

FOUR STATES TELEVISION, INC.

IBLA 75-601

Decided September 19, 1977

Appeal from decision of New Mexico State Office, Bureau of Land Management, requiring stipulation, advance rental and back-use charges for communication site right-of-way NM-11035.

Affirmed.

1. Communication Sites--Federal Land Policy and Management Act--Rights-of-Way: Act of March 4, 1911--Rights-of-Way: Federal Land Policy and Management Act

A right-of-way for a communication site for which application was made under the Act of March 4, 1911, shall conform to the provisions of the Federal Land Policy and Management Act of 1976, § 510, 90 Stat. 2743, 2782, when application for grant was pending on October 21, 1976.

2. Appraisals--Communication Sites--Rights-of-Way: Act of March 4, 1911--Rights-of-Way: Federal Land Policy and Management Act

Where the current fair rental value of a right-of-way has been determined in accordance with accepted appraisal procedures, and the permittee contends that the rental is excessive, the burden is upon the lessee to prove by positive, substantial evidence that the appraisal is in error. Where the lessee fails to do so, the appraisal will stand.

APPEARANCES: Gerald R. Procter, President, Four States Television, Inc., for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Four States Television, Inc., appeals from a May 8, 1975, decision of the New Mexico State Office, Bureau of Land Management, requiring payment of advance rental for a 5-year period and back-use charges for a similar period for a communication site right-of-way NM-11035.

On December 24, 1969, Gerald R. Proctor, on behalf of Woodland Broadcasting Company, presently known as Four States Television, Inc., filed an application for a communication site right-of-way to construct television structures and facilities under the Act of March 4, 1911, 43 U.S.C. § 961 (1970). The site consists of a 400 x 400 foot tract located on a State highway approximately 2-1/2 miles south of Farmington, New Mexico.

A preconstruction permit was granted by the State Office on January 15, 1970, and notice of site availability was given on March 23, 1970. The Federal Communications Commission construction permit was approved on October 27, 1971, and a license to broadcast was issued on October 26, 1972.

On May 8, 1975, the State Office issued its decision stating that rental for the site was \$880 for a 1-year period or \$3,600 for a 5-year period. The figures were based on an appraisal prepared by Bureau of Land Management appraisal staff in March 1975. The decision also required that appellant submit back-use charges of \$1,500 for the period January 15, 1970, to January 15, 1975, and sign and return an enclosed stipulation.

In its statement of reasons, appellant says that the back-use charges and the \$880 annual rental are "exorbitant and unsupported by fact."

[1] The Federal Land Policy and Management Act of 1976, section 504(g), 510(a), Publ. L. 94-579, 90 Stat. 2743, 2779, 2782, 43 U.S.C. §§ 1764, 1770 (197), provides in part:

Section 504(g) The holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way * * *. Rights-of-way may be granted, issued, or renewed * * * to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary * * * for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest. Such rights-of-way issued at less

than fair market value are not assignable except with the approval of the Secretary issuing the right-of-way. * * *

Section 510(a) Effective on and after the purposes listed in this title shall be granted, issued, or renewed over, upon, under, or through such lands except under and subject to the provisions, limitations, and conditions of this title: Provided, That nothing in this title shall be construed as affecting or modifying the provisions of the Act of October 13, 1964 (78 Stat. 1080; 16 U.S.C. 532-538 * * *. Any pending application for a right-of-way under any other law on the effective date of this section shall be considered as an application under this title. The Secretary concerned may require the applicant to submit any additional information he deems necessary to comply with the requirements of this title * * *.

Any right-of-way issued herein shall therefore conform to the provisions of said Act.

[2] Under both 43 U.S.C. § 961 (1970) and § 1764(g), (197), the charge for use and occupancy of lands under the regulations is generally the fair market value of the right-of-way as determined by appraisal by an authorized officer.

The appraisal first determined the value of the site, a 3.7-acre tract, by comparing it with other tracts in the area deemed comparable and then computed the rental on the basis of the minimum rate of return necessary to attract investment capital in the area. An appraisal was made as of January 15, 1970, and again as of January 15, 1975, to compute rental due, first, for occupancy prior to the issuance of a permit and, next, for the first 5 years of the permit. For the first appraisal four sales of lands deemed comparable were chosen and for the second five. They were compared with the subject tract as to time of sale, location, access, water, accessibility, and terms. The comparable tracts varied in size from 2 acres to 7.18 acres.

