INTERIOR BOARD OF LAND APPEALS

Richard Campell/Communications Management

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RICHARD CAMPELL
COMMUNICATIONS MANAGEMENT

IBLA 93-636, 95-172 Decided January 2, 1997

Appeals from decisions of the California Desert District Office, Bureau of Land Management, setting annual rental and cancelling communications site right-of-way R-03951 and ordering appellant to remove its facilities.

Affirmed.

1. Appraisals--Communication Sites--Rights-of-Way: Appraisals

Generally, the proper appraisal method for determining the fair market value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. 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.

2. Appraisals--Communication Sites--Rights-of-Way: Act of March 4, 1911--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 by a preponderance of the evidence that the appraisal upon which the increase is based incorrectly determined the fair market rental value of the right-of-way by the comparable lease method of appraisal.

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

Where the holder of a communications site right-of-way grant failed to pay the annual rental charges in

> advance, BLM properly cancels a communications site right-of-way pursuant to 43 CFR 2803.1-2, following 30-day notice to the holder that the right-of-way would be terminated.

APPEARANCES: Lawrence A. McHenry, Esq., Phoenix, Arizona, for appellant. Henri R. Bisson, District Manager, California Desert District Office, Riverside, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Richard Campell/Communications Management (appellant) has appealed two decisions of the California Desert District Office, Bureau of Land Management (BLM). In the first decision, dated July 29, 1993, BLM affirmed the annual rental for appellant's Black Mountain microwave repeater site right-of-way (ROW) R-03951 at $6,000, as established by a 1982 appraisal. In the second decision, dated November 29, 1994, BLM cancelled the ROW for failure to pay annual rentals in advance as required by the terms of the grant. The appeals of these decisions, docketed as IBLA 93-363 and IBLA 95-172, are consolidated for review because of the similarity of issues invloved.

BLM originally issued ROW R-03951 on November 30, 1964, pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1976) (repealed effective Oct. 21, 1976, by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2793 (1976)). As initially issued, the grant was for a term of 50 years and the annual rental was $300. Appellant obtained the grant as assignee of a predecessor-in-interest on April 6, 1981. The grant had been reappraised and the annual rental was $1,600 (Appraisal approved Jan. 22, 1974) when appellant obtained the grant.

BLM completed another reappraisal of the communications sites on Black Mountain on October 21, 1982. That appraisal was supplemented with further information on September 21, 1983, and amended on December 16, 1983, to reflect the fact that there was joint use of the site.

By decision of October 14, 1988, BLM notified appellant that the site had been appraised at $6,000 annual rental and requested appellant to remit rental based on that rate (a total of $32,100 was calculated) for the 6-year period beginning with November 30, 1988. In response, appellant requested a hearing on the annual rental. No hearing was immediately scheduled. On May 6, 1991, appellant applied to modify the ROW by adding a new user and upgrading the site. In an October 20, 1992, letter to appellant, the Acting District Manager (ADM) stated in part as follows:

> Before any action can be taken to approve any additional improvements on your facility we must reach a satisfactory resolution to the past due status of your right-of-way grant. We appreciate the fact that you requested a hearing to address the 1988 [BLM] decision which raised the site rental from $1,600 to

> $6000 and apologize for not scheduling a hearing to resolve the matter in 1988. The BLM's failure to follow up on your request and any misunderstanding it may have caused is unfortunate.
>
> BLM's failure to make any hearing arrangement was not meant to imply that you were not required to make timely rental payments. As a result of a review of your case file it has been determined that rental payments for right-of-way RO-3951 are past due.

The ADM further stated that BLM had not received any rental payments since October 28, 1985, and that the total amount owing was now $56,100. He also suggested a meeting so that the appraisal and the arrears could be discussed.

On March 4, 1993, BLM notified appellant that it was "not exempt from paying the $1,600 per year annual rental for the years 1986 through 1992." BLM requested payment in the amount of $11,200, an amount appellant had acknowledged was past due for those years.

On April 22, 1993, the District Manager held a hearing in order to take testimony for the purpose of determining the appraisal value of ROW R-03951 and "to record the views of [appellant] concerning the appraisal before making a final decision" (Transcript of Hearing (Tr.) at 4, 5). Appellant, through counsel, participated in the hearing at which the appraiser was also present. Appellant did not present his own appraisal nor any evidence as to why the rental charges in BLM's appraisal were excessive.

On April 23, 1993, the District Manager issued a decision rescinding his October 14, 1988, decision. As noted above, in the October 14, 1988, decision, appellant had been requested to remit a rental amount of $32,100. In the April 23, 1993, decision, the District Manager approved a payment plan for the collection of $9,600 (6 years' past due rental at $1,600 per year). Under the payment plan, requested by appellant, three installments of $3,200 each were to be paid on June 1, August 1, and October 1, 1993.

On July 29, 1993, the District Manager issued the first of the two decisions on appeal herein. In that decision, the District Manager concluded that appellant had failed to show error in BLM's 1982 appraisal. He therefore upheld the annual rental as determined by that appraisal. He also notified appellant that the annual rental of $6,000 was required to be paid beginning on November 30, 1994.

Because appellant did not adhere to the rental installment schedule memorialized in BLM's April 23, 1993, decision, BLM again attempted to collect payment by letter of December 20, 1993. In that letter, the District Manager again reminded appellant of the April 23, 1993, arrangement to allow appellant to become current on his rental payments. The District Manager noted that appellant had failed to remit "any payment" since BLM's April 23 decision, that the total amount past due was now

$11,200, and that if rental fees were not remitted to BLM within 30 days, the ROW would be held for cancellation.

The second decision on appeal herein is the District Manager's November 29, 1994, decision cancelling the ROW for failure to make proper rental payments. That decision summarized rental payments remitted by appellant and applied to his outstanding balance. This decision also indicates, contrary to the December 20, 1993, letter, that appellant did indeed make rental payments after BLM's April 23, 1993, decision (Decision at 5). According to a table in the District Manager's decision, appellant made six rental payments beginning on April 23, 1993. The April 23 payment ($1,600) was for the 1986-87 rental year. Appellant's next payment of $1,600, on January 5, 1994, was for the year 1987-88. On January 28, 1994, appellant paid $1,500 which BLM credited to the 1989-90 rental year. Id. Another $1,600 payment on February 14, 1994, was credited to the 1990-91 rental year. The last two payments, both $1,500, were made on April 22 and June 15, 1994, and credited to the 1991-92 and 1992-93 rental years. No rental payments for the years 1992-93 and 1993-94 were made. The total amount of the six payments was $9,300. With interest at a rate of 4 percent, the past due amount still owing to the United States at that point was $4,141.49 (Decision at 5-6).

The District Manager noted that appellant had failed to pay rentals annually in advance as required by 43 CFR 2803.1-2(a). He therefore cancelled ROW RO-3951 and ordered appellant to remove his facilities. 43 CFR 2803.1-2 requires the holder of a right-of-way to "pay annually, in advance * * * the fair market rental value as determined by the authorized officer * * *."

In his answer to the appeal, the District Manager states that appellant "paid the delinquent unadjusted rental on April 4, 1995," and that this "payment simply credits the balance for past due rental" (Answer at 14-15).

In his statements of reasons (SOR), appellant asserts that BLM's appraisal should be set aside because BLM failed to present evidence to corroborate that appraisal at the April 22, 1993, hearing. Appellant cites American Telephone & Telegraph Co., 25 IBLA 341 (1976), contending that that case closely parallels this case on the facts.

Next, appellant asserts that neither the grant itself nor the Act of March 4, 1911, nor FLPMA provides authority for reappraisal. Under the terms of the grant, appellant asserts, an appraisal may not be made until the 49th year of the grant, 2015.

Appellant critiques BLM's appraisal report suggesting that the BLM appraiser may not have been qualified, that he did not properly carry out the field work necessary for the appraisal, and that the comparable lease data he relied on may have been flawed and could easily lead to inflated rentals (SOR at 8).

Challenging the appraisal and the appraiser's testimony at the hearing, appellant asserts that there was no "[p]roof of the existence of comparable leases with similar terms and conditions," that the data in the appraisal is unreliable and that BLM could not identify or exclude anomalous comparables (SOR at 8). Appellant alleges that the appraiser failed to properly evaluate factors such as access, competition, size, and time. Appellant charges that the appraisal "contains no information by which one can determine that the $6,000.00 charge is the fair market rental * * *" (SOR at 11). Although appellant states that "[t]he BLM appraiser is obligated to employ current appraisal methodology" (SOR at 11), he maintains that BLM was without authority to reappraise a "grant that was made for a term of 50 years under the lump-sum formula until the last year of the grant" (SOR at 16).

With respect to cancellation, appellant asserts that ROW R-03951 could not be terminated under present regulations because ROW R-03951 was "not granted, issued or renewed" under Title V of FLPMA (SOR in IBLA 95-172 at 20).

In his answer, the District Manager asserts that BLM's authority to reappraise ROW grants such as appellant's is well established, that a holder is obligated to pay fair market rental annually in advance, and that the ROW was properly terminated for appellant's failure to make timely and correct payments.

The District Manager points out that the ROW was reappraised at $1,600 annual rental even before appellant obtained it by assignment, and that by accepting assignment, appellant agreed that the grant was subject to applicable regulations at 43 CFR Part 2800. The District Manager further points out that even though the 1982 appraisal established the rental at $6,000, BLM continued, until 1993 to demand the old rental ($1,600) from appellant because BLM had failed to apprise appellant of his right to a hearing in October 1988 (Answer at 9-10, 12). The District Manager notes that appellant was informed of the consequences of nonpayment, given an opportunity to pay, and did not dispute the fact that payment had not been made. Under the circumstances, the District Manager contends, cancellation of the ROW should be affirmed.

In response to appellant's broad-based challenges to BLM's appraisal authority, as well as the applicability of FLPMA and its regulations, we note that prior to the repeal of the Act of March 4, 1911, supra, rights-of-way issued pursuant to that Act were subject to rental charges calculated on the basis of the fair market value of the right-of-way determined by a BLM appraisal. 43 CFR 2234.1-6(a) (1965) (redesignated 43 CFR 2802.1-7(a) at 35 FR 9502, 9503 (June 13, 1970)). ROW R-03951 expressly conditioned the grant upon the regulations in 43 CFR Subpart 2234, which also provided at 43 CFR 2234.1-6(e) for periodic review and modification of the rental charges.

Following repeal of the Act of March 4, 1911, by FLPMA, BLM promulgated regulations pursuant to Title V of FLPMA to govern BLM's management of rights-of-way. 45 FR 44518 (July 1, 1980). However, after the Board

held that those regulations did not apply to pre-FLPMA rights-of-way in James W. Smith (On Reconsideration), 55 IBLA 390 (1981), BLM amended the regulations in 43 CFR Part 2800 to clarify its intent that rules found in 43 CFR Part 2800 were also applicable to rights-of-way granted pursuant to statutes repealed by FLPMA. 51 FR 6542 (Feb. 25, 1986).

The regulations provide at 43 CFR 2801.4 that a right-of-way grant issued on or before the enactment of FLPMA, October 21, 1976, shall be covered by the regulations in 43 CFR Part 2800, unless administration under that part diminishes or reduces any rights conferred by the statute under which it was issued. The Board has held that 43 CFR 2803.1-2(a), which provides for the collection of fair market rental value, does not diminish or reduce the rights granted pursuant to the Act of March 4, 1911. See Southern Pacific Transportation Co., 116 IBLA 164, 166 (1990); Tucson Electric Power Co., 111 IBLA 69, 75 (1989); Mountain States Telephone & Telegraph Co., 107 IBLA 82, 86 (1989). 43 CFR 2803.1-2, mandating annual fair market rental to be paid in advance, is taken directly from section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1994), which contains the same language. There is no substance to appellant's assertion that as a grant under the Act of 1911, ROW R-03951 is somehow exempt from fair market annual rental as determined by appraisal.

[1] The regulation at 43 CFR 2803.1-2(c)(3)(i) provides that the rental for nonlinear right-of-way grants such as communication sites "shall be determined by the authorized officer and paid annually in advance. Said rental shall be based upon either a market survey of comparable rentals, or on a value determination for specific parcels * * *." It is well established that the preferred method for appraising the fair market value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal where there is sufficient comparable rental data available and appropriate adjustments are made for differences between the subject site and other leased sites. Mountain States Telephone & Telegraph Co., 109 IBLA 142, 145 (1989), and cases cited.

[2] With BLM's appraisal in the record and available to appellant, the burden is upon him as the holder of the right-of-way to demonstrate by a preponderance of the evidence that the appraisal upon which BLM's increase of rental is based incorrectly determined fair market value. See Union Pacific Railroad Co., 114 IBLA 399, 406 (1990). American Telephone & Telegraph Co., supra, does not, as appellant alleges, closely parallel the case now before us. In that case, a BLM decision increasing rental was partially based "upon unspecified evidence not in the record and not made known to appellants, * * *." Id. at 348. In the case now before us, BLM's appraisal was made available to appellant, as appellant admitted at the hearing. Based on that appraisal, BLM increased the amount of annual rental.

A perusal of BLM's appraisal demonstrates that appellant's charges are unsupported. The appraiser evaluated relevant characteristics such as size and access ("good county road"), competition ("eleven primary users, one

condo, and a multitude of secondary users"). All types of uses, commercial broadcasting, microwave relay, and mobile relay are represented (Appraisal Report at 12-13).

The appraiser used the market comparison approach, comparing the site with recent rentals of properties with similar utility. Eight comparables were used to illustrate the value of the site. Discarding the two least comparable sites, the appraiser found that the remaining leases ranged from $4,100 to $11,000 in annual rental. The discussion and evaluation of comparables amply illustrates the appraiser's rationale in arriving at an annual rental of $6,000 for ROW R-03951.

Testifying at the hearing before the District Manager, the appraiser, John Horyza, stated that he had 20 years of experience as an appraiser, and had attended various courses and classes in this discipline (Tr. 16, 127). Horyza testified that he interviewed lessors and lessees of comparable sites to gather data for his appraisal (Tr. 22-23). Responding to questions by appellant's counsel, Horyza explained the fundamentals of appraising and fully discussed the details of his appraisal of ROW R-03951.

Appellant has failed to show by convincing evidence that the appraisal is in error or that the rental charge adopted was in excess of fair market value. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal. Accordingly, BLM's appraisal must be upheld. Kelly E. Hughes, 135 IBLA 130, 133-34 (1996).

[3] The regulation relating to suspension or termination of right-of-way authorizations, 43 CFR 2803.4, provides that the authorized officer may suspend or terminate a right-of-way grant "if he determines that the holder has failed to comply with applicable laws or regulations, or any terms, conditions or stipulations * * *." 43 CFR 2803.4(b). The ROW was terminated after appellant was given written notice pursuant to 43 CFR 2803.4(d) of the contemplated termination, the grounds therefor, and the opportunity to submit the rental due. The regulation specifically providing for termination where there has been a default in rental charges is 43 CFR 2803.1-2(d). It provides that if a rental charge "is not paid when due, and such default * * * continues for 30 days after notice, action may be taken to terminate the right-of-way grant * * *."

The decision taken by the District Manager in cancelling the right-of-way is supported by the record. That record shows that appellant failed to timely pay annual rental, that he was given notice and opportunity to submit proper payment, and that he failed to do so. Accordingly, the decision cancelling the ROW must be affirmed. Roy L. Parrish, 114 IBLA 336 (1990); D. R. Johnson Lumber Co., 106 IBLA 379 (1989).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

John H. Kelly
Administrative Judge

I concur:

David L. Hughes
Administrative Judge