

SOUTHWEST WIRELESS NETWORKS

IBLA 2005-191, et al.

Decided January 18, 2006

Appeals from decisions of the Las Cruces Field Office, Bureau of Land Management, approving the assignment and amendment of a communications site right-of-way, charging willful trespass and ordering removal of unauthorized equipment, and billing for trespass damages and related charges. NMNM-52998 and NMNM-112038.

Affirmed.

1. Federal Land Policy and Management Act of 1976:
Rights-of-Way–Rights-of-Way: Conditions and
Limitations–Rights-of-Way: Federal Land Policy and
Management Act of 1976

Although a communications site right-of-way holder may allow third-party users to use the land and facilities encompassed by the right-of-way without BLM approval, if the right-of-way grant so provides, a communications site right-of-way grant limiting use to television transmission or to wireless internet service does not authorize the holder of such a right-of-way to allow third parties to locate cellular telephone antennas and related equipment on the right-of-way.

2. Federal Land Policy and Management Act of 1976:
Rights-of-Way–Rights-of-Way: Conditions and
Limitations–Rights-of-Way: Federal Land Policy and
Management Act of 1976–Trespass: Measure of
Damages–Trespass: Willful Trespass

When the holder of a communications site right-of-way permits third-party users to locate cellular telephone antennas and related equipment at the site, contrary to

restrictions in the amended right-of-way limiting subleasing to wireless internet service providers, BLM properly charges the holder with willful trespass, and bills the holder for trespass damages and related charges, including the costs incurred by BLM for removing the unauthorized equipment from the site.

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OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Southwest Wireless Networks (Southwest)^{1/} has appealed from three decisions of the Las Cruces Field Office (LCFO), Bureau of Land Management (BLM), relating to communications site right-of-way (ROW) NMNM-52998, on Tortugas “A” Mountain in Las Cruces, New Mexico.^{2/} In the first decision, dated May 17, 2005, entitled “Assignment Approved/Right-of-Way Amendment Approved/Stipulations Required,” LCFO approved an assignment of the ROW from Multimedia Development Corporation (Multimedia), by and through its court-appointed receiver, Stonehill Group, LLP (Stonehill), to Southwest. LCFO also approved an amendment of the ROW changing the authorized use of the site from television transmission to wireless internet service, conditioning approval of the assignment on a limitation that Southwest’s subleasing would be limited to wireless internet service providers, and any new facilities, expansion, or improvements could only include low-power public health and safety uses, as per the October 7, 2004, Tortugas “A” Mountain Communications Site Plan (2004 Site Plan). Southwest appealed (IBLA 2005-191), challenging the limitation on its ability to sublease, and petitioned for stay of that limitation in order to allow it to continue to permit cellular telephone providers to place their antennas and equipment on the tower on the ROW. By order dated July 14, 2005, this Board denied that petition, and, by order dated August 11, 2005, we denied reconsideration of that July 14, 2005, order.

^{1/} Southwest is also identified in the record as “Southwest Wireless Net” and as “Tony Velez, d/b/a, Southwest Wireless Net.”

^{2/} Most of the 4,931-foot high Tortugas “A” Mountain is public land withdrawn for use by the National Aeronautics and Space Administration (NASA). The communications site at issue is within the Las Cruces Ranally Metro Area, which had a population of 113,000, as of Oct. 7, 2004.

The second decision at issue is dated July 6, 2005, entitled “Trespass Decision/Notice to Remove.” Therein, LCFO charged Southwest with a willful trespass (NMNM-112038) “for the unauthorized installation of cellular telephone antennas and related equipment within” the ROW. BLM ordered the payment of trespass damages and the removal of the antennas and related equipment within 15 days of receipt of the decision. The Board docketed Southwest’s appeal from that decision as IBLA 2005-215. Southwest did not seek a stay of that decision.^{3/}

When Southwest did not remove the cellular telephone antennas and related equipment, as directed, BLM’s contractor removed them on August 16, 2005. Thereafter, on August 30, 2005, LCFO issued the third decision at issue herein, accompanied by five Bills for Collection, charging Southwest with the administrative and other costs associated with removal of the equipment, and related trespass damages.^{4/} Payment of trespass damages was to occur within 30 days of receipt of the decision. The Board docketed Southwest’s appeal from that decision as IBLA 2005-273.

By order dated October 25, 2005, we consolidated all three appeals, stayed BLM’s August 30, 2005, decision, and granted expedited consideration of the merits of the appeals “[i]n order to resolve this continuing controversy[.]” (Order at 2.)

Factual Background

BLM issued ROW grant NMNM-52998 to Rural Television System (RTS) on September 13, 1983, for a term of 25 years, subject to renewal, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended,

^{3/} In accordance with 43 CFR 2801.10, that decision “remain[ed] in effect pending appeal,” absent the granting of a stay by the Board. See 43 CFR 2808.11(f).

^{4/} The five Bills for Collection, Nos. A516143 (\$14.97), A516145 (\$2,482.70), A516146 (\$1,497.88), A516154 (\$2,121.25), and A516155 (\$6,543.00), total \$12,659.80. They encompass the original administrative and other costs associated with the trespass, incurred from May 24, 2005, to BLM’s July 6, 2005, decision (A516146), the interest accrued on the costs assessed in Bill No. A516146, as of Aug. 25, 2005 (A516143), the costs associated with BLM’s contract for removal of the cellular telephone antennas and related equipment (A516154), the administrative and other costs incurred from July 6 to Aug. 26, 2005 (A516155), and the total rental value of the affected land for cellular telephone use for the period from May 24 to August 16, 2005, multiplied by a factor of two for a willful trespass (A516145). See 43 CFR 2808.11(b)(1).

