

INTERIOR BOARD OF LAND APPEALS

Alyeska Pipeline Service Company

167 IBLA 298 (December 29, 2005)

Title page added by:
ibiadecisions.com

ALYESKA PIPELINE SERVICE COMPANY

IBLA 2003-245

Decided December 29, 2005

Appeal from decisions of the Alaska State Office, Branch of Pipeline Monitoring, Bureau of Land Management, assessing use charges for communication sites associated with the Trans-Alaska Pipeline System Right-of-Way. AA-31239, et al.

Set aside and remanded.

1. Communication Sites--Mineral Leasing Act: Generally--Mineral Leasing Act: Rentals--Rights-of-Way: Act of February 25, 1920--Rights-of-Way: Appraisals--Rights-of-Way: Oil and Gas Pipelines

BLM erred in assessing rentals based on its Calendar Year 2003 Communication Uses Rental Schedule (BLM Information Bulletin No. 2003-005) for communication sites which are defined as “related facilities” by the Agreement and Grant of Right-of-Way for the Trans-Alaska Pipeline System (TAPS Agreement), or by a related Grant of Right-of-Way for Communication Site expressly made subject to the TAPS Agreement, which were issued pursuant to section 28 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 185 (2000), and section 203(b) and (c) of the Trans-Alaska Pipeline Authorization Act of 1973, 43 U.S.C. § 1652(b) and (c) (2000). Such communication sites are exempt from the nationwide rental schedules established by BLM (see 43 CFR 2803.1-2(d)(1)), and rental for such communication sites should be assessed at fair market rental value in accordance with Section 8 of the TAPS Agreement and 43 CFR 2803.1-2(a), rather than based upon nationwide rental schedules established by BLM.

APPEARANCES: Thomas E. Meacham, Esq., Anchorage, Alaska, for Alyeska; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Alyeska Pipeline Service Company (Alyeska or APSC), agent for the Owner Companies of the Trans-Alaska Pipeline System (TAPS), has appealed two Letter Decisions issued by the Alaska State Office, Branch of Pipeline Monitoring, Bureau of Land Management (BLM), each regarding 2003 annual rental or use charges assessed by BLM for rights of use and occupancy granted by the United States to the TAPS Owner Companies under the January 23, 1974, Agreement and Grant of Right-of-Way for TAPS (TAPS Agreement or TAPS Grant).

Alyeska's Notice of Appeal (NOA), filed on February 10, 2003, referenced a series of Letter Decisions which concerned "the 2003 annual rental or use charge assessed against [Alyeska] by BLM for rights of use and occupancy granted to [Alyeska] under authority" of the TAPS Agreement. Alyeska stated that "[a]ll of the Decisions have as their common denominator the BLM's 2002 appraisal of the monetary values of the federal land interests and rights encumbered under the TAPS Agreement and Grant." (NOA at 2.) The 2002 appraisal mentioned by Alyeska was prepared by the private appraisal firm Black-Smith & Richards (B-S&R) of Anchorage, Alaska (TAPS or B-S&R Appraisal).^{1/}

Two of the Letter Decisions, both dated January 9, 2003, identified in Alyeska's NOA, are relevant to this decision. One of the Letter Decisions imposes a use charge for the Grant of Right-of-Way for the Gulkana Microwave Site (AA-31239), which, as Alyeska stated in its "First Amended Notice of Appeal," was not based upon the B-S&R Appraisal, but rather upon application of BLM's Calendar Year 2003 Communication Uses Rental Schedule (BLM Information Bulletin No. 2003-005) (hereinafter "2003 Communication Uses Rental Schedule"). In response to Alyeska's suggestion, as well as BLM's subsequent formal motion, the Board severed Alyeska's appeal regarding the annual rental for the Gulkana

^{1/} In *Alyeska Pipeline Service Company*, 167 IBLA 112 (2005), the Board decided Alyeska's first appeal, docketed by the Board as IBLA 2003-237, as well as additional appeals docketed as IBLA 2004-115, IBLA 2005-5, IBLA 2005-6, IBLA 2005-7, and IBLA 2005-175, all of which involved application of the B-S&R Appraisal. The Board reserved for this decision the issues involving rental fees or use charges for the 14 communication sites docketed under IBLA 2003-245.

Microwave Site from the remainder of Alyeska's appeals and docketed it as IBLA 2003-245.

