

INTERIOR BOARD OF LAND APPEALS

Rock Creek Joint Venture

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ROCK CREEK JOINT VENTURE

IBLA 93-564

Decided January 28, 1997

Appeal from a decision of the District Manager, Burley, Idaho, District Office, Bureau of Land Management, determining the fair market rental for amended right-of-way I-20094.

Set aside and remanded.

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

BLM properly appraises the fair market rental of a right-of-way used for hydroelectric purposes as a percentage of the gross income received from the sale of electricity generated by the project where a market survey of comparable private leases supports the use of that appraisal methodology; adjustments are made for differences between the comparable private leases and the right-of-way; and the appellant fails to show error in that appraisal method. A BLM assessment of rental for a right-of-way based on an appropriate appraisal methodology will nevertheless be set aside and remanded where the appellant challenges the data supporting BLM's rental computation and BLM concedes that some of its measurements may not be accurate.

APPEARANCES: Mark A. Edson, Manager, Shorock Hydro, Inc., Twin Falls, Idaho, for appellant. 1/

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Rock Creek Joint Venture (RCJV) has appealed from the June 29, 1993, decision of the District Manager, Burley, Idaho, District Office, Bureau of Land Management (BLM), determining the annual fair market rental for amended right-of-way I-20094 to be \$577.

On June 7, 1983, BLM issued right-of-way I-20094 to Idaho Frozen Foods Corporation (Idaho Frozen Foods) pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761-1771 (1994), authorizing the use of an existing road approximately 3,700 feet long and 30 feet wide across two parcels of public

1/ Shorock Hydro, Inc., is the manager of Rock Creek Joint Venture.

land described as lot 5, sec. 24, T. 9 S., R. 16 E., Boise Meridian (BM), and lots 10 and 12, sec. 30, T. 9 S., R. 17 E., BM, Twin Falls County, Idaho. ^{2/} Idaho Frozen Foods had applied for the right-of-way on November 23, 1982, to afford the company access to the potato waste water treatment facility on its privately owned land. ^{3/} The right-of-way grant set \$180 as the rental for use of the land and stated that the rental amount was subject to readjustment "whenever necessary to place the charges on the basis of fair market value of uses authorized by this grant" (Right-of-Way Grant I-20094 at ¶ 7). ^{4/}

BLM approved the assignment of right-of-way I-20094 from Idaho Frozen Foods to SLC Leasing (Wyoming), Inc. on October 9, 1986, and on February 12, 1987, it approved the assignment of the grant to RCJV.

On July 22, 1988, RCJV applied to amend right-of-way I-20094 to add the use of an existing 0.5-mile long, 50-foot wide road across lot 6 in the SE¹/₄ SE¹/₄ sec. 24, T. 9 S., R. 16 E., BM, Twin Falls County, Idaho. The September 20, 1988, land report prepared in response to the amendment request recommended inclusion of the additional road in the grant, noting that RCJV needed the road to provide access to its hydroelectric plant and related facilities in the Snake River Canyon. BLM amended right-of-way I-20094 to include the additional road, effective October 4, 1988, subject to the terms, conditions, and stipulations of the original grant.

BLM requested an appraisal of the amended road right-of-way on November 9, 1988. On January 26, 1993, BLM again requested an appraisal of amended right-of-way I-20094, classifying the grant as a hydroelectric project right-of-way and describing the land subject to the grant as 5.58 acres within lots 5 and 6, sec. 24, T. 9 S., R. 16 E., BM, and lots 10 and 12, sec. 30, T. 9 S., R. 17 E., BM, Twin Falls County, Idaho. ^{5/} BLM completed its appraisal of RCJV's hydroelectric site right-

^{2/} The application described the access road in lots 10 and 12, sec. 30, as including 2,633 linear feet with a width of 50 feet and the road in lot 5, sec. 24, as encompassing 1,085 linear feet with a width of 50 feet, for a total of 3,718 linear feet.

^{3/} By letter dated Dec. 27, 1982, Idaho Frozen Foods withdrew its request to construct a pipeline in lot 5, sec. 24, included in the original application, advising BLM that the pipeline was no longer needed. Although the applications for assignment of the right-of-way grant, which were copied from the original application, mention the pipeline, no pipeline exists on the public lands subject to the right-of-way and the grant has never authorized the use of a pipeline. See June 16, 1989, Memo to the File.

^{4/} BLM based the rental on a May 18, 1983, appraisal which evaluated data from a sale of adjoining private land and from a rental agreement for use of parts of the access road crossing private land.

^{5/} During the time between the first and second appraisal requests, the Idaho State Office was developing, with input from affected small hydroelectric project right-of-way holders, including RCJV, the appropriate methodology for appraising the fair market rental of such grants.

of-way on June 9, 1993, and the Chief State Appraiser, Idaho State Office, BLM, approved the appraisal on June 17, 1993.

In its appraisal report, BLM stated that the land subject to appraisal consisted of a 5.58-acre corridor of right-of-way traversing a stretch of unimproved rangeland, and that it formed part of the road system providing vehicular access to the Rock Creek hydroelectric facility located on private lands (Appraisal Report at 4-5). Except for the part of the access road crossing three separate parcels of BLM land, virtually the entire power project was situated on a leasehold estate, the report states. BLM estimated the total length of the access road to be about 4 miles and concluded that the 6,358 feet of existing road on public land represented 30 percent of the total road system, adding that no other component of the hydroelectric facility was located on BLM land. Id. at 5.

BLM noted that the subject land comprised part of a proposed hydroelectric facility, along with a segment of the access road currently being used to service the existing hydroelectric facility's power canal and powerplant (Appraisal Report at 12). BLM found that, since the subject site fit into the overall layout of both a present and a planned hydroelectric venture, its value no longer related to the uses extant prior to the development of the power project, but arose instead from its significance as an indispensable element of hydroelectric facility development. BLM, therefore, concluded that the highest and best use of the subject property was for inclusion as part of a hydroelectric project. Id. at 13.

In determining the appropriate appraisal methodology, BLM explained that a survey of comparable rentals revealed that the majority of leases of privately owned lands for hydroelectric development charged rentals based on a percentage of the gross income realized by the sale of power to a major power company (Appraisal Report at 13). Since right-of-way grants for the development of small hydroelectric facilities on BLM land authorized varying amounts of use, BLM devised a method for allocating the percent of gross income to reflect the portion of the facility situated on BLM land. Id. at 13-14. BLM divided small hydroelectric facilities into eight essential components: water, diversion structure, reservoir and/or power canal, penstock, powerhouse, tail race, interconnecting powerline, and road access. ^{6/} Id. at 14. Although BLM found that the percentage of gross income used in private leases was not tied to the particular component or components of the project on the leased land, it nevertheless concluded that the overall percentage should be adjusted to coincide with the number of components on BLM land. Id. After considering several methods for allocating the maximum percentage of gross income to the individual project components, BLM adopted the equal weight method, which attributes identical weight to each component, since the absence of any one component would preclude development of the project. Id. at 14-15; see also July 26,

^{6/} BLM included road access because the Federal Energy Regulatory Commission (FERC) would not issue a license or an exemption from licensing without proof of legal access to a proposed project site. Id. at 14.

1989, Issue Paper entitled "Proposed Valuation Methodology for Estimating Fair Market Rent of Hydro Power Sites on BLM Lands," attached to an Aug. 1, 1989, Memorandum to State Director, Idaho, BLM, from Deputy State Director for Operations, Idaho State Office, BLM, at 2-4. Thus, BLM determined that each component contributed 12.5 percent of the maximum percentage of gross income that might be paid to a private lessor (Appraisal Report at 15). BLM added that the percentage attributable to each component on BLM land would be further modified by the proportionate share of that component actually located on public land. Id.

BLM examined 16 leases of private land in Idaho for hydroelectric purposes and found that rental for these private leases ranged from 0.5 to 15 percent of the gross income derived from the sale of electricity generated by the operation of the permitted hydroelectric facility (Appraisal Report at 16-17). BLM identified various factors influencing the royalty percentage determination, including the date of the lease, the proportionate contribution of the permitted project to the total force of the water through the powerhouse (as reflected in the change in elevation from the point of water diversion to the powerhouse, *i.e.*, the "head"), the ratio of the total distance from the point of water diversion to the powerhouse to the head, and the number of components of the project located on the permitted land. 7/ Id. at 17-19.

BLM compared RCJV's right-of-way to the 16 private leases based on these pertinent considerations and selected 5 of the leases for direct comparison with the right-of-way. After correlating the private hydroelectric site leases, which had royalty rates between 1.5 and 12.5 percent, with the subject grant and making adjustments for time, tax credits, contribution to total head, size and configuration, and authorized uses, BLM ascertained that the range of 1.5 to 2.5 percent of gross income bracketed the value of the subject site (Appraisal Report at 22-27). BLM accordingly concluded that 2 percent of gross income represented the appropriate royalty rate if 100 percent of the project were on BLM lands. Id. at 27.

Since RCJV's right-of-way involved only one component of the project, the access road, and included only approximately 30 percent of that single component, BLM attributed 3.75 percent (12.5 percent times 30 percent) of the gross income generated by the project to the part of the project on public land (Appraisal Report at 28). Multiplying the grant's 3.75 percent

7/ BLM explained that the passage of time had resulted in a decrease of royalty rates adopted in private leases due to adjustments in the regulated rates or tariffs paid by electrical utilities to the power producers and changes in Federal energy and investment tax credits applicable to hydroelectric projects. Id. at 18. BLM also noted that lands containing a greater proportion of the head could generate more power and, thus, more revenues and that the shorter the distance from the point of diversion to the place of use, the less cost would be involved in producing sufficient head to produce electricity. Id. at 19. BLM further indicated that a higher royalty rate would likely be charged where more of a project was located on permitted lands. Id.

contribution by the maximum 2-percent royalty, BLM computed the adjusted royalty rate for RCJV's grant to be 0.075 percent of the annual gross income of the project. 8/ *Id.* As required by BLM Instruction Memorandum No. ID-93-010 (Oct. 22, 1992), BLM applied this percentage to the project's 1992 gross income of \$769,014 and calculated the 1993 fair market rental for amended right-of-way I-20094 to be \$577 (rounded from \$576.76). *Id.* at iii, 1, 29.

In his June 29, 1993, decision, the District Manager notified RCJV that, pursuant to 43 CFR 2803.1-2(c)(3)(i), BLM had prepared a fair market appraisal of the 1.2-mile long road right-of-way and that, in accordance with the appraisal, the rental for the right-of-way for the period June 1, 1993, through July 30, 1994, was \$673.19. He explained that the figure was based on a royalty of 2 percent adjusted by 3.75 percent to reflect the percentage of RCJV's small hydroelectric project located on BLM lands, *i.e.*, 30 percent of the road system, and that the resulting 0.075 percent had been applied against the 1992 gross income for the project as reported to FERC by the Idaho Power Commission. The \$577 annual rental produced by this calculation was then multiplied by 1.1667 to include a factor for partial year June 7, 1994, to July 30, 1994, to obtain the total rental due of \$673.19. 9/ The District Manager also advised RCJV that the rental for the next 5 years would be based on 0.075 percent of the previous year's gross income from its power production. 10/

On appeal, RCJV contends that the fair market appraisal is erroneous and that the assessment is excessive. RCJV disputes BLM's calculations of the lengths of both the right-of-way and the entire access road for the hydroelectric project. RCJV avers that only 5,173 feet of road traverses public land, that the complete road system extends 27,456 feet, and that, therefore, only 19 percent of the road, not 30 percent, crosses Federal land. RCJV's computation of amount of road crossing public land derives from its claim that, although unsure exactly what right-of-way I-20094 actually includes, it needs only two separate road segments to access its property: the existing 2,633-foot long, 20-foot wide road across lots 10 and 12 in sec. 30, T. 9 S., R. 17 E., BM, and the 2,640-foot long, 30-foot

8/ This percentage was approved for use for the 1993 through 1997 billing years. *Id.* at iii.

9/ The District Manager noted that annual rental due dates for small hydroelectric rights-of-way had been changed to July 31 to allow sufficient time for BLM to gather the previous calendar year's gross income information and to prepare the annual bill.

10/ We note that, although the Oct. 4, 1988, amendment to right-of-way I-20094 added use of an additional 2,640-foot long, 50-foot wide road to the uses authorized by the grant, RCJV paid only the \$180 annual rental appraised for the original grant through June 6, 1993, despite the use of additional public lands. BLM has apparently waived any claim for back rental for the use of the added acreage.

wide old gravel haul road located in lot 6, sec. 24, T. 9 S., R. 16 E., BM. 11/ RCJV further maintains that it could avoid using the old haul road by constructing a new road and bypassing lot 6. 12/

The rental is excessive, RCJV urges, because the access roads are not dedicated roads for the hydroelectric project in the canyon, but also provide passage to a gravel pit, an abandoned farm and ranch, and grazing livestock. RCJV suggests that the prior annual rental reasonably approximated the cost of access across the isolated BLM lands and that increasing the rental 10 years after construction of the project places an additional hardship on the enterprise due to its inability to offset the charge by increasing its rates or revenue. Its costs are escalating and its taxes have tripled, RCJV states. RCJV questions BLM's decision to charge an access royalty for hydroelectric projects only, while other land users pay no royalty based on their income stream. The 310-percent increase in rental, RCJV concludes, exceeds the fair market value of the nonirrigated, rocky, and weedy land embraced by the right-of-way grant.

