view of . . . the serious questions Heath raises concerning the size of that loop, we set aside the requirements of paragraph 2.b and Special Stipulation 2 that Heath submit a separate plan of development to

⁶ BLM maintains land value zones to which per-acre values are assigned for purposes of calculating linear ROW rent and those values are adjusted yearly. Boulder County was situated in Zone 5 until 2008. *Compare* 52 Fed. Reg. 25811, 25821 (July 8, 1987) *with* 73 Fed. Reg. 65040, 65078 (Oct. 31, 2008) (Boulder County now resides in Zone 8). The higher the zone number is, the greater the rental cost becomes.

⁷ BLM filed a motion to dismiss Heath's appeal on the grounds that the revised ROW grant offer was not a final decision and therefore was not appealable. This Board denied the motion in *Mark Patrick Heath*, 172 IBLA 162 (2007), for the reasons set forth therein.

construct a 50' x 50' parking loop, and remand this issue to BLM for reconsideration of the appropriate size of the parking area.

175 IBLA at 194.

B. The Current ROW Grant Offer, its Attachments, and the Instant Appeal

After this Board denied Heath's Petition for Reconsideration by Order dated March 10, 2009,⁸ BLM wrote to Heath, informing him that it would reevaluate and recalculate the bond amount. See AR 7, BLM letter to Heath, dated Mar. 12, 2009. BLM also stated its understanding that Heath thought "a 20' by 20' pullout area would be sufficient for two vehicles to turn around safely, thereby meeting the goals of the BLM." BLM "agree[d] with this." *Id.* The letter stated that "inasmuch as your proposal would disturb less area, and we would authorize it within the original limits of the offered loop area, this is consistent with the original offer and can be made without further environmental analysis. . . . Please advise us whether this will meet your needs, or provide an alternative for us to consider." *Id.* Heath did not respond.

BLM's Acting State Director selected John Treacy, a construction cost estimator at BLM's National Operations Center, Division of Resource Services, Architectural and Engineering Services, to provide the RGFO with a revised probable rehabilitation costs estimate for the ROW, in the event that Heath abandoned it. See AR 8, e-mail dated Oct. 1, 2008. In order to calculate the costs associated with fully obliterating Segment 3, Treacy developed reclamation (not construction) earth cut/fill quantities based on Heath's engineer road construction drawings.⁹ See AR 8, Quantity Survey, dated June 12, 2009. Cutting during construction would occur in places where the elevation is higher than the surrounding terrain (a hill) and the material created by the cut would be used to fill lower elevations along a route (a valley). Thus, in theory, any earth removed during construction would be replaced and any soil added during construction would be removed during reclamation.

The engineer drawings break down Segment 3 by 50-foot "stations." The drawings show that stations 0+00 through approximately 7+21 traverse over public

⁸ Heath argued that this Board should have explicitly provided deadlines or other directions to BLM to follow when calculating a new bond because, without doing so, BLM would intentionally make errors in the bond estimate so that Heath would again have to appeal. Because we have no general supervisory or management authority over BLM, see *General Chemical (Soda Ash) Partners*, 176 IBLA 1, 11-12 n.7 (2008), we denied the Petition.

⁹ The engineer drawings include both public and private lands. The private lands extend from about station 7+22 to 11+00. See discussion *infra*.

lands. Those drawings indicate the topography across stations 4+00 through 5+00 and 6+50 through 7+50 is immensely steep and a large amount of material would have to be placed during construction in these areas in order to reduce the road grade. Based on his earthwork volume calculations, Treacy initially found that it would cost around \$18,178 to “[r]emove [from stations 0+00 through 7+21] material placed as fill [during construction] and place directly in areas previously excavated” AR 8, Initial Cost Estimate, dated June 15, 2009.¹⁰ This cost covered only on-the-ground earthwork; no hauling of excess dirt offsite was necessary because Treacy found that “any excess fill material removed can be wasted on site.” E-mail from Treacy to RGFO, dated June 15, 2009. Notably, he based the fill/cut balance on reclaiming not just the public lands in Segment 3, but also the private lands extending to Heath’s property (*i.e.*, stations 7+00 through 11+21).

In August 2009, Treacy revised the cost estimate for obliterating Segment 3 and returning it to its original grading.¹¹ Instead of using the CDOT 2008 Cost Data Report, he relied on a reference book titled *R.S. Means Building Construction Cost Data (2009)* to calculate earthwork (scraping, ripping, excavating, filling, etc.) costs. He no longer calculated the reclamation price per cubic yard, based on job type, but itemized each cost associated with the road’s demolition. In so doing, Treacy only included earth volumes on public lands. While his cut/fill quantities did not substantially change, the cut/fill ratio was no longer balanced—the cost estimate no longer took into consideration that any excess fill excavated from stations 0+00 through 7+21 could be spread over the private portion of land extending east or west of Segment 3. Consequently, 994.4 CY of earth would be left over from Segment 3’s

¹⁰ Treacy used figures from the Colorado Department of Transportation’s (CDOT) 2008 Cost Data Report, issued Feb. 19, 2009, which is a compilation of weighted average prices for highway construction projects that were bid on during the 2008 calendar year, in his initial cost estimate calculations. See <http://www.coloradodot.info/business/eema/documents/2008/2008%20CONST%20OCDB%20Complete.pdf>. Those prices, while not itemized, included contractor overhead and profits and accounted for labor, material, equipment, and other incidentals necessary or convenient to successfully complete the bid-upon project. See *The State’s Rules for Pre-qualification and Bidding*, 2 C.C.R. § 601; see also <http://www.coloradodot.info/business/bidding/Bid%20Rules/view>. The average cost contractors charged CDOT to excavate and reposition “embankment material” was \$8.27 per cubic yard (CY). See AR 8, Initial Cost Estimate, dated June 15, 2009.

¹¹ Around this time, BLM determined that no bond was required for Segment 2.

obliteration.¹² Treacy decided that about 69 CY of the extra fill could be distributed over portions of Segment 2, but that approximately 925 CY of material (about 116 dump trucks) would have to be hauled off site.

