

INTERIOR BOARD OF LAND APPEALS

Crawford Mesa Water Association

150 IBLA 14 (August 2, 1999)

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CRAWFORD MESA WATER ASSOCIATION

IBLA 95-605

Decided August 2, 1999

Appeal from a decision of the Bureau of Land Management, Montrose District Office, Colorado, requiring fair market rental for a right-of-way for a domestic water pipeline. COC 57812.

Affirmed.

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

Where membership in nonprofit organization is open only to individuals who reside within a service area and pay a membership fee and a minimum monthly metered charge that pays for system operations, maintenance and construction, a further assessment can be imposed to the extent of any deficiency, and new members are not accepted unless appellant first determines that there will be no undue hardship on, or inconvenience or expense to, existing members, appellant has not shown that it provides a valuable benefit to the public or to the Secretary's programs at no charge or at a reduced rate.

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

Whether to waive or reduce an annual rental for a FLPMA right-of-way is a matter of discretion. The Board will not substitute its judgment for that of the authorized officer where the record shows that the exercise of such discretion was founded upon reasoned analysis and consideration of the relevant factors.

APPEARANCES: F. Lynn French, Esq., Crawford, Colorado, for Appellant; John R. Kunz, Esq., Office of the Solicitor, Rocky Mountain Region, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Crawford Mesa Water Association (CMWA) has appealed the June 13, 1995, Decision of the Bureau of Land Management (BLM), Montrose (Colorado)

District Office, establishing a fair market rental of \$313 per annum for domestic water pipeline right-of-way COC 57812, issued pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1994). In its Notice of Appeal (NA), CMWA stated that it accepted the right-of-way grant and all its terms and conditions, but did not accept the annual rental charge. As reasons for appeal, 1/ CMWA argued "rent should not be imposed as the sole purpose of CMWA is to provide the public with potable drinking water. * * * No private use is realized by the Right of Way Grant; only the public benefits from this grant." Accordingly, CMWA asks the Board to reverse the Decision insofar as it establishes an annual rental charge.

BLM has filed its Answer, in which four cogent points in support of the Decision are made. First, it is argued that whether to waive or reduce an annual rental is discretionary. (Answer at 3-4.) Second, BLM's exercise of discretion fully comports with District Instruction Memorandum No. (IM) 89-4, 2/ (Answer at 4.) BLM next contends that the nonprofit status of a right-of-way grantee is not dispositive of the question of whether annual rental should be waived or reduced. (Answer at 3.) BLM's final point is that, contrary to CMWA's assertion, the purpose served by the right-of-way is essentially a private purpose. (Answer at 5.) In support of the latter point, BLM notes four indicators of the private purpose and benefits derived from the right-of-way grant. (Answer at 6-8.)

The general rule is that the United States is to receive the fair market value for use of the public lands and resources unless otherwise provided. FLPMA, 43 U.S.C. § 1701(a)(9) (1994). FLPMA provides for such an exception at 43 U.S.C. § 1764(g) (1994), which states in material part:

Rights-of-way may be granted, issued, or renewed to * * * nonprofit associations or nonprofit corporations which are not themselves controlled or owned by profitmaking corporations or business enterprises, or to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary concerned * * * including free use as the Secretary concerned finds equitable and in the public interest.

1/ Appellant did not file a separate statement of reasons. By Order dated Oct. 11, 1995, this Board denied BLM's Motion for Summary Dismissal on the ground of failure to file the statement of reasons required by 43 C.F.R. § 4.412(a), concluding that the NA adequately explained why CMWA believes the Decision is in error.

2/ A copy of IM 89-4 is included in the record. It is dated Dec. 19, 1988, and states that it expired on Sept. 30, 1990. Thus, on the face of it, it no longer is valid, a question not addressed in BLM's Answer. Because IM 89-4 is not inconsistent with FLPMA or the provisions of 43 C.F.R. § 2803.1-2(b), however, the status of IM 89-4 is not critical to our analysis.