In response, 13/ BLM explains that the 6,358-foot length of the access road over BLM land represents the sum of the figures set out in RCJV's application for assignment of the original grant, which repeated the dimensions of the land needed delineated in the application for the original grant, i.e., 2,633 feet of access road in lots 10 and 12, sec. 30, T. 9 S., R. 17 E., BM, and 1,085 feet of access road in lot 5, sec. 24, T. 9 S., R. 16 E., BM, and the length of the additional road sought in the amendment application, i.e., 2,640 feet in lot 6, sec. 24, T. 9 S., R. 16 E., BM. While acknowledging that this total is 18 feet more than the totals from the two right-of-way decisions, BLM justifies its use of the higher number on its assumption that RCJV based the amount of footage requested in the two applications on detailed plans. 14/

As far as RCJV's objection to BLM's 4-mile estimated length of the entire access road over both public and private lands is concerned, BLM advises that it approximated the extent of the road based on plans submitted with the applications for the right-of-way, one of which consisted of a line drawn on a topographic map and the other of which depicted engineer's plans for new access roads within the original hydroelectric

11/ RCJV omits the 1,085-foot long, 50-foot wide access road in lot 5, sec. 24, which was included in the original grant.

12/ We note that RCJV's indication that an alternative exists to using the haul road contradicts the statement in its right-of-way amendment application that crossing Federal lands was the only available route of access.

13/ BLM's response consists of a July 29, 1993, memorandum to the right-of-way file authored by the right-of-way appraiser. By order dated Aug. 11, 1993, the Board provided RCJV with a copy of the memorandum.

14/ The original grant described the right-of-way as containing "approximately 3,700 feet," rather than 3,718 feet, the actual sum of the 2,633 feet in lots 10 and 12 and the 1,085 feet in lot 5.

site boundaries. According to BLM, the 4-mile estimation resulted from its utilization of the engineer's scale to measure the road system identified on the two sets of plans. BLM acknowledges, however, that "[t]he scale of the map is so small that it would be easy to be off a few hundred feet since the width of a pencil mark could be as much as 50 feet" (July 29, 1993, Memorandum at 1). Given that the case file did not contain detailed diagrams disclosing the length of the access road over private lands, BLM asserts that its estimate from scaling a topographic map was the best information available in the file. Nevertheless, BLM offers to consider data from "as built" plans if RCJV provides those items.

BLM dismisses RCJV's claim that the appraised rental is excessive and inconsistent with charges for other users of access road rights-of-way. BLM distinguishes the use authorized in this case from other types of access uses on the ground that confirmed access is a prerequisite to securing a FERC license or exemption from licensing for power production purposes. In any event, BLM insists that the appraisal includes market data demonstrating that private landowners typically charge rental based on a royalty derived from the income stream of a hydroelectric project for a variety of uses indispensable to hydroelectric power production, including access. BLM emphasizes the importance of access to the entire project, stressing that, without access to the site, the hydroelectric power developer would not even be able to start construction, much less actual power production.

[1] Section 504(g) of FLPMA, as amended, 43 U.S.C. § 1764(g) (1994), requires the holder of a right-of-way to pay rental annually in advance for the fair market value of the right-of-way when this value is established by an appraisal. Michael D. Dahmer, 132 IBLA 17, 24 (1995); Alaskan M.D.S., Inc., 130 IBLA 13, 15 (1994); see also 43 CFR 2803.1-2(a) (requiring holder to pay "fair market rental value as determined by the authorized officer applying sound business management principles and, so far as practicable and feasible, using comparable commercial practices"). Such value is considered the amount "for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desires but is not obligated to so use." Qwestar Service Corp., 119 IBLA 65, 67 (1991), citing American Telephone & Telegraph Co., 25 IBLA 341, 349-50 (1976).

