

WILLIAM F. BIEBER

IBLA 84-261

Decided July 2, 1984

Appeal from decision of Montrose District Office, Colorado, Bureau of Land Management, determining rental charges for access road right-of-way C-34090.

Set aside and remanded.

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

BLM properly requires the holder of a right-of-way for an access road to pay its fair market rental value in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), but where there is no evidence that BLM considered the question of whether the holder is entitled to a reduced fee because a valuable benefit is provided to the public by maintenance and improvement of the road, the case will be remanded to BLM to consider that question.

APPEARANCES: William F. Bieber, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

William F. Bieber has appealed from a decision of the Montrose District Office, Colorado, Bureau of Land Management (BLM), dated December 1, 1983, determining the rental charges for the 5-year period beginning February 1, 1982, for his access road right-of-way C-34090.

Effective February 1, 1982, BLM granted a nonexclusive right-of-way to appellant for a term of 30 years for an access road situated in the SE 1/4 sec. 7, T. 14 S., R. 90 W., sixth principal meridian, Gunnison County, Colorado, from the Minnesota Creek Road to appellant's Bear Paw Springs Ranch, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1982). The right-of-way was to be 40 feet wide and 1,900 feet long, encompassing an area of 1.7 acres. The right-of-way was issued subject to an appraisal of its fair market value. By memorandum dated November 4, 1983, a BLM realty specialist informed the Montrose District Office that using an annual rental figure of \$45.90 per acre for a linear right-of-way, the annual rental charge for appellant's right-of-way was \$80 or \$400 for a 5-year period. See 43 CFR 2803.1-2(a). Appellant was notified of this determination in the December 1983 BLM decision, which

required payment "within 30 days of receipt of this decision," less a \$25 advance rental deposit. Appellant was required by BLM to pay the rental or "the right-of-way shall be subject to cancellation."

In his statement of reasons for appeal, appellant objects to the rental charge determined by BLM as "excessive," arguing that it is a single-lane dirt road which has been in existence since 1917 and that the Department has never charged rental for its use. Appellant also contends that the road, which he maintains, is the shortest route into the national forest, which borders his property, and that the Government should pay for such maintenance. Appellant states that he will agree to maintain the road and allow access across his property in return for free use of the road.

[1] Section 501 of FLPMA, 43 U.S.C. § 1761 (1982), provides that the Secretary is authorized to grant a right-of-way over public lands for the purposes of "roads." In addition, section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1982), requires that the holder of a FLPMA right-of-way "shall pay annually in advance the fair market value thereof as determined by the Secretary granting \* \* \* such right-of-way."

Appellant contends first that he should not be required to pay a rental charge for his use of the access road because no rental has been charged in the past. However, appellant has misconstrued the nature of a right-of-way. The road has apparently been in existence since 1917. Nevertheless, in order to ensure his continued use of the road, appellant is required to obtain a right-of-way over that road from BLM, and in return appellant must pay for that use. The right-of-way represents a right of continued access. 1/ Payment of an annual rental in such circumstances is mandated by section 504(g) of FLPMA, supra.

Appellant also argues that his maintenance of the road should be set off against the rental charge. We note that appellant is required, pursuant to section 502(c) of FLPMA, 43 U.S.C. § 1762(c) (1982), and under the terms of the right-of-way grant, specifically special stipulation No. 2, to maintain the right-of-way. Such maintenance is to be only "commensurate with the particular use requirements" of appellant. Id.

However, section 504(g) of FLPMA, supra, does provide for certain instances in which the Department may charge a reduced fee or no fee for a FLPMA right-of-way. See also 43 CFR 2803.1-2(c). We can discern only one instance in which appellant may arguably be entitled to a reduced fee, i.e., "[w]hen a holder [of a right-of-way] provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary." 43 CFR 2803.1-2(c)(3). As noted, supra, appellant's right-of-way grant

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1/ We note that appellant has not argued that, by virtue of longstanding public use of the access road, the road has become a public highway under State law pursuant to 43 U.S.C. § 932 (1982) (repealed by section 706(a) of FLPMA, P.L. 94-579, 90 Stat. 2793 (1976), subject to valid existing rights). Rather, the road remains public land, subject to the jurisdiction of BLM.

required appellant to maintain the access road, which maintenance included reshaping the road surface, barrow ditches, waterbars, and culverts, and reseeding disturbed areas "following road improvement." The right-of-way granted was nonexclusive, and section 1(b) of the grant document specifically reserved the right to require common use of the right-of-way granted. To the extent that this maintenance benefits the public, directly or indirectly through use of the road by the Forest Service and the public at large, as well as appellant, there may be a valuable benefit within the meaning of 43 CFR 2803.1-2(c)(3). There is no evidence that BLM considered the question of a reduced fee for this reason. <sup>2/</sup> Therefore, we must set aside the December 1983 BLM decision and remand the case to BLM for consideration of possible public benefits which might result from appellant's improvement and maintenance of the road. We note that appellant has provided no other evidence supporting the conclusion that there was error in the appraisal of the fair market value for his access road right-of-way. See Pacific Power & Light Co., 65 IBLA 50 (1982).

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 set aside and the case is remanded to BLM for further consideration consistent with this decision.

R. W. Mullen

Administrative Judge

We concur

Wm. Philip Horton

Chief Administrative Judge

Will A. Irwin  
Administrative Judge

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<sup>2/</sup> However, under no circumstances would appellant be entitled to no fee, consistent with the intent of Congress in enacting section 504(g) of FLPMA, *supra*. See Bench Lake Irrigation Co., 78 IBLA 305, 308 (1984).

