

**Editor's note: Reconsideration granted; decision set aside -- See Northwest Pipeline Corp. (On Reconsideration), 77 IBLA 46 (Nov. 1, 1983); Reaffirmed and Clarified -- See Northwest Pipeline Corp. (On Reconsideration), 83 IBLA 204 (Oct. 18, 1984)**

NORTHWEST PIPELINE CORP.

IBLA 81-941, et al.

Decided July 9, 1982

Appeals from decisions of New Mexico, Colorado, and Wyoming State Offices, Bureau of Land Management, determining annual rental charges for natural gas pipeline rights-of-way. NM 43325, et al.

Affirmed.

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

The "going rate" approach for appraising rights-of-way for natural gas pipelines granted pursuant to the Mineral Leasing Act of Feb. 25, 1920, as amended, 30 U.S.C. § 185 (1976), may be used by the Bureau of Land Management in determining the fair market rental value for such grants where there are sufficient market data available to evidence sales of similar right-of-way grants by private landowners.

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

In determining fair market rental value for a right-of-way for a natural gas pipeline granted pursuant to the Mineral Leasing Act of Feb. 25, 1920, as amended, 30 U.S.C. § 185 (1976), the Bureau of Land Management may consider market data concerning acquisition of similar rights-of-way across private lands even though the party acquiring those rights-of-way had the power of eminent domain.

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

Where the record shows that the Bureau of Land Management took into consideration differences between pipeline rights-of-way granted by the Bureau and those granted by private land owners in determining an adjustment factor to be applied to the going rate to arrive at the fair market rental value, in challenging that adjustment figure the right-of-way holder must show by positive and substantial evidence either that the Bureau failed to analyze the proper differences or that the adjustment factor failed reasonably to reflect the amount of those differences.

APPEARANCES: Richard W. Sabin, Esq. and W. A. Thomasson, Salt Lake City, Utah, for appellant; Marla E. Mansfield, Esq., Office of the Regional Solicitor, Denver, Colorado, and Robert J. Uram, Esq., Office of the Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The Northwest Pipeline Corporation has appealed from various decisions of the New Mexico, Colorado, and Wyoming State Offices, Bureau of Land Management (BLM), determining annual rental charges for natural gas pipeline rights-of-way. <sup>1/</sup>

Appellant is the holder of numerous rights-of-way for buried natural gas pipelines, each with a term of 30 years, granted pursuant to section 28 of the Mineral Leasing Act, as amended, 30 U.S.C. § 185 (1976). While Departmental right-of-way regulations relating to Mineral Leasing Act rights-of-way historically have required that the charge for use and occupancy of the public lands

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<sup>1/</sup> Because of the substantial similarity of issues involved and pursuant to a request by the parties the cases listed in Appendix A have been consolidated for decision. We note that the Solicitor's Office on behalf of BLM made a motion to dismiss IBLA 82-298, concerning NM 43366, and IBLA 82-306, involving NM 43664, because of untimely filed notices of appeal. Appellant admits they were filed untimely, but states that because of the similarity of all the cases it would be unfair to dismiss these two. Unfortunately, where a notice of appeal is not filed timely, the Board has no jurisdiction, and the appeal must be dismissed. Nicky Nickoli, 43 IBLA 296 (1979). The motion is granted, and IBLA 82-298 and IBLA 82-306 are dismissed.

would be fair market value (e.g., 43 CFR 2802.1-7(a) (1972), 43 CFR 2234.1-6(a)(1970), section 101 of the Act of November 16, 1973, P.L. 93-153, 87 Stat. 576, amended section 28 of the Mineral Leasing Act specifically to provide, in relevant part, that "the holder of a right-of-way \* \* shall pay annually in advance the fair market rental value of the right-of-way \* \* \* as determined by the Secretary \* \* \*." 30 U.S.C. § 185(1) (1976); see 43 CFR 2883.1-2.

The rental charges for appellant's rights-of-way were determined using a standard appraisal statement prepared by the appraisal staff of each of the BLM state offices. For purposes of illustration, set forth below are the relevant portions of the appraisal statement with respect to right-of-way NM 43325 (IBLA 81-941):

This office has on-going studies of industry practices regarding acquisition of rights-of-way in New Mexico. Master valuation reports giving the full details of this study are available in this office. The following steps summarize the valuation of the subject right-of-way based on these studies:

- |    |  |                     |     |   |                 |
|----|--|---------------------|-----|---|-----------------|
| *  | *  | *                   | *   | * | *               |
| *  |  |                     |     |   |                 |
| 3. | Typical industry going rate for R's/W on private lands   |                     |     |   |                 |
|    | <u>\$ 10.00 /Rod</u>   |                     |     |   |                 |
| 4. | Adjusted rate for BLM grants (30% reduction)   |                     |     |   |                 |
|    |  | <u>\$ 7.00 /Rod</u> |     |   |                 |
| 5. | Length of subject R/W  |                     |     |   | <u>\$</u>       |
|    | <u>222.72/Rod</u>  |                     |     |   |                 |
| 6. | Market value of BLM grant if in perpetuity   | \$1,559.04          | say |   | <u>\$ 1,559</u> |
| 7. | Annual Payment - annual amount necessary to amortize total value of right-of-way (#6 above) over 100 years at 10.25% |                     |     |   |                 |
|    | \$144.95 say   | <u>\$ 145</u>       |     |   |                 |

The appraiser is very familiar with all areas covered by this going rate study. He periodically field examines selected

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2/ We note that BLM's calculation of the annual payment of this right-of-way is apparently low. The annual amount necessary to amortize the total value of this right-of-way (\$1,559) over 100 years at 10.25 percent as computed on a Texas Instrument MBA calculator is \$159.81.

market data used in the study as well as rights-of-way on BLM lands. This particular right-of-way, however, may not have been inspected in detail on the ground.

Memorandum from Chief, Appraisal Staff, New Mexico State Office, BLM, to Chief, Lands Section, New Mexico State Office, BLM, dated June 8, 1981.

