

AZ SPECTRUM WIRELESS

IBLA 2001-240

Decided May 17, 2004

Appeal from a decision of the Phoenix Field Office, Bureau of Land Management, estimating annual rental for a communication site right-of-way. AZA-9062.

Affirmed.

1. Conveyances: Reservations and Exceptions–Federal Land Policy and Management Act of 1976: Rights-of-Way–Patents of Public Lands: Reservations–Recreation and Public Purposes Act–Rights-of-Way: Federal Land Policy and Management Act of 1976

When a patent conveys lands “subject to * * * all communication site and related facility rights-of-way, granted or to be granted” in accordance with documents referred to in the patent that describe areas that “will be reserved for communications site use” and state “[i]t is understood that patents issued for the above described lands will provide for continued use of the communication sites,” the patent reserved an interest in lands for use as communication sites and those areas are public lands over which BLM has jurisdiction to grant rights-of-way for communication sites.

2. Estoppel–Res Judicata

When the base rate for rental of a communication site right-of-way has been approved on appeal to the Board, the doctrine of administrative finality precludes reviewing it in a subsequent appeal.

APPEARANCES: Cindy J. Kofile, Payson, Arizona, for appellant; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

AZ Spectrum Wireless has appealed the February 13, 2001, decision of the Field Manager, Phoenix Field Office, Bureau of Land Management (BLM), determining the estimated rental for appellant's communication site right-of-way for calendar year 2001 and requesting payment by March 13, 2001.

In its February 2001 decision, BLM emphasized it had estimated the 2001 rental value until it had the opportunity to comply with our October 3, 2000, order in an earlier appeal in which we set aside a portion of BLM's December 1999 decision determining appellant's rental for the 2000 calendar year. BLM stated that it estimated the 2001 rental to be \$9,029.77 by taking the \$8,564.41 rate for the 2000 billing year that was "established by the above dated order," adding \$160 as the final amount of phased-in increased rates under 43 CFR 2803.1-2(d)(4), and multiplying the sum by 1.035, the Consumer Price Index for All Urban Consumers (CPI-U) inflation adjustment for 2001.^{1/} We stayed BLM's decision by order dated May 22, 2001.

Before dealing with the merits, we must address a question appellant raised when it requested "dismissal due to lack of subject matter jurisdiction and refund of all rent increases" on April 30, 2003, well after several rounds of briefing by appellant and by BLM had been filed. Appellant's right-of-way is located on Middle Peak within the White Tank Mountains Regional Park on land that was granted to the Maricopa County Board of Supervisors by a patent issued by BLM in October 1972 under the

^{1/} The "phase-in" amount was based on BLM's determination, by decision dated Dec. 5, 1996, that the annual rent for appellant's right-of-way needed to be increased a total of \$1,640, in order to bring it into line with the new rental fee schedule regulations, which had been promulgated effective Dec. 13, 1995 (60 FR 57058 (Nov. 13, 1995)). However, since the regulations limited the initial increase over the calendar year 1996 rent to \$1,000, the rest of the increase was to be phased in, in equal amounts (\$160), over the course of an additional four calendar years, from 1998 through 2001, pursuant to 43 CFR 2803.1-2(d)(4). Each installment of \$160 was to be added, along with the "annual adjustment in the total rent," to the "previous year's rent," to arrive at the total rent for each succeeding calendar year, from 1998 through 2001. *Id.*

Recreation and Public Purposes Act, 43 U.S.C. § 869 (2000). Based on the language of the patent, appellant argues that BLM does not have jurisdiction over its right-of-way and requests a refund of the sum of the increases in rentals it has paid above the \$6000/year it agreed to pay BLM when the right-of-way was transferred to it in 1992.

In response, BLM points out that Patent Number 02-73-0030 was “subject to”

[a]ll communication site and related facility rights-of-way, granted or to be granted, in accordance with the “Plan of Coordinated Park and Communications Use of White Tank Mountains, Maricopa County, Arizona, of 1966,” as amended by the “Addendum to Land Management Plan and Agreement” signed February 11, 1971 by the Director of Maricopa County Parks and Recreation Department[.]