43 U.S.C. §§ 1761-1771 (2000). The ROW covers a 120 x 120-foot parcel of public land, containing 0.33 acres, more or less, in the NW¹/₄SW¹/₄ sec. 24, T. 23 S., R. 2 E., New Mexico Principal Meridian, Dona Ana County, New Mexico. At the time of the grant, the ROW authorized use of the public land for a “television transmission site.” (ROW Grant at 1, emphasis added.) Attached to and incorporated in the ROW grant was a private survey plat of the 120 x 120-foot parcel of land, depicting the location of an antenna tower, an antenna receiver dish, and an equipment building within the parcel. BLM issued the ROW grant subject to the regulations in 43 CFR Part 2800, and attached stipulations.^{5/} The ROW grant did not contain any authorization for third-party use of the ROW or ROW facilities.^{6/}

By decision dated August 26, 1988, BLM approved an August 12, 1988, assignment of the ROW from J.H. Voiers (d/b/a RTS) to Walter K. and Hazel C. Mickelson, effective February 8, 1988, subject to the terms and conditions and stipulations of the original ROW, and new Special Stipulations executed by the Mickelsons, which, inter alia, provided that the ROW holder could “sublease to third parties the right to use the holder’s facilities without third parties being required to obtain a right-of-way grant from the Bureau of Land Management.” (Emphasis added.) Those stipulations did, however, require the holder to notify BLM and existing users within a one-mile radius, not less than 45 days prior to occupancy of holder’s facilities, of any intent to locate additional users, within or upon its existing

^{5/} BLM amended the 43 CFR Part 2800 regulations governing FLPMA ROWs, effective June 21, 2005, after the date of issuance of the first decision at issue (May 17, 2005), but before the other two (July 6, 2005, and Aug. 30, 2005). See 70 FR 20969, 21058 (Apr. 22, 2005). Herein, unless otherwise noted, the regulations cited in 43 CFR Part 2800 are those currently in effect.

^{6/} RTS was advised by BLM, by letter dated July 29, 1983, prior to the ROW grant, that “[h]olders of communication [site] right-of-way grants issued after October 21, 1976, [pursuant to FLPMA,] may, with prior written consent of the authorized officer of the Bureau of Land Management, authorize or subgrant to third parties the right to use the holder’s facilities without third parties being required to obtain a right-of-way from the Bureau.” (Emphasis added.) No such consent was contained in the Sept. 18, 1983, grant.

facilities.^{7/} In addition, they expressly stated that “[i]f the proposed use is not specified in the original right-of-way grant, an amendment will be required.”

By decision dated January 18, 1995, BLM approved a December 30, 1994, assignment of the ROW from the Mickelsons to Multimedia, subject to the terms and conditions and stipulations of the original ROW and the additional stipulations executed by the Mickelsons.

On November 6, 1997, BLM promulgated the “A’ Mountain Management Plan” (1997 Management Plan), for the purpose of managing communications use on Tortugas “A” Mountain. That plan provided, at page 4, that “A’ [M]ountain will be developed and managed for users who provide a service to the community for protection of public health and safety,” defining public health and safety as “a service such as radio coverage for ambulance, law enforcement, utilities, and fire.” It also stated that existing users who did not provide service for public health and safety “will be allowed to remain at the site and operate as currently authorized.” Id. It appears that Multimedia was, at that time, an existing user who did not provide service for public health and safety, but was permitted to continue to operate “as currently authorized,” i.e., for television transmission.

Multimedia was placed in receivership, and Stonehill was appointed its receiver on April 17, 2001. On April 25, 2003, Southwest entered into an “Agreement for Purchase and Sale of Assets” with Stonehill, providing for, inter alia, the purchase of assets and the assignment of various ROWs, including the ROW at issue, to Southwest, subject to the approval of a State court. On December 23, 2003, Southwest sought BLM’s approval of an assignment of the ROW from Multimedia, attaching thereto an assignment executed by the parties in October 2003.^{8/}

^{7/} That notification was to include the name and current address of the third-party user, the expected date of occupancy, a photograph or sketch “illustrating the type of antenna to be installed, as well as any other planned physical changes to the exterior facilities operated by the holder,” and a copy of the third-party user’s Federal Communications Commission (FCC) license.

^{8/} By letter dated Nov. 26, 2003, BLM acknowledged receipt of an earlier Oct. 14, 2003, request for BLM approval of assignment of the ROW from Multimedia to Southwest, notifying Southwest, at page 1, that the assignment “is not in effect unless and until it is approved in writing by the BLM authorized officer.” BLM also noted that Southwest was engaging in “unauthorized” communications use, which “must be suspended immediately.” Id. BLM explained, at page 1 of an undated “Chronology

(continued...)