Implementing regulations reflect FLPMA's authorization to waive or reduce costs and rentals in appropriate circumstances. 43 C.F.R. §§ 2803.1-2 and 2808.5(a). Of the factors enumerated that may furnish the basis for a decision to waive or reduce annual rental, Appellant relies upon 43 C.F.R. § 2803.1-2(b)(2)(i) and (ii), which respectively require either nonprofit status or a determination that the right-of-way holder provides a valuable benefit to the public or to a program of the Secretary free of charge or at a reduced rate.

[1] While it appears that CMWA is a nonprofit entity, it also appears that its purpose as a nonprofit organization is private in nature. As BLM notes, membership in CMWA is open to individuals who reside within Appellant's service area who pay a membership fee of at least \$350. New members are not accepted unless CMWA first determines that the new service will not impose any undue hardship on, or inconvenience or expense to, existing members. (CMWA's By-laws, Article III, Section 1.) Members pay a minimum monthly metered charge for water service that pays the costs of operations, maintenance and construction, among others. A further assessment can be imposed to the extent of any deficiency between actual costs and the monthly charges collected by Appellant. (CMWA's By-laws, Article VII, Sections 1 and 2.) Thus, it is argued that

the term "public" surely connotes a broader spectrum of people than those relative few who might be members of Crawford Mesa. * * * It seems completely illogical to argue or otherwise assume that, to be part of the "public" contemplated by the regulation, one must first live in a particular geographic area, or pay a membership fee. [3/]

(Answer at 8-9.) Accordingly, BLM contends that no benefit inures to the general public as Appellant claims, and that to the extent that a benefit may be conferred, it is incidental and secondary to the benefit derived by CMWA's members.

[2] Whether to waive or reduce an annual rental for a FLPMA right-of-way clearly is matter of discretion. 4/ As a general matter, the Board

^{3/} BLM contends that from April 1980 to July 1994, the total population of Crawford, Colorado, never exceeded 268, and that it declined to 218 in July 1985. In support of the contention, an excerpt from a chart attributed to the Colorado State Demography Service was submitted. We are asked to take administrative notice of the "facts" asserted in the chart. However, the chart states that it is only an estimate – and not a census – of the populations in various counties in different years. We accept it as the estimate it purports to be, since Appellant has neither questioned nor rebutted the source or quality of the data presented.

^{4/} It should be noted that Congress did not intend to allow the free use of the public lands and resources except where the right-of-way holder is a component of the Federal Government, or where the cost of

will not substitute its judgment for that of the authorized officer where the record shows that the exercise of such discretion was founded upon reasoned analysis and consideration of the relevant factors. Goldmark Engineering Inc., 137 IBLA 303, 306 (1997). See also Red Rock Hounds, 123 IBLA 314 (1992). Appellant has done no more than allege that it provides a benefit to the general public. More than unsupported allegations are necessary, however. As this Board stated in Ruth Tausta-White, 127 IBLA 101, 103 (1993), it is up to Appellant to demonstrate that it is qualified to receive the waiver or reduction sought. In light of the foregoing, we find that BLM considered the relevant factors in reaching its decision to require payment of the fair market rental for the right-of-way. 5/

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision is affirmed.

T. Britt Price
Administrative Judge

I concur:

James L. Bymes
Chief Administrative Judge

fn. 4 (continued)

collecting a token rental charge is significantly greater than the charge itself. S. Rep. No. 583, 94 Cong., 1st Sess. 72-73 (1975). Thus, we cautioned in Delbert D. Jones, 147 IBLA 195, 203 (1999), that the discretionary authority to waive rental fees is not to be exercised capriciously.

5/ Because BLM's Decision reflects a reasoned analysis of the factors before it, we express no view regarding whether the term "public" is or must be defined as more than the 268 individuals who reside in a town.