BLM has provided copies of the 1966 plan and the 1971 addendum. The plan refers to four peaks in unsurveyed sections 27, 28, 29 and 34 (including Middle Peak), T. 3 N., R. 3 W., Gila and Salt River Base and Meridian, above 3800 feet that “will be reserved for communications site use,” and states that “BLM will not issue right-of-way permits outside of these designated peak areas.” The plan adds:

These peak areas will continue under Recreation and Public Purposes lease to Maricopa County for recreation purposes compatible with the communications use. If and when Maricopa County purchases the lands in the White Tank Mountain County Regional Park, these designated peak areas will be excluded from the patent, but can continue to be leased by the County for compatible recreation use.

The 1971 addendum, drafted in connection with the county’s application to purchase the lands, stated:

The existence of right-of-way permits for communications site use in the White Tank Mountain area is hereby acknowledged. Six (6) peak areas are specified in the Plan For Coordinated Park and Communications Use of White Tank Mountains, Maricopa County, Arizona, of 1966. Four (4) peaks are located in unsurveyed Sections 27, 28, 29, and 34 (now a part of Tract 37), T3N, R3W, G&SRB&M, above 3,800 feet elevation * * * . It is understood that patents issued for the above described lands will provide for continued use of the communication sites. It is further understood that the Bureau of Land Management will reserve the right to manage, consistent with the recreational objectives of the area,

permits for communications sites and to retain any revenues from such management.

[1] Appellant argues that these provisions mean that Maricopa County owns the land on which its right-of-way is located and BLM has only the right to manage it. Because the lands referred to in the patent and the plan and addendum are not public lands, *i.e.*, are not “owned by the United States” as defined in 43 U.S.C. §1702(e) (2000), in appellant’s view, BLM may not issue rights-of-way or charge fees for their use.

We cannot agree. We believe reading the “[a]ll communication site and related facility rights-of-way, granted or to be granted” language of that paragraph together with the language associated with the descriptions of portions of the peaks in the plan that is referred to in the paragraph – *i.e.*, “will be reserved for communications site use,” and “these designated peak areas will be excluded from the patent” – and in the addendum, *i.e.*, “[t]he existence of right-of-way permits for communications site use in the White Tank Mountain area is hereby acknowledged” and “[i]t is understood that patents issued for the above described lands will provide for continued use of the communications sites” – makes clear that the patent reserved an interest in the lands on those portions of the peaks described in the plan and the addendum for use as communication sites. That interest is therefore public lands, which are defined in 43 U.S.C. § 1702(e) (2000) to include an “interest in land owned by the United States,” over which BLM has jurisdiction and over which it may grant rights-of-way for communication sites. If it does grant such a right-of-way, the holder of the right-of-way must pay annually in advance its fair market value in rental. 43 U.S.C. § 1764(g) (2000); 43 CFR 2803.1-2(a).

That brings us to the merits. Appellant filed a statement of reasons (SOR) that “continue [its] argument from last year [when] the IBLA set aside and remanded back to the BLM for further analysis that portion of the December 6th decision that deals with the area the White Tanks serves and the determination that the population served had increased from Zone 3 to Zone 2 based on the Ranally Metro Area Index.” (SOR filed April 12, 2001, at 1). Appellant is referring to its earlier appeal, IBLA 2000-97, of BLM’s December 6, 1999, decision in which BLM had determined the calendar year 2000 rent for appellant’s right-of-way. In our October 3, 2000, order in that appeal we reversed the portion of BLM’s decision that included an amount (as would be required by 43 CFR 2803.1-2(d)(3)) based on BLM’s mistaken understanding that appellant had a tenant in its facility, and we affirmed the portion of its decision that determined base rent based on use of the site for commercial mobile radio service (CMRS), *i.e.*, \$8,564.41, that encompassed the \$160 phase-in

installment and CPI-U adjustment added to the previous year's rent, \$8,228.26. (Oct. 3, 2000, order in IBLA 2000-97 at 2-3.)

In our October 2000 order we also adjudicated the propriety of BLM's December 1999 decision to change its classification of the population of the local community where appellant's communication site is located or that is served by that site from Zone 3 to Zone 2.^{2/} Normally, this change would result in an increase in the applicable base rent, under the rental fee schedule, since the population of the local community where the site is located or that is served by the site would be deemed larger. See 43 CFR 2803.1-2(d)(2)(i) ("The rental schedules will be adjusted annually based on * * * Ranally Metro Area population rankings."); 60 FR at 57058, 57064, col. 3 (" * * * [T]he RMA rankings will be updated annually to reflect changes in estimated population. Of course, this may also result in rent adjustments."). Although we observed that the change from Zone 3 to Zone 2 did "not appear to have affected the amount of rent BLM actually assessed" for calendar year 2000 rent, we were aware that the change would alter the rent charged.^{2/} Because we concluded that BLM's decision to change the zone classification was unsupported by the record, we set aside that aspect of its December 1999 decision. (Oct. 3, 2000, order in IBLA No. 2000-97 at 4.) We noted that our order did not preclude BLM from making the same determination based on a more complete record or preclude appellant from changing the use of its facility or requesting that BLM review the rental rate in accordance with 43 CFR 2803.1-2(b)(2)(iv). Id.

