

TUCSON ELECTRIC POWER CO.

IBLA 88-350, 88-355

Decided September 22, 1989

Appeals from decisions of the San Simon Area Manager, Safford District Office, Arizona, Bureau of Land Management, increasing the rental amount for linear rights-of-way A-7585 and A-6932.

Affirmed in part, set aside and remanded in part.

1. Appraisals--Rights-of-Way: Generally--Rights-of-Way: Act of March 4, 1911--Regulations: Generally--Regulations: Validity--Rights-of-Way: Appraisals

The regulations at 43 CFR 2801.4 provide that a right-of-way grant issued on or before Oct. 21, 1976, shall be covered by the regulations in 43 CFR Part 2800. In turn, 43 CFR 2803.1-2(c)(1) provides, with limited exceptions, that an annual rental payment must be submitted in accordance with the per-acre rental schedule set out therein. A proposed per-acre rental schedule by state, county, and type of linear right-of-way use was published in the Federal Register, and comments were sought. The final rules, also published in the Federal Register, set out a county-by-county rental schedule. Rules and regulations reasonably adapted to the administration of a congressional act, and not inconsistent with any statute, have the force and effect of law, and this Board has no authority to declare such rules and regulations invalid. There being no showing that the Department exceeded its statutory authority when setting the rental rate, this Board is obligated to accept the use of those rates. BLM's decision to use rate zones and its use of the rental schedule as the basis for calculating the rental obligations were proper.

2. Appraisals--Rights-of-Way: Generally--Rights-of-Way: Act of March 4, 1911--Rights-of-Way: Appraisals

When setting the yearly rentals for existing linear rights-of-way not previously subject to the rental schedule set out at 43 CFR 2803.1-2(c)(1)(i), the regulatory provisions found at 43 CFR 2803.1-2(c)(2)(ii)

require a rental adjustment if the new rental exceeds \$100 and is more than a 100-percent increase over the current rental. The amount of the increase in excess of the 100-percent increase must be phased in by equal increments, plus the annual adjustment, over a 3-year period. A BLM decision establishing a new rental rate for a linear right-of-way, and using the rate schedule for the first time, will be set aside and remanded if BLM fails to phase in the amount of the rental increase in excess of 100 percent of the current rental pursuant to 43 CFR 2803.1-2(c)(2)(ii).

APPEARANCES: Melvyn O. Smoot, Superintendent, Land Management, Tucson Electric Power Company, Tucson, Arizona, for appellant; Ray A. Brady, District Manager, Safford District Office, Safford, Arizona, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE MULLEN

Tucson Electric Power Company (TEP) has appealed from two March 16, 1988, decisions of the San Simon Area Manager, Safford District Office, Arizona, Bureau of Land Management (BLM), increasing the rental for rights-of-way A-6932 and A-7585. 1/

On April 25, 1972, TEP (formerly known as Tucson Gas & Electric Company) applied for a 330-foot-wide right-of-way for two electrical transmission lines. 2/ On April 26, 1973, BLM issued right-of-way A-6932, pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1976). 3/ This 220-foot-wide right-of-way was issued to facilitate construction of one 345-kV transmission line across BLM lands in Arizona. Right-of-way A-6932 has a term of 50 years and has been amended several times since its issuance.

Right-of-way A-6932 provided that BLM would notify TEP in writing of the rental amount at 5-year intervals. BLM then conducted an appraisal which established the annual rental at \$1,504, and on April 23, 1973, TEP

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1/ The appeal from the rental increase for right-of-way A-6932 was docketed as IBLA 88-355, and the appeal from the rental increase for right-of-way A-7585 was docketed as IBLA 88-350. The appeals have been consolidated because the issues are identical.

2/ The transmission lines were to commence at the San Juan Generating Station near Farmington, New Mexico, and traverse a total of 427 miles, crossing BLM, private, and New Mexico and Arizona state lands, the Gila and Apache National Forests, the Zuni Indian Reservation, and Navajo Tribe land, and terminate at the Vail Substation southeast of Tucson, Arizona. TEP's plans called for immediate construction of one line and the construction of the second at some future date.