Again, he used the *R.S. Means Building Construction Cost Data* manual to calculate costs associated with offsite disposal of the excess fill. He determined that, over a period of 4 days, an operator could use a hydraulic excavator to load the 925 CY of excess fill into five 8 CY dump trucks. As a traffic control measure, a pickup truck would be required to transport 4 flaggers to “two highway access points with two (2) flaggers at each location.” Cost Estimate at 3. Four construction signs would be needed. *Id.* Fill removal would also require the deployment of a bulldozer and its operator to the dump site to “knock down the material.” *Id.* Finally, a foreman to oversee the job is purportedly necessary. The foreman would not double as a machine operator, flagger, or truck driver.¹³ Four days of hiring laborers and renting equipment and signs would cost \$30,499.40, or \$32.97 for each cubic yard of excess material hauled away.¹⁴

Treacy also revised the cost estimate to include itemized prices based on equipment type and production rate, equipment rental costs, and labor costs for on-the-ground earthwork (not to be confused with costs associated with hauling excess fill off site). He assumed that a 200 HP track bulldozer and a hydraulic excavator could excavate, reposition, and grade the area to conform to its surroundings at a pace of 250 CY per 8-hour day. Because 1,475 CY of original fill had to be placed in the original cut, Treacy divided the total earthwork quantity by 250, which resulted in a 6-day (48 hour) project time to obliterate the road and re-grade the area. Treacy used the *R.S. Means Building Construction Cost Data* manual to figure equipment rental and labor prices, for a total of \$20,935.20.

Treacy stated in his revised cost estimate that removing and disposing of two drainage culverts would be \$627.92, revegetation costs would run about \$2,655.20,

¹² Heath’s engineer’s calculations show that about 943.219 CY of excess fill material would be left on stations 0+00 through 7+25. We arrived at this number by subtracting the total cut amount from the total fill amount for each station, as recorded on the engineer’s drawings.

¹³ “A foreman is needed because two separate work sites would be involved in the restoration work, i.e., the ROW site on Big Horn Mountain and an excess waste disposal site yet to be determined. The foreman would provide supervision, coordination, and administration of work at both sites.” Answer at 29.

¹⁴ According to CDOT’s 2008 Cost Data Report, “Sediment Removal and Disposal” runs about \$27.85 per cubic yard.

two portable bathroom facilities would cost \$342.00, and installing silt fencing for erosion purposes would demand \$126.00. He then added those costs to the offsite excess fill disposal costs (\$30,499.40), and earthwork costs (\$20,935.20) for a base reclamation total cost of \$58,953.24. Treacy added \$5,143.46 (10 percent of the offsite excess fill disposal costs and earthwork costs) to the base price to cover “Contingency Cost[s].” The new total, \$64,096.70, quickly expanded to \$92,363.34 when Treacy attached 12, 15, and 17.1 percent fees for “Construction Administration,” “Planning, Survey, and Design,” and “Indirect Cost Rate,” respectively.

On October 15, 2009, BLM issued to Heath the ROW Grant Offer now at issue. Segment 1 is 2,222 feet long and 40 feet wide (2.04 acres), Segment 2 is 391 feet long and 30 feet wide (0.269 acres), and Segment 3 is 626 feet long and 70 feet wide (1.006 acres), for a total of 3.37 acres over public lands.¹⁵ BLM did not change the parking area’s dimensions; the agency offered Heath a 50' x 50' (.057 acres) parking area to be located at Segment 2’s end. The ROW comprises 3.37 acres, more or less. The Grant Offer and its attachments explained that BLM would grant to Heath a 30-year term vehicular access to all three segments and that rent would be \$30,915.10 for the entire term. In support of its rental fees, BLM attached one “Rental Schedule Worksheet” for all three segments. The agency rounded up the total acreage granted to 3.4 acres, and multiplied that number by the per-acre annual rental rate for Zone 8. Of course, BLM also demanded that Heath post a reclamation bond in the amount of \$92,000. Heath appealed, again contesting the ROW Grant Offer’s terms and conditions.¹⁶

¹⁵ In 2001, BLM initially offered Heath 626 linear feet of access over Segment 3. See discussion *supra*; AR 1, 2001 ROW grant offer. When Heath subsequently submitted to BLM road construction plans for that segment, the survey, which BLM appended to both its 2007 and current Grant Offer, shows that Segment 3 spans across approximately 721 linear feet of public lands. Even though BLM implemented the additional length in its reclamation bond calculations accompanying the 2007 and 2009 ROW grant offers, BLM never amended either the 2007 or the 2009 ROW grant offer descriptions for Segment 3 to reflect the additional length. We modify BLM’s 2009 ROW Grant Offer to correct this clerical error. By doing so, and as explained below, we have increased the rental value for Segment 3.

¹⁶ Heath, *pro se*, filed a notice of appeal with BLM on Nov. 25, 2009, and a Statement of Reasons (SOR) on Dec. 28, 2009. BLM responded, filing a motion to dismiss the case as both untimely and premature, which we denied on Apr. 14, 2010. BLM filed its Answer on May 14, 2010. Heath, by counsel, promptly filed a “Motion for Extension of Time to File Reply and to Compel Compliance with Order,” in which he requested this Board to require BLM to produce for inspection two reference books
(continued...)

II. Analysis

Heath argues that BLM erred in its determination of both the rent and bond calculations in its latest rendition of the ROW Grant Offer. We take each of his arguments in turn, after identifying the proper standards of review for this appeal.

