

EARL M. HARDY

BOX CANYON TROUT COMPANY, INC.

IBLA 87-414

Decided March 27, 1990

Appeal from a decision of the Idaho Shoshone District Office, Bureau of Land Management, requiring payment of balance of rental due, appraisal costs, and application processing fees for right-of-way I-2880.

Affirmed.

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

The Board of Land Appeals will uphold an appraisal of the fair market rental value of a right-of-way for the construction, operation, and maintenance of a water diversion, flume, and access road in conjunction with a fish-propagation facility on adjoining private land where the appraisal is based on a reasonable comparable sales analysis and the challenge to the appraisal does not establish error in the comparability evaluation.

2. Rights-of-Way: Applications

An applicant for a right-of-way for the construction and operation of a water diversion and flume to serve a fish-propagation facility on adjoining land may be required to pay all reasonable administrative and other costs in processing the right-of-way application, pursuant to the provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982).

APPEARANCES: W.F. Ringert, Esq., Boise, Idaho, for appellants.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Earl M. Hardy and the Box Canyon Trout Co. (Hardy/appellants), have appealed from a decision of the Idaho Shoshone District Office, Bureau of Land Management (BLM), dated March 4, 1987, establishing annual rental at \$500, and directing payment of the cost of appraisal (\$2,599.54), and reimbursement of the application processing costs (\$215.66) for right-of-way I-2880.

Effective December 15, 1986, BLM granted right-of-way I-2880 to appellants for a term of 20 years 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 granted for the construction, operation, and maintenance of a water diversion, flume, and access road in conjunction with a fish-propagation facility on private land owned by Hardy. Pursuant to section 3 of the right-of-way grant, the right-of-way was issued subject to the agreement by appellants to pay fair market rental value as determined by the authorized officer.

In order to determine the fair market rental value, Kenneth R. Wood, a BLM appraiser, prepared an Appraisal Report (AR) dated January 30, 1987. The AR was approved by the Supervisory Appraiser on February 5, 1987. Wood calculated the fair market rental value by analyzing leases for comparable properties and then "adjusting for differences" between the comparable leases and the subject right-of-way (AR at 13).

In their statement of reasons for appeal (SOR), appellants challenge the BLM appraisal on several grounds. Appellants' principal contention is that "the appraiser's determination was based solely on his analysis of a 99-year lease of land for developing a fish hatchery in which the lessee had to provide water from adjoining lands." As the water to be diverted through the subject right-of-way grant will, in fact, be used for a fish propagation facility on appellant Hardy's private land, appellants further contend that "it is improper to consider the use to which the water will be put in determining the value of a right-of-way for a water transmission facility" (SOR at 3).

Appellants also argue that the appraisal was in error in that only 5 of the 29 stipulations appended to the right-of-way were considered as possible offsets against rental value. They submit that nearly all of the stipulations impose obligations not included in comparable lease agreements and that the financial burdens presented thereby should be taken into account.

We first consider appellants' arguments bearing on BLM's fair market rental determination.

After protracted negotiations between Hardy and BLM, including rejection by BLM of a previous right-of-way proposal, right-of-way I-2880 was granted in December 1986 authorizing the right to construct, maintain, and terminate a water diversion, flume, and access road on public lands to service a fish-propagation facility to be built on adjacent lands owned by Hardy. The right-of-way is located on approximately 3 acres of public land within and adjacent to the creek bottom of Box Canyon in Gooding County, Idaho, specifically described as in portions of lot 1 and NW $\frac{1}{4}$ NE $\frac{1}{4}$, sec. 28, T. 8 S., R. 14 E., Boise Meridian, Idaho. This 3-acre site is part of a larger tract under BLM's jurisdiction which contains a total of 128.3 acres.

Section 501(a) of FLPMA authorizes the Secretary of the Interior to grant rights-of-way over the public lands for "(1) reservoirs, canals,

ditches, flumes * * * and other facilities and systems for the impoundment, storage, transportation, or distribution of water." 43 U.S.C. § 1764(g) (1982). The implementing regulation concerning the establishment of rentals for a right-of-way grant is found at 43 CFR 2801.1-2(a), which provides in part:

(a) The holder of a right-of-way grant or temporary use permit shall pay annually, in advance, except as provided in paragraph (b) of this section, the fair market rental value as determined by the authorized officer applying sound business management principles and, so far as practicable and feasible, using comparable commercial practices.

