

A. KEITH BARBEN

IBLA 84-161

Decided June 19, 1984

Appeal from a decision of the Utah State Office, Bureau of Land Management, imposing higher rental charges for a water pipeline right-of-way. U-41837.

Reversed.

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

Where there is no appraisal to support a readjusted rental rate for a water pipeline right-of-way, a decision imposing the readjusted rate must be reversed.

APPEARANCES: A. Keith Barben, pro se.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

By decision dated October 20, 1983, the Utah State Office, Bureau of Land Management (BLM), gave notice to A. Keith Barben that the rental charge for right-of-way U-41837 (for a culinary water pipeline) would be increased to \$180 for each successive 5-year term as of September 4, 1984. 1/ The decision states that

[r]egulation, 43 CFR 2803.1-2(d)(1) provides for the review of the fair market value for the use and occupancy of the public lands. The review supports the imposition of the following rental rate: \$180/5 years term or \$900/remaining term of grant. Please advise this office as to which rental term is desired. 2/

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1/ The BLM decision states that the right-of-way was granted on Sept. 5, 1979. The grant itself shows the actual date to be Sept. 25, 1979. The right-of-way expires 30 years from the date of the grant. and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1982).

2/ The decision under which appellant's right-of-way was granted clearly states the authority for the grant to be Title V of the Federal Land Policy

Effective July 31, 1980, the right-of-way regulations were revised. 45 FR 44518, 44537 (July 1, 1980). Pursuant to section 504(g) of FLPMA,

A memorandum dated October 14, 1983, from the staff appraiser, Utah State Office, to the district manager, Richfield, entitled "Consideration of Rental Charges, Right-of-Way Application U-41837" is contained in the record. That memorandum states as follows:

Rental charges for the subject right-of-way have been considered. It involves 2.78 acres of public land. Applying current policies for establishing rental charges, the following calculations show the annual, 5 year, and lump sum rental options that may be charged for the right-of-way grant:  
Option No. 1

$$\frac{3}{\text{acreage (rounded)}} \times \frac{\$12}{\text{rate per acre}} = \frac{\$ 36}{\text{annual rental}}$$

Option No. 2 (For low value rights-of-way)

$$\frac{36}{\text{annual rental}} \times \frac{5}{\text{years}} = \frac{\$ 180}{\text{5 year rental}}$$

Option No. 3

$$\frac{36}{\text{annual rental}} \times \frac{25}{\text{term of grant or remaining period}} = \frac{\$ 900}{\text{lump sum rental}}$$

At the bottom of the memorandum is the following notation: "This is not an appraisal, and no inspection of the property has been made." The memorandum was concurred in by a reviewing appraiser in the Utah State Office.

fn. 2 (continued)

43 U.S.C. § 1764(g) (1982), the regulation, 43 CFR 2803.1-2(d), was added. That regulation provides, in pertinent part:

"§ 2803.1-2 Rental fees.

"(a) The holder of a right-of-way grant or temporary use permit, except as provided in paragraphs (b) and (c) of this section, or when waived by the Secretary, shall pay annually, in advance, the fair market value as determined by the authorized officer. Said fee shall be based upon the fair market value of the rights authorized in the right-of-way grant or temporary use permit, as determined by appraisal by the authorized officer, provided however, that where the annual fee is \$100 or less, an advanced lump-sum payment for 5 years for right-of-way grants and 3 years for temporary use permits may be required. The lump-sum for use and occupancy of lands under these regulations shall not be less than \$25.00.

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"(d) Rental fees may be initiated or adjusted whenever necessary to reflect current fair market value:

"(1) As a result of reappraisal of fair market values which shall occur at least once every 5 years, or (2) as a result of a change in the holder's qualifications under paragraph (c) of this section. Reasonable notice shall be given prior to imposing or adjusting rental fees pursuant to this paragraph. Decisions on fees are subject to appeal pursuant to § 2804 of this title."

The date of the original grant of the right-of-way was September 25, 1979, and rental of \$25 was listed in the grant as being due at the beginning of each 5-year period. A memorandum dated August 3, 1979, from the Chief, State Appraiser, BLM, to Chief, Branch of Land and Minerals Operations, BLM, is included in the case file. That memorandum states:

Rental charges for the subject right-of-way have been considered. It involves 2.78 acres of public land. Applying current policies for establishing rental charges, the following calculations show the land value that would be necessary in order for the rental to exceed the \$25/5-year regulatory minimum charge:

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|--|-----------|
| 1. Annual minimum rent: \$25/5             | \$ 5      |
| 2. Cost of Appraisal (annualized): \$300/5 | \$ 60     |
| 3. Total: 1 & 2                            | \$ 65     |
| 4. Right-of-way value: \$65/.09625         | \$ 675.32 |
| 5. Fee value: \$675.32/.40                 | \$1688.31 |
| 6. Per acre value: \$1688.31/2.78          | \$ 607.31 |

The computations demonstrate that the land value of the subject right-of-way would have to be more than \$607 per acre to warrant spending the time and money in appraising it. Recent transactions in the area of the subject indicate a range in value of \$50/ acre to \$150/ acre for land similar to the subject. In view of this, an appraisal would not be reasonable. Therefore, it is recommended that the annual rent be \$5.00, or \$25.00 per 5 year period in accordance with CFR 2802.1-7(b). 3/ [Emphasis in original.]

