INTERIOR BOARD OF LAND APPEALS

Quality Broadcasting Corp. and Unicom Broadcasting, Inc.

126 IBLA 174 (May 11, 1993)

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ibiadecisions.com

<u>Editor's note</u>: Reconsideration granted; decision reversed in part by Nov. 9, 1993, Order at 126 IBLA 190A, below.

QUALITY BROADCASTING CORP.
UNICOM BROADCASTING, INC.

IBLA 90-447 Decided May 11, 1993

Appeals from decisions of the Nevada State Office, Bureau of Land Management, requiring payment of rentals for communication site right-of-way N-20943.

Affirmed as modified.

1. Bankruptcy Code: Generally

An appellant's claim that its debt to BLM for rental for a communication site right-of-way was discharged by the confirmation of its reorganization plan in its Chapter 11 bankruptcy proceeding will be rejected where the rental debt to BLM was neither listed nor scheduled as required by the Bankruptcy Code, and, although BLM apparently had actual notice of the bankruptcy proceeding, the appellant fails to demonstrate that the United States Attorney also received the notice mandated by Bankruptcy Rule 2002(j)(4).

2. Administrative Authority: Generally -- Statute of Limitations

A statute establishing time limitations for the commencement of judicial actions for damages on behalf of the United States does not limit administrative proceedings within the Department of the Interior.

3. Appraisals -- Communication Sites -- Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Appraisals

A BLM increase in the annual rental charge for a communication site right-of-way is properly affirmed where the holder of the right-of-way fails to establish that the appraisal upon which the increase is based incorrectly determined the fair market rental value of the right-of-way. 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. 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.

APPEARANCES: Donald L. Christensen, Esq., Reno, Nevada, for Quality Broadcasting Corporation; Barry A. Friedman, Esq., and Steven R. Becker, Esq., Washington, D.C., and Howard J. Braun, Esq., Washington, D.C., for Unicom Broadcasting, Inc.; Burton J. Stanley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Quality Broadcasting Corporation (Quality) and Unicom Broadcasting, Inc. (Unicom), have appealed from two June 7, 1990, decisions of the Nevada State Office, Bureau of Land Management (BLM), requiring, respectively, that Quality pay $52,018 in rentals for communication site right-of-way N-20943 for the period April 4, 1984, through July 31, 1986, and that Unicom pay $71,114 in rentals for that right-of-way for the period August 1, 1986, through December 31, 1990. 1/

Background

BLM issued communication site right-of-way N-20943 to Quality for a 30-year term, effective April 4, 1979, pursuant to section 501(a)(5) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a)(5) (1988). The grant authorized the use of a 5.0489-acre tract described as lot 57, sec. 33, T. 20 S., R. 60 E., Mount Diablo Meridian, Clark County, Nevada, for a radio transmitting tower facility, and provided that the rental for the right-of-way would be due upon billing. The grant also expressly stated that it was subject to all applicable regulations, including those rules to be promulgated under section 310 of FLPMA, 43 U.S.C. § 1740 (1988). In the cover letter transmitting the grant to Quality, BLM indicated that although a right-of-way grant normally was not issued until rental for the site had been paid, it was issuing Quality's grant without the benefit of an appraisal establishing annual rental in order to accommodate Quality's construction and operating schedules. BLM noted, however, that Quality had been advised that the communication site

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1/ Although BLM issued separate June 7, 1990, decisions to Quality and to Unicom, both decisions contained identical reference numbers. Unicom's notice of appeal did not identify which of BLM's June 7, 1990, decisions it was appealing. In its statement of reasons for appeal (SOR), Unicom indicates that it is appealing the decision addressed to Quality. However, in its reply to BLM's response to the Board's June 28, 1991, order requiring an answer, Unicom refers to BLM's rental demand addressed to it as the decision which it is appealing. Therefore, we consider Unicom to have appealed from both of BLM's June 7, 1990, decisions.

was located in an area of high real estate values and that the rental for the site could exceed $5,000. BLM also informed Quality that even though the grant had a 30-year term, it was subject to cancellation for failure to pay the required rental.

In an appraisal report dated September 11, 1979, and approved October 2, 1979, BLM's appraiser set the annual fair market rental for the site at $4,600. After determining that the highest and best use of the site was investment for residential or commercial development, the appraiser used the market data approach and directly compared the parcel with similar properties which had been conveyed on the open market. Based on his analysis of five comparable sales in the neighborhood of the site, the appraiser concluded that the fair market fee value of the site was $10,000 per acre and that the annual fair market rental value was $4,600. 2/

By letter dated November 6, 1979, BLM notified Quality that the rental for right-of-way N-20943 had been set at $4,600 for the first one-year period beginning April 4, 1979. BLM reminded Quality that in accordance with the terms of the right-of-way grant, rental was payable upon billing and advised that this letter constituted the billing.

Although Quality initially disputed the April 4, 1979, effective date of the grant and the assessment of rental commencing on that date, Quality ultimately paid the rental for the April 4, 1979, through April 3, 1980, period on February 21, 1980. Quality did not pay the rental due April 4, 1980, until September 3, 1980, after BLM had sent it several letters demanding the rental payment.

On June 5, 1981, the Las Vegas District Manager, BLM, notified Quality that P.L. 96-586, 94 Stat. 3381, enacted by Congress on December 23, 1980, authorized BLM to offer Quality the opportunity to purchase its communication site right-of-way under non-competitive procedures. He advised Quality that if it was interested in purchasing the site, the current appraisal of the site would be reviewed and amended to reflect current market information and the land would then be offered at its current estimated fair market value. The District Manager further informed Quality that if it did not wish to purchase the site, the terms of its right-of-way grant would continue to authorize and protect its use of the site, but noted that the rental for the site could be expected to increase as land values in the vicinity of the site rose as the surrounding public land was sold.