This appraisal statement apparently was not incorporated in BLM's decision establishing the rental. In fact, the decision appealed from in IBLA 81-941 (NM 43325) merely states that "[a]n appraisal has been completed on the right-of-way and the annual rental is \$145.00." It does not appear that BLM explained its methodology in arriving at fair market rental value in any of its decisions. Examination of the records in these cases and of documents submitted on appeal, however, disclose both the methodology and BLM's rationale for its adoption.

BLM is obligated by law to ensure that the rental paid for a pipeline right-of-way represents the fair market value of the right granted. BLM uses the Uniform Appraisal Standards for Federal Land Acquisitions (1973) (UAS), established by the Interagency Land Acquisition Conference, as a guide in determining fair market value. See 602 DM 1.3. Fair market value is defined in the UAS at 3, and, as applied to rights-of-way, is the amount in cash, or terms reasonably equivalent to cash, for which in all probability a right-of-way would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desires but is not obligated to use. See B & M Service, Inc., 48 IBLA 233 (1980); Full Circle, Inc., 35 IBLA 325, 332-33, 85 I.D. 207, 211 (1978); American Telephone & Telegraph Co., 25 IBLA 341, 349-50 (1976).

Fair market rental value, according to the legislative history of the 1973 amendments to the Mineral Leasing Act of 1920, "can be based on any combination of facts that might reasonably be considered by a landowner in a free market, when determining the price to be asked for the right to use or cross his land." Conference Report No. 924, 93d Cong., 1st Sess. 2, reprinted in [1973] U.S. Code Cong. & Ad. News 2523, 2527.

[1] The UAS sets forth various appraisal techniques for arriving at fair market value. The comparable sales approach is generally recognized as providing the best evidence for valuation (UAS at 9). In valuing rights-of-way the Board has stated with respect to communication site rights-of-way that comparing a site with similar sites in the same region under private lease "is a proper appraisal method for determining fair market value when current, well-established rental data for comparable sites is available." Northwestern Colorado Broadcasting Co., 49 IBLA 23, 26 (1980); see Full Circle, Inc., supra.

The methodology adopted by BLM in the present cases has been termed the "going rate" approach. The justification for choosing this appraisal

technique is contained in two documents, T. Heisler, Valuation Study for Oil and Gas Industry Related Rights-of-Ways, San Juan Basin, Northwestern New Mexico (May 1979, revised May 1981) (Valuation Study) and S. Redfield and R. Goossens, Wyoming Going Rate Study (February 1981) (Going Rate Study). Both studies were initiated because of a recognition that private landowners were receiving much greater values for granting oil and gas industry rights-of-way across their lands than the Federal Government was receiving for granting the same types of rights-of-way across public land. Valuation Study at 2; Going Rate Study at 3.

Going rate is defined in the Going Rate Study at 3 as "the amount in cash paid by an entity, usually a utility or pipeline company, on a per rod, per pole or per line mile basis to a landowner for the right to place a pipeline, road or other encumbrance on his land." Therefore, while the term "going rate" is used, in actuality what is being examined are the terms of comparable sales.

Appellant argues, however, that the going rate is an inappropriate appraisal technique, and that the proper approach to be used in valuation of rights-of-way across public lands is the "before and after" method. Appellant directs our attention to the UAS at page 24 which states that:

Under this method [before and after], which usually is the simplest approach, just compensation is arrived at by first estimating the market value of the entire unit before the taking and then subtracting from it the market value of what remains in the owner after the taking. The difference is compensation including both value of land taken and any diminution of value in the remainder.

While the before and after approach is an appropriate appraisal technique, we cannot find that it is the only acceptable method, nor that BLM is required to use it to the exclusion of other appraisal methods. The UAS at page 34 states:

When an easement or servitude over land is condemned for the public use, the appraisal should be in the amount of the difference between the fair market value of the land before and the fair market value immediately after the imposition of the easement. Full consideration should be given to and due allowance made for the substantial enjoyment and beneficial ownership remaining to the owner, subject only to the interference occasioned by the taking and exercising of the easement.

In the case of easements such as those acquired for domestic electric, telephone or cable lines, where there is an established going rate per pole and per-line mile, such transactions may be considered among other market data. In the absence of better evidence of market value, the "before and after" method discussed above should be employed.

Therefore, although the UAS indicates a preference for the before and after method with respect to the condemnation of easements, it recognizes the validity of going rate data.

Clearly, the private sector has not adopted the before and after approach in valuating pipeline rights-of-way. 3/ As pointed out in the Valuation Study at 13, use of the before and after method would result in the value of the right-of-way being "most typically zero, since the market has never indicated \* \* \* that ranches or other large acreage sales sell for more because they are free from rights-of-way or less because of the imposition of a right-of-way." 4/

Thus, if sufficient market data are available to evidence sales of rights-of-way by private landowners, we find no bar to BLM using such evidence to establish fair market value. BLM asserts that sufficient data do exist and that such data were used to establish the going rate in the present cases. 5/

[2] Appellant, however, challenges the use of such data. It asserts that since purchasers of private pipeline rights-of-way ordinarily have the power of eminent domain, evidence of what they pay on the private market may not be employed in reaching a fair market value determination. We cannot agree.

Appellant has presented no evidence that the power to condemn on the part of the entity seeking a right-of-way has so tainted the data obtained from the marketplace as to make it unreliable. BLM states that landowners ordinarily do not object to pipelines, are knowledgeable of the market, and are motivated by an immediate cash return on their lands. On the other hand,

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3/ It is stated in the Valuation Study at 12: "Each of these methods [before and after or part of the whole] are acceptable appraisal approaches involving partial takings; however, except where high value land/or improvements are involved, they are seldom used in the market place for acquisition of oil and gas industry related rights-of-way." The exception seems to be for very high value land. Valuation Study at 21.

4/ The Going Rate Study at 2 notes that the before and after approach "does not allow for recognition of supply or demand for the estate which it is attempting to evaluate. It assumes that the supply and demand forces acting upon easement estates are identical to those acting upon the overlying surface estates. These forces could hardly be less related."