In his statement of reasons for appeal, appellant contends that no provision for reappraisal is found in the right-of-way grant, although he acknowledges that the right-of-way was granted subject to certain terms and conditions, one of which was that the right-of-way grant was subject to "[a]pplicable regulations in 43 CFR, Subpart 2801, 2802, 43 CFR Part 17." Appellant further contends that both the rental increase as determined by BLM in its decision of October 20, 1983, and the original \$25 per year rental fee are excessive and unfair. As to the \$25 fee, appellant states that he "should have been issued a free use permit to begin with" because "[t]his project was simply an extension of an existing free use permit." In support of this statement, appellant asserts that "[t]here has been a pipeline delivering

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3/ Section 310 of FLPMA, 43 U.S.C. § 1740 (1982), directs the Secretary of the Interior to issue regulations to carry out the purposes of the Act applicable to public lands and provides that prior to the promulgation of such regulations, lands subject to the Act were to be administered under existing rules and regulations concerning such lands, to the extent practicable. The regulation, 43 CFR 2803.1-2, did not become effective until July 31, 1980. 45 FR 44518 (July 1, 1980). The regulation, 43 CFR 2802.1-7 (1979), in effect when the right-of-way was issued, provided, as does 43 CFR 2803.1-2, that the charge for use and occupancy of lands shall not be less than \$25 per 5-year period.

culinary water from this spring since 1930 and we just built our home further to the west and had to extend the pipeline to reach us." <sup>4/</sup> As to the proposed rental, appellant states that the \$180 figure equals a \$3 per month fee. He asserts that the towns and cities in Piute County, where his property is located, only charge their water users \$5 to \$7 per month to furnish water. Unlike users of "city" water, he owns the spring, he paid for and installed his own pipeline, and he is required to maintain it, he argues.

Appellant asserts that "rangeland without irrigation water attached to farm land is being sold at \$125 to \$200 per acre." Appellant computes the total cost to him during the course of a 30-year lease as being \$440.50 per acre. <sup>5/</sup> Appellant concludes that he will pay two to three times more for 30 years' rental than he would pay if he bought the land.

Finally, appellant asserts that there is no impact of any kind on the public lands since he does not use or occupy the surface of the land and because the 1-inch pipe is buried 3 to 4 feet, it has been covered, and the disturbed area has been replanted and restored to better than original condition. <sup>6/</sup>

[1] Appraisals of rights-of-way will be upheld if there is no error in the appraisal methods used by BLM and the appellant fails to show convincing evidence that the charges are excessive. Donald R. Clark, 70 IBLA 39 (1983). Conversely, where a BLM appraisal has not followed criteria established for calculating the fair market value of rental for a right-of-way, the case will be remanded to BLM for further consideration. Western Slope Gas Co., 10 IBLA

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<sup>4/</sup> Appellant further states:

"We have checked with many of the towns and ranchers in this area which have both culinary and irrigation pipelines crossing the BLM. These pipelines are as large as 14" and cross much greater distances than ours and yet they pay nothing. They have free use permits.

"Why are we being singled out and charged such an outrageous fee for our 1" culinary line going such a short distance?"

We note that under the regulation, 43 CFR 2802.1-7 (1979), no charge for use and occupancy of lands was allowed in certain special situations including municipally operated projects, nonprofit projects, where the use was by a Federal agency, and those where the use and occupancy was exclusively for irrigation projects and for livestock watering. See 43 CFR 2802.1-7(c)(1) and (2). Under the right-of-way rental provisions of FLPMA, 43 U.S.C. § 1764(g) (1982), and 43 CFR 2801.1-2(c), we have 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. See, e.g., Wellton-Mohawk Irrigation & Drainage District, 79 IBLA 308 (1984); San Miguel Power Association, Inc., 71 IBLA 213 (1983). Although others "in the area" may pay no charge for irrigation pipelines, etc., crossing BLM land, no such option is available to appellant, a private person using public lands.

<sup>5/</sup> Appellant computes the area covered by the right-of-way and divides \$925 by the acreage.

<sup>6/</sup> Appellant notes that about one-half of the right-of-way is under the middle of a public road which pre-existed the pipeline.

345 (1973). Or, thirdly, where an appellant offers evidence challenging the basis of a BLM appraisal, the Board may, in its discretion, order a hearing. Colorado-Ute Electric Association, 79 IBLA 53 (1984). None of these circumstances clearly describe this case, however.

The October 20, 1983, decision in this case simply stated "the review [under 43 CFR 2803.1-2(d)(1)] supports the imposition of the following rental rate." The only "review" in the record is the October 14, 1983, memorandum, which stated in terms that it was not an appraisal, and which contradicts the 1979 determination that an appraisal would not be worthwhile and that the minimum rate of \$25 for 5 years should be charged. The memorandum gave no basis for a \$12 per acre rate beyond the statement that it was "applying current policies for establishing rental charges." There was no appraisal in accordance with 43 CFR 2803.1-2(d). Without an appraisal the October 20, 1983, decision must be reversed. <sup>7/</sup>

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Utah State Office is reversed.

Will A. Irwin  
Administrative Judge

We concur:

C. Randall Grant, Jr.  
Administrative Judge

Bruce R. Harris  
Administrative Judge

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<sup>7/</sup> We note that appellant asserts that land values range from \$125 to \$200 per acre. The 1979 memorandum stated that land values would have to be greater than \$607 per acre to justify the time and expense of an appraisal. Under the circumstances it appears that minimum rental would continue to be appropriate.

