

INTERIOR BOARD OF LAND APPEALS

London Bridge Broadcasting, Inc.

130 IBLA 73 (July 26, 1994)

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LONDON BRIDGE BROADCASTING, INC.

IBLA 94-462

Decided July 26, 1994

Appeal from a decision establishing fair market rental value by appraisal for communication site right-of-way AZA 27907.

Decision affirmed; petition for stay denied as moot.

1. Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rules of Practice: Appeals: Stay

The provisions of 43 CFR 4.21(a), 58 FR 4942-43 (Jan. 19, 1993), govern the effect of a decision pending appeal "[e]xcept as otherwise provided by law or pertinent regulation." The regulations governing the administration of rights-of-way, including communication sites rights-of-way, 43 CFR Part 2800, contain

a "pertinent regulation" that meets the exception of 43 CFR 4.21(a). Under 43 CFR 2804.1(b), "[a]ll decisions of the authorized officer under this part shall remain effective pending appeal unless the Secretary rules otherwise."

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

Where a right-of-way holder charges that the fair market rental value determined by BLM is in error, but shows no error in BLM's appraisal method and provides no evidence to establish that BLM's appraisal is excessive, the Board will affirm BLM's determination.

APPEARANCES: Lee R. Shoblom, Lake Havasu City, Arizona, President and General Manager, for London Bridge Broadcasting, Inc.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

London Bridge Broadcasting, Inc. (London Bridge), has appealed from a decision of the Area Manager, Havasu Resource Area, Yuma District Office,

Arizona State Office, Bureau of Land Management (BLM), dated April 11, 1994, establishing by appraisal the fair market rental rate for communication site right-of-way AZA 27907 to be \$5,000 per year. In its notice of appeal, London Bridge also petitioned for a stay of the Area Manager's decision.

On June 8, 1993, pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732 (1988), London Bridge applied for a modification of its communication site right-of-way grant from that of a secondary to a primary user, based upon an upgrade of its existing FM radio station from a 3,000 watt local FM station to a 100,000 watt regional station. The switch to primary user permitted London Bridge to upgrade its transmittal tower from 50 to 188 feet. The right-of-way grant comprises an area of 0.010 acre, more or less, and is located within the NW¼ of sec. 10, T. 15 N., R. 20 W., Gila and Salt River Meridian, Arizona.

BLM issued a decision on October 29, 1993, proposing a right-of-way grant and requesting that London Bridge sign and return copies of the grant. The decision informed London Bridge as follows:

In accordance with 43 CFR 2803.1-2, the estimated annual rental rate for your right-of-way (AZA 27907) is \$3000 per year. We are requesting \$3500 advanced rental to pay through December 31, 1994 (\$500 for 1993 + \$3000 for 1994). After we receive an approved appraisal from our State Office, the rental payment for 1995 will be adjusted accordingly.

London Bridge signed and returned the grant, and the right-of-way issued with an effective date of February 9, 1994. 1/

Thereafter, BLM requested an appraisal, and on March 15, 1994, the BLM appraiser returned the appraisal establishing the fair market rental value for the site at \$5,000 per year. On March 29, 1994, the BLM Arizona Chief State Appraiser approved that valuation.

On appeal, London Bridge states:

As you recall, I was quite content being a secondary user with Citizen's Utilities Company at approximately \$300 a month.

1/ The grant, at paragraph 3, provides for rental as follows:

"For and in consideration of the rights granted, the holder agrees to pay the Bureau of Land Management fair market value rental as determined by the authorized officer unless specifically exempted from such payment

by regulation. Provided, however, that the rental may be adjusted by the authorized officer, whenever necessary, to reflect changes in the fair market rental value as determined by the application of sound business management principles, and so far as practicable and feasible, in accordance with comparable commercial practices."

Your people came to me, suggesting the desirability of switching to primary user. I was promised the monthly rate would be comparable, so I agreed.