In this case, fair market rental value of the right-of-way was based on an appraisal report which analyzed lease rates for similar uses on private lands, or the "comparable lease" method of valuation. Because this right-of-way includes requirements to protect certain threatened and endangered species that may be affected by development on the right-of-way, a separate analysis was made by BLM to estimate the value of special stipulations required for mitigation, with such value calculated "as an offset against the value estimated for the right-of-way where unusual terms and conditions are not imposed" (AR at 13).

BLM's appraisal considered three leases in its comparability analysis. Two of these, the Clear Lakes Trout Company lease and the Idaho Springs Trout lease, involved the lease of land to divert and transport water to adjoining land for fish-propagation purposes. The third lease, identified as the Kaster lease, involved the lease of land for developing a fish hatchery in which the lessee would provide the water required from adjoining land. Ultimately, the Clear Lakes Trout Company lease was excluded from a final comparability computation. It was concluded that because this 20-year lease, executed in 1969 at an annual rental rate of \$200 per year, contained no provision for rental adjustment over the full duration of the lease, it was not a typical lease and was the "least reliable" indicator of fair market value for the use provided (AR at 17).

The Idaho Springs Trout lease and the Kaster lease were selected by BLM as the most comparable contracts for comparison with appellants' right-of-way. The critical element of these leases considered by the appraiser is the cost per cubic foot of water transported (cfs). For the right-of-way in question, BLM determined there would be 330 cfs of water at the proposed diversion on BLM property (AR at 8). However, it is stipulated in the right-of-way grant that "[a] minimum of 75 cfs of instream water volume shall be bypassed through, over, and/or around the diversion facility on a continuous, permanent, and verifiable basis" (Stipulation No. 15). Accordingly, BLM's final computation for rental value was based on the value of 255 cfs of water (330-75) (AR at 23).

The Idaho Springs Trout lease was executed in 1954 for 99 years at an annual rental rate of \$2,000 per year, or \$20 per cfs. In accordance

with adjustment provisions of the lease, the rental had increased to \$5,026 per year, or \$50.26 per cfs as of January 1987 (AR at 14). As previously noted, this lease is similar to the subject right-of-way in that the land leased was for the sole purpose of diverting and transporting water across the leased area to adjoining land for fish propagation. BLM's summary of the Idaho Springs Trout lease with the subject right-of-way is set forth at page 17 of the AR as follows:

Subject is equal to this lease as to time since the lease has provision for updating the lease rate to current market conditions. Subject is considered equal to the lease as to uses permitted on the leased property. Subject and the lease are equal in that both are assignable. Subject and the sale are considered equal as to disposition of improvements at the end of the lease term. Subject and the lease are also equal as to purchase option provisions, in that neither has a provision for option to purchase at the end of the lease term. Subject is inferior to the lease in that there is no public parcel of which the lease is a part.

Overall, subject is considered equal to somewhat inferior to the lease. Subject right-of-way and the lease are nearly equal in most respects except for public access. In addition, the lease rate is estimated to be higher than what one might expect for use of one's land where water is being taken from the land. The lessee would have had to initiate condemnation proceedings to secure an easement across this property in the event of being unable to negotiate a lease. The lessor was in a position to command a premium lease rate in order for the lessee to avoid the added cost of litigation to force an easement over the Fisher property. Therefore, the lease rate reflected by this lease is considered on the high end of the range and somewhat excessive in terms of what amicable negotiations might reflect.

The Kaster lease is a 99-year lease entered into in 1966 for the development of a fish hatchery and for which the lessee is required to provide water from adjoining lands. Specifically, the lease was made contingent on the lessee securing 100 cfs from adjoining land for use on the leased premises. Subsequent to the lease agreement, the lessee obtained rights to an additional 75 cfs of water that is used on the lease, but the cost or value of this additional water is not factored into the price of the lease (AR at 15). As of November 1986, the annual rental for the Kaster lease, which was last adjusted in 1983, was \$2,592. The BLM appraiser attributed a unit cost of \$25.92 per cfs for the Kaster lease, based on its annual rental and the obligation to provide a minimum of 100 cfs for the lease. The AR notes that the Kaster lease would be due for another adjustment in 1988, which it estimated would bring the rate to \$28 per cfs (AR at 17).

BLM's appraiser summarized the above lease in comparison with the subject right-of-way as follows:

Subject property is considered equal to this lease as to time since the lease has provision to adjust the lease rate to a current rate to reflect current market and inflationary trends. Subject is inferior to the lease due to uses permitted under the lease which allow for building a fish hatchery and related structures on the leased property. This use is considered more flexible and more directly tied to producing an income than are the uses granted under subject right-of-way. Subject is equal to or superior to the lease in that the lease can and has been assigned, but has restrictions on who it can be assigned to. Subject is considered superior to the lease in that the lessee will be required to relinquish improvements to the lessor at the end of the lease unless the lessee exercises an option to purchase during the 99th year of the lease. This relinquishment provision would tend to reflect a lower lease rate than in situations where improvements can be removed by the lessee at the end of the lease. Subject is also considered superior to the lease as to the lease option to purchase which tends to lower the lease rate. Subject is equal to the lease in that there is no provision for public road access to either property.