5/ The Valuation Study at 22 states that "[o]ver 500 rights-of-way have been verified and tabulated to date." Appended to the Valuation Study are tables containing the pertinent data for each of the private right-of-way grants. In addition attached to the Solicitor's response (Colorado) to Appellant's Statement of Reasons is Exhibit A, an affidavit of Wayne E. Condreay, BLM Chief State Appraiser, Colorado State Office. He states that approximately 330 transactions were examined in seven western Colorado counties of which 53 were selected for further examination and confirmation.

BLM asserts that pipeline companies frequently have more than one operation in an area, do not desire to alienate landowners, and also are knowledgeable of the market.

Essentially the same argument as that pressed by appellant in this case was dealt with in United States v. 5.00 Acres of Land, 507 F. Supp. 589 (E.D. Tex. 1981), an eminent domain case involving the taking of, inter alia, a 50-foot easement for multiple pipelines. Therein, the United States argued, citing Transwestern Pipeline Co. v. O'Brien, 418 F.2d 15 (5th Cir. 1969), that sales to buyers with the power of eminent domain should not be considered in determining fair market value. The court rejected this argument stating:

To disallow all sales to pipeline companies as the Plaintiff urges would be to disallow all evidence of comparable sales. Transcript at 194; Report at 10. The Commission's duty, imposed by the fifth amendment, was to award just compensation for the property taken. The Commission could not discharge that duty by relying on pure speculation. Olson v. United States, 292 U.S. 246, 257, 54 S.Ct. 704, 709, 78 L.Ed. 1236 (1934). There must be some evidence in the record for the Commission to base its award upon. The Court feels that the Commission admirably dealt with this quandary by considering the comparable sales objected to by the Plaintiff, while keeping the substance of its objection in mind. This is the preferred procedure outlined by the fifth circuit in the recent case of United States v. 320.0 Acres of Land, 605 F.2d 762 (5th Cir. 1979). In that case, Chief Judge Brown, addressing a virtually identical issue, reasoned as follows:

The fairness of an evidentiary exclusion may be entirely different, however, if the exclusion would eliminate all or nearly all of the "most comparable" sales. For then the parties would be forced to resort to sets of "less comparable" sales (sales much further removed in time or distance, or sales of properties with markedly different characteristics), and the very factors that diminish the comparability of these sales vis-a-vis the excluded sales may significantly favor one party and disadvantage the other. Nor would the exclusion necessarily expedite the trial proceedings in these circumstances, for it is likely that more time and effort would be devoted to litigating whether and what sort of adjustments must be made to reflect the greater dissimilarities between the condemned property and the "less comparable" sales.

Thus, where an evidentiary exclusion would eliminate the "most comparable" sales available, the

better course would be to admit the possibly tainted sales with appropriate instructions, permit the parties to present testimony pro and con regarding whether the sales are tainted and how much the taint distorts true market value, and then instruct the factfinder as to what elements of value must be included or excluded from the compensation award.

Id. at 801-02 (footnotes omitted). [Emphasis in original.]

Id. at 596.

We find this same type of rationale appropriate in this case. In addition, while the position urged by appellant represents the general rule that sales involving purchasers with the power of eminent domain should be excluded from consideration, the Valuation Study and Going Rate Study indicate that sales of rights-of-way by private landowners to entities with the power of eminent domain are generally voluntary and are not in connection with or in anticipation of condemnation proceedings. As such, they fall within a recognized exception to the general rule.

See United States ex rel. T.V.A. v. Easement and Right of Way, 405 F.2d 305, 307 (6th Cir. 1968).

Virtually all the market data available in arriving at the going rate in these cases concerns sales in which the buyer had the power of eminent domain. Sales to such buyers, however, do not by reason of that fact alone lose competency or significant probative value, and blindly to exclude consideration of that data would be to frustrate the attempt to determine fair market rental value.

As pointed out by counsel for BLM, the Board's case, Denver & Rio Grande Western Railroad Co., 58 IBLA 4 (1981), is distinguishable. It involved appraisal of a communication site right-of-way, and we held that BLM properly excluded from its comparative analysis rentals paid by condemning authorities. The basis for our holding was that there was no reason to consider such evidence in that case because there were sufficient private transactions available for comparison that did not involve condemning authorities, and, therefore, the other evidence could be safely ignored. That is not the situation in this case. We find that BLM was not barred in these cases from considering sales to buyers with the power of eminent domain, and that such evidence was properly considered in arriving at the going rate.

The going rate reflects a combination of factors that might reasonably be considered by a landowner in determining the price to be asked for the right to use or cross his land. Accordingly, we hold that it is a proper method to be used by BLM in determining fair market rental value for oil and gas industry related pipeline rights-of-way.

Having concluded that the going rate method properly may be used by BLM in appraising oil and gas industry related pipeline rights-of-way,

we must examine the factors considered by BLM in arriving at the going rate and thereafter fair market rental value.

Initially, BLM studied market data and from this data it determined that \$10 per rod was the going rate for oil and gas industry related pipeline rights-of-way. This figure represented a negotiated per rod purchase price, not a rental fee. However, in recognition that BLM grants are in certain respects inferior to private grants, BLM adjusted the going rate figure Valuation Study at 21; Going Rate Study at 15-19. <sup>6/</sup> The adjustment factor was determined at a 2-day meeting of BLM appraisers in May 1981 in Salt Lake City, Utah. As explained in the affidavit of Karl G. Esplin, Chief Appraiser, Bureau of Land Management, dated October 26, 1981, submitted as Exhibit B to Solicitor's response (Colorado) to appellant's statement of reasons:

6. Discussion was had as to the adjustments necessary to reflect differences between the Bureau of Land Management and private grants. The following items of inferiority in regard to a Bureau of Land Management grant were noted:

A. Tenure.

B. Right to reappraise every five years.

C. Annual payments.

D. More restrictive land rehabilitation requirements in some cases.

E. Right of revocation.

F. Right to require changes in line if land is needed for a public project.

G. Right to authorize other grants over the same right-of-way (some private rights-of-way are comparable in this respect).