A. Standard of Review

“We begin,” as we said in *Santa Fe Northwest Information Council, Inc.*, 174 IBLA 93 (2008),

with the rule that under section 501(a)(6) of the FLPMA, 43 U.S.C. § 1761(a)(6) (200[6]), a decision to accept or reject an ROW application for a road is discretionary. *See, e.g., Wiley F. & L’Marie Beaux*, 171 IBLA 58, 66 (2007); *Mark Patrick Heath*, 163 IBLA [at 388]; *Douglas E. Noland*, 156 IBLA 35, 39 (2001). The Board will affirm a BLM decision approving or rejecting an ROW application where the record shows that the decision represents a reasoned analysis of the factors involved, made with due regard for the public interest, and where no reason is shown to disturb BLM’s decision. *James Shaw*, 130 IBLA 105, 115 (1994); *Mark Patrick Heath*, 163 IBLA at 388; *Fallini v. BLM*, 162 IBLA 10, 34 (2004); *James M. Chudnow*, 70 IBLA 225, 226 (1983); *James E. Sullivan*, 54 IBLA 1, 2 (1981). As we have said, to successfully challenge a discretionary decision,

The burden is upon an appellant to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made.

¹⁶ (...continued)

that BLM had relied upon but refused to provide, citing copyright law. *See Answer at 13, n.3.* By order dated July 1, 2010, we denied Heath’s motion to compel because the Board’s rules do not provide for such motions, but requested BLM to reconsider whether its stated reasons for withholding the material were legally sound, and urged the agency to provide copies of the relevant pages to both the Board and Heath. BLM produced several copied pages of the manuals the next day. We received Heath’s Reply on Aug. 2, 2010.

174 IBLA at 104 (quoting *International Sand & Gravel Corp.*, 153 IBLA 293, 299 (2000); *Utah Trail Machine Association*, 147 IBLA 142, 144 (1999)).

B. Rental Costs

Under section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (2006), the holder of an 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 ROW holders pay to use Federal land. If an appellant challenges on appeal an ROW rental determination assessed by BLM, then he or she bears the burden of demonstrating that BLM used inappropriate data or erred in its calculations, or otherwise erred in applying the rental schedule to its particular right-of-way. *See Mark Patrick Heath*, 175 IBLA at 176. Heath meets this burden with respect to Segment 1, and has demonstrated that the Decision to offer and charge a rental fee for a FLPMA ROW over Segment 1 is not supported by a record showing that BLM gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made.

1. Rental for Segment 1

Heath complains that BLM has no authority to charge him rent for Segment 1, because it is “a public road used as primary access by numerous property owners besides [him]self for over a century,” and because the agency has consistently recognized it as an R.S. 2477 ROW. SOR at unp. 1; *see* Reply at 10-12. BLM does not address Heath’s assertion that the Old Road is open for public use. Rather, BLM argues that because a Federal Court has not declared that Boulder County has a title interest in Segment 1’s surface, as it crosses public lands, pursuant to the Quiet Title Act, 28 U.S.C. § 2409a (2006),¹⁷ the agency automatically has exclusive jurisdiction

¹⁷ When the land burdened by an asserted R.S. 2477 ROW is owned by the Federal government, the Quiet Title Act, 28 U.S.C. § 2409a (2006), provides the only waiver of the Government’s sovereign immunity, so an action can be brought only in Federal court under that statute. *County of San Bernardino*, 181 IBLA at 5-6 n.2 (citing *Kane County v. Salazar*, 562 F.3d at 1088; *Public Lands for the People, Inc. v. U.S. Dep’t of Agriculture*, 733 F. Supp. 2d 1172, 1194-95 (E.D. Cal. 2010); *Friends of the Panamint Valley v. Kempthorne*, 499 F. Supp. 2d 1165, 1176 (E.D. Cal. 2007)); *see also Long v. Area Manager, Bureau of Reclamation*, 236 F.3d 910, 915 (8th Cir. 2001) (The “right of an individual to use a public road is not a right or interest in property for purposes of the Quiet Title Act.” (citing *Kinscherff v. United States*, 586 F.2d 159, 160 (10th Cir. 1978))).

(continued...)

over the Old Road, and that Heath may use the road only if BLM grants him a FLPMA ROW. Answer at 5-7. In his reply, Heath contends that no Federal lawsuit is required to allow any person to *freely* traverse the Old Road, of which Segment 1 is a part. See Reply at 10-12. He reasserts that, as an R.S. 2477 ROW, the Old Road is clearly open to public use and, therefore, he is not required to pay rental charges to the Federal government for that use. *Id.*

[1] We have examined the record evidence to determine whether it supports Heath's claim that Segment 1 is an R.S. 2477 road and should cost him nothing to use. We found a map, titled "Record of Public Roads—Boulder County, Colorado, Road No. 85," dated December 15, 1953, which states that in February 1905, the Road was "declared [a] highway" "by long usage." AR 4. In a 1997 letter to Heath, BLM stated that the Road was open for public use:

The status of Gold Hill Road [Segment 1] has been a concern of many of the residents in the Gold Hill area. The road appears to have been established as a county road in 1876 and abandoned, but not vacated, in 1887 when [Sunshine Canyon Drive] was constructed. Various plats and maps from that era show the road in existence. I have walked the route on the ground and, while vague at times, the original route is visible. Several local residents have submitted letters to this office stating the existence and use of much of the road over time. This information would tend to indicate that Gold Hill Road is a public road.

BLM letter to Heath, dated July 28, 1997. In addition, according to BLM's revised EA for Heath's ROW, the agency recognized that

Segment 1 is a portion of [a] public road . . . , which is not a county maintained road. Although Mr. Heath has legal access on this segment, issuance of a ROW on this road would allow the holder to maintain the road within the limits of the terms and conditions of the grant and

¹⁷ (...continued)

In 1986, Congress amended the Quiet Title Act to exempt states from the applicable 12-year statute of limitations. 28 U.S.C. § 409a(g) (2006). Although Congress waived the limitation for states, this waiver does not extend to cities and counties. *Calhoun County, Tex. v. U.S.*, 132 F.3d 1100, 1103 (5th Cir 1998); *Okanogan County v. United States*, No. CV-10-166-LRS, 2010 WL 5168943 (E.D.Wash. Dec. 14, 2010); *County of Inyo v. Department of the Interior*, No. CV-F-06-1502, 2008 WL 446 8747 (E.D.Cal. Sep. 29, 2008); *Hat Ranch, Inc. v. Babbitt*, 932 F.Supp. 1 (D.D.C. 1995), *aff'd. sub nom. Hat Ranch, Inc. v. U.S.*, 102 F.3d 1272 (D.C.Cir. 1996) (Table); see *County of San Bernardino*, 181 IBLA at 7.

would establish his responsibility for adequately maintaining the road in an environmentally sound manner.

