

AMAX MAGNESIUM

IBLA 89-229

Decided June 6, 1991

Appeal from a decision of the Salt Lake City, Utah, District Office, Bureau of Land Management, establishing the market rental for a right-of-way grant for solar evaporative ponds and related roads and pipelines at \$1.15 per acre, totalling \$62,857 annually. U-54897.

Set aside and remanded.

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

Generally, the proper appraisal method for determining the fair market rental value of non-linear rights-of-way, including rights-of-way for solar evaporation ponds and related facilities, is the comparable lease method of appraisal. An appraisal may be set aside and the case remanded where the record on appeal shows insufficient analysis of other leases considered in the appraisal to verify their comparability with the right-of-way appraised.

APPEARANCES: Lee R. Brown, Salt Lake City, Utah, for Amax Magnesium; David K. Grayson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

AMAX Magnesium (AMAX) has appealed from a January 23, 1989, decision of the Salt Lake District Office, Bureau of Land Management (BLM), determining the market rental for solar evaporative ponds and related roads and pipelines right-of-way grant U-54897 to be \$1.15 per acre, totalling \$62,857 annually. BLM issued the right-of-way grant on June 3, 1987, for a period of 30 years, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1988), subject to a future rent determination.

BLM informed AMAX that its decision was based upon an appraisal of the right-of-way completed on November 1, 1988, 1/ and that within 30 days from

1/ BLM indicated that under the Department's right-of-way regulations promulgated on Aug. 7, 1987, BLM is required to determine right-of-way

receipt of its decision, AMAX was required to submit a rental payment of \$157,128, derived from the following calculation:

	<u>31,439</u>	Partial year rent for 1987
+	<u>62,857</u>	January 1 through December 31, 1988
+	<u>62,857</u>	January 1 through December 31, 1989
-	<u>25</u>	Rental deposit submitted
=	<u>157,128</u>	Rental payment due

(Decision at 1).

In its statement of reasons (SOR), AMAX explains that in a letter to BLM dated July 23, 1986, it requested that BLM determine the value of the lands subject to right-of-way U-54897, and that as a result Kent J. Wilkinson of the Utah State Office, BLM, prepared an appraisal report, approved on November 20, 1987, which "utilized lands in the Stansbury Basin adjacent to [AMAX's] developed properties." AMAX asserts that the proper rental value of the lands is \$.70 per acre, based upon the following reasons:

- A. The lands under U-54897 are not as valuable as the lands evaluated in Stansbury Basin because of the remote location, lack of utilities, lack of developed transportation facilities, distance from work force populace and lack of access to Great Salt Lake Brines on a continuous or guaranteed basis. (In other words, if the Knolls properties were adjacent to our pond system in Stansbury Basin, we would agree that the fair market rental value was \$1.00/acre.)
- B. Mr. Wilkinson (the appraiser) researched various land transactions in the desert. The only ones clearly indicated a sale of similar lands were sale data indices:

#003-043	320 acres at \$10.31/acre
#003-053	280 acres at \$14.29/acre
#003-046	3894 acres at \$15.00/acre

The other sales were either land exchanges or near towns and had potential for winter range of sheep or other multiple uses.

The land in U-54897 comprises 54,658 acres of absolute waste land. There should be given consideration for

fn. 1 (continued)

rental in accordance with a schedule to be adjusted annually based upon a national index, except non-linear rights-of-way, such as U-54897, which must be appraised. See 43 CFR 2803.1-2.

the size of the lease and the lack of potential use of the property. [Emphasis in original.]

(SOR at 2).

AMAX further states that the State of Utah has leased to it 5,960 acres of land in "this area" at \$1 per acre. AMAX contends that while this fee is "still excessive," it is "much more realistic than the BLM's current proposal of \$1.15 per acre." Id.

Counsel for BLM submitted to the Board as BLM's answer to AMAX's SOR a memorandum from Wilkinson to the Pony Express Resource Area Manager, BLM, dated February 7, 1989 (hereinafter "Answer"). In this memorandum, Wilkinson explained that in response to AMAX's request that BLM determine the rental value of the lands covered by right-of-way U-54897, BLM sent to AMAX a copy of an appraisal of another solar evaporative pond right-of-way (U-0146683), approved on November 18, 1986. Right-of-way U-54897 was not the subject of this appraisal. In fact, BLM indicated to AMAX that the "U-0146683 appraisal was supplied only to give [AMAX] an idea of the methodology that might be employed by B.L.M. to set a rental for U-54897, and to supply an approximate rental figure for AMAX's planning purposes" (Answer at 1). He explained that the appraisal of right-of-way U-54897 was completed and approved on November 1, 1988, estimating the rental for the right-of-way at \$63,900, about \$1.15 per acre.

