

COLORADO INTERSTATE GAS CO.

IBLA 87-389

Decided August 14, 198

Appeal from a decision of the Area Manager, Green River Resource Area, Wyoming, Bureau of Land Management, determining annual rental charges for compressor station right-of-way. W-70326.

Affirmed.

1. Appraisals -- Mineral Leasing Act: Rentals -- Oil and Gas: Pipelines: Rights-of-Way -- Rights-of-Way: Appraisals -- Rights-of-Way: Oil and Gas Pipelines

A BLM appraisal of a right-of-way for a compressor station will be affirmed on appeal where the right-of-way holder has not demonstrated that it was error for BLM to use a market survey of comparable transactions involving the issuance of private rights-of-way rather than the fee schedule for linear rights-of-way or the "before and after" appraisal method.

APPEARANCES: Karen L. Pauley, Esq., Colorado Interstate Gas Company, Colorado Springs, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Colorado Interstate Gas Company (CIG) has appealed from a decision of the Area Manager, Green River Resource Area, Wyoming, Bureau of Land Management (BLM), dated February 20, 1987, determining the annual rental charges for a compressor station right-of-way, W-70326.

Effective August 22, 1980, BLM issued to CIG a 30-year right-of-way pursuant to section 28 of the Mineral Leasing Act, as amended, 30 U.S.C. § 185 (1982) for the Canyon Creek Field compressor station located on .459 acres of land situated in the SW 1/4 SW 1/4 sec. 35, T. 13 N., R. 101 W., sixth principal meridian, Sweetwater County, Wyoming. The compressor station was to be used in connection with CIG's natural gas pipeline. The grant provided that the rental fee for the first 5-year period was \$ 25, subject to adjustment "in accordance with the provisions of 43 CFR 2803.2-1(d) [(1979)] to reflect current fair market value."

By decision dated March 22, 1985, BLM notified CIG that, as a result of a reappraisal, the annual rental charge for the subject right-of-way was being increased to \$ 200 for the 1-year period from August 22, 1985, through August 21, 1986. The record indicates that the annual rental charge was, in accordance with Instruction Memorandum (IM) No. WY-83-105, dated

December 10, 1982, taken from the suggested rental for "First User Sites of 5 Acres or less" contained in a "Right of Way Fee Schedule" (No. RRS-84), dated January 30, 1984. According to the fee schedule, the schedule had been prepared by the Wyoming State Office appraisal staff, "based on market research and analysis, as presented in a report dated and approved December 6, 1982, and an update dated January 30, 1984." However, at the time of the March 1985 BLM decision, the record did not contain any evidence supporting establishment of the fee schedule. CIG appealed from the March 1985 BLM decision.

By decision dated November 18, 1986, the Board set aside the March 1985 BLM decision because, in the absence of any evidence regarding the basis for calculation of the suggested rental in the fee schedule, the record "does not contain sufficient information to determine whether the adjusted rental rate was based upon fair market value as determined by appraisal." Colorado Interstate Gas Co., 94 IBLA 306, 307 (1986). Accordingly, the Board remanded the case to BLM in order that it might issue a new decision determining the annual rental charge and "illustrating [with appropriate documentation] how it arrived at its adjusted rental rate." Id.

In her February 1987 decision, the Area Manager, based on an "enclosed analysis and supporting data for our rental schedule valuation of first user [non-linear] sites of less than five acres," again determined that the annual rental charge for the subject right-of-way is \$ 200, and, accordingly, affirmed the assessment of a rental charge of that amount for the 1-year period from August 25, 1985, through August 24, 1986, and assessed a corresponding rental charge for the 1-year period from August 25, 1986, through August 24, 1987. The Area Manager's February 1987 decision was specifically based on an analysis and supporting data attached to a February 2, 1987, memorandum from a BLM staff appraiser to the Chief, Branch of Appraisal, Wyoming State Office, BLM. That memorandum, which was approved by the Acting Chief, Branch of Appraisal, on February 2, 1987, recommended a rental rate of \$ 200 for first user non-linear sites of 5 acres or less where that rate was based on a review of "[n]early fifty leases and sales of similar types of first user sites."

