

Editor's note: Reaffirmed and Clarified -- See Northwest Pipeline Corp. (On Reconsideration), 83 IBLA 204 (Oct. 18, 1984)

NORTHWEST PIPELINE CORP.
(ON RECONSIDERATION)

IBLA 81-941, et al.

Decided November 1, 1983

Petition for reconsideration of the Board's decision in Northwest Pipeline Corp., 65 IBLA 245 (1982), on appeal from decisions of the 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.

Reconsideration granted. Prior Board decision set aside; Bureau of Land Management decisions set aside and cases remanded.

1. Appraisals--Rights-of-Way: Generally--Rights-of-Way: Act of February 25, 1920

Where, while a petition for reconsideration is pending before the Board of Land Appeals, BLM acknowledges petitioner's contention that there are conflicting and inconsistent practices within BLM as to the appraisal method used to determine fair market rental values for natural gas pipeline rights-of-way, granted pursuant to the Act of Feb. 25, 1920, as amended, 30 U.S.C. § 185 (1976), and BLM proposes to resolve the conflicts and inconsistencies by means of a study team to develop and recommend an acceptable method for arriving at the estimated fair market annual rental for BLM rights-of-way grants, the Board may set aside its prior decision and the BLM decisions under appeal and remand the cases to BLM to apply the approved appraisal method adopted following the completion of the study team report.

APPEARANCES: James M. Day, Esq., William J. Slosberg, Esq., Gail Lindsay Simmons, Esq., and Bruce A. McDonald, Esq., Washington, D.C., for appellant; Sheryl L. Katz, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Northwest Pipeline Corporation has petitioned for reconsideration of the Board's decision styled Northwest Pipeline Corp., 65 IBLA 245 (1982), in which we affirmed decisions by the New Mexico, Colorado, and Wyoming State

Offices, Bureau of Land Management (BLM), determining annual rental charges for natural gas pipeline rights-of-way. 1/ Appellant is the holder of numerous rights-of-way for 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). The methodology adopted by BLM in the subject cases to determine the annual rental charges has been termed the "going rate" approach. Appellant argued, 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. In Northwest Pipeline Corp., supra, we found that although the before and after appraisal technique is an appropriate appraisal method, it is not the only acceptable method; we held at page 252 that "going rate" "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."

In applying the "going rate" method, in the cases in question, BLM, recognizing that BLM grants are in certain respects inferior to private grants, determined that a 30 percent downward adjustment of the going rate figure is appropriate. Although appellant took exception to the 30 percent figure for a number of reasons, this Board stated, "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." Northwest Pipeline Corp., supra at 262.

Appellant has asked us to reconsider our holding, primarily contending in the petition for reconsideration that (1) there were numerous substantial and material errors of law and fact alleged by BLM and erroneously adopted by this Board; (2) there is a conflict of standards and practices within the Department as to the method used to determine fair market rental value and the application of individual methods; and (3) a principal case upon which the Board relied has since been reversed. 2/ For the above reasons, and because

1/ See Northwest Pipeline Corp., supra, at Appendix A for a listing of the cases that were consolidated for the decision.

2/ Appellant's contention and subsequent discussion is not entirely accurate. United States v. 5.00 Acres of Land, 507 F. Supp. 589 (E.D. Tex. 1981), an eminent domain case, was used by the Board to support the principle that sales to buyers with the power of eminent domain "do not by reason of that fact alone lose competency or significant probative value." Northwest Pipeline Co., supra at 252. The Board continued that "blindly to exclude consideration of that data would be to frustrate the attempt to determine fair market rental value." The Fifth Circuit in United States v. 8.41 Acres of Land, 680 F.2d 388 (5th Cir. 1982), reversed the district court case because it found that on the facts of that partial-taking case, the before and after method of valuation was the most appropriate. The Fifth Circuit at page 395 n.9 specifically stated, however, that it was not addressing the question of whether comparable pipeline right-of-way sales were "hold up value" rather than "fair market value," because it determined that the District Court had erred in establishing the highest and best use of the land as pipeline right-of-way. Thus, although the case cited by the Board was reversed, it was not reversed on the point relied upon by the Board.

this is a case of first impression which could be dispositive of hundreds of appeals and involves public interest considerations, appellant urges the Board's reconsideration en banc and requests a hearing before an Administrative Law Judge.

The Office of the Solicitor, on behalf of BLM, urges this Board to deny appellant's request for reconsideration and argues that (1) reconsideration may only be granted in extraordinary circumstances and (2) appellant has failed to allege any extraordinary circumstances.

[1] The appraisal standards and criteria used for all lands under the supervision of BLM should be as uniform as practicable. American Telephone & Telegraph Co., 25 IBLA 341, 358 (1976). Appellant contends, however, that with respect to natural gas pipeline rights-of-way conflicting and inconsistent practices exist within BLM as to the method used to determine fair market rental value of those rights-of-way and as to the application of individual methods.