[1] Section 501(a)(1) of FLPMA, 43 U.S.C. § 1761(a)(1) (1988), authorizes the Secretary of the Interior to grant rights-of-way over the public lands for "reservoirs, canals, ditches, flumes * * * and other facilities and systems for the impoundment, storage, transportation, or distribution of water." Under section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1988), the holder of a right-of-way is required to pay rental annually in advance for the fair market value of the right-of-way when this value is established by an appraisal. E.g., Mallon Oil Co., 104 IBLA 145 (1988); Harvey Singleton, 101 IBLA 248 (1988); Glover Communications, Inc., 89 IBLA 276 (1985); see also Southern California Gas Co., 81 IBLA 358 (1984); Mountain States Telephone & Telegraph Co., 79 IBLA 5 (1984).

The Department's regulation concerning the establishment of rental for a right-of-way grant, 43 CFR 2801.1-2(a), provides in part:

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 addition, 43 CFR 1801.1-2(c)(3)(1) provides that the rental for non-linear right-of-way grants "shall be determined by the authorized officer and paid annually in advance. Such rental shall be based upon either a market survey of comparable rentals, or on a value determination for specific parcels * * *."

Generally, the preferred method for appraising the fair market rental value for non-linear rights-of-way is the comparable lease method of appraisal where there is sufficient comparable rental data available and appropriate adjustments are made for differences between the subject site and other leased sites. E.g., Southern Pacific Transportation Co., 116 IBLA 164 (1990); Thomas L. Sawyer, 114 IBLA 135 (1990); High Country Communications, Inc., 105 IBLA 14 (1988). Absent a showing of error in the choice of appraisal methods used, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive. E.g., Pacific Bell, 104 IBLA 66 (1988); Mesa Broadcasting Co., 94 IBLA 381 (1986). However, even though an appellant does not submit a formal appraisal, an appraisal may be set aside and remanded where the appraisal report provides insufficient data on leases compared and insufficient analysis of the differences and similarities between the comparable leases and the subject lease to support the appraisal. Mountain States Telephone & Telegraph Co., 109 IBLA 142 (1989); Communications Enterprises, Inc., 105 IBLA 132 (1988).

In determining the "fair market rental value" of right-of-way U-54897, BLM states that it employed the "market approach," estimating "the rental value of the subject property by comparing it with the most recent rental transactions for similar type properties in the area." In its Appraisal Report, BLM compares right-of-way U-54897 to lands leased for evaporative ponds by the State of Utah, which bases its rental fees on guidelines contained in "Rules and Regulations Governing Issuance of Mineral Leases" (Exh. 1 to the Appraisal Report). BLM's methodology in comparing U-54897 with State of Utah leases is set forth below:

While it is recognized that State leases are different in several respects from right-of-way grants issued by B.L.M., the proximity of the State leases and the similarity of the actual land use makes them particularly valuable for comparison with the use of the subject.

* * * * *

Under State rules the rights to use the waters of the Great Salt Lake, without a lease on surrounding State land (a water only lease), requires an advance minimum royalty payment of \$5,000. Royalty payments are made for minerals extracted from lake water on an escalating scale. The royalty payments due for minerals extracted from lake water are credited towards the \$5,000 minimum royalty value required. Thus, under State rules, the value of the right to use waters of the Great Salt Lake for mineral extraction is equal to the royalty payments due on the minerals extracted, with a \$5,000 guaranteed minimum.

The right to lease land around the Great Salt Lake and use the waters of the Great Salt Lake (a combined lease), requires an advance minimum royalty payment of \$10,000. Charges for the lease of State land are currently \$1 per acre per year for the

first 10 years, and \$2 per acre per year thereafter. These rentals are credited toward production royalties due, including the \$10,000 minimum combined lease royalty.

Therefore, it can easily be deduced that the minimum payment to lease the land portion of a combined lease is \$5,000 (\$10,000 combined lease less \$5,000 water only lease).

* * * * *

Currently, the State collects royalties on minerals extracted from both lake water and from the surface of the leased land. The State considers these royalty payments their fair share of the revenues generated from mineral extraction. According to the Division of State Lands and Forestry the royalty payment is the fair market value of the owners' share of the minerals extracted.

These two rights, the right to use waters of the Great Salt Lake and the right to extract minerals from the surface of the land under lease, are not included in the subject B.L.M. right-of-way grants.

However, B.L.M. Right-of-Way Regulations do provide that upon securing authorization under the Materials Act (30 U.S.C. 601 et seq.) and paying in advance the fair market value of the mineral material, resources may be taken from public lands. (See 43 CFR 2801.1-1(d). Therefore, no significant difference exists between State leases and B.L.M. right-of-way grants for the right to extract minerals from the surface of the land under lease. In both cases the landowner must receive the fair market value of the mineral material taken from the land.

The other right, the right to use waters of the Great Salt Lake, only becomes significant if an allocation of value to that particular right cannot be accurately estimated. The contribution of the rights to use Great Salt Lake water can easily be calculated for State leases because the State receives a \$5,000 minimum royalty payment, and a royalty on minerals extracted over the minimum.