During the pendency of Southwest's request for assignment of the ROW, BLM approved the 2004 Site Plan, which replaced the 1997 Management Plan. The 2004 Site Plan states that it is to "be used by BLM officials administering communication uses at Tortugas 'A' Mountain, existing lessees, holders, and applicants desiring a lease, grant, or an amendment to an existing lease or grant." (2004 Site Plan at 2.) It provides, under its "GOALS AND OBJECTIVES," that the Tortugas "A" Mountain site be "managed jointly for low-power two-way public health and safety uses and broadcast uses [^{9/}] limited to the NWS [(NOAA Weather Station)] 100 watt[] station and the NMSU [New Mexico State University] 200K watt digital station," restricting all current and future facilities on the mountain to such uses. Id. at 4, emphasis added. Excepted from this limitation were "[g]randfather[ed]" uses, which are described as existing uses for "commercial mobile radio service (CMRS) and WISP [wireless internet service provider] which are not specifically operating as public health and safety uses," provided that "they continue to protect the senior uses [^{10/}]

^{8/} (...continued)

of Events 1993-2004," in the case file for IBLA 2005-191, under the heading "November 26, 2003," that Southwest was already in the Multimedia building at the site "relaying frequencies for the use of an internet business, **without a BLM grant**," and that "Velez claimed he was a tenant of Multimedia Development Corporation. Yet the Communication Site Users Inventory (CSIU) Forms never showed any tenants in the building, which would substantiate this contention." The next CSIU form in the case file is dated Jan. 11, 2005, and appears to have been signed by Velez, on behalf of Multimedia. It lists Southwest as a "Tenant," and describes the type of use by Southwest as "Microwave-ISP."

^{9/} The 2004 Site Plan, at page 2, defines "BROADCAST" as "includ[ing] Television Broadcast, AM and FM Radio Broadcast, Cable Television, Broadcast Translator, Low Power Television, and Low Power FM Radio."

^{10/} The 2004 Site Plan does not contain a definition for "senior uses," but, at page 2, it defines "SENIOR SITE USER" as "[a] Facility Owner/Facility Manager who holds a BLM Grant before the management plan was in effect." Presumably, a senior use is the authorized use of a senior site user. "FACILITY MANAGER" is defined as "[t]he holder of a BLM communications use authorization who leases space for other communication users," while "FACILITY OWNER[S]" are "[i]ndividuals, commercial entities, organizations, or agencies that own a communications facility on Federal land, own and operate their own communications equipment, and hold a communications use authorization." Id. at 1.

which are public health and safety.” ^{11/} Id. Cellular telephone service is not listed as a grandfathered use. The plan also provides that “[a]ll uses must be designed, operated and maintained so as not to materially or electronically interfere with the senior uses.” Id.

The 2004 Site Plan further states at page 5 that it “will be incorporated into all leases, grants, and reservations issued (now or in the future) for this communications site,” and that the provisions of the plan will be “enforced through the granting authorization.” Facility owners and managers are responsible for complying with all sections of the plan; for ensuring all new facilities, expansions, or improvements are consistent with the plan; for complying with the terms and conditions of the ROW; and for ensuring that their tenants and customers are in compliance with the terms and conditions of the ROW. Id. at 6-7. Facility owners and managers are also “authorized to rent building/tower space to tenants and/or customers without prior written approval from the BLM.” Id. at 6.

By decision dated February 1, 2005, BLM denied the December 23, 2003, request for BLM’s approval of the assignment from Multimedia to Southwest. The basis for denial was that Multimedia was not in compliance with its rental obligations under the ROW. At that time, back rent in the total amount of \$4,817.42 was past due for the years 2003 and 2004. Velez visited the LCFO on February 4, 2005, and paid that amount. (BLM Conversation Record, dated Feb. 4, 2005.)

On February 8, 2005, Stonehill and Southwest executed a second assignment of the ROW. On March 1, 2005, a state court issued an order granting the motion by Stonehill to approve the April 25, 2003, “Agreement for Purchase and Sale of Assets.”

^{11/} We note that the record contains an official BLM webpage listing, as of May 18, 2005, the “Tortugas ‘A’ M[oun]t[ai]n Communications Site Users,” including the ROW holders, identified as NMSU (NMNM-25002), City of Las Cruces (City) (NMNM-65497), Pinnacle Towers, Inc. (Pinnacle) (NMNM-168959), and Southwest (NMNM-52998), and any “Tenant[s]” or “Customer[s].” Dona Ana County (County) is listed as an ROW holder, but, in fact, operates under the City’s ROW. The 2004 Site Plan, at page 1, defines tenants as “[a] communications user who rents space in a communications facility and operates communications equipment for the purpose of re-selling or broadcasting communications services to others for profit.” Customers are defined as “[e]ntities that pay a Facility Owner, Facility Manager or tenant for communications services and are not re-selling or broadcasting communications services to others.” Id. Southwest’s use is reported to be “MIC [(Microwave)] (WISP).” No tenants or customers are listed as associated with Southwest.

On March 16, 2005, Southwest requested BLM, in a letter signed by Velez, to approve an amendment of the ROW to change the authorized use “from a Television transmission site to a low power Microwave site for data communications.” Velez explained his intention in seeking the amendment, as follows:

Our mission is to provide a service that will enhance the quality of life in the Dona Ana County rural areas. There are many communities in this area that will or may never have Broadband Services available through landline connection. So providing this service by wireless would be an asset to the community in providing opportunities for home businesses and educational services for low-income families.

On March 29, 2005, BLM billed Southwest \$2,482.72 for rental for NMNM-52998 from January 1, 2005, through December 31, 2005.^{12/} BLM received payment in that amount on April 11, 2005.

