

V. IRENE WALLACE

IBLA 90-35

Decided March 12, 1992

Appeal from a decision of the District Manager, Battle Mountain District, Nevada, Bureau of Land Management, determining the rental for right-of-way grant N-36113.

Set aside and remanded.

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

An appraisal of the fair market rental value of a reservoir right-of-way will be upheld on appeal where no error is shown in the appraisal method used by BLM and the appellant fails to show by convincing evidence that the annual rental charge is excessive.

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

A decision initially advising the holder of a right-of-way of the fair market rental value of the grant and billing that amount more than six years after issuance of the right-of-way may be set aside and remanded for consideration of whether in the public interest the rental charge should be reduced on the basis of undue hardship to the holder under the regulation at 43 CFR 2803.1-2(b)(2)(iv) where the reservoir authorized by the right-of-way was never constructed.

APPEARANCES: V. Irene Wallace, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal has been brought by V. Irene Wallace from a September 5, 1989, decision of the District Manager, Battle Mountain District, Nevada, Bureau of Land Management (BLM), determining the fair market rental for reservoir right-of-way N-36113.

On April 5, 1982, Wallace filed an application for a right-of-way pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1988). She sought a right-of-way for the use of an earthen reservoir to be constructed in the SW 1/4 NE 1/4

sec. 15, T. 4 S., R. 36 E., Mount Diablo Meridian, Esmeralda County, Nevada, to provide water for irrigating adjacent private land.

BLM prepared a Land Report on January 28, 1983, assessing the environmental consequences of granting the proposed right-of-way and alternatives thereto. The report recommended the grant of the right-of-way.

On February 1, 1983, the Area Manager, Stateline-Esmeralda Resource Area, Nevada, BLM, held that the grant of the proposed right-of-way would not result in any significant environmental impacts and approved the grant. In a letter dated February 24, 1983, BLM submitted a set of stipulations to be included in Wallace's right-of-way grant, and afforded her an opportunity to object to or accept the stipulations by signing them. The letter stated: "Upon return of the signed stipulations, a decision can be issued granting the right-of-way." Signed stipulations were filed with BLM on March 7, 1983.

On March 30, 1983, BLM issued a 30-year right-of-way grant for approximately 10 acres of land, described as the SW 1/4 SW 1/4 NE 1/4 sec. 15. The grant provided for construction and use of an earthen reservoir, with associated spillway and inlet and outlet pipes, which would be enclosed by a barbed wire fence on land and stated that rental would be "[p]ayable upon billing."

By letter dated April 19, 1983, BLM forwarded the right-of-way grant documents to Wallace, noting that she had previously been contacted regarding certain additional stipulations incorporated in the grant as issued. The letter enclosed a copy of the additional stipulations holding the grantee liable for damages or injuries to third parties resulting from her use and occupancy of the public land. The BLM letter also provided appellant with an opportunity to submit any objection to the additional stipulations for "review and consideration." <sup>1/</sup> The April 19 letter further stated:

Normally, such a grant is not issued until rental for the right-of-way has been paid. However, in order to accommodate your construction and operating schedules, the grant is being issued without benefit of the appraisal which establishes the annual rental. Upon completion of the appraisal you will be billed for the annual rental commencing from the effective date of the grant. <sup>2/</sup>

---

<sup>1/</sup> No objection appears in the record. A report of a telephone conversation of Apr. 14, 1983, between BLM and appellant by which appellant was initially advised of the liability stipulations indicates appellant agreed to adhere to them.

<sup>2/</sup> Appellant requested in a signed hand-written addendum dated Jan. 12, 1983, to the cover letter which accompanied her right-of-way application: "Please grant prior to appraisal. I agree to pay fair market assess value when determined."

Finally, the letter provided that construction was to be completed within five years and Wallace was to notify BLM within 90 days following the completion of construction.

In a "short note transmittal" written shortly after issuance of the right-of-way grant a BLM adjudicator noted that an appraisal should be undertaken. For some reason not apparent from the record, the matter languished for almost 6 years before a formal request for appraisal was made on January 10, 1989. On June 12, 1989, an appraisal report was prepared to determine the annual fair market rental value of Wallace's right-of-way grant.