Further, in its "Motion to Sever Communications Site Rental Appeals," Alyeska stated that it "recently realized" that a portion of a second January 9, 2003, Letter Decision (FF-12505/AA-05847) included "disputed rental amounts totaling \$23,018.06 for 13 communication sites under rentals derived from the CY 2003 Communication Uses Rental Schedule," and moved that the "communications-site issue" be severed and incorporated into the Gulkana Microwave Site appeal docketed as IBLA 2003-245. By order dated October 14, 2004, the Board granted Alyeska's motion, stating that all communication site rental appeals then pending before the Board would be consolidated under IBLA 2003-245.^{2/}

The two January 9, 2003, Letter Decisions considered herein applied the 2003 Communication Uses Rental Schedule in assessing Alyeska \$1,770.62 in rental for the Gulkana Microwave Site (AA-31239), and \$23,018.06 in rental for the 13 telecommunication sites (\$1,770.62 for each of the 13 sites) (FF-12505/AA-05847). Annual rentals assessed for communication sites are generally based upon a nationwide schedule for BLM's communication site (*i.e.*, non-linear) rights-of-way or permits as provided in 43 CFR 2803.1-2(d). These nationwide schedules are ranked and differentiated in accordance with Rand-McNally Metropolitan Area population rankings (43 CFR 2803.1-2(d)(2)(i)), and adjusted annually, based upon the U.S. Department of Labor Consumer Price Index for All Urban Customers (CPI-U), U.S. City Average, published in July of each year. See Statement of Reasons (SOR) at 5-6. Alyeska maintains that the nationwide rental payment schedules, as reflected in the 2003 Communication Uses Rental Schedule, are not applicable to the 14 communication sites associated with its operations under the TAPS Agreement. For the reasons that follow, we agree.

In placing these appeals into their proper context, we note that the TAPS Agreement was issued under the authority of section 28 of the Mineral Leasing Act of 1920 (MLA), as amended, 30 U.S.C. § 185 (2000), and section 203(b) and (c) of the Trans-Alaska Pipeline Authorization Act of 1973 (TAPAA), 43 U.S.C. § 1652(b), (c) (2000). Section 28(a) of the MLA authorizes BLM to issue right-of-way grants across the Federal lands for "pipeline purposes for the transportation of * * * natural gas," and section 28(l) requires the grantee to pay to the Department the "fair market

^{2/} We will state, as we did in Alyeska Pipeline Service Co., 167 IBLA at 115 n.4, that "this decision applies only to those matters specifically identified herein. If there are other properly filed appeals from additional Letter Decisions, it is incumbent upon the parties to bring them to the Board's attention. See 43 CFR 4.411(a)."

rental value” of the right-of-way “as determined by the Secretary.” 30 U.S.C. § 185(a),(l); see Alyeska Pipeline Service Co., 167 IBLA 112, 117 (2005); Alaska Pipeline Company, 164 IBLA 149, 151 (2004); Wesfrac, 153 IBLA 164, 167 (2000). Section 203 of TAPAA provides that “[r]ights-of-way, permits, leases, and other authorizations issued pursuant to [30 U.S.C. Chapter 34--Trans-Alaska Pipeline] shall be subject to the provisions of [section 28 of the MLA],” with certain exceptions. 43 U.S.C. § 1652(c).

As authorized by section 28 of the MLA and section 203 of TAPAA, the United States granted to the TAPS Owner Companies a right-of-way “for the purpose of the construction, operation, and maintenance of one (1) Oil transportation pipeline, consisting of one (1) line of forty-eight (48)- inch diameter pipe and its Related Facilities (such pipeline and Related Facilities being herein referred to as the ‘Pipeline.’)” (TAPS Agreement, Section 2.A. (attached as Exh. 1 to Alyeska’s SOR in IBLA 2003-237.) Consistent with section 28(l) of the MLA, Section 8.A. of the TAPS Agreement provides that the TAPS Owner Companies “shall pay to the United States, annually and in advance, the fair market rental value of the Right-of-Way, as determined by the Secretary. (Such rental value is hereinafter called the ‘Use Charge.’)”

Exhibit D to the TAPS Agreement, comprised of “Stipulations for the Agreement and Grant of Right-of-Way for the Trans-Alaska Pipeline,” is incorporated by reference into, and made a part of, the Agreement pursuant to Section 4.A.(4) of the Agreement. Stipulation 1.1.1.22 defines “Pipeline System” as follows:

“Pipeline System” means all facilities located in Alaska used by Permittees [TAPS Owner Companies] in connection with the construction, operation, maintenance or termination of the Pipeline. This includes, but is not limited to, the Pipeline, storage tanks, Access Roads, communication sites, airfields, construction camps, materials sites, bridges, construction equipment and facilities at the origin station and at the Valdez terminal. This does not include facilities used in connection with production of oil or gathering systems nor does it include such things as urban administrative offices and similar facilities which are only indirectly involved. [Emphasis added.]

Stipulation 1.1.1.24 provides the following definition of the term “Related Facilities:”

A. “Related Facilities” means those structures, devices, improvements, and sites, the substantially continuous use of which is

necessary for the operation or maintenance of the Oil transportation pipeline, including:

* * * * *

(4) monitoring and communication devices, and the structures housing them;

* * * * *

B. "Related Facilities" not authorized by this Agreement include roads and airports. Authorizations for such Related Facilities shall be given by other instruments. [^{3/}] [Emphasis added.]

In its SOR, Alyeska emphasizes that, "[b]ased on these documents, it is clear that Alyeska's TAPS communications sites are, by their specific mention in the Stipulations, part and parcel of the 'Pipeline System' (Stip. 1.1.1.22); and in addition are specifically defined as 'Related Facilities' (Stip. 1.1.1.24A.(4))." (SOR at 5.) Further, there is no dispute that as "Related Facilities," the communication sites constitute a part of the right-of-way lands granted by Section 2.A. of the TAPS Agreement for the "Pipeline," which is defined as the "line of forty-eight (48)- inch diameter pipe and its Related Facilities." See SOR at 4-5.

Alyeska argues generally that BLM erred in applying the 2003 Communication Uses Rental Schedule to the "fourteen communication sites Alyeska occupies and uses as an integral part of [the] TAPS operation." *Id.* at 6. According to Alyeska, "BLM's actions are contrary to its regulations." *Id.* Alyeska correctly points out that "BLM's regulations at [43 CFR] Part 2800 encompass the requirements and procedures for assessing rentals for those rights-of-way (both linear and site-specific) that it may issue across federal lands under the authority granted by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761-1771 [(2000)];" that Part 2800 contains "more specific regulations that involve differing types of rights-of-way;" and that "[s]ite rights-of-way for specific locations such as communication sites are found at 43 CFR § 2803(d)." (SOR at 6.) BLM's Communication Uses Rental Schedule and its periodic annual updates are provided for in 43 CFR Subpart 2803.

^{3/} Stipulation 1.2.4 (under Section 1.2, entitled "Responsibilities"), states that "[p]ermittees shall make separate application, under applicable statutes and regulations, for authorization to use or occupy Federal Lands in connection with the Pipeline System where the lands are not within the Right-of-Way granted by this Agreement."

In arguing that its communication sites are not subject to rental based upon the 2003 Communication Use Rental Schedule, Alyeska begins with 43 CFR 2800.0-7, entitled “Scope,” which contains the following “broad exclusion” at subsection (c): “However, the regulations in this part do not cover right-of-way grants for: Federal Aid Highways, roads constructed or used pursuant to cost-share or reciprocal road use agreements, wilderness areas, and oil, gas and petroleum products pipelines except as provided for in §2800.0-7(a)(8) of this title.” (Emphasis added by Alyeska.) The exception mentioned at 43 CFR 2800.0-7(a)(8) pertains to “rights-of-way [granted] to any Federal department or agency for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any product produced therefrom.” *Id.* Alyeska reasons that because 43 CFR 2800.0-7(a)(8) is the only exception to the general rule exempting oil and/or gas pipelines from BLM’s right-of-way regulations of 43 CFR Part 2800 and Subpart 2803, BLM has “no authority * * * to apply to the TAPS Pipeline any subpart of Part 2800 * * * that implements its FLPMA right-of-way authority.” (SOR at 7.) Alyeska states that the TAPS Agreement was not issued under the authority of FLPMA, but rather under the authority of section 28 of the MLA and section 203(b) and (c) of TAPAA. Further, Alyeska maintains, the TAPS Agreement definition of “Pipeline System” includes “all facilities located in Alaska used by the [Owner Companies] in connection with the construction, operation, maintenance or termination of the Pipeline,” and, more specifically, the 14 communication sites, which are “integral and defined elements encompassed within the scope of [F]ederal rights granted under the 1974 Grant.” (SOR at 7-8; *see* TAPS Agreement, Section 2.A., Stips. 1.1.1.22 and 1.1.1.24.)

Further, Alyeska asserts that “[t]he exclusion of ‘oil, gas, and petroleum product pipelines’ from the regulatory coverage of Part 2800 * * * also excludes the TAPS pipeline.” (SOR at 7-8.) Alyeska argues:

Since Part 2800 includes the more specific regulations at Subpart 2803 that establish and apply BLM’s “Communication Use Rental Schedule” to microwave communication sites, the categorical exclusion of “oil ... pipelines” contained in §2800.0-7(c) automatically extends to the more specific regulations in Subpart 2803. BLM has erred in applying its communications site rate schedule to the subject TAPS communication sites, evidently overlooking the regulatory preclusion of oil pipelines and their related facilities from this rate schedule.

(SOR at 8.)

Moreover, according to Alyeska, the communication site regulations themselves exempt the TAPS Agreement from the Communication Uses Rental Schedule. The specific regulation pertaining to non-linear communication site rights-of-way, 43 CFR 2803.1-2(d), provides:

The annual rental payment for communication uses listed in paragraph (d)(1) of this section is based on rental payment schedules. The rental schedules apply to right-of-way holders and tenants authorized to operate and maintain communication facilities on public lands. They do not apply to holders who are public telecommunications service operators providing public television or radio broadcast services granted a waiver under § 2803.1-2(b)(2)(i). Nor do they apply to communication site uses, facilities or devices located exclusively within the exterior boundaries of an oil and gas lease and directly associated with the operations of the oil and gas lease (subpart 2880). [Emphasis added.]