In response to inquiries from, inter alia, the City of Las Cruces and Dona Ana County, Angel Stiggins-Mayes, BLM Realty Specialist, LCFO, stated in a May 10, 2005, e-mail that BLM’s approval of the assignment/amendment was expected “early next week,” that Southwest would be authorized to sublease only “to Wireless Internet Service Providers,” in accordance with the Site Plan, and that “Cellular use will not be a permitted use.”^{13/}

^{12/} A Rental Calculation Worksheet for NMNM-52998, dated Feb. 10, 2005, prior to assignment of the ROW, lists Southwest as the “Facility Owner/Manager” and establishes the scheduled rental as \$2,482.72 based on the type of use as “MIC.” See n.11, supra. “MIC” is evidently the category of use listed in the “Rental Schedule for Communication Uses Calendar Year 2005” as “MICROWAVE and Wireless Internet Service Provider (ISP).” That schedule shows \$2,482.72 as the fee for a population of 100,000 to 299,999. See n.2, supra. The fee for “CELLULAR TELEPHONE” for the same population is listed as \$4,965.43, while “TELEVISION” is \$7,448.15.

^{13/} The May 10 e-mail evidently related to a May 4, 2005, meeting at NMSU for all Tortugas “A” Mountain communication site users, the purpose of which was to develop a user’s association group. In a document titled “CHAIN OF EVENTS” in the IBLA 2005-215 casefile, it is reported at page 2 that, “[w]hen the meeting was concluded Tony Velez[] asked if he could install cellular use on the tower, Brent Mcbeth [BLM Communication Planning Specialist] [and] * * * Angel [Stiggins-]Mayes * * * told Tony that cellular telephone use was not an authorized use for A-Mountain according to the A-Mountain Communication [Site] Plan [d]ated (continued...)

In its May 17, 2005, decision, BLM approved assignment of the ROW from Multimedia to Southwest, and amendment of the ROW, changing “the current communication use from a television transmission site to a wireless internet service.” (May 17 Decision at 1.) BLM stated that the assigned ROW was

subject to the terms and conditions of the original grant with the following condition:

Southwest Wireless Net’s sub-leasing will be limited to wireless internet service providers, and any new facilities, expansion, or improvements, will only include low-power public health and safety uses, as per the October 7, 2004[,] Tortugas “A” Mountain Communications Site Plan, copy attached as Exhibit A. [Emphasis added.]

Id. The assignment was subject to, inter alia, the terms and conditions and stipulations of the original ROW and new stipulations, which were to be executed by Southwest no later than 30 days from receipt of the decision. ^{14/}

Southwest appealed timely, requesting a stay of the subleasing restriction. In requesting a stay, Southwest admitted that it had entered into a contract permitting “Sprint Cellular” to use its antenna tower at the communications site to provide cellular telephone service, along with wireless internet service, and that it was in the process of seeking to contract with other companies for the same purpose. ^{15/} (Request for Stay Pending Appeal (Request for Stay) (IBLA 2005-191), dated June 2, 2005, at 2.)

On May 25, 2005, before the Board acted on Southwest’s stay request, BLM issued a “Notice to Cease and Desist” (Notice to Cease), notifying Southwest that BLM considered it to be in trespass based on the “installation of a cellular telephone

^{13/} (...continued)

October 2004.”

^{14/} The decision also stated that “[an] ROW * * * is hereby granted to Southwest Wireless Net * * *.” (May 17 Decision at 2.) Despite this representation, it is clear that the ROW in question, which retains the serial number of the original ROW (NMNM-52998), is an amended ROW and not a new ROW.

^{15/} The record indicates that “Sprint Cellular” is actually Alamosa Properties, L.P., a subsidiary of which evidently is Alamosa Personal Communications Service (PCS), a Sprint PCS Network Partner (hereinafter, Alamosa).

antenna on right-of-way NMNM 52998.” (Notice to Cease at 1.) BLM explained that, based on the subleasing restriction in the ROW amendment, “[c]ellular telephone [use] was specifically prohibited in the grant.” Id. It noted that BLM personnel had observed the installation of communications equipment on May 24, 2005, at which time they were told by the installing technicians that the equipment was “a ‘cellular antenna’ for Alamosa Sprint.”^{16/} Id. It further stated that Southwest was in violation of the provision of 43 CFR 2801.1-1(b) (2004) that “[a] right-of-way grant * * * may be used only for the purposes authorized.” BLM stated:

[Y]ou are liable for fair market value rent of the public lands and BLM will assess trespass fees from the day the trespass began. You must immediately cease and desist from the violations charged, and you must immediately remove the cellular [telephone] antenna. You will be allowed 15 days to arrange settlement of trespass liability, at the Bureau of Land Management, Las Cruces Field Office * * *. [^{17/}]

(Notice to Cease at 1.) Finally, BLM stated that failure to comply with the Notice to Cease and resolve the trespass liability “may result in additional trespass penalties,” and criminal and civil penalties. Id.

In a letter dated May 27, 2005, filed with BLM on the same date, counsel for Southwest notified BLM that Southwest and Velez would be appealing the May 17, 2005, decision. Although counsel made no mention of the May 25 Notice to Cease, she did ask BLM not to “threaten” Velez and “to allow him to continue what he is

^{16/} BLM observations at the site are documented in an “Unauthorized Use Log” (NMNM-112038) in the IBLA 2005-215 casefile, which covers the period from May 24 to July 7, 2005, and in May 24, and June 8, 2005, e-mails of Tim L. Sanders, Assistant Field Manager, LCFO, who participated in the May 24 inspection. The log notes that, during a follow-up field inspection on May 31, 2005, installation activities continued. In addition, on June 29, 2005, during a field inspection of the communications site, BLM discovered an employee of Alamosa or its contractor “installing additional cellular [telephone] equipment.” (CHAIN OF EVENTS (IBLA 2005-215) at 3.)