3/ The Act of Mar. 4, 1911, was repealed, effective Oct. 21, 1976, by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2793 (1976).

paid \$6,430 as rental for the first 5 years of the right-of-way. <sup>4/</sup> The right-of-way was reappraised in February 1978, and TEP paid the adjusted rental of \$6,365 for 5 years (\$1,563 per year) on April 6, 1978. On April 14, 1983, TEP paid an additional 5-year rental of \$6,365.

In May 1973, TEP filed an application for an additional 110-foot-wide right-of-way for a second transmission line parallel and adjacent to the transmission line in right-of-way A-6932. On July 15, 1976, BLM issued right-of-way A-7585, with a width of 220 feet, for the construction of the additional 345-kV transmission line on public lands located in Arizona. <sup>5/</sup> Right-of-way A-7585 runs parallel to and overlaps right-of-way A-6932 by 110 feet. The terms of right-of-way A-7585 are virtually identical to right-of-way A-6932, and right-of-way A-7585 has also been amended several times.

By letter dated October 10, 1977, BLM notified TEP that the annual rental for right-of-way A-7585 would be \$1,578, and that, pursuant to section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1982), the rental had to be paid annually rather than for an extended term. TEP has paid the \$1,578 rental annually. <sup>6/</sup>

By letters dated August 19, 1987, BLM notified TEP that, effective August 7, 1987, a new rental fee schedule was in effect, and that rental rates would be determined from this new schedule. BLM also informed TEP that the rental period would change from the anniversary date of the individual right-of-way grant to a calendar-year rental period. BLM explained that the rental amounts for the existing right-of-way grants would be adjusted to reflect the calendar-year billing period by prorating the months remaining in the calendar year against a full year's rental. A copy of the new regulations mandating the described changes was enclosed with each notice.

By separate decisions, dated March 16, 1988, BLM informed TEP that the rental rates for its rights-of-way had been reviewed pursuant to the regulations contained in 43 CFR 2800. Based on the new rental schedule, BLM established an \$8,754 annual rental for each right-of-way. <sup>7/</sup> As noted in

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<sup>4/</sup> The 1973 appraisal established the 5-year rental amount by multiplying the annual rental by a factor of 4.2756. The record also contains a corrected page 1a of the appraisal, dated Oct. 12, 1973, establishing the rental at \$1,441 per year, or \$6,161 for 5 years.

<sup>5/</sup> This right-of-way was also issued pursuant to the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1976). See footnote 1.

<sup>6/</sup> The record contains rental receipts for all the rental payments except for the payment due in July 1983.

<sup>7/</sup> According to BLM acreage calculations for the two rights-of-way (which have not been contested), each right-of-way encompassed 3.71 acres in Cochise County, 448.12 acres in Graham County, and 361.31 acres in Greenlee County, Arizona. Based on the rental schedule, Cochise and Graham Counties are classified as Zone 2 counties with a \$4.62 per acre rental. Land in Greenlee County is classified as Zone 5 acreage with a rental rate of \$18.45 per acre. See 52 FR 25821 (July 8, 1987) for the Linear Rights-of-Way Rental Schedule.

its earlier letters, the guidelines also required the conversion to a calendar billing period. BLM prorated the annual rental amount from the grant anniversary rental due date through December 31, 1988, and determined that TEP owed \$5,836 rental for right-of-way A-6932 and \$4,377 for right-of-way A-7585. The decisions noted that the next rental due date for both rightsof-way would be January 1, 1989.