Alyeska acknowledges that the referenced subpart 2880 “does not deal strictly with oil and gas ‘leases.’” (SOR at 8.) However, argues Alyeska, the reference to subpart 2880 “encompasses ‘Oil and Gas Pipelines and Related Facilities’ across [F]ederal lands in conjunction with oil and gas leasing under authority of the MLA.” (SOR at 8-9.) Alyeska emphasizes that the authority for Subpart 2880 is section 28 of the MLA, as amended, 30 U.S.C. § 185 (2000), unless otherwise noted (43 CFR 2880.0-3), the same statutory authority pursuant to which the TAPS Agreement was issued. Alyeska deduces that “it is clear that the TAPS pipeline and related facilities, which includes the TAPS communication sites,--are, by the specific terms and references of 43 CFR 2803.1-2(d), excluded from regulation by BLM” under the 2003 Communication Uses Rental Schedule. ^{4/} (SOR at 9.)

^{4/} The other reference to oil and gas rights-of-way issued pursuant to section 28 of the MLA appears at 43 CFR 2803.1-3(e)(1), which provides: “Rental for communication site rights-of-way not covered by the schedule, except those issued pursuant to Section 28 of the Mineral Leasing Act (30 U.S.C. 185), will be based on comparative market surveys, appraisals or other reasonable methods.” The main clause of this sentence is clear enough: “Rental for communication site rights-of-way not covered by the schedule * * * will be based on comparative market surveys, appraisals or other reasonable methods.” However, communication site rights-of-way issued pursuant to section 28 of the MLA appear to be excepted, or treated differently, from other communication site rights-of-way not covered by the schedule. But if rental for communication site rights-of-way issued pursuant to section 28 of the MLA is not to
(continued...)

In Alyeska’s view, “[t]he breadth of the definitions for ‘pipeline,’ ‘pipeline system,’ and ‘related facilities’ is such that the TAPS communication sites must be covered thereby,” in that they “are included within the same terms by the specific provisions of the TAPS Grant and its Stipulations.” (SOR at 9.) Alyeska views this “result” as “logical because Subpart 2880 and the TAPS Grant were written under the authority of the MLA and its regulations.” *Id.*; see TAPS Agreement, Section 2.A., Stips. 1.1.1.22 and 1.1.1.24. Alyeska derives support for this position from 43 CFR 2880.0-5, which defines the terms “pipeline” and “pipeline system” as follows:

(i) *Pipeline* means a line of [sic] traversing Federal lands for transportation of oil or gas. The term includes feeder lines, trunk lines, and related facilities, but does not include a lessee’s or lease operator’s production facilities located on his lease.

(j) *Pipeline system* means all facilities, whether or not located on Federal lands, used by a holder in connection with the construction, operation, maintenance, or termination of a pipeline.

* * * * *

(l) *Related facilities* means those structures, devices, improvements and sites, the substantially continuous use of which is necessary for the operation or maintenance of a pipeline, which are located on Federal lands, and which are authorized under the Act, including but not limited to * * * monitoring and communication devices and structures housing them * * *. Related facilities may be connected or non-connected or contiguous or noncontiguous to the pipe. [Emphasis added.]

^{4/} (...continued)

be “based on comparative market surveys, appraisals or other reasonable methods,” the question arises as to what will serve as the basis for such rental. The preamble to this rule does not elucidate its meaning. See 60 FR 57058 (Nov. 13, 1995). In reading the regulation consistently with Alyeska’s interpretation of 43 CFR 2800.0-7(c) and 43 CFR 2803.1-2(d), with which we ultimately agree, we see it as reflecting an effort to treat communication site rights-of-way related to an oil and gas pipeline as among those communication site rights-of-way not covered by the schedule, with rental for such rights-of-way to be based on comparative market surveys, appraisals, or other reasonable methods.

Alyeska submits that these regulations “specifically contemplate that communication facilities and the [F]ederal lands sites that they occupy are among ‘Related Facilities’ that are included in the meaning of the term ‘Pipeline.’” (SOR at 10.) “As such,” Alyeska states that under the provisions of 43 CFR 2803.1-2(d), “they are categorically excluded from rental assessments” based upon BLM’s 2003 Communication Uses Rental Schedule. (SOR at 10.)

Further, noting that the TAPS Agreement was issued on January 23, 1974, and that FLPMA, 43 U.S.C. §§ 1701-1771 (2000), was enacted on October 21, 1976, Alyeska maintains that 43 CFR 2801.4, set forth below, exempts the TAPS communication sites from regulation under Part 2800:

A right-of-way grant issued on or before October 21, 1976, pursuant to then existing statutory authority is covered by the provisions of this part unless administration under this part diminishes or reduces any rights conferred by the grant or the statute under which it was issued, in which event the provisions of the grant or the then existing statute shall apply.

Alyeska asserts, assuming arguendo that the TAPS Agreement for the “pipeline and its Related Facilities were not otherwise categorically exempted” from Part 2800 and Subpart 2803, the exemption provided in 43 CFR 2801.4 “would nevertheless accomplish that result.” (SOR at 11.)

Alyeska emphasizes that the “then-existing statutory authority” under which the TAPS Agreement was issued is still in place. See section 28 of the MLA, 30 U.S.C. § 181 (2000); section 302(b) and (c) of TAPAA, 43 U.S.C. § 1652(b) and (c) (2000). Under the TAPS Agreement, the Owner Operators have the right “to have annual rental for the right-of-way determined by an appraisal based on the fair market value of the specific lands in the right-of-way.” See TAPS Agreement, Section 8.A. (“Permittees shall pay to the United States, annually and in advance, the fair market rental value of Right-of-Way, as determined by the Secretary.”) According to Alyeska,

[t]he Grant does not contemplate -- and the TAPS Owners did not agree to -- the calculation of rentals for the pipeline or any of its elements to be based on some nationwide “rental schedule” derived from “Rand McNally Metro Area population rankings,” or an annual escalator derived from the “Dept. of Labor Consumer Price Index for all Urban Consumers (CPI-U), U.S. City Average,” as implemented by 43 CFR 2803.1-2(d)(2)(I).

(SOR at 11.) Alyeska maintains that “the Use Charge for the Grant was to be the fair market rental value of the specific federal lands involved.” Id. Alyeska’s view is that “the imposition on the TAPS Owners of BLM’s communications site rental schedules by the Decisions appealed from has deprived the owners of a pre-existing lease right which they still possess under the Grant.” (SOR at 11.) Alyeska concludes that under 43 CFR 2801.4 BLM must derive the annual rental for the communication sites from the fair market value of the Federal lands involved, just as it derives the annual rental for “all other Related Facilities and the pipeline itself,” as required by Section 8.A. of the TAPS Agreement. (SOR at 11-12.)

In demonstrating adverse effect, Alyeska addresses the disparity between BLM’s application of the 2003 Communication Uses Rental Schedule (\$1,770.62 per site) and fair market value rental rates, observing that its appeals involve more than “some minor dispute” between BLM and itself, but rather that they involve “monetary disparities that are significant and demonstrable now, and can only grow more significant over time.” (SOR at 12.) Alyeska shows that the BLM annual use charge for each of the communication sites as stated in the appealed decisions is \$1,770.62 per site, which, “at a nominal size of two acres per site, * * * amounts to an annual rental of \$885.31 per acre.” Id.

Alyeska has submitted an Affidavit of Peter C. Nagel (Nagel Affidavit, Exh. 1 to SOR), Senior Land Owner Relations Specialist for Alyeska, to which he has attached a letter from Alan G. Olson, “a real estate appraiser who is familiar with the valuation of remote parcels in Alaska, including sites of the physical size, use, and location comparable to the 14 communication sites granted for use by the United States for use by the TAPS Owners.” (Nagel Affidavit at 2.) Appended to Olson’s letter is a list of remote communication sites in Alaska demonstrating that “of the seven single-user radio or microwave repeater sites of comparable size of which Mr. Olson has personal knowledge, the per-acre rental values range from \$68.00 to \$543.00 per year.” (SOR at 12.) Alyeska states that “[t]his range of annual rental values is significantly below the annual value of \$885 per acre per year which BLM has derived from its nation-wide rental schedule and annual escalator, and has ordered Alyeska to pay under the Decisions appealed from.” Id. Further, Alyeska contends that the annual rental derived from the 2003 Communication Uses Rental Schedule “also considerably exceeds the per-acre rental value of the federal TAPS pipeline lands as a whole.” Id. at 13.

Consequently, Alyeska concludes that BLM’s application of the 2003 Communication Uses Rental Schedule deprives the TAPS Owner Operators of a “significant existing contract right” under the TAPS Agreement “to have their annual rentals or Use Charges to be based on the fair market rental value of the specific

federal lands involved.” *Id.* at 13. Thus “[u]nder 43 CFR § 2801.4, no right-of-way rental determination by BLM is permitted to adversely affect Alyeska’s existing rights under the Grant.” *Id.* Alyeska asks the “Board to order BLM to appraise and assess annual rentals for such sites in conjunction with its fair market rental determinations for the remainder of the TAPS Pipeline and its Related Facilities.” *Id.* at 14.

In its answer to Alyeska’s SOR, BLM appears to concede Alyeska’s argument that it improperly applied the 2003 Communication Uses Rental Schedule to the 13 communication sites subject to its January 9, 2003, decision identified by FF-12505/AA-05847. BLM merely “states that, pursuant to 43 CFR § 2803.1-2(d)(2)(v), the annual rent for the communication sites included under the main right of way for the TAPS should be determined in the same manner as the annual rent for the TAPS.” (Answer at 1.) The cite to “43 CFR § 2803.1-2(d)(2)(v)” is an apparent error, and with nothing more than this passing reference we are unable to surmise what authority BLM intended to invoke. However, we view BLM’s statement as an acknowledgment that it inappropriately applied the 2003 Communication Uses Rental Schedule to the 13 communication sites, which is consistent with Alyeska’s argument that those sites should be based upon their fair market rental value in accordance with section 28 of the MLA and 43 CFR 2803.1-2(a), as well as the TAPS Right-of-Way itself.

In its Reply, Alyeska states that “BLM’s Answer concedes that the legal position advanced by Alyeska * * * is the correct one, except (as BLM alleges) in the case of the Gulkana communications site AA-031239.” (Reply at 1.) BLM did not respond to Alyeska’s reply. For the reasons that follow, we conclude, as did BLM, that Alyeska’s argument is correct that the 2003 Communications Uses Rental Schedule was not applicable to the thirteen communication sites.