^{17/} BLM’s determination of trespass and requirement that Southwest immediately remove the unauthorized equipment and resolve the trespass liability within 15 days is at odds with BLM’s statement on appeal that a cease and desist notice is designed “to notify a person of a perceived trespass * * * before issuing a final determination that there is a trespass.” (Response (IBLA 2005-215), dated Oct. 13, 2005, at 3.)

doing.” She offered that if, at the completion of the appeal process, Velez were “found to have erred,” he would remove the equipment.

Southwest appealed BLM’s May 17, 2005, decision on May 31, 2005. The Notice of Appeal stated, in relevant part: “Notice is hereby given that Tony Velez of Southwest Wireless Networks is appealing from the Decision filed on May 17, 2005[,] concerning his company’s rights for a communication site on Tortugas ‘A’ Mountain.” There was no indication that Southwest was appealing BLM’s May 25, 2005, Notice to Cease, and no such notice of appeal has ever been filed.

Southwest does not challenge BLM’s May 17, 2005, decision to the extent that it approved the assignment to Southwest or to the extent that it approved the amendment of the ROW to change the authorized use from television transmission service to wireless internet service. It challenges only BLM’s restriction on authorized use by its sublessees.^{18/}

During the pendency of Southwest’s appeal from BLM’s May 17, 2005, decision, BLM issued its July 6, 2005, Trespass Decision/Notice to Remove, declaring Southwest to be in willful trespass because of the “unauthorized installation of cellular telephone antennas and related equipment” at the Tortugas “A” Mountain communications site covered by the ROW, and requiring payment of trespass damages and removal of the equipment within 15 days of receipt of the decision. (July 6 Decision at 1.) BLM also stated that, should the equipment not be removed, “the United States * * * will without further or any additional notice of any kind whatsoever and without liability, contract to remove said property at your expense.” Id. BLM added that failure to remove the equipment and pay the trespass damages might result in additional trespass penalties, and a criminal and/or civil penalty. Southwest appealed timely, but did not request a stay of the effect of BLM’s July 6, 2005, decision.^{19/}

^{18/} It is appellant’s position that, if it is able to establish that its ROW, in fact, authorized it to allow its sublessees to place cellular telephone antennas and related equipment at its communications site, BLM was not justified in charging appellant with trespass and imposing trespass liability. We agree that the validity of BLM’s trespass charge and liability is inextricably tied to the validity of BLM’s conclusion that the ROW did not authorize the placement of such equipment at the site.

^{19/} Under 43 CFR 2801.10(b), “[a]ll BLM decisions under this part remain in effect pending appeal unless the Secretary of the Interior rules otherwise, or as noted in this part. You may petition for a stay of a BLM decision under this part with the Office of
(continued...)

By order dated July 14, 2005, the Board denied Southwest's request to stay the effect of BLM's May 17, 2005, decision, to the extent that the decision had restricted Southwest's subleasing to wireless internet service. In that order, we stated at page 3 that "Southwest may continue to provide wireless internet service to its customers, but any cellular telephone service established in violation of the subleasing limitation is prohibited."

In an August 11, 2005, order, we denied Southwest's request to reconsider our July 14, 2005, order; however, we clarified that order by stating that it had "made no mention of removal of any cellular telephone equipment, but implicit in the statement that 'cellular telephone service established in violation of the subleasing limitation is prohibited' was the requirement that Southwest disable such equipment pending resolution of the appeal." (Aug. 11 Order at 3.) We then observed that in its July 7, 2005, response to the petition for stay in IBLA 2005-191, filed after issuance of the July 6, 2005, Decision/Notice,

BLM took the position that Southwest should be required to remove "any new, unauthorized, cellular telephone equipment that it has installed at the site since May 17, 2005," or should be required to disable it. (Response at 7, n.2.) Despite that apparent limitation, we interpret BLM's position, advanced in that response, as relating to any cellular telephone equipment installed on NMNM 52998, whether before or after May 17, 2005, and that disabling the equipment pending resolution of IBLA 2005-191, which will control IBLA 2005-215, is sufficient.

Id. at 4.

Thus, while we interpreted BLM's position advanced in IBLA 2005-191 that disabling the cellular equipment on NMNM-52998 would satisfy the subleasing restriction pending resolution of the merits of IBLA 2005-191, we made no ruling on the effect of BLM's July 6, 2005, Decision/Notice because no petition for stay of that Decision/Notice had been filed by Southwest. Therefore, when Southwest failed to take the action directed by that Decision/Notice, BLM had the cellular antennas and equipment removed. BLM's actions did not, as argued by Southwest, "violate" our

^{19/} (...continued)

Hearings and Appeals, Department of the Interior."

August 11 order. ^{20/} (Southwest Third Supplement to Appeal Brief (IBLA 2005-191), dated Sept. 1, 2005, at 2; see Southwest Response to Motion to Consolidate, dated Oct. 13, 2005, at 3.)