The BLM appraisal of the right-of-way grant was bifurcated to determine the fair market rental value as of two dates: March 30, 1983, the date of issuance of the grant, and April 5, 1989, the date of the appraiser's inspection of the parcel. The appraiser used the market data approach, comparing the value of the grant lands with sales of comparable land having a similar highest and best use. The highest and best use was found to have been speculative investment for agricultural development on March 30, 1983, when the "agricultural market was stronger." The highest and best use was found to have been speculative investment for subdivision on April 5, 1989. The market values of the comparables were adjusted for differences in terms of the time of the sale, terms of the sale, parcel size, location, character of the land, presence of water and septic system, proximity of power and telephone service, and access. Four sales were selected to determine the fair market value as of March 30, 1983, and six parcels were selected for determining value as of April 5, 1989.

The resulting estimated fair market value of the tract for the period from March 30, 1983, through April 4, 1989, was found to be \$500 per acre, which was discounted 10 percent to \$450 per acre to reflect the limited authorized use (for reservoir purposes). The fair market rental value of the grant was then determined for this period, using adjusted rates of return designed to reflect economic conditions at the time. The report concluded that the fair market rental value was as follows:

<u>Year(s)</u>	<u>Annual Return</u>	<u>Rental/year</u>
1983	13%	\$585
1984-86	10%	\$450
1987-4/4/89	8%	\$360

The appraised value of the land from and after April 5, 1989, was set at \$1,200 per acre. After discounting the value to \$1,080 per acre, and using an 8-percent rate of return, the appraiser set the fair market rental value from and after April 5, 1989, at \$864 per year. The appraisal report was approved by the Chief, Branch of Appraisal, Nevada, BLM, on July 3, 1989.

In his September 5, 1989, decision the District Manager held that, on the basis of the appraisal, the fair market rental for Wallace's right-of-way grant during the period from March 30, 1983, to December 31, 1989, was

\$3,245.22. A bill for that amount was enclosed with the decision. This appeal was taken from the District Manager's decision.

In her statement of reasons for appeal, Wallace contends that she never received the subject right-of-way grant and that, having heard nothing regarding her application, she "relinquished" any rights she might have had, effective on the date of application. She contends that she was never "allowed" to undertake any construction, that she never heard a word from BLM for seven years, and that she received no timely billing. Hence, appellant asserts it would be improper to charge her rental. In summary, she states that "[t]o be billed for 7 years total, for no use or possession, is absolutely ridiculous." She also notes that she had never constructed the proposed reservoir on the tract. 3/

When Wallace filed her application for a right-of-way on April 5, 1982, BLM undertook the steps necessary for issuance of the right-of-way. Upon completing this process except for setting the rental amount, BLM issued a right-of-way grant to her. The grant documents were transmitted to her under cover of an April 19, 1983, letter noting that construction of the reservoir and appurtenant structures "must be completed within five years from the date of the grant," which was March 30, 1983. The letter containing the grant was sent by registered mail and the return receipt card attached to the file copy of the April 1983 letter indicates that the letter was received by James P. Wallace on April 22, 1983. 4/ Therefore, Wallace is deemed to have received notice of the issuance of the right-of-way grant at that time. See 43 CFR 1810.2(b); Lloyd M. Baldwin, 75 IBLA 251, 252-53 (1983).

From and after the date of issuance, the land has been subject to the terms and conditions of the grant giving Wallace the right to construct and operate the proposed earthen reservoir. 5/ Having received the grant, Wallace was also obligated to comply with the terms and conditions of the grant regardless of whether she ever took advantage of such authorization. See 43 U.S.C. § 1764(g) (1988); 43 CFR 2803.1-2(a) (1982); Roy L. Parrish, 114 IBLA 336, 338 (1990). The BLM letter of April 19, 1983, and the terms of the accompanying grant put appellant on notice that she would be charged rental from the date of issuance of the grant. The grant stated that rental

---

3/ It appears from a photograph of the subject tract in the 1989 appraisal report that the reservoir was not built on the right-of-way.

4/ James P. Wallace is the right-of-way applicant's father and it appears from the record that he assumed overall responsibility for the right-of-way. See Conversation Record (Verna Wallace and Diane Ross), dated Aug. 10, 1989. When BLM attempted to contact V. Irene Wallace in August 1989, the employee reached her mother and was referred to James P. Wallace because he "knows all the particulars." Id.

5/ While there is a provision in the relevant regulations authorizing BLM to require a right-of-way holder to await receipt of a notice to proceed prior to undertaking construction, we find nothing in the record to indicate such a condition was included in appellant's grant. 43 CFR 2803.2(a).

would be payable "upon billing." The April 19 letter further clarified that billing would not occur until the grant had been appraised, but that, in any case, appellant would be billed for annual rental "commencing from the effective date of the grant."

