

INTERIOR BOARD OF LAND APPEALS

Ingram Warm Springs Ranch

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INGRAM WARM SPRINGS RANCH

IBLA 94-33      Decided March 12, 1996

Appeal from a decision of the Area Manager, Challis Resource Area, Idaho, Bureau of Land Management, setting the fair market rental for hydroelectric project right-of-way IDI-20915.

Affirmed.

1. Appraisals–Rights-of-Way: Appraisals

The holder of a right-of-way grant must pay the fair market rental for the right-of-way. The rental is to be based on either a market survey of comparable rentals or a value determination. A market survey approach is in essence the comparable lease method of appraisal in which the fair market rental for a right-of-way is derived from a review of the rentals charged for comparable leases, adjusting for any differences between the subject right-of-way and the selected comparable leases.

2. Appraisals–Rights-of-Way: Appraisals

A BLM appraisal using the market survey approach which finds the fair market rental for land used for hydroelectric purposes to be a percentage of gross income, derived by comparing the leased land with comparable leases, with adjustments for differences and in recognition of public benefit, is consistent with comparable commercial practices.

3. Appraisals–Rights-of-Way: Appraisals

The holder of a FLPMA right-of-way must pay the fair market rental value annually in advance of the year of use. Thus, when the rent calculation is based on past gross income, it is due at the start of the next rental period.

4. Appraisals–Rights-of-Way: Appraisals

The Secretary has authority to charge less than fair market rental value in certain specified circumstances,

including when the right-of-way holder provides a valuable benefit to the public without charge, or at reduced rates. However, it is incumbent upon the right-of-way holder to demonstrate that it is qualified to receive a waiver or reduction of the rental charges.

APPEARANCES: Will Ingram, for appellant.

#### OPINION BY ADMINISTRATIVE JUDGE MULLEN

Ingram Warm Springs Ranch (Ingram) has appealed a September 9, 1993, decision issued by the Area Manager, Challis Resource Area, Idaho, Bureau of Land Management (BLM), determining the fair market rental for right-of-way grant IDI-20915.

An earthquake in 1983 increased the water flow from the Warm Springs located on Ingram's property from about 12 cubic feet per second (CFS) to 75 CFS. This created an erosion problem and increased the amount of sediment being carried into the Salmon River. On June 8, 1984, Ingram filed an application for a right-of-way for a canal to convey this excess water for use in a small hydroelectric generator.

The application also stated that the contemplated water diversion was primarily for hydroelectric power generation, with the secondary purpose of diverting water into a nonerosive canal to prevent bottom land erosion. The water diversion was the second phase of a hydroelectric project with a projected installed capacity of less than 5 megawatts. Ingram holds a Federal Energy Regulatory Commission (FERC) license to generate electric power for resale to Utah Power and Light (now PacifiCorp) encompassing both phases of the project.

Effective December 16, 1988, BLM granted a right-of-way (IDI-20915) 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 stated purpose of the right-of-way was to construct, operate, and maintain a canal, penstock and maintenance road, and the term was 30 years. In a cover letter, written when BLM sent the right-of-way to Ingram for approval and signature, BLM explained that it was issuing the right-of-way before setting the annual rental amount in order to expedite the grant, and that Ingram would be billed for the fair market rental after completion of an appraisal.

Following execution of the right-of-way, BLM prepared an appraisal of the fair market rental which should be charged for the portion of the hydroelectric facility located on BLM-managed lands. The appraiser was directed to determine a fair market rental rate based upon a percentage of the prior year's gross income. See Instruction Memorandum No. ID-93-010, dated Oct. 22, 1992, at 1. The Appraisal Report for Ingram Warm Springs Ranch I-20915 Hydroelectric Site Right-of-way, Salmon District (Appraisal Report), dated May 28, 1993, was approved on June 11, 1993.

Leases for 16 tracts of private land in Idaho which had been leased for hydroelectric purposes were examined. The appraiser found that the private property owners charged from 0.5 to 15 percent of the gross income derived from the sale of the generated electricity as rental (Appraisal Report at 17). The appraiser compared various factors contributing to the value of Ingram's right-of-way and the 16 private land leases. <sup>1/</sup> He found 5 of the 16 leases the most comparable (Appraisal Report at 22-25). Two had similar ratios of the length of water delivery system to head. Three had similar land uses. All of the selected leases had moderate to high ratios of length to head. Id. at 25.