AR 5, EA at 2. The record also contains a 2007 BLM affidavit stating that “[t]he County recognized the public road status of segment 1, as does the BLM, and no bond has been requested for segment 1.” Affidavit of RGFO’s Staff Supervisor, Jan S. Lownes, dated Dec. 3, 2007.

Finally, as indicated above, we note that, in 2000, the Colorado appellate court determined that the Old Road traversing over private property was a public road by virtue of the public’s acceptance of a Federal statutory grant under R.S. 2477. *See Heath v. Parker*, 30 P.3d 746.

We are faced with the issue of whether, in light of these facts, BLM erred in granting a FLPMA ROW over Segment 1 and in applying the FLPMA rental schedule to that section, which, Heath asserts, is an existing road established pursuant to R.S. 2477, over which he claims a pre-existing right of access. Although we know of no Federal court that has ruled on the status of the Old Road under R.S. 2477, the 10th Circuit has made clear that, although BLM lacks primary jurisdiction to make “binding” determinations on the validity of ROWs granted under R.S. 2477, BLM has the authority to make “administrative determinations” of the validity of R.S. 2477 ROWs that are “useful only for limited purposes, namely, for the agency’s internal land-use planning purposes” regarding the public lands. *SUWA v. BLM*, 425 F.3d at 757¹⁸; *see Sierra Club v. Hodel*, 848 F.2d at 1084; *County of San Bernardino*, 181 IBLA at 26; *Charles W. Nolan*, 168 IBLA 352, 359 (2006). From the Decision and the particular facts presented in the record before us, we are unable to discern if BLM made an administrative determination of whether an R.S. 2477 ROW exists over Segment 1 at any date prior to or during consideration of Heath’s ROW application.

As we have stated numerous times before, it is incumbent upon an agency to ensure that its decision is supported by a rational basis which is explained in the written decision and is substantiated by the administrative record accompanying the decision. “An administrative decision is properly set aside and remanded if it is not

¹⁸ The Secretary implemented the 10th Circuit’s ruling nationwide. *See* Memorandum of the Secretary, “Departmental Implementation of *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005),” at 3, and attached Guidelines for Implementation at 1. The Memorandum is attached to Instruction Memorandum No. 2006-159 (May 31, 2006), which is electronically located at http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2006/im_2006-159_.print.html.

supported by a case record providing the information necessary for an objective, independent review of the basis for the decision.” *Robert Gadinski*, 177 IBLA 373, 394 (2009) (citing *Shell Offshore, Inc.*, 113 IBLA 226, 233, 97 I.D. 73, 77 (1990)); see *The Navajo Nation*, 152 IBLA 227, 234 (2000); *Fred D. Zerfoss*, 81 IBLA 14 (1984). Appellant, as the recipient of a BLM decision, “is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board.” *John L. Stenger*, 175 IBLA 266, 279 (2008) (quoting *The Pittsburgh & Midway Coal Mining Co. v. OSM*, 140 IBLA 105, 109 (1997)).

BLM has not met this standard. BLM’s decision does not reasonably identify the basis for its determination pertaining to Segment 1. It does not indicate those factors it considered in making the decision or point to their support in the record. For example, it is unclear whether BLM considered: the possibility of an R.S. 2477 grant over Segment 1; whether the December 3, 2007, affidavit of RGFO’s Staff Supervisor, Jan S. Lownes, or any other evidence, reflects a nonbinding administrative determination by BLM; or the nature and scope of any administratively determined R.S. 2477 ROW in light of the FLPMA ROW application.¹⁹ Accordingly, we set aside and remand the part of the Decision

¹⁹ We recognize that if BLM previously has made or prospectively makes an administrative determination that Segment 1 is an R.S. 2477 ROW, an important consideration would be whether Heath’s proposed use of Segment 1 would exceed the scope of any ROW for the same land previously issued under R.S. 2477. We observe that the Preliminary Engineering Report Heath submitted to the Boulder County Land Use Department states that the Old Road, Boulder County Road 85, “has a 60 ft. right-of-way . . . [and] is currently 10-12’ wide in its present state.” AR 4, Preliminary Engineering Report, dated Jan. 18, 2000, at 1; see AR 4, Record of Public Roads–Boulder County, Colorado, Road No. 85, dated Dec. 15, 1953. Notably, Heath does not propose to improve the Old Road beyond routine maintenance and BLM did not grant Heath a width exceeding 60 feet. “This does not mean that no changes can ever be made, but that any improvements must be made in light of the traditional uses in which the right of way had been put, fixed as of October 21, 1976.” *SUWA v. BLM*, 425 F.3d at 748 (citing *Sierra Club v. Hodel*, 848 F.2d at 1084). The Tenth Circuit held that, under *Sierra Club v. Hodel*, 848 F.2d at 1084-85, the right of way holder may sometimes be entitled to change the character of the roadway when needed to accommodate traditional uses, but even legitimate changes in the character of the roadway require consultation when those changes go beyond routine maintenance. Just because a proposed change falls within the scope of a right of way does not mean that it can be undertaken unilaterally.

(continued...)

pertaining to Segment 1 to allow BLM the opportunity to comply with the operative standard, consistent with this decision.²⁰

2. Rental for Segments 2 and 3

Heath advances several theories why he should be exempt from paying rent or should pay less than the minimum annual rental for Segments 2 and 3, citing the regulation at 43 C.F.R. § 2806.15(b) that specifies certain circumstances under which BLM may exempt someone from the obligation to pay full rental.²¹ SOR at unp. 2-3.

¹⁹ (...continued)

Id.; see *Owyhee County, Idaho*, 179 IBLA 18, 28 (2010) (“BLM is not compelled by law or precedent to concede management authority over these roads to the County prior to a judicial validation of its assertions [of control].”)