The file contains further evidence of Wallace's knowledge of and intent to hold the right-of-way after issuance. On November 6, 1986, BLM sent a letter to Wallace containing the following statements:

On March 30, 1983 you were granted right-of-way N-36113 for a 660-square foot earth reservoir adjoining your private land. As a condition of your grant, you agreed to submit a monitoring fee in the amount of \$100 within 90 days of the effective date of the grant. To date, we have not received your remittance for the monitoring fee.

We apologize for not notifying you in the past about this oversight. But we shall appreciate your direct attention and we shall expect your remittance in the amount of \$100 in the near future.

Receipt and Accounting Advice statement No. 1291113 shows receipt of payment from Wallace on December 12, 1986.

No relinquishment of the right-of-way grant was filed with BLM prior to issuance of the decision under appeal. The only mention of relinquishment in the record prior to the filing of this appeal is made in a memorandum setting out the text of an August 10, 1989, telephone conversation between a BLM employee and James P. Wallace. According to the memorandum, after receiving a copy of the appraisal and being informed of the anticipated rental due for the period from March 30, 1983, to December 31, 1989, James P. Wallace stated that "they intend to relinquish" and that "he would have a relinquishment sent to us." As the notice of appeal filed with BLM on October 2, 1989, expressed the clear intent of the holder to relinquish the right-of-way, we find that the filing of this instrument effectively relinquished the right-of-way as of that time.

Wallace cannot now object that she never received notice that rent would be charged from the date of issuance. It is well recognized that the issuance of a right-of-way grant subject to subsequent determination of the proper rental is an accepted procedure and has long been approved by the Board. See 43 CFR 2803.1-2(b) (1982); Oregon Broadcasting Co., 119 IBLA 241, 242-43 (1991), and cases cited therein. <sup>6/</sup>

---

<sup>6/</sup> Normally, BLM collects an estimated rental in anticipation of a subsequent appraisal and determination of the actual fair market rental. See 43 CFR 2803.1-2(b) (1982). In this case BLM made no estimate of the fair market rental when the right-of-way grant was issued. Despite this error, 43 CFR 2803.1-2(b) (1982) clearly provided for deferral of assessment and

[1] Wallace also argues that the appraisal was in error because the fair market value was based on a use other than agricultural purposes. Wallace's argument is confined to an assertion that the fair market rental value of the subject grant is based on values taken from sales of small acreage tracts for residential usage, rather than for agricultural purposes, and is unsupported. We note that over the bulk of the appraisal period (1983 through April 4, 1989), the assessment was based on comparable sales of land for agricultural development. Further, there is support in the record for the appraiser's finding that speculative investment for subdivision accords with the definition of highest and best use of the subject land as of April 5, 1989. Wallace submits no evidence that the appraiser improperly concluded that this was the highest and best use of that land and, thus, selected sales of comparable land on an improper basis. See American Telephone & Telegraph Co., 25 IBLA 341, 352 (1976). She has failed to demonstrate any error in the appraisal and, therefore, the appraisal of fair market value must be upheld. See Delbert Jones, 100 IBLA 289, 291 (1987). Thus, the BLM decision would be affirmed except to the extent it applied to rental after filing of the notice of appeal on September 5, 1989, when the right-of-way was clearly relinquished, if the appraisal of fair market value was the only issue.

[2] The relevant regulations regarding right-of-way rental provide that the authorized officer may reduce or waive the rental payment in certain circumstances. In particular, the regulations provide that the rental payment may be reduced when: "With the concurrence of the State Director, the authorized officer, after consultation with an applicant/holder, determines that the requirement to pay the full rental will cause undue hardship on the holder/applicant and that it is in the public interest to reduce or waive said rental." 43 CFR 2803.1-2(b)(2)(iv). Certain aspects of the record in this case raise the issue of whether charging the full fair market rental value of the right-of-way for the period from March 30, 1983, to the date of relinquishment imposes an undue hardship on appellant.