[1] We have seen that in Alyeska’s view the TAPS Right-of-Way is generally excluded from the regulations in 43 CFR Part 2800, pursuant to 43 CFR 2800.0-7(c), which provides that those regulations “do not cover right-of-way grants for * * * oil, gas, and petroleum products pipelines.”^{5/} Further, Alyeska finds clear authority in

^{5/} Also related to the coverage of the regulations at 43 CFR Part 2800 is 43 CFR 2800.0-7(a)(2), which provides that the regulations at 43 CFR Part 2800 governs “[i]ssuing, amending or renewing right-of-way grants for necessary transportation or other systems or facilities * * * including but not limited to * * * [p]ipelines and other systems for the transportation or distribution of liquids and gases, * * * other than water and other than oil, natural gas, or any refined product produced therefrom, and for storage and terminal facilities in connection therewith.”

(continued...)

43 CFR 2803.1-2(d) for its position that the communication sites used in connection with the TAPS Right-of-Way are exempt from the rental schedules authorized under 43 CFR 2803.1-2(d)(1).

As noted, 43 CFR 2803.1-2(d) states that the rental schedules listed in paragraph (d)(1) do not “apply to communication site uses, facilities, or devices located exclusively within the exterior boundaries of an oil and gas lease and directly associated with the operations of the oil and gas lease (subpart 2880).” We see that this paragraph clearly excludes communication site uses, facilities, or devices located exclusively within the exterior boundaries of an oil and gas lease, and are directly associated with the operations of the oil and gas lease, from coverage of the rental schedules. We are less convinced that the reference to “subpart 2880,” standing alone, has the effect of excluding communication sites used in connection with the TAPS Right-of-Way from the rental schedules. However, our review of BLM’s promulgation of 43 CFR 2803.1-2(d) on November 13, 1995 (60 FR 57058), and its subsequent promulgation of rules governing rights-of-way under FLPMA and the MLA on April 22, 2005 (70 FR 20970), lead us to conclude that BLM’s 1995 version of 43 CFR 2803.1-2(d) was likely intended to exclude communication sites appurtenant to oil and gas pipeline rights-of-way, such as those used by Alyeska in connection with the TAPS Right-of-Way, from coverage of the rental payment schedules.

On November 13, 1995, BLM promulgated a final rule amending its right-of-way regulations for setting rent for communication uses located on BLM land, establishing “procedures and a rental schedule for determining rent for nine categories of communication uses.” 60 FR 57058. The ninth category covered “[o]ther communication uses [which] include holders of FCC-licensed private communication uses such as amateur radio, personal/private receive-only antennas, passive reflectors, natural resource and environmental monitoring equipment, and other small, low-power devices used to monitor or control remote activities.” 43 CFR 2803.2-1(d)(1)(ix); 60 FR 57071 (Nov. 13, 1995.) In its preamble to the final rule, BLM explained that “[t]he rental schedule for ‘other communication uses’ was intended to include small, unobtrusive, low-power uses that monitor or provide communication service to a small number of customers,” and that “[t]he definition of ‘other communication uses’ has been clarified to include low-power monitoring or controlling devices.” 60 FR 57068. BLM then states: “The definition explicitly excludes communication devices and related facilities appurtenant to either a BLM oil

^{5/} (...continued)

(Emphasis added.) The emphasized language appears consistent with Alyeska’s reading of 43 CFR 2800.0-7(c).

and gas lease or pipeline right-of-way authorized under the Mineral Leasing Act.” *Id.* BLM states again that the definition of “other communication uses has been rewritten * * * excluding communication devices and related facilities appurtenant to either a BLM oil and gas lease or pipeline right-of-way authorized pursuant to the Mineral Leasing Act of 1920.” *Id.* The language of 43 CFR 2803.1-2(d) thus tracks the preamble in excluding communication devices related to an oil and gas lease from application of rental payment schedules, but omits similar language related to oil and gas pipeline rights-of-way. The preamble would suggest that BLM also intended for 43 CFR 2803.1-2(d) to exclude communication devices and related facilities appurtenant to a pipeline right-of-way issued pursuant to the MLA, but neglected to draft the regulation accordingly.^{6/}

On April 22, 2005, BLM published a final rule amending its regulations governing rights-of-way under FLPMA and the MLA. 70 FR 20970. BLM stated that its final rule “clarifies how BLM applies the rent schedules for communication site rights-of-way and reorganizes the regulations in a manner similar to the sequence in which BLM takes action on applications and monitors issued grants.” *Id.* BLM referred to the rules published on November 13, 1995 (*see* 60 FR 57073) as providing a communication use rent schedule, stating: “The final rule we publish today makes no substantive changes to the policies or procedures in that rule.” Further, BLM states: “There are several situations to which the communication use rent schedule does not apply, and those are listed in this section [2806.30] as well.” In looking at new 43 CFR 2806.30, we see that the rent schedule for communication uses does not apply to: “Communication site uses, facilities, and devices located entirely within the existing boundaries of an oil and gas lease, and directly supporting the operations of the oil and gas lease” (43 CFR 2806.30(c)(1)), or “[c]ommuni-cation facilities and uses ancillary to and authorized under a linear grant, such as a railroad grant or oil and gas pipeline grant” (43 CFR 2806.30(c)(2)).