H. Longer time delay in some cases.

I. Archeological inventory and environmental review requirements.

J. Reimbursement of administrative costs.

7. Certain of the above items are independently required to be paid by an applicant over and above fair market value so are not available for a direct cost adjustment.

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<sup>6/</sup> The need for making adjustments in order to insure comparability is accepted because of the impossibility of selecting fully comparable rights-of-way. See UAS at 10; Dwight L. Zundel, 55 IBLA 218 (1981); Full Circle, Inc., supra.



8. It was recognized that a professional judgment was necessary to attempt to quantify these differences. After discussion, the consensus opinion of the appraisers gathered was that these differences require a 30% reduction from what ever rate emerged from examination of comparable data. No rule requiring use of this figure was imposed upon individual appraisers. However, in the cumulative judgment of the appraisers present, it was reasonable and based on consideration of all data.

On page 7 of its Brief, <sup>7/</sup> appellant states that "[f]or the purposes of these appeals, appellant accepts the initial \$10.00 per rod as representative of what it pays private land owners for rights-of-way." Since we have approved BLM's use of the going rate appraisal method, \$10 per rod may be considered as the starting point for determining fair market rental value in these cases. Appellant makes a number of arguments, however, directed to the adjustment factors and the amount of the adjustments.

Appellant states that initially the \$10 per rod figure should be reduced because the going rate consists of two factors: Consideration for the right-of-way and a damage figure. Appellant asserts that only \$5 per rod is paid for the right-of-way, the other \$5 per rod being for damages that reasonably can be anticipated during construction (see Exh. A attached to Appellant's Brief). Appellant lists such damages as property damage, inconvenience to the property owner, and disruption of the property owner's operations (Brief at 3). Appellant asserts that none of these factors can reasonably be included in the BLM valuation for rental purposes.

BLM does not dispute that the going rate may be broken down into two components -- a base rate and damages. This is explained in the Valuation Study at 16:

The overall going rate is usually divided into two components, a base rate and a rate for damages. Discussions with landowners and industry representatives has led this appraiser to conclude that the breakout of a rate for damages has little bearing on the actual damages sustained other than to acknowledge that there is, in fact, damages to the overall property no matter how intangible. Both parties are looking at the overall rate as the going rate. Breakouts of damages frequently differ among landowners, although the overall rate remains the same. This is at the request of the landowner and is conceivably done for tax purposes. If they have a willing landowner, EPNG [El Paso Natural Gas] will pay damages after construction. In this way, if the project is cancelled and the right-of-way is not needed, they save this portion of the

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<sup>7/</sup> Two documents styled "Brief of Northwest Pipeline Corporation" were submitted by appellant; however, one is actually an elaboration on appellant's statement of reasons and will be referred to as "Brief." The other was a response to BLM's answer and will be referenced as "Reply Brief."

overall rate. Not all landowners agree to this procedure, however. In summary, the market evidence supports the use of the base rate plus the rate for damages as the going rate. [Emphasis in original.]

The question presented is whether there should be an adjustment to the \$10 per rod figure in recognition of the damage component of the going rate, since appellant argues that damages are not applicable to rights-of-way granted by BLM.

Appellant has failed to provide persuasive evidence that such an adjustment is necessary. It appears that the damage figure is not an actual calculation of the damages which might be incurred by a landowner. Appellant asserts that the payments approximate \$5 per rod for the right-of-way and \$5 per rod for damages. The tables appended to the Valuation Study reflect payments generally of \$7 per rod as the base rate with \$3 per rod for damages. However, as indicated above, regardless of the breakout for damages, the overall going rate remains constant. Therefore, apparently the parties view the overall going rate as being fairly constant, but the components are subject to internal adjustment based on external factors, e.g., tax considerations. Moreover, appellant has failed to persuade us that no damage occurs to the public land. Clearly, there is some degree of damage to the public land, regardless of whether it may be quantifiable. We find that BLM is not required to make an adjustment to the going rate for damages as urged by appellant.

[3] Next we must examine the adjustment factor applied by BLM in these cases. In order to prevail on this point appellant must show by substantial and positive evidence that BLM failed to analyze the proper differences between public grants and private grants or that BLM's adjustment factor failed reasonably to reflect the amount of these differences. Cf. Hyatt Lake Homeowners Association, 48 IBLA 159, 163 (1980); Michael S. Deering, 32 IBLA 142, 145 (1977). As set forth above, in recognition of the inferior nature of a right-of-way grant from BLM, the BLM appraisers determined that a 30 percent adjustment figure is applicable.

Appellant takes exception with this figure for a number of reasons. First, appellant states that BLM does not indicate how the 30 percent was arrived at other than to indicate that after "full consideration" the "consensus opinion" was that 30 percent was the proper figure. Appellant also objects that the meeting at which the figure was decided upon was attended only by Government appraisers. Appellant argues that a 30 percent discount figure based on consensus opinion and cumulative judgment cannot stand. Appellant also asserts that BLM did not assess properly the differences between private grants and BLM grants in arriving at the adjustment figure. In support of this assertion appellant submits Exhibits A and B, attached to its brief, which it contends present its evaluation of the appropriate

discount percentage based upon actual costs incurred in connection with rights-of-way granted by BLM versus those granted by private landowners. 8/

BLM contends that it considered all the appropriate differences and that such differences are reflected in the 30 percent adjustment factor.

BLM and appellant agree that there are differences between BLM and private right-of-way grants, and their respective lists of differences are not that dissimilar. Appellant's principal concern is the amount of the adjustment which should be required in recognition of these differences.

The parties agree that the following factors are differences; that they should be considered in arriving at fair market rental value; and that they are difficult to assess and quantity.

1. Tenure - BLM grant is for a term of years; the private grant is in perpetuity.
2. Method of payment - BLM grant requires annual payment with right to reappraise every 5 years; private grant is for lump sum. 9/
3. Revocation and relocation - BLM grant has a right to both by regulation; private grant does not unless negotiated. 10/
4. Method of acquisition (delay) - BLM grant is acquired by application process that is ordinarily more lengthy than securing a private grant by negotiation.