During the pendency of the appeals from the May 17 and July 6, 2005, decisions, BLM issued its August 30, 2005, decision, and attached Bills for Collection, requiring payment of trespass damages, in the total amount of \$12,659.80, within 30 days of receipt of the decision. Southwest appealed timely from that decision.

Discussion

Appellant rests its entire challenge to BLM's determination of trespass liability and assessments of trespass damages on whether it was entitled under ROW NMNM-52998 unilaterally to authorize third-party users to co-locate their cellular telephone antennas and related equipment at its ROW facility. Southwest contends that the original ROW, as amended in BLM's August 26, 1988, approval of the assignment from RTS to the Mickelsons, authorized the ROW holder to sublease to third parties the right to use the ROW facilities without BLM's prior approval, and that this authority was transferred from the Mickelsons to Multimedia, with BLM's January 18, 1995, approval of the assignment, and then to Southwest, with BLM's May 17, 2005, approval of the assignment. Southwest argues that the "existing rights" assigned to it included "the right to continue providing services that were not for public health and safety." (Appeal (IBLA 2005-191) at 5.) Southwest concludes that the ROW authorizes it to permit third-party use of the communications site for cellular telephone use, without seeking prior approval by BLM. ^{21/}

^{20/} BLM informs us that, on Aug. 12, 2005, following the Board's Aug. 11, 2005, order, Alamosa filed a Federal civil lawsuit against Southwest and BLM, styled Alamosa Properties, LP v. Southwest Wireless Net, No. 2005-860 WJ/RLP (D. N.M.), initially seeking to enjoin any dismantling or removal of its equipment at the communications site, and that the request was denied. (Response (IBLA 2005-215) at 5-6.) BLM states that it removed the equipment only following the Federal district court's ruling. It also asserts that the court's ruling either "moot[s] the IBLA proceedings entirely" or "remove[s] jurisdiction from IBLA over underlying administrative proceedings." Id. at 6 n.3. We disagree with that interpretation. The court only declined to grant injunctive relief. It did not rule on the merits of the question of Southwest's authorization under the ROW, which is directly at issue in IBLA 2005-191, and controlling in IBLA 2005-215 and IBLA 2005-273.

^{21/} Appellant does not contest BLM's authority to charge it with trespass, BLM's
(continued...)

[1, 2] BLM is authorized by section 501(a) of FLPMA, as amended, 43 U.S.C. § 1761(a) (2000), to grant rights-of-way for “systems for transmission or reception of radio, television, telephone, telegraph, and other electronic signals, and other means of communication[.]” 43 CFR 2805.11(c) provides that an ROW holder “may only use the right-of-way for the specific use the grant authorizes.” At the time of BLM’s May 17, 2005, decision, 43 CFR 2801.1-1(b) (2004) stated that “[a] right-of-way grant * * * may be used only for the purposes authorized.” While that regulation also provided that “[t]he holder [of an ROW] may allow others to use the land as his/her agent in exercising the rights granted,” it is clear that third-party users of an ROW were also restricted to use of the ROW only for the purposes authorized. Id.

43 CFR 2801.1-1(f) (2004) set forth additional provisions concerning third-party use. It stated that “[t]he holder of a right-of-way grant may authorize other parties to use a facility constructed, except for roads, on the right-of-way with the prior written consent of the authorized [BLM] officer,” but then excepted “the holder of a right-of-way grant for communications purposes” from the requirement of prior written consent by BLM “if so provided by terms and conditions of the grant.” Id., emphasis added. It also stated that “[i]n any such arrangement, the holder shall continue to be responsible for compliance with all conditions of the grant.” Id.

The current regulations have essentially carried forward these provisions. 43 CFR 2805.14 provides that an ROW grant “conveys to [the holder] only those rights which it expressly contains,” specifically including “the right to * * * [u]se the described lands to construct, operate, maintain, and terminate facilities within the right-of-way for authorized purposes under the terms and conditions of the grant[.]” Id. Also included is “the right to * * * [a]llow others to use the land as your agent in the exercise of the rights that the grant specifies[.]” Id. The regulation further states that an ROW grant conveys the right to,

[i]f your grant specifically authorizes, allow other parties to use your facility for the purposes specified in your grant and you may charge for such use. If your grant does not specifically authorize it, you may not

^{21/} (...continued)

calculations of trespass damages, or, BLM’s assessment of trespass liability in the total amount of \$12,659.80, except to the extent that BLM charged appellant with the costs of removing the unauthorized equipment from the site, on the basis that such action violated the Board’s July 14, 2005, order. However, as discussed supra, we conclude that removal did not violate our order.

let anyone else use your facility and you may not charge for its use unless BLM authorizes or requires it in writing. [Emphasis added.]

Id.

Accordingly, a communications site ROW holder may allow third-party users to use the land and facilities encompassed by its ROW, without BLM's prior approval, if BLM has so provided in the ROW grant. Further, authorized third-party users are required to conform to the use specified in the grant.

Moreover, 43 CFR 2808.10 and 2808.11 (formerly 43 CFR 2801.3 (2004)) set forth various provisions concerning unauthorized use in connection with ROWs. See 43 CFR 2807.20(c) ("Any activity not authorized by your grant may subject you to prosecution under applicable law and to trespass charges under [43 CFR] [S]ubpart 2808"). 43 CFR 2808.10(a) states that a "[t]respass is using, occupying, or developing the public lands or their resources without a required authorization or in a way that is beyond the scope and terms and conditions of your authorization. Trespass is a prohibited act." ^{22/} When someone is determined by BLM to be in violation of subsection (a) of 43 CFR 2808.10, subsection (a) of 43 CFR 2808.11 provides that "BLM will notify you in writing of the trespass and explain your liability."