On appeal TEP raises two issues. First, it argues that, because the two rights-of-way overlap by 110 feet, the rental charge for the overlap is excessive and unfair. TEP alleges that it discussed the overlap with the BLM offices in Safford and Phoenix, Arizona, and that the District Managers informed it that fees were based on linear distance, not on acreage, so the overlap would not affect the fees as established. <sup>8/</sup>

Second, TEP challenges BLM's determination that Greenlee County warrants a Zone 5 rating. TEP contends:

It was noted in the Federal Register, (Volume 52, No. 130/ Wednesday, July 8, 1987/Rules and Regulations) "that the zone values do not reflect the land value of private lands and or [sic] other ownerships, unless the lands are comparable with the lands typically occupied by a right-of-way grant under permit from the [BLM]." The land values for the area the right-of-way traverses are now appraised at \$200 per acres [sic], or less. The right-of-way easements purchased previously were \$100 per acre, plus damages. The range land values have not increased in value and recent sales do indicate appraisals have remained at this dollar amount for the past few years.

The BLM land crossed by the transmission line facility is range land and used for grazing of livestock. It was upon the statements in the Federal Register, we based our opinion that the zone established for areas crossed with the facilities would be prudent and compatible with subject areas. In our opinion, based on various appraisals reviewed, the area in Greenlee and Graham Counties crossed by these facilities should be established as a zone 2 classification. We find little, if any, difference in the access to and of the terrain features noted in our Exhibit "C" attached. [<sup>9/</sup>]

In our opinion, Greenlee County does not warrant a zone 5 rating.

TEP requests that the rental be computed on the basis of a 330-foot-wide right-of-way, thus eliminating the overlap, and that the lands in Greenlee County, Arizona, subject to its rights-of-way be classified as Zone 2.

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<sup>8/</sup> TEP does not indicate when these conversations occurred.

<sup>9/</sup> Exhibit C contains maps of the rights-of-way indicating access and terrain limitations.

In response, BLM contends that no appeal is necessary for the rental charges on the overlap width, because TEP has not formally requested an amendment of the width of right-of-way A-7585, and BLM has never issued a decision on this issue. BLM indicates that it would be willing to consider such a request should it be made, however, and suggests that TEP's belief that the overlap acreage would not be considered when determining the rental amount, because the rental was based upon a linear distance rather than acreage, was based on a misunderstanding. BLM notes that, although the method of determining rental for linear rights-of-way when these rightsof-way were issued was based on total acreage and not linear distance, the fee for processing the application was determined by linear distance.

Finally, BLM argues:

As to [TEP's] determination that Greenlee County should be established as a zone 2 classification instead of a zone 5 because of similar land values where their electric facilities cross Greenlee and Graham Counties, we refer to a statement in 52 FR 130, published July 8, 1987, regarding the final rulemaking on rental determination procedures, which is: For any zone there are almost certain to be higher or lower value lands. The zone boundaries are judged to be accurate reflections of the general or blended value of the lands in the zone. These zones were established through the rulemaking process which allowed for review by the public and their comments. Any changes would be made through this same process.

As an initial matter, we find that TEP's challenge to the propriety of the 110-foot overlap of the two rights-of-way is not ripe for review. BLM issued right-of-way A-7585 in 1976. TEP did not challenge BLM's decision to issue that right-of-way for a width of 220 feet, including the 110-foot overlap, before its initiation of this appeal. Thus there is no pending BLM decision on the overlap issue. However, BLM indicated its willingness to consider a formal request to amend right-of-way A-7585, and the record contains a June 22, 1988, formal request seeking review of the overlap. 10/

[1] Before turning to TEP's specific challenge to the classification of the acreage in Greenlee as Zone 5 land, we must determine whether TEP's rights-of-way are subject to the rental schedule established by 43 CFR 2803.1-2(c)(1). Prior to the repeal of the Act of March 4, 1911, 43 U.S.C. § 961 (1976), electrical power transmission line rights-of-way issued pursuant to that Act were subject to rental charges calculated on the basis of the fair market value of the right-of-way determined by a BLM appraisal.

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10/ In response to this request to review the overlap, BLM stated that it had no authority to act on the matter until final action by the Board on these appeals. BLM indicated that it would review the matter after the appeal had concluded, and the case files had been returned to it.