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8/ Exhibit A is an affidavit of W. A. Thomasson, Director, Right-of-Way and Environmental Affairs, Northwest Pipeline Corporation, which contains a tabulation of information comparing direct property acquisition costs for those BLM grants in appeals IBLA 81-966, 81-997, and 81-1025 with various private grants. Exhibit B is an affidavit of Wilson M. Dietrich, appellant's Manager, Right-of-Way Gathering Systems, which sets forth a comparison of preconstruction costs related to acquisition of right-of-way grants on private lands versus BLM administered lands. The affidavit also shows alleged additional construction costs when construction is on public lands.

9/ Annual payments are required by statute, 30 U.S.C. § 185(1) (1976), and requiring annual payments with the possibility of increases results in a grant inferior to a grant involving a lump sum payment for a grant in perpetuity.

10/ Appellant states that in one situation BLM directed a preconstruction relocation due to the possibility that the proposed route would cross an area where the black-footed ferret might live. Appellant admits that such relocations are rare, but asserts that the example given resulted in additional expense of \$130,000.

5. Reclamation - BLM grant has the possibility of more restrictive standards, although private landowners often require reclamation to BLM standards.

Appellant also argues that the width of the respective rights-of-way should also result in an adjustment. It asserts that public grants are normally for rights-of-way between 15 and 50 feet in width, compared to private grants of between 50 and 60 feet in width. It claims that the reduced width affects construction costs and requires the additional expense of applying to BLM for additional workspace. It states that the reduced value cannot be statistically verified, but it points to Exhibit B attached to its brief as support for the proposition that public grants require additional construction expenses.

BLM urges that appellant's assertion of divergent widths is not supported by the factual evidence in these cases. Inspection of the tables appended to the Valuation Study reveals that private right-of-way grants varied between 30 and 60 feet. Perusing the last 50 entries in those tables discloses that 21 out of 50 private rights-of-way were for less than 50 feet with the majority being 30 feet. It appears that most of the BLM rights-of-way involved in the present cases are 50-foot widths. Therefore, we find no reason to require that alleged variations in right-of-way widths be considered as a factor requiring adjustment. We note that the Valuation Study at page 18 indicates that there was no corresponding reduction in price when private right-of-way widths were less than 50 to 60 feet.

Consequently, we must reject appellant's argument that an adjustment is required for BLM rights-of-way because of increased construction costs. While we do not doubt that in certain instances increased construction costs are incurred by appellant, it has failed to establish that BLM right-of-way grants are, in fact, for such widths as would require an adjustment of the going rate.

Another factor over which there is dispute in the cost of completing archeological clearances and other surveys on public lands. Appellant asserts that this is a difference that must be considered in arriving at fair market value.

BLM points out that 30 U.S.C. § 185(1) (1976), requires (1) reimbursement of the United States for administrative and other costs incurred in processing the application; (2) reimbursement of the United States for costs incurred in monitoring the construction, operation, maintenance, and termination of any pipeline; and (3) payment of fair market value of the right-of-way annually in advance. It states that the legislative history confirms that BLM cannot credit cost reimbursement against fair market value: "Section 28(1) requires reimbursement of costs incurred in processing an application. These costs include the cost of preparing an environmental impact statement. It also requires payment annually in advance of the fair market

rental value of the right-of-way or permit." Conference Report No. 924, 93d Cong., 1st Sess. 2, reprinted in [1973] U.S. Code Cong. & Ad. News 2523, 2527. Thus, no dollar adjustment may be made for reimbursement costs even though an appraiser might find a public grant inferior because of such a requirement. Counsel for BLM argues that "[a]rcheological survey costs are part of the costs in processing Northwest's applications," and, therefore, not a subject for adjustment. Solicitor's Response (Santa Fe) at 11. We cannot agree.

Archeological survey costs are borne by the right-of-way applicant. The applicant must pay for the archeological study. The Government does not incur expense to undertake a study. The Government may only be reimbursed to the extent it expends monies to process an application. Since the applicant pays for the study, there can be no costs for which reimbursement is necessary.

Our conclusion is supported by statements in the Valuation Study. Therein it is stated:

It is concluded by this appraiser that quality of rights affects value most significantly when there is a cost to the grantee at the beginning of the grant. The one notable condition in BLM grants that meets this criteria and is not a requirement in private grants, is the condition that an archeological clearance be conducted at the grantee's expense.

Id. at 19.

However, as concluded earlier, BLM terms and conditions that create an immediate cost to the grantee have a definite negative effect on the value of the rights granted. The most significant BLM condition in this category is the requirement that the grantee conduct an archeological clearance at its own expense before the grant is issued. This is usually not a requirement on private land.

Id. at 20.

The Going Rate Study also indicates that adjustment is necessary: "The adjustment mandated by BLM's requirement that an archeological study be done is easily quantified from the market. \* \* \* Adjustments for the archeological study can be taken directly from the market place. A preliminary check shows a typical per-rod cost of sixty cents." Id. at 17, 20.

In support of its claim that adjustment is required for archeological survey study costs, appellant submitted Exhibit B, *supra*. Appellant asserts that Exhibit B shows that in a typical situation the costs associated with right-of-way acquisition -- including the costs for archeological study -- are

approximately six times greater for acquisition of BLM rights-of-way than for private rights-of-way.

Exhibit B provides the following:

The following comparison was drawn from averages using several projects located in gathering areas. A hypothetical model was constructed employing a project of 4-1/2" O.D. buried pipeline being 1.5 miles in length:

#### Pre-Construction costs

##### A. Privately owned lands

1. Fly, map and rough stake route	\$1,200
2. Prepare easement and damage release, negotiate with owner	350
3. Record easement and office expense (index, etc.)	150
4. Notification of construction start	<u>50</u>
Total	\$1,750

##### B. BLM administered lands

1. Fly, map and rough stake	\$1,200
2. Take BLM personnel onto proposed route	2,000
3. Field study for Plan of Operation and E.A.R. mapping, report	1,500
4. Archeological study: per diem, field trip, report, map, etc.	2,200
5. Prepare BLM application with maps, studies; deliver and file with BLM offices	350
6. Process BLM receipt, office expense (index, etc.)	150
7. Pursue grant processing through District and Area Offices-phone calls, letters and hand carry of documents to expedite processing	1,200
8. Pre-construction meeting between BLM personnel and Northwest Pipeline's contractor to review, re-examine, right-of-way	2,500
9. Processing of Proof of Construction document (if no additional requirements)	<u>200</u>

Subtotal \$10,300 [Footnotes omitted.]



