

SAN MIGUEL POWER ASSOCIATION, INC.

IBLA 82-528

Decided May 26, 1982

Appeal from decision of Montrose, Colorado, District Office, Bureau of Land Management, requiring rental charges for right-of-way C 31092.

Affirmed.

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

While sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1976), indicates that the Secretary of the Interior may charge less than fair market value for annual right-of-way rental, including no charge, the legislative history of that provision reveals that Congress intended that free use be restricted to agencies of the Federal Government and to those situations where the charge is token and the cost of collection unduly large.

APPEARANCES: Robert R. Wilson, Esq., Cortez, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

San Miguel Power Association, Inc., appeals from the amendatory decision of the Montrose, Colorado, District Office, Bureau of Land Management (BLM), dated February 8, 1982, which set a rental charge of \$25 for the 5-year period beginning April 22, 1981, and ending April 21, 1986, for the electric power transmission line right-of-way C 31092.

Appellant filed the right-of-way application C 31092 December 23, 1980, under section 501(a)(4) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a)(4) (1976), for a 50-foot right-of-way to accommodate a 14.4/24.9 kv electric power transmission line across public land in the SE 1/4 sec. 10, T. 44 N., R. 18 W., New Mexico principal meridian, Colorado, to serve Pioneer Uranium. The right-of-way occupies an area of public land 1,120 feet long and 50 feet wide.

In its statement of reasons, appellant contends that it is a nonprofit distribution cooperative supplying electric energy at retail to almost 6,000 consumers in the southwestern portion of Colorado. It is member owned and is not a subsidiary of a profit making business or enterprise. It is a public utility under the laws of the State of Colorado, Colo. Rev. Stat., 1973, 39-4-101(3). Appellant argues that regulation 43 CFR 2803.1-2(c)(1) does not provide a basis for exclusion of appellant from the class of holder eligible for exemption from right-of-way fee requirements. Rather, appellant avers it is a nonprofit holder of the type intended to be covered under the provisions of 43 CFR 2803.1-2(c)(2) and that, as a matter of public policy, annual rentals should not be imposed upon appellant. Appellant alleges that the BLM decision is arbitrary, capricious, erroneous, contrary to law and fact, and is inconsistent with public policy. Annual rentals should not be assessed for rights-of-way for the use of public land by appellant in this case or by rural electric cooperatives in general. Appellant requested a hearing.

[1] Section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1976), provides in its relevant portion:

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

The pertinent regulation, 43 CFR 2803.1-2(c), states:

(c) No fee, or a fee less than fair market rental, may be authorized under the following circumstances:

(1) When the holder is a Federal, State or local government or any agency or instrumentality thereof, excluding municipal utilities and cooperatives whose principal source of revenue is customer charges.

(2) When the holder is a nonprofit corporation or association which is not controlled by or is not a subsidiary of a profit making corporation or business enterprise.

(3) When a holder provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary.

In *Tri-State Generation & Transmission Association, Inc.*, 63 IBLA 347, I.D. (1982), this Board held that free use of rights-of-way is

restricted to agencies of the Federal Government and to those situations where the charge is token and the cost of collection unduly large. That interpretation was based on the legislative history of section 504(g) of FLPMA:

Subsection (f). This subsection provides that no right-of-way shall be issued for less than "fair market value" as determined by the Secretary. The proviso at the end of the subsection qualifies this standard where the application is a State or local government or a nonprofit association. In this case, the right-of-way may be granted for such lesser charge as the Secretary determines to be equitable under the circumstances. However, it is not the intent of this Committee to allow use of national resource land without charge except where the holder is the Federal Government itself or where the charge could be considered token and the cost of collection would be unduly large in relation to the return received. [Emphasis added.]

S. Rep. No. 583, 94 Cong., 1st Sess. 72-73 (1975). Appellant is not an agency of the Federal Government, and while its rental charge is certainly token, being the minimum allowed by regulation, BLM obviously has determined that the cost of collection is not unduly large, as the line serves but a single customer. We must hold, therefore, that appellant is not entitled to an exemption from the rental fees set by BLM. We observe that in Tri-State Generation & Transmission Association, Inc., *supra*, we held that the exclusionary language of 43 CFR 2803.1-2(c)(1) eliminates from consideration for reduced charges for rights-of-way under any category of 43 CFR 2803.1-2(c) cooperatives whose principal sources of revenue is customer charges. The BLM decision is not contrary to law or inconsistent with public policy.

In light of our disposition of this appeal, there is no issue of material fact, and therefore a hearing would serve no useful purpose. See John J. Schnabel, 50 IBLA 201 (1980). Accordingly, the request for a hearing is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

