

GIFFORD ENGINEERING, INC.

IBLA 99-56, 99-57

Decided October 24, 2002

Appeals from decisions of the Bureau of Land Management denying requests for hardship waiver or reduction of rental payments due for communication site rights-of-way. R-05105 and CA-4874.

Set aside and remanded.

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

Where a ROW holder providing private two-way radio service to members of the community, including businesses which serve the public good, demonstrates total loss of a business facility and equipment due to accidental fire, BLM must examine the specific financial data presented to determine whether the fair market rental charge will create an "undue hardship" on the applicant's ability to successfully operate.

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

The holder of a ROW under FLPMA is entitled to be notified of a decision establishing a rental rate, provided a copy of the appraisal, and given an opportunity to appeal.

APPEARANCES: Nancy O. Dix, Esq., San Diego, California, for appellant; Alan Stein, District Manager, California Desert District, Riverside, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Gifford Engineering, Inc. (GEI), has appealed from two decisions of the California Desert District Office, Bureau of Land Management (BLM), dated September 23, 1998, imposing rental assessments for two communication site

rights-of-way (ROW's). GEI holds the ROW's, serialized as R-05105 and CA-4874, for private mobile two-way radio service. The ROW's are located on public lands on Otay Mountain, 25 miles to the southeast of San Diego, California. For reasons set forth below, we set aside and remand both decisions for further action by BLM.

Rental for these ROW's was previously the subject of a September 30, 1997, adjudication by this Board in Gifford Engineering, Inc. (GEI, Inc.), 140 IBLA 252 (1997). 1/ Prior to that appeal, BLM had increased annual rental on each ROW to \$23,000. In that appeal, we noted that ROW R-05105 was granted pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1970) 2/, while CA-4874 was issued pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1994). Under the 1911 Act, secondary use is permitted without prior BLM approval, and no increase in rental may be made without notice and opportunity for hearing. Under FLPMA, prior BLM approval for secondary use is required and holders may be assessed trespass damages where prior approval for secondary use is not obtained. GEI, Inc., supra.

In GEI, Inc. we affirmed BLM's decision assessing nonwillful trespass damages in the amount of \$16,300 for unauthorized secondary use on CA-4874 from February 1986 through June 1993. BLM levied the assessment, which was based on the difference between single-use and multiple-use of the ROW, because GEI failed to report secondary use of the ROW to BLM, thereby preventing BLM from taking that use into account in computing rental value. However, the Board vacated and remanded BLM's 1994 rental assessment for CA-4874 on the basis that GEI had not been afforded an opportunity to challenge BLM's appraisal methodology, and because section 10003 of the Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103 - 66, 107 Stat. 405 (1993), limited annual rental for calendar year 1994 to 10 percent above the amount charged in fiscal year 1993. GEI's appeal with respect to R-05105 was remanded to BLM because, under the 1911 Act, BLM is required to give notice and an opportunity for a hearing prior to raising rental. 140 IBLA at 265. 3/

1/ GEI, Inc. decided appeals by several ROW holders on Otay Mountain. Specific to Gifford and GEI, GEI, Inc. decided IBLA 94-12, which pertained to R-05105, and IBLA 93-658, which pertained to CA-4874.

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

3/ In its September 23, 1998, decision assessing 1997 rental on R-05105, BLM indicated that an April 7, 1994, Order by the Board in IBLA 94-12 authorized BLM to assess \$4,025 in rental. That is not an accurate portrayal of our ruling. The Order did not affirm the \$4,025 rental, but merely denied a stay of the requirement to pay that amount pending appeal. Our later decision in GEI, Inc. indicated that any efforts to raise rental on ROW's issued under the 1911 Act are to be accompanied by notice and opportunity for hearing. At any rate, GEI has not appealed that portion of BLM's decision, so the \$4,025 rental assessment for 1997 stands.