Attached to the February 1987 memorandum is an updated analysis supporting the establishment of a rental rate in the amount of \$ 200 for first user non-linear sites of 5 acres or less (hereinafter referred to as the Appraisal Analysis). The avowed purpose of the analysis was "to determine if market rental values for non-linear right-of-way grants are uniform enough that a single rental rate for identified areas may be continued and supported" (Appraisal Analysis at 1). In order to fulfill that purpose, the analysis reviewed 47 leases and sales of small portions (5 acres or less) of larger tracts of land operated primarily for agricultural production in rural areas of the state of Wyoming. The leases and sales, which were transacted from 1978 to 1986, were for various uses, including compressor stations. 1/ Pertinent data regarding each of the transactions was appended

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1/ The various uses for which land was leased or sold in sizes of 5 acres and less included "microwave stations, passive reflectors, tank batteries,

to the analysis. This data indicates that the transactions reviewed were almost entirely leases. Using the data, the analysis assessed the effect on rental values of certain characteristics of the lease or sale, viz., time, terms, location, types of use, access, availability of utilities, whether appurtenant to an existing right-of-way, and intangible influences. 2/

The analysis concluded that there was a great variance in annual rental rates, attributable in part to certain characteristics, but that "by far the most frequent rental value is between \$ 200 and \$ 300 (inclusive)" (Appraisal Analysis at 8). Thus, the analysis concluded:

[S]ome point within this range appears to be the most typical rental amount negotiated in the market place, and within the limitations of a schedule valuation process, accurately represents a sound conclusion of fair market value.

By their very nature, schedule valuations rely more on the broader trends and analyses than on individual comparisons. They are applicable if the data expresses a point or value of "central tendency." The user of the schedule bears the burden of the benefit of any doubt in the rentals, thus a conservative value is warranted.

The final conclusion is that the scheduled rental concluded in the 1983 study remains valid and is supported by more current data. The estimated market rental for small sites of less than 5 acres lying in the rural area of the state is \$ 200.00. *Id.* [Emphasis in original.]

CIG has appealed from the Area Manager's February 1987 decision.

In its statement of reasons for appeal (SOR), appellant contends that the method employed by BLM to determine the annual rental charges for the subject right-of-way, described as the "going rate" method, was not designed to arrive at the fair market rental value of the right-of-way as required by statute and violates other statutory and constitutional provisions, and that BLM should have used the recently adopted fee schedule for linear rights-of-way or, failing that, the "before and after" method of appraisal (SOR at 1). Accordingly, appellant requests the Board to remand the case to BLM for a recalculation of annual rental charges in accordance with either method. Assuming that the Board affirms the method used by BLM, appellant contends that the Board must, in any case, remand the case to BLM for a recalculation of annual rental charges, giving special consideration to the differences

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fn. 1 (continued)

compressor stations, metering stations, well pads, pig launcher sites, cathodic protection fields, flare stacks, water tanks, and mobile radio repeaters" (Appraisal Analysis at 1).

2/ For comparison purposes, the prices of the sales included in the review were converted to an annual rental rate using a 10-percent rate of return.

between BLM and private rights-of-way. Appellant submits no independent appraisal of the subject right-of-way and, moreover, suggests no fair market rental value based on its own analysis. Finally, appellant requests a hearing. BLM has filed no response to appellant's SOR.

[1] Under section 28(1) of the Mineral Leasing Act, as amended, 30 U.S.C. § 185(1) (1982), the holder of a right-of-way issued pursuant to that statute is required to "pay annually in advance the fair market rental value of the right-of-way \* \* \*, as determined by the Secretary." See also 43 CFR 2883.1-2 (incorporating by reference 43 CFR 2803.1-2). Where a fair market rental value has been determined by BLM in accordance with authority delegated by the Secretary, it is well established that the Board will not overturn that determination unless error is demonstrated in the appraisal method employed or the rental charges are otherwise shown to be excessive. High Country Communications, Inc., 105 IBLA 14, 16 (1988); Delbert Jones, 100 IBLA 289, 291 (1987); Lawrence Dupuis, 99 IBLA 174, 176 (1987); Northwest Pipeline Corp., 93 IBLA 293, 295 (1986).

Appellant's principal contention is that BLM should use the fee schedule adopted by the Forest Service for linear rights-of-way in determining the annual rental charge for non-linear rights-of-way where there is no "rational basis" for differentiating the two types of rights-of-way. The fee schedule adopted by the Forest Service was effective December 5, 1986. See 51 FR 44014 (Dec. 5, 1986). We note, however, that subsequent to the filing of appellant's SOR, BLM promulgated a similar fee schedule for linear rights-of-way, effective August 7, 1987. See 52 FR 25811 (July 8, 1987). Both fee schedules were the result of a coordinated review by BLM and the Forest Service of rentals charged for rights-of-way crossing Federal lands.

However, in the course of promulgating the fee schedule with respect to linear rights-of-way, BLM specifically provided that the rental for non-linear rights-of-way "shall be based on either a market survey of comparable rentals, or on a value determination for specific parcels or groups of parcels." 43 CFR 2803.1-2(c)(3)(i) (52 FR 25819 (July 8, 1987)). Accordingly, BLM implicitly disavowed establishment of a general fee schedule for non-linear rights-of-way. Moreover, this regulatory pronouncement has the effect of precluding the Board from specifically authorizing the use of the fee schedule in the case of non-linear rights-of-way. 3/ Western Slope Carbon, Inc., 98 IBLA 198, 201 (1987).