The preferred method for appraising the fair market value of nonlinear rights-of-way is the comparable lease method, where there is sufficient comparable rental data and appropriate adjustments are made for differences between the subject site and other leased sites. William J. Colman, 134 IBLA 375, 380 (1996); Michael D. Dahmer, supra; Alaskan M.D.S., Inc., supra; Oregon Broadcasting Co., 119 IBLA 241, 243 (1991), and cases cited; see 43 CFR 2803.1-2(c)(3)(i) (rental for nonlinear rights-of-way based on "market survey of comparable rentals"). Under this method, which was the method utilized in the appraisal of RCJV's right-of-way,

the rentals charged for rights-of-way in the area are reviewed and adjustments are made for variations in the features of the grant and the rights obtained under the leases. See Idaho Wireless Corp., 120 IBLA 172, 174 (1991), and cases cited.

An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. See, e.g., William J. Colman, *supra*; Michael D. Dahmer, *supra*; Oregon Broadcasting Co., *supra*. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive. See, e.g., William J. Colman, *supra*; Michael D. Dahmer, *supra* at 25; Oregon Broadcasting Co., *supra*, and cases cited. While RCJV's arguments are inadequate to invalidate the appraisal methodology used by BLM to arrive at the fair market value of amended right-of-way I-20094, it has raised sufficient questions as to the accuracy of BLM's calculation of the percentage of the total access road traversing public lands to warrant setting aside BLM's rental computation and remanding the matter for a reassessment of the fair market rental of the grant.

We find no fault with BLM's adoption of the royalty or percentage of gross income method for determining the fair market rental value of the access road component of the small hydroelectric power project. BLM based the rental value determination on a review of comparable leases, which is the preferred approach and, thus, consistent with "comparable commercial practices," as required by 43 CFR 2803.1-2(a). See Vernon Ravenscroft, 137 IBLA 39, 43 (1996); Ingram Warm Springs Ranch, 135 IBLA 77, 82 (1996); Lateral 10 Ventures Limited Partnership, 133 IBLA 268, 273 (1995); see Bear Creek Hydro (On Reconsideration), 124 IBLA 225, 229-30 n.3 (1992); 15/ Bear Creek Hydro, 122 IBLA 200, 208 (1992). BLM does not charge all other access road right-of-way holders rental based on a percentage of their gross income, but that does not undermine BLM's use of that methodology to value hydroelectric project related access road grants since the market survey of private rentals for hydroelectric project sites validates use of that appraisal method.

BLM's application of this appraisal system in this case, however, may have been based on inaccurate data. RCJV objects to BLM's computation of the lengths of both the access road crossing public land and the entire access road system. Although RCJV claims that the length of the access roads crossing public lands totals only 5,173 feet rather than the

^{15/} We set aside BLM's decision on reconsideration only because BLM had failed to adequately substantiate its adoption of a 4-percent royalty figure.

6,358 feet calculated by BLM, RCJV's figure ignores the 1,085 feet of road in lot 5, sec. 24, T. 9 S., R. 16 E., BM, sought in the original right-of-way application and included in the original grant. If RCJV does not use this land, it can relinquish it and, thus, reduce the amount of the road subject to the right-of-way. Until it does so, this 1,085-foot road forms part of the grant, and rental for amended right-of-way I-20094 properly includes charges for the authorized use of that land. 16/

While we reject RCJV's challenge to BLM's determination that the access road right-of-way traverses 6,358 feet of public land, it appears that its objection to BLM's use of 4 miles as the length of the entire access road system across both public and private lands may be correct. Although RCJV provides no foundation for its claim that the complete road system totals 5.2 miles or 27,456 feet, BLM has acknowledged that the data it used in reaching its number, despite being the best evidence available in the case file, was inexact and has expressed its willingness to reconsider the issue using updated information provided by RCJV. Since fair market rental valuations must be based on as complete and as accurate data as possible, we set aside BLM's rental determination for amended right-of-way I-20094 and remand the matter to allow BLM to recompute the percentage of the total access road crossing public land based on "as built" information from RCJV and to adjust the royalty rate and rental to reflect that recalculated percentage.

Therefore, 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 set aside and remanded for further action consistent with this opinion.

Will A. Irwin
Administrative Judge

I concur.

David L. Hughes
Administrative Judge

16/ Similarly, if, contrary to the statement in its amendment application, RCJV does not need to use the existing haul road in lot 6, sec. 24, T. 9 S., R. 16 E., BM, it can further decrease the amount of public land subject to the right-of-way by surrendering that acreage.