²⁰ It is important to note, as we did in *County of San Bernardino*, 181 IBLA at 29, that land subject to an R.S. 2477 ROW is subject to Federal regulatory and permitting requirements:

The United States remains owner of the public lands within which the ROW is situated. The County’s utilization of that ROW remains subject to BLM’s obligations to protect the land over which the ROW passes. See 425 F.3d at 747 (citing section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2006)); see also 1993 [Department of the Interior] *Report to Congress [on R.S. 2477: The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands]* (June 1993)] at 33-41 [](providing a discussion of the tension between asserted R.S. 2477 ROWs and the land-management agency’s ability to manage public lands according to the agency’s mission).

See also *Clouser v. Espy*, 42 F.3d 1522, 1538 (9th Cir. 1994) (the court rejected the plaintiffs’ argument that the Forest Service could not preclude them from expanding the existing R. S. 2477 road and using it for motorized access to their mining claims); cf. *Wilkenson v. Department of the Interior*, 634 F. Supp. 1265, 1280 (D. Colo. 1986) (the court found that the National Park Service could regulate R.S. 2477 ROWs in a park but it could not prohibit commercial vehicles from using them, finding further that “[t]he charging of a fee for such non-recreational use is an unlawful interference with that property right of public use.”).

²¹ An 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 (43 C.F.R. § 2806.15(b)(1)); if the holder provides without charge or at reduced rates a valuable benefit to the public or programs of the Secretary (43 C.F.R. § 2806.15(b)(2)); if the holder has a valid Federal authorization in

(continued...)

As to Segment 1, he argues that his efforts to have the State court acknowledge Segment 1 as an R.S. 2477 road provided “a benefit or special service to the general public,” as provided in 43 C.F.R. § 2806.15(b)(1). *Id.* Regarding Segments 2 and 3, he asserts that a Mutual Access Agreement he entered into with eight other property owners of patented and unpatented lode claims provides shared public access to the properties, qualifying him for a waiver or reduction of rental under 43 C.F.R. § 2806.15(b)(4). *Id.*

There is nothing in the record to suggest that Heath was attempting to qualify for or applied for a waiver or reduction in rental for any of the three segments under any provision of 43 C.F.R. § 2806.15(b), and nothing to suggest that he is qualified to receive a waiver or reduction of rental charges. For instance, the regulation at 43 C.F.R. § 2806.15(b)(1) is unavailable to Heath, who is not “a non-profit organization, corporation, or association,” whose “facility or project will provide a benefit or special service to the general public or to a program of the Secretary.” The regulation at 43 C.F.R. § 2806.15(b)(4) is likewise inapplicable to Heath’s circumstances, because neither Heath nor the record demonstrate that, whether through the Mutual Agreement or otherwise, Heath has conveyed an ROW to the United States in connection with a cooperative cost share program between the United States and Heath. *See* 70 Fed. Reg. at 21008 (“Section 504(g) of FLPMA provides that BLM may waive rentals when a FLPMA right-of-way holder conveys a right-of-way to the United States in connection with a cooperative cost share program between the United States and the holder.”). Heath has failed to show that BLM erred in not applying the regulations at 43 C.F.R. § 2806.15(b) to waive or reduce his rental. *See Bradley Henspeter*, 172 IBLA 273, 278-79 (2007).

B. Rental Cost Corrections to Be Implemented on Remand

On remand, the size of the ROW Grant Offer shall be adjusted, as necessary, pursuant to BLM’s administrative determination regarding R.S. 2477. Segment 2 would remain the same (0.269 acres). As noted above, Segment 3 is 721 linear feet, not 626 linear feet, and thus the Decision is corrected to show that it comprises approximately 1.16 acres, not 1.006 acres. Finally, that part of the Decision determining that the parking area should comprise 50' x 50' (.057 acres) is not

²¹ (...continued)

connection with the grant and the United States is already receiving compensation (43 C.F.R. § 2806.15(b)(3)); or if the holder’s grant involves a cost share road or a reciprocal ROW agreement. 43 C.F.R. § 2806.15(b)(4); *see* 70 Fed. Reg. 20970, 21008 (Apr. 22, 2005); *see also* 43 U.S.C. § 1754(g) (2006) (Section 504(g) of FLPMA provides authority for the Secretary to charge less than fair market rental value in certain specified circumstances.).

supported by any record evidence. *See County of San Bernardino*, 181 IBLA at 23. Accordingly, it is vacated and modified to indicate that the parking lot shall consist of 20' x 20' (.01 acres). Therefore, rental for Segments 2, 3, and the parking lot shall be based on 1.4 acres.

C. Bond Amount

Heath requests this Board to set aside and vacate BLM's bond amount, \$92,363.34, rounded down to \$92,000, for reclaiming only Segment 3, for a number of reasons. We take each reason in turn.

1. Authority to Require a Bond for a FLPMA ROW

[2] BLM conditioned Heath's ROW grant on Heath furnishing a bond for reclaiming Segment 3 to protect the Federal Government from loss if the required reclamation is not carried out when the ROW terminates or is abandoned. *See* ROW Grant at stipulation 7. Heath does not dispute that BLM has the authority to collect a reasonable bond amount. 43 U.S.C. § 1764((i)) (2006); 43 C.F.R. § 2805.12(g) (A bond may be collected for a FLPMA ROW grant "to cover any losses, damages, or injury to human health, the environment, and property in connection with your use and occupancy of the right-of-way, including terminating the grant."). While BLM's authority to require such insurance is clear, neither the statute nor the regulations set forth a formula for calculating a FLPMA ROW reclamation bond. Consequently, no exact standardized reclamation cost estimating process exists.²²

²² In 2005, BLM revised its ROW regulations. During this revision process, the public requested BLM to identify how it would determine a bond amount and wanted BLM to "list those factors, which the agency considers when setting the amount of the bond." 70 Fed. Reg. at 21043. BLM disclosed that no bond calculation guide would be forthcoming, but did state that,

[a]mong the factors that we will use to determine bond amounts are the expected costs to the agency to restore and reclaim disturbed areas and to repair damage to scenic, aesthetic, cultural, and environmental values and to protect public health and safety. Those costs can include both direct costs for things such as equipment and labor and indirect costs for administrative overhead costs.

