

KPVI CHANNEL 6

IBLA 90-283

Decided March 3, 1992

Appeal from a decision of the Bennett Hills Resource Area Office, Bureau of Land Management, increasing the rental for right-of-way I-21043.

Affirmed.

1. Appraisals--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Generally

An appraisal of a right-of-way will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market rental value or the appellant shows that the resulting charges are excessive. Absent error in the appraisal methods utilized, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

APPEARANCES: Harry Newhardt, Vice President/General Manager, KPVI Channel 6, Pocatello, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

KPVI Channel 6 (KPVI) has appealed a March 21, 1990, decision of the Bennett Hills Resource Area Office, Bureau of Land Management (BLM), notifying KPVI that the rental for right-of-way I-21043 was being increased from \$5 to \$400 per year.

The site is located on Flat Top Butte, about 15 miles north of Twin Falls, Idaho. Year-round access to the site by two-wheeled vehicles is gained by traveling from a State highway for about one-third of a mile on a paved road and continuing 1 mile on a graveled road. Electrical power is available on site. Seven parties identified as primary grantees use Flat Top Butte as a communications site. KPVI uses the site for a television translator site, sharing facilities owned by one of the primary grantees, and has erected an antenna tower in exchange for use of space in the building owned and controlled by the primary grantee.

The right-of-way initially issued to KPVI on September 11, 1984, was for a term of 10 years with a rental of \$5 per year for the first 5 years, subject to adjustment by appraisal pursuant to 43 CFR 2803.1-2. On April 22, 1988, KPVI filed an application for right-of-way amendment to permit construction of a 100-foot-high tower which would increase visual power and provide coverage over a greater area with better quality. On June 14, 1988, an amended right-of-way was issued. This grant provided at article 3 that

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

On June 15, 1989, the District Manager requested a real estate appraisal of the fair market value of KPVI's communication site. The appraisal was undertaken with an effective appraisal date of September 13, 1989. Three sites in Idaho regarded by the appraiser as comparable to the Flat Top Butte site were used in the appraisal. The rental charged for the sites was \$200, \$400, and \$500. The appraiser compared the sites as to: (1) time (age of lease and effect of inflation on the rental amount); (2) coverage (length of line-of-sight transmission, area of coverage, and population served); (3) Government regulation (costs, regulations, and limitations imposed upon use of the site); (4) location (distance to market and maintenance services); (5) access (ease of getting to the site); (6) physical character (relative ease of construction and maintenance of facilities); (7) power (access to commercial power); and (8) overall consideration (relative importance of the individual factors). Based upon the appraiser's comparison of the sites and adjustments deemed warranted to reflect the comparable quality of various factors at the three sites, the appraiser concluded that the fair market rental value for the KPVI site was \$400 per year. An appraisal report was completed and submitted to the District Manager on March 9, 1990.

In its March 21, 1990, notice, BLM informed KPVI of the appraisal, that the rental for right-of-way I-21043 was being increased to \$400 per year, and that the rental period was being adjusted to correspond with the calendar year. ^{1/} After making adjustments to the rental, prorating the amount

^{1/} The applicable regulation, 43 CFR 2803.1-2, provides, in applicable part:

"The holder of a right-of-way grant * * * shall pay annually in advance * * * the fair market rental value as determined by the authorized officer applying sound business management principles and, so far as practicable

due for the remainder of the calendar year and crediting KPVI for its prior payment, BLM informed KPVI that \$278 was owing for the balance of calendar year 1990. BLM also informed KPVI that it had the right of appeal to this Board in accordance with the regulations found at 43 CFR 4.400 and advised it that it must follow the procedures outlined on the enclosed Form 1842-1 and that KPVI had the burden of proof by "positive and substantial" evidence that BLM's decision was in error.

In its notice of appeal, KPVI voices its opinion that the fair market value of the right-of-way is not in accord with values for similar operations obtained through the private sector. It notes its belief that the matter would be set for a hearing resulting in a lowering of the rental amount and states that it had submitted information regarding the rental charges to the Idaho Broadcasters Association, who had filed a statement on the matter. ^{2/}

[1] This Board will not set aside a right-of-way appraisal unless it can be shown that BLM has failed to apply proper criteria when calculating the fair market value of a right-of-way rental or the resulting charges are shown to be excessive. See, e.g., High Country Communications, Inc., 105 IBLA 14 (1988); Harvey Singleton, 101 IBLA 248 (1988); Blue Mesa Road Association, 89 IBLA 120 (1985), B & M Service, Inc., 48 IBLA 233 (1980). Absent a showing of error in the appraisal methods utilized by BLM, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive. Mesa Broadcasting Co., 94 IBLA 381 (1986); James W. Smith, 46 IBLA 233 (1980).

Appellant alleges that it had acquired 10-year leases at nearby privately owned sites for an annual payment of \$100. However, it does not identify any of the 10 sites referred to and offers no evidence which might indicate that any of those sites might be considered comparable to the Flat Top Butte site in any way. Nor does KPVI allege a specific error made by BLM in arriving at the rental amount. There is nothing upon which we might compare those sites to the Flat Top Butte site for any of the eight criteria noted above and we thus have no basis for a conclusion that there was any error in the BLM appraisal. It may well be that \$100 per year is a fair market rental for those sites. The mere reference to their existence does not render the \$400 amount charged for the Flat Top Butte site something other than the fair market value for that site, however. There is no basis for overturning BLM's decision.

fn. 1 (continued)

and feasible, using comparable commercial practices. Annual rent billing periods shall be set or adjusted to coincide with the calendar year * * *."

^{2/} As of the date of this decision, no statement by the Idaho Broadcasters Association has been received by either the Bennett Hills Resource Area Office or this Board.

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.

R. W. Mullen
Administrative Judge

I concur:

John H. Kelly
Administrative Judge