By letter dated July 22, 1981, Quality apprised the District Manager that it was quite interested in purchasing the site and requested that he go forward and obtain an appraisal for the property.

2/ The appraiser derived the fair market rental value for the site by multiplying the fee value per acre ($10,000) by the number of acres in the site (5.0489 acres), then multiplying the total fee value ($50,489) by the percentage of use authorized by the right-of-way grant (95 percent), and multiplying this right-of-way value ($47,965) by the applicable rate of return (.09625) to arrive at the rounded annual rental of $4,600.

By decision dated October 23, 1981, BLM held Quality's right-of-way grant for cancellation for failure to pay the rental due April 4, 1981. BLM noted that it had informed Quality that the rental was due even though Quality was contemplating purchase of the land included in the right-of-way. The decision allowed Quality 30 days from receipt to submit the $4,600 rental or the right-of-way would be cancelled.

Quality paid the rental due on April 4, 1981, on January 20, 1982. On July 6, 1982, Quality paid the $4,600 rental due on April 4, 1982.

In an appraisal report for the direct sale of the site to Quality dated November 19, 1982, and approved December 1, 1982, the BLM appraiser determined that the highest and best use of the parcel was investment for commercial use. Utilizing the market data valuation approach, the appraiser identified four comparable sales, made adjustments for various value factors, and concluded that the fair market value of the 5-acre tract was $70,000 per acre or $350,000. The appraiser updated this appraisal on December 16, 1982, in view of the fact that none of the BLM parcels suitable for commercial development had sold at a recent land sale. He noted that no physical changes had occurred on the parcel between his original July 28, 1982, site inspection and his December 7, 1982, reinspection, nor had any additional transactions taken place. Based on interviews with realtors and investors and an examination of an additional appraisal report, the appraiser determined that a 20 percent discount against the current appraised price was appropriate to reflect market conditions in the subject neighborhood. He therefore concluded that the current fair market value of the tract was $280,000 (the $350,000 previous appraised price minus the 20 percent marketing discount). He also set the reappraised annual fair market rental for the right-of-way at $38,300. 3/

By decision dated December 29, 1982, BLM offered the 5-acre right-of-way site for direct sale to Quality at the appraised fair market value of $266,000. 4/ BLM requested that Quality submit purchase money in that amount.

By letter dated June 2, 1983, BLM advised Quality that it had not received any response to its December 29, 1982, decision offering the 5-acre site for direct sale to Quality. BLM noted that the appraisal had also valued the annual rental for the land at $38,300, and directed Quality to submit either the $266,000 purchase money or the $38,300 annual rental for the period April 4, 1983, through April 3, 1984, within 30 days of receipt of that letter.

3/ He calculated this amount by multiplying the $280,000 fair market value by the value of the rights granted by the right-of-way (95 percent) to determine the value of the right-of-way ($266,000) and then multiplying that right-of-way value by a 14.4 percent rental return rate to arrive at a rounded annual rental of $38,300.

4/ The decision erroneously stated that the sale was authorized by section 203 of FLPMA, 43 U.S.C. § 1713 (1988), instead of P.L. 96-586, 94 Stat 3381 (Dec. 23, 1980).

BLM followed up that letter with a September 7, 1983, decision, requiring the payment of either the $266,000 purchase money or the $38,300 annual rental within 30 days of receipt of the decision. BLM stated that if Quality failed to submit either the purchase money or the annual rental within the 30-day period, the right-of-way would be cancelled. BLM also indicated that the decision was not final, but was an interlocutory decision from which no appeal could be taken.

In a decision dated April 23, 1984, BLM noted that Quality had submitted $4,600 in rental for the April 4, 1983, through April 3, 1984, rental period, leaving a balance of $33,700 due for that period. 5/ BLM advised Quality that if it wanted to continue paying annual rental for the site, $38,300 was also due for the April 4, 1984, through April 3, 1985, rental period. BLM again reminded Quality that if it wished to purchase the site, the $266,000 purchase money was due. BLM allowed Quality 30 days to pay either the purchase money or the annual rental fees, stating that the right-of-way would be cancelled if neither was received within the 30-day period. BLM further indicated that the decision was not final, but was an interlocutory decision from which no appeal could be taken.

A representative of Quality personally contacted BLM on May 15, 1984, requesting clarification of why the April 23, 1984, decision concerning the new rental and purchase amounts was unappealable. He also informed BLM that the rental billings from BLM's Denver billing center, including the billing for the April 4, 1984, through April 3, 1985, rental period, listed the amount due as $4,600, not $38,300. 6/ BLM and Quality discussed alternatives concerning the right-of-way including partial relinquishment of unused acreage, applying for another established site on a mountaintop, and eventual total relinquishment of the present site.

Quality paid $4,600 annual rental for the April 4, 1984, through April 3, 1985, period, the amount listed in the billing it had received from the Denver billing center, on May 23, 1984. 7/ BLM then contacted the Denver billing center, changing the annual rental amount for the right-of-way to $38,300 beginning in April 1985. 8/

5/ Quality submitted this rental payment, which was received on July 5, 1983, in response to a billing from BLM's Denver billing center requesting annual rental in the amount of $4,600 for the Apr. 4, 1983 - Apr. 3, 1984, rental period.
6/ After receiving this information, BLM contacted the Regional Solicitor's office and was advised that the billings constituted an offer and that if the right-of-way holder paid the billed amount, a valid contract for that amount existed.
7/ We note that the receipt for payment for the rental due Apr. 4, 1984, contained in the file was manually corrected to change the amount due from $38,300 to $4,600, and the due date from Apr. 4, 1985, to Apr. 4, 1984.
8/ The case file contains a June 14, 1984, letter from the Las Vegas District Manager to Senator Paul Laxalt responding to Senator Laxalt's inquiry on behalf of Quality concerning the communication site right-of-way. After reviewing the background of the case, the District Manager

By letter dated June 12, 1984, Quality informed BLM that it wished to relinquish the northern half of lot 57, effective April 4, 1985, and that it was interested in purchasing the southern half of the lot. Quality requested that BLM obtain an appraisal for the sale of the southern half of lot 57.

