

BIG HORN CANAL ASSOCIATION

IBLA 83-472

Decided October 18, 1983

Appeal from determination of the Wyoming State Office, Bureau of Land Management setting rental for right-of-way W-59856.

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

Sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g), indicates that under certain circumstances the Secretary of the Interior may charge less than fair market value for annual right-of-way rental, including no charge. However, no reduction or waiver of the fee based on fair market rental will be made if the right-of-way user is a cooperative or similar organization whose principal source of revenue is customer charges.

APPEARANCES: William R. Shelledy, Jr., and Elmer J. Scott, Esq., Worland, Wyoming, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Big Horn Canal Association has appealed from a determination of the Wyoming State Office, Bureau of Land Management (BLM), setting fair market rental for Big Horn Canal right-of-way W-59856.

The right-of-way, granted August 31, 1981, pursuant to Title 5 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1976), is for a siphon, drain structure, and canal in tracts 63, 65, and 68, T. 47 N., Rs. 92-1/2 W. and 93 W., T. 48 N., Rs. 92-1/2 W. and 93 W., Washakie County, Wyoming. With respect to rental fee the grant stated: "Initial fee is \$25 for a one-year period, subject to appraisal. Fee to be determined by appraisal of the grant."

BLM's appraisal initially listed an annual rental of \$515. On January 20, 1983, this figure was adjusted to \$365 to reflect a change in interest rate (see appraisal report at 7 and memorandum dated March 24, 1983, from Chief, Branch of Appraisal, Wyoming State Office, BLM, to District Manager, Worland entitled Rental Valuation, Big Horn Canal Association, W-59856).

By letter dated January 21, 1983, BLM requested payment of rental, stating as follows:

A minimum rental payment of \$25.00 was received on 8/25/81 and the right-of-way granted subject to appraisal to determine fair market rental. The billing includes rental for the period 8/31/81 to 8/30/82 and 8/31/82 to 8/31/83. The amount of \$730.00, less the advanced payment of \$25.00, or a total of \$705.00 is the amount of rental now due.

Appellant contends on appeal that it is a nonprofit corporation providing a benefit for the public and should be exempted from the rental requirement. Appellant states that it has operated exclusively as a nonprofit corporation since it was organized in 1911. Appellant asserts it has been recognized as a tax exempt entity by the Internal Revenue Service (IRS). A letter from the District Director, IRS, dated November 14, 1974, is attached to the statement of reasons. The letter is to the effect that the IRS recognized appellant as tax exempt for the period ended October 31, 1973. Appellant further states that its sole function is to maintain a canal for the delivery of water to its stockholders and that a profit has never been realized.

[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.

This Board has 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. San Miguel Power Association, Inc., 71 IBLA 213 (1983); Socorro Electric Cooperative, 64 IBLA 65 (1982); Tri-State Generation and Transmission Association, Inc., 63 IBLA 347, 89 I.D. 227 (1982). 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's application for the right-of-way was originally filed with BLM on June 22, 1977. By letter dated July 19, 1977, BLM requested appellant to submit certain other items to facilitate processing the application. The letter stated in pertinent part:

In addition to the information submitted, we also need the following items:

1. A copy of your company's Articles of Incorporation, duly certified by the proper state official of the state where it was organized.

* * * * *

3. Since your association is registered as a nonprofit corporation, no rental fee will be assessed by this Bureau for the right-of-way at such time as it is approved. The right-of-way, however, would be subject to the nondiscrimination provisions of Title VI of the Civil Rights Act of 1964. Therefore, the enclosed Assurance of Compliance must be executed by an authorized official and returned to this office. A copy of the Assurance should be retained in your files.

While it appears that, at the time that additional information was requested, BLM was contemplating awarding the right-of-way without charge, there is sufficient evidence for the determination that the appellant was subject to assessment of the fair market value rental. The "Articles of Incorporation" provide that the corporate purpose is to acquire title to certain water appropriations and an irrigation system "for the use and benefit of any and all purchasers, holders and owners of the shares of said corporation." The shares of the corporation are assessable and represent the right to use a proportionate share of the water under appropriations owned by the corporation.

The assertion that the provisions of 43 CFR 2803.1-2(c) should be found applicable to electric cooperatives has been presented to this Board on a number of occasions. This Board has uniformly held that the exception found in 43 CFR 2803.1-2(c)(1) specifically applies to such cooperatives even though they are qualified as nonprofit corporations for tax purposes. San Miguel Power Association, Inc., supra; Northern Electric Cooperative, Inc., 66 IBLA 121 (1982); Tri-State Generation and Transmission Association, Inc., supra. The purposes of the appellant corporation, the services that it renders, and the method of payment for these services are so similar to that of a nonprofit cooperative electric corporation that application of the statutory and regulatory standards regarding charges for rights-of-way should be the same.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's determination setting rental for right-of-way W-59856 is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Will A. Irwin
Administrative Judge