Id.; *see also* BLM's Manual 2805 § 12(D)(3) ("The amount of the bond should be determined by estimating the cost to the United States to satisfy every stipulation covered by the bond in the event of noncompliance by the holder. In arriving at this estimation, all costs should be considered including, but not limited to, direct, indirect, administrative, equipment, contracting, monitoring and reclamation costs.").

2. *Standard of Review*

As indicated above, BLM possesses considerable discretion in determining bond values—discretion that is tempered by the standard of reasonableness. *See generally Bear River Land and Grazing v. BLM*, 132 IBLA 110, 114 (1995) (“This Board will afford considerable deference to the party exercising discretionary authority when the exercise appears to be reasonable and supported by the evidence.” (quoting *Donald K. Majors*, 123 IBLA 142, 147-48 (1992))). Counsel for BLM stated it cogently enough: The standard of review regarding the bond issue “is not whether [Heath] can find the least expensive contractor to perform the work, but, whether he can demonstrate . . . that BLM committed a material error in its factual analysis . . . or . . . did not act on the basis of a rational connection between the facts contained in the record and the choice made regarding the amount of the bond.” Answer at 29.

Because both parties rely heavily on their own bond cost estimate experts, Heath has the burden of proving by a preponderance of the evidence that Treacy’s cost estimate is arbitrary and capricious or that it is based on an error in methodology, data and/or analysis. *Salinas Ramblers Motorcycle Club*, 171 IBLA 396 (2007), and cases cited. A difference of opinion will not suffice. *Id.* (citing *Susan J. Doyle*, 138 IBLA 324, 327 (1997)). In cases where experts simply disagree, “an agency must have discretion to rely on the reasonable opinions of its qualified experts.” *Id.* (quoting *Fred E. Payne*, 159 IBLA 69, 78 (2003)).

3. *Direct Costs*

i. *Off-Site Disposal of Excess Removed Fill Materials*

According to BLM’s calculations, as attached to the Grant Offer, the probable reclamation costs to reclaim Segment 3, which does not include administrative fees, is \$58,953.24. A large portion of that amount comes from BLM’s determination that \$30,499.40 is needed to pay for loading, hauling, and disposing excess fill from the site. Heath does not disagree with BLM’s calculations regarding the excess fill amount but argues that any additional fill does not have to be transported off site. He believes that leftover material can be used for road base surfacing over Segments 1 and 2, as well as portions of the road that would traverse private lands. SOR at unp. 3; Reply at 18-19. BLM counters that, because Heath only supplied the agency with engineering plans for Segment 3, it

could not adequately determine if the 925 CY of excess removed fill material could be deposited on portions of either Segment 1 or 2. Without proper engineering . . . of Segment 1 and 2, drainage, erosion,

and regulatory issues could be exacerbated due to the random placement of significant additional fill material. Further, BLM does not have approval from the owners of the private lands in Segments 1 and 2 for the disposal of the materials. Thus, disposal of the 925 CY of excess material in Segments 1 and 2 was not considered to be an option.

Answer at 26-27.

Heath has not shown on appeal that any excess fill from reclaiming Segment 3 can be safely or otherwise distributed over the existing road in Segment 2, over private lands extending east from Segment 3, or over the Old Road. While Heath submits a local contractor's cost estimate for reclaiming the road, the contractor baldly assumes, without explanation, that "cut and fill will balance on Segments 1-3 Therefore, we do not anticipate any export." Reply at Ex. C. Heath has failed to show any error in BLM's analysis.

ii. Labor and Equipment Rental Costs

Heath takes issue with BLM's use of the *Means Building Construction Cost Data* manual to calculate labor and reclamation equipment rental costs because local contract prices are lower. See SOR at unp. 3; Reply at 14-16. He appends to his Reply an affidavit and a cost estimate from James McKenzie, the owner of Valley Excavating, Inc., an excavating company in Colorado. McKenzie is familiar with "the feasibility, cost estimation, scheduling, supervision, construction and invoicing of driveways, roads, and . . . the resources necessary to rehabilitate land impacted by such projects." Reply, Ex. C. at ¶ 2(a). McKenzie concludes, after looking at Heath's engineer's drawings, that reclaiming, but not landscaping,²³ Segment 3 should cost no more than \$13,600.00, which includes labor and mobilization costs. McKenzie did not include equipment rental fees in his estimate, presumably because "excavation contractors [] own[] [their] own equipment." SOR at unp. 4.²⁴

²³ On appeal, Heath submitted a landscaping estimate from a "local experienced landscape restorationist" totaling \$4,426.75 (\$6.33/sq. ft.). SOR at unp. 3; *id.* at Ex. 3; Reply at Ex. D. This estimate included 28,000 square feet. Treacy's revegetation/planting cost estimate was \$2,655.20 and included about 21,780 square feet (\$8.20/sq. ft.). How the square footage figures to be replanted were calculated are not explained in either cost estimate.

²⁴ Equipment rental accounts for about \$29,500 of the \$92,000 reclamation cost estimate. BLM states that it includes equipment rental costs because the agency

(continued...)

Based on the information supplied by McKenzie, Heath posits that “[t]he great disparity between the bids from actual local contractors experienced in doing such work in Boulder County and the irrelevant national average costs deliberately chosen by the BLM to increase the bond amount underscores the unreasonableness and irrationality of the BLM’s entire methodology of calculating the reclamation bond.” Reply at 14. “[I]f Mr. Heath does not properly reclaim the relevant portions of Segment 3 and his reclamation bond is forfeited, the BLM will be seeking to hire local contractors at local market costs in Boulder County, Colorado, and not searching the 50 states for a contractor who charges ‘the national average costs’ which the BLM used from the R.S. Means Manuals.” *Id.* at 16-17.