The appraisal report first states that it is made under several assumptions, one of which was:

4. Giving full consideration to constraints and/or restrictions, if any, rendered by the Act of March 4, 1911, the regulations in 43 CFR 2800 and BLM policy and procedures, it is assumed that the rights being granted are sufficiently comparable to a 5-year lease with options to renew at revised rentals (if appropriate) for a period of 50 years.

It then continues,

RIGHTS BEING APPRAISED

As specified by 43 CFR 2861, the rights being granted by the United States are an easement for right-of-way for radio, television or other forms of communication transmitting, relay or receiving structure and facilities. The easement is issued for a term of 50 years with periodic rental review and adjustment (if warranted) at not less than 5-year intervals. No estate of any kind in fee is granted. These rights are assumed to be reasonably comparable to private leases.

Thereafter follows an analysis of the area, the San Juan Basin, which describes population, highways, the economy, which it says is benefiting from the Navajo irrigation project, production of oil and gas, and recent coal mining. It concludes that the future of the area is bright.

It then notes the land ownership pattern, the increased demand for the land, and the scarcity of land available for purchase.

It then turns directly to the area in which the subject land lies:

NEIGHBORHOOD DESCRIPTION

The neighborhood is the area south from Farmington dominated almost entirely by the Navajo Indian Irrigation Project. Development is underway on the project resulting in considerable construction activity which will go on for several years. After development is complete, there will still be considerable activity due to production and marketing of produce grown on the project. In addition to the irrigation project, the 2 gasification plants and Public Service Company's coal fired power plant will be located south from here. Access from Farmington to these significant projects will be via New Mexico State Highway 371 which passes through the subject neighborhood and irrigation project.

The neighborhood has obviously changed from land use devoted strictly to ranching and the oil and gas industry to agricultural-industrial land use. It is concluded by this appraiser that if private lands were available in the market, there would be a significant demand for these lands by investors and speculators, especially along major roads

and highways. Since almost all the land is either Federal, State or Indian, this demand cannot be measured in the market.

PROPERTY DESCRIPTION

The subject tract is located on the high bluffs south of Farmington and south of the San Juan River. It is on State Highway 371, about 2-1/2 miles south of the intersection of the truck by-pass (Pinon Street) and Highway 371. The tract has 400 feet of frontage on the east side of the highway. Its elevation of 5,840 feet is 580 feet above the valley floor one mile north. The site is essentially level and at grade with Highway 371. Electricity and telephone are available to the site. Water is not available and a private well would necessitate drilling in excess of 600 feet at a cost of \$7,000 (estimate received by station manager Gerald Proctor). The city has extended water to the San Juan Mission, one mile north, however, this location is 500 feet lower in elevation than the TV station. To provide the station with city water, the city would find it necessary to build a pumping station and storage tank, besides the necessary pipeline, a capital expenditure they obviously would not make for one water user. As a result, the manager hauls his own water for restrooms and buys bottled water for drinking.

The studio is housed in a 3,200 square feet steel prefabricated building. The 74 foot antenna is supported by a 136 foot cross-section, guyed tower. The market value of building and tower as estimated by the San Juan County Assessor is \$35,000. Studio equipment (personal property) is estimated at \$110,000. The studio is heated primarily from heat from the transmitters and is supplemented by electric heaters during extreme cold.

(pg. 5.)

It then compared and analyzed the various sales it deemed most comparable to the subject lands. In discussing the January 15, 1975, appraisal date, it said:

January 15, 1975, Appraisal Date

As already discussed, the present economy of Farmington area is strikingly improved from that of January 1970. Real estate activity is booming. Due to the proposed extensive agricultural and industrial

developments south of Farmington and the imminent plans to improve and extend State Highway 371 south to I-40, the subject property's neighborhood has changed significantly between the two appraisal dates. The potential for Highway 371 becoming a major artery leading into the Farmington metropolitan areas is high. It is already being suggested that Highway 371 via I-40 at Thoreau will replace Highway 44 as the major highway between Farmington and Albuquerque because it will reduce the total mileage and allow over 1/2 of the journey to be traveled over interstate freeway.

Three very recent sales (sales 5, 6 and 7) in the Bisti Road neighborhood south of town illustrate new interest in this area. There have been other negotiations and offers to buy, however, most owners prefer to hold on to their land at this time, speculating on much higher prices after the gasification and other developments begin. These sales are not comparable to the subject because of their greater size, however, [they] are presented to reflect recent demand, as well as prices being paid for gross acreage tracts. There still are no sales of smaller tracts, such as the subject, in the Bisti Road neighborhood, consequently, it is necessary again to go outside of the neighborhood for this data.

Sales 8-12 in the south river road neighborhood east of Farmington are believed to best reflect values as they might relate to the subject. They are analyzed as follows:

"#	Date	Acres	\$/Ac	Time	Loc.	Acc.	Wtr.	Adapt.	Size	Terms	OA
8	12/73	7.813	1,500	+	+	+	-	0	+	0	+
9	07/74	6.450	1,860	0	+	+	-	0	+	-	+
10	10/73	2.000	2,000	+	+	0	-	+	-	0	0
11	07/74	3,478	2,300	0	+	0	-	+	0	0	0
12	09/74	5.370	2,514	0	+	0	-	+	0	0	0"

(pg. 11.)

The report continues with comments on why the various factors had a positive or negative effect compared to the subject tract.

It then concluded:

Correlation of Sales' Analysis

The analysis of the South River Road sales indicates a price per acre between \$2,000 and \$2,500. Due to the

yet speculative nature of the subject neighborhood and lack of services, the low side of the range at \$2,000 per acre appears most appropriate. This is adequately bracketed by the remaining sales. It also correlates with the larger neighborhood sales and other market evidence around the tri-city area.

VALUE CONCLUSIONS (1975 APPRAISAL DATE)

Fee Value - \$2,000/ac x 3.673 ac = \$7,346.00 -
SAY \$7,350.00

Economic Rent

Rate of Return - The minimum rate of return necessary to attract investment capital in the Farmington area in 1975 is 12%. This has been substantiated with local investors, brokers and lending institutions. Twelve percent usually would be considered for a national, low risk tenant ("triple A") and a long term lease. Something around 15 to 18% would be necessary for a more local tenant such as the subject, at least to start out. However, the 12% rate is frequently used for speculative properties at the edge of town with little in the way of development or public services. Usually, this rate of return would not involve a long-term lease, allowing the owner to capitalize on future growth and rapidly increasing values. The subject tract is still in a speculative area without water or sewer services. Within 5 years (next appraisal date), this neighborhood has high potential to develop and at this time, a higher rate of return may be required of the subject tenant. At this time, however, I recommend the lower rate of 12%.

ANNUAL RENTAL - \$7,350 x 12% (.12) = \$882.00 -
SAY \$880.00

5 year Lump Sum Prepayment (present worth of \$880/annum for 5 years at 7% Instruction Memo DSC 95-6) - \$880.00 x 4.1002 = \$3,608.18 - SAY \$3,600.

The fair market value of the right-of-way for 5 years is estimated to be \$3,600 if payment is received in a lump sum in advance.

The appraisal report is a thorough and careful assessment of the tract. It followed the same methodology used in a recent case, Junction Oil Company, 28 IBLA 183 (1976), where a small tract lease was appraised to determine "the fair market rental of the lands

involved." The appraisal compared the lease site with other comparable properties and made the same computations as were performed here to arrive at the rental.

In opposition to the appraisal, appellant offers only references to several tracts without a detailed analytical comparison of them with the subject tract.

Appellant explains that the site is dry grazing land without water. Appellant asserts that it is highly unlikely the site will ever have city water because it is higher than city tanks.

Appellant asserts that the proposed rental is far in excess of any communication site right-of-way known to appellant's President in all northwestern New Mexico. Appellant refers to two sales and a rental in the area:

1. A block of private land consisting of 120 acres, 1.8 miles nearer Farmington than the land in question, offered for sale at \$1,000 per acre. He notes that this property is within 1,200 feet of a Farmington water line and has highway frontage on both sides of the road.

