

INTERIOR BOARD OF LAND APPEALS

Vernon Ravenscroft

137 IBLA 39 (November 7, 1996)

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VERNON RAVENSCROFT

IBLA 93-555

Decided November 7, 1996

Appeal from a decision of the Shoshone District Office, Idaho Bureau of Land Management, determining fair market rental for right-of-way IDI 17053.

Affirmed.

1. Appraisals—Rights-of-Way: Appraisals

BLM's determination of the fair market rental for a right-of-way for a hydroelectric project will be affirmed where the determination is based on an appraisal using the market survey approach which finds the fair market rental 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.

APPEARANCES: Vernon Ravenscroft, pro se.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Vernon Ravenscroft has appealed from a June 25, 1993, decision of the Bennett Hills Resource Area Manager, Shoshone District Office, Idaho Bureau of Land Management (BLM), determining fair market annual rental for appellant's hydro development right-of-way IDI 17053, located in sec. 29, T. 6 S., R. 14 E., Boise Meridian, Gooding County, Idaho. The right-of-way embraces 42.2 acres, and was granted on March 5, 1982, for a term of 25 years, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761-1771 (1994). Initially, the rental was stated as \$250 annually, subject to revision upon completion of an official appraisal.

The site is bisected by the Malad or Big Wood River. The right-of-way granted to appellant authorized the building of a canal to carry water to an electrical power generation plant and a sediment reduction pond embracing approximately 12 acres.

BLM employed a comparable lease analysis listing 16 leases for estimating the maximum percent of gross income to be used in appraising appellant's site. As a general rule, the charge for the use of the land on which the project is located is a royalty or a percent of the gross income received by the hydroelectric developer from the sale of power. Of the 16 leases, BLM selected and analyzed 5 it considered most similar to the site at issue. Based on its overall comparisons, BLM determined that "a lease rate of 3 percent of the gross income" was proper for the site at issue (Appraisal Report at 27).

In its valuation process, BLM analyzed eight project components: (1) water, (2) diversion structure, (3) reservoir and/or power canal, (4) penstock, (5) powerhouse, (6) tailrace, (7) interconnecting powerline, and (8) road access. These eight components were considered to contribute equally (12.5 percent each) to the income of the project because the absence of any one component would preclude development of the project. However, each component percentage was modified to reflect the proportionate share of that component actually on BLM land.

Concerning the canal and access, the appraisal report states as follows:

It is estimated that 42.2 acres out of a total 50.665 acres, or  $\pm$  83 percent of the canal/reservoir and ponds covering four different tracts are represented by BLM lands. These estimates are taken from the "as-built" right-of-way survey prepared by John Priester, registered professional engineer for the grantee, Vernon Ravenscroft.

The diversion structure and the powerplant are on private leased tracts. Access to the powerplant and the diversion point are across the leased tracts and are granted to the lessee for the lessee's business purposes only. Vehicular access within the subject boundaries is included to ensure vehicular access for the State Division of Highways to reach a material site right-of-way on BLM lands in the SW1/4SE1/4 of Section 29. Total access is estimated to be about 2.1 miles, of which an estimated 3/4 mile of access is over BLM lands. About 35.7 percent of all access roads among the four parcels required for the project are on BLM lands. All other components required for producing electrical power are on lands owned or leased by Vernon Ravenscroft.

(Appraisal at 6).

BLM determined that 83 percent of the power canal and 35.7 percent of the access road were on BLM land. At 12.5 percent, the contribution for the power canal calculates to 10.4 percent and for the access road to 4.5 percent. The sum of these two components is 14.9 percent.

For its fair market rental conclusion, BLM utilized the product of 3 percent of gross income, and 14.9 percent (portion of project on BLM land) which equals 0.447 percent of gross income. Multiplying that figure by \$170,030 (appellant's 1992 gross income) BLM arrived at a fair market rent for 1993 of \$760 (Appraisal Report at 1, 16, 29).