^{2/} BLM did not decide that there had been any change in the local community where the site is situated or that the site serves. See Declaration of Harold West, Telecommunications Team Lead, Arizona State Office, BLM, dated Sept. 30, 2001 (Ex. P attached to BLM Answer), at 3 ("I note that Appellant's White Tanks site AZA-9062 is outside the Phoenix RMA [Ranally Metro Area] boundary. I * * * conclude, however, that this site, in the context of the three FCC [Federal Communications Commission] licenses relating thereto * * *, serves the Phoenix RMA."). Rather, BLM simply concluded that the population of that community, which was the Phoenix RMA, had increased, thus necessarily resulting in its reclassification from Zone 3 to Zone 2, under the rental fee schedule. See Information Bulletin No. 99-208, dated Aug. 29, 1999 (Ex. N attached to BLM Answer), at Attachment 1 ("Listing of Cities by Population Strata (10-01-99)") and Attachment 2 ("Rent Schedule for Communications Uses [-] Billing Year 2000").

^{3/} The Rent Schedule for Communications Uses - Billing Year 2000, supra note 2, shows the rent for a CMRS facility serving a population of 1,000,000 to 2,499,999 (zone 3) was \$8,744.30, while the rent for one serving 2,500,000 to 4,999,999 (zone 2) was \$10,930.37.

Appellant argues “that the BLM MUST take into consideration several factors beyond [the] Ranally Metro Area Index, for determining the ‘community’ that we serve, such as: 1.) terrain; 2.) actual ‘eligible radio users’; 3.) FCC power restrictions; 4.) co-channel users on other sites; 5.) and also the limitations of the equipment used by our subscribers. * * * [W]e ask that the IBLA take into consideration the limitations forced upon us for the reasons given, and change our zoning from ‘zone 3 to zone 6’ which would coincide better with our true transmitter coverage capabilities on the White Tanks Mountain right of way # AZA-9062.” (SOR at 1, 2; emphasis in original.)

[2] As noted above, in our October 3, 2000, order “the December 6, 1999, decision by the Phoenix Field Manager [was] affirmed as to \$8,228.26 based upon the rental rate for 1999, the additional ‘phase in’ of \$160.00, and the CPI-U adjustment for a total of \$8,564.41.” (Oct. 3, 2000, order at 4.) That is, we approved BLM’s decision that based appellant’s rental for 2000 on Zone 3 (as BLM had for 1997, 1998, and 1999 – without objection by appellant, we note). We did so after considering appellant’s request “that it be reclassified as ‘zone 6’ because it is authorized to transmit to a population of less than 200,000.” (Oct. 3, 2000, order at 3.) Appellant did not appeal our order or request reconsideration of that issue, and our order therefore precludes further review of that issue based on the doctrine of administrative finality. See Turner Brothers Inc. v. OSMRE, 102 IBLA 111, 121 (1988). BLM’s February 2001 decision is therefore correct in stating that the \$8,564.41 rate was “established by the [October 3, 2000] order.”

BLM’s February 2001 decision estimated appellant’s rental for that calendar year pending compliance with our October 3, 2000, order. It did not determine whether the rental for 2001 should continue to be based on Zone 3 or on Zone 2. It is not our province to make initial decisions that properly belong to BLM or to render advisory opinions, *i.e.*, in this case, whether appellant’s site is properly regarded as serving all – or any – of a Zone 2 community. See California Association of Four-Wheel Drive Clubs, 30 IBLA 383 (1977); Chevron U.S.A. Inc., 154 IBLA 88 (2000). Some of the material the parties have submitted to us in this appeal will be relevant to BLM’s decision on what the proper rental should be, a decision that will, of course, give appellant a right of appeal. In the meantime, it is appropriate to affirm BLM’s February 13, 2000, decision.

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, BLM's decision is affirmed.

Will A. Irwin
Administrative Judge

I concur:

H. Barry Holt
Chief Administrative Judge