

SOUTHERN PACIFIC TRANSPORTATION CO.

IBLA 89-546

Decided September 26, 1990

Appeal from a decision of the Yuma, Arizona, District Manager, Bureau of Land Management, determining the fair market rental of communication site right-of-way AZAR-034987.

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.

APPEARANCES: Roger W. Pearson, Esq., Southern Pacific Transportation Company, San Francisco, California; Fritz L. Goreham, Esq., U.S. Department of the Interior, Office of the Field Solicitor, Phoenix, Arizona.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Southern Pacific Transportation Company appeals from a May 22, 1989, decision of the Yuma, Arizona, District Office, Bureau of Land Management (BLM), determining a fair market rental of \$4,000 per annum for communication site right-of-way AZAR-034987.

A grant was initially issued to the Southern Pacific Company on October 28, 1965, for a 50-year term under the authority of the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1976) (repealed effective Oct. 21, 1976, by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2793 (1976)). The grant, AR 34897, permitted a microwave station site in the SE¼ NE¼, sec. 5, T. 9 S., R. 20 W., Gila and Salt River Meridian, and access by an existing road. This site is one of several communication sites located in

the immediate area on the Gila Mountains known as Telegraph Pass, just outside of Yuma, Arizona. The initial rental for the grant was placed at \$100 per year with a provision for a 5-year lump-sum payment of \$442. Later appraisals established the rental in 1971 at \$855 for a 5-year period and at \$300 per annum in 1976. The facilities were upgraded in 1973 with no immediate modification to the rental structure.

In early 1980, it was discovered that Southern Pacific's facilities were actually situated outside the site specified in the original grant. Soon thereafter, an application to amend the grant was received from the Southern Pacific Land Company. An amended right-of-way grant, AR-034987 (to be later identified as AZAR-034987), was issued to the Southern Pacific Transportation Company on February 27, 1981, under the authority of section 601 of FLPMA, 43 U.S.C. § 1761 (1982). An ensuing appraisal later in 1981 set the rental at \$650 per annum.

In 1989, BLM completed an appraisal of the communication sites in the Telegraph Pass area. BLM determined the fair market rental for microwave sites, such as AZAR-034987, to be \$4,000 per annum. By its decision, dated May 22, 1989, BLM notified the Southern Pacific Transportation Company of its determination and an effective date of October 28, 1989, for the new rental.

In its statement of reasons for its appeal, appellant contends that the right-of-way agreement did not provide for rental increases such as proposed by BLM. Further, appellant argues that it is uncertain BLM has authority to modify the rental rate in this manner, noting that BLM failed to cite statute or applicable regulation as basis for its action. Appellant also asserts the appraisal is not in accordance with Departmental rules and claims the information relied upon by BLM is insufficient to support the results of the reappraisal.

As no appraisal was included in the case record for the subject grant, the Board requested by order dated June 27, 1990, a copy of the BLM appraisal report upon which the rental determination was based. BLM was also instructed to provide a copy to counsel for appellant, upon which he would be allowed 30 days from date of receipt of the report to comment or rebut the appraisal. Counsel for appellant received the report on July 17, 1990, and has not yet responded in writing to the Board.

Appellant's argument that rental charges for its grant cannot be adjusted is without merit. Current Departmental regulation, 43 CFR 2803.1-2, mandates that the "holder of a right-of-way grant * * * shall pay annually, in advance * * * the fair market rental value as determined by the authorized officer." However, appellant, ignoring its participation in amending the grant in 1981, suggests that the right-of-way grant, because it was issued before the enactment of FLPMA, is not governed by such requirements.

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)). Right-of-way grant AR 34987 expressly conditioned the grant upon the regulations in 43 CFR Subpart 2234, which also provided at 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 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 Tucson Electric Power Co., 111 IBLA 69, 75 (1989); Mountain States Telephone & Telegraph Co., 107 IBLA 82, 86 (1989). ^{1/}

Thus, even though the record clearly demonstrates that the subject grant was converted to a FLPMA right-of-way in 1981, it would not matter in this instance whether the grant was issued pre-FLPMA or post-FLPMA. See, e.g., Tucson Electric Power Co., 113 IBLA 327, 331 (1990). Management of the grant must proceed in accordance with 43 CFR Part 2800.

[1] The regulation at 43 CFR 2803.1-2(c)(3)(i) provides that the rental for non-linear 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 non-linear 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.

^{1/} The standard for assessment of rental charges remains the same for both pre- and post-FLPMA right-of-way grants, i.e., the fair market rental value. Fair market value has been considered the amount "for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable use who desires but is not obligated to so use." American Telephone & Telegraph Co., 25 IBLA 341, 349-50 (1976).

BLM's rental determination for AZAR-034987 was based upon a document entitled "Appraisal Report for Rental of Electronic Communication Sites upon The Gila Mountains at Telegraph Pass East of Yuma, Arizona, as of February 9, 1989." An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if the appellant fails to show error in the appraisal method used by BLM or fails to show by convincing evidence that the charges are excessive. See Tortoise Communications, 105 IBLA 193, 194 (1988), and cases cited. In the absence of compelling evidence that a BLM appraisal is erroneous, such an appraisal generally may be rebutted only by another appraisal. Mallon Oil Co., 104 IBLA 145 (1988).

Further, a review of appraisal cases before the Board shows that an appraisal may be set aside and the case remanded for further consideration where the record on appeal shows insufficient analysis of the leases contrasted in the appraisal to verify their comparability. See, e.g., Lone Pine Television, 113 IBLA 264 (1990); Mountain States Telephone & Telegraph Co., 109 IBLA at 146; Communications Enterprises, 105 IBLA 132 (1988). The report employed in Mountain States, was a market study "which involved a multi-state review of rental data for telecommunication facilities" arriving at an estimated fair market value for "each of the several different categories of site." 109 IBLA at 144, 146. The Board faulted the study because it failed to provide sufficient data and analysis to verify the comparability of the leases being appraised with those considered. Id. at 146. In cases such as Lone Pine and Communication Enterprises, the Board found that the appellant had raised sufficient doubt in the comparability of the subject site and the sites contrasted by challenging BLM's consideration of certain characteristics such as accessibility, reliability of electrical power, or size of the population served. 113 IBLA at 266; 105 IBLA at 134-35.

We find in the instant case that BLM adequately identified the features of the Telegraph Pass sites and carefully contrasted it with other communication sites. Appellant has not demonstrated that BLM erred either in selecting comparable sites for the appraisal or in choosing the features used for comparison. While BLM's appraisal report jointly analyzes all Telegraph Pass grants and categorizes the various sites into four groups, it is unlike the market study encountered in Mountain States. Rather, BLM offers considerable discussion regarding how the Telegraph Pass microwave sites differ and compare with 10 contrasted microwave leases. Appellant does not challenge BLM's specific conclusions respecting those features compared. The rental for the 10 contrasted leases range from \$2,360 to \$7,320. After comparing the leases, with their specific advantages and disadvantages, BLM concluded that, "Given all the facts supplied by the leases," the fair market value of Telegraph Pass microwave sites is "in the amount of \$4000 per year" (Appraisal Report at 26). On the basis of the record before us and absent evidence to the contrary, we conclude that BLM's report in this case correctly determines fair market value rental. Appellant has failed to show either error in BLM's appraisal method or that the resulting charges are excessive, and appellant does not offer its own appraisal in rebuttal to BLM's appraisal.

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Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

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