By its June 25, 1993, decision, BLM billed appellant \$886.92 rental as determined by the appraisal, for a billing period from June 1, 1993, to July 30, 1994 (\$760 per annum X 1.1667 factor for partial). BLM stated that for the next 5 years rental would be based on 0.447 percent of appellant's previous year's gross income. BLM advised that the amount was due within 30 days of appellant's receipt of BLM's decision, and noted that the appraisal report was available for appellant's inspection at BLM's Shoshone District Office.

In his statement of reasons (SOR), appellant admits that the 1992 gross income figure, \$170,030, is correct. He contends, however, that the appraisal failed to take into account a payback ("clawback") provision in appellant's contract with his purchaser, Idaho Power Company. Under article IV, section D of the contract (SOR Exh. A at 6), certain adjustments to the purchase price of electricity are to be made over a 10-year period following the initial period of 15 years. Appellant, as seller, will have to pay back to Idaho Power (buyer) an amount equal to the difference between the initial purchase rate and any revised rates that might be implemented after the initial period ends in 1998. Repayment would be made by reducing the "capacity" payments made to the seller during the 10-year period following the initial period of 15 years. The net effect would be a reduction of gross income paid to the seller (appellant) beginning in 1998 and continuing through 2008. *Id.*; July 12, 1993, Memorandum to File by BLM Staff Appraiser.

Appellant has submitted a copy of the closing December 1991 and 1992 Idaho Power Reports (SOR Exhs. B and C). These reports indicate that the repayment obligation for 1992 was \$139,391.54 and the total "accrued amount to be repaid at the end of the initial period" was \$799,933.03. Appellant states that his "adjusted" income (gross income less 1992 payback amount) for 1992 was "\$30,639, not the \$170,030 used by the appraiser" (SOR at 2). Appellant contends that the repayment obligation is a debt which "must be considered as an adjustment in the year in which it is obligated." *Id.* Based on adjusted gross income, appellant states annual rental should be \$102.95 for 12 months, or \$120.11 for the period June 1, 1993, through July 30, 1994.

Next, appellant asserts that the appraiser incorrectly calculated the access factor at 35.7 percent. This factor, appellant asserts, should be 37.66 percent. Appellant obtained this figure from a consulting firm, Myers Engineering Company, P.A. (Myers) which made an estimate of "BLM's involvement" in the project. Myers' letter to appellant (Exh. D) states

that an estimated 1.405 miles of access road (37.66 percent) is on BLM land. Appellant states that Myers' estimate is based on aerial photographs copies of which have been appended to appellant's exhibit D.

Appellant further asserts the appraiser failed to take into account that special access, separate and apart from the access necessary for daily monitoring, is required for heavy machinery. Appellant asserts further that the appraiser failed to properly consider access to "the generation site, the water gauge site, the headgate structure and to the diversion structure." Id.

As a third error, appellant asserts that the appraisal "lumps both the canal system and the reservoir system into one appraisal unit." Id. Appellant states that BLM used an "as-built" drawing that "fails to record the reservoir area located on private property upstream of the diversion structure." Id.

The "as-built" drawing, prepared for appellant by the John E. Priester Engineering and Land Surveying Firm, is included in the appraisal report. Appellant alleges that the "true current relationship" as between private and BLM surface area is shown in aerial photographs used by Myers Engineering. Appellant alleges that the metes and bounds measurements stated on the "as-built" drawing are highly favorable to BLM.

Appellant asserts that according to Myers, only 51.9 percent of the power canal, not 83 percent as shown in the appraisal, is on BLM land. Utilizing 51.9 percent and 37.66 percent for the power canal and access, respectively, appellant calculated a 0.336 percent contribution for these components. Appellant multiplied this value by his adjusted gross income (\$30,639) to arrive at a fair market rental of \$102.95 for 1993.