2. A 24-acre tract of land about 1 mile closer to Farmington than the first tract which sold for \$1,315 per acre in the fall of 1974. This tract has city water and river and highway frontage.

3. A 40-acre parcel was "leased" by BLM to the American Indian Movement for 10 days for their annual convention for \$20. Projected to a yearly basis, appellant computes this would be \$730.

Appellant also asserts that the Navajo Tribe has been authorized to purchase unspecified dry grazing land in New Mexico at \$50 per acre.

The dissent concedes that appellant's assertions are not supported by any detailed evidence such as a proper appraisal report or other objective evidence.

It is well established that an applicant who contends that the rental set by a Bureau of Land Management appraisal is excessive must prove by substantial and positive error that the appraisal is in error. Henry O. Woodruff, 24 IBLA 190 (1976); Harold Kyllonen, 16 IBLA 86, 81 I.D. 364 (1974). The appellant has not met that burden.

As the Board recently stated in a recent case, where it reviewed an appraisal setting the fair market value of well water:

[T]he BLM conducted a survey of the existing market for well water in this area of Colorado. The conclusion of the appraiser, Jerry J. Rohr, was that the fair market value of the water is 6 cents per 1,000 gallons. The study appears to have been conducted with due regard to professional standards, and the conclusions are well supported by the facts marshalled by Rohr. Where the fair market value of the land or water has been determined in accordance with generally accepted appraisal procedures the conclusions of the appraisal will not be disturbed in the absence of a showing of error. See George D. Jackson, 20 IBLA 253, 257 (1975); Eugene G. Roguszka, 15 IBLA 1, 11 (1974). As appellants have failed to point to any specific error in the report, the conclusions of the appraisal are accepted as correct.

Park Central Water District, 28 IBLA 370, 371 (1977), __ I.D. __.

Without convincing evidence that the use and occupancy charges are excessive, the charges properly prescribed by an authorized officer will be sustained on appeal. Junction Oil Company, *supra*; Mountain States Telephone and Telegraph Company, 26 IBLA 393 (1976); Western Arizona CATV, 15 IBLA 259, 263-264 (1974). Appellant has failed to submit such evidence.

Therefore pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is affirmed.

Martin Ritvo
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE GOSS DISSENTING:

At the outset, the Department should resolve appellant's claim that Four States should not be required to bear the burden of the rental charge because of the public service which it renders. Appellant explains that it lost \$65,884 during 1974 in attempts to provide television service to a large underserved area. Appellant says that in many instances it provides the only television service available, particularly on the Indian reservations.

Under both 43 U.S.C. § 961 (1970) ^{1/} and the Federal Lands Policy and Management Act of 1976 (FLPMA), Sec. 504(g), 43 U.S.C. § 1764(g) (197₂), the charge for use and occupancy of rights-of-way is generally fair market value as determined by appraisal by an authorized officer. One exception is noted in 43 CFR 2802.1-7(c): "No charge shall be made for the use and occupancy of lands under the regulations of this part * * * where the use and occupancy are exclusively for * * * nonprofit * * * projects * * *." (Emphasis added.) The fact that appellant's business operated at a loss does not qualify it as a nonprofit project excepted under the regulation. Carson Ambulance Service, 8 IBLA 454 (1972). Appellant's argument that it provides television service to residents of neighboring Indian reservations and is a public service should, however, be evaluated under FLPMA, Sec. 504(g), 43 U.S.C. § 1764 (197₂):

Sec. 504(g) * * * Rights-of-way may be granted, issued, or renewed * * * to a holder where he provides without or at reduced charges a valuable benefit to the

^{1/} It was intended by Congress that 43 U.S.C. § 961 (1970) be repealed by FLPMA, but errors appear in the advance copy of 90 Stat. 2793:

"REPEAL OF LAWS RELATING TO RIGHTS-OF-WAY

"Sec. 706. (a) Effective on and after the date of approval of this Act, * * * the following * * * parts of statutes are repealed insofar as they apply to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System:

Act of	Chapter	Section	Large	43 U.S. Code
*	*	*	*	*
Mar. 4, 1911.....	238.....	36: 1253.....		951 [sic]
			(16 U.S.C. 5,	
			420, 523).	