Thus, BLM has finally promulgated a rule regarding communication facilities and uses appurtenant to an oil and gas pipeline which is consistent with the language of the 1995 preamble to 43 CFR 2803.1-2(d), but which it neglected to include in that regulation. BLM’s statement that its promulgation of the new communication site rental regulations “makes no substantive changes to the policies or procedures” in the 1995 rule suggests that its new rule reflects the exclusion in the 1995 rule concerning rental for communication sites related to oil and gas pipelines. Reading

^{6/} BLM also stated in the preamble that “[p]assive reflector has been removed from the schedule,” with “appropriate rent [to] be determined based on appraisal or other methods,” but “passive reflectors” is retained in the final rule as being subject to the schedules. 60 FR 57068, 56071 (Nov. 13, 1995).

the 1995 rule governing such rental in light of the recently promulgated rule, we conclude that Alyeska's interpretation of 43 CFR 2803.1-2(d) is correct, and that rental for the 13 communication sites used in connection with the TAPS Right-of-Way should be calculated in the same manner as rental for the TAPS Right-of-Way itself.

Further, we see no basis for treating the Gulkana Microwave Site differently, as advocated by BLM. In its Answer, BLM states that the Gulkana Microwave Site "is a separately authorized use of lands not authorized under the right-of-way grant for the linear facility which is the Trans-Alaska Pipeline and not within the boundaries of the right-of-way granted for the TAPS." (Answer at 1-2.) BLM provides no explanation or basis for this assertion. In its Reply, Alyeska contends that the "reasons given for treating the Gulkana site differently for appraisal purposes-- and for separating the Gulkana site from the general concession BLM makes in its Answer that Alyeska's legal position on TAPS-related communication site rentals is correct--are unavailing, because they are legally and factually unsupportable." (Reply at 2.) Likewise, Alyeska insists that the Gulkana Microwave Site, like the other 13 communication sites, is included in the definition of "Related Facilities," and is an integral part of the "Pipeline System," as defined in Stipulation 1.1.1.24 to the Grant.^{7/}

Alyeska argues that "[t]here is no requirement that a communications site right-of-way be physically 'within the boundaries' of the earlier TAPS right-of-way grant, or that such a right-of-way be issued contemporaneous with the Grant." (Reply at 3.) Alyeska contends, persuasively, that "[t]he Gulkana site right-of-way was granted by BLM for the same TAPS purposes, and under the same authorities, as were the thirteen earlier sites that BLM has acknowledged are 'Related Facilities' and are integral parts of the 'Pipeline System.'" *Id.* In fact, Alyeska asserts that rather than issuing a new right-of-way grant for the Gulkana Microwave Site, BLM could have "simply amend[ed] the original TAPS Grant to include it."^{8/} (Reply at 6.) In

^{7/} BLM issued the right-of-way grant for the Gulkana Microwave Site on Nov. 29, 1979. As stated by Alyeska: "This grant was issued explicitly under TAPAA, and incorporates the definition of a non-exclusive right-of-way across 'Federal lands,'" as that term is defined in section 28 of the MLA, 30 U.S.C. § 185 (2000). (Reply at 5.) There is no reference to "BLM's general public-land right-of-way authority" under FLPMA, pursuant to which BLM's 43 CFR Part 2800 "nationwide communications site fee schedules are promulgated and applied." (Reply at 5.)

^{8/} According to Alyeska, the history of the Gulkana site shows that it is a "Related Facility," and an integral part of the TAPS "Pipeline System." Alyeska explains that it
(continued...)

any event, Alyeska argues that “there is no question but that the Gulkana site is ‘directly associated with the operations of the oil and gas lease. . .’ as is required by the exclusionary language of 43 CFR § 2803.1-2(d).” (Reply at 6.) Alyeska concludes that the Gulkana Microwave Site must be included with the 13 other communications sites for purposes of rental determinations.

As Alyeska points out, Paragraph 9 of the Gulkana Right-of-Way grant sets forth “[s]pecial conditions applicable to this right-of-way,” including: “Applicable provisions of the regulations contained in Title 43 Code of Federal Regulations, Part 2800, except to the extent that such regulations are inconsistent with any provisions of this grant of right-of-way.” (Emphasis added by Alyeska.) Alyeska argues that this “special condition” language clearly subordinates the 43 CFR Part 2800 regulations to the statutory authorities, *i.e.*, section 203 of TAPAA and section 28 of the MLA, pursuant to which the Gulkana Right-of-Way was granted by BLM. “In fact,” Alyeska observes, “the Part 2800 regulations are not ‘inconsistent’ with the Gulkana grant because the jurisdictional exceptions contained in Part 2800 clearly exclude the ‘Related Facilities’ of a ‘Pipeline System’ for an oil pipeline authorized under section 28 of the MLA.” (Reply at 6, *citing* 43 CFR 2800.0-7(a)(8) and 2803.1-2(d).)

