

MEYRING LIVESTOCK CO.

IBLA 82-96

Decided November 30, 1982

Appeal from a decision of the Colorado State Office, Bureau of Land Management, determining annual rental charges for irrigation ditch right-of-way. C-29987.

Affirmed.

1. Appraisals -- Rights-of-Way: Appraisals

An appraisal of a right-of-way for an irrigation ditch, granted pursuant to section 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1976), will be upheld on appeal if no error is shown in the appraisal method used by BLM and the appellant fails to show by convincing evidence that the annual rental charge is excessive.

APPEARANCES: David Meyring, General Partner, Meyring Livestock Company, Walden, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Meyring Livestock Company has appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated September 22, 1981, determining annual rental charges amounting to \$225 for an irrigation ditch right-of-way, C-29987, commencing April 14, 1981.

On April 14, 1981, appellant was granted a 50-foot wide and 5,700-foot long right-of-way for the construction, operation, and maintenance of the West Arapahoe Reservoir Feeder Ditch No. 2, for a term of 30 years, pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1976). The irrigation ditch would be situated in secs. 1 and 2, T. 5 N., R. 81 W., sixth principal meridian, Jackson County, Colorado.

Section 504(g) of FLPMA, 43 U.S.C. § 1765(g) (1976), provides, in relevant part, that the holder of a right-of-way "shall pay annually in advance the fair market value thereof as determined by the Secretary granting \* \* \* such right-of-way." See 43 CFR 2803.1-2. On April 14, 1981, BLM prepared an "Appraisal Report" (AR) which assessed the "fair market value" of appellant's

right-of-way as of that date. For purposes of appraisal, the right-of-way, comprised of 6.5 acres, was considered as a partial taking of a larger parcel (1,427 acres).

In appraising the subject land, BLM used the "comparable sales approach" set forth in Uniform Appraisal Standards for Federal Land Acquisitions (UAS) (1973), established by the Interagency Land Acquisition Conference and adopted by the Department. 603 DM 1.3. Arm's-length transactions for neighboring lands were compared to arrive at a comparable sale price for the subject land. Three sales were selected, ranging in size from 436 acres to 1,520 acres, and rated on the basis of their comparability to the subject land in terms of time, location, access, physical characteristics, and overall characteristics. BLM noted that the subject land was "inferior to sale 56-13 at \$370 per acre (land only) and superior to sale 56-5 at \$116 per acre," and concluded that "[g]iving consideration to all pertinent factors, the land value of the fee ownership described within the right-of-way is estimated to be: \$300 per acre" (AR at 4-5). Further, BLM stated that it considered the fair market value of the irrigation ditch right-of-way to be 95 percent of the fair market value of the fee simple. Finally, this per acre market valuation was multiplied by the acreage in the right-of-way (6.5 acres) and then by a rate of return factor of 12.25 percent to determine the annual rental charge.

In its statement of reasons for appeal, appellant contends that the annual rental charge "does not reflect the fair market value of the land involved," arguing that the right-of-way will not appreciably diminish and may possibly enhance the "productive capacity" of the land and that the irrigation ditch uses only a "small portion" of the right-of-way. <sup>1/</sup> In addition, appellant argues that where the use and occupancy of a right-of-way is exclusively for an irrigation project, 43 CFR 2802.1-7(c)(1) (1979) provides for "no charge."

[1] The general standard for reviewing appraisals is to uphold the appraisal if there is no error in the appraisal method used by BLM or the appellant fails to show by convincing evidence that the charge is excessive. Western Slope Gas Co., 61 IBLA 57 (1981), and cases cited therein. Ordinarily, in the absence of compelling evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal. Id.

The thrust of appellant's argument is that BLM did not give appropriate consideration to the elements of the "before and after" method of appraisal. The "before and after" method, as described in the UAS on page 24, involves "[f]irst 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." The result is a

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<sup>1/</sup> Appellant also argues that the right-of-way will be used for agricultural purposes and that BLM has used appellant's land for 10 years for an access road "without any compensation of any kind to Meyring." We fail to see how either of these arguments relates to the issue at hand, i.e., the appraised value of right-of-way C-29987.

figure which includes "the independent value of the part taken together with any so-called 'severance damages' or benefits," i.e., the diminution or enhancement in value of the remainder of the land. Id.

While the BLM appraiser did not use the "before and after" method per se, i.e., he did not calculate the value of the land before and after the imposition of the right-of-way, he did adjust the figure resulting from the "comparable sales approach" using the elements of the "before and after" method.

In particular, the BLM appraiser considered whether there was any change in the value of the remainder of the land, but concluded that "[t]here are no severance damages or special benefits to the remainder because of the right of way" (AR at 5). Appellant apparently disputes this conclusion, stating that the right-of-way will not appreciably diminish and may possibly enhance the productive capacity of the land. However, appellant has offered no supporting evidence.

In addition, the BLM appraiser considered the independent value of the land covered by the right-of-way in terms of the degree of encumbrance on the rights in the fee simple, using the figure of 95 percent. Appellant also disputes this, arguing that the irrigation ditch uses only a small portion of the right-of-way. Appellant, however, has failed to consider that while the ditch is only 12 feet wide, BLM has granted the full 50-foot width of the right-of-way not only for the operation of the ditch, but its construction and maintenance. In a memorandum to the Director, BLM, dated April 15, 1975, the State Director, Colorado, BLM, stated, at 6, that the 95 percent degree of encumbrance was to be used in cases of "[t]otal surface occupancy." This approach was followed by the BLM appraiser in this case (AR at 2). Appellant has offered no evidence that the rights granted to it are not equivalent to 95 percent of the rights in the fee simple. Western Slope Gas Co., 21 IBLA 119 (1975).

Appellant's final contention is that it is entitled to no annual rental charge because the use and occupancy of the right-of-way is exclusively for an irrigation project. The regulation cited by appellant, 43 CFR 2802.1-7(c)(1) (1979), provided, in relevant part:

(c) No charge will be made for the use and occupancy of lands under the regulations of this part:

(1) Where the use and occupancy are exclusively for irrigation projects, municipally operated projects, or non-project or Rural Electrification Administration projects, or where the use is by a Federal governmental agency.

See 35 FR 9637 (June 13, 1970). However, on July 1, 1980, the Department published amended regulations implementing the right-of-way provisions of FLPMA. These regulations eliminated the requirement that no charge be assessed where "use and occupancy are exclusively for irrigation projects." See 43 CFR 2803.1-2(c); Tri-State Generation and Transmission Association, Inc., 63 IBLA 347 (1982). Moreover, while section 504(g) of FLPMA, supra,

and the Departmental regulations provide for free use in the case of certain enumerated rights-of-way, the legislative history of FLPMA indicates that this is limited to situations where the holder is the Federal government or where the charge is token and the cost of collection unduly large. San Miguel Power Association, Inc., 64 IBLA 172 (1982).

Appellant has not demonstrated that the appraisal method used by BLM is erroneous or that the annual rental charge for its right-of-way is excessive. Accordingly, we uphold BLM's assessment of an annual rental charge in the amount of \$225.

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.

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James L. Burski  
Administrative Judge

We concur:

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Anne Poindexter Lewis  
Administrative Judge

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Edward W. Stuebing  
Administrative Judge