Therefore, no significant adjustments are necessary for the above differences between the subject grant and State leases. The value of right to use lease water can easily be allocated out in the valuation process, and the right to extract minerals from the surface of the land under either right-of-way or lease are similar. [Emphasis in original.]

(Appraisal Report at 10-11).

BLM provides two "production lease models * * * to show what per acre rents the subject grant could be expected to produce under various lease

conditions." Id. at 11; see Exh. 2. BLM's analysis of the two models is set forth below:

In Model A, production was estimated at less than \$10,000 to give a picture of what production might be for the start up years, or other low production periods. It also gives a land rental less influenced by production revenues. Model B uses production royalties estimated from the 1986 royalty paid for State ML Nos. 18779 and 36633. The factor of 1.56661185 is based on the average production per acre of leased area (\$232,533 royalty divided by 148,477.27 acres). This factor assumes a low to moderate level of production for the subject.

Production Lease Model A shows that the rental for the 55,558 permanent acres of the subject would be \$0.91 per acre, while Production Lease Model B shows the rental at \$1.48 per acre.

(Appraisal Report at 12).

BLM states that "[a] search of B.L.M. records showed that there are other right-of-way grants that have been issued for uses similar to the subject grant. The rentals for all the grants issued, or updated, within the last 5 years were for amounts between \$1.00 to \$1.50 per acre per year." Id. The appraisal report does not provide the specifics as to these rights-of-way.

BLM points to "[s]ix transactions involving lands similar to the subject [which] show a range of land values for similar land from a low of just over \$10 per acre to a high of \$25 per acre." Id. at 13. BLM's comparison of these transactions to AMAX's right-of-way is set forth below:

Under right-of-way regulations, the B.L.M. reserves certain rights in their right-of-way grants. These include the right of access, the right to require the common use of the right-of-way area, and the right to authorize and collect rental for compatible uses. It is felt that the rights conveyed under the right-of-way provisions for solar evaporative industries are equivalent to about 70% of the bundle of right [sic] conveyed in fee ownership, and that the Government retains about 30% of the bundle of rights.

Using a rate of return on total assets of 10%, a rental range based on land values can be calculated as follows:

\$10/acre x 10% rate of return x 70% of fee = \$0.70/acre
 \$25/acre x 10% rate of return x 70% of fee = \$1.75/acre

Therefore, the subject should rent for an amount between \$0.70 and \$1.75 per acre per year based on land values.

Id.

For the reasons set forth below, we set aside BLM's decision and remand this case for further appraisal. The major shortcoming of BLM's appraisal of the fair market rental of right-of-way U-54987 is that there is no direct comparison of the subject property with similar properties leased for similar use. BLM states that its primary method of comparison in its Appraisal Report will involve "[t]he direct comparison of the subject [right-of-way] to State of Utah leases, to other B.L.M. evaporative industry rights-of-way, and to minimum rentals [for] other Federal mineral leases" (Appraisal Report at 9). However, there is no such direct comparison.

In its SOR, AMAX refers to a number of factors which, in our view, would be relevant in appraising the fair market rental of U-54897: "The lands under U-54897 are not as valuable as the lands evaluated in Stansbury Basin because of the remote location, lack of utilities, lack of developed transportation facilities, distance from work force population and lack of access to Great Salt Lake Brines on a continuous or guaranteed basis" (SOR at 2). In its Answer, appraiser Wilkinson is quoted as stating:

While minor differences exist in the factors [AMAX] lists, I do not believe that the differences between the property north of Timpie in the Stansbury Basin, and the subject property north of Knolls, are that great. For example, rail lines and I-15 pass near both areas, power service is available in both areas at a short distance, both are remote in location, and both have reasonable access to Lake brines depending on the Lake level.

While the land in U-54897 is farther from the Grantsville/Toole work force populace, AMAX's pond operations are not a labor intensive industry.

(Answer at 2).

Our purpose in quoting the disagreement between AMAX and BLM concerning these factors is to indicate that on remand BLM should directly compare right-of-way U-54897 with other leases in the area with reference to those features which add to or detract from the value of the property, thus providing an analysis of the differences and similarities between right-of-way U-54897 and the comparable leases. The objective of the appraisal of right-of-way U-54897 is to establish the fair market rental value of the property involved.

BLM states that "[a] search of B.L.M. records showed that there are other right-of-way grants that have been issued for uses similar to the subject grant. The rentals for all the grants issued, or updated, within the last 5 years were for amounts between \$1.00 to \$1.50 per acre per year" (Appraisal Report at 12). We recommend that BLM select a reasonable number of those similar rights-of-way and compare right-of-way U-54897 with them. Such an approach would serve more utility than the rather abstract comparison of right-of-way U-54897 with two models based upon the State of Utah's general approach in leasing land around the Great Salt Lake.

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 set aside and the case is remanded.

Wm. Philip Horton
Chief Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge