

KEITH P. CARPENTER (ON RECONSIDERATION)

IBLA 88-438

Decided January 30, 1990

Reconsideration sua sponte of the Board's decision in Keith P. Carpenter, 112 IBLA 101 (1989), on appeal from a decision of the Idaho Falls District Office, Bureau of Land Management, setting linear rental rate for electric power line right-of-way I-22234.

Prior Board decision affirmed as modified.

1. Appraisals--Rights-of-way: Generally--Regulations: Generally

Provision of 43 CFR 2803.1-2 allows a rental increase to be paid in graduated increments with the full amount of the increase being deferred until the third year after the increase is effective. This provision only applies, however, where there was payment at a lower rate. It does not apply where there was never a lower rental rate, nor can a rental deposit be considered to have been a rental rate for purposes of obtaining the delayed increase allowed by the regulation.

APPEARANCES: L. Wid Disney, Authorized Agent, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Board has decided to reconsider sua sponte the appeal of Keith P. Carpenter, 112 IBLA 101 (1989), in which we affirmed a decision of the Idaho Falls District Office, Bureau of Land Management (BLM), establishing the rental for a linear right-of-way for an electric power line (I-22234) at \$286 for the period beginning August 26, 1985, and ending December 31, 1988. In our decision we stated:

Appellant's rental rate was set using a schedule as provided by 43 CFR 2803.1-2(c)(1)(i) through (v). The record of the decision under review establishes that appellant's electric power line right-of-way rental was calculated for Clark County, Idaho, at the rate of \$13.84 for each acre of use on a yearly basis.

This charge was not fully imposed for each of the years from 1985 through 1988, but was "phased in by equal increments" as required by 43 CFR 2803.1-2(c)(2)(ii). The resulting rental for the period ending on December 31, 1988, was therefore correctly calculated according to the regulations promulgated for electric power line linear rights-of-way. Id.; see also Tucson Electric Power Co., 111 IBLA 69 (1989). [Emphasis added.]

Keith P. Carpenter, supra at 102. The emphasized sentence is not correct and must be removed from our decision for the following reasons.

Departmental regulation 43 CFR 2803.1-2(c)(2)(ii) provides as follows:

"(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, over a 3-year period." A review of the record in this case shows that what appeared to be a "phase in" was actually the annual adjustment required by 43 CFR 2803.1-2(c)(1)(ii). A "phase in" would not be appropriate in this case because the initial charge of \$25 to appellant in the right-of-way grant was made at a time when Instruction Memorandum (IM) No. 84-490, Change 1, dated November 28, 1984, was in effect. The IM states:

Applicants for new rights-of-way should be charged the minimum rental of \$25 for 5 years. The grant is to be made subject to a rental determination at a later date and the express covenant that any additional rental that is determined to be due as the result of the rental determination shall be paid upon request.

See Dean R. Karlberg, 98 IBLA 237 (1987). Both the IM and the right-of-way grant make it clear that the \$25 charge is subject to review at a later date and that if it is determined that additional rental is due, it shall be paid upon request. Also, the right-of-way grant specifies that the \$25 payment constitutes a rental deposit pending issuance of new regulations and a determination of the fair market rental.

We find that the \$25 charge represents an interim payment and is not a "current rental" within the meaning of 43 CFR 2803.1-2(c)(2)(ii). Here, there is no "new rental" which exceeds \$100 and represents more than a 100percent increase over the "current rental" which was the case in Tucson Electric Power Co., supra. Therefore, the "phase in" provision of 43 CFR 2803.1-2(c)(2)(ii) is not applicable. The worksheet included in the case file shows that BLM did not "phase in" the rental. We affirm our holding in Keith P. Carpenter, supra, that BLM's rental determination of \$286 for the period beginning August 26, 1985, and ending December 31, 1988, was proper. We modify the decision by deleting the emphasized sentence quoted above to recognize that BLM was correct in not "phasing in" the rental.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, our decision in Keith P. Carpenter, *supra*, is affirmed as modified.

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Franklin D. Arness  
Administrative Judge

I concur:

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Gail M. Frazier  
Administrative Judge