To accommodate Quality's relinquishment request, lot 57 was subdivided into two 2.5 acre lots, designated as lots 69 and 70. In a decision dated December 7, 1984, BLM accepted Quality's relinquishment of the right-of-way as to the lands described as lot 69, sec. 33, T. 20 S., R. 60 E., Mount Diablo Meridian.

In the appraisal report prepared for the sale of lot 70, dated March 25, 1985, and approved April 12, 1985, the BLM appraiser determined that the highest and best use of the 2.5 acre parcel was investment for commercial development, identified seven comparable sales, and adjusted the market data obtained from those sales for various value factors. Based on this analysis, he concluded that the fair market value of the parcel was $68,000 per acre or $170,000 for the 2.5-acre lot, and that the annual rental value for the site was $16,100. 9/

By decision dated June 6, 1985, BLM offered lot 70 for direct sale to Quality, and requested purchase money in the amount of $170,000. 10/

Unbeknownst to BLM, Quality had filed a voluntary petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-1146 (1988), on January 11, 1985. BLM was not named as a creditor in the list of creditors accompanying the petition, nor was it included in the schedules identifying all the liabilities of Quality, as the debtor, and it received no notice of the filing of the petition at that time. BLM first learned of

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(fn. 8 continued)
acknowledged that the problems concerning the increased rental amount resulted from BLM's failure to provide reasonable notice to Quality prior to adjusting the rental and to clarify that, while the obligation to pay rental was not appealable, the appraisal establishing both the purchase price and the adjusted rental was subject to protest and appeal. He indicated that Quality was current in its rental payments through Apr. 3, 1985; that rental for the site would increase to $38,300 beginning Apr. 4, 1985; and that Quality would be formally notified in writing of the rental adjustment with an opportunity to submit comments or objections. The District Manager also noted that the option to purchase the site remained open and that if Quality had objections to the purchase price, it should submit its written comments to the district office.

9/ He derived the rental amount by multiplying the fair market value ($170,000) by the percentage of rights granted by the right-of-way (95 percent), and then multiplying this right-of-way value ($161,500) by a 10 percent rate of return, and rounding the result to $16,100.

10/ The decision erroneously stated that the lot contained 5 acres of land instead of 2.5 acres of land.

Quality's bankruptcy on January 27, 1986, when the partners in a business venture interested in purchasing Quality met with BLM to discuss the status of Quality's communication site right-of-way. 11/

In a decision dated February 27, 1986, after noting that Quality had not responded to the June 6, 1985, direct sale offer, BLM corrected the acreage of the offered parcel to 2.5 acres. 12/ BLM informed Quality that it was now making a final offer for the purchase of the 2.5 acre parcel, and that if it did not receive the $170,000 purchase price within 30 days, the offer would be withdrawn without further notice. BLM stated that this was a final decision subject to appeal. BLM further indicated that if Quality did not exercise its right to purchase the site, rental for the period April 4, 1986, through April 3, 1987, had to be paid in advance, and that past due rental for the period April 4, 1985, through April 3, 1986, was also payable at that time. If the total rental money in the amount of $32,200 was not received within 30 days, BLM advised that it would take action to cancel the right-of-way grant. This portion of the decision, BLM explained, was not final and not subject to appeal at that time.

According to a note in the case file, a representative of Quality contacted BLM telephonically on March 6, 1986, to clarify the February 27, 1986, decision. Quality's bankruptcy petition was not mentioned.

BLM received copies of various bankruptcy court documents in March and April 1986. 13/ The documents received included Quality's third amended plan of reorganization and disclosure statement and an April 9, 1986, notice of the June 1, 1986, deadline for creditors to file proof of their claims against Quality. Several of the other documents mentioned the BLM right-of-way as one of Quality's assets, acknowledged that a dispute existed between Quality and BLM concerning the right-of-way, and provided that Quality would take necessary steps to resolve that dispute without adverse financial or operating effect upon any potential buyer of Quality.

On April 24, 1986, a representative of Unicom contacted BLM, advising BLM that Unicom planned to buy Quality and requesting verification of the annual rental for Quality's communication site right-of-way and the rental owed in arrears. BLM informed Unicom that as long as it was willing to assume responsibility for complying with the terms on the right-of-way grant, BLM would refrain from cancelling the grant.

11/ BLM noticed at that meeting that its June 6, 1985, decision contained the error of describing the offered parcel as encompassing 5 acres, instead of 2.5 acres.
12/ BLM also clarified that the correct sale authority for the subject lands was the Act of Dec. 23, 1980, P.L. 96-586, 94 Stat. 3381, not section 203 of FLPMA, 43 U.S.C. § 1713 (1988).
13/ It is unclear who sent these documents to BLM. Some of the documents have a typed label addressed to BLM taped to them and a regular postage stamp affixed to the addressed side.

BLM received copies of additional bankruptcy court documents in May 1986. On May 19, 1986, the United States Bankruptcy Court for the District of Nevada confirmed Quality's third amended plan of reorganization as modified, including the sale of Quality's stock to Unicom. In re: Quality Broadcasting Corp., Case No. BK S-85-0043 (Bankr. D. Nev. May 19, 1986).

By letter dated May 20, 1986, Unicom apprised BLM that it had entered into an agreement with Quality's current shareholders to purchase all of Quality's shares and assume control of it, including control over the BLM right-of-way grant. Unicom estimated that the sale would occur in August and indicated that it expected that the matter of past rentals would be resolved satisfactorily by that time. It further advised BLM that, upon assuming control of Quality, Unicom would make rental payments on a timely basis, and requested, therefore, that BLM take no adverse action on the grant pending consummation of the transaction.

On September 10, 1986, BLM received $6,100 from Quality. In the September 1, 1986, letter accompanying the check, the trustees of the former shareholders of Quality identified the check as payment for the delinquent rentals due for the period April 4, 1985, through July 31, 1986, based on an annual rental of $4,600. 14/

By letter dated October 17, 1986, Unicom notified BLM that, in accordance with the terms and conditions of the stock purchase agreement approved by the bankruptcy court, Unicom had acquired all of Quality's stock, and had become the sole owner and operator of Quality, obtaining all the assets and rights of Quality, including the right-of-way, free and clear of all claims. Unicom acknowledged that the annual rental for the right-of-way was $16,100, although it specifically stated it did not intend to waive the prior owner's claim that such was not the correct rental amount. Unicom expressly assumed responsibility for the rental due after August 1, 1986, the date it had acquired Quality's stock, and advised that it would tender the amounts due upon receipt of BLM's statement for the amount due. It further indicated that, pursuant to the approved purchase agreement, any amounts due and owing for the period before August 1, 1986, were the sole responsibility of the former shareholders of Quality. Unicom also requested that BLM update its records to reflect the transfer of Quality's interests to Unicom upon receipt of final merger documents from Unicom. 15/

On January 20, 1989, Nemesis Communications, Inc., requested that communication site right-of-way N-20943 be assigned from Unicom to it. By letter dated February 3, 1989, BLM informed Unicom that the assignment could not be processed until $58,300 in back rental due on the right-of-way for the 4-year period from April 4, 1985, through April 4, 1989, 16/ was paid.

14/ The $6,100 was computed as $4,600 for the Apr. 4, 1985, through Apr. 3, 1986, rental period and $1,500 (119/365 X $4,600) for the Apr. 4 through July 31, 1986, period.
15/ No final merger documents are included in the case file, nor does it appear that BLM sent Unicom any rental billings.
16/ The correct end date for the 4-year period is Apr. 3, 1989.

Unicom contacted BLM on February 22, 1989, reminding BLM that it had assumed responsibility only for the right-of-way rental due on and after August 1, 1986, the date it acquired Quality's stock. Unicom also inquired as to whether the amount of back rental due was negotiable and whether it could purchase the parcel for the $170,000 purchase price established in the April 1985 appraisal.

After consultation with the Regional Solicitor's office, BLM responded to Unicom in a letter dated March 27, 1990. BLM advised Unicom that the Regional Solicitor's office had reviewed the bankruptcy court documents and had concluded that nothing in those documents allowed either Quality or Unicom to avoid paying all the rental due. Accordingly, BLM determined that Quality was responsible for rental payments through July 31, 1986, after which Unicom was responsible for the rental payments. BLM calculated that the rental due and payable from Unicom for the period August 1, 1986, through December 31, 1990, 17/ was $71,114, and enclosed a sheet detailing its rental computations. BLM informed Unicom that if no response was received within 15 days of its receipt of that letter, BLM would prepare and send a formal billing to Unicom calling for full payment within 30 days.

Also on March 27, 1990, BLM sent a similar letter to the former shareholders of Quality, apprising them that the rental due and payable from Quality for the period April 4, 1984, through July 31, 1986, was $52,118, as computed on the enclosed sheet. BLM gave Quality 15 days from receipt to respond to the letter, after which, if no response was forthcoming, BLM would prepare and send a formal billing to Quality demanding full payment within 30 days. By letter dated April 23, 1990, Quality requested additional time to respond to the BLM letter, and on May 1, 1990, BLM granted Quality an extension through June 6, 1990. 18/

In its June 7, 1990, rental determination decision addressed to the former shareholders of Quality, BLM reiterated that the Regional Solicitor's office had concluded that nothing in the bankruptcy documents reviewed by that office allowed either Quality or Unicom to avoid paying all the rentals due. BLM determined that, based on computations explained in the decision, rental in the amount of $52,018 was due and payable by Quality for the period April 4, 1984, through July 31, 1986. 19/ BLM also expressly stated that Unicom was responsible for the rental payments after July 31, 1986.

17/ BLM noted that current regulations required that all right-of-way rentals be adjusted to a calendar year billing. See 43 CFR 2803.1-2(a). - 18/ BLM received Quality's response on June 12, 1990, after it issued its rental determination decision. In that response, Quality asserted that this matter had been resolved at the time the bankruptcy court entered its order confirming Quality's reorganization plan and the subsequent payments had been made to creditors whose claims were listed as undisputed or who had filed claims that were allowed, and that BLM was, therefore, precluded from asserting any claim against Quality's former shareholders at this time.
19/ BLM's rental computations identified the annual fair market rental value of the communication site as $38,300 for the Apr. 4, 1984, through

In its June 7, 1990, rental determination decision addressed to Unicom, BLM also repeated the Regional Solicitor's office's conclusion that nothing in the bankruptcy documents reviewed by that office allowed either Quality or Unicom to avoid paying all the rentals due. Relying on the computations included with its decision, BLM determined that Unicom owed rental in the amount of $71,114 for the period August 1, 1986, through December 31, 1990, 20/ explicitly acknowledging that Quality was responsible for rental payments prior to that period.

