

BLUE MOUNTAIN ENERGY, INC.

IBLA 2000-260

Decided July 2, 2004

Appeal in part from decisions of the Field Office Manager, White River Field Office, Colorado, Bureau of Land Management, denying, in whole or in part, a request for refund of rental fees paid and a request for exemption from payment of rental fees for five rights-of-way associated with a coal-mining operation. COC-30118, COC-30119, COC-31639, COC-31641, and COC-34338.

Affirmed.

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

BLM properly denies a request for a refund of rental fees paid for a right-of-way where it determines that the right-of-way is not for an electric or telephone facility or an extension therefrom, and is thus not exempt from such fees under section 504(g) of the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. § 1764(g) (1994 or 2000) and implementing regulations at 43 CFR 2803.1-2(b)(1)(iii). Right-of-way grants for access roads, conveyor routes, haul roads, or railroads for the conveyance of coal do not constitute authorizations for “electric or telephone facilities”; nor do they constitute authorizations for extensions from such facilities.

APPEARANCES: David F. Crabtree, Esq., and Matthew C. Brimley, Esq., Blue Mountain Energy, Inc., South Jordan, Utah, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Blue Mountain Energy, Inc. (Blue Mountain), formerly Western Fuels-Utah Inc. (WFU) and a wholly-owned subsidiary of the Deseret Generation & Transmission

Co-operative (Deseret), has appealed portions of five decisions of the Field Office Manager, White River Field Office, Colorado, Bureau of Land Management (BLM), all dated April 17, 2000, to the extent they deny in whole or in part Blue Mountain's November 21, 1996, request for a refund of rental fees paid for five rights-of-way (ROWs) associated with the Deserado Mine, an underground coal-mining operation in Rio Blanco County, Colorado. The Field Office Manager also denied, in whole or in part, Blue Mountain's request for exemption from the payment of rental fees.

The five ROWs at issue here (COC-30118, COC-30119, COC-31639, COC-31641 (amended effective May 24, 1990), and COC-34338), were originally granted to WFU in 1981 and 1982 pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761-1771 (2000). Each ROW grant required payment of the fair market rental value of the right-of-way. The record establishes that WFU paid rental fees, based on appraised fair market rental values, at least from the time the ROWs were granted until the time period surrounding the 1996 request for refund. This appeal raises the question of whether Blue Mountain is entitled to exemptions from the payment of rental fees for ROWs under section 504(g) of FLPMA, as amended, 43 U.S.C. § 1764(g) (2000).

To explain the exemption at issue, we begin with the passage of the Rural Electrification Act of 1936, see 7 U.S.C. §§ 901-950aa-1 (2000). For purposes relevant here, this "Act of 1936" as subsequently amended in 1944, 1948, 1949 and 1955, authorized the Administrator of the Rural Electrification Agency (REA), ^{1/} to

make loans for rural electrification * * * to corporations * * * and cooperative * * * associations * * * for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines, or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, and loans, * * * to cooperative associations and municipalities for the purpose of enabling said cooperative associations and municipalities to the extent that such indebtedness was incurred with respect to electric transmission and distribution lines or systems or portions thereof serving persons in rural areas * * *.

7 U.S.C. § 904 (1982). Corporations were distinguished from rural electric cooperative associations (also called rural electric cooperatives, or cooperatives); the latter could obtain loans to cover incurred indebtedness. Moreover, rural electric cooperatives have a distinct status as instrumentalities of the United States. Alabama Power Co. v. Alabama Elec. Coop., Inc., 394 F.2d 672, 677 (5th Cir. 1968), cert. denied, 393 U.S. 1000 (1968), citing 37 FPC 12 (cooperatives "were chosen by

^{1/} The REA is now the Rural Utilities Service (RUS), U.S. Department of Agriculture.

Congress for the purpose of bringing abundant, low cost electric energy to rural America”); Salt River Project Agricultural & Power District v. Federal Power Commission, 391 F.2d 470 (D.C. Cir. 1968).

Beginning in 1952, the Department of the Interior established a regulatory rental charge exemption for use and occupancy of public lands. “No rental charge will be required for the use and occupancy of public * * * lands under a right-of-way authorizing such use and occupancy exclusively for * * * REA cooperative projects.” 43 CFR 244.21(c) (1954); 17 FR 5896, 5900 (July 1, 1952). Revisions to this rule were made in 1961. 26 FR 10728 (Nov. 16, 1961). “No charge will be made for the use and occupancy of lands under the regulations of this part [governing rentals for use and occupancy of Federal lands, and subsequently ROWs] * * * [w]here the use and occupancy are exclusively for * * * [REA] projects.” 43 CFR 244.21(c)(1) (1964); recodified at 43 CFR 2802.1-7(c) (1975). This latter regulation remained in effect as recodified until 1980, by which time FLPMA had been enacted.

Among the many provisions for the government and administration of public lands Congress added with the passage of FLPMA in 1976 was section 504(g), to ensure that the Department of the Interior (and the Department of Agriculture, for lands within its administrative responsibility) charged and received fair market value rental for ROWs across such lands. 43 U.S.C. § 1764(g) (1982). In promulgating regulatory amendments designed to implement the intent of FLPMA, the Department largely eliminated the regulatory rental exemption for exclusive use and occupancy of public lands for REA projects. 45 FR 44526 (July 1, 1980). Subsequent to this amendment, the rule governing rentals for ROWs limited the exemption to “cooperatives whose principal source of revenue is customer charges.” 43 CFR 2803.1-2(c)(1) (1981).

In addition, the Department implemented FLPMA’s provisions by defining various terms relevant here. Under these rules, ROWs could be issued across public lands pursuant to ROW grants for “projects,” for “transportation or other system[s].” 43 CFR 2800.0-5(g), (h), and (k). BLM defined “facilities” as “improvements constructed or to be constructed or used within a right-of-way pursuant to a right-of-way grant.” 43 CFR 2800.0-5(j) (1981) (emphasis added).

The Department’s regulatory change in 1980, as well as subsequent inconsistency between the management of ROWs with respect to REA cooperatives and projects by the Departments of the Interior and Agriculture, was the impetus behind the Congressional amendment to FLPMA at issue here. Congress was concerned that the Departments had construed their obligations to charge fair market value rental for ROWs on the public lands in a way that prevented rural electric projects from obtaining rent-free ROWs for telephone and electric lines on public lands. Congress was apparently of the belief that FLPMA’s enactment had not

intended to change this exemption. S. Rep. No. 388, 98th Cong., 1st Sess. at 2 (1983), reprinted in 1984 U.S.C.C.A.N. 512, 513; H.R. Rep. No. 475, S. Rep. No. 388, to accompany H.R. 2211, 98th Cong., 1st Sess. at 2 (1983).

Thus, Congress amended section 504(g) of FLPMA in the Act of May 25, 1984, Publ. L. No. 98-300, 98 Stat. 215, to add a legislative exemption from payment of rental fees for ROWs on public or National Forest lands administered by the two Departments. That amendment provided that an ROW would be granted, “without rental fees, for electric or telephone facilities financed pursuant to the Rural Electrification Act of 1936, as amended, [7 U.S.C. § 901 et seq.], or any extensions from such facilities.” 43 U.S.C. § 1764(g) (1994). The purpose of the amendment was to restore the exemption for rental fees which had been in effect, at least for ROWs issued by the Department of the Interior, for the previous two decades. The House bill “simply restores the exemption from rental fees which rural electric and telephone facilities have always received when they have needed to cross Federal land.” 129 Cong. Rec. 31,438 (1983) (remarks of legislation author and Representative Marlenee) (emphasis added).^{2/}

Subsequently, Congress amended both FLPMA section 504(g) and the relevant provision of the Act of 1936. In 1994 and on April 4, 1996, Congress amended the Act of 1936, to authorize the Secretary of the Department of Agriculture to

make loans for rural electrification * * * to corporations * * * and cooperative * * * associations * * * for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines, or systems for the furnishing and improving of electric service to persons in rural areas, *including by assisting electric borrowers to implement demand side management, energy conservation programs, and on-grid and off-grid renewable energy systems*, and loans, * * * to cooperative associations and municipalities for the purpose of enabling said cooperative associations and municipalities to the extent that such indebtedness was incurred with respect to electric transmission and distribution lines or systems or portions thereof serving persons in rural areas * * *.

7 U.S.C. § 904 (2000) (language added in 1996 italicized).

The FLPMA exemption was thereafter expanded by section 1032(a) and (b) of the Omnibus Parks and Public Lands Management Act of 1996, Publ. L. No. 104-333,

^{2/} See also id. (remarks of Rep. Seiberling); id. at 31,439 (remarks of Rep. Lujan); id. (remarks of Rep. Oberstar), id. at 31,440 (remarks of Rep. Boucher); 130 Cong. Rec. 11,744 (1984) (remarks of Senator Baucus).

110 Stat. 4239 (Nov. 12, 1996). As a result of that amendment, the Department has been obligated to grant ROWs “without rental fees, for electric or telephone facilities *eligible for financing* pursuant to the Rural Electrification Act of 1936, as amended, [7 U.S.C. § 901 et seq.], *determined without regard to any application requirement under that Act*, or any extensions from such facilities.” 43 U.S.C. § 1764(g) (2000) (language added in 1996 italicized).

The Department has implemented the statutory exemption, since August 7, 1987, by the following regulatory language.

(b)(1) No rental shall be collected where:

* * * * *

(iii) The facilities constructed on a site or linear right-of-way are or were financed in whole or in part under the Rural Electrification Act of 1936, as amended, or are extensions from such Rural Electrification Act financed facilities.

43 CFR 2803.1-2(b)(1)(iii); see 52 FR 25811, 25819 (July 8, 1987). Confusing matters considerably, this rule omitted any reference to the section 504(g) statutory term “electric or telephone facilities.” The regulatory definition of “facility” remains unchanged; however, a provision was added to specify that a communication site facility “means the building, tower, and/or other related incidental improvements authorized” by the ROW grant. 43 CFR 2800.0-5(j) (2003).

It was in the middle of the changing statutory and regulatory framework that the ROWs at issue here were granted. The following facts appear to be undisputed.

All ROWs covered by this appeal were issued in 1981 and 1982, during which time the rental exemption did not exist as a matter of legislation or regulation. The parties agree that the central purpose of each ROW is not for an electric or telephone facility; rather each ROW was issued for a purpose directly related to a transportation and conveyance system for coal produced from the Deserado Mine for transfer to, and eventual use by, the Bonanza Power Plant. Blue Mountain has asserted that the ROWs “included access roads, conveyor routes, haul road, and a railroad ROW.” (May 27, 1997, Statement of Reasons (SOR) in appeal IBLA 97-418 at 2.) See also Blue Mountain Energy Inc., 151 IBLA 10, 13 (1999) (description of ROWs).

While the parties are less in agreement on this point, the record demonstrates unequivocally that the ROWs were issued in association with the Moon Lake Power Plant Project, proposed by Deseret. Deseret received a loan from the REA for the power plant project. Deseret then entered into contractual relationships to provide

loans to WFU for WFU's construction of mine facilities. See Oct. 19, 1981, Funding Agreement between Deseret and REA. According to their contractual agreement, Deseret provided monies derived from its REA loan to WFU. Deseret contracted with WFU, for the construction of railroads, conveyor systems and other projects associated with the coal mine. (Jan. 18, 1982, Railroad Construction Plan at 8; see also Jan. 18, 1982, Specification for Civil Work, Coal Transportation System (references to WFU as "Contractor").)

An Environmental Impact Statement (EIS) was prepared jointly by BLM and the REA with the assistance of the United States Forest Service for Units 1 and 2 of the Moon Lake Power Plant project. (Jan. 8, 1981, EIS USDA-REA (ADM) 81-1-0.) Deseret proposed to construct the power plant with associated transmission facilities, and proposed coal production and transportation from the Deserado Mine. Without cataloguing them, it is clear from review of the EIS and associated documents that many if not dozens of ROWs would be required within Colorado and Utah for the breadth of the Moon Lake Power Plant Project, for, inter alia, transmission lines, transportation systems, water pipelines and storage ponds and the like. Appendix 3 to the EIS lists "major authorizing actions" required by Federal, State and local authorities, including 18 references to needed ROWs. The Deserado Mine was considered in separate environmental documentation prepared by WFU as required by section 102 of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332 (2000). See Moon Lake EIS at 121 (referring to mining plan of operations and associated Federal documentation). The Moon Lake Power Plant Project EIS considered, inter alia, power lines to the mine, coal storage and loadout facilities, access roads, surface coal handling, and transportation facilities associated with railroad haulage. See EIS at 58-75, Figures 2-20 and 2-21; see also Jan. 18, 1980, BLM letter (conveyor system "integral part of the powerplant complex").

The individual ROWs at issue here were considered in association with the entire Moon Lake Power Plant project. ROW COC-30119 was granted on July 23, 1981, for the right to "construct, operate and maintain * * * a haul road to a waste disposal area and an overland conveyor to a railroad loadout area." The ROW application included a 2.4-mile power line to parallel the conveyor, though this was permitted within a separate grant. See May 1, 1981, Memorandum re: ROW applications for Moon Lake Project at 2 (COC-30119 separated into 3 ROWs with powerline in COC-31641); Apr. 17, 2000, Decision COC-31641 at 1.^{3/}

ROW COC-31641 was issued to WFU on July 13, 1981, for the right to "construct, operate and maintain * * * alluvial wells AW-1, 2, 3, 4, 5, and 6 with

^{3/} The specification for civil work for the coal transportation system refers to ROWs COC-30118, COC-30119, COC-31639 and U-45319 (referring to a Utah ROW). (Jan. 18, 1982, Specification for Civil Work, Coal Transportation System at 5.)

related access roads, waterlines, 13.8 KV powerline and telephone line facilities.” It was amended on May 10, 1990, to permit construction of a “dike, lagoon and temporary access road.” BLM issued COC-31639 on July 23, 1981, for a “railroad loadout area.” On September 30, 1982, WFU agreed to allow Mountain Bell to use ROW COC-31639 to install a telephone line for the exclusive use of WFU.

ROW COC-30118 was issued to WFU on February 24, 1982, for “the construction, operation, maintenance, and termination of a railroad transportation system from the Utah-Colorado border to the loading facilities of the Deserado mine.” Other than the fact that the railroad is itself electrified, the ROW contains no provision regarding “electric or telephone facilities.” Rather, the record indicates that the railroad crosses transmission lines for which other ROWs were acquired in the 1960s and 1970s and held in 1982 by WFU. (Aug. 19, 1982, letter from Department of Energy to BLM.) While Blue Mountain consistently refers to ROW COC-30118 as one for a railroad to the power plant, by its plain terms the ROW authorization extends through Colorado to the Utah border. The Bonanza Power Plant is located some distance from the Utah border in Uintah County, Utah, seven miles north of the town of Bonanza. (June 24, 1981, Decision Option Document and Record of Decision, Moon Lake Powerplant Project - Units 1 and 2, Map 3.) The Colorado ROW connects with ROW U-45319, for continuation of the railroad system authorization through Utah. (Jan. 7, 1983, Deseret-Western Railway Right-of-Way Maintenance Plan; see also Dec. 28, 1981, telephone conversation memorandum discussing need for Colorado and Utah BLM State Offices to “adopt a unified approach” to the ROW grants; Aug. 21, 1981, Memorandum from Utah State Office to Colorado State Office (proposing to merge Colorado and Utah administered ROWs under U-45319); Dec. 19, 1979, letter from WFU to BLM proposing two ROW applications for Colorado and Utah for conveyor system).^{4/} WFU prepared a Construction-Operation Plan for Railroad Transportation System in association with the railroad project along both ROWs U-45319 and COC-30118. (Jan. 18, 1982, Railroad Construction Plan at 1-2.)

ROW COC-34338 was granted to WFU on August 26, 1982, for an access road to private property. The authorized use is “construction, maintenance, ingress, egress and termination of an access road.” Neither the ROW nor the attached stipulations contains any reference to electric or telephone facilities. Nor does the WFU application submitted July 12, 1982.^{5/}

^{4/} Powerplant maps show transmission and transportation system routes through Utah and Colorado. (June 24, 1981, Decision Option Document and Record of Decision, Moon Lake Powerplant Project - Units 1 and 2, Maps 2, 3 and 4.)

^{5/} The record contains information regarding additional ROWs granted to WFU in Colorado. ROW COC-44223 was granted on Jan. 15, 1987, for a power line used to (continued . . .)

The question of an entitlement to a rental fee exemption first arose at the time surrounding the formation of Blue Mountain in October 1996. On October 7, 1996, Deseret submitted to BLM a request under section 504(g) of FLPMA for refund of rental fees paid before November 12, 1996, the date of enactment of Publ. L. No. 104-333, on grounds that the facilities covered by the five ROWs were financed pursuant to the 1936 Act.^{6/} (Oct. 7, 1996, letter from Deseret to BLM.) Deseret explicitly stated that it was not seeking an exemption after November 1996 on the basis of REA financing because, as of October 1996, “neither Deseret nor BME will fall under any program administered by RUS.” (Oct. 7, 1996, letter from Deseret to BLM.) Deseret also explained that WFU was now called Blue Mountain or “BME.”

In a subsequent letter to BLM, Blue Mountain asserted again that because RUS financing would be ending on October 17, 1996, it did not seek a rental exemption after that date on the basis of eligibility for financing under the 1936 Act. Rather, it claimed that it would qualify after that date for continued rental exemption in its status as a “non profit association” under BLM regulation 43 CFR 2803.1-2(b)(2)(i). (Nov. 21, 1996, letter from Blue Mountain to BLM.) Blue Mountain submitted organizational documents to substantiate its status. These documents show that on Oct. 16, 1996, WFU amended its articles of incorporation to change its name to Blue Mountain. At that point, Blue Mountain was established as a non-profit corporation in which Deseret holds each of two memberships. (Blue Mountain Articles of Amendment to Articles of Incorporation [WFU], Oct. 16, 1996.) This was not true for WFU. WFU’s Articles of Incorporation dated December 2, 1993, reveal that it was a non-profit corporation to operate on a “cooperative non-profit basis for the mutual benefit of its members and contract patrons.” Whether Deseret was wholly in control of WFU is not clear from the documents in the record. Moreover, Deseret’s letter BLM dated October 7, 1996, stated that WFU has changed its name and “is now a wholly-owned subsidiary.” We interpret this to mean that this change was made in October 1996.^{7/}

^{5/} (. . . continued)

light the coal mine disposal pile to allow 24-hour operations. (Lease C-31709 was issued under section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1994), on June 16, 1982, to authorize disposal of spoil from the coal mining operation.) Blue Mountain Energy Inc., 151 IBLA at 13. ROW COC-34338 was issued for construction and maintenance of an additional access road. Id.

^{6/} As Congress first provided for this exemption on May 25, 1984, in enacting Publ. L. No. 98-300, no exemption is permitted for time periods prior to that date. Beehive Telephone Co., Inc., 83 IBLA 86, 89 n.3 (1984).

^{7/} In a previous decision of this Board, we stated that “WFU was organized for the
(continued . . .)

BLM denied Blue Mountain's request for rental fee exemption in April 1997.

These [ROWs] have clearly been considered to be facilities necessary for the operation of a coal mine * * *. Ultimately, these rights were acquired and held by Western Fuels-Utah, which to our knowledge did not, itself, borrow money from the REA, or with an REA guarantee. While [WFU] apparently borrowed money from Deseret * * *, which in turn had an REA guaranteed loan, the actual source of any money loaned to WFU is not clear.

(Decision dated Apr. 22, 1997, at 2.) BLM, however, approved Blue Mountain's request for exemption from the payment of rental fees after November 12, 1996, concluding that Blue Mountain must be entitled to an exemption because all of these facilities were considered to have been eligible for financing pursuant to the 1936 Act as of that date. Id. at 1. BLM thus did not consider or address Deseret's or Blue Mountain's acknowledgments in the October and November 1996 requests for refund that Blue Mountain did not "fall under any program" authorized by RUS.

Blue Mountain appealed. (IBLA 97-418.) On October 19, 1999, the Board set aside BLM's April 1997 decision and remanded the case to BLM for adjudication of the question of Blue Mountain's entitlement to a rental fee exemption for the period both before and after November 12, 1996, with respect to all five ROWs. Blue Mountain Energy, Inc., 151 IBLA 10 (1999). While we did not decide whether the REA loans to Deseret constitute the REA financing required by the language of section 504(g), we noted: "[Our decision in Western Fuels-Utah, Inc., 119 IBLA at 232] indicates that the [two] projects [including the Deserado Mine, and its related facilities,] were financed by REA grants to Deseret on behalf of WFU." 151 IBLA at 15. Instead, the Board stated that the statutory language limited the exemption to "electric or telephone facilities" or extensions therefrom. We noted that the ROWs would not be exempt from payment of fees, either before or after November 12, 1996, even if they were properly deemed to have been financed or eligible for financing as required by FLPMA section 504(g), if they did not qualify as electric or telephone facilities or extensions therefrom. Id. We thus directed BLM to determine whether these ROWs were granted for such facilities. Id. We noted that BLM had applied the exemption on an inconsistent basis, granting it for some ROWs with powerlines but not for others, and required BLM to straighten out such matters. Id.

Finally, in the event BLM rejected Blue Mountain's request for a rental fee exemption under section 504(g) of FLPMA, we noted that BLM was required in the

⁷ (. . . continued)

sole purpose of owning and operating the Deserado Mine to supply coal to the Bonanza Power Unit." Western Fuels-Utah, Inc., 119 IBLA 231, 232 (1991).

first instance to decide whether to exercise its discretionary authority to waive or reduce Blue Mountain's rental fees, pursuant to 43 CFR 2803.1-2(b)(2)(i), "assuming they were granted to a nonprofit corporation or association which is not controlled by or is not a subsidiary of a profit-making corporation or business enterprise. See Valley Pioneers Water Co., Inc., 125 IBLA 326 (1993)." 151 IBLA at 15 n.5, quoting 43 CFR 2803.1-2(b)(2)(i).

On remand, BLM issued the April 2000 decisions subject to this appeal.^{8/} In each decision, the Field Office Manager concluded that none of the main facilities covered by the ROWs could be considered an "electric or telephone facility," within the meaning of section 504(g) of FLPMA. E.g., Decision COC-30118 at 2. He thus, for the most part, denied Blue Mountain's request for a refund of rental fees paid with respect to the five ROWs for the period prior to November 12, 1996, and held that it was not entitled to an exemption for the period after that date for the same reason.

In the case of ROW COC-30118, BLM noted that the authorized facility has an electrical component but concluded that it could not be considered an electric facility since this component is "clearly ancillary to the main purpose of the right-of-way: transportation of coal from the Deserado Mine to the Bonanza Power Plant via railroad." (Decision COC-30118 at 2.) BLM also stated that even a partial exemption would not result in any reduction in rental fees since the bed of the railroad along with its track, which is the main facility, encumbers all of the ROW acreage and thus sets the fee. Id. at 3. By contrast, in the case of ROW COC-31641, BLM concluded that, to the extent that the ROW encompasses a 13.8 kV electric power line and telephone line into the mine area, which are separate from any of the other authorized facilities, Blue Mountain was entitled to an exemption from the payment of rental fees, before and after November 12, 1996. (Decision COC-31641 at 4.)

The Field Office Manager also considered whether Blue Mountain should be afforded a waiver or reduction of rental fees with respect to the five ROWs pursuant to section 504(g) of FLPMA and 43 CFR 2803.1-2(b)(2)(i). He noted first that Blue Mountain was not entitled under any circumstances to a waiver, since this was intended by Congress to be "restricted to agencies of the Federal Government and to those situations where the charge is token and the cost of collection unduly large." (Decision COC-30118 at 3, quoting Tri-State Generation & Transmission Association,

^{8/} In its Apr. 22, 1997, decision, BLM denied Blue Mountain's request for a refund of rental fees with respect to ROW COC-44223, which specifically authorized an electric powerline for use at the mine. In our Oct. 19, 1999, decision, we noted, without deciding, that this right-of-way "appear[ed] to be exempt" from the payment of rental fees before and after Nov. 12, 1996. Blue Mountain Energy, Inc., 151 IBLA at 15. Subsequently, BLM concluded that this ROW was exempt from the payment of rental fees. The matter is not before us in this appeal.

Inc., 63 IBLA 347, 354, 89 I.D. 227, 231 (1982).) The Field Office Manager then held that, to the extent he has the discretionary authority to reduce rental fees in the case of nonprofit corporations, he would decline to do so because it “is not deemed appropriate to reduce * * * rent where the holder is engaged in business or following practices similar to private commercial enterprise.” (Decision COC-30118 at 3.) Finally, the Field Office Manager notified Blue Mountain in four decisions that its rental fees for the applicable ROWs for periods starting at differing dates and continuing through December 31, 2000, or 2001, had been redetermined by BLM pursuant to 43 CFR 2803.1-2, and that payment was required within 30 days.

Blue Mountain appealed that part of each decision which denied the rental exemption. Blue Mountain does not raise any issue in this appeal with respect to the charged amounts and we do not consider BLM’s computations to be at issue here. Moreover, while Blue Mountain initially appealed the decisions to the extent BLM refused to permit a rental waiver based upon 43 CFR 2803.1-2(b)(1)(i), it later withdrew this aspect of the appeal. (Reply at 1.) Accordingly, our review is limited to that portion of the five decisions denying a rental exemption because the ROWs did not involve “electric or telephone facilities” or extensions therefrom.

ANALYSIS

The record reveals that BLM has struggled to implement the rental fee exemption of FLPMA section 504(g), grappling with pre-1996 statutory language, post-1996 language, a regulation that does not track statutory language, varying fact patterns and unsubstantiated factual assertions regarding the entities in question. While this Department is not vested with any authority to administer REA or RUS loans, it is obligated to administer FLPMA. To the extent the issues presented in this case have not been squarely decided by this Department, we address them under the delegated authority of the Secretary to implement the terms of that statute.

We turn first to Blue Mountain’s argument that the Board’s October 1999 decision erred in requiring BLM to consider the manner in which the ROWs conformed to the portion of section 504(g) requiring that they be for “electric and telephone facilities.” Blue Mountain asserts that this exercise is prohibited because it is directly contrary to 43 CFR 2803.1-2(b)(1)(iii), which requires only that the “facilities” or extensions therefrom authorized in an ROW grant be financed under the 1936 Act. Because it focuses exclusively on funding, Blue Mountain asserts that the regulation “expressly prohibit[s]” consideration of whether an authorized facility is an, or an extension from an, electric or telephone facility. “It is plain error, subject to swift and sure judicial remediation, to insert into the express language of the regulation an additional requirement that facilities so financed must also qualify as ‘electric’ or ‘telephone’ facilities.” (SOR at 3.) “The inquiry * * * begins and ends with whether or not these facilities were financed under” the 1936 Act. Id. at 6.

Blue Mountain is wrong as a matter of statutory construction. The statute as enacted in 1984 and amended in 1996 makes clear that an exemption is required for an “electric or telephone facility” or any extension from such a facility. 43 U.S.C. § 1764(g) (1994 and 2000). The Department is vested with the authority to implement that provision. We can find no support for the suggestion that implementing the statute compels the Department to turn a blind eye to plain statutory language in so doing.

The unequivocal language of section 504(g) before and after its amendment on November 12, 1996, contains no rental fee exemption in the case of ROWs where the authorized facilities are not electric or telephone facilities or extensions from such facilities, notwithstanding their potential financing. To hold otherwise would be to ignore plain statutory language. Silverman v. Eastrich Multiple Investor Fund, L.P., 51 F.3d 28, 31 (3d Cir. 1995) (“[A] statute ‘should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant * * *.’ 2A Norman J. Singer, Sutherland, Statutes and Statutory Construction, § 46.06, at 119-20 (5th ed. 1992).”); San Juan Coal Co., 155 IBLA 389, 400 (2001); McNabb Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 282, 289 (1988), aff’d, McNabb Coal Co., Inc. v. Lujan, No. 88-C-281-E (N.D. Okla. Sept. 29, 1989), stipulated dismissal, No. 89-5187 (10th Cir. Nov. 23, 1990); California Portland Cement Corp., 83 IBLA 11, 16 (1984).

Blue Mountain errs in suggesting that proper regulatory construction of 43 CFR 2803.1-2(b)(1)(iii) would compel us to ignore this statutory language. Blue Mountain correctly notes that the applicable rule makes no mention of the statutory requirement that authorized facilities be electric or telephone facilities or extensions therefrom. But the rule cannot alter or repudiate plain language in the statute, which remains effective. Even if there were a conflict between the two we would be required to reconcile the statute and rule. A rule must be interpreted harmoniously with a statute dealing with the same subject matter. Rice v. Martin Marietta Corp., 13 F.3d 1563, 1568 (Fed. Cir. 1993); see United States v. Larionoff, 431 U.S. 864, 873 (1977) (regulation must be consistent with statute authorizing it). Moreover, the statute takes precedence over an inconsistent rule, as the executive branch has no power to override legislation by rulemaking. LaVallee Northside Civic Association v. Virgin Islands Coastal Zone Management Commission, 866 F.2d 616, 623 (3rd Cir. 1989) (“[O]ur starting point is to attempt reconciliation of seemingly discordant statutes and regulations. Only where that outcome is not possible do we disregard the regulations.”); Alamo Ranch Co., Inc., 135 IBLA 61, 69 (1996); Merit Productions, 144 IBLA 156, 164 (1998) (Burski, A.J., concurring). Considering this precedent, proper construction of the statute and regulation requires that the “facilities” referred to in 43 CFR 2803.1-2(b)(1)(iii) are and must be the same electric or telephone facilities referred to in section 504(g).

Next, Blue Mountain argues that an “electric or telephone facility” within the meaning of section 504(g) must nonetheless be defined as any facility financed or eligible for financing pursuant to the 1936 Act, since only such facilities properly may be funded pursuant to the 1936 Act.

The existence of the generic terminology “electric or telephone facilities” * * * does nothing more than reaffirm the fact that REA financed facilities are inherently electric or telephone facilities, by operation of the REA Act itself. * * * [I]t is inconsistent with the Rural Electrification statutory scheme to suggest that REA funded projects are not electric or telephone facilities by their nature.

(SOR at 5; see Reply at 4 (“Congress decided to leave the words ‘electric or telephone’ in the statute * * * to limit the rental exemption to facilities which already qualified for the rental exemption by qualifying for REA financing or were extensions from such REA qualified facilities”).) Blue Mountain relies on section 2 of the Act of 1936 which provides that RUS “is only authorized and empowered ‘to make loans ... for rural electrification and for the purpose of furnishing and improving electric and telephone service in rural areas ...’ and other on and off-grid electric energy systems.” (SOR at 5, quoting 7 U.S.C. § 902(a) (2000); see 7 U.S.C. § 902 (1988).)

We disagree. As a matter of plain language, it is simply not accurate to say that the only statutory criterion for an exemption is financing by the REA. The exemption is controlled by the language in FLPMA providing for it, not the language in the Act of 1936 providing for financing.^{2/} Further, nothing in the legislative history of section 504(g) of FLPMA suggests that Congress sought to make the exemption coextensive with the financing provisions of the 1936 Act, 7 U.S.C. §§ 902, 904 (1988). See S. Rep. No. 388, 98th Cong., 1st Sess. 1 (1983), reprinted in 1984 U.S.C.C.A.N. 512 (“The exemption would apply only to [ROWs] for electric and telephone facilities that are financed through the Rural Electrification Act.”) To the contrary, Congress made clear that it had no such intention. “The amendment restricts the exemption only to telephone and electric facilities rather than entities financed by the 1936 [Act].” 129 Cong. Rec. 31,438 (comments of Rep. Marlenee).

Thus, to review BLM’s decisions, we must determine whether it properly interpreted section 504(g). What is properly considered an “electric or telephone

^{2/} At the time section 504(g) of FLPMA was amended in 1984, the Act of 1936 authorized the Administrator, REA, to “make loans for rural electrification * * * for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines, or systems.” 7 U.S.C. § 904 (1988). Though the the class of facilities eligible for financing pursuant to the 1936 Act may be broader than the class of ROWs allowed a fee exemption, FLMPA establishes the exemption.

facility” is to be determined by reference to FLPMA. Thus, consistent with the Secretary’s authority to implement FLPMA, we must construe a “facility” within the meaning of section 504(g) to be an “improvement constructed or to be constructed or used within an ROW grant.” 43 CFR 2800.0-5(j) (1981 and 2003).^{10/}

While no express statutory language defines the adjectives “electric or telephone,” construction must be guided by common sense. When Congress identified, for ROWs covered by the exemption in section 504(g), an “electric or telephone facility,” it meant a facility (an improvement constructed or to be constructed within an ROW grant) that constituted an electric or telephone improvement. Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 548 (1987) (“[W]here an expression is capable of precise definition, we will give effect to that meaning absent strong evidence that Congress actually intended another meaning”); Jesse H. Knight, 155 IBLA 104, 117 (2001).^{11/}

We agree with BLM that none of the improvements authorized by the five ROWs at issue here constitutes an electric or telephone facility within the meaning of section 504(g). These facilities, as detailed by ROW number above, are a 22-mile

^{10/} Congress was fully aware at the time of the enactment of the 1984 amendments to section 504(g) of FLPMA of the Department’s regulatory scheme in place to implement that statute. It was this regulatory scheme, promulgated in 1980, which brought about the 1984 legislative change. In that 1980 rule, BLM adopted this definition of “facility” which remains unchanged to this day.

^{11/} In its Reply at 3, Blue Mountain cites a Board decision which contains an exhaustive review of the legislative history of Publ. L. No. 98-300, the statutory amendment to FLPMA section 504(g), in support of its conclusion that Congress did not mean to restrict the exemption only to electric or telephone facilities. South Central Utah Telephone Association, Inc., 98 IBLA 275, 278 n.8 (1987) (referring to H.R. Rep. No. 475, 98th Cong., 1st Sess. at 3 (1983)). In that decision, the Board analyzed Congress’ decision to refer to “facilities” rather than “entities” financed by the 1936 Act, in the context of considering whether “facilities” can be limited to electric or telephone “lines.” The Board noted that Congress used the term “facilities” to avoid having the rental fee exemption broadly apply to all of the assets of a “large company” simply by virtue of the fact that a company had acquired the assets of an entity which was itself REA-financed. 98 IBLA at 278 n.8; see H.R. Rep. No. 475, 98th Cong., 1st Sess. at 3 (1983) (“the exemption * * * applies only to facilities which have met the requirements of the Rural Electrification Act, regardless of the nature of the entity constructing or operating such facilities”); 129 Cong. Rec. 31,438 (1983). Considering other aspects of the legislative history, the Board rejected the notion that “facilities” was restricted to “lines” as argued by BLM. We do not read that Board decision to answer or support Blue Mountain’s claim.

railroad transportation system running from the Deserado Mine to the Colorado/Utah border; a 3.5-mile overland conveyor belt system which carries coal from the mine portal area to a railroad loadout facility, and a haul road to a waste disposal area; a railroad loadout facility which places coal in railroad cars for transportation to the power plant; six alluvial wells used to obtain ground water for use in mining operations and associated electric power distribution lines and access roads running to the wells, water pipelines running from the wells to the mine area and a water retention dike to protect the wells and related lagoon; and a 200-foot-long road providing access to railroad siding on private lands.

The facilities' purposes do not concern the generation, transmission, or distribution of electric energy, or the transmission or reception of telephone signals. See 43 U.S.C. § 1761(a) (2000); e.g., South Central Utah Telephone Association, Inc., 98 IBLA at 277-79 (microwave repeater site used for telephone communication); Beehive Telephone Co., Inc., 83 IBLA at 89 (underground telephone cable); La Plata Electric Association, Inc., 82 IBLA 159, 161 (1984) (overhead electric power line for REA cooperative). Further, while some of these facilities include distribution lines which provide electricity and/or telephone lines necessary for operation of or a communication link with the main facility, to the extent the electric or telephone lines are extensions of the main facility, the plain language of the statute requires that extensions therefrom be extensions from an electric or telephone facility. Use of electric power or telephones in the operation of an improvement created for a purpose other than electricity or telephone transmission is not enough to come within the meaning of the statute. Otherwise, any "facility" would have to be considered an electric or telephone one, since most generally cannot operate without electricity or telephone communications. There is no evidence that this was Congress' intent.

Blue Mountain argues though that even though the ROWs are not themselves electric or telephone facilities, they are extensions therefrom because they are extensions of the Bonanza Power Plant electrical generating facility. "The improvements and equipment in question constitute vital and essential components of an electric generating plant [since] without them the Bonanza generating station cannot continue to produce electricity." (SOR at 6.) Blue Mountain notes that the plant requires approximately 1.5 million tons of coal per year for its 40-year life, which can only feasibly occur because it is transported by the only railroad serving the plant running from the mine, authorized under ROW COC-30118. Id. at 6-7. Blue Mountain contends that the plant provides the only market for coal from the mine, and that the ROWs would not exist without the power plant. Id. at 4. ^{12/}

^{12/} Blue Mountain also states that the fact that the railroad serves only the plant renders it exempt from regulation under the "Federal Railroad Act." Id. at 7. This statute has no bearing on construction of the relevant portion of section 504(g).

Thus, according to Blue Mountain, the answer to the question of whether the ROWs are exempt from rental depends on how the Secretary decides to relate them to the power plant. Blue Mountain contends that the ROW facilities are extensions of the power plant. “The fact that these ROW[s] are associated with the development and operation of a coal mine is of no importance.” (1997 SOR at 4.) BLM contends that they are extensions of the coal mine instead of the power plant.

We cannot fathom that Congress meant the section 504(g) exemption to be determined by such characterizations. The functional interdependence among the mine, the plant, and related facilities does not answer the question of whether the ROWs authorize “extensions from” “electric or telephone facilities,” within the meaning of the statute. Remembering that the facility is the improvement authorized by the ROW grant, as defined consistently in BLM regulations since 1980, the question would be whether the ROW authorizes a facility that is an extension from an “electric or telephone facility.”

Plainly these ROWs do not. Blue Mountain does not demonstrate that any of the ROWs in question actually purports to be an extension from anything. We might be persuaded that an ROW for a road might be an extension from another road, or an ROW for a pipeline from a well might be an extension from the well, if the facts were to support that conclusion. But simply calling these ROWs “extensions” because the statutory phrase would require it for Blue Mountain to prevail does not make it so.

We find no basis in any of the ROW grants for concluding that BLM thought it was authorizing an extension from an electric or telephone facility or, frankly, an extension at all. In fact, it is clear from the EIS that the Moon Lake Power Plant Project was new, and that ROWs were needed, *inter alia*, for the creation of a new coal mine, roads, coal conveyance system, wells and pipelines. That such facilities within a larger combined coal mine and power plant project are interrelated does not meet the test of an “extension from” an electric or telephone facility.^{13/}

Moreover, we will not construe the term “extensions from such [electric or telephone] facilities” to open the exemption to anything related to a power plant constructed with an REA grant. The power plant is undoubtedly an electric facility within the meaning of the statute. South Central Utah Telephone Association, Inc., 98 IBLA at 278 (bill which became Publ. L. No. 98-300 applied “to ‘all facilities, including * * * power generation plants’”). However, the plain statutory language

^{13/} It cannot be disputed that Congress meant that an REA-funded ROW to extend a telephone line from an existing source would be rent free. Conversely, we conclude that Congress did not mean to include such things as an ROW for a water pipeline from an existing impoundment, or a road from an existing road within its concept of an “extension from” an electric or telephone facility.

does not refer to “extensions of” an electric facility. We must presume that the word “from” was more than happenstance; it was deliberate and, in any event, must be given effect. McNabb Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA at 289; Hiko Bell Mining & Oil Co. (On Reconsideration), 100 IBLA 371, 387, 95 I.D. 1, 10 (1988).

To the extent Blue Mountain means to suggest that without the electric facility, the mine (and hence the ROWs) would not have been established, such logic creates a causation string without end. Under this analysis, any ROW granted in association with any coal mine could be exempt, so long as the miner obtained financial assistance from an REA-funded purchaser, simply because coal is used for electricity generation. Likewise, similar funding arrangements for ROWs associated with oil and gas wells which provide natural gas, uranium mines which provide radioactive material, or water reservoirs which provide water used by gas-fired, nuclear, or hydroelectric plants to generate electrical power could be considered extensions from such electric facilities, and thus entitled to an exemption from rent. If Congress meant this result, it would have said so.

It is worth noting that the legislative history comports with our reading of section 504(g). The purpose of the FLPMA rental fee exemption was to promote extension of electrical services to rural areas, consistent with one of the principal purposes of REA-financing under section 2 of the 1936 Act, as amended, 7 U.S.C. § 902 (1994 and 2000). S. Rep. No. 388, 98th Cong., 1st Sess. at 1-2 (1983), reprinted in 1984 U.S.C.C.A.N. 512-13; H.R. Rep. No. 475, 98th Cong., 1st Sess. 1-2 (1983). As Representative Seiberling stated:

H.R. 2211 deals with rental fees for rights-of-way across Federal lands for construction or extension of electric or telephone lines which receive Federal assistance under the Rural Electrification Act.

* * * * *

[T]he fact is that it does cost more to provide electrical [and telephone] service to rural areas because of the long distances involved for relatively sparse populations, and that is one of the basic reasons that there is a Federal subsidy.

Certainly we should not add to that cost when we are allowing those lines to cross Federal lands[.]

129 Cong. Rec. 31,438 (1983) (emphasis added). Representative Oberstar stated:

I know how crucial this legislation is not only to the [rural electric] co-ops and the borrower companies, but also to their member consumers who live in sparsely settled, high-cost-of-living areas * * *.

* * * * *

The major overhead cost to cooperatives is the long powerline requirements. Investor-owned utilities average about 25 to 30 customers per mile of power line while cooperatives average only about 4.5 customers per mile of line. Investor-owned utilities generate revenues of about \$36,000 per mile while cooperatives average less than \$3,000 per mile.

129 Cong. Rec. 31,439 (1983) (emphasis added). Representative Boucher complained that “[rental] fees have boosted consumer utility bills and, in some instances, complicated the extension of electric and telephone services for isolated areas.” *Id.* at 31,440. An author of the legislation, Representative Marlenee, stated that it “accomplishes my objective of holding down the high costs of providing essential electric and telephone service to sparsely populated areas.” *Id.* at 31,439.

We note that, having had occasion to consider the issue of the legislative history of the exemption, this Board has already concluded, and correctly so, that the rental fee exemption was not intended to be given only to REA cooperatives. In South Central Utah Telephone Association, Inc., 98 IBLA at 279, we noted that the Committee on Interior and Insular Affairs considered an amendment to H.R. 2211 that would have limited those eligible for the exemption to REA cooperatives, but did not pursue it. Nonetheless, the frequent reference to REA cooperatives in the legislative history and ROWs granted “exclusively for REA projects” in this Department’s pre-FLPMA rules confirms that the exemption cannot be construed as broadly as Blue Mountain contends.

It is clear that the 1952 and 1961 Department rules, the absence of which prompted the 1984 legislation, limited the exemption to ROWs where the “use and occupancy” was exclusively for cooperative projects or, later, REA projects. 43 CFR 244.21(c) (1954); 43 CFR 244.21(c)(1) (1964). In considering H.R. 2211, members of Congress repeatedly stated that the statutory change “simply restores the exemption from rental fees which rural electric and telephone facilities have always received when they have needed to cross Federal land.” 129 Cong. Rec. 31,438 (1983) (remarks of Rep. Marlenee); *see id.* (Rep. Seiberling); *id.* at 31,439 (Rep. Lujan); *id.* (Rep. Oberstar); *id.* at 31,440 (Rep. Boucher); 130 Cong. Rec. 11,744 (1984) (Senator Baucus); S. Rep. No. 388, 98th Cong., 1st Sess. at 2 (1983), reprinted in 1984 U.S.C.C.A.N. 513; H.R. Rep. No. 475, 98th Cong., 1st Sess. at 2 (1983). We find no instance in which the Department had, prior to 1980 or

afterward, afforded an exemption from rental fees for ROWs granted for facilities for the conveyance or transportation of coal, such as those at issue here. We find no mention of any such practice in the legislative history.

After consideration of the plain language and history of its enactment, we conclude that Congress did not intend for the ROW rental exemption to be granted for “access roads, conveyor routes, haul road, and a railroad ROW.” (May 27, 1997, SOR in appeal IBLA 97-418 at 2.) Facilities for the transportation and conveyance and storage of coal from a coal mine which provides coal to a power generation plant are not electric or telephone facilities or extensions therefrom within the meaning of section 504(g) of FLPMA by virtue of the coal’s eventual delivery to the power plant. The fact that a coal mine is captive to one power plant, since it does not have the means, at present, to reasonably sell its coal other than to that plant, does not alter our conclusion.^{14/} We thus affirm BLM on all issues subject to this appeal. This decision, however, does not reach any conclusion on matters not appealed and presented to the Board; in particular, this decision does not affirm any of the challenged decisions to the extent BLM granted refunds of rental fees.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from in part are affirmed.

Lisa Hemmer
Administrative Judge

I concur:

H. Barry Holt
Chief Administrative Judge

^{14/} Though this has no bearing on our conclusion, for the record we note that, after a mine fire, the plant acquired coal from the Colowyo Mine on a temporary basis. (Feb. 15, 1996, letter from WFU to BLM (COC-30119 ROW file).)