The appraiser noted that the two leases with the highest royalty rates were also the oldest leases. He concluded that it "would probably not be feasible to pay these higher rates for lease land, given the lower tariff for purchased power in effect at the time" ID-20915 was developed. Id. at 26. <sup>2/</sup> Two leases were considered to bracket right-of-way ID-20915. The inferior lease was negotiated after the effective date of ID-20915, when a lower rate was in effect. The lease considered to be generally equal to ID-20915 had a 3 percent of gross income rental rate. The appraiser concluded that, based on the overall comparisons of the leases and considering the ratio of length to head, a lease rate equal to 3 percent of the gross income would be appropriate for a lease of the entire hydroelectric site. Id. at 26.

The appraiser adjusted this rental rate to reflect the fact that the project provided a benefit to the public, i.e., additional watering areas for wildlife and the reduction of the sediment discharge into the Salmon River. Based on available data quantifying public benefits, the appraiser reduced the gross income royalty 0.5 percent to reflect the benefit to the public, with a resulting rate of 2.5 percent of gross income.

The appraiser considered a hydroelectric project to be composed of eight components – water, diversion structure, reservoir and/or canal, penstock, powerhouse, tailrace, interconnecting powerline, and road access. Id. at 14. Portions of the power canal, access roads, and penstock were found to be on BLM land. Id. at 5. <sup>3/</sup> He found that, although the private

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<sup>1/</sup> Factors considered included the date of the right-of-way grant, the proportionate contribution of the permitted project to the total head

(i.e., the force of the water through the powerhouse), the ratio of the total distance from the point of water diversion to the powerhouse, and

the number of components of the project located on the permitted land (Appraisal Report at 20-21).

<sup>2/</sup> The Public Utilities Commission (PUC) sets PacifiCorp's rate scale for power purchases from the independent power producers. With lower rates, projects will generate less income for independent producers than realized by producers who negotiated when higher rates were in effect.

<sup>3/</sup> The canal is 24,500 feet long, with 19,140 feet (78.12 percent) of its length on BLM administered land. The access road extends 20,490 feet on

leases did not directly tie the rental rate to the particular component or components located on the leased land, the overall rate did reflect the number of components actually on the leased land. Id. at 14. Further adjustments were deemed necessary to reflect the number of components on Ingram's right-of-way.

Several methods of allocating a percent of the gross income were considered, and the appraiser selected what he called an equal weight method. This method attributes an equal weight to each component, with each of the eight components contributing 12.5 percent of the gross income (Appraisal Report at 15).<sup>4/</sup> A further adjustment was deemed necessary to reflect the proportionate share of a component actually on BLM land. Id. at 15; see fn. 3 above. The appraiser then calculated the percentage of the components on BLM administered land to be 19.093 percent of the total site (Appraisal Report at 15). The 2.5 percent rental rate was adjusted to reflect having 19.093 percent of the total site on BLM administered lands, giving an effective rental rate of 0.477 percent of the gross income from electrical generation. Id. at 28.

As noted previously, FERC had issued one license for two distinct projects and a further adjustment was necessary to allocate the portion of the gross income attributable to the second phase of the project. The appraiser considered two methods for allocating the income. The first was to allocate income based on the proportionate acreage of the two sites. Using this method, 74.9 percent of the total income would be allocated to the project under consideration. The second method was to prorate the income based net head available to each of the two projects. Using this method, the pro rata share applicable to the second phase was 65.7 percent. The latter method was deemed to be more reliable because income from the two projects was directly tied to the amount of head on a given project. Id. at 27.

In its 1992 report to FERC, PacifiCorp stated that Ingram's income from hydroelectric generation was \$235,795. The pro rata share for the second phase (65.7 percent) was \$154,917.32, and the 1993 fair market rental was calculated to be \$738.96 ( $\$154,917.32 \times 0.025 \times 0.19093$ ).

A further reduction was made to offset the land use charge assessed by FERC. In 1993 FERC charged Ingram \$740.31 for both projects. This amount was allocated between the two project phases in the same manner as above,

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fn. 3 (continued)

BLM administered land, representing 60.26 percent of the total road length. The penstock is 9,400 feet long, with 1,350 feet (14.36 percent) on BLM administered land. Id.

<sup>4/</sup> Id. at 15; Issue Paper ("Proposed Valuation Methodology for Estimating Fair Market Rent of Hydro Power Sites on BLM Lands," dated July 26, 1989), attached to Memorandum to State Director, Idaho, BLM from Deputy State Director for Operations, Idaho State Office, BLM, dated Aug. 1, 1989, at 2-4.

and the pro rata share attributable to the second phase was \$486.38. That amount was deducted from the \$738.96 estimated fair market rental. The remaining \$252.58 rental to be collected by BLM was rounded off to \$252. Id. at iii, 28-29.