Issues

In its statement of reasons (SOR) for appeal, Quality argues that the 6-year statute of limitations found at 28 U.S.C. § 2415(a) (1988), which precludes the United States from seeking money damages under an express or implied contract if it does not file a complaint within 6 years after the right of action accrues, bars BLM from seeking to collect the $33,700 it claims to be due for the April 4, 1984, through April 3, 1985, rental period. Quality asserts that BLM's right of action for annual rental accrues on the date the rental is due, i.e., at the beginning of the annual rental period. Since BLM issued its June 7, 1990, rental determination more than 6 years after the April 4, 1984, rental due date, and more than 6 years after its May 23, 1984, receipt of Quality's $4,600 rental payment for that period, Quality insists that the statute of limits prevents BLM from pursuing the claimed additional rental for that period. 21/

(fn. 19 continued)
Apr. 3, 1985, rental period, based on the 1982 appraisal for the 5-acre site; $19,150 for the Apr. 4, 1985, through Apr. 3, 1986, rental period based on that same 1982 appraisal reduced by 50 percent in recognition of Quality's approved relinquishment which reduced the size of the site to 2.5-acres; and $16,100 for the Apr. 4, through July 31, 1986, rental period based on the 1985 appraisal. BLM prorated the $16,100 annual rental value over a 4-month period to arrive at a $5,368 rental amount for this last rental period. We note, however, that this last rental period did not contain four full months since it began on April 4, not April 1. BLM subtracted the amounts of the rental payments it had received from Quality for these periods from the rental value due to reach the $52,018 figure. BLM erred, however, by overstating by $100 the amount of rental attributable to the Apr. 4 through July 31, 1986, rental period. See the Sept. 1, 1986, letter accompanying Quality's $6,100 rental payment.

20/ BLM's rental computation relied on the $16,100 annual fair market rental value determination established in the April 1985 appraisal of the 2.5 acre parcel. Although BLM based its proration of that value for the Aug. 1, 1986, through Apr. 4, 1987, period on 8 months instead of 8 months and 3 days, it balanced that understatement by a 3-day overstatement in basing its proration of that value for the period Apr. 4 through Dec. 31, 1990, on a 9-month period.

21/ Quality also contends that the doctrine of laches bars BLM from attempting to collect the additional rental for this period. The authority of the United States to enforce a public right or protect a public interest, however, is not vitiated or lost by its officers' laches, neglect

Quality notes that it filed for relief under Chapter 11 of the Bankruptcy Code on January 11, 1985, and avers that BLM failed to file a proof of claim in Quality's Chapter 11 bankruptcy proceeding for any alleged pre-petition rental payments due and owing to BLM for the right-of-way. Quality contends that, under 11 U.S.C. § 1141 (1988), the 1986 confirmation of its reorganization plan discharged any debt due to BLM, and that the discharge bars BLM from seeking any amounts allegedly due and owing to it which accrued prior to the plan's confirmation.

Quality also challenges BLM's increase of the original rental amount. Quality maintains that BLM's 1982 and 1985 fair market rental valuations of the right-of-way so greatly exceed the 1979 fair market rental valuation under which Quality accepted the right-of-way grant that they violate traditional notions of fundamental fairness and deny Quality due process of law. BLM's rental determination is unjust and excessive, Quality adds, because BLM valued the land based on additional uses not authorized by the grant. In any event, Quality claims that the bankruptcy court has exclusive jurisdiction over the rental determination due to Quality's Chapter 11 filing.

In its SOR, 22/ in addition to raising the 6-year statute of limitations established in 28 U.S.C. § 2415(a) (1988) as a bar to BLM's collection of the rental claimed to be due for the April 4, 1984, through April 3, 1985, rental period, Unicom disputes BLM's 1982 and 1985 rental valuations. Unicom asserts that BLM's unilateral increases in the rental value of the right-of-way so greatly exceed the fair market rental value established in 1979 under which Quality agreed to the right-of-way, that they violate traditional notions of fundamental fairness and deny due process of law. Unicom argues that the right-of-way grant is terminable only for cause 23/ and thus vests in the holder a property interest in the benefit of use of

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(fn. 21 continued)
of duty, failure to act, or delays in performance of their duties. 43 CFR 1810.3(a); Reo Broadcast Management Co., 98 IBLA 139, 141 (1987). Thus, Quality's laches' argument fails.

22/ Unicom challenges the BLM decision addressed to Quality to the extent it deemed Unicom responsible for any of the rental ultimately found to be due from Quality for the period from Apr. 4, 1984, through July 31, 1986. Although that decision did indicate that nothing in the bankruptcy documents reviewed by the Regional Solicitor's office allowed either Quality or Unicom to avoid paying all rentals due, it nevertheless explicitly found that Quality was responsible for the rental for the Apr. 4, 1984, through July 31, 1986, period while Unicom's rental obligation did not begin until after July 31, 1986. Since BLM has not expressly found Unicom liable for the rental accrued prior to Aug. 1, 1986, we need not decide what effect, if any, the terms of the stock purchase and sale agreement approved by the bankruptcy court have on BLM's authority to determine responsibility for the rentals due for the right-of-way.

23/ We note that the cover letter transmitting the grant to Quality informed Quality that the right-of-way grant also was subject to cancellation for failure to pay the required rental.

the right-of-way. BLM's initial rental determination establishing annual rental at $4,600, Unicom insists, created a mutually understood expectation that the holder would receive the benefit of its property interest at rates reasonably related to the initial fair market rental value.

Unicom maintains that Quality had no notice when it received the right-of-way that the initial rental could be increased by 833 percent to $38,300 only 3 years later. It claims that the unconscionability of the increase is enhanced by BLM's admission in the appraiser's December 16, 1982, memorandum that little had occurred in the vicinity of the right-of-way to account for the exorbitant rise in the rental value. 24/ According to Unicom, BLM's unconscionable-on-its-face, unilaterally-assessed ninefold increase in rent in only a 3-year period significantly altered Quality's property interest, controverted the right-of-way holder's expectation of incremental rental changes, and thus violated traditional notions of fundamental fairness.

