

JACQUELINE BALANDER

IBLA 90-544

Decided February 17, 1993

Appeal from a decision of the Area Manager, Glendale Resource Area, Oregon, Bureau of Land Management, requiring payment of rental for water pipeline right-of-way OR-37394.

Affirmed.

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

BLM is entitled (and required) to charge fair market value rental for an existing water pipeline right-of-way issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. §§ 1761-1771 (1988), even though no rental had been charged for a right-of-way or use authorization for the pipeline for a number of years prior to right-of-way issuance.

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

It does not matter that no surface uses of the land subject to an existing water pipeline right-of-way are or may be disrupted by the pipeline. The rental is charged for the right to use the land, and would accrue even if the right-of-way holder did not use the land.

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

The fair market value rental for a linear right-of-way is based upon the amount of land required to construct and maintain the pipeline. The mere fact that the pipeline is longer than it might be if the sole basis for choosing the route had been the per-acre rental charge is not a proper basis for concluding that the rental is too high.

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

The regulation at 43 CFR 2803.1-2 provides authority for reduction or waiver of rental for a right-of-way if requiring payment of the full rental will cause undue hardship on the holder and it is in the public interest to reduce or waive the rental. BLM need not consider applying this regulation when assessing the rental amount if there is no evidence that charging the full rental amount would cause undue hardship.

APPEARANCES: Kim Black, Sunny Valley, Oregon, for appellant.

#### OPINION BY ADMINISTRATIVE JUDGE MULLEN

Jacqueline Balander has appealed from an April 27, 1990, decision of the Area Manager, Glendale Resource Area, Oregon, Bureau of Land Management (BLM), directing her to pay rental for water pipeline right-of-way OR-37394.

On July 31, 1984, Balander applied for a right-of-way for an existing underground domestic water pipeline running northwest from a spring on public land in the NW $\frac{1}{4}$  sec. 1, T. 34 S., R. 6 W., Willamette Meridian, Josephine County, Oregon, to a private home in sec. 2 of that township. <sup>1/</sup> In a letter dated March 19, 1985, BLM notified Balander that it would issue a right-of-way for the pipeline and directed her to sign and return an enclosed grant document and remit \$25, the advance rental for the first 5 years of the right-of-way term. BLM stated that it would issue the grant upon receipt of the signed grant document and payment.

BLM received the executed grant and \$25, and on April 9, 1985, right-of-way OR-37394 was issued to Balander, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761-1771 (1988). The right-of-way is approximately 200 feet long, 10 feet wide, and encompasses 0.1 acres of public land. In pertinent part, the grant provides:

In consideration for these uses, the holder shall pay to the [BLM] the sum of twenty-five dollars (\$25.00) for the period from 4-9-85 to 4-9-90, and thereafter annually five dollars (\$5.00): Provided, however, charges for these uses may be made or readjusted whenever necessary to place the charges on the basis of fair market value of uses authorized by this grant.

On April 23, 1990, BLM calculated the rental for Balander's right-of-way utilizing the linear right-of-way rental fee schedule incorporated

<sup>1/</sup> The public land crossed by the pipeline was O & C land which had been granted to the Oregon and California Railroad and revested in the United States by the Act of June 9, 1916, ch. 137, 39 Stat. 218 (1915-17).

in Departmental regulations effective August 7, 1987. 2/ See 52 FR 25811 (July 8, 1987). In his April 1990 decision, the Area Manager notified Balander that, after a reappraisal, BLM had determined that the fair market rental value of her right-of-way for the period from April 4, 1990, through May 28, 1995, was \$8, and directed her to pay that amount within 30 days of receipt of the decision. Balander appealed from that decision. 3/

Balander does not dispute BLM's computation of the rental using 43 CFR 2803.1-2. Nor can we find any error. The basis for her appeal is her claim that BLM has no right to charge any rental. She states that, even though the water pipeline crosses public land, it has been in place for almost 100 years, with no rent being charged until 1985. 4/

[1] The right-of-way issued to Balander for her water pipeline on April 9, 1985, was granted pursuant to FLPMA, which authorized BLM to grant rights-of-way "over, upon, under, or through [the public] lands" for "pipelines \* \* \* for the \* \* \* transportation \* \* \* of water." 43 U.S.C. § 1761(a) (1988). When it issued the right-of-way BLM was entitled (and required) to charge fair market value rental. 43 U.S.C. § 1764(g) (1988); see also 43 CFR 2803.1-2(a) (1985). The fact that no rental had ever been charged for a right-of-way or use authorization for this pipeline prior to April 1985 is of no relevance to BLM's continuing obligation to collect rental for rights-of-way. Balander is not entitled to free use of the

2/ BLM may use the regulatory schedule to determine the rental value for a right-of-way issued before the then current schedule if "reasonable notice" is given to the right-of-way holder. 43 CFR 2803.1-2(c)(2)(i). Notice was given to Balander in the April 1990 BLM decision, which provided 30 days to either comply or challenge the rental amount.

3/ The April 1990 Area Manager's decision did not inform Balander of her right to appeal or outline the procedure for appealing. On June 7, 1990, Balander sought information regarding the appeals process, asserting that BLM was not entitled to charge rental. BLM responded on June 27, 1990, stating: "We did not include the appeal form in our letter dated April 27, 1990, since there was a reduction in rental fees and [we] did not feel the decision to reduce rental charges on your right-of-way was adverse to you." BLM sent that form to Balander and, on Aug. 3, 1990, received another letter from Balander objecting to the rental. The April 1990 decision was a final decision adversely affecting Balander if she has no obligation to pay rental. She was therefore entitled to appeal that decision. See 43 CFR 4.410(a); Texas Oil & Gas Corp., 58 IBLA 175, 179, 88 I.D. 879, 881 (1981). Her June 1990 letter was a timely notice of appeal.