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3/ There is also a serious question whether non-linear rights-of-way which encompass less than 1 acre of land, such as is the case herein, have a per acre rental value which can be represented in any fee schedule and can then, multiplied times that acreage, result in a figure which reflects the fair market rental value of the right-of-way. A review of the 47 transactions covered in the Appraisal Analysis reveals that there is no apparent correlation between the size of a private right-of-way and its annual rental value, especially where the right-of-way is in the sub-acre category. BLM's own analysis revealed that "[s]ites below approximately 5 acres appeared to be priced upon a per-site basis, whereas leases and sales larger than 5 acres appeared to be priced upon a per acre basis" (Appraisal Analysis at 1-2).

In the alternative, appellant contends that the proper appraisal method is the "before and after" method where the present situation is comparable to that of the condemnation of a portion of a larger tract of land for a particular public purpose and that method is recognized as the preferred approach in such situations. Under the "before and after" appraisal method, there is subtracted from the fair market value of the entire tract of land prior to the taking, the fair market value of what remains in the owner after the taking, thereby awarding to the owner the value of the land taken and any diminution in the value of the remainder.

In Northwest Pipeline Corp., 65 IBLA 245, 249-50 (1982), we recognized the acceptability of using the "before and after" appraisal method for valuing linear rights-of-way issued for natural gas pipeline purposes, but concluded that it was not the only acceptable approach. However, we also noted, as identified by BLM, certain deficiencies in the application of this method to the valuation of rights-of-way for rental purposes. In particular, BLM had stated that, in focusing exclusively on the effect of issuance of a right-of-way on the value of a larger tract of land, an appraisal would ignore the separate value attributed to the right-of-way apart from its effect on that larger tract and, most likely, would result in a zero valuation where such a right-of-way generally would have no demonstrable effect on the value of the larger parcel. *Id.* at 250. As the Department has otherwise stated:

[The "before and after"] method has little practical use for setting rental payments because the function is to show damages to the landowner and not the benefit to the user. It also assumes that rent is directly related to land value and that the type of right-of-way use has no bearing on the rent required. 50 FR 2698 (Jan. 18, 1985).

Appellant has not shown that application of the "before and after" method in the case at hand would not result in those deficiencies cited above.

The comparable lease method of appraisal, which is essentially the method employed by BLM herein, is in any case the preferred approach and appellant has, as will be shown *infra*, demonstrated no reason for not permitting BLM to use that method. See Denver & Rio Grande Western Railroad Co., 58 IBLA 4, 5 (1981); Michael S. Deering, 33 IBLA 142, 145 (1977). Thus, we conclude that it was not impermissible for BLM to use the comparable lease, rather than the "before and after," appraisal method.

The approach adopted by BLM for valuing the subject right-of-way purports to be a "market survey of comparable rentals," in accordance with 43 CFR 2803.1-2(c)(3)(i). Such an approach is in essence the comparable

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fn. 3 (continued)

This corresponds to the situation with similar communications site rights-of-way, which are considered to have a fair market rental value independent of size. See American Telephone & Telegraph Co., 77 IBLA 110, 122 (1983).

lease method of appraisal where the fair market rental value of a right-of-way is derived from a review of the rentals charged for comparable leases, adjusting for any differences between the subject right-of-way and the selected comparable leases.

Appellant challenges this approach, contending that it was not designed to arrive at the fair market rental value of the subject right-of-way, where that value is defined as the "amount in cash, or on terms reasonably equivalent to cash, for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desires but is not obligated to use." American Telephone & Telegraph Co., 25 IBLA at 349-50.

Appellant argues that BLM's approach could not yield a fair market rental value where the transactions relied upon were not between parties of equal bargaining strength because the party acquiring the right to use private land had the "power to condemn" the land for its desired use (SOR at 2). Appellant has not identified which transactions relied upon by BLM are considered by appellant not to be a reliable indicator of fair market rental value. We note that only some of the transactions involved a party who would have had the "power to condemn."

Nevertheless, we have held that the fact that one party to a private transaction had eminent domain power does not necessarily render the resulting transaction not suitable for use by BLM in the absence of some evidence that the transaction was thereby tainted and, as such, should not be excluded especially where exclusion would frustrate the determination of fair market value. Northwest Pipeline Corp., 65 IBLA at 250-52. <sup>4/</sup> Appellant has submitted no proof that the fact that some of the transactions relied upon by BLM involved parties with the power of eminent domain required exclusion of the transactions from the determination of the fair market rental value of the subject right-of-way. Accordingly, we do not consider reliance on such transactions as improper. See Pacific Power & Light Co., 65 IBLA 50, 54-55 (1982); see also Northwest Pipeline Corp. (On Reconsideration), 83 IBLA at 218 (Burski, A.J., concurring).