We agree with appellant that among the rights that it acquired at the time of BLM's May 17, 2005, approval of the assignment of the subject ROW was the right to authorize use of its facilities by third parties without third parties being required to obtain a right-of-way grant from BLM. This right was first set forth in the Special Stipulations executed by the Mickelsons, and incorporated in the ROW in BLM's August 26, 1988, approval of the assignment of the ROW from RTS to the

^{22/} Subsection (a) of 43 CFR 2801.3 (2004) provided, in its entirety, that "[a]ny use, occupancy, or development of the public lands that requires a right-of-way, temporary use permit, or other authorization pursuant to the regulations of [43 CFR] [P]art [2800] and that has not been so authorized, or that is beyond the scope and specific limitations of such an authorization, or that causes unnecessary or undue degradation, is prohibited and shall constitute a trespass as defined in [43 CFR] § 2800.0-5 [(2004)]." See Tom Watson, 154 IBLA 140, 147-48 (2001); Gifford Engineering, Inc., 140 IBLA 252, 263 (1997). When improvements are placed on public lands in trespass, BLM is authorized to require their removal. John T. Alexander, 157 IBLA 1, 11 (2002); Dalton Wilson, 156 IBLA 89, 98-99 (2001).

Mickelsons. We also agree with appellant that the 1997 Management Plan and 2004 Site Plan both recognize the authority to sublease use of the ROW facility to third-party users, without prior BLM approval. However, appellant states that not only do the 1997 Management Plan and 2004 Site Plan recognize its subleasing authority, but,

under both the old site plan and the new site plan, it appears that Southwest Wireless Networks has been given the right to lease space on its tower to other communication companies that do not necessarily deal with [public] health and safety. This would include cellular telephone companies, internet companies, and television companies that are fully licensed by the FCC, or appropriate authority, and conform to environmental standards. [Emphasis added.]

(Appeal (IBLA 2005-191) at 6-7.)

Appellant is mistaken. While the subleasing authority is broad under the 1997 Management Plan and 2004 Site Plan, the Special Stipulations to the ROW state that, “[i]f the proposed use is not specified in the original right-of-way grant, an amendment will be required.”^{23/} (Emphasis added.) This provision clearly restricted use of the communications site at issue by the ROW holder or any third-party user to the uses “specified” in the original ROW grant. That use was for a “television transmission site.” The fact that television transmission was the authorized use for the site throughout Multimedia’s tenure as ROW holder is evidenced by the fact that appellant specifically sought amendment of the ROW on March 16, 2005, for the precise purpose of changing the authorized use “from a Television transmission site to a low power Microwave site for data communications.”

^{23/} Appellant also states that the 2004 Site Plan requires the “[m]ultiple use of * * * improvements.” (Appeal (IBLA 2005-191) at 6 (quoting 2004 Site Plan at 8).) This specific requirement, however, applies to “new facilities and improvements,” which does not encompass appellant’s existing facility. (2004 Site Plan at 8.) Nonetheless, the plan does, at page 4, set as a goal and objective of the plan that all facilities be used to their maximum extent: “Systematically develop the site to maximize the number of compatible uses while ensuring safety and protection of resources. Development of new towers or buildings within each of the authorized owner’s facilities will be authorized only after their respective tower or building space area is filled to near capacity.” However, the fact that the 2004 Site Plan promotes the maximum use of Tortugas “A” Mountain does alter the specific restrictions of the ROW at issue.

Because use of NMNM-52998 was restricted to television transmission, Multimedia had no right to allow third parties to place cellular telephone antennas and related equipment at the site for the purpose of offering cellular telephone service, and Southwest can claim no greater rights than those assigned by Multimedia for the purposes of third-party placement. Moreover, in seeking a change of use from a television transmission site to a low power Microwave site for data communications, Southwest sought to limit its use. BLM approved the change to “wireless internet service,” and made abundantly clear in the express language of its assignment of the ROW that Southwest’s right to sublease to third parties was restricted to authorization for wireless internet service.^{24/}

Appellant argues that BLM’s May 17, 2005, decision, limiting subleasing of the ROW to wireless internet service providers, altered its existing rights to permit third-party use of the communications site for cellular telephone service, and violated its property rights in the ROW, resulting in a taking of those rights contrary to the Fifth Amendment of the U.S. Constitution. See Appeal (IBLA 2005-191) at 7-11. Since Southwest never had rights to permit third-party use of NMNM-52998 for cellular telephone service, there can be no property rights violation.

Appellant also refers repeatedly to the fact that the 2004 Site Plan provides, at page 4, that “[a]ll uses must be designed, operated and maintained so as not to materially or electronically interfere with the senior uses” of Tortugas “A” Mountain, noting that it qualifies as a senior site user. See, e.g., Appeal (IBLA 2005-191) at 6, 7-8. Presumably, Multimedia, as a BLM grant holder on the date of approval of the Site Plan, was a senior site user. The Site Plan makes no mention of television transmission as a senior use (senior use is not defined in the Site Plan, although arguably it is the authorized use of a senior site user), possibly because Multimedia was in bankruptcy in 2004 and Southwest was, at that time, using the ROW for wireless internet service.^{25/} Even if, upon approval of the assignment of

^{24/} Appellant argues that, prior to its May 17, 2005, decision, BLM failed to notify appellant that it would not be permitted to allow third-party users to locate cellular telephone equipment at the communications site. See, e.g., Velez Affidavit, dated Aug. 23, 2005 (attached to Third Supplement to Appeal Brief) (Aug. 23 Velez Affidavit), at 3-4. Even if such notice were required, the record indicates that Velez was aware of BLM’s position regarding the placement of cellular telephone equipment on NMNM-52998, prior to receipt of the May 17, 2005, decision. See n.13, supra.