On September 9, 1993, BLM issued its decision establishing the rental rate for Ingram's right-of-way based on the appraisal and notified Ingram that, in accordance with 43 CFR 2803.1-2(c)(3)(i), the rental due for the period from June 1, 1993, through July 30, 1994 was \$295.18. This amount included \$252 for the period from June 1, 1993, through May 31, 1994, plus an additional amount assessed as rental for the period from June 1 through July 31, 1994. 5/ Ingram appealed BLM's decision.

On appeal, Ingram asserts that it does not sell power to Idaho Power and that its gross income for 1992 was not \$154,917. It is clear from the case file that the reference to Idaho Power is in error. However, that error was not material and had no effect on the rental determination. The appraisal report, the basis for the gross income figure, states that FERC reported the gross income for Licensed Project No. 8498 (Appraisal Report at 29). Ingram's FERC license was "to generate electric power for resale to Utah Power and Light (now PacifiCorp)." Id. at 5. The Appraisal Report gives a detailed description of how BLM arrived at the rental amount, and if Ingram had submitted evidence that gross income for 1993 was another amount, the rent could easily have been adjusted. However, Ingram has submitted nothing in support of the allegation that the amount was incorrect, and without some evidence that another amount should be used or that BLM's figure is incorrect we have no basis for using another amount.

Ingram's statement of reasons also indicates some confusion regarding the time period covered by the billing. The decision states that the billing was for the period from June 1, 1993, through July 30, 1994, a period of 14 rather than 12 months. A 14-month period was used because BLM had changed its annual billing due date for small hydro rights-of-way to July 31. The 14-month rental was determined by multiplying the annual rental by a factor of 1.167 to compensate for the additional 2 months. 6/

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5/ The future annual billing cycles were to run from August 1 through July 31, to allow sufficient time for BLM to gather the previous calendar year's revenue information and calculate the rental for the next billing period. See Decision at 1.

6/ A handwritten note on the file copy states that there was a typographical error in the decision, indicating that the rental period was from

June 1, 1994 to July 30, 1994, when the decision should have read June 1, 1993, and that the right-of-way holder had been advised. However, we

find no typographical error, as the June 1, 1994, date was in the parenthetical phrase following the 1.167 adjustment factor, and was explaining

the 16.7 percent increase when calculating the amount due for a 14-month (rather than 12-month) period.

[1] Section 504(g) of FLPMA, as amended, 43 U.S.C. § 1764(g) (1988), and its implementing regulation (43 CFR 2803.1-2(a)) require the holder of a right-of-way grant to pay fair market value rent. The rent is to be based on either a "market survey of comparable rentals" or a "value determination" (43 CFR 2803.1-2(c)(3)(i)). A market survey approach "is in essence the comparable lease method of appraisal where the fair market rental value of a right-of-way is derived from a review of the rentals charged for comparable leases, adjusting for any differences between the subject right-of-way and the selected comparable leases." Thousand Peak Ranches, Inc., 129 IBLA 397 (1994).

[2] BLM determined that the customary rental for private land leases for hydroelectric purposes was a percentage of gross income. It then calculated an appropriate rental by comparison with similar leases, with adjustments for differences and in recognition of public benefit. We find no fault with BLM's having adopted the percentage of gross income method for determining fair market rental value. That determination was based upon comparable leases, which is the preferred approach and consistent with "comparable commercial practices" (43 CFR 2803.1-2(a)). See Bear Creek Hydro (On Reconsideration), 124 IBLA 225, 229-30 n.3 (1992) (quoting from Laguna Gatuna, Inc., 121 IBLA 302, 306-07). <sup>7/</sup> On review, we discern no error in BLM's application of this appraisal method or the way BLM adjusted the rate found in comparable leases, and we find no inaccuracy in either the data used or the calculations. See Laguna Gatuna, Inc., 121 IBLA at 304, 307.

[3] Ingram questions being billed for future use. Section 504(g) of FLPMA requires that the holder of a FLPMA right-of-way "shall pay annually in advance the fair market value determined by the Secretary granting \* \* \* such right-of-way." 43 U.S.C. § 1764(g) (1988) (emphasis added); Laguna Gatuna, Inc., *supra*; Amax Magnesium, 119 IBLA 281 (1991). Departmental regulation 43 CFR 2803.1-2(c)(3)(i) states that rent "shall be determined by the authorized officer and paid annually in advance." Thus, while the rent is calculated based on past gross income, it is paid at the start of the rental period. <sup>8/</sup>

Ingram asserts that the second phase should have been grandfathered by the first phase, and that BLM should not be allowed to change its procedures or collect fees other than those assessed for the first phase. It

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<sup>7/</sup> In Bear Creek Hydro, 122 IBLA 200, we approved BLM's use of a royalty method for appraising hydroelectric project rights-of-way (at least as to the site components of the right-of-way). However, BLM's decision was set aside on reconsideration because BLM had failed to properly substantiate its use of a 4-percent royalty. See Bear Creek Hydro (On Reconsideration), 124 IBLA at 229.