Prior to issuance of our September 1997 decision, in December 1996, GEI requested a waiver or reduction of the 1997 rental for both ROW's, averring that both sites were destroyed by a wildfire occurring on Otay Mountain on October 22, 1996. GEI asserted that paying the 1997 rental would be a great hardship, given the losses the company sustained and the necessity to replace and repair damaged equipment. The fire charred 14,000 acres on Otay Mountain; however, GEI asserts that it was the only ROW holder on the mountain to meet with serious damage. (Statement of Reasons (SOR), Ex. 11.)

On September 23, 1998, BLM issued four decisions to GEI, two decisions pertaining to each ROW. The decisions concerning ROW R-05105 increased rental for 1997 from the previously assessed amount of \$3,850 to \$4,025, and ordered GEI to file a certified statement listing tenants in its facility and their "category of use," pursuant to 43 CFR 2803.1-2(d) (6). GEI did not appeal from either of those specific adjudications. BLM also denied appellant's request for a hardship waiver or reduction in rental on that ROW for 1997, from which GEI did appeal.

One of the decisions pertaining to ROW CA-4874 denied appellant's request for hardship reduction for 1997, and raised the 1998 rental for CA-4874 from its 1997 amount of \$1,650 to \$6,315.96. The other decision issued a demand for payment for the \$16,300 trespass assessment affirmed by the Board in GEI, Inc., supra. GEI appealed BLM's denial of a hardship waiver or reduction for 1997, as well as the increase in rental assessed for 1998.

With its SOR, GEI submitted a "Verification of Business Disaster Loss" filed with the Small Business Administration (SBA) (SOR, Ex. 5), letters to and from Liberty Mutual Insurance Company (Liberty Mutual) and the SBA indicating total amounts paid by Liberty Mutual on GEI's insurance policy and loan amounts granted by the SBA (SOR, Ex.'s 6-9), and a comparative profit and loss statement for years 1997 and 1998, as well as a balance sheet and income statement as of September 30, 1998. (SOR, Ex. 10.) The documentation indicated that costs of replacing both business realty and equipment were \$304,000, that Liberty Mutual paid GEI the full amount of its policy, or \$163,000, and that the SBA awarded two loans to GEI for a total of \$146,500. ^{4/} Thus, GEI received a total of \$309,500 with which to replace its business, half of which was insurance recoupment, the other half which is to be repaid, subject to long-term low interest loans.

BLM's decision found that this information alone provided sufficient basis for rejecting appellant's request for a hardship waiver or reduction in rental. The decision stated:

While many of our clients may incur unplanned expense or losses, it is not the policy of the BLM to reduce or waive rental fees

^{4/} The first was a 30-year loan for \$63,700 at 4% per annum, with a monthly payment of \$307. The second loan was for \$82,800, and the terms of the loan are undisclosed.

whenever a client suffers damage to property in the right-of-way facility. That policy is based upon our existing regulations. Under those regulations, which are contained in 43 CFR 2803. 1-2(iv) [,] right-of-way rental may be waived or reduced when:

. . . the requirement to pay the full rental will cause undue hardship on the holder/applicant and * * * it is in the public interest to reduce or waive said rental.

* * * * *

Evidence has been submitted in your case which indicates that a portion of your losses may be recovered through insurance, and that an application for loan has been filed with the U.S. Small Business Administration for additional relief. While your request indicates that there may be a shortfall in the amount of money available to you to fully recover your losses, the BLM is not obligated to underwrite the difference between whatever a business might set aside or budget for its operational expenses (expenses which may include ensuring that it maintains adequate business insurance) and balance it against its projected annual profits.

Further, given the existing number of other vendors (communication site facility owners) located on Otay Mountain which have not requested any similar rental reduction/waiver, you have not demonstrated that it is in the public interest to reduce/waive your rental.

(Decision at 1-2.)

In its SOR, GEI claims that both sites were completely destroyed, and that nothing was salvageable. (SOR at 2.) GEI claims that neither the SBA nor Liberty Mutual covered costs of labor for getting the company back in service, nor did they cover loss of income. GEI avers that at least \$66,500 of its start-up costs were not recouped either by insurance or loan, and that, additionally, it suffered total business losses of \$83,921.54 in fiscal year 1997, and \$45,706.35 in fiscal year 1998 as the result of the fire. As of November 1998, GEI states, it continued to operate at a loss. (SOR at 3-4.)