You requested and I provided, in timely fashion, a check in the amount of \$3,500.00 which, believe me, I could not afford, as I had been led to believe I would be paying this on a month to month basis. This, pending an appraisal of the facility.

Now, I'm told your "fairmarket" appraisal would raise us from \$3,000 a year to \$5,000. Frankly, for \$500.00 monthly, the operators of a local commercial facility on much-higher Crossman Peak, both site rental and electric power would be included. Believe me, I'd have gone that route, had I known.

Appellant further requested a stay of BLM's decision, stating that the appraised rental makes its operation uneconomical. For that reason, it claims that imposition of BLM's decision will cause immediate and irreparable harm. It asserts that the public interest will be served if the stay is granted, because otherwise the station will have to go off the air until other arrangements can be made.

[1] We first address appellant's request for stay. 43 CFR 4.21(a) controls the effect of decisions pending appeal, "[e]xcept as otherwise provided by law or other pertinent regulation," and provides at (a)(2) that a decision will be effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for a stay pending appeal is filed together with a timely notice of appeal. In this case, there is another "pertinent regulation." See In re Eastside Salvage Timber Sale, 128 IBLA 114, 115 (1993). 43 CFR 2804.1 states, as an exception to 43 CFR 4.21(a), that "[a]ll decisions of the authorized officer under this part shall remain effective pending appeal unless the Secretary rules otherwise." 2/

Accordingly, 43 CFR 4.21(a) does not apply in this case and the provisions thereof relating to the filing of petitions for a stay are inapplicable. Cf. In re Eastside Salvage Timber Sale, supra (43 CFR 4.21(a) does not apply to forest management decisions because 43 CFR Part 5000, contains a "pertinent regulation" that meets the exception of 43 CFR 4.21(a)); Michael Blake, 127 IBLA 109, 110 (1993) (43 CFR 4.21(a) does not apply to decisions to remove wild horses or burros from public lands because 43 CFR 4770.3(c) contains a specific provision governing the effect of such decisions).

2/ This holding is consistent with our ruling in Texaco Trading & Transportation, Inc., 128 IBLA 239, 240 (1994), that the regulations governing mineral leasing rights-of-way, 43 CFR Part 2880, contain a regulation, 43 CFR 2884.1(b), creating an exception to 43 CFR 4.21. The language of 43 CFR 2884.1(b) is identical to that of 43 CFR 2804.1(b).

However, nothing in the regulations in 43 CFR Part 4 precludes the filing of a petition or request for a stay at any time during a proceeding before the Board, and the Board, in its discretion, may entertain such a petition or request. Robert E. Oriskovich, 128 IBLA 69 (1993). 3/

Although 43 CFR 4.21 is not applicable in this case, the standards set out in 43 CFR 4.21(b) for judging a petition for a stay are essentially those that have long been recognized and applied by this Board in determining whether to grant a stay. In re Eastside Salvage Timber Sale, *supra*. Those standards are, as set forth in Jan Wroncy, 124 IBLA 150, 152 (1992), likelihood of success on the merits, threat of irreparable injury to the moving party if the stay is not granted, whether the threatened injury to the moving party outweighs the potential harm the stay may cause to the nonmoving party, and whether the stay is contrary to the public interest. In addition, the party requesting the stay bears the burden of proof to demonstrate that a stay should be granted.

However, we need not address those standards in this case because, for the reasons stated below, we affirm the BLM decision, thereby mooting appellant's petition for stay.

[2] 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. Quality Broadcasting Corp., 126 IBLA 174, 188 (1993); Questar Service Corp., 119 IBLA 65, 67 (1991); Great Co., 112 IBLA 239, 242 (1989). 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." Questar Service Corp., *supra*, citing American Telephone & Telegraph Co., 25 IBLA 341, 349-50 (1976). The preferred method for appraising fair market value of non-linear rights-of-way, including communication sites, 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. Oregon Broadcasting Co., *supra* at 243, and cases cited therein; *see* 43 CFR 2803.1-2(c)(3)(i).