<sup>8/</sup> Ingram is apparently unsure of which hydroproject is involved. The rental determination identifies right-of-way IDI-20915, which is part of the second phase of the project. Only that right-of-way grant is covered by the decision on appeal.

asserts that, if private enterprise "is to be expected to carry out projects which may happen to cross BLM land, it needs to be informed of all costs at the initial stages of planning, not to be surprised at a later date after the project is completed of new charges." Ingram should not have been surprised when receiving a bill for the right-of-way issued in conjunction with the second phase project. BLM's cover letter forwarding the right-of-way to Ingram for comment and signature expressly advised Ingram that BLM was issuing the right-of-way without assessing a rental payment to permit a more expeditious issuance of the right-of-way. The cover letter specifically stated that when BLM completed its appraisal Ingram would be billed for the rent. In addition, the grant document executed by Ingram stated that the holder agreed to pay BLM fair market rental as determined by the authorized officer, unless specifically exempted by regulation and that "the rental may be adjusted by the authorized officer, whenever necessary, to reflect changes in the fair market rental as determined by the application of sound business management principles, and so far as practicable and feasible, in accordance with comparable commercial practices." 9/ Ingram cannot now argue that it did not knowingly agree to pay fair-market-value rental for the right of way when the right-of-way grant was executed and returned to BLM. By executing that document, Ingram's agent agreed to its terms and conditions.

Ingram contends that its hydropower projects provide a public benefit because they solve a "major siltation problem which was dumping thousands of tons of silt into the main Salmon River annually." Ingram also asserts that the project actually enhances the value of BLM land by providing water for wildlife and livestock. Moreover, it argues that crossing BLM land is not comparable to crossing private land because private land has a multitude of uses including cultivation, homesites, industrial uses, and developments.

[4] Section 504(g) provides authority for the Secretary to charge less than fair market rental value in certain specified circumstances. 43 U.S.C. § 1754(g) (1988); 43 CFR 2803.1-2(b)(2). Included are instances when a right-of-way holder "provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary" or "the requirement to pay full rental will cause undue hardship \* \* \* and it is in the public interest to reduce or waive said rental." *Id.*, see *William F. Bieber*, 82 IBLA 6 (1984). The appraiser did, in fact, consider and give weight to the benefits Ingram mentions. The rental amount was reduced by 16.7 percent in recognition of the benefit to the public in the form of additional watering areas and the curtailment of siltation.

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9/ BLM also sent Ingram a letter dated Sept. 17, 1991, noting that when the right-of-way was issued BLM did not have sufficient comparable market data to establish the fair market rental rate, and that it was preparing to appraise the right-of-way based on available market data. The letter also mentioned the notice in the right-of-way grant that the rental was subject to adjustment to reflect fair market rental.

As a general rule, the Board will affirm a right-of-way rental appraisal unless an appellant is able to demonstrate error in the appraisal method used by BLM or is able to show by convincing evidence that the charges are excessive. London Bridge Broadcasting, Inc., 130 IBLA 73 (1994); V. Irene Wallace, 122 IBLA 349 (1992); Thomas L. Sawyer, 114 IBLA 135 (1985). In the absence of a preponderance of evidence that a BLM appraisal is erroneous, an appraisal may be rebutted only by another appraisal. Id. It is incumbent upon the right-of-way holder to demonstrate that it is qualified to receive a waiver or reduction of the rental charges. Voice Ministries of Farmington, Inc., 124 IBLA 358 (1992). This requirement also applies when the right-of-way holder alleges that the reduction is not sufficient.

Ingram disagrees with BLM's assessment of the value of the public benefits, but submits nothing to demonstrate that the assessment is incorrect. Ingram has not shown error in the methodology employed by BLM, or that there was any error in its application of that methodology. Nor has Ingram shown that the resulting rental value deviated from fair market value. Thus, Ingram has failed to carry the burden of proof. We conclude that BLM properly determined the fair market rental for right-of-way ID-20915. See, e.g., London Bridge Broadcasting, Inc., *supra*; Voice Ministries of Farmington, Inc., *supra*.

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.

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R. W. Mullen  
Administrative Judge

I concur.

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C. Randall Grant, Jr.  
Administrative Judge