* * * Overall, subject is considered equal to somewhat superior to this lease. The lease provisions which restrict assignability, require relinquishment of improvements, and include an option to purchase, all tend to lower the lease rate and thereby suggest a higher rate for subject right-of-way without these provisions. These factors reflecting subject's superior position are estimated to more than offset the sale's superior position of uses permitted under the lease terms, indicating an overall equal to superior rating for subject.

From the "updated rate" for the Kaster lease of \$28 per cfs, the BLM appraiser made an upward adjustment to account for differences with the subject right-of-way, noted above, and arrived at a rate of \$30 per cfs as the fair market value rate for appellants' right-of-way (AR at 17). The AR also states that \$30 per cfs represents a discount from the rate given for the Idaho Springs Trout lease (\$50.26 per cfs) "to adjust for access and for the factor of avoiding litigation costs by the lessee of this lease." Id.

While not included in the BLM appraiser's evaluation as comparable sales, his report refers to the relative higher rates for "other leases involving use of land, water rights, and improvements for fish propagation," noting "current rates of around \$500 per c.f.s." (AR at 15).

[1] Appellants submit that a rate of \$30 per cfs as the proper rate to apply "to water flow being conveyed across the BLM land" is too high (SOR at 5). In support of this contention, they point to the differences between a right-of-way established for the mere transportation of water and one such as the Kaster lease which entails development for a

fish-production facility. However, it is apparent that BLM recognized and understood the differences between the two kinds of leases and took such distinctions into account in comparing the subject right-of-way with the Kaster lease (which the appraisal report notes is far less expensive in cost per cfs than other leases used for fish production).

Moreover, appellants submit that the appraiser's evaluation was based "solely" on a comparison with the Kaster lease (SOR at 2, 3, 5) when, in fact, the rate of \$30 per cfs was found by the appraiser to represent an appropriate deduction from the other comparable lease, the Idaho Springs Trout lease, to account for differences in that transaction and the right-of-way in question. Thus, accepting as averred that the Kaster lease should be discounted as a basis for comparison, this leaves unchallenged another lease, which, like the subject right-of-way, exists for the sole purpose of diverting water to adjoining land for fish propagation purposes. In fact, we consider BLM's adjustment of the Idaho Springs Trout lease from \$50.26 per cfs to \$30, in its reconciliation of that lease with right-of-way I-2880, to be generous in appellants' behalf.

We are further compelled to accept BLM's valuation where, as here, appellants have not come forward with appraisal reports or sales comparisons to contradict BLM's analysis. Absent a showing of error in the appraisal methods utilized by BLM, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges imposed by BLM are excessive. Mesa Broadcasting Co., 94 IBLA 381 (1986); Meyerling Livestock Co., 69 IBLA 110 (1982).

The remaining challenge to the rental value determination by BLM is appellants' argument that insufficient offsets were allowed in view of numerous stipulations to the lease which they consider burdensome. Generally, the SOR on this issue consists of a summary of the various stipulations rather than specific argument on how BLM allegedly failed to give proper credit to appellants for stipulations regarded as onerous. The BLM appraisal concluded that 5 of the 29 stipulations incorporated in the right-of-way agreement presented terms not typically found in commercial transactions. These stipulations were examined to determine what, if any, offsets against rental should be allowed. The appraisal concluded that three of the five stipulations justified mitigation in the grantees' behalf, viz., Stipulation No. 15, concerning the requirement to maintain a minimum stream flow of water of 75 cfs; Stipulation No. 21, requiring reimbursement to BLM for monitoring costs for a 4-year period; and Stipulation No. 25, requiring a grant of access to BLM across private land owned by Hardy to the right-of-way site.

