

INTERIOR BOARD OF LAND APPEALS

Gifford Engineering, Inc., et al.

140 IBLA 252 (September 30, 1997)

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GIFFORD ENGINEERING, INC., ET AL.

IBLA 93! 658, et al.

Decided September 30, 1997

Appeals from decisions of the District Manager, California Desert District, Bureau of Land Management, establishing annual rentals for primary use of communications site rights! of! way, legitimizing secondary use of pre! FLPMA rights! of! way, and requiring resolution of unauthorized secondary use of FLPMA right! of! way. CA! 4874, et al.

Decisions affirmed in part; decision affirmed in part, vacated and remanded in part, and reversed in part; decisions set aside in part and remanded.

1. Rights! of! Way: Act of March 4, 1911! ! Rights! of! Way: Nature of Interest Granted

A determination by BLM that right! of! way grants issued pursuant to the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1970), entitled the holders, under the authority of that Act, its implementing regulations, and their grants, to permit others to use their rights! of! way without prior approval will be affirmed where an individual 1911 Act right! of! way grant holder fails to establish that the Department intended to grant that right to him exclusively.

2. Federal Land Policy and Management Act of 1976: Rights! of! Way! ! Rights! of! Way: Conditions and Limitations! ! Trespass: Generally! ! Trespass: Measure of Damages

Where a FLPMA right! of! way grant holder permits secondary users to utilize communications equipment in its right! of! way facility without prior written consent from BLM, as required by 43 C.F.R. § 2801.1! 1(f), it is properly deemed to be in trespass under 43 C.F.R. § 2801.3(a). Pursuant to 43 C.F.R. § 2801.3(c)(1), BLM properly assessed trespass damages in the amount of the rental that would have been paid for such use during the period of the trespass.

3. Appraisals! ! Rent! ! Rights! of! Way: Appraisals

A BLM decision establishing the annual rental for the primary use of a communications site right! of! way will be remanded to allow the grant holder an opportunity to review the appraisal so that it can adequately defend its position that BLM improperly appraised the right! of! way on the basis of comparable private leases, used inappropriate data, erred in its calculations, or otherwise arrived at a rental that deviated from fair market value. In accordance with section 10003 of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103! 66, 107 Stat. 405 (1993), the annual rental for calendar year 1994 will be limited to 10 percent above the amount charged in fiscal year 1993.

4. Federal Land Policy and Management Act of 1976: Rights!
of! Way! ! Rights! of! Way: Conditions and Limitations! ! Rights! of! Way:
Nature of Interest Granted

The BLM improperly requires the holder of a FLPMA right! of! way grant to amend its grant in order to obtain authorization for the secondary use of its communications site by others where it may obtain such authorization under its existing grant.

APPEARANCES: Nancy O. Dix, Esq., Heather E. Pollock, Esq., and Joseph A. Delaney, Esq., San Diego, California, for Gifford Engineering, Inc., and Francis H. Gifford; James W. Smith, pro se; Marilyn I. Suchecki, Esq., and Elizabeth R. Sachs, Esq., Washington, D.C., for Meridian Sales & Service Company and Palomar Communications, Inc.; Michael A. Menius, Esq., and Mary E. Brooner, Esq., Washington, D.C., for Motorola, Inc., and David M. Haug, Esq., and Mitchell F. Hertz, Esq., Washington, D.C., for Motorola Communications & Electronics, Inc.; William M. Wirtz, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

On August 13, 1993, the California Desert District Office, Bureau of Land Management (BLM), announced the completion of the final Otay Mountain Communications Site Management Plan (Plan) and Revised Environmental Assessment (EA) No. EA-CA 063-92-03. In connection with the Plan, the District Manager issued separate Decisions to the right-of-way holders on Otay Mountain regarding the status of their grants, including annual rental determinations. Gifford Engineering, Inc. (GEI), James W. Smith (Smith), Meridian Sales & Service Company (Meridian), Motorola Communications & Electronics, Inc. (Motorola), and Francis H. Gifford (Gifford), each of whom has a communications site right! of! way atop Otay Mountain in southern

California, have appealed. 1/ The GEI appeals BLM's determination which found that past "secondary use" of its right-of-way without BLM's prior approval constituted a trespass for which GEI is liable in damages. It also challenges the determination that continuing to permit secondary use requires that its right-of-way grant be amended and the increase in its annual rental. Smith appeals that aspect of the Plan and EA connected to the Decisions issued by the District Manager that would allow the other grant holders authority to permit secondary usage of their right-of-way without prior BLM approval. Meridian, Motorola, and Gifford appeal that part of their Decision, which is based on the appraisal-established annual rental of their respective rights-of-way. 2/

1/ Appeals filed by right-of-way holders from the various BLM Decisions were docketed as follows:

<u>Appeal</u>	<u>Docket Number</u>	<u>Right-of-Way (Date Issued)</u>
GEI	IBLA 93-658	CA 4874 (1/12/79)
James W. Smith	IBLA 93-661	LA 0163131 (9/2/59)
Meridian	IBLA 93-679	LA 0163654 (9/11/59)
Motorola	IBLA 94-6	LA 0166402 (5/27/64)
Gifford	IBLA 94-12	R 05105 (7/6/64)