43 CFR 2802.1-7(a) (1975). Following FLPMA repeal of the Act of March 4, 1911, BLM promulgated regulations pursuant to Title V of FLPMA. 45 FR 44518 (July 1, 1980).

In James W. Smith (On Reconsideration), 55 IBLA 390 (1981), the Board held that these FLPMA right-of-way regulations did not apply to pre-FLPMA rights-of-way. In response to this determination, BLM amended the regulations in 43 CFR Part 2800 to clarify its intent that the procedures found in Part 2800 were applicable to rights-of-way granted pursuant to statutes repealed by FLPMA. 51 FR 6542 (Feb. 25, 1986). Specifically, the regulations provide at 43 CFR 2801.4 that a right-of-way grant issued on or before October 21, 1976 (the date of the enactment of FLPMA), shall be covered by the regulations in 43 CFR Part 2800, unless administration under that part diminishes or reduces any rights conferred by the statute under which it was issued.

We have previously held that 43 CFR 2803.1-2(a), which provides for the collection of fair market rental value, does not diminish or reduce the rights granted pursuant to the Act of March 4, 1911. Mountain States Telephone & Telegraph Co., 107 IBLA 82, 86 (1989). This regulation states that rental "shall be determined in accordance with the provisions of paragraph (c) of this section." 43 CFR 2803.1-2(a). In turn, 43 CFR 2803.1-2(c)(1) provides that, unless the authorized officer determines that an individual appraisal is required by the regulations, a right-of-way applicant must submit an annual rental payment in advance in accordance with the per-acre rental schedule set out therein. This paragraph further states that "[a] per-acre rental schedule by State, County, and type of linear right-of-way use, which will be updated annually, is available from any [BLM] office."

The regulation at 43 CFR 2803.1-2(c)(2) provides:

(i) Existing linear right-of-way grants \* \* \* may be made subject to the schedule provided by this paragraph upon reasonable notice to the holder. The notice shall provide the reasons for making the right-of-way subject to the schedule.

(ii) Where the new annual rental exceeds \$100 and is more than a 100 percent increase over the current rental, the amount of increase in excess of the 100 percent increase shall be phased in by equal increments, plus the annual adjustment [43 CFR 2803.1-2(c)(1)(ii)], over a 3-year period.

TEP does not contend that its rights-of-way are not subject to these regulations, and we find them to be applicable to TEP's rights-of-way. See Mountain States Telephone & Telegraph Co., *supra*.

BLM established its per-acre rental schedule for linear rights-of-way following a lengthy study of rental rates and the formulation of a standard policy for determining fair market value. Prior to the promulgation of the current regulations, there was no standard method for determining fair market rental. Consequently, BLM state and district offices often utilized

inconsistent and conflicting approaches to the appraisal process. See Northwest Pipeline Corp. (On Reconsideration), 77 IBLA 46, 49-50 (1983). Recognizing this problem, BLM formed a study team to develop and recommend a more acceptable, uniform approach, and published notice of its intent to propose rulemaking and revise the regulations concerning fair market rental determinations for rights-of-way. 49 FR 19049 (May 4, 1984). After receiving suggestions in response to this notice, BLM published a second notice of intent outlining the approach it proposed to take in promulgating the rules. 50 FR 2697 (Jan. 18, 1985). On September 5, 1986, following receipt of additional comments, BLM published proposed rules, including the proposed county-by-county linear right-of-way rental schedule, and sought further comments. 51 FR 31886 (Sept. 5, 1986). The final rules were promulgated effective August 7, 1987. 52 FR 25811 (July 8, 1987). The county-by-county rental schedule published with the final rules differs only slightly from the proposed schedule set out in the proposed rules. See 52 FR 25821-23 (July 8, 1987).