The only offset claim arguably pursued by appellants in other than summary or conclusory terms concerns Stipulation No. 25 (SOR at 8-9). It is not entirely clear, but it appears the value of the access road easement is considered by appellants to be \$5,000, rather than \$1,400

as calculated by BLM. How appellants arrive at the foregoing value is not explained. BLM, on the other hand, provides a detailed explanation of its calculation of an easement value of \$1,400:

Road Easement Valuation - About two miles of road easement across Mr. Hardy's land is estimated to provide BLM with administrative access to subject right-of-way. A 50 foot wide road easement across other private land was negotiated in 1979 by Mr. Hardy at the same point where subject road easement is now proposed. Subsequent to obtaining this easement, Mr. Hardy purchased the land over which the easement crossed at a price of \$600 per acre in 1985. The Ritter Ranch was purchased in 1986 by Nature Conservancy based on the appraised value with an overall price of \$2,450 per acre excluding the contributing value of improvements. The Ritter Ranch includes farm ground, dry pasture, an island in the Snake River, and almost two miles of Snake River frontage with steep canyon walls and numerous springs. On an overall basis the Box Canyon land with its variety of topography, soils, canyons, and springs is considered comparable to the Ritter Ranch. The overall value of the Ritter Ranch rounded to \$2,500 per acre is used as the basis for estimating the fee value of 310.86 acres of the Hardy property which takes in the lands above and below the rim of Box Canyon. The farm ground purchased by Mr. Hardy in 1985 takes in an additional 102 acres at \$850 per acre including a sprinkler system added later. Mr. Hardy stated that it cost him \$100,000 to build the road from the canyon rim on the Blind Canyon side to the flume in the Box Canyon.

Based on the above land values and road construction costs, a total value of \$963,850 is estimated for Mr. Hardy's total 412.86 acres, or \$2,334.57 per acre as an average value. Rounding to \$2,335 per acre, this unit value is applied to an estimated 12.12 acres needed for the BLM road easement across Mr. Hardy's land. Since Clear Springs Trout Company also uses this road, as well as BLM and Mr. Hardy, it is further estimated that one-third of the fee value of the easement should represent an appropriate charge to BLM for administrative access across Mr. Hardy's land. This figure represents a one time purchase for an easement.

The easement value can be capitalized to reflect an annual rental charge for the easement. A rate of return of 9% to 10% has been used by BLM for converting fee values to annual rental fees for road right-of-way over BLM [sic]. However, a higher rate of return on investment dollars is needed when attempting to attract capital for higher risk ventures related to fish propagation. Therefore, a capitalization rate of 15% is considered a fair rate of return in today's market and is applied to the adjusted fee value estimated for the BLM easement over Mr. Hardy's land.

The above values and rates are summarized as follows:

12.12 acres at \$2,335 per acre	=	\$28,300.00
Adjusted value-BLM's one-third use	=	$\frac{\$28,300.00}{\times 1/3}$
		\$ 9,424.00
Annual rent at 15%	=	$\frac{\$9,424.00}{\times .15}$
		\$ 1,413.60
Annual fee for easement	SAY	\$ 1,400.00

(AR at 21-22).

We find the above analysis, which is based, among other things, on Hardy's statement of road construction costs, to be reasonable. By comparison, appellants' apparent contention that a credit of \$5,000 should be allowed for the easement fails for lack of any justification. 1/

Appellants' final grounds for appeal also are unsupported. No argument is advanced in support of the position that the costs of the appraisal should not be borne by the right-of-way applicant or that the costs noted for reimbursement are too high. As to the objection to BLM's claim for reimbursement of other application processing costs, appellants merely note that BLM has not shown that such costs were absorbed by the lessee of the Kaster lease, which it used in its comparability determination.

[2] The Federal Land Policy and Management Act of 1976 states that the Secretary may "require an applicant for or holder of a right-of-way to reimburse the United States for all reasonable administrative and other costs incurred in processing an application for such right-of-way and in inspection and monitoring of construction, operation, and termination of the facility pursuant to such right-of-way." 43 U.S.C. § 1764(g) (1982). This authority was properly exercised by BLM in this case. Since the Kaster lease is not a Federal lease, any reference by appellants to the lack of cost reimbursement provisions in that transaction has no relevance here.

1/ Similarly, appellants' assertion that the use to which the water is to be put cannot be considered in determining the fair market value of the right-of-way has no basis in fact. The quotations from the Uniform Appraisals Standard for Federal Land Acquisitions (UAS), cited in the SOR at pages 3-4, refer to application of the "before and after" test in Federal condemnation actions. As this Board has noted, however, the "before and after" test is not applicable under the comparable sales or lease approach. See American Telephone & Telegraph Co., 77 IBLA 110 (1983). Moreover, condemnation proceedings ascertain "just compensation" which is not the legal or economic equivalent of "fair market value." See Northwest Pipeline (On Reconsideration), 83 IBLA 204, 213-19 (1984) (Burski, A.J., concurring). Thus, the provisions of the UAS referenced by appellants are singularly inapplicable to the issues presented in the instant case.

Therefore, 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.

Wm. Philip Horton
Chief Administrative Judge

I concur:

James L. Burski
Administrative Judge