Unicom notes that BLM's 1982 and 1985 rental valuations considered the highest and best use of the subject site to be commercial, in contrast to the residential highest and best use determination employed in the 1979 valuation. Unicom argues that, to the extent the rental increase is attributable to the alteration of the highest and best use designation, BLM's change of valuation criteria without notice at the time of acceptance of the right-of-way grant that such changes could occur violates due process and traditional notions of fundamental fairness by significantly altering the expectation that reasonable rentals would be based on consistently applied standards. In any event, Unicom asserts, since the right-of-way has only been used as a broadcast transmission tower site, the rental value of the property should be based on the value of broadcast transmission facilities rather than residential or commercial use.

In response to the Board's June 28, 1991, order requesting BLM's submittal of an answer addressing the issues raised in Quality's and Unicom's SOR's, BLM disputes the applicability of the 6-year statute of limitations set forth in 28 U.S.C. § 2415(a) (1988) to this administrative proceeding. BLM asserts that the statute, by its own terms, pertains only to civil actions for money damages brought by the United States, not to administrative proceedings. BLM contends that, while its ability to collect a debt in a civil action brought by the United States is proscribed by the statute of limitations, that statute does not extinguish the debt. Since this proceeding is not a civil action for money damages, BLM concludes that the statute of limitations does not apply to this proceeding.

As far as Quality's claim that any debt it owed to BLM was discharged by the confirmation of its reorganization plan is concerned, BLM suggests that Quality's bankruptcy is an affirmative defense which must be proven by Quality. BLM observes that it was not served with Quality's bankruptcy

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24/ In this Dec. 16, 1982, memorandum the appraiser actually describes the lack of changes in the area around the communication site found during his Dec. 7, 1982, reinspection of the site as compared to his July 28, 1982, initial inspection of the site.

petition and acknowledges that it did not file a claim in the bankruptcy proceeding. BLM avers that its lack of access to the bankruptcy file, including its ignorance of whether it was named as a creditor in the bankruptcy proceeding, precludes it from expressing an opinion as to whether Quality's bankruptcy discharged debts owed to BLM. BLM proposes that, if the Board wishes to consider the bankruptcy defense at this late date, Quality should be required to submit a certified copy of the bankruptcy file in order to facilitate a proper evaluation of its bankruptcy defense.

In its reply to BLM's answer, Quality states that under Bankruptcy Rule 3002(a), a creditor must submit a proof of claim unless the claim is listed as undisputed in the debtor's schedule of liabilities. Quality admits that it did not identify BLM as a creditor in its schedule. Quality asserts, however, that BLM received actual notice of the bankruptcy proceedings, and that despite this notice, BLM failed to file a proof of claim in the bankruptcy case. Because BLM had notice and was required to file a proof of claim in order to be recognized as a creditor of Quality, Quality insists that BLM's failure to file a proof of claim as dictated by law prevents it from attempting to collect on this debt through this proceeding.

Unicom notes in its reply that, since BLM expressly held that Unicom was not responsible for rental payments prior to August 1, 1986, neither the statute of limitations defense nor Quality's bankruptcy defense has any bearing on the issues raised in its appeal. Unicom points out that nothing in BLM's answer controverts any of Unicom's challenges to BLM's 1982 and 1985 rental valuations for the right-of-way, and suggests that this silence supports its claim that those rental valuations were so excessive that they violate traditional notions of fairness and that their imposition denied due process of law. Unicom contends that, as Quality's successor-in-interest, it has never acceded to BLM's rental valuation since it was unfairly imposed without clear justification. 25/ Unicom emphasizes that it is not suggesting that its rental obligation for the August 1, 1986, through December 31, 1990, rental period should be extinguished, but rather that the increases from the original 1979 rental valuation should be based on other than arbitrary, inexplicable factors. Accordingly, Unicom requests that the August 1986 through December 1990 rental demanded by BLM be adjusted to a lesser amount that comports with traditional notions of fundamental fairness.

As indicated above, these appeals present three major issues: (1) whether Quality's rental debt to BLM was discharged in its bankruptcy proceeding; (2) whether the 6-year statute of limitations established in

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25/ We note, however, that in its Oct. 17, 1986, letter notifying BLM that it had acquired Quality's outstanding shares, Unicom explicitly acknowledged that rental for the right-of-way was $16,100, and stated that it assumed responsibility for the rental after Aug. 1, 1986, and would tender the rental amounts upon receipt of a BLM statement therefor. While Unicom disclaimed any intent to waive Quality's objections to the rental amount, nothing in this letter hinted that Unicom also objected to the rental amount.

28 U.S.C. § 2415(a) (1988) bars BLM from collecting rental for the April 4, 1984, through April 3, 1985, rental period; and (3) whether BLM's 1982 and 1985 reappraisals of the communication site right-of-way properly established the fair market rental value of that site. We will address each of these issues seriatim.

Discussion

[1] The Bankruptcy Code provides that confirmation of a reorganization plan in bankruptcy makes the provisions of the plan binding on both the debtor and creditors, and except as otherwise provided in the plan or confirmation order, the plan's confirmation discharges the debtor from debts that arose before the date of confirmation. 11 U.S.C. § 1141 (1988); 9B Am. Jur. 2d Bankruptcy § 2515 (1991). See also Great Western Petroleum & Refining Co., 124 IBLA 16, 27 (1992). The confirmation of a plan under 11 U.S.C. § 1141 (1988), however, does not necessarily discharge a debtor from all debts. Exceptions from discharge include debts which were neither listed nor scheduled under 11 U.S.C. § 521(1) (1988) in time to permit the timely filing of a proof of claim, unless the creditor had notice or actual knowledge of the case in time to make such timely filing. See 11 U.S.C. § 523(a)(3) (1988); 9B Am. Jur. 2d Bankruptcy § 2516 (1991). Where the debt has not been duly scheduled, the burden is on the debtor to prove that the creditor had notice or actual knowledge of the bankruptcy case in time to file a proof of claim. 9 Am. Jur. 2d Bankruptcy § 676 (1991).