Exhibit B also states that BLM grants require \$8,500 in additional construction costs because of the narrower rights-of-way. As noted earlier, we rejected appellant's argument concerning the relative widths of right-of-way grants. Therefore, we are not concerned with this alleged additional expense.

As recognized in the Valuation Study at page 20, BLM terms and conditions that create an immediate cost to the grantee have a negative impact on value. The terms and conditions referred to by BLM, however, are those set forth in the right-of-way grants and those incorporated by reference from 43 CFR 2881.2. 11/ Although appellant has provided evidence in Exhibit B of costs, in addition to archeological survey expenses, that it incurs in acquiring BLM rights-of-way, these projected costs do not appear to be related directly to terms and conditions of the grant. They would more appropriately

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11/ The BLM rights-of-way provide the following in the grant itself:

"Terms and Conditions of Grant

"Pursuant to the authority vested in the undersigned by Order No. 701 of the Director, Bureau of Land Management, dated July 23, 1964 (29 F. R. 10526), a right-of-way, the details of which are shown above, is hereby granted subject to the terms and conditions of the regulations contained in 43 CFR 2800 and to the following:

- "1. All valid rights existing on the date of the grant.
- "2. All provisions of Executive Order 11246 of September 24, 1965, as amended. See Equal Opportunity Clause attached.
- "3. The General Equal Employment Opportunity/Affirmative Action Plan provisions. See attachment.
- "4. The right-of-way grantee will notify the District Manager prior to the date that construction is to begin and the date that construction has been completed. Within 90 days after completion of construction or after all restoration stipulations have been complied with, whichever is later, proof of construction, on forms approved by the Director, shall be submitted to the authorized officer.
- "5. Prior to the beginning of construction, grantee will post the terms and conditions of this right-of-way, along with the stipulations in all field offices in conjunction with this right-of-way. Also, grantee will post the terms and conditions as stated in 43 CFR 2881.2 (44 F.R. 58131, October 9, 1979) with the above information. Grantee will make available copies of the above information to all field inspectors for the purpose of informing the contractors.
- "6. In a manner suitable to the authorized officer, grantee will stamp the BLM serial number on all signs used to identify the right-of-way. This right-of-way will be identified at the point of origin and completion on public land.
- "7. Grantee will make no payment or other consideration to other users, licensees, permittees or lessees for any damage to or loss of natural vegetation, wildlife, mineral material, or for soil disturbance occurring on public lands, which result from operation, development or construction activities carried out under the authority of this right-of-way.
- "8. There is reserved to the United States the right to grant additional

be considered under "method of acquisition (delay)," supra. Since the BLM appraisers were cognizant that the "method of acquisition" required adjustment (Going Rate Study at 16-17), and also that an adjustment was needed to reflect the cost of the archeological study (Valuation Study at 19-20; Going Rate Study at 17), we conclude that the genera of cost considerations represented in appellant's Exhibit B must necessarily have been weighed by the BLM appraisers and reflected in the 30 percent adjustment figure arrived at by them.

Appellant also presented, as Exhibit A to its brief, a statistical comparison of BLM right-of-way grants and private ones. The table contained in that exhibit is set forth in Appendix B herein. The conclusions drawn from that table are as follows:

Based upon the foregoing, I conclude that the rental values assessed by the BLM, as shown above, are substantially in excess of equivalent rental values for private lands rights-of-way. The excess shown is on the order of two-to-one without consideration of excessive costs imposed upon the grantee as reflected in Exhibit B, Affidavit of Wilson M. Dietrich. That Affidavit shows cost differentials on the order of 10.6 to one without consideration of many other costs involved in BLM grants, such as future rental increases, and possible future pipeline relocations.

Based upon the cost considerations shown here and in Exhibit B, it is my opinion that a BLM right-of-way should not be valued at more than 30% of the cost of acquiring private right-of-way, not including damages; that is, 30% of \$5.00 per rod, or \$1.50 per rod, based on fee values, or \$.15375 per rod at 10.25%. It is my further opinion that even at 15 cents per rod, the fair rental value would be overstated greatly.

Id. at 3.

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fn. 11 (continued)

permits or rights-of-way for compatible uses on or adjacent to the land included in this grant.

"9. If in its operations, the right-of-way grantee discovers any historic or prehistoric ruin, monument or site, or any object of antiquity subject to the Antiquities Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. Secs. 431-433), and 43 CFR Part 3, then work will be suspended and the discovery promptly reported to the District Manager. The Bureau will then take such actions as required under the Act and regulations thereunder. When directed by the District Manager, the right-of-way grantee will obtain, at his expense, a qualified archaeologist to examine and if necessary, excavate or gather such ruins or object.

"10. The right-of-way herein granted shall be subject to the express covenant that if other administrative costs and/or additional rentals are due, as indicated by an appraisal, they shall be paid upon request."

Appellant's statistics are somewhat distorted, however, given the fact that the "total cost" shown in column IV for private landowners reflects only the base rate figure (\$5 per rod) and is exclusive of the damage figure (\$5 per rod). Since we have rejected appellant's claim that the damage component of the going rate figure must be eliminated in determining fair market rental values, an accurate picture of the total cost of the private grants would require that the total cost figure be doubled in each case (\$10 per rod instead of \$5 per rod). This then would result in a doubling of the rental per rod per year figures for private rights-of-way. Comparing these figures with the rental per rod per year figures for BLM grants reveals that, rather than the BLM rates being in excess on the "order of two-to-one," the BLM rates are on the order of 30 percent less than the rates for private grants. These statistics, as adjusted, are therefore reflective of BLM's intention to adjust the going rate by 30 percent, and are not supportive of appellant's claim that BLM rates are excessive.