Section 504(g) of FLPMA, as amended, 43 U.S.C. § 1764(g) (1994), and its implementing regulation (43 CFR 2803.1-2(a)) require the holder of a right-of-way grant to pay annually to the United States the fair market rental value for the right-of-way. The rental 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).

[1] 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). The Board has approved BLM's methodology of calculating fair market rental as a percentage of gross proceeds in other appeals involving hydroelectric projects. See Ingram Warm Springs Ranch, 135 IBLA 77 (1996); Lateral 10 Ventures Limited Partnership, 133 IBLA 269 (1995).

BLM's approach of utilizing a percentage of gross income for determining fair market rental for hydroelectric rights-of-way has been in effect over a number of years and is memorialized in a series of instruction memoranda. See ID 95-017 (Dec. 16, 1994) and ID 93-010 (Oct. 22, 1992). The policies in BLM's instruction memoranda are based on 43 CFR 2803.1-2(a) which requires BLM to collect "the fair market rental value as determined by the authorized officer using sound business management principles and, as far as practicable and feasible using comparable commercial practices," and 43 CFR 2803.1-2(c)(3)(i) which provides that the rental be "based either on a market survey of comparable rentals, or on a value determination for specific parcels or group of parcels \* \* \*." As explained in ID 95-017, once power is produced, BLM appraisals of hydroelectric rights-of-way are based upon comparable market data "which so far, has supported a royalty fee." This fee is a percentage of gross income applied to income from power production for the previous calendar year.

In this case BLM's appraisal surveyed 16 leases, all "tied to a royalty," and demonstrating that a royalty, i.e., percentage of gross income, is the method of charging for use of land for such a project. Appellant simply asserts that his contractual debt obligation to Idaho Power "must be considered as an adjustment" in BLM's valuation procedure. Appellant cites no authority for this assertion and we have found none. As noted above, BLM's appraisal policy, as enunciated in its instruction memoranda, is based on applicable regulations. BLM is not at liberty to deviate from applicable regulatory guidelines and recognized market practice based on individual contract provisions between grantees and their purchasers. We therefore conclude that BLM properly utilized appellant's gross income in calculating fair market annual rental.

We note, however, that the appraiser's memorandum to the file indicates that there will be appraisal updates after 1998 when additional information has been received "particularly from Idaho Power to determine how annual income for purchased power accounts will be reported to [the Federal Energy Regulatory Commission], for those accounts in which the so-called 'claw-back' will affect gross income in future years."

As to BLM's estimated percentage values for access and power canal, we find that appellant has not shown such values to be in error. Appellant refers to the Myers estimates, prepared from unrectified aerial photographs. At best, these exhibits are difficult to interpret. In any event,

they are of no value in deriving the percentages appellant uses for road access and the power canal. In addition, appellant offers no rationale as to why the values estimated by Myers are more credible than those based on the as-built survey utilized by BLM.

This Board has held that BLM's determination of the fair market rental for a right-of-way for a hydroelectric project will be affirmed where the holder fails to demonstrate, by a preponderance of the evidence, that the appraisal methodology utilized improper data, erred in its calculations, or otherwise arrived at a rental that differed from fair market value. Lateral 10 Ventures Limited Partnership, supra. In the absence of a preponderance of evidence that the BLM appraisal is erroneous, the general rule is that the appraisal may only be rebutted by another appraisal. See, e.g., Western Field Production, Inc., 116 IBLA 225, 228 (1990).

In this case, appellant has failed to demonstrate that BLM improperly adopted its appraisal methodology, that there was any error in its application, or that the rental ultimately adopted deviated from fair market value. Nor did appellant submit his own appraisal of the right-of-way. Therefore, we conclude that BLM properly determined the fair market rental for hydroelectric project right-of-way IDI 17053. See Lateral 10 Ventures Limited Partnership, 133 IBLA at 276 (1995).

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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John H. Kelly  
Administrative Judge

I concur.

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Franklin D. Amess  
Administrative Judge