4/ We find no record of any formal right-of-way for Balander's pipeline prior to 1985, and presume that none existed until then. Prior to FLPMA, the Act of Feb. 15, 1901, 43 U.S.C. § 959 (1970) (repealed effective Oct. 21, 1976, by section 706(a) of FLPMA, P.L. 94-579, 90 Stat. 2793 (1976)), provided authority for right-of-way grants for domestic water pipelines. See Hazel E. Kincaid, 25 IBLA 257, 258 (1976). Payment of fair market rental was also required under that Act. See 43 CFR 2802.1-7 (1975).

right-of-way simply because she, or her predecessors-in-interest, had previously enjoyed free use. See A. Keith Barben, 81 IBLA 332, 334-35, 335 n.4 (1984). 5/

[2] Balander argues that she is entitled to free use of her right-of-way because the pipeline is buried and does not disturb "any logging or other works in the area." It does not matter that no surface uses of the land subject to the right-of-way are or may be disrupted by the line. The rental is charged for the grant of the right to use the land and would accrue even if the land were not used at all. See 43 U.S.C. § 1764(g) (1988); 43 CFR 2803.1-2(a).

[3] Balander states that no rental should be charged because her ancestors would not have chosen the present pipeline route across the public land if they had known that she would ultimately be required to pay rental based upon the amount of public land it crossed. We do not find this argument persuasive. The fair market rental for a linear right-of-way is based upon the acreage required to construct and maintain the existing pipeline, and is directly related to its length. Knowing that she will be required to pay the fair market rental value of the right-of-way based upon the acreage of the grant, Balander has the right and option to apply for an amendment to the existing right-of-way to permit construction of a shorter pipeline, thus reducing rental, but does not seek this solution. We find no reason for concluding that the rental is incorrect because the pipeline is longer than it might be if the sole basis for choosing the route had been the per-acre rental charge.

Balander states that in about 1960 her grandfather was "forced \* \* \* to sell" a right-of-way to BLM for an access road across his land. She argues that BLM should have "traded" that right-of-way for the pipeline right-of-way. BLM has the authority to grant a right-of-way in return for the grant of an equivalent right-of-way to the United States. See 43 CFR 2801.1-2. It also has the authority to waive or reduce the rental amount in exchange for a right-of-way across private land. See 43 CFR 2803.1-2(b)(2). These provisions now afford no relief to appellant, however. The sale of the road right-of-way by Balander's grandfather occurred more than 25 years before the issuance of her pipeline right-of-way. There is no evidence that an exchange was proposed at the time of the sale, and it was not an error for BLM to fail to provide for an exchange in 1960. See Kevin C. Kehoe, 119 IBLA 257, 258 (1991). In addition, there was no realistic way BLM could have provided for an exchange in either 1985 or 1990. Having purchased the right-of-way across her grandfather's property in 1960 there was no reciprocal right-of-way agreement, and no basis for a waiver or reduction of Balander's rental under 43 CFR 2803.1-2(b)(2). See Kevin C. Kehoe, supra.

5/ We also note that the initial rental charged was the minimum amount allowed by Departmental regulations, i.e., \$25 for the first 5-year period. See 43 CFR 2803.1-2(a) (1985); Mr. & Mrs. Gerald H. Murray, 117 IBLA 138, 139-40 (1990).

[4] Specific situations allowing relief from the requirement that fair market rental must be charged for rights-of-way are found in the applicable statutes and regulations. See 43 U.S.C. § 1764(g) (1988); 43 CFR 2803.1-2(b). If a right-of-way holder qualifies under those provisions, the rental can either be waived or reduced. Of the listed bases for relief, only one might be applicable to Balander's right-of-way.

Balander contends that the "government is taking too much from the people who cannot afford it," suggesting that payment of fair market rental would work a hardship on her. 6/ The regulation at 43 CFR 2803.1-2 provides authority for reduction or waiver of rental if the State Director concurs with the authorized officer's determination that "the requirement to pay the full rental will cause undue hardship on the holder \* \* \* and that it is in the public interest to reduce or waive said rental." 43 CFR 2803.1-2(b)(2)(iv). It is clear that BLM did not consider applying this regulation when assessing the rental amount. We find no error, however. There is absolutely no evidence that charging \$8 as rental for use of the right-of-way for a 5-year period would cause undue hardship or that it would be in the public interest to reduce or waive the rental. Compare V. Irene Wallace, 122 IBLA 349 (1992); see Laguna Gatuna, Inc., 121 IBLA 302, 307 (1991). If Balander is of the opinion that she can demonstrate undue hardship and that it would be in the public interest to reduce her rental, she may pursue that issue when the case is returned to BLM. See Laguna Gatuna, Inc., supra at 308 n.10. We express no opinion on whether Balander is so entitled. 7/

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 affirmed.

R. W. Mullen  
Administrative Judge

I concur:

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James L. Byrnes  
Chief Administrative Judge

6/ The question naturally arises why Balander would be unable to pay the current rental charge (a little more than \$1.50 per year). She may have believed that the original \$25 charge (\$5 per year) was a one-time fee. 7/ We note that, after asserting that the Government is generally "taking too much," Balander states that the rental charge is "petty." She also expresses her concern regarding future rental charges. The hardship exception is limited to "unique hardship cases." 52 FR 25816 (July 8, 1987).