The record demonstrates and Quality admits that it neither listed nor scheduled the rental debt owed to BLM under 11 U.S.C. § 521(1) (1988). Quality contends, however, that BLM had actual notice of the bankruptcy proceeding in time to file a proof of claim, and the record reveals that BLM did receive notice of the June 1, 1986, filing deadline on April 13, 1986. Bankruptcy Rule 2002(j)(4), however, which governs the provision of notice to the United States in Chapter 11 cases where the papers disclose a debt to the United States other than for taxes, mandates that the debtor notify both the United States Attorney for the district in which the case is pending and the department, agency, or instrumentality through which the debtor became indebted. Notice given to the appropriate agency but not to the United States Attorney is defective. See In re Divco Philadelphia Sales Corp., 60 B.R. 323 (Bankr. E.D. Pa. 1986). Nothing in the case file or arguments submitted by Quality demonstrates that the United States Attorney had actual or constructive notice of Quality's bankruptcy proceeding at any time. Since the record before us does not evidence that both BLM and the United States Attorney had actual timely notice of the bankruptcy proceeding, we conclude that Quality has failed to establish that its debt to BLM was discharged by that proceeding. 26/

26/ We reject Quality's claim that the bankruptcy court has exclusive jurisdiction over the rental determination. Quality is free, of course, to challenge this determination and our discharge determination in the appropriate forum.

[2] We also reject the contention that BLM is barred from seeking to collect rental for the April 4, 1984, through April 3, 1985, rental period by the 6-year statute of limitations set forth in 28 U.S.C. § 2415(a) (1988). A statute establishing time limitations for the commencement of judicial actions for damages on behalf of the United States does not limit administrative proceedings within the Department of the Interior. See Anadarko Petroleum Corp., 122 IBLA 141, 147-48 (1992), and cases cited therein. Therefore, 28 U.S.C. § 2415(a) (1988) does not prevent BLM from collecting the rental due for that period.

Nevertheless, we conclude that Quality does not owe BLM any additional rental for the April 4, 1984, through April 3, 1985, rental period. The record demonstrates that Quality paid $4,600 in annual rental for this period after receiving a billing for this amount from BLM's Denver billing center. Apparently, BLM had neglected to inform the billing center that it had reappraised the right-of-way and increased the annual rental amount. BLM first mentioned the increased rental amount in a June 2, 1983, letter to Quality, which BLM followed with a September 7, 1983, decision requiring either the purchase money or the increased rental, in which it indicated that the decision was not final and therefore unappealable. As BLM admitted in its June 14, 1984, letter to Senator Laxalt, the conflict between BLM and Quality over the increased rental stemmed from BLM's failure to provide reasonable notice to Quality prior to the adjustment of the rental from $4,600 to $38,300, and BLM's imprecision in informing Quality about its right to appeal the appraisal determining the adjusted rental amount. As a result of these acknowledged procedural shortcomings, BLM advised both Quality and Senator Laxalt that Quality was current in its rental payments through April 3, 1985. To reflect this determination, BLM manually altered the receipt for payment for the April 4, 1984, through April 3, 1985, rental year to clarify that the amount due for that period was $4,600. Given these unique circumstances, we find that BLM erred in holding Quality liable for an additional $33,700 in rental for the April 4, 1984, through April 3, 1985, rental year, and modify its decision to eliminate this amount from its rental due and payable computations.

[3] Both Quality and Unicom attack BLM's 1982 and 1985 reappraisals of the fair market value of the communication site right-of-way. Under section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1988), the holder of a right-of-way is required to pay rental annually in advance for the fair market value of the right-of-way when this value is established by an appraisal. See Questar Service Corp., 119 IBLA 65, 67 (1991); Great Co., 112 IBLA 239, 242 (1989); Mountain States Telephone & Telegraph Co., 107 IBLA 82, 85-86 (1989). 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., Oregon Broadcasting Co., 119 IBLA 241, 243 (1991); Great Co., 112 IBLA at 242, and cases cited therein. 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., Oregon Broadcasting Co., 119 IBLA at 243, and cases cited therein.

Neither Quality nor Unicom has shown error in BLM's appraisal method. BLM based its revised rental determinations on the fair market value of the site as established in the 1982 and 1985 appraisals prepared for the possible sale of the site to Quality. Using the comparable sale method of appraisal, BLM evaluated sales of comparable parcels, adjusted those sale prices to reflect various value factors, and established the fair market fee value of the site, based upon which it computed the rental value of the right-of-way. Although Quality and Unicom contend that BLM improperly changed its designation of the highest and best use of the site from residential in the 1979 appraisal to commercial in the 1982 and 1985 appraisals, BLM's 1979 appraisal indicated that the highest and best use of the site was for residential or commercial development. See 1979 Communication Site Appraisal Report at 23. This notice to Quality in 1979 that BLM considered commercial development as a viable use of the site contradicts appellants' assertion that Quality was not timely apprised that BLM might redesignate the highest and best use for the site as commercial development.

Similarly, appellants' contentions to the contrary notwithstanding, Quality had notice that the rental for its right-of-way could be increased. The regulations promulgated pursuant to section 310 of FLPMA, 43 U.S.C. § 1740 (1988), subject to which the communication site was expressly granted, provided notice to the right-of-way holder that rental fees could be adjusted whenever necessary to reflect current fair market value. See 43 CFR 2803.1-2(d) (1982). Furthermore, BLM's June 5, 1981, letter advising Quality of its option to purchase the site informed Quality that the rental for the site could be expected to increase due to additional sales activity in the vicinity of the site. Accordingly, we reject appellants' due process challenges to the 1982 and 1985 rental valuations.