Common experience dictates that upon entering into a lease of property, the lessee will ordinarily be liable for rent for the duration of the lease regardless of the degree to which the property was utilized. Thus, upon renting an apartment, the lessee becomes liable for the rent regardless of whether he ever occupies the premises as the lessor is unable to lease the property to others during the term of the lease. On the other hand, experience dictates that a lessor should not allow a lease to continue for a period of almost 7 years without receipt of a rental payment or even a written determination of the amount of the rent to be charged. In this regard, the

---

fn. 6 (continued)

payment of fair market rental. The failure to collect an estimated rental does not preclude collection of fair market rental, as required by 43 U.S.C. § 1764(g) (1988). See Mountain States Telephone & Telegraph Co., 79 IBLA 5, 7 (1984).

record shows that the BLM adjudicator noted that an appraisal was required on April 28, 1983, 9 days after the right-of-way was mailed to appellant. However, no appraisal was ordered until January 10, 1989, and no decision regarding the rental due was issued until September 5, 1989. The only documents in the file between those two dates are the 1986 notice that a \$100 "monitoring fee" was due and the subsequent receipt of that sum.

In the same letter that advised Wallace that the rental was to be set at some later date she was advised that "[c]onstruction must be completed within five years from the date of the grant." This is consistent with the provision in the right-of-way regulations to the effect that the failure of the holder of a right-of-way grant to use the right-of-way for the authorized purpose "for any continuous five-year period shall constitute a presumption of abandonment." 43 CFR 2803.4(c); *see* 43 U.S.C. § 1766 (1988). The monitoring fee was assessed to offset costs that would be incurred by BLM to assure compliance with this and other requirements of the right-of-way. No notice of completion was filed because the reservoir was never constructed, but the file contains no notice that the right-of-way was terminated as a result of Wallace's failure to complete construction.

Indeed the hardship represented by the circumstances of this case was recognized in part by BLM officials. Thus, in a memorandum ordering an appraisal in 1989 of the value of the right-of-way issued in 1983 the Manager of the Tonopah Resource Area remarked: "No rental has been paid on this grant since its issuance on March 30, 1983. [The g]rant states that rental is 'payable upon billing.' [The a]ppraiser may wish to take this into account in formulating appraisal" (Memorandum of Jan. 10, 1989). Similar concern for the hardship presented by billing the holder for the appraised fair market value rental more than 6 years after issuance of the right-of-way was manifested by the telephone call to the holder placed by a BLM employee upon receipt of the appraisal to "give \* \* \* advance notice that it is a considerable amount" (Conversation Record, Aug. 10, 1989). In these circumstances, we find it appropriate to set aside the decision determining the amount of rental due for the right-of-way and remand the case for consideration of the hardship regulation at 43 CFR 2803.1-2(b)(2)(iv).

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.

---

C. Randall Grant, Jr.  
Administrative Judge

I concur:

---

R. W. Mullen  
Administrative Judge

## ADMINISTRATIVE JUDGE HUGHES CONCURRING:

The decision of the Bureau of Land Management (BLM) establishing rental for V. Irene Wallace's right-of-way was correct. Although I concur that the decision should be set aside and remanded, I wish to stress that our decision in no way suggests that the rental determined by BLM was not due. The only issue needing review by BLM is whether the relief provisions of 43 CFR 2803.1-2(b)(2)(iv) apply here. We have not prejudged that question.

I am unpersuaded that BLM has previously recognized that the requirement to pay the rental due on this right-of-way would cause undue hardship. The record indicates only that, in requesting the appraisal, the Tonopah Area Manager, BLM, noted that no rental had ever been paid on the lease since its issuance in 1983, and that the appraiser might wish to take this into account in formulating the appraisal. This statement merely expresses a fact. It does not express concern about the adverse impact on the grantee of BLM's failure to set the rental timely. It makes no judgment as to whether the requirement to pay imposes an undue burden. <sup>1/</sup> Although a BLM employee telephoned to give Wallace advance notice that BLM would be issuing a bill for a "considerable amount" of money, the BLM employee also advised Wallace's father that he "would still be obliged to remit the rental for the period he held the right-of-way."

BLM has never addressed whether collection of rental constitutes an undue hardship or whether reduction or waiver would be in the public interest, and there may be other facts that must be assembled prior to ruling on that question. As a result of our decision, BLM is now required to make an initial decision whether that provision applies and, if so, how much the rental due should be adjusted, using the procedure set out in 43 CFR 2803.1-2(b)(2)(iv). Any adverse decision by BLM would be subject to appeal under 43 CFR 4.410.

---

David L. Hughes  
Administrative Judge

---

<sup>1/</sup> The Area Manager may simply have been advising the appraiser that, owing to the long delay between issuance and appraisal, both a current and a historical appraisal were required.

