BEAR CREEK HYDRO

IBLA 89-298 Decided February 10, 1992

Appeal from a decision of the Ukiah District Office, Bureau of Land Management, adjusting the rental rate for right-of-way CA-15574.

Affirmed.


Absent a demonstration that BLM's method for appraising the value of the linear and site components of a right-of-way granted for a hydroelectric power facility is erroneous or the rental is clearly excessive, a BLM decision adjusting the rental is properly affirmed.

APPEARANCES: Ernest R. Martinez, Esq., Redding, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Bear Creek Hydro (Bear Creek) has appealed a February 21, 1989, decision of the Ukiah District Office, Bureau of Land Management (BLM), adjusting the rental rate for right-of-way CA-15574. The right-of-way consists of the site for a hydroelectric power plant and two linear segments for roads, a transmission line, and a buried penstock, and is located in the N½ NE¼, sec. 22, T. 31 N., R. 1 W., Mount Diablo Meridian, Shasta County, California.

The right-of-way was granted pursuant to Title V, Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1988), to Northwestern Resources, Inc., on September 25, 1984. 1/ The right-of-way contains the following terms and conditions:

8. Compliance will be here in accordance with the terms and conditions as specified herein and in Appendix A.

1/ On Mar. 19, 1985, BLM approved assignment of the right-of-way to TKO Power, and on June 12, 1985, approval for assignment to Bear Creek was granted.

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9. In consideration for these uses, the holder shall pay rental to the Bureau of Land Management, the sum of twenty-five dollars ($25.00) for the first five year period, 1985 to 1989 and thereafter each five year period ($25.00), or you may pay one hundred fifty dollars ($150.00) for the full term of the grant. Provided, however, charges for this use may be made or readjusted whenever necessary to place the charges on the basis of fair market value. This right-of-way grant is not in force unless the holder has paid the rental fee in advance.

10. This right-of-way grant shall terminate 30 years from the effective date of this grant prior thereto it is relinquished, abandoned, terminated, or otherwise modified pursuant to the terms and conditions of this grant of any applicable Federal law or regulation.

(Right-of-Way at 2-3).

Appendix A includes the following stipulations:

9. The holder will provide public access for all lawful purposes to the involved public lands via pedestrian traffic along the road right-of-way or a trail along the penstock route from its intersection with Inwood Road to the public lands and Bear Creek.

10. The holder agrees to provide to the U.S. an equivalent right-of-way that is adequate in duration and rights across private lands in T. 31 N., R. 1 W., M.D.M., Section 23, NW 1/4 (see Attachment #3). Value of rights granted by reciprocity will be determined by appraisal and balanced by payments upon completion of the permanent easement acquisition to the U.S., rental charges will be waived and the term of the grant amended to perpetuity.

Attachment 3 shows the route of the right-of-way referred to in Stipulation 10, beginning at the end of the right-of-way granted across public lands in sec. 22, crossing the grantee's property in sec. 23, and ending north of Inwood Road at the boundary of property owned by Lucia Myers. Lucia Myers' property is located to the south of grantee's property, also in sec. 23. See June 12, 1984, Land Report, Exhibit B (Reciprocal Right-of-Way) and Attachment 7 (Land Ownership Map).

The June 12, 1984, Land Report, which recommended approving the application, states:

III. Decision Factors

A. Land Use Plans
Intensive forest management and non-commercial forest lands are identified in the subject area. Future management of these resources would be enhanced through a reciprocal grant to the United States for right-of-way across the applicant's property, in conjunction with a permanent, non-exclusive easement acquisition from the contiguous landowner [Lucia Myers], linking the county road [Inwood Road] to the reciprocal right-of-way to the U.S.

B. Other Factors:

2. Location and Access

*** Physical access to the subject public lands would result from implementation of the proposed action. Legal access for resource management purposes would require easement acquisition from two property owners, either by purchase or by a reciprocal right-of-way agreement, where appropriate.

3. Reciprocal Right-of-Way to U.S.

At present, there is no legal or physical access to the subject public lands, portions of which are identified for intensive forest management in the Resource Area's land use plans. Implementation of the proposed action would establish physical access. To serve the public interest, acquisition of a reciprocal, nonexclusive right-of-way to the U.S. would provide legal access for resource management purposes across the exclusive right-of-way of equivalent value should be acquired, pursuant to 43 CFR 2801.1-2, in reciprocation for a right-of-way grant from the U.S.