"Only the last two paragraphs under the subheading 'Improvement of the National Forests' under the heading [sic] 'Forest Service'."

public or to the programs of the Secretary * * * for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest.

It is possible that a reduction commencing October 21, 1976, would be appropriate.

It is correct that appellant's assertions as to value of the right-of-way are not supported with an offer of detailed evidence, such as an appraisal report submitted by a competent real estate appraiser or other objective proof. See Mountain States Telephone and Telegraph Company, *supra*. A review of the record, however, indicates that the Board should take notice of such essential matters as the extent of rights granted and highest and best use. See El Paso Products Co., 10 IBLA 116 (1973). Departmental Manual 602.1.3 states that the Interagency Land Acquisition Conference, Uniform Appraisal Standards for Federal Land Acquisition (1973), is to be used as a guide for Bureaus which dispose of Federal property. American Telephone and Telegraph Company, 25 IBLA 341, 348-49 (1976). There is no indication that the appraisal was conducted pursuant to the Uniform Appraisal Standards.

The Uniform Standards provide at 34:

When an easement or servitude over land is condemned for the public use, the appraisal should be in the amount of the difference between the fair market value of the land before and the fair market value immediately after the imposition of the easement. Full consideration should be given to and due allowance made for the substantial enjoyment and beneficial ownership remaining to the owner, subject only to the interference occasioned by the taking and exercising of the easement.

In the case of easements such as those acquired for domestic electric, telephone or cable lines, where there is an established going rate per pole and per line mile, such transactions may be considered among other market data. In the absence of better evidence of market value, the "before and after" method discussed above should be employed.

There is no comparable lease data or other "better evidence of the market value" in the record. 2/ The easement is a part of a large

2/ Under BLM Instruction Memorandum No. 73-295 (July 13, 1973, expired December 31, 1974), "[T]he preferred method of estimating annual rental fees for communications sites is by direct comparison to similar sites which have been leased."

federal holding. It would therefore appear that the value of the easement can be computed most readily by evaluating the part taken, with an allowance for diminution or enhancement in value of the remainder. See also Uniform Appraisal Standards at 24-25. The appraisal is silent as to the effect of the grant on the underlying and the remainder of the Federal property.

Neither is the appraisal clear as to present highest and best use, so that comparisons with other properties may be made. See Uniform Appraisal Standards, 6-7, supra. ^{3/} In compiling the "sales * * * believed to best reflect values as they might relate to the subject," the appraisal at 11 omits the November 18, 1974, Sale #5, at \$613.16 per acre. Sale #5 is closest physically to the subject land. The appraisal relies completely on sales of several small parcels which may be suitable for business or residential purpose, with water more readily available and situated several miles from the subject tract. It would appear that the tract in Sale #5 should have been given greater weight, with allowances made for the fact that smaller areas such as herein involved are generally more expensive per acre. It is possible that the appraisal was more influenced by the use to which the land was put by Four States Television, rather than the highest and best use of the land in its undeveloped state. See American Telephone and Telegraph Company, supra at 352-56.

Additionally, the appraisal is based entirely on the value of the fee of other properties in the area and makes no adjustment for the fact that the communication site right-of-way granted does not include exclusive use of the site. 43 U.S.C. § 1763 (197_); 43 CFR 2801.1-5(1); see Southern Oregon Timber Industries Association, A-30815 (March 26, 1968). There is no allowance in the appraisal for the fact that a Government grantee must agree to comply with those provisions of 43 CFR 2801.1-5, which provisions would tend to limit the value of the right-of-way as compared with a similar right-of-way on private lands. ^{4/} One important condition is that set forth in section 2801.1-5(m):

That the right-of-way herein granted shall be subject to the express covenant that it will be modified, adapted,

^{3/} Cf. Junction Oil Company, 28 IBLA 183 (1976), in which the highest and best use for the small tract being leased was clearly specified. Therein, lessee was entitled to exclusive use of the 4.735 acres of lots 6 and 7 outside the highway right-of-way.

^{4/} See BLM Instruction Memorandum No. 73-295, supