



ROBERT B. KAPLAN, RBK RANCHES, LLC,
D/B/A RED REFLET GUEST RANCH

187 IBLA 121

Decided March 7, 2016



United States Department of the Interior
Office of Hearings and Appeals

Interior Board of Land Appeals
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ROBERT B. KAPLAN, RBK RANCHES, LLC,
D/B/A RED REFLET GUEST RANCH

IBLA 2014-69

Decided March 7, 2016

Appeal from a December 23, 2013, decision by the Field Manager, Worland Field Office (Wyoming), Bureau of Land Management, adjusting appellant's rent for two land use permits. WYW-134061 and WYW-134062.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976:
Generally--Federal Land Policy and Management Act of
1976: Permits--Public Lands: Leases and Permits

A BLM decision setting the fair market value rent for a land use permit issued pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b), must be supported by a rational and defensible basis that is set forth in the decision and reflected in the administrative record accompanying the decision.

2. Administrative Procedure: Administrative Record--
Appraisals--Federal Land Policy and Management Act of
1976: Permits--Public Lands: Leases and Permits
The Board properly sets aside and remands a BLM decision establishing fair market value rent based on an appraisal when the appraisal fails to disclose any information regarding the comparable data utilized and thus precludes independent verification of the data, effective challenge as to the accuracy of the data and appraisal, and meaningful review by the Board.

APPEARANCES: Robert B. Kaplan, Ten Sleep, Wyoming, for appellant; Tracie A. Williamson, Esq., Office of the Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE SOSIN

Robert B. Kaplan (appellant) has appealed from a December 23, 2013, decision by the Field Manager, Worland Field Office, Bureau of Land Management (BLM), adjusting appellant's rent for two land use permits (LUPs), serialized as WYW-134061 and WYW-134062, authorizing the agricultural use of public lands. Prior to BLM's decision, appellant paid \$200 per year for each LUP. BLM's adjusted rental determination, based on an appraisal of the fair market rental value of the lands, requires appellant to pay \$65.00 per acre annually for each LUP, which results in a total payment of approximately \$1200.00 annually for the two permits. On appeal, appellant claims that the new rental is excessive and will result in a net loss of income per acre. See Notice of Appeal (NOA) at unpaginated (unp.) 2.

As explained below, we find that BLM's decision is not supported by a rational basis set forth in the decision or reflected in the administrative record, and that the appraisal relied upon fails to disclose the information used by the appraiser in setting the fair market rental schedule. We therefore set aside and remand BLM's decision for further action consistent with this decision.

Factual and Procedural Background

In 2003, BLM approved the assignment of two LUPs, WYW-134061 and WYW-134062, from Red Rim Ranch to Robert B. Kaplan. Decision, Assignment Approved, Rental Due, dated Mar. 5, 2003. Both permits were originally issued to Red Rim Ranch in 1990 for agricultural purposes. LUP WYW-134061 contains 12.6 acres, and LUP WYW-134062 contains 6 acres.¹ *Id.* Rental for each permit at the time of the assignment was \$200 per year. Appellant also owns and utilizes large tracts of lands adjacent to the BLM permitted lands for agricultural purposes.² See Land Description Review Worksheet, dated Dec. 6, 2012, attached maps.

¹ LUP WYW-134061 covers the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 20, and the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Sec. 21, T. 26 N., R. 87 W., Washakie County, Wyoming, 6th Principal Meridian (PM). See BLM Case Recordation (Live) Serial Register Page, WYW-134061, dated Jan. 9, 2014, at 1. LUP WYW-134062 covers the NW $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 10, T. 46 N., R. 87 W., Washakie County, Wyoming, 6th PM. See BLM Case Recordation (Live) Serial Register Page, WYW-134062, dated Jan. 8, 2014, at 1.

² Appellant also has a right-of-way (ROW), WYW-156320, which authorizes the use of public lands for a center pivot irrigation system wheel track. The ROW was issued to appellant in 2003 and expires in 2033; appellant paid rent in 2009 for a period of 10 (continued...)

BLM renewed both LUPs without any adjustment in rent from 1990 until 2013. In a letter dated November 20, 2012, BLM notified appellant that for 2013, the rental due for the permits was \$400 (\$200 for each LUP), but that “the permits will be renewed subject to a subsequent appraisal which has been requested by this office.” Letter from Rebecca A. Spurgin, Field Manager, to Robert Kaplan, dated Nov. 20, 2012. The letter further stated:

The authorized user agrees to pay the Bureau of Land Management, upon request, those fees determined in the appraisal to represent fair market rental for the use of the public lands involved in the land-use authorizations, retroactive to January 1, 2013. Upon receipt of the renewal request and current rental due, the permits will be renewed for a three year term through December 31, 2015.

Id. Appellant sought renewal of both LUPs and paid the \$400 in advance rentals. See Letter from Robert B. Kaplan, to Rebecca A. Spurgin, Field Manager; BLM Case Recordation, WYW-134061, dated Nov. 30, 2012; BLM Case Recordation, WYW-134062, dated Nov. 30, 2012. BLM thereafter renewed the permits for a term of 3 years, to expire on December 31, 2015.

The Department of the Interior’s Office of Valuation Services (OVS) conducted an appraisal and provided BLM with a Market Survey Report and Update of Agricultural Permit Schedule, Right-of-Way, Bighorn Basin, WY (OVS Market Survey Report), dated August 16, 2012. The appraisal explained that its purpose was “to establish agricultural rental payments for routine Bureau of Land Management land use authorizations within Wyoming BLM jurisdiction not otherwise addressed by rental schedules or other authorities.” OVS Market Survey Report at 2.

In determining the fair market rentals, the appraiser used the “cash lease” method for measuring income from farm property ownership. As explained in the appraisal, under this method, “the owner of the property receives a cash payment at the inception of the lease usually before the farming season (March/April). The property owner (lessor) collects cash annually on the lease which may vary from three to six years, and the operator (lessee) assumes all risks and returns from crops.” OVS Market Survey Report at 5. The appraiser concluded that this method was most appropriate because

(continued...)

ears. BLM has not proposed an adjusted rent for the ROW, and the ROW is not at issue in the present appeal.

most of the land involved in this rental schedule will be small parcels of poor to marginal classified land having little if any production the first few years, and most likely only marginal after that. Further, the United States is assuming no expenses of any kind. An upfront rental payment of some kind would be the most reasonable method for this appraisal problem.

Id. at 6. The appraiser further stated that she was able to rely on “an abundance of information in the market area for rentals on a cash lease basis,” including information from agricultural loan departments at local banks, Farm Services and Farm Credit Agencies, and Extension offices in the area, and individual land owners. *Id.*

Based on this methodology, the appraisal established a fair market rental schedule for public lands within the Bighorn Basin, including lands in which appellant’s LUPs are located, that identified rent for three categories of lands: (1) \$110.00 to \$120.00 per acre for “good land,” which is described as lands having “excellent soil conditions resulting in high productivity” and “best irrigation methods and an abundance of water available;” (2) \$65.00 to \$85.00 per acre for “average or marginal land,” which is described as lands having “average or marginal soil conditions as well as irrigation methods and water availability;” and (3) \$30.00 to \$45.00 per acre for “poor land,” which is described as lands having “poor soil conditions, availability of water, and terrain.”³ OVS Market Survey Report at 7. The appraiser noted that in her view, “the rental rate values for land involved in this schedule would most often fall at the low end of the poor land category range based on the fact the BLM, as the landowner, is not supplying maintenance of any kind or payment of the landowners water assessment, since seldom does BLM land contain water rights or fences.” *Id.*

³ The appraisal explained that “market rent” is defined in the OVS Appraisal Manual as:

The most probable rent that a property should bring in a competitive and open market reflecting all conditions and restrictions of the specified lease agreement including term, rental and adjustment and revaluation, permitted uses, use restrictions, and expense obligations; the lessee and lessor each acting prudently and knowledgeably, and assuming consummation of a lease contract as of a specified date and the passing of the leasehold from lessor to lessee under [certain] conditions

OVS Market Survey Report at 3.

She further noted that “[l]and which has been in production for a number of years would likely fall into the higher end of the poor category.” *Id.*

The appraisal was reviewed by an OVS Review Appraiser, who concluded that “the appraiser utilized appropriate methods and techniques in developing the analysis as well as the final opinion of the value,” and therefore approved BLM’s use of the appraisal to determine the market rent for agricultural rights-of-way permits. Appraisal Review Report, dated September 7, 2012, at 5.

Based on the appraisal, and after consulting with the Washakie County Assessor’s Office regarding the value of appellant’s lands to determine the land type as set forth in the appraisal, BLM notified appellant in letters dated November 14, 2013, that the agency was adjusting appellant’s LUP rentals to \$120.00 per acre (\$1,512 for WYW-134061 and \$720 for WYW-134062) based on its determination that the lands were “good.”⁴

In a meeting on December 2, 2013, and in a letter dated December 4, 2013, appellant objected to the adjusted rental rates for the two LUPs. Appellant stated that the new rent was unfair and unreasonable, and “does not make economic sense for the use of this land.” Letter from Robert B. Kaplan, to Rebecca A. Good, Field Manager, dated Dec. 4, 2013 (Dec. 4, 2013 Letter), at unp. 2; *see also* Conversation Record, dated Dec. 2, 2013. Appellant explained that both parcels are used for the irrigated production of alfalfa and “yield, at best, 2.5 tons per acre.” Dec. 4, 2013, Letter at unp. 2. Appellant claimed that, based on data from the Washakie County Assessor’s Office, the alfalfa produces an average gross revenue of \$277.10 per acre, which results in “a best case profit of [\$]47.11 per acre” under the previous rent. *Id.* Appellant stated that the new rental of \$120 per acre would result in a loss of \$100 per acre. *Id.*

Thereafter, in a letter dated December 23, 2013, BLM notified appellant of its decision to readjust and lower the rentals for both LUPs. BLM explained that it had “taken into consideration [appellant’s] correspondence dated December 4, 2013 and further research of our available information” and determined that it would re-categorize the lands subject to appellant’s LUPs from “good” to “average or marginal.” BLM therefore adjusted the rental for both LUPs to \$65.00 per acre (\$819.00 for WYW-134061 and \$390.00 for WYW-134062), in accordance with the rate of \$65.00 to \$85.00 per acre for “average or marginal” land as set forth in the

⁴ The Washakie County Assessor categorized appellant’s lands as “Irrigated Crop Land, Class III,” with a “high” value. *See* OVS Market Survey Report, attached pages 1-5.

appraisal. BLM applied the new rent retroactively to cover all of 2013, and credited \$200 per permit for the advance rentals already paid by appellant.

Appellant timely appealed, and BLM filed an answer.

Discussion

Section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA) provides the Secretary of the Interior, acting through BLM, with authority to manage “the use, occupancy, and development of the public lands” through various instruments, including permits. 43 U.S.C. § 1732(b) (2012). BLM’s implementing regulations, at 43 C.F.R. Part 2920, govern BLM’s issuance and administration of LUPs. Under the regulations, LUPs may authorize uses of the public lands “not specifically authorized under other laws or regulations,” including “residential, agricultural, industrial, and commercial” uses. 43 C.F.R. § 2920.1-1. The regulations require that holders of an LUP pay, in advance, an annual rental that is based on “the fair market value of the rights authorized in the land use authorization or as determined by competitive bidding. In no case shall the rental be less than fair market value.” 43 C.F.R. § 2920.8(a)(1). The regulations further provide that BLM may adjust rental fees “every 5 years or earlier, as determined by the authorized officer, to reflect current fair market value.” 43 C.F.R. § 2920.8(a)(2).

Consistent with this authority, BLM notified appellant that an appraisal would be undertaken to assess and adjust the fair market rental of appellant’s LUPs. We have held that when fair market rent is determined based on an appraisal, the appraisal will generally be affirmed “unless the appellant either demonstrates error in the appraisal method used by BLM or presents convincing evidence that the charge is excessive.” *Yukon River Tours*, 156 IBLA 1, 8 (2001); *see also Wesfrac, Inc.*, 153 IBLA 164, 167-68 (2000); *Regina B. Perry*, 142 IBLA 278, 281 (1998) (“As a rule, BLM’s fair market value determination will be affirmed if the appellant does not demonstrate error in the appraisal method or otherwise present convincing evidence that the fair market value determination is erroneous.”). Further, “[i]n the absence of a preponderance of the evidence that a BLM appraisal is erroneous, such an appraisal normally may be rebutted only by another appraisal.” *Yukon River Tours*, 156 IBLA at 9.

The issue presented by this appeal, therefore, is whether appellant has met his burden to show that BLM’s determination of the fair market rental for appellant’s LUPs is erroneous or excessive.

Appellant does not directly challenge the OVS appraisal. Appellant objects to the adjusted rental, stating that it “simply does not make economic sense for the use of this land,” and that the \$65.00 per acre rental “would represent 23.5% of the gross

revenue and result in a net loss per acre for 2013 and 2014.” NOA at unpag. 1, 2. Appellant, however, presents no evidence that the appraisal is erroneous in any way; nor does he provide another appraisal in rebuttal. Rather, he argues primarily that BLM should have taken an approach to rent for its LUPs similar to the State of Wyoming’s approach to leasing lands. See NOA at unpag. 2-3.⁵ As such, he has not met his burden to show that BLM’s appraisal was erroneous. See *Yukon River Tours*, 156 IBLA at 9; *Jancur, Inc.*, 93 IBLA 310, 312 (1986).

Our inquiry, however, does not end there. This is because we find that while appellant has not met his burden, he could not have done so because BLM’s decision, and the appraisal on which the decision is based, did not provide sufficient information to allow appellant an effective challenge to the decision and appraisal, or this Board meaningful review of the agency’s decision. As explained below, we therefore set aside and remand BLM’s decision.

[1] We have long held that a BLM decision made in the exercise of its discretionary authority, such as the decision at issue in the present appeal, “must be supported by a rational and defensible basis which is set forth in the decision, or it will be found to be arbitrary and capricious.” *Rick Badgley*, 186 IBLA 253, 256 (2015) (quoting *Continental Land Resources*, 162 IBLA 1, 7 (2004)); *Bookcliff Rattlers Motorcycle Club*, 171 IBLA 6, 13 (2006) (“An exercise of the Secretary’s discretionary authority . . . must have a rational basis and be supported by facts of record demonstrating that an action is not arbitrary, capricious, or an abuse of discretion.”). Here, BLM’s December 23, 2013, decision provided no explanation for BLM’s determination that the lands subject to appellant’s LUPs were in the “average or marginal” category described in the OVS Market Survey, thus supporting a per acre rental fee of \$65.00. The decision merely stated that BLM readjusted its previous determination that the rental fee should be \$120 per acre, based on the discussion with, and the December 4, 2013, letter from, appellant. BLM’s decision does not

⁵ Appellant argues first that BLM should base its rent on Animal Unit Months (AUMs) produced by the lands, as the State does when it leases irrigated crop lands within Bighorn Basin. He argues that the State’s AUM determination “likely reflects the average of 2 ½ tons of alfalfa per acre realized in Wyoming on such fields, [and] allows for a low harvest after replanting the field every 5-7 years.” NOA at unpag. 2. Appellant further notes that in his view, as compared to the lands leased by the state, the BLM parcels subject to his LUPs have inferior soil and productivity, “and thus lower value.” *Id.* He also criticizes BLM for not gradually increasing rent as the state does. *Id.* (“The State of Wyoming carefully increases their fee structure with about a 6% increase[] annually.”).

reference the OVS Market Survey; nor do we find evidence that the appraisal was appended to the decision, or provided separately to appellant. We therefore find BLM's decision deficient for its failure to provide a rational basis supporting the agency's rental determination.

[2] Further, in cases involving appraisals we have specifically held that

[i]t is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision and is demonstrated in the administrative record accompanying the decision. The recipient of the decision is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board.

KHWY, Inc., 155 IBLA 6, 15 (2001); *Kitchens Productions, Inc.*, 152 IBLA 336, 345 (2000), and cases cited. We have therefore set aside and remanded decisions based on appraisals where the appraisal "failed to reveal enough specifics about the comparables . . . surveyed to permit an independent assessment of whether those leases were in fact comparable to [appellant's] site." *Lone Pine Television, Inc.*, 158 IBLA 86, 102 (2002). When an appraisal "fails to disclose any information regarding the comparable data utilized," it "preclude[s] independent verification of the lease data, effective challenge as to the accuracy of the data and appraisal, and meaningful review by the Board." *Id.* (citing *KHWY, Inc.*, 155 IBLA 6 (2001)). For example, in *Lone Pine Television, Inc.*, we reversed a BLM decision increasing the annual rental for a communications site right-of-way because the appraisal used as the basis for BLM's decision provided no specific information about any of the leases used for comparison. 158 IBLA at 98. Similarly, in *KHWY, Inc.*, we reversed a BLM right-of-way rental determination where "[n]one of the comparables was disclosed in the . . . [a]ppraisal; the BLM reviewing appraiser did not analyze or verify the data relied on by [the appraiser]; there is no evidence that the data was disclosed to [appellant]; and that data was not subject to review by this Board." 155 IBLA at 14.

The appraisal used to establish the rent for appellant's LUPs fails to meet the standard set forth in these cases. While the OVS Market Survey Report explained the methodology used by the appraiser, stating that she used the "cash lease" method and obtained information from a variety of relevant sources (e.g., banks, county agencies, private individuals), it did not identify or include any of the underlying data relied upon, or specific information about any of the leases examined for comparison purposes. The appraisal presents only the conclusions, *i.e.*, that "good" land currently leases for \$110 to \$120 per acre; "average or marginal" land currently leases for \$65 to \$85 per acre; and "poor" land currently leases for \$30 to \$45 per acre. Without more,

the appraisal does not provide any basis for evaluating its conclusions about the fair market rental values attached to each category of lands within the Bighorn Basin, or reveal enough specifics about the leases examined “to permit an independent assessment of whether those leases were in fact comparable” to appellant’s LUPs. *Lone Pine Television, Inc.*, 158 IBLA at 102. Thus, the appraisal does not satisfy the requirement to allow for meaningful review either by appellant or this Board.⁶ *Id.*

Conclusion

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is set aside and remanded for further action consistent with this decision.

_____/s/
Amy B. Sosin
Administrative Judge

I concur:

_____/s/
James F. Roberts
Administrative Judge

⁶ We note that the administrative record is labeled as containing “Proprietary/Confidential Information,” and the appraisal submitted with the administrative record is contained in an envelope with the label “Proprietary/Confidential Information.” The appraisal, however, makes no representations about the proprietary or confidential nature of any of the information included in the appraisal; and, as we have already noted, the appraisal does not include any of the underlying data used to establish the fair market rental schedule. In any event, “[t]his Board has previously addressed and rejected the claim that site-specific information reviewed by an appraiser to establish . . . fair market rental . . . is confidential.” *See Kitchens Productions, Inc.*, 152 IBLA at 344, and cases cited.