GEI claims that it was the only ROW holder that suffered major damage from the fire, and therefore, that BLM's reliance on the fact that no other holders applied for a hardship waiver or reduction is illogical. (SOR at 4.) GEI contends that BLM "took an extremely narrow view of the 'public interest,'" which should be conceived of as "encompassing more than just Right-of-Way holders on Otay Mountain." GEI maintains that its customers,

which include "ambulances, the Civil Air Patrol, and security companies," have invested in equipment that is specific to the services GEI provides and will incur significant expense if GEI can no longer provide radio service. The "general public interest" will be affected "in a significant and negative way if GEI is forced out of business," GEI argues. (SOR at 4-5.)

Lastly, GEI contends that BLM erroneously raised its 1998 rental from \$1,065 to \$6,315.96, because it did not comply with 43 CFR 2803.1-2(d) (4), which requires that "[i]ncreases in base rental payments over 1996 levels in excess of \$1,000 will be phased in over a 5-year period." (SOR at 5; 43 CFR 2803.1-2(d) (4).)

In its Response to appellant's SOR, BLM now alleges that it grossly under-calculated rental for CA-4874, and proposes that the Board remand the matter back to BLM. (BLM Response dated November 17, 1998.) It charges that GEI neither paid the \$16,300 in trespass damages (Response at 3), nor did it report secondary use on the site from 1993 through 1996 (Response at 2). It claims that the failure to report constitutes a continuing trespass, and that rental should be adjusted to properly reflect secondary use on the ROW from 1993 through 1996. BLM claims that the Board's 1998 adjudication affirmed its assessment of \$3,000 per year for back rental (in the form of trespass damages) from 1986 to 1993, and therefore, under that decision, BLM has authority to assess \$3000 in rental per year for GEI's continuing trespass through the date of the 1996 fire.

According to the Response, the proper amount of back rental (characterized as outstanding trespass damages) owed for ROW CA-4874 is \$29,300 (\$16,300 in trespass damages previously assessed plus \$13,000 in back rental due on secondary use from June 20, 1993, through October 22, 1996, when the fire occurred). When added to the rental liability due in 1997 and 1998 (which, for 1997, should have been assessed at \$5,909.62, and for 1998 at \$6,315.96), GEI's total outstanding rental liability (through 1998) for CA-4874 is \$41,326.68, according to the Response (Response at 2-4).

GEI strenuously objects to BLM's revised assessment for CA-4874, claiming that BLM's decisions do not state a basis for finding GEI in trespass at any time subsequent to June 20, 1993, and that BLM was fully aware of GEI's customers in 1993, 1994, and 1995, yet did not charge rental for secondary use at the time, but now unfairly seeks to retroactively assess additional amounts. GEI also objects to BLM's recalculated rentals for 1996 through 1998, under amended regulations implemented on November 13, 1995.

[1] Generally, section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1994), requires the holder to pay the fair market rental value of a ROW. However, section 504(g) also provides authority for the Secretary to charge less than fair market rental value in certain specified circumstances. 43 U.S.C. § 1754(g); 43 CFR 2803.1-2(b) (2). Included are those situations where the ROW holder "provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary," as well as situations where

"the requirement to pay full rental will cause undue hardship * * * and it is in the public interest to reduce or waive said rental." Id.; see Ruth Tausta-White, 127 IBLA 101, 103 (1993). It was explained in the preamble to the 1987 rulemaking which adopted the hardship provision that it was "added * * * to cover unique hardship cases." 52 FR 25816 (July 8, 1987). Goldmark Engineering Inc., 137 IBLA 303, 306 (1997); see Mallon Oil Co., 104 IBLA 145, 151-52 (1988).