TEP contends Greenlee County should be classified as Zone 2 because it does not warrant the Zone 5 rating assigned by BLM. We find TEP's challenge to BLM's zone classification determination to be untimely. BLM published its proposed zone classifications in the Federal Register and sought comments. Nothing in the record indicates that TEP informed BLM of its opinion as to the appropriate rating for Greenlee County during the applicable comment period. <sup>11/</sup> Nor has TEP shown anything in the manner in which the rates were promulgated which would lead to the conclusion that the final rate setting rules published by the Department on July 8, 1987, were not validly promulgated. Having been validly promulgated they are binding on all agencies of the Department, including this Board. Western Slope Carbon, Inc., 98 IBLA 198 (1987); Sam P. Jones, 71 IBLA 42 (1983); Ensearch Exploration, Inc., 70 IBLA 25 (1983).

The authority of the Secretary to promulgate rules establishing rental rates for electrical power rights-of-way pursuant to the Act of March 4, 1911, has not been challenged by TEP. Nor has TEP pointed to any aspect of the Department's classification of rental rates by zone as being contrary to or broader than the provisions of the enabling statute, 43 U.S.C. § 961 (1976), which authorized and empowered the Secretary, "under the general regulations fixed by him, to grant easements for rights-of-way \* \* \* for electrical poles and lines for the transmission of electrical power."

Without a showing that the Department exceeded its statutory authority when setting the rental rate, TEP cannot now challenge that rule, and we are obligated to follow it. Donald St. Clair, 84 IBLA 236, 92 I.D. 1 (1985). The language adopted by Congress when enacting 43 U.S.C. § 931 (1976), indicates its intent to grant broad Secretarial authority to regulate the

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<sup>11/</sup> In the final rulemaking BLM responded to the comments received on specific values for specific counties by stating that it had reviewed the data concerning those counties and adjusting some of the values based on that review. See 52 FR 25812 (July 8, 1987).

terms of grants for electrical transmission rights-of-way. Rules and regulations reasonably adapted to the administration of a congressional act, and not inconsistent with any statute, have the force and effect of law, and this Board has no authority to declare such rules and regulations invalid. General Services Administration v. Benson, 415 F.2d 878, 880 (9th Cir. 1969); American Gilsonite Co., \_\_ IBLA \_\_, \_\_ I.D. \_\_ (1989); Sam P. Jones, *supra*; St. Scholastica Academy, 40 IBLA 175 (1979). The Zone 5 designation for Greenlee County, Arizona, was made by duly promulgated rulemaking, and we find no basis for holding it to be incorrect. Therefore, we affirm that portion of BLM's March 16, 1988, decision as to use of Zone 5 and its use of the rental schedule as the basis for calculating TEP's rental obligations.

[2] We find, however, that we must set aside BLM's rental determination because BLM failed to apply the provisions of 43 CFR 2803.1-2(c)(2)(ii) when setting the yearly rentals for the rights-of-way in question. This regulatory provision provides that, if the new rental exceeds \$100 and is more than a 100-percent increase over the current rental, "the amount of the increase in excess of the 100 percent increase shall be phased in by equal increments, plus the annual adjustment, over a 3-year period" (emphasis added). The new rental assessments for TEP's rights-of-way (*i.e.*, \$8,754 per year per right-of-way) far exceed a 100-percent increase over the old annual rentals of \$1,563 for right-of-way A-6932 and \$1,578 for right-of-way A-7585. Therefore, BLM is obligated to phase in the excess over 100 percent, which it did not do in its decisions of March 16, 1988.

In the interest of fairness, we believe that, on remand, BLM should initially decide the issue of whether right-of-way A-7585 should be amended to eliminate the 110-foot overlap, thus reducing the acreage subject to rental. After its review of this matter, it should reassess the rental due in accordance with its determination on that matter and apply the provisions of 43 CFR 2803.1-2(c)(2)(ii) to the rental due from the date of the decisions on appeal.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed in part, and set aside and remanded in part for further action consistent herewith.

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R. W. Mullen  
Administrative Judge

I concur:

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Franklin D. Arness  
Administrative Judge