Section 28 of the Mineral Leasing Act, as amended, provides, 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. Thus, 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. In two BLM market reports, T. Heisler, Valuation Study for Oil and Gas Industry Related Rights-of-Way, 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), the authors conclude that the use of the "going rate" appraisal method results in BLM receiving the fair market rental value required by law. ^{3/} The Solicitor's Office in its "Response on the Merits to Petition for Reconsideration of Northwest Pipeline Corporation," at pages 5-6, states that in some instances where the "before and after"

^{3/} The Valuation Study and Going Rate Study had different approaches to establishing the "going rate," though both studies agreed that it is the most appropriate method to use. The Valuation Study stressed that the rate was established by the market and that items such as width of right-of-way in reality had no impact on the "going rate" price. The Valuation Study seemed to conclude that only the "going rate" price was relevant and determined that the 30 percent downward adjustment of that price provided sufficient compensation to equalize the private and Federal rights-of-way. The Going Rate Study, however, seemed to look at the "going rate" as a part of the data that should be evaluated along with other appraisal features mentioned in the Uniform Appraisal Standards for Federal Land Acquisitions (1973) under comparable sales. The Going Rate Study recommended, for example, that each right-of-way be inspected, and that each appraisal should be a direct comparison to specific, confirmed, and inspected sales of rights-of-way in the private sector. It analyzes the approach to take to reconcile the differences between private grants and Federal grants. It does not provide for a 30 percent downward adjustment. The Going Rate Study does say, however, that some of its suggested approaches may be reconsidered once BLM has been involved with the "going rate" method. Appellant attacks both studies as being inaccurate and replete with errors of fact and law (Appellant's Petition for Reconsideration at 12-13).

method of appraisal was used, "the federal government was receiving as little as one-tenth to one-fifteenth as much in payment for its rights-of-way as were similarly situated private landowners. This meant that BLM was in derogation of its statutory duty to collect rental at fair market value from holders of rights-of-way." Yet, appellant asserts that only the three states before us in this case, Colorado, New Mexico, and Wyoming, use the "going rate" method of appraisal.

In 1982, appellant surveyed the BLM State Offices in Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, and Utah, and it states that it was advised that none of them apply the "going rate" method. ^{4/} In fact, appellant establishes that in 1982 three states, Utah, Idaho, and Oregon issued pipeline rights-of-way to appellant for far less than the "going rate" method of appraisal would have realized. Where there is such a disparity in the results of the "before and after" method and the "going rate" method, it would appear that either some state offices are charging far more than fair market rental value, or some state offices are accepting far less than fair market rental value. In either case this would mean, in the Solicitor's words, that BLM is "in derogation of its statutory duty" to collect fair market rental value for rights-of-way. BLM acknowledges in Instruction Memorandum No. 83-836, dated September 16, 1983, that its work on this case has "disclosed wide variances between States in determining the rent for rights-of-way (R/W)."

Appellant asserts that not only is BLM inconsistent in the method of appraisal which it uses to determine fair market rental value, but that BLM is also inconsistent in the application of the individual methods. BLM, in the instruction memorandum referred to above, states that although BLM appraisers agreed in 1980 to a 30 percent downward adjustment as "generally appropriate for the 'inferiority' of the BLM R/W grant as compared to R/W easements obtained from the private sector," some states are adhering to the 30 percent adjustment and others "may vary as they see fit." BLM then acknowledges, "There appear to be differences in practice among the States in making comparative adjustments between the market data * * * and the BLM R/W grant * * *."

In response to the disclosures brought about by this case, BLM stated in Instruction Memorandum No. 83-836, as follows:

In order to achieve uniformity and consistency within the BLM, a study group is to be assembled to recommend a solution or solutions to this problem. The problem presented to the Study Team is to develop and recommend an acceptable method for arriving at the estimated fair market annual rental for BLM R/W grants.
[Emphasis in original.]

^{4/} Appellant's Petition for Reconsideration at page 22 states:

"On November 1 and 2, 1982, Mr. W. A. Thomasson, Director, Right-Of-Way and Environmental Affairs for Northwest and President-Elect of the International Right-Of-Way Association, surveyed the BLM State Offices in Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon and Utah and was advised that none of these State Offices follow the 'going rate' or '30% adjustment factor.' Therefore, there was no 'consensus opinion' reached at the [BLM appraisers] meeting (Appendix E)."

Given BLM's recognition of the problem and its creation of the study team to address the problem, it would be inappropriate for the Board to take action in this case that might conflict with the appraisal method presently being developed by the BLM study team. Consequently, in light of BLM's expressed intent to develop and recommend an acceptable method to be applied uniformly to meet BLM's statutory obligation to receive fair market rental value for rights-of-way, we will set aside our decision in Northwest Pipeline Corp., supra, and set aside the BLM decisions and remand the cases to BLM. When the study team has completed its work and the appraisal method and its application has been adopted by BLM, the three State offices whose cases are before us in these appeals should review the cases we are remanding and apply the approved appraisal approach to those cases. Appellant will have the right to appeal those decisions at that time.

The establishment of the study team provides BLM with an excellent opportunity to evaluate the kinds of industry concerns that were expressed in appellant's petition for reconsideration in this case. Even though the appropriate method to achieve fair market rental value is to be determined by the Secretary, not industry, the Secretary must have a reasonable basis for his determination. Therefore, BLM should proceed to develop a carefully reasoned analysis to support the conclusions of the study team which are ultimately adopted by BLM as the proper appraisal method. 5/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted, the Board's decision in Northwest Pipeline Corp., supra, is set aside; the BLM decisions are set aside and the case files are remanded for action consistent with the policies adopted pursuant to the study team recommendations.

Bruce R. Harris
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

James L. Burski
Administrative Judge

5/ BLM might alleviate some of the problems that have developed in the appraisal of the fair market rental value of natural gas pipeline rights-of-way by including the public in its development of the proper appraisal method. BLM possibly could benefit, for example, by adopting the approach it used with the Wilderness Inventory Handbook, and providing for public review of and comment on the study team recommendations prior to BLM implementation. Alternatively, the study team recommendations might be developed into regulations, thus providing the public with a formal comment and review period. Such public input would provide BLM a broad basis upon which to make a reasonable final decision.