In sum, Alyeska argues there is no legal or factual support for BLM’s position that the Gulkana Microwave Site is subject to BLM’s nationwide communication sites fee schedule simply because it is a right-of-way that was issued later than the original TAPS Agreement. Alyeska requests the Board to “affirm BLM’s admission * * * that

^{8/} (...continued)

applied for a right-of-way for the Gulkana Microwave Site “when it became apparent to Alyeska that a line-of-sight communication link would be needed between Alyeska Security at Pump Station 11, and [needed for] closed-circuit television surveillance of the suspension-bridge crossing the Gulkana River by the TAPS Pipeline.” (Reply at 4.) Alyeska explains further:

“[B]ecause the Gulkana River crossing was 30 miles distant from Pump Station 11 (where the nearest Alyeska security guards would be posted), the continuous, line-of-site microwave feed of a television picture of the river crossing structure to the security post at Pump Station 11 would be required, in order to maintain pipeline security. * * * In addition, an existing powerline right-of-way at the site, and considerations of pipeline integrity if the microwave tower were to topple onto it (either during construction or operation), dictated the choice of a communication site that did not lie within the boundaries of the existing TAPS right-of-way Grant.” (Reply at 4.)

rentals for the other 13 TAPS communication sites are * * * not properly derived by application of BLM's Part 2800 nationwide fee schedule," and that the Gulkana Microwave Site likewise not be found subject to the 2003 Communication Uses Rental Schedule. (Reply at 7.)

The right-of-way grant for the Gulkana Microwave Site was executed pursuant to the same authority as the TAPS Agreement, and was expressly made "subject to the terms and conditions" of the TAPS Agreement. See Gulkana Right-of-Way, Section 1. As in the case of the TAPS Agreement, the Gulkana Right-of-Way provided for "a non-exclusive right-of-way * * * across, through, and upon the Federal lands," as defined in section 28 of the MLA, "that shall be used as a communication site and access road and for no other use or purpose whatsoever." Section 1 of the Gulkana Right-of-Way leaves no doubt that it is subject to the terms of the TAPS Agreement:

The right-of-way shall be subject to the terms and conditions of the aforementioned [TAPS] Agreement of January 23, 1974, including the exhibits thereto (hereinafter the "AGREEMENT"), the same as if the right-of-way hereby conveyed and the Federal lands subject thereto had been specifically included within the listing of related facilities set forth in Exhibit A to the said AGREEMENT, and the right-of-way shall be deemed to be a related facility within the meaning of Stipulation 1.1.1.24 of Exhibit D to the said AGREEMENT, provided, however, that in the event of any conflict, either express or implied, between any provision of the said AGREEMENT on the one hand, and, on the other hand, any provision of this grant, such conflict shall be resolved in favor of the provisions of this grant. Provided further, that whenever the context of the said AGREEMENT so requires for purposes of applicability to the subject right-of-way for a communication site and access road, reference to "Right-of-Way" in the AGREEMENT shall also be deemed to include the subject right-of-way for a communication site and access road.

BLM's lone assertion that the Gulkana Microwave Site "is a separately authorized use of lands not authorized under the right-of-way grant for the linear facility which is the Trans-Alaska Pipeline," is flatly contradicted by the plain terms of the Gulkana Right-of-Way, as quoted. BLM has simply failed to posit a convincing rationale for treating the Gulkana Microwave Site differently.

The Gulkana Right-of-Way specifically recognized the Gulkana communication site and access road as "related facilities," as that term is defined in the TAPS Agreement. The Gulkana Right-of-Way expressly identifies the right-of-way as a

“related facility” within the meaning Stipulation 1.1.1.24 of the TAPS Agreement. In addressing the subject of annual rental, Section 3 of the Gulkana Right-of-Way shows again that it is inextricably tied to the TAPS Agreement: “The Permittees shall pay an annual rental to the United States in the amount of TWENTY-FIVE & No/100 Dollars (\$25.00) in the manner specified in Section 8 of the [TAPS] AGREEMENT, and said rental shall be subject to adjustment as therein specified.” (Emphasis added.) Because the Gulkana Microwave Site is a facility appurtenant to the TAPS Right-of-Way authorized under the MLA, and by its terms is a “related facility” as defined in Stipulation 1.1.1.24, we hold the rental schedules authorized at 43 CFR 2803.1-2(d)(1) do not apply to the Gulkana Microwave Site.

In conclusion, we hereby set aside BLM’s rental determinations for the subject 14 communication sites, and remand the matters to BLM for a determination of the fair market rental value of those communication sites as authorized and required by Section 8 of the TAPS Agreement.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Letter Decisions appealed from are set aside and remanded for action consistent with this opinion.

James F. Roberts
Administrative Judge

I concur:

Christina S. Kalavritinos
Administrative Judge