According to the appraisal, the right-of-way is located on a prominence known as Mohave Mountain. Mohave Mountain is one of at least three communications site locations generally north of Lake Havasu City (Appraisal at 4). This site remained undeveloped until the early 1980's, when it was selected

3/ Although 43 CFR 2804.1(b) provides that right-of-way decisions shall remain effective during the pendency of an appeal "unless the Secretary rules otherwise," it states that "[p]etitions for the stay of a decision shall be filed with the Office of Hearings and Appeals, Department of the Interior." Thus, it is contemplated that action on such a petition will be taken by the Board of Land Appeals, which acts on behalf of the Secretary in matters involving the use and disposition of public lands and their resources. 43 CFR 4.1(b)(3).

by Citizens Utilities Company (Citizens) as the site for a telephone microwave facility, designed to serve long distance needs out of Lake Havasu City. In 1987, London Bridge entered into negotiations with Citizens, eventually obtaining their acquiescence to allow placement of a prefab building and tower on the site. Id.

Noting that the "highest and best use" is defined as that legal use which at the time of appraisal is most likely to produce the highest probable net return over a given period of time, the appraiser determined that the highest and best use for the site was for communications purposes, and that its rental could best be ascertained by comparing it with what is being paid for similar use at similar sites (Appraisal at 5). To avoid the potential for distortions that might be present between FM rents and other uses, the appraiser attempted to locate as many FM broadcast leases as possible. He did, however, consider communications leases other than those leased strictly for FM use, in order to secure several leases with which to compare the London Bridge right-of-way (Appraisal at 6).

For comparison, the appraiser selected six leases and compared them with the subject site on the basis of coverage (the ability of the signals to reach a population or market), lease terms, time (the effect passage of time has had on rental levels), access, and electric power (availability of a supply for operating needs, and the source and costs of such power) (Appraisal at 7). Following that analysis, he arrived at his conclusion that the fair market rental rate should be \$5,000 per year (Appraisal at 10-11).

Where BLM has appraised the fair market rental value of a communication site right-of-way, such appraisal will not be overturned on appeal unless an appellant is able to demonstrate by a preponderance of the evidence that there was error in the appraisal method used or that the appraised value is excessive. MCI Telecommunications Corp., 115 IBLA 117, 120 (1990), and cases cited. In the absence of a showing of error in the appraisal method used, a BLM appraisal may generally be rebutted only by another appraisal. Id.

Appellant claims "for \$500.00 monthly, * * * on much-higher Crossman Peak, both site rental and electric power would be included." However, appellant has shown no error in the appraisal methods used by BLM, nor has it provided another appraisal or any evidence that the charges are excessive, particularly in light of the rental rates for similar leases. 4/

4/ In its decision, BLM advised that "[i]f you wish to file a petition pursuant to 43 CFR 4.21 (58 FR 4939, January 19, 1993) or 43 CFR 2804.1 for a stay of the effectiveness of this decision during the time that your appeal is being reviewed by the Board, the petition for stay must accompany your notice of appeal." BLM's advice was not entirely accurate because, as we have pointed out, 43 CFR 4.21 is not applicable in this case. In addition, only 43 CFR 4.21 requires that the petition accompany the notice of appeal.

Appellant also represents that he was assured that switching from a secondary to a primary user would not result in an increase in the rental rate. Appellant has provided no evidence in support of that charge, but even if it were true, it would not support a reduction in the rental rate because the United States is not bound or estopped by the acts of its officers or agents when they enter into an arrangement or agreement to

do or cause to be done what the law does not sanction or permit. 43 CFR 1810.3(b). BLM is required by law to collect fair market rental value for right-of-way grants, except in certain circumstances not relevant in this case. 43 CFR 2803.1-2(a); 43 CFR 2803.1-2(b)(1).

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 and the petition for stay is denied as moot.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

David L. Hughes
Administrative Judge