On June 26, 1984, the Acting Area Manager signed the Decision Record and Finding of No Significant Impact. The decision was to grant a right-of-way to Northwestern Resources, Inc., pursuant to Title V. of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1761). *** The grant is issued for a period of 30 years, renewable, and is subject to the terms and conditions as set forth. If appropriate, the grant requires a reciprocal, permanent, nonexclusive right-of-way to the U.S. across the Holder's property (see Exhibit B). Upon acquisition of the reciprocal right-of-way, the term of the grant will be amended to perpetuity and rental charges will be waived.

On December 8, 1988, BLM wrote Bear Creek:

In reviewing your Right-of-Way Grant *** we noted that the estimated annual rental, subject to formal appraisal and
adjustment, is $25.00. Condition 9 of the grant specifies BLM has the right to appraise and collect additional fair market rentals when warranted. We have just received guidance on fair market rental appraisals of Mini-Hydro Project. [2/]

Effective immediately, we need to adjust your rental rate.

Our rental amount will be the difference between the amount the Federal Energy Regulatory Commission (FERC) charges you, as a land use fee and the amount we derive from BLM fee schedule plus a 4% royalty fee assessed on gross income of your power production. Therefore, please provide us an accounting of the following fees:

1. Gross income of power production

2. Annual land use fees paid FERC (#5766)[.]

We will then calculate annual rental due minus FERC payments and rent already paid to BLM for this year. May we have your response within the next 30 days. If you have any questions feel free to contact us.

In response to this letter Bear Creek called to ask about the meaning of Stipulation 10 of Appendix A. BLM replied on January 17, 1989:

According to our record the intent in 1984 was to establish a reciprocal right-of-way so that the United States would have legal access to a planned Bear Creek Timber Sale. Since this easement and another easement would be needed, a decision was made to conduct the timber sale without access. The timber was sold on July 1, 1986. The timber has been removed and all site preparation completed. Since we have not acquired nor do we now need reciprocal access to the Bear Creek area we feel that we must collect rental based upon [IM CA-89-06] (copy enclosed).* *

* Therefore, please furnish us the information previously requested * * *. May we have your response within the next 30 days.

In the absence of a response, BLM issued it February 21, 1989, decision requiring Bear Creek to "submit a report stating gross income of power production and lands use fees paid to FERC, and pay the difference of 4% royalty on gross power production and the FERC land use fees within 30 days after receipt of this decision." Bear Creek's notice of appeal with timely.

Bear Creek's statement of reasons (SOR) recites items 8 and 9 of the terms and conditions, and Stipulations 9 and 10 set forth above, and then relates:

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2/ The reference is to Instruction Memorandum (IM) No. CA-89-06 entitled "Fair Market Rental Appraisals of Mini-Hydro Project," which was issued Oct. 7, 1988, by the State Director, California State Office, BLM.

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Following the issuance of the Right-of-Way Grant, Mr. Norman E. Kamp of TKO discussed at length with Ms. Kay Miller of BLM the manner in which the reciprocal easements for public access to Bear Creek and BLM access across the private easement of TKO would be accomplished. Ms. Miller informed Mr. Kamp that she wished to see the construction of the powerhouse associated with the project on Bear Creek completed before the reciprocal easement and the public access easement were specifically set down in legal forms. She orally agreed with Mr. Kamp that the future rental payments for the right-of-way granted to TKO by BLM would be offset in their entirety by the grant by TKO of the requested reciprocal easement and public access easement. * * * This [Bear Creek Hydro Project] facility began operation in December 1985 * * *.

Following completion of the construction of the powerhouse, TKO stood ready, willing and able to effect the transfer of the reciprocal easements contemplated by the terms of the Right-of-Way Grant. Assuming either that BLM would eventually finish what appeared to be ministerial paperwork with respect to said easements or that such work has been completed, TKO has continually allowed the public that access described in Stipulation 9 of the grant for fishing in proximity of the Bear Creek Hydro site with no interference or obstruction from TKO. Further, TKO allowed without protest the hauling over and across TKOs private easement of that timber which was logged off of BLM land adjacent to that referenced in Stipulation 10 pursuant to the term of that stipulation. However, since Mr. Kamp's oral agreement with Ms. Miller, BLM has apparently taken no steps to accomplish the "completion of the permanent easement acquisition to the U.S." as required by Stipulation 10 * * *.

(SOR at 2-3).