^{25/} In its Request for Stay (IBLA 2005-191), Southwest admitted, at page 1, that it
(continued...)

NMNM-52998, Southwest became a senior site user under the Site Plan, such status did not allow Southwest to authorize third-party users to engage in any uses that were not authorized under the ROW.

Appellant appears to challenge BLM's authority to place any limitations on the use of an ROW. See Appeal (IBLA 2005-191) at 9-10. We find ample statutory and regulatory support for this authority. Under FLPMA, an ROW applicant may be required to provide "those plans, contracts, agreements, or other information reasonably related to the use, or intended use, of the right-of-way," which BLM "deems necessary to a determination, in accordance with the provisions of this Act, as to whether a right-of-way shall be granted, issued, or renewed and the terms and conditions which should be included in the right-of-way." 43 U.S.C. § 1761(b)(1) (2000). It is clear from the regulatory requirements in effect at the time of BLM's May 17, 2005, decision that in granting an ROW, BLM would specify the authorized uses (43 CFR 2801.1-1(b) (2004)), and that any use beyond the scope and specific limitations of the authorization was prohibited. 43 CFR 2801.3(a) (2004).^{26/} In addition, 43 CFR 2803.2(b) (2004) provided that any "substantial deviation in * * * authorized use by the holder * * * shall be made only with prior approval of the authorized [BLM] officer under [43 CFR] § 2803.6-1 [(2004)][.]" Such "deviation" meant "the holder has changed or modified the authorized use by adding equipment, overhead or underground lines, pipelines, structures or other facilities not authorized in the instant grant or permit." 43 CFR 2803.2(b)(2) (2004).^{27/}

Appellant further argues that BLM's decision to limit subleasing to wireless internet service providers was arbitrary and capricious, and an abuse of discretion.

^{25/} (...continued)

"has been operating its internet service on 'A' Mountain for several years." It is unclear under what authority it was conducting that business on NMNM-52998, but BLM apparently knew of that activity and condoned it.

^{26/} The current regulations contain similar provisions. See 43 CFR 2805.11(c) and 2808.10(a).

^{27/} The current regulations contain a provision requiring an ROW holder to "obtain BLM's approval before you begin any activity that is a substantial deviation," 43 CFR 2807.11(b), and defines such "deviation" to mean "[a]ny change from, or modification of, the authorized use," stating that "[e]xamples of substantial deviation include: Adding equipment, overhead or underground lines, pipelines, structures, or other facilities not included in the original grant," 43 CFR 2801.5(b). See 43 CFR 2807.20(a) ("You must * * * seek an amendment of your grant when there is a proposed substantial deviation in * * * use").

We disagree. Appellant sought and received a change in use for the ROW. BLM's approval conformed to the authorization sought by appellant. It was not BLM's responsibility to envision what other communications use appellant might desire to engage in at the site, adjudicate the relative merits of granting or denying such use, and reach a decision. Rather, it fell to appellant to expressly set forth its desired use in an appropriate manner, and seek BLM approval. There is no evidence in the record that Southwest ever filed a written application with BLM seeking an amendment of the ROW to include cellular telephone service as an authorized use. ^{28/}

We note that BLM, in response to the petition for stay filed in IBLA 2005-191, argued that there would be harm to the public interest from allowing cellular telephone service to continue, given the "distinct possibility of radio interference among new and existing users." (Response to Request for Stay (IBLA 2005-191), dated July 7, 2005, at 8-9.) It presented affidavits of employees of the City (Kenneth Luchini) and the County (Eric Fuller), both knowledgeable and experienced in radio telecommunications, who offered their opinions of the potential for conflict between cellular telephone service and public safety communications services of the City and County in support of its assertion.

Appellant has provided considerable evidence on appeal, purporting to demonstrate that cellular telephone use of the communications site would not, in fact, interfere with the public safety communications use by the City and County. See, e.g., Third Supplement to Appeal Brief (IBLA 2005-191), dated Sept. 1, 2005, and attachments thereto. Nevertheless, questions of interference are beside the point and need not be resolved in this appeal, because the fact remains that appellant's authorized use of the ROW in question is expressly limited to wireless internet service, thereby precluding cellular telephone use, whether by the holder or third-party users.

To the extent appellant has made other arguments not expressly addressed herein, they have been considered and rejected as failing to establish error in BLM's decisions.

^{28/} To the extent that Southwest may be arguing that BLM is estopped from limiting its ability to sublease based on oral representations made to Velez (see Affidavit of Tony Velez, dated Aug. 11, 2005, at 3), we have long held that a claim of estoppel cannot be made to rest simply on an oral opinion, even where it is given by a responsible Government official. United States v. Webb, 132 IBLA 152, 168 (1995); James W. Bowling, 129 IBLA 52, 55 (1994).

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

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

H. Barry Holt
Chief Administrative Judge