We agree with Heath that locality costs may differ significantly from the national average construction costs and that BLM should take care in not overcharging an ROW holder for reclamation. BLM failed to disclose that the *R.S. Means Building Construction Cost Data* manual contains average construction cost indexes for many U.S. cities, including Boulder, Colorado. In 2009, “installation” costs in Boulder, Colorado, which include labor and equipment costs, was 22.3 percent less than the national average operation costs used by BLM in this case. See *R.S. Means, City Cost Indexes*. Consequently, we deem it appropriate that BLM reduce each direct cost by 22.3 percent.

To the extent Heath argues that McKenzie’s cost estimate should be accepted over Treacy’s estimate, we disagree. McKenzie’s cost estimate does not itemize any equipment, labor, or any other unit costs underpinning the project. Nor does it outline the precise work to be done, how much earth would be excavated, and in what time frame. On the other hand, BLM’s cost estimate contains detailed information about the activities needed for road obliteration, sets forth the specific costs associated with each aspect of the work needed, including equipment, materials, and labor, and projects the number of hours needed to complete the project. Thus, we cannot effectively compare the bases of the two cost estimates. We find no reason to accept McKenzie’s bond estimate over BLM’s.

²⁴ (...continued)

does not develop costs which may be incurred by a particular contractor because the factors that make up the costs for each contractor (such as equipment ownership, lease, rent, age, type, size, wear, level of maintenance) may vary widely from contractor to contractor, even on a local basis. Instead, BLM uses [rental] costs for the components reported in the R.S. Means publications, which are a national average of [rental] costs.

Answer at 15. Heath has not demonstrated error in BLM’s inclusion of equipment rental costs in its cost estimate.

iii. *Mobilization/Demobilization Fee*²⁵

We disagree with this fee's amount, but not for the reasons proposed by Heath.²⁶ Treacy explained in the cost estimate that he “[a]ssume[d] that equipment will come from a local contractor and can be: loaded, hauled to the site, off loaded[,] and returned to the point of origin in 4 hours round trip.” (Emphasis added.) We understand this to mean that it would take no more than four hours to transport heavy machinery to and from the work site. However, Treacy states that “[t]his equates to a total of 8 hours . . . to and from the site.” He does not explain why he doubles his round-trip figure. Then, using the faulty 8-hour round trip number, Treacy found that renting a truck tractor and a low-bed trailer for 8 hours each and hiring a driver for 8 hours to drive the 18 wheeler, “total[ed] 24 hours of trucking/transport time.” AR 8, Cost Estimate at 3. He multiplied the hourly cost for renting the truck tractor and low-bed trailer, and the hourly driver wage rate by 24 hours for a total mobilization/demobilization cost. There is no rational basis for this.

Accordingly, because it would only take 4 hours to get equipment to and from the site, we find that the total hours of mobilization/demobilization must be reduced by 20 hours. Changing the calculation to include four hours worth of rental and labor costs, instead of 24 hours, and using the same unit cost amounts would reduce the mobilization/demobilization fee to \$627.92 (without implementing the city cost index reduction). BLM shall incorporate this correction into its next ROW grant offer.

iv. *Restoration of Trees*

BLM states that construction of Segment 3 will require the removal of 50 trees, more or less. Heath does not dispute this figure; he disagrees with doubling the amount of trees during reclamation that will be removed during construction.

²⁵ “Mobilization/demobilization is the cost to a contractor for transporting heavy equipment from the contractor’s base of operations to the work site (mobilization) and, at job completion, return of the heavy equipment to the base of operations (demobilization).” Answer at 14.

²⁶ Heath argues that the mobilization/demobilization fee is “merely the equivalent of the ‘remote site fee,’” which this Board struck down in Heath’s last appeal. Reply at 17; *Heath*, 175 IBLA at 191. We disagree. That fee, a hefty \$24,500, which purported to cover costs associated with transporting labor, materials, equipment, and fuel to a rural site, lacked any rational justification. BLM simply attached the fee as a percentage of the total reclamation costs without any real explanation. Here, BLM has itemized its Mobilization/Demobilization fee, which is corroborated by the *R.S. Means Building Construction Cost Data* manual.

SOR at unp. 4; Reply at 20. The agency explains that, to reclaim the area, “[a]pproximately 100 ponderosa pine seedlings planted at the rate of roughly (1) seedling for every 218 sf of disturbed area would be required.” This is because “[i]t obviously isn’t possible or practical to replace trees of the same size and density; however, efforts should be made to re-establish ground cover that [was] disturbed by the construction.” Cost Estimate at 2. Heath has not affirmatively pointed out in what respect BLM’s tree repopulation figures are in error. Again, mere disagreement with BLM’s approach to reclamation is not sufficient to demonstrate error on appeal. *Ferrell Anderson*, 171 IBLA 289, 294 (2007).

4. Administrative Costs

BLM added \$28,266.65 to the estimated reclamation cost amount to cover “associated project costs.” The agency based its authority to charge administrative fees on Instruction Memorandum (IM) No. 2004-247, dated September 20, 2004. So far as we can tell,²⁷ this IM relates generally to BLM’s assets, facility upkeep, land acquisition, and capital investments. It describes how to submit project proposals for Federal funding by implementing the “Five-Year Deferred Maintenance and Capital Improvement [] Planning Process.” If, for example, BLM wishes to build a recreation facility on public lands, then it must incorporate that project into an itemized budget for future approval. Costs relating to administering the new facility’s construction must be incorporated in the project proposal. These costs include “Construction Administration Costs,” which cover “inspection and quality assurance, as well as costs for the contract officer’s representative and the contracting officer’s time,” and represent 12% of the total estimated construction cost. Answer, Ex. R-8 at 8. “Survey and Design Costs,” is a charge that pays for the “general work associated with planning, surveys, design[,] and preparation of contract documents. This cost . . . is 15% of the total Estimated Construction Cost. The 15% includes costs for administrating the [] contract.” *Id.*

By its own terms, the IM upon which BLM currently relies expired on September 30, 2005. We are unable to determine from BLM’s website whether that policy has been reissued or extended, or whether it reflects the State Director’s current policy regarding FLPMA ROW reclamation bonds. Moreover, since instruction memoranda have no legal force or effect and are not binding on this Board or the public at large (*see Joe B. Fallini*, 162 IBLA 10, 35 (2004)), we examine BLM’s administrative costs for reasonableness.

²⁷ While this guidance document is over 100 pages, BLM only supplied this Board with the table of contents and 3 pages containing a section titled “Project Cost Estimate.”

i. Planning, Survey, and Design Costs

BLM attached to the total estimated reclamation cost a \$9,614.51 fee, titled “BLM Planning, Survey, Design,” “which includes the cost of preparing the contract for award and a pre-bid sight tour. BLM Instruction Memorandum No. 24[7] specifies 15% [of the estimated reclamation cost] to be used for BLM’s Planning, Surveying and Design Costs.” Cost Estimate at 4. Taking issue with charging him for a subsequent survey, Heath contends that no additional surveying for reclaiming Segment 3 is required because “[e]xisting survey work by RMCS Surveying, and existing drawings by Wilkenson Civil Engineering” are “more than adequate” for any reclamation planning and design. SOR at 4.

According to Heath, “[i]f the BLM used this detailed survey to calculate the exact length of the right-of-way and therefore the acreage (to the 1/100th of an acre) in preparing both the 2007 and 2009 right-of-way grants, the BLM has necessarily acknowledged that further survey work is unnecessary and any costs associated with the additional survey work in the 2009 right-of-way grant offer is unreasonable and irrational and should be deleted in its entirety.” Reply at 20-21. BLM claims in its answer that “a survey is required that would clearly delineate the boundaries between public and private lands. The survey submitted by RMCS is not sufficient for such a boundary survey.” Answer at 32.

Regardless of whether a subsequent survey is necessary, this fee also represents the cost of preparing the reclamation contract for award and a pre-bid sight tour. We find this fee to be reasonably based and supported by the record.

ii. Indirect Cost Fee

[3] Heath further contends that the “Indirect Cost Rate,” a \$10,960.54 fee, is redundant of both the “BLM Construction Administration” and “Planning, Survey and Design” fees and should therefore be omitted from the cost estimate. SOR at unp. 4; Reply at 21. BLM disagrees. Without that fee, BLM could not recover “reimbursable construction activities,” Cost Estimate at 4, which include “utilities, telecommunications, information technology, space rental[,] and a range of administrative support functions.” Answer at 33.

BLM bases this fee on IM No. 2009-105, a guidance document that transmits the indirect cost rate for the fiscal year 2009 (Oct. 1, 2008 through Sept. 30, 2009). See Answer, Ex. R-9. Again, this IM expired 15 days before BLM issued the ROW Grant Offer currently on appeal in this case. Nevertheless, BLM states that this IM requires the agency to recover its *total* costs, both direct or indirect, and that “[t]he indirect cost rate to be assessed on all cost-recoverable, reimbursable, trust and road

maintenance [Work Breakdown Structure] (projects) for FY 2009 is 17.1 percent.” *Id.*, Ex. R-9 at 1.

While this rate specifically applies to the “Repair of Damaged Lands, Public Lands,” the IM notes an exemption to “this policy of full cost recovery”:

Indirect charges are waived for mining operations conducted under a notice or plan of operations where financial guarantees are mandatory. This financial guarantee amount must include all operating, maintenance, *and* the BLM administrative costs. The amount of the financial guarantees correlate to the total government cost of contracting the required reclamation work on public lands that the mining operators would have normally performed. *Under this requirement, applying an indirect cost rate to the theoretical contract amount is unnecessary and adds to the price that the operators pay for obtaining these financial guarantees. Applying the standard indirect rate would normally result in a cost in excess of the actual administrative work required for such contracts.*

Answer, Ex. R-9, at 2 (italics added).

Although the IM refers to bonds posted pursuant to 43 C.F.R. Subpart 2809 (notice-level and plan-level solid mineral operations), we think its reasoning applies to the case at hand. BLM has required Heath to post a reclamation bond, which includes a Construction Administration fee, 12 percent of the total estimated reclamation price, or \$7,691.60. This fee purportedly recovers “the government’s cost of providing contract inspection and oversight [of] the awarded contract. Among other duties, this includes the on-site inspection of the contractor’s performance in compliance with the contract’s specifications and drawings.” Answer at 16, 34; Cost Estimate at 4. Moreover, the “Planning, Survey, and Design” fee, \$9,614.51, would pay for BLM to prepare a “contract for award and a pre-bid sight tour.” Because BLM only relies on IM No. 2009-105 to justify its indirect cost fee, and because we find that IM to implicitly exempt such a fee in this case, we reject the fee as unreasonable.²⁸

²⁸ We note that the “indirect costs” for reclaiming a FLPMA ROW may be covered by BLM’s monitoring fee. Monitoring fees, which are based on the estimated number of work hours necessary to monitor an ROW grant, recover costs to administratively oversee the “termination of permanent or temporary facilities and protection and rehabilitation activities until the holder completes rehabilitation of the right-of-way (continued...)

III. Conclusion

In sum, we set aside and remand the Grant Offer to the extent that it overlaps the asserted R.S. 2477 ROW for clarification of whether BLM considered the possible existence of an R.S. 2477 ROW over Segment 1, whether it made an administrative determination as to the existence of such, and, if it did, what that determination is. In addition, we correct and modify the ROW's acreage, as well as the required amount of reclamation bond. The decision is affirmed in all other respects.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's ROW Grant Offer is affirmed in part, modified in part, and set aside and remanded in part for further action consistent with this decision.

_____/s/_____
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/_____
James F. Roberts
Administrative Judge

²⁸ (...continued)
and BLM approves it." 43 C.F.R. § 2801.6 (definition of monitoring); *see id.*
§ 2805.16.