As set forth, supra, appellant and BLM agreed that various items required consideration for adjustment. In addition, BLM appraisers realized that adjustment was necessary for BLM terms and conditions (such as archeological clearance) that created immediate costs to the right-of-way applicant. On the other hand, appellant failed to establish that consideration was required for the damage component of the going rate and for the comparative widths of right-of-way grants by BLM and private landowners.

We must conclude that the record in these cases indicates that BLM considered the proper factors in determining the necessary adjustment. Appellant failed to show that there were comparison factors which BLM did not consider.

With respect to the 30 percent adjustment factor, applied by BLM, we find that appellant failed to present positive and substantial evidence that BLM erred in arriving at that figure. Admittedly, an appellant in a situation such as this has a difficult burden of proof. Indeed, in these cases appellant was required to refute a consensus opinion of professional judgment. Although appellant is highly critical of a decision based on such consideration, we believe that BLM's professional judgment is entitled to deference, notwithstanding that the amount of the adjustment factor is something over which reasonable men can, and obviously do, differ. The information submitted on appeal by appellant, while highlighting the differences between a BLM grant and a private one, does not support a change in the adjustment factor. Appellant has failed to show by convincing evidence that the rental charges imposed by BLM are excessive. Northwestern Colorado Broadcasting Co., supra at 27. 12/

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12/ In fairness to pipeline right-of-way grantees we recommend that future BLM decisions establishing fair market rental value by the going rate method include, or incorporate by reference, information concerning the going rate, the adjustment factor, and fair market rental value. This should include,

Appellant's request for a hearing in this case 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 decisions appealed from are affirmed.

Bruce R. Harris  
Administrative Judge

We concur:

James L. Burski  
Administrative Judge

Gail M. Frazier  
Administrative Judge

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fn. 12 (continued)

but not necessarily be limited to, the specifics of the private grants that serve as the basis for the going rate, the items considered by BLM in arriving at the adjustment factor for the grant and the particular items that resulted in some adjustment, the amount of the adjustment, and the calculations resulting in fair market rental value.

## APPENDIX A

IBLA No.	Right-of-Way	Date of Grant	Annual Rental	Date of BLM Decision
81-941	NM 43325	Feb. 11, 1981	\$145	July 8, 1981
	NM 43326	Jan. 21, 1981	81 (5 years) *	July 10, 1981
	NM 43327	Jan. 23, 1981	126	July 10, 1981
	NM 43364	Jan. 22, 1981	132	July 10, 1981
	NM 43365	Jan. 22, 1981	171	July 8, 1981
	NM 43659	Feb. 11, 1981	64 (5 years)	July 8, 1981
	NM 43660	Jan. 29, 1981	32 (5 years)	July 6, 1981
	NM 43661	Jan. 29, 1981	142 (5 years)	July 6, 1981
	NM 43662	Jan. 30, 1981	32 (5 years)	July 6, 1981
81-966	C 27352-C	Mar. 19, 1981	120	July 24, 1981
	C 27444-H	Jan. 16, 1981	40	July 24, 1981
	C 28022-L	Jan. 16, 1981	50	July 24, 1981
81-980	NM 41042	Aug. 15, 1980	86 (5 years)	July 27, 1981
	NM 41045	Aug. 1, 1980	298	July 29, 1981
	NM 42628	Dec. 9, 1980	38 (5 years)	July 21, 1981
	NM 42630	Dec. 30, 1980	135 (5 years)	July 21, 1981
	NM 42632	Dec. 10, 1980	64 (5 years)	July 21, 1981
	NM 42696	Dec. 30, 1980	298 (5 years)	July 15, 1981
	NM 42699	Dec. 10, 1980	385 (5 years)	July 15, 1981
	NM 43802	Feb. 25, 1981	379 (5 years)	July 14, 1981
	NM 43803	Feb. 26, 1981	407 (5 years)	July 14, 1981
	NM 44269	Mar. 24, 1981	201	July 17, 1981
	NM 44392	Mar. 23, 1981	141 (5 years)	July 24, 1981
	C-23734AK	Apr. 16, 1981	37	Nov. 9, 1981
	C-23734AL	June 3, 1981	87	Nov. 9, 1981
	C-23734AM	June 3, 1981	158	Nov. 9, 1981
	C-23734AN	June 3, 1981	53	Nov. 9, 1981
	C-23734AO	June 3, 1981	99	Nov. 9, 1981
82-219	C-24128AA	Apr. 22, 1981	8	Nov. 9, 1981
	C-24128AE	June 3, 1981	290	Nov. 9, 1981
	C-24128AF	Oct. 7, 1981	12	Nov. 9, 1981
82-220	C-31234	June 16, 1981	12	Nov. 13, 1981
	C-25122BH	May 15, 1981	60	Dec. 1, 1981
82-227	C-25122BG	June 26, 1981	370	Nov. 13, 1981
	C-25122BK	Apr. 16, 1981	220	Nov. 13, 1981
	C-25122BL	Apr. 22, 1981	35	Nov. 13, 1981
	C-25122BM	Aug. 28, 1981	400	Nov. 13, 1981
	C-25122BQ	Sept. 25, 1981	1,550	Nov. 13, 1981
	C-25122BR	Oct. 8, 1981	2,800	Nov. 13, 1981
	C-25122BS	Oct. 20, 1981	500	Nov. 13, 1981