Whether to waive or reduce rental for a ROW is clearly a matter of discretion. ^{5/} As a general matter, the Board will not substitute its judgment for that of the authorized officer where the record shows that the exercise of such discretion was founded upon reasoned analysis and consideration of the relevant factors. Crawford Mesa Water Association, 150 IBLA 14, 16-17 (1999); Goldmark Engineering Inc., *supra*; see also Red Rock Hounds, 123 IBLA 314 (1992). More than unsupported allegations are necessary, however. As this Board stated in Ruth Tausta-White, *supra*, it is up to the appellant to demonstrate that it is qualified to receive the waiver or reduction sought. For its part, it is incumbent upon BIM to ensure that its decisions are supported by a rational basis, and that all relevant factors have been considered.

The Board has addressed the question of what factors are relevant to a determination of undue hardship in relatively few cases. In Kitchens Productions, Inc., 152 IBLA 336, 343, 350 (2000), the Board found that Kitchens had made a prima facie showing of hardship where it submitted information regarding the rents actually paid by its tenants and customers in 1999, which on its face revealed that its projected annual gross income would be less than the appraised annual rent. In addition, as part of its showing of hardship, Kitchens discussed its operating, maintenance, and amortization costs. Similarly, in Lone Pine Television, Inc., 113 IBLA 264, 270 (1990), the Board remanded an appeal to BIM for consideration of appellant's claim of undue hardship where appellant indicated that it reported losses on its tax returns for 5 of the 6 years from 1981 through 1986, and submitted evidence showing that the local economy was depressed. Likewise, in High Country Communications, Inc., 105 IBLA 14 (1988), the Board noted that revised ROW regulations promulgated in 1987 added an "undue hardship" provision to the earlier provision permitting a reduction or waiver of rental when "a holder provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary." The Board stated that

[t]he difference between the original public interest provision and the recently added hardship provision is

^{5/} It should be noted that Congress did not intend to allow the free use of the public lands and resources except where the ROW holder is a component of the Federal Government, or where the cost of collecting a token rental charge is significantly greater than the charge itself. S. Rep. No. 583, 94th Cong., 1st Sess. 72-73 (1975). Thus, we cautioned in Delbert D. Jones, 147 IBLA 195, 203 (1999), that the discretionary authority to waive rental fees is not to be exercised capriciously.

that the former turns on the financial structure under which an applicant operates, and the latter depends on whether the fair market rental charge will create an "undue hardship" on the applicant's ability to successfully operate.

High Country Communications, Inc., supra at 19 (1988) (footnote omitted). The Board remanded the appeal to BLM for consideration of whether appellant's rental charge constituted "an inordinately large portion of the station's operating costs," thereby posing a serious threat to the feasibility of the operation. Id. at 19-20. 6/

Under the facts here, we set aside and remand both appeals for further consideration of the question of whether a reduction or waiver of rental based upon undue hardship is justified. We find the fact that other ROW holders on Otay Mountain did not sustain losses to be irrelevant under the facts presented here. GEI extends a service that is sufficiently in the public interest to warrant further consideration by BLM of "whether the fair market rental charge will create an 'undue hardship' on the applicant's ability to successfully operate." Id. at 19. BLM stated in its decision that "[w]hile many of our clients may incur unplanned expenses or losses, it is not the policy of the BLM to reduce or waive rental fees whenever a client suffers damage to property in their right-of-way facility." We do not believe that this general denial of GEI's hardship request is a proper exercise of discretion under the circumstances. While ordinary unplanned expense or loss indeed should not justify a hardship waiver, total loss of a business facility to accidental fire is not in the nature of an ordinary unplanned loss or expense, but rather, in our view, approximates exactly the "unique" hardship contemplated by the regulation. Under these circumstances, BLM must, at the very least, weigh the particular facts surrounding GEI's situation to determine whether this appellant will suffer "undue" hardship.

Upon remand, BLM should consider all factors relevant to whether rental payment for both ROW's constitutes an undue financial hardship on this appellant, keeping in mind the few parameters set forth in this decision and the cases cited above. BLM may also request GEI to provide any further information relating to profit and loss that it considers pertinent to an accurate determination of whether a reduction or waiver in rental is justified. To the extent such relevant information is withheld, BLM may be justified in denying GEI's request for reduction or waiver. 7/

6/ The Board has found that appellants did not meet their burden of showing undue hardship in, inter alia, the following cases: Crawford Mesa Water Association, supra at 17; Voice Ministries, 124 IBLA 358, 362 (1992).