Next, appellant argues that the transactions relied upon by BLM are not a reliable indicator of the fair market rental value of the subject right-of-way where they did not involve "like land for like purposes" (SOR at 2). It is clear that the transactions relied upon by BLM involved a variety of uses from compressor stations to well pads. Nevertheless, we conclude that

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<sup>4/</sup> The Northwest Pipeline decision was subsequently set aside by the Board on reconsideration. See Northwest Pipeline Corp. (On Reconsideration), 77 IBLA 46 (1983). That subsequent decision, however, was expressly premised on the Board's recognition that, in view of the fact that various BLM state offices were using different appraisal techniques, BLM had undertaken to develop a standard appraisal method, and, thus, it was inappropriate for the Board to "take action \* \* \* that might conflict with the appraisal method presently being developed." Id. at 50. The decision did not disparage the conclusions reached in the prior opinion.

appellant has not demonstrated that reliance on such transactions resulted in error in the BLM appraisal.

Next, appellant contends that the private transactions relied upon by BLM are not a reliable indicator of the fair market rental value of the subject right-of-way where the rights granted by BLM and private landowners vary fundamentally and that, in any case, BLM must take such differences into account when appraising that right-of-way (SOR at 2, 3). Appellant details various terms and conditions of BLM and private right-of-way transactions which differ, including those with respect to the nature of the grant (whether exclusive or non-exclusive and revocable or irrevocable), the term of the grant (whether in perpetuity or 30 years), consideration paid (whether lump sum or annual not subject to reappraisal or annual subject to reappraisal), and assignability (whether free or restricted).

The premise of appellant's contention that it was improper to use private transactions to value the subject BLM right-of-way and that the differences between such rights-of-way must be taken into account in any event is that the differences in the character of the rights granted has a marked effect on value. However, appellant has presented no evidence to support this postulation. Nor can we subscribe to that theory in the absence of any evidence that it is so.

The record indicates that BLM considered the effect on value of the terms and conditions of the private transactions relied upon. See Appraisal Analysis at 3. No express conclusion is drawn. In any case, appellant has offered no evidence that such terms have a significant effect on value to the contrary. Likewise, appellant has not demonstrated that the incorporation of BLM terms and conditions in private transactions would have any effect on the accepted value in such transactions. Thus, we can find no basis for concluding that the BLM appraisal was rendered invalid by BLM's failure to take the differences between BLM and private rights-of-way into account, or for ordering BLM to make some adjustment in the rental value of the subject BLM right-of-way in order to account for such differences where appellant has not shown that such differences would be determinative of value. Northwest Pipeline Corp., 93 IBLA at 296 n.3; Mountain States Telephone & Telegraph Co., 80 IBLA 128, 131-32 (1984).

Appellant also contends that, even given application of the comparable lease appraisal method, BLM must, in determining the fair market rental value of the subject BLM right-of-way, adjust the rental values of the comparable private transactions downward where a portion of the rental values was designed to constitute liquidated damages for any damage to the private land, and BLM requires payment apart from annual rental charges for any damage to the public land. Otherwise, as appellant argues, "[b]y reflecting damages in the rental, BLM has effectively charged [appellant] for them twice" (SOR at 9).

We conclude that no adjustment of the rental values of the comparable private transactions is warranted where there is no evidence that such values contain any damage component. Appellant has simply not demonstrated that any liquidated damages are reflected in the rentals charged by private

landowners. Even assuming that there is a damage component, we are not persuaded that the rental values of comparable private transactions must be adjusted downward. See Northwest Pipeline Corp., 65 IBLA at 254-55.

Appellant also contends that it has been denied procedural due process where it has not had an opportunity "to rebut BLM's evidence" (SOR at 10). It is well established that appellant's procedural due process rights have been satisfied by appeal to the Board. Santa Fe Pacific Railroad Co., 90 IBLA 200, 220 (1986). Appellant has had ample opportunity before the Board to present any and all arguments and evidence rebutting BLM's appraisal of the subject right-of-way.

Finally, appellant requests a hearing. Because appellant has failed to establish that there is any material issue of fact, we decline to grant appellant's hearing request. See Woods Petroleum Co., 86 IBLA 46, 55 (1985).

In summary, appellant has not demonstrated that the appraisal method employed by BLM to determine the fair market rental value of the subject right-of-way was in error. In addition, appellant has not shown that the annual rental charges for the subject right-of-way determined by appraisal are excessive. We find that the charges are now supported by the master appraisal included in the record, and therefore hold that they are not arbitrary and capricious or without a rational basis. We therefore conclude that BLM properly determined the annual rental charges for appellant's Canyon Creek Field compressor station right-of-way, W-70326.

Accordingly, 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.

John H. Kelly  
Administrative Judge

I concur:

Franklin D. Arness  
Administrative Judge.