82-297	NM 042634	Mar. 6, 1958	3,525	Nov. 6, 1981
82-298	NM 43366	Jan. 22, 1981	127	Sept. 18, 1981
82-299	NM 0134912	Oct. 31, 1960	250 (5 years)	Oct. 23, 1981
82-300	NM 0121800	Aug. 16, 1960	315 (5 years)	Nov. 2, 1981
82-301	NM 36201	Nov. 25, 1959	4,100	Nov. 6, 1981
82-302	NM 012916	Sept. 9, 1953	4,850	Nov. 2, 1981
82-303	NM 036215	July 12, 1957	105	Nov. 12, 1981
82-306	NM 43664	Feb. 11, 1981	288 (5 years)	Sept. 18, 1981
82-414	C-25122BU	Nov. 12, 1981	33	Dec. 18, 1981
82-418	W 70603	Dec. 4, 1980	55	Jan. 5, 1982
82-476	C-24402AL	Dec. 11, 1981	217	Jan. 15, 1982
82-477	C-23734AS	Dec. 7, 1981	79	Jan. 15, 1982
82-478	C-23734AR	July 29, 1981	1,855	Jan. 29, 1982
82-479	C-24128AG	Dec. 11, 1981	60 (5 years)	Jan. 15, 1982
82-480	C-24122BV	Nov. 12, 1981	75	Jan. 29, 1982
82-481	C-25122BX	Dec. 11, 1981	85	Jan. 15, 1982
82-482	C-25122BW	Dec. 11, 1981	100 (5 years)	Jan. 15, 1982
82-483	C-24402AM	Nov. 12, 1981	36	Jan. 15, 1982
82-484	C-24402AD	June 6, 1981	165	Jan. 21, 1982
82-525	C-23734AQ	July 29, 1981	350	Jan. 12, 1982
82-571	C-25379L	Dec. 29, 1981	15	Feb. 2, 1982
	C-25122CB	Dec. 29, 1981	165	Feb. 2, 1982
	C-24402K	June 12, 1981	100	Feb. 2, 1982
82-609	C-28022L	Mar. 19, 1981	312	Feb. 10, 1982
82-636	C-23734AT	Dec. 16, 1981	550	Feb. 11, 1982
	C-24402AJ	Aug. 13, 1981	208	Feb. 11, 1982
82-710	C-34127	Feb. 9, 1982	1,582	Mar. 12, 1982
82-716	C-24402AN	Jan. 15, 1982	9	Mar. 15, 1982
	C-24492AO	Feb. 5, 1982	9	Mar. 15, 1982
	C-25122BT	Nov. 10, 1981	375	Mar. 15, 1982
	C-25122CA	Jan. 15, 1982	46	Mar. 15, 1982
	C-25122CC	Jan. 15, 1982	280	Mar. 15, 1982
82-723	C-23734AV	Jan. 15, 1982	820	Mar. 15, 1982
	C-23734AY	Feb. 8, 1982	28	Mar. 15, 1982
	NM-51629	Mar. 8, 1982	290 (5 years)	Apr. 9, 1982
	NM-51630	Mar. 8, 1982	125	Apr. 9, 1982
	NM-51631	Mar. 24, 1982	215 (5 years)	Apr. 9, 1982
	NM-51643	Mar. 25, 1982	540	Apr. 9, 1982
	NM-51644	Mar. 25, 1982	105	Apr. 9, 1982
82-773	C-25122CG	Mar. 23, 1982	1,460	Apr. 8, 1982
	C-25122CI	Mar. 23, 1982	655	Apr. 8, 1982
82-774	C-25122CD	Mar. 8, 1982	983	Mar. 30, 1982
82-789	NM-41568	Aug. 19, 1980	450 (5 years)	Mar. 12, 1982

NM-47060	Oct. 6, 1981	175 (5 years)	Mar. 17, 1982
NM-47061	Oct. 6, 1981	380 (5 years)	Mar. 17, 1982
NM-47062	Oct. 6, 1981	54 (5 years)	Mar. 17, 1982
NM-47063	Oct. 6, 1981	180 (5 years)	Mar. 17, 1982
82-796 C-31077E	Mar. 19, 1981	22	Mar. 29, 1982
C-31228	Aug. 27, 1981	38	Apr. 14, 1982
82-834 NM 45863	June 3, 1981	335 (5 years)	Apr. 21, 1982
NM 45864	June 26, 1981	110 (5 years)	Apr. 21, 1982
NM 45865	June 26, 1981	345 (5 years)	Apr. 21, 1982
NM 45866	June 26, 1981	29 (5 years)	Apr. 21, 1982
NM 45299	June 4, 1981	225 (5 years)	Apr. 21, 1982
NM 45191	June 4, 1981	520	Apr. 21, 1982
NM 51643	Mar. 25, 1982	540	Apr. 21, 1982
82-838 C 24402AP	Mar. 8, 1982	98	Apr. 21, 1982
82-867 C 23734AX	Apr. 1, 1982	271	May 5, 1982
C 23734AU	Apr. 15, 1982	56	May 5, 1982
C 25122CL	Mar. 23, 1982	12	May 5, 1982
C 24128Z	Apr. 30, 1980	158	May 5, 1982
82-876 NM 45860	June 30, 1981	175 (5 years)	May 6, 1982

\* 43 CFR 2803.1-2(a) provides "that where the annual fee is \$100 or less, an advanced lump-sum payment for 5 years for right-of-way grants \* \* \* may be required."

## APPENDIX B

I	II	III	IV	V	VI	VII	VIII
IBLA #S	LANDOWNER & LOCATION	LENGTH RODS	COST	IN TOTAL COST	RENTAL R/W WIDTH	RENTAL PER ACRE	RENTAL PER ACRE PER ROD PER YEAR PER YR.
1.	81-966 Colorado BLM	61	\$ 399	35'	493	\$49.35	\$.654
2.	81-966 Colorado BLM	72	500	35'	524	52.32	.694
3.	81-966 Colorado BLM	182	1201	35'	500	49.84	.66
4.	81-997 Colorado BLM	85	723	35'	642	64.17	.85
5.	81-997 Colorado BLM	309	2620	35'	639	64.11	.85
6.	81-1025 Wyoming BLM	91	609	50'	352	35.33	.6693
7.	81-1025 Wyoming BLM	137	917	50'	530	35.33	.6693
8.	81-1025 Wyoming BLM	152	1017	50'	351	35.23	.6693
9.	Colorado Private	375	1875	60'	220	22.00	.50
10.	Wyoming Private	30	130	50'	225	23.33	.43
11.	Wyoming Private	553	2665	50'	224	22.42	.50
12.	New Mexico Private	21	104	60'	220	22.00	.50
13.	New Mexico Private	276	1381	60'	220	22.00	.50
14.	New Mexico Private	207	1033	60'	220	22.00	.50