7/ In making a hardship determination, BLM should have all information it considers relevant before it; appellants cannot expect to provide favorable and withhold unfavorable information relevant to their request. To the extent appellant is concerned about confidentiality of proprietary information, it can request protection under relevant Departmental regulations providing for such.

[2] We now turn to issues specific to CA-4874. BLM's Response renders additional conclusions which essentially moot those reached in the September 23, 1998, decision pertaining to CA-4874. The well-settled, declared policy of the Department is that when an appeal is taken from the decision of one of its offices, that office loses jurisdiction over the matter. Jurisdiction is restored by final disposition of the appeal by the appellate body. West Virginia Highlands Conservancy, 152 IBLA 158, 189 (2000); Gateway Coal Co. v. OSM, 84 IBLA 371, 374-75 (1985); Utah Power & Light Co., 14 IBLA 372 (1974); Audrey I. Cutting, 66 I.D. 348 (1959); L.D. Crawford, 61 I.D. 407 (1954). When, subsequent to an appeal, a Departmental agency renders additional conclusions, the Board generally remands the matter to the agency so that it may properly adopt and render those conclusions. Gateway Coal Co. v. OSM, *supra*. If no purpose would be served by the remand, the Board will assume de novo jurisdiction over the matter. *Id.*

It is incumbent upon BLM to ensure that its decisions are supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision. Parkway Retail Centre, LLC, 154 IBLA 246 (2001); Kitchens Productions, Inc., *supra* at 345; Larry Brown & Associates, 133 IBLA 202, 205 (1995); Roger K. Ogden, 77 IBLA 4, 7, 90 I.D. 481, 483 (1983). In this situation, BLM's later pleadings render the decision on appeal moot, but they do not establish a rational basis which would justify our adoption of their conclusions in the first instance.

BLM has not provided a coherent record or decision for us to determine whether its allegations concerning GEI's continuing trespass and outstanding rentals are justified. BLM relies upon our September 1997 decision as a basis that its proposed assessment of an annual adjustment in rental from 1993 through 1996 is justified. However, our decision does not provide justification for that assessment, but instead relied upon an appraisal by BLM which provided a rational basis for the assessment. No such appraisal or other technical justification for the conclusions asserted in BLM's pleadings has been presented in this case. Moreover, neither of BLM's responses provides an in-depth analysis showing how various statutory and regulatory limiting provisions might impact any retroactive rental assessment for years 1993 through 1996. Accordingly, this matter is set aside and remanded to BLM for development of an appropriate technical report and accompanying record and decision addressing these concerns. The holder of a ROW under FLPMA is entitled to be notified of the decision establishing a rental rate, provided a copy of the appraisal, and given an opportunity to appeal. Philip L. Angell d.b.a. Platronics Communication, 146 IBLA 38, 47 (1998). 8/

8/ We note that BLM's additional conclusions pertain both to rental assessed prior to and subsequent to November 13, 1995, when BLM issued revised regulations establishing rental schedules for certain users. *See* 60 FR 57058-74 (November 13, 1995). Prior to that time, appraisals were used to establish rental rates. Also, this opinion takes note of the holding in Kitchens Productions, Inc., *supra* at 349-50, wherein the Board noted that the

In fairness to GEI, in the event BLM issues a new decision increasing GEI's outstanding rental liability, BLM should afford GEI an opportunity to amend its request for hardship waiver or reduction.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's decisions on appeal are set aside and remanded for further action consistent with this opinion.

James F. Roberts
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

fn. 8 (continued)

nature of the use, i.e., whether the secondary use is that of tenant or customer, may impact the amount of rental properly assessed under either an appraisal system or rental schedules, to the extent they apply. BLM may wish to address this issue in any technical report it prepares in support of additional back rental assessments to appellant.