Stating that BLM's January 19, 1989, letter "sets out BLM's rationale for not granting to TKO Right-of-Way No. CA 15574 in perpetuity, as required by the terms of the Right-of-Way Grant," Bear Creek argues:

Basically, BLM's position with respect to the reciprocal easements is that, since BLM has already derived the benefit of that reciprocal easement, BLM is now free to ignore the promise made in 1984 to receive such an easement in exchange for the perpetual grant to TKO of Right-of-Way CA 15574, and is consequently free to collect rental from TKO on the project pursuant to the formula laid out in Instruction Memorandum No. CA-89-06. * * * The unilateral disregard of a material portion of the Right-of-Way Grant

3/ See n.1, supra.
represented by the adoption of the above-stated position by BLM forms the basis of one of the
grounds for the appeal [of the February 21, 1989 decision].

(SOR at 3).

When BLM received Bear Creek's inquiry about Stipulation 10 in December 1988, it investigated the history of
the provision. The report of that investigation states:

Prior to issuing this subject grant, Kay Miller, former Redding Resource Area Realty Specialist, and I
discussed, on several occasions, the possibility of requiring the Holder to convey an easement to the
United States because of the possibility of a future timber sale in the Bear Creek area. Even thou[gh] Kay
was not sure if there would be a timber sale, she did include a stipulation in Appendix A, (stipulation 10) * * *
. The Holder agreed to this stipulation.

After [the right-of-way was granted in September 1984], it was decided to conduct a timber
sale in the Bear Creek area. In preparing to acquire access for this sale, I advised Jim Francis,
former Redding Resource Area Supervisory Forester, of the reciprocity stipulation contained in the
right-of-way grant. However, since an easement was also need[ed] from Mrs. Lucia Myers, the
decision was made in that order to save both time and money, the Bear Creek timber sale would be
advertised and sold without access. This sale was sold on July 1, 1986, and contained 535 MBF for
a total return of $47,000.00.

The last time the subject of reciprocity is mentioned in the casefile was on October 28, 1986.
[4] This was in a telephone confirmation from Mr. Norman Bathwaite, TKO Power to Kay Miller.
In this conversation he was asking about establishing the reciprocal right-of-way as provided in the
grant terms. It was relayed to him that according to Jim Francis, "a right-of-way for fuelwood cutting
is desirable in the Bear Creek area and should be perfected this FY 87." I was approached several
times regarding this acquisition and relayed that I would have time to pursue this easement and one
from Mrs. Myers as soon as the easements plans were prepared. In return I was told the engineers
would be given this assignment. However, perhaps due to other higher priority work, the surveying
work was never accomplished.

4/ There is no mention of this in the record submitted to the Board on appeal. However, this absence is inconsequential, for it
is settled that reliance on inaccurate information provided by a Federal employee cannot create rights not authorized by law.
In a discussion on January 6, 1989 with John Borgic, Redding Resource Area Acting Supervisory Forester, I was informed the slash piles which contained the above referenced fuelwood had been burnt. Therefore, the need for access for fuelwood cutting is no longer valid. I was also advised that approximately 300 MBF of timber remains near Bear Creek but the possibility exists this timber will not be harvested. It was suggested by John Borgic that a 4% royalty fee from the hydro project would probably be a much higher return to the government than a small future timber sale. He concluded that access rights to the U.S. under reciprocity are probably not needed.

(Memorandum from John Coon, Realty Specialist, to Wayne King, Supervisory Realty Specialist, received Jan. 9, 1989, at 2).

Bear Creek also argues it

has received no market evidence or empirical data which justifies the formula contained in Instruction Memorandum No. CA-89-06 for determining the fair market appraisals for rights-of-way of mini-hydro projects generally, and of the Bear Creek Hydro Project in particular. Assuming that BLM is allowed to unilaterally ignore the terms of the Stipulations to the Right-of-Way Grant, the increase in the rental to be paid by [Bear Creek] for the right-of-way to the rate indicated in the Decision Re Rental Rate Adjustment appears to be arbitrary and not related to the fair market value of the rights granted [Bear Creek] under Right-of-Way Grant CA 15574.

(SOR at 3-4).

With its Answer BLM submitted a copy of the September 30, 1988, justification and Minihydro Market Survey in support of IM No. CA-89-06. Appellant was sent a copy of these documents.

43 CFR 2801.1-2 authorizes BLM, if it determines that it is in the public interest, to require an applicant for a right-of-way, "as a condition to receiving a right-of-way grant, to grant the United States an equivalent right-of-way that is adequate in duration and rights." The BLM Manual currently includes the following instructions pertaining to processing of so-called reciprocal grants:

Concurrent Processing. The R/W grant and the easement document should be processed concurrently. The applicant should be advised of the need for reciprocal rights during preapplication.

5/ "When the United States acquire a right-of-way, the costs of environmental reports, special studies and processing are borne by the Bureau of Land Management rather than the land owner." 44 FR 58113 (Oct. 9, 1979).
activities or at the earlier possible stage in application processing. BLM should make every effort to process these rights-of-way promptly. The right-of-way grant and the easement should be delivered as one package for the applicant's signature. The authorized officer should execute the documents simultaneously.

(Blm Manual 2801.47.B.9, Release 2-263, Mar. 8, 1989). Had this guidance been in place and followed when Bear Creek's right-of-way was granted in 1984, the subsequent events that have occasioned Bear Creek's appeal would have been avoided. However, we cannot agree with Bear Creek's argument that the language of the right-of-way grant, considered as a whole, required BLM to "complet[e] * * * the permanent easement acquisition to the U.S.," waive the rental charges, and amend the term of the grant to perpetuity, as provided in Stipulation 10. In our view, item 8 of the terms and conditions speaks to compliance by "the holder" with the other terms and conditions and Appendix A, and does not commit BLM to Stipulation 10. Stipulation 10 itself is phrased in the future tense, not in terms of mutual agreement. Item 10 is the terms and conditions makes clear that the term of the grant is thirty years unless it is modified. Although such a modification was discussed, it was not a condition of the grantee's acceptance of the grant. Rather, the grantee's agreement to convey an equivalent easement to the U.S. was a condition of granting the right-of-way, as the regulation provides. Presumably the grantee accepted this condition in order to be able to receive the right-of-way it needed from BLM in order to carry out its project. Further, it is clearly indicated in the contemporaneous June 26, 1984, Decision Record and Finding of No Significant Impact signed by the Acting Area Manager that the decision on a reciprocal right-of-way would be made at some future time. That June 26 decision states: "If appropriate, the grant requires a reciprocal, permanent, nonexclusive right-of-way **." (Emphasis supplied.)

[1] IM No. CA-89-06 establishes the procedures for determining rental charges for mini-hydro projects in California. It provides that

the lineal improvements located on public lands, including penstocks, diversion canals, distribution lines, etc., which lead to or from the power plant will be appraised as linear right of way in accordance with the fee schedule contained in 43 CFR 2803.1-2(o)(1)(i). The actual rental amount charged ** will be difference, if any, between the amount of the Federal Energy Regulatory Commission charges as a land use fee and the amount derived from BLM's fee schedule.

As a power plant that has begun production, "the market evidence indicated that a 4 percent royalty fee shall be assessed, based on gross income of the production of power."

The State Appraiser's September 30, 1988, justification explains that "the market reveals that rental charges for these projects are determined by using two approaches addressing separate portion of the total project," i.e., the linear improvements and the power plant. The rental charge for the former "is based on land value times percentage of fee times a discount"
rate (same approach as how the BLM's fee schedule is determined), "while a power plant and its immediate improvements "is
considered as a site. In this case, the market reveals that the rental charge * * * is determined by applying the income approach
using a percentage of royalty as the basis." These conclusions were based on information obtained from PG&E and Pacific
Telephone, who both pay for linear rights-of-way on the same basis as the BLM fee schedule while PG&E pays a 4- to 5-
percent gross royalty fee for power plants constructed on private land. Information obtained from the Federal Energy
Regulatory Commission indicates it applies the BLM fee schedule to all portions of a mini-hydro project, but the State
Appraiser concluded that "[a]ll of our market date points to using the gross 4% royalty [for power plants on BLM lands].
Overall, it seems a practical and sensible approach." The attached Minihydro Market Survey is based on eight facilities in six
counties, taking into consideration their components, rentals, and special circumstances.

It is well established in our decisions that an appellant must demonstrate the appraisal for a site right-of-way or for
a linear right-of-way in accordance with 43 CFR 2803.1-2(c)(1) is erroneous by a preponderance of the evidence. Without such
evidence, an appraisal generally may be rebutted only by another appraisal. Oregon Broadcasting Co., 119 IBLA 241 (1991);
Gila Electronics, 117 IBLA 51 (1990); Mr. and Mrs. Gerald H. Murray, 117 IBLA 138 (1990). In this case, although Bear
Creek argues the increase in rental appears to be arbitrary and not related to fair market value, it has not shown any defects in
BLM's appraisal methodology or demonstrated the rental is excessive. Nor has appellant established that the IM is contrary to

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the
Interior, 43 CFR 4.1, BLM's February 21, 1989, decision is affirmed.

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Will A. Irwin
Administrative Judge

I concur:

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James L. Byrnes
Administrative Judge

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