While appellants argue that BLM's 1982 and 1985 fair market rental valuations are excessive, they have failed to demonstrate that the methodology employed by BLM was erroneous nor have they provided their own appraisals. Appellants' assertion that, because the right-of-way has only been used as a broadcast transmission tower site, the rental value of the property should be based on the value of broadcast transmission facilities rather than residential or commercial potential ignores the fact that fair market value must be determined as if the land were being offered for sale on the open market. See Western Slope Gas Co., 61 IBLA 57, 62 (1981). The highest and best use of a parcel includes uses so reasonably likely in the near future that the availability of the property for that use would be taken into effect by a purchaser under fair market conditions. See Uniform Appraisal Standards for Federal Land Acquisitions at 7 (1973). Appellants have presented no evidence contradicting BLM's highest and best use determination, nor have they offered their own appraised assessments of the fair market value of the right-of-way. Thus, appellants have failed to establish that the 1982 and 1985 appraisals upon which the increased rentals were based incorrectly determined the fair market rental value of the right-of-way and should be set aside.

While we affirm BLM's rental determination addressed to Unicom in toto, we must modify BLM's rental determination addressed to Quality to the extent

it overstated the rental due from Quality. As discussed above, BLM incorrectly held Quality liable for an additional $33,700 for the April 4, 1984, through April 3, 1985, rental year. BLM also overcharged Quality approximately $132 ($16,100 annual rental divided by 365 days multiplied by 3 days) for 3 days for the April 4 through July 31, 1986, rental period, and overstated by $100 the amount of rental received from Quality attributable to that rental period. See note 19, supra. Thus the correct amount of rental due from Quality is $18,286, not $52,018.

To the extent appellants have raised arguments not specifically addressed herein, they have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision addressed to the former shareholders of Quality is affirmed as modified by this decision, and the decision addressed to Unicom is affirmed.

John H. Kelly
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

November 9, 1993

IBLA 90-447 : N-20943
126 IBLA 174 (1993) :
: Right-of-Way
QUALITY BROADCASTING CORP. :
UNICOM BROADCASTING, INC. : Petition for reconsideration
: granted; prior decision
: reversed in part

ORDER

Quality Broadcasting Corporation (Quality) has petitioned the Board for reconsideration of that part of our decision styled Quality Broadcasting Corp., 126 IBLA 174 (1993), in which we considered an appeal from a decision of the Nevada State Office, Bureau of Land Management (BLM), requiring Quality to pay $52,018 in rentals for communication site right-of-way N-20943 for the period April 4, 1984, through July 31, 1986. 1/ We affirmed BLM's decision to increase the rental rate for the right-of-way, but concluded that Quality did not owe BLM any additional rental for the April 4, 1984, through April 3, 1985, rental period. Nevertheless, in sustaining BLM's determination with respect to the rest of the rental, we rejected Quality's argument that its rental debt was discharged in its bankruptcy proceeding.

In our prior decision, we noted that on May 19, 1986, the United States Bankruptcy Court for the District of Nevada confirmed Quality's third amended plan of reorganization as modified including the sale of Quality's stock to Unicom Broadcasting, Inc. In re Quality Broadcasting Corp. BKS-85-0043 (Bank. D. Nev. May 19, 1986). We concluded, however, that Quality's obligation was not discharged because Quality neither listed nor scheduled the rental debt owed to BLM, and although Quality may have provided BLM with actual notice of the bankruptcy proceeding, Quality made no showing that the United States Attorney had actual or constructive notice of Quality's bankruptcy proceeding at any time as required by Bankruptcy Rule 2002(j)(4).

In its petition for reconsideration, Quality asserts that the requirement of Bankruptcy Rule 2002(j)(4) were met. Quality attached a copy of an affidavit of mailing filed on March 17, 1986, in Quality's bankruptcy case. The affidavit identifies the United States Attorney for the District

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1/ In our decision, we also affirmed a separate BLM decision requiring Unicom Broadcasting, Inc., to pay $17,114 in rental for the same right-of-way for the period of Aug. 1, 1986, through Dec. 31, 1990. This action is not affected by our disposition of Quality's petition.

of Nevada as one of the parties to whom a notice of hearing filed with the court on March 13, 1986, was sent, in addition to BLM's Nevada State and Las Vegas District Offices. An Amended Debtor's Disclosure Statement filed with the court and received by BLM on March 31, 1986, made clear that Quality as debtor, not Unicom, had agreed to take whatever action was necessary to resolve the right-of-way dispute with BLM. On April 9, 1986, the bankruptcy court issued a notice establishing June 1, 1986, as the deadline for filing claims against Quality, and BLM received this notice on April 13. As we noted in our decision, 126 IBLA at 186, BLM acknowledged that it did not file a claim, and Quality asserts that this failure prevents BLM from attempting to collect on this debt through this proceeding.

By order dated August 30, 1993, we provided BLM an opportunity to file an answer to Quality's petition. None was received. In Lone Star Steel Co. (On Reconsideration), 124 IBLA 144 (1992), the appellant moved that we vacate our prior decision requiring the payment of additional coal royalty because collection of that payment was automatically stayed by pending bankruptcy proceedings. Counsel for MMS agreed that proceedings against the debtor were stayed, but convinced us that our decision was necessary to enable the Department to seek recovery from the surety on the bonds that were not considered to be part of the bankruptcy estate. Therefore, we denied appellant's motion to vacate.

In contrast with the showing made by counsel for MMS in Lone Star, counsel for BLM has made no similar showing that our decision is necessary to establish the liability of a party other than the debtor. Accordingly, we see no reason why BLM's decision requiring Quality to pay rental should not be reversed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted, and our prior decision is reversed to the extent that it held Quality responsible for payment of rental for the period stated in BLM's decision.

John H. Kelly
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

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