2/ In an Order dated Apr. 7, 1994, the Board disposed of various preliminary motions filed by the right-of-way holders on Otay Mountain. Therein, we denied the petitions for stay filed by Meridian, Motorola, Gifford, and Smith. We granted that part of GEI's petition which sought to stay BLM's determination to collect trespass fees. We granted Smith's petition to intervene in the appeal of GEI and denied Smith's motions for expedited consideration and for a hearing before an Administrative Law Judge. Finally, the Board recognized GEI, Meridian, Motorola, and Gifford as adverse parties with the right to fully participate in Smith's appeal. Right-of-way R! 05459 was issued September 18, 1966, to Dean Hovey-Palomar Communications, Inc. (Palomar). While Palomar did not appeal from the District Manager's August 1993 Decision, it did seek to intervene in Smith's appeal. Like the other right-of-way holders, Palomar was determined to be an adverse party entitled to fully participate in Smith's appeal. In his notice of appeal, Smith also stated that he appealed from an Aug. 13, 1993, Decision Record (DR), in which the Director, BLM, adopted the Plan, which generally governs the management of existing and new communication site rights-of-way on Otay Mountain. However, in a May 17, 1994, letter, Smith stated that, since the DR constituted the final decision of the Department, and thus was not appealable to the Board, he would instead pursue a judicial remedy.

The DR, like any other BLM decision specifically affecting the administration of rights-of-way, remained effective "pending appeal," pursuant to 43 C.F.R. § 2804.1(b), it was, for this reason alone, final agency action subject to judicial review. 43 C.F.R. § 4.21(c); Southern Utah Wilderness Alliance, 123 IBLA 13, 17 (1992); The Wilderness Society, 110 IBLA 67, 72 (1989). In our Apr. 7, 1994, Order, we also denied Smith's request for a hearing and decision by an Administrative Law Judge, because we concluded that resolution of his appeal did not turn on a material question of fact. The Director, Office of Hearings and Appeals, in a June 3,

Otay Mountain, is a 3,750-foot high mountain 25 miles to the southeast of San Diego, California. Ten communications site rights-of-way are located on Otay Mountain. It is the highest peak in the San Diego area, and is the best location to place a communication facility in the region. The rights-of-way, each of which encompasses 1 acre or less of land, are generally situated within a 640-acre area of public lands situated in secs. 13, 14, 23, and 24, T. 18 S., R. 1 E., San Bernardino Meridian, San Diego County, California.

The right-of-way at issue in IBLA 93-658 (CA 4874) was granted to GEI pursuant to the authority of Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1994). The remaining five were granted pursuant to the authority of the Act of March 4, 1911 (1911 Act), as amended, 43 U.S.C. § 961 (1970). ^{3/}

Because of the interrelated nature of these appeals, we have sua sponte consolidated them for resolution. Because Smith's appeal raises issues central to each of the other appeals, and each of the other appellants are parties therein, we will begin with that appeal, then proceed to consider the merits of the other appeals seriatim.

Smith's challenge to the Decisions of the District Manager addresses the long-standing question of whether any 1911 Act grantee, other than he, is entitled to permit secondary use of its right-of-way without obtaining prior approval from BLM. With respect to this issue, the District Manager found that either BLM or the Forest Service, U.S. Department of Agriculture, had improperly converted the 1911 Act rights-of-way issued to Meridian, Motorola, Gifford, and Palomar to FLPMA rights-of-way. ^{4/} Thus, he cancelled those actions and reinstated the original grants. He took

fn. 2 (continued)

1994, "Notice and Order," styled In the Matter of James W. Smith, Docket No. D 94-29, refused Smith's May 4, 1994, petition to take jurisdiction of his appeal and overrule the Board's April 1994 Order, to the extent we denied his requests for a hearing and for a stay. We now further deny his request, pursuant to 43 C.F.R. § 4.25, for oral argument, since no purpose would be served thereby.

^{3/} The 1911 Act was repealed, subject to valid existing rights, effective Oct. 21, 1976, by section 706(a) of FLPMA, Pub. L. No. 94-579, 90 Stat. 2793 (1976). See 90 Stat. 2786 (1976).

^{4/} Section 509(a) of FLPMA provides that, "with the consent of the holder [of a pre-FLPMA right-of-way], the Secretary [of the Interior or Agriculture] may cancel such a right-of-way * * * and in its stead issue a right-of-way pursuant to the provisions of [Title V of FLPMA]." 43 U.S.C. § 1769(a) (1994); see Donald R. Clark, 39 IBLA 182, 186 n.1 (1979). The District Manager could find no consent by any of the grantees to such a conversion of its original 1911 Act right-of-way.

that action because he found that none of the grantees had ever sought to convert its right-of-way into a FLPMA right-of-way, pursuant to section 509(a) of FLPMA, 43 U.S.C. § 1769(a) (1994). Thus, he concluded that the rights-of-way remained under the authority of the 1911 Act, and that, as holders of such grants, Meridian, Motorola, Gifford, and Palomar were entitled, like Smith, to the authority to permit secondary use of their rights-of-way without obtaining prior BLM approval.

In making his determination, the District Manager relied on a December 28, 1988, Decision by the Director, BLM, styled James W. Smith, which was concurred in by the Secretary of the Interior. That Decision, which constituted a final decision for the Department on that issue, resolved the question of whether Smith could rent his right-of-way to third parties. (Director's Decision at 3.) In James W. Smith, 34 IBLA 146 (1978), the Board ruled that BLM had authority to regulate secondary users, concluding that "nothing in appellant's grant or any other regulation then in effect permitted appellant to lease or grant use of a portion of his right-of-way to another party without authorization." The 1988 Director's Decision effectively overruled the Board on this issue. Accordingly, the District Manager, referencing the Director's Decision, held:

Smith * * * states that where the grant holder is in the business of providing radio and other forms of communications services to customers; where the customers either use the holder's equipment or install their own equipment within the holder's premises; where the holder charges a fee for these services; where these contracts do not purport to assign the grant or transfer beneficial ownership or control over the grant to any of these customers; then such [secondary use] arrangements ". . . do not violate the provisions of . . ." 43 CFR § 218.18a (1954)[.] ^[5/]

* * * In addition, the Director found no prohibitions of such arrangements in either the 1911 Act or the R/W [right-of-way] grant; as such there is ". . . nothing inherently unlawful in such arrangements."

(Meridian Decision, dated Aug. 13, 1993, at 2.) Consequently, the District Manager concluded, as set forth in the Director's Decision in Smith, that the rights-of-way issued to Meridian, Motorola, Gifford, and Palomar under the 1911 Act were, with respect to secondary users, the same as the right-of-way grant issued to Smith. Therefore, the District Manager held that, as with Smith, the other 1911 Act grantees could permit secondary usage of their rights-of-way without BLM's prior approval.

^{5/} The regulation at 43 C.F.R. § 244.18(a) (1954) required the holder of a right-of-way grant to seek BLM approval in the case of "[a]ny proposed transfer, by assignment * * * or otherwise, of a right-of-way."

On appeal, Smith argues that he alone has the right to permit secondary use without prior BLM approval, as recognized in the Director's Decision issued with the concurrence of the Secretary. See Statement of Reasons for Appeal (SOR) at 3, 28! 29, 37, 55, 59. He objects to the District Manager's August 1993 determination which extends to the other 1911 Act grantees the authority to authorize secondary use of their rights! of! way by others without the prior approval of BLM. He contends that BLM, by permitting such use by Meridian, Motorola, Gifford, and Palomar, allows them to trespass, infringes on his valid existing rights, and reduces the economic value of his right-of-way. He concludes that the other 1911 Act grants should be invalidated.

It is Smith's opinion that only his right to permit secondary use without BLM's prior approval was decided by the Director's Decision, arguing that it clarified his rights under his grant and has no application to the rights of Meridian, Motorola, Gifford, and Palomar. (SOR at 32.) Thus, he contends that BLM has improperly applied that Decision to expand the rights granted to these 1911 Act grantees to his detriment.

[1] We have considered Smith's arguments. However, we are not persuaded by his rationale that any legitimate basis exists to justify not applying the Director's Decision regarding Smith's authority to permit secondary users under the 1911 Act to Meridian, Motorola, Gifford, and Palomar. As BLM points out: "[T]here is nothing in that decision which interprets Smith's R/W grant as possessing the exclusive right to permit subsequent users." (Answer at 16.)

In defending his position that his right! of! way grant differs from the other 1911 Act grants at issue here, Smith points to the fact that the State Director had issued a policy pronouncement in October 1962 to the effect that the secondary users of 1911 Act rights! of! way were required to obtain their own rights! of! way. 6/ See SOR at 10! 11, 16, 22 (referring to

6/ Smith also notes that the October 1962 policy was applied to Motorola's right! of! way in a Dec. 13, 1963, Decision, wherein the Chief, Branch of Land Appeals, concluded that "it is necessary that [parties other than the grantee] make application to the appropriate Bureau office for [a] right! of! way on their own behalf." Id. at 1. In so holding, the Chief used reasoning virtually identical to that later adopted by the Board in James W. Smith, 34 IBLA at 149 ("Nothing in appellant's grant or in any other regulation then in effect permitted appellant to lease or grant use of a portion of his right! of! way to another party without BLM authorization");

"There is nothing in the statute or the regulations thereunder, (43 U.S.C. sec. 961; 43 C.F.R. § 244 et seq[.]) * * * which specifically permits the grantee to authorize the use of the right! of! way facilities or for the installation of additional facilities by third parties. Nor is the grant of a right! of! way easement * * * of such a nature that it can be subleased by third parties."

a memorandum to the Manager, Riverside Land Office, from the State Director, dated Oct. 8, 1962). Thus, Smith asserts:

BLM is in error in its conclusion * * * that each 1911 Act [p]rimary right! of! way grantee holds the same enjoyment under the law as [he does under] LA! 0163131. The BLM's policy position changed in 1962 three * * * years after the vesting of the exclusive use rights clarified in the [Director's] December 1988 Decision for LA! 0163131.

(SOR at 19.)

Whatever significance Smith ascribes to the State Director's October 1962 pronouncement, it was finally overruled by the Director's Decision.

In order to achieve uniformity in the rights accorded all right! of! way grantees by the 1911 Act and its implementing regulations, we conclude that application of the Director's Decision extends to other similarly! situated grantees, like Meridian, Motorola, Gifford, and Palomar. 7/ Simply put, it "articulate[d] the rights associated with a communications [site] R/W granted pursuant to the Act of [March 4,] 1911." (Palomar Answer at 4! 5.) As the court stated in Doubleday Broadcasting Co. v. Federal Communications Commission (FCC), 655 F.2d 417, 423 (D.C. Cir. 1981): "[A Federal agency] may not decide a case one way today and a substantially similar case another way tomorrow, without a * * * reasonable explanation." See also Garrett v. FCC, 513 F.2d 1056, 1060 (D.C. Cir. 1975). We can find no reasonable basis for treating the other 1911 Act right! of! way grantees differently than Smith. Earlier BLM decisions holding to the contrary were impliedly overruled by the Director's Decision, which was made explicit with issuance of the District Manager's Decisions in August 1993.

fn. 6 (continued)

(Decision of Chief, Branch of Land Appeals, dated Dec. 13, 1963, at 1.) This part of the December 1963 Decision was vacated by the District Manager in his August 1993 Decision with respect to Motorola, since it was inconsistent with the conclusion that Motorola, like Smith, might permit secondary use without any prior BLM approval.

7/ Smith argues that the following language "conditioned" the other 1911 Act grants and precluded the ability of the grantees to permit secondary use: "Nothing herein authorizes the grantee to allow use by others, either of unoccupied areas, or the improvements placed on the ground by the grantee." (SOR at 21; see id. at 22! 23, 49.) While proposed at various times, that language was not included as a term or condition of any of the other 1911 Act grants at issue here. The nearest it came was in the case of Motorola's right! of! way (LA! 0166402). We note that the language first appeared in an Oct. 8, 1962, memorandum from the State Director, which "recommended" to the Manager, Riverside Land Office, BLM, that, in lieu of a regulatory change governing secondary use, the language be included in grants.

There is also no evidence that Smith has any rights, by virtue of his preexisting right-of-way, or the underlying 1911 Act and its implementing regulations, to physically exclude others from using, for communications purposes, other parts of the mountain not encompassed by his right-of-way, whether they obtain their own rights-of-way or permission to use the rights-of-way of other grantees.

As BLM stated in its Plan, adopted by the Director, BLM, in his August 1993 DR, at page 27:

None of the primary R/W [Grant] holders have exclusive rights-of-way or easements for communications facilities. The BLM retains the authority to approve rights-of-way with subsequent user rights (or amendments to existing rights-of-way to allow subsequent users) as long as primary holders and subsequent users in such sites do not interfere, either electronically or physically[,] with other existing communications facilities on Otay Mountain.

While Smith enjoys protection from physical and electromagnetic interference with his right-of-way and operations, there is no merit to his argument that he was afforded by his right-of-way, or the 1911 Act and its implementing regulations, any protection from "economic infringement" by other communications site users. (SOR at 33.) Such a grant would essentially constitute a monopoly, and there is no basis to believe such a grant was intended or was legally permissible. In any case, that BLM did so is belied by the fact that it subsequently issued competing communication site right-of-way grants on Otay Mountain. ^{8/}

The GEI appealed the District Manager's determination that its failure to obtain prior written consent from BLM to allow secondary users of its right-of-way constituted a trespass, for which it is liable in damages. The GEI also challenged the determination which required it to amend its right-of-way grant, in order to continue to permit secondary use, and to pay an increased annual rental, based on an appraisal.

^{8/} Smith also contends that the District Manager, in his August 1993 Decision, should have terminated GEI's right-of-way where GEI had failed to timely file a proof of construction and committed a willful trespass by permitting unauthorized secondary use of its right-of-way, in violation of its right-of-way grant and applicable regulations. Regardless of the merits of his contention, we conclude that Smith lacks any standing, under 43 C.F.R. § 4.410(a), to bring it before the Board, since he has failed to demonstrate that he has been, or may be, adversely affected by BLM's failure to find a termination of GEI's right-of-way for any of the reasons asserted. We thus will not address this matter. Cf. Robert D. McGoldrick, 115 IBLA 242, 247! 48 (1990) (co! owner of mining claim lacks standing to object to invalidation of interests of other co! owners).

Because GEI's grant was issued pursuant to FLPMA, the District Manager concluded that BLM's prior authorization of any secondary use of its right of way under 43 C.F.R. § 2801.11(f) was required. However, since GEI had permitted others, during the 7-1/4 year period from February 20, 1986, through June 20, 1993, to engage in the secondary use of its right of way, without that authorization, such use was deemed by BLM to be in trespass. See also Plan at 2, 20 ("Thirty-eight known subsequent users are present without formal authorization from BLM"). However, BLM held the trespass to be nonwillful.

The BLM calculated trespass damages, pursuant to 43 C.F.R. § 2801.3(b), according to the additional rental that would have been paid if the secondary use had been properly authorized. See also Plan at 2, 29. It did so based on a March 23, 1992, appraisal, which effectively determined, as of February 20, 1992, the "value difference between [the rental value of] a 'limited use' site (a site where the R/W grant holder is the sole user of the facility) vers[u]s the rental value of an 'unrestricted use' site (a site with tenants)." (Decision, dated Aug. 13, 1993, at 6.) See also memorandum to the Deputy State Director, Lands and Renewable Resources, California, BLM, from the Appraisal Staff, California, BLM, dated May 19, 1992. The resulting figure (\$3,000) was held to be the rental value attributable to tenants or additional users, or the value of the unauthorized secondary use, for the period February 20, 1992, to February 20, 1993. Taking this figure, BLM then went back and computed what would have been the "value difference" for previous years.^{9/} It did not go back further than 1986 since it concluded that it was less likely that there was a difference between the rental value of single user and multiple user rights of way at that time, and thus no trespass damages could have been assessed for that time period. See Plan at 29. Based on this analysis, the District Manager, in his August 1993 Decision, required GEI to pay back rent in the total amount of \$16,300, within 30 days of receipt of that Decision.

Next, the District Manager advised GEI that, should it desire to continue to permit the secondary use of its right of way during the remainder of the 30 year term, GEI was required to submit an application to amend its right of way grant specifically requesting BLM to permit secondary use. See also Plan at 6. He further stated that, should the grant be amended, GEI would, based on the appraisal, be required to pay an annual rental of \$23,000. See also Plan at 2.

^{9/} The BLM concluded that the rental values for the various years, each of which ran from Feb. 20 to Feb. 20, were as follows: \$3,000 (1992-93); \$2,700 (1991-92); \$2,400 (1990-91); \$2,100 (1989-90); \$1,900 (1988-89); \$1,700 (1987-88); and \$1,500 (1986-87). It further calculated a prorated rental value of \$1,000 for the 4 month period from Feb. 20, 1993, through June 20, 1993, based on an annual rental value of \$3,000.

On appeal, GEI contends that it has not engaged in any trespass by permitting others to use its right-of-way facility for communications purposes without prior BLM authorization, because the permitted use simply did not constitute "secondary use." It relies on statements made by the Board in American Telephone & Telegraph Co. (AT&T), 25 IBLA 341 (1976), and James W. Smith, supra, to the effect that secondary users are subsequent occupants of a communications site who enter the site and either construct their own facility, (SOR at 3 (citing AT&T, 25 IBLA at 351 n.10)), or, within an existing facility, install their own equipment. (Response to BLM Answer at 2 (citing Smith, 34 IBLA at 148).) The GEI argues that its "customers" were not secondary users since they constructed no facility and installed no equipment at its site, but merely used GEI's existing facility and equipment, which is "maintained, operated and controlled solely by GEI." (Response to BLM Answer at 2, 3.)

[2] The GEI's right-of-way grant was issued pursuant to the authority of Title V of FLPMA, and its implementing regulations. The GEI's grant identified the "[r]egulations applicable to [the] grant," as follows: "Sections 2801 through 2802.5, Title 43, Code of Federal Regulations." (Right-of-Way Grant at 1.) The grant, thus, incorporated those regulations in effect at the time of the grant, and any subsequent amendments thereto promulgated pursuant to FLPMA. Donald R. Clark, 39 IBLA at 189 (citing Full Circle, Inc., 35 IBLA 325, 331, 85 Interior Dec. 207, 210 (1978)).

Further, as BLM properly noted, one of those regulations, 43 C.F.R. § 2801.11-1(f), which has been in effect since July 31, 1980, see 45 Fed. Reg. 44518, 44528 (July 1, 1980), and thus during the entire period of GEI's purported trespass, provides that

[t]he holder of a right-of-way grant may authorize other parties to use a facility constructed * * * on the right-of-way with the prior written consent of the authorized [BLM] officer and charge for such use. In any such arrangement, the holder shall continue to be responsible for compliance with all conditions of the grant. [10/]

(Emphasis added.)

On January 30, 1978, GEI applied for a communications site right-of-way that would permit it to construct a 16-foot by 24-foot concrete building and an adjacent 195-foot guyed tower on 0.987 acres of public land situated

^{10/} Implicit in section 8(t) of GEI's right-of-way grant was the recognition that the secondary use of the right-of-way was subject to BLM authorization: "Grantee shall post on the exterior of his building the serial number assigned by the Bureau of Land Management of each secondary user authorized to operate within said primary site." (Right-of-Way Grant at 5 (emphasis added).)

in the NE¼ sec. 23, T. 18 S., R. 1 E., San Bernardino Meridian, San Diego County, California. The GEI stated that the site would "accommodate our equipment used to serve our customers." (Communication Site Request, dated Jan. 27, 1978.)

Thereafter, GEI's "customers," in return for a fee, used GEI's equipment, and thus the facility in which it was housed, for their own communications purposes, i.e., repeating two-way radio communications between fixed and mobile transmitting units. See Letter to BLM from GEI, dated Nov. 5, 1991, at 2, 3; GEI SOR at 3 ("GEI's customers * * * utilize GEI's equipment and services"); GEI Response to BLM Answer at 2 ("GEI sells communications services using its own equipment"); GEI Response to BLM Order to Show Cause, dated Jan. 23, 1992, at 2 ("GEI presently services approximately 50 customers at the site covered by Grant CA 4874"), 7. We are not persuaded that, simply because these companies and others did not own the facility or any of the equipment, their use of the facilities does not rise to "secondary use." Indeed, they appear to have been among the primary beneficiaries of GEI's operation, since that use was the reason for the facility. See also GEI Response to BLM Order to Show Cause, dated Jan. 23, 1992, at 6 ("BLM knew from the onset that the site would be operated for the public benefit of secondary users").

Thus, we conclude that GEI permits "other parties" to use its right-of-way facility, within the meaning of 43 C.F.R. § 2801.11(f). 11/ The GEI has offered no evidence to rebut BLM's conclusion that such use persisted throughout the period from February 20, 1986, through June 20, 1993.

11/ The Department has, since the filing of GEI's appeal, amended its right-of-way regulations to distinguish, in the assessment of annual rents, between a "tenant" and a "customer." The former is a person who rents space in a right-of-way facility, operates communications equipment, and resells his communications services for a profit, while the latter is a person who pays a facility owner for communications services but does not resell them for a profit. 43 C.F.R. § 2800.05(b) and (c) (60 Fed. Reg. 57070 (Nov. 13, 1995)). In the present case, GEI's users might be considered "customers." The distinction was intended only to "help make clear which occupants in the facility would be subject to an additional amount of rent under terms of the holder's authorization." 60 Fed. Reg. 57063 (Nov. 13, 1995). There is no indication that the Department intended to limit the requirement in 43 C.F.R. § 2801.11(f) to obtain prior BLM approval only to the case of tenants. Indeed, while the Department amended that regulation, it left the term "other parties" and did not substitute the term "tenant." See 60 Fed. Reg. 57070 (Nov. 13, 1995). We thus conclude that, even under the current regulations, the holder of a right-of-way grant is required to obtain prior BLM approval for any use of his facility, whether it be by a "tenant" or a "customer," as those terms are currently defined.

In addition, 43 C.F.R. § 2801.3(a), which has been in effect in its present form since July 20, 1989, see 54 Fed. Reg. 25851, 25854 (June 20, 1989), provides that "[a]ny use [or] occupancy * * * of the public lands that requires a right-of-way * * * or other authorization pursuant to the regulations of [43 C.F.R.] [Part] [2800] and that has not been so authorized * * * is prohibited and shall constitute a trespass." ^{12/} (Emphasis added.) Plainly, authorization was required by 43 C.F.R. § 2801.1! 1(f) in the case of the use of GEI's right-of-way facility by its "customers." The GEI does not deny that it failed to obtain BLM's consent.

We, therefore, conclude that BLM properly deemed GEI to have engaged in a trespass on the public lands where, without prior BLM authorization, it permitted others to use its right-of-way, during the 7-1/4 year period from February 20, 1986, through June 20, 1993. Cf. High Desert Communications, Inc., 123 IBLA 20, 25 (1992) (use and occupancy absent right-of-way); KLAS, Inc., 101 IBLA 206, 208 (1988) (helicopter use of communications sites rights-of-way); Gold Mountain Logging Co., 34 IBLA 326, 327 (1978) (use and occupancy absent right-of-way).

Further, 43 C.F.R. § 2801.3(b) now requires that anyone determined to be in violation of 43 C.F.R. § 2801.3(a) "shall be liable to the United States for * * * [t]he [fair market] rental value of the lands * * * for the current year and past years of trespass." High Desert Communications, Inc., 123 IBLA at 24. The BLM determined the rental value for the entire 7-1/4 year period of GEI's trespass from February 20, 1986, through June 20, 1993, based on an appraisal. That value represented the rental that would have been paid just for the unauthorized secondary use, i.e., the additional rent that would have been exacted by the marketplace for a multiple use, versus a single use, right-of-way. The GEI has offered no evidence to rebut BLM's conclusion that a premium was charged for multiple use rights-of-way. See 60 Fed. Reg. 57062 (Nov. 13, 1995) ("Generally, multiple user facilities located on public lands are more valuable than single user facilities, and an additional amount of rent should be paid"). It did not offer its own appraisal to establish that BLM's appraisal methodology was erroneous, that BLM used inappropriate data or erred in its calculations, or that the rental values deviated from the

^{12/} This superseded a prior regulation, 43 C.F.R. § 2801.3 (1988), which had been in effect since July 31, 1980. See 45 Fed. Reg. 44518, 44529 (July 1, 1980). It had provided that "[a]ny occupancy or use of the public lands * * * without authorization shall be considered a trespass and shall subject the trespasser to prosecution and liability for the trespass." At the time of issuance of GEI's right-of-way grant, 43 C.F.R. § 2801.1! 4 (1979), provided simply that "[a]ny occupancy or use of the lands of the United States without authority will subject the person occupying or using the land to prosecution and liability for trespass."

fair market value during the period of the trespass. 13/ Under the circumstances, we hold that BLM properly computed trespass damages. High Desert Communications, Inc., 123 IBLA at 25! 26; Gold Mountain Logging Co., 34 IBLA at 328.

Next, we turn to GEI's appeal from the District Manager's Decision establishing an increased annual rental for the primary use of right! of! way CA! 4874. Pursuant to 43 C.F.R. § 2803.1! 2(a) and (c)(3)(i) (1992), BLM conducted a review of the rental value of the communications site on Otay Mountain. 14/ As a result of the March 23, 1992, appraisal of comparable private leases, BLM determined that the fair market rental value was \$20,000 per year, as of February 20, 1992. 15/ The District Manager, in his August 1993 Decision, established the annual rental at that level, effective January 1, 1994. However, noting that he was constrained by section 314 of the Department of the Interior and Related Agencies Appropriations Act of 1993 (Appropriations Act), Pub. L. No. 102! 381, 106 Stat. 1416 (1992), not to increase the rental for a BLM communications site right! of! way more than 15 percent above what it was on October 5, 1992, the

13/ The GEI argues only that BLM is not permitted to "assess rent retroactively" and must afford notice and an opportunity for a hearing before doing so. (SOR at 4.) While the trespass damages assessed GEI are admittedly in the nature of "back rent," there is simply no requirement, either in the 1911 Act, its implementing regulations, or Departmental precedent, that such damages be assessed only after notice and an opportunity for a hearing. Such procedural protections arise only where BLM seeks to impose rental charges for future use. See 43 C.F.R. § 2802.1! 7(e) (1979); AT&T, 25 IBLA at 346. In any case, GEI holds a FLPMA right! of! way for which there is no requirement for notice and an opportunity for a hearing prior to the imposition of rent, prospectively or retroactively. Richard Boulais, 107 IBLA 109, 110 n.1 (1989).

The GEI also asserts that BLM should be estopped from collecting any trespass damages, but makes little effort to demonstrate why estoppel should apply. Significantly, GEI points to no specific affirmative misrepresentation by BLM concerning the propriety of any secondary use of its particular FLPMA right! of! way, which it relied on to its detriment. See Response to BLM Answer at 5! 6. Thus, estoppel will not lie. Dean Staton, 136 IBLA 161, 163! 64 (1996), and cases cited therein.

14/ Effective Dec. 13, 1995, BLM amended the applicable regulations regarding the assessment of rentals for communications site rights! of! way. See 60 Fed. Reg. 57058 (Nov. 13, 1995).

15/ The BLM's appraisal was actually prepared, at BLM's direction, by Paul H. Meiling, a private real estate appraiser, and is set forth in a report, entitled "An Appraisal of Market Rental Rates for Telecommunication Sites Located on Otay Mountain, San Diego County, CA." That report was approved by the State Appraiser, California, BLM, on Apr. 28, 1992. See memorandum to the Deputy State Director, Lands and Renewable Resources, from the State Appraiser, dated Apr. 29, 1992.

District Manager stated that, for calendar year 1994, GEI would be charged \$1,725, which would be due on or before January 1, 1994. 16/

[3] The GEI makes no effort to challenge BLM's appraisal on appeal, except to state that, "based on information and belief, * * * [BLM's] appraisal is not based on comparable rental data from the subject site." (SOR at 6.) The GEI defends its failure to counter the appraisal by explaining that BLM has not afforded it an opportunity to review the appraisal. 17/

It does not appear that the March 1992 appraisal on which BLM rested its rental valuation was available, as a matter of public record, to GEI at any time prior to issuance of the District Manager's August 1993 Decision imposing the 1994 rental, or transmittal of the case file for GEI's right! of! way to the Board on August 1, 1994. In his Decision, the District Manager stated, at page 7, that GEI "may arrange an appointment, within the next 30 days, to visit this office and review/discuss the appraisal as it affects your site." The GEI, through its attorney, made a request to meet with BLM to review and discuss the appraisal on September 13, 1993, stating: "We certainly appreciate your making the necessary arrangements for this meeting and look forward to hearing from you concerning scheduling details." (Letter from Nancy O. Dix., Esq., dated Sept. 10, 1993, at 2.) In its Response to BLM's "Motion for Partial Stay," counsel states that the appraisal has been requested, but that BLM has failed to produce it claiming that appraisals were internal documents. The BLM has not refuted this allegation. We believe that GEI should be afforded a reasonable opportunity to challenge the appraisal.

We recognize that GEI did not introduce its own appraisal to contradict the rental determination. Nevertheless, without an opportunity to evaluate the basis for the BLM determination, GEI cannot effectively demonstrate that BLM's appraisal methodology was erroneous, that BLM used inappropriate data or erred in its calculations, or that the annual rental arrived at deviated from the fair market value of the right! of! way. Under the circumstances, that portion of the District Manager's August 1993 Decision is vacated and remanded.

16/ The Appropriations Act, in fact, required that BLM not increase rentals "by more than 15 per centum per user in fiscal year 1993 over the levels in effect on January 1, 1989." 106 Stat. 1416 (1992) (emphasis added). However, because BLM had not raised the annual rental for GEI's right! of! way since that date, it did not deviate from the statute by basing the permitted increase on the Oct. 5, 1992, level.

17/ The GEI also states that it is "entitled to notice and an opportunity for [a] hearing" before imposition of BLM's rental increase. (SOR at 6.) There is no such entitlement in the case of rights! of! way, such as GEI's, granted pursuant to Title V of FLPMA. Richard Boulais, 107 IBLA at 110 n.1.

Further, while BLM was correct in noting that section 314 of the Appropriations Act, enacted on October 5, 1992, limited any increase in annual rentals for communications site rights! of! way to 15 percent of the rental that was previously in effect, that limit was applicable "in fiscal year 1993." 106 Stat. 1416 (1992). In his August 1993 Decision, the District Manager established the annual rental beginning January 1, 1994, which is in the 1994 fiscal year. The BLM Decision cites the incorrect statute in this regard.

Instead, the applicable statute was section 10003 of the Omnibus Budget Reconciliation Act of 1993 (Omnibus Act), Pub. L. No. 103! 66, 107 Stat. 405 (1993), which provided:

Notwithstanding any other provision of law, for fiscal year 1994, * * * the Secretary of the Interior shall assess and collect annual charges for the utilization of existing radio, television and commercial telephone transmission communication sites located on Federal lands administered by * * * the Bureau of Land Management at a level 10 percent above the fee assessed and collected during fiscal year 1993.

(Emphasis added.)

The BLM was thus required to assess GEI an annual rental for calendar year 1994 at a level 10 percent above that assessed during fiscal year 1993. The BLM therefore improperly determined the initial permissible rental increase for GEI's right! of! way. Since the District Manager, in his August 1993 Decision, required GEI to pay a higher rental, that portion of the Decision is also vacated and remanded. 18/

[4] We hold that GEI need not amend its existing right! of! way grant in order to obtain authorization for the secondary use of its right! of! way, because such use is already subject to authorization, under its existing grant, pursuant to 43 C.F.R. § 2801.1! 1(f). 19/ See Storm Master Owners,

18/ We also note that the incremental increase in the annual rental for GEI's right! of! way, which is attributable to any authorization by BLM of secondary use (\$3,000), will, together with the increase in the rental for GEI's primary use (\$20,000), be subject, at least for calendar year 1994, to section 10003 of the Omnibus Act.

19/ That BLM can currently authorize the secondary use of a FLPMA right! of! way was recognized in the regulatory change effected on Dec. 13, 1995. In that rulemaking, BLM adopted a schedule of pre! determined rents for communications site rights! of! way. It would be used to assess a base rent according to the schedule rent for the highest! valued category of use made of a right! of! way, whether by the right! of! way grant holder or a "tenant[] covered by [the holder's] authorization" and to assess an additional rent for every other tenant, according to 25 percent of the schedule rent for his category of use. 60 Fed. Reg. 57062! 63 (Nov. 13, 1995); see id. at

103 IBLA 162, 177! 81 (1988). Thus, to the extent that the District Manager, in his August 1993 Decision, required GEI to seek an amendment of its right! of! way grant, in order to permit such continued secondary use, the Decision is reversed.

With respect to the appeals by Meridian, Motorola, and Gifford from the District Manager's, August 13, 1992, Decisions, the Appellants oppose the rental determination, based on an appraisal, that they were each required to pay an increased annual rental for the primary use of their rights! of! way. 20/ Recognizing that each of the Appellants was entitled to a hearing before BLM increased its annual rental, since their right! of! way grants were issued pursuant to the 1911 Act, and its implementing regulations, BLM requested the Board to remand all of these cases so that it might afford Appellants the proper procedure.

For good cause shown and absent any objection to BLM's request, we will set aside the District Manager's August 1993 Decisions, to the extent that he increased the annual rental for the primary use of the rights! of! way of Meridian, Motorola, and Gifford, without affording them an opportunity for a hearing, as required by 43 C.F.R. § 2802.1! 7(e) (1979) (formerly 43 C.F.R. §§ 2234.1! 6(e) (1964) and 244.21(e) (1962)). This accords with longstanding precedent. 21/ See Cole Industries, Inc., 82 IBLA 289, 290! 91 (1984); Mountain States Telephone & Telegraph Co., 64 IBLA 164, 166 (1982); AT&T, 25 IBLA at 346! 47.

Except to the extent that they have been expressly or impliedly addressed herein, all other motions and arguments made by any of the Appellants have been considered and rejected as contrary to the facts

fn. 19 (continued)

57060, 57062! 63. This situation was distinguished from that where a tenant, having a "separate authorization," would be assessed his full schedule rent. 60 Fed. Reg. 57063 (Nov. 13, 1995). In either case, a "tenant" is defined as an occupant who rents space in a right! of! way facility and operates communications equipment for profit, by reselling a communications service. 43 C.F.R. § 2800.0! 5(bb) (60 Fed. Reg. 57070 (Nov. 13, 1995)).

20/ Based on the March 1992 appraisal, BLM determined that the annual rental for each of the Appellants' rights! of! way was \$23,000, effective Jan. 1, 1994. However, as noted above, BLM mistakenly cited section 314 of the Appropriations Act to increase the rental by more than 15 percent above that charged on Oct. 5, 1992. Because the rental increase established for the 1994 fiscal year was limited by the Omnibus Act to an initial increase at a level of 10 percent above the 1993 rent, the District Manager on remand should correct those determinations accordingly.

21/ The BLM's decision to afford a hearing also accords with the Plan, approved by the Director, BLM, in his August 1993 DR, wherein BLM, in providing for an increase in annual rentals payable by Meridian, Motorola, and Gifford, states: "All 1911 Act R/W [Grant] holders will be provided with an opportunity for a hearing on the rental increase." (Plan at 2.)

or law, or immaterial. See National Labor Relations Board v. Sharples Chemicals, 209 F.2d 645, 652 (6th Cir. 1954); Glacier-Two Medicine Alliance, 88 IBLA 133, 156 (1985).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the District Manager's August 13, 1993, Decisions issued to Meridian, Motorola, Gifford, Hovey, and GEI are affirmed in part; the District Manager's August 13, 1993, Decision with respect to GEI is affirmed in part, vacated and remanded in part, and reversed in part; the District Manager's August 13, 1993, Decisions issued to Meridian, Motorola, and Gifford are set aside in part, and the cases are remanded to BLM for further action consistent herewith.

Gail M. Frazier
Administrative Judge

I concur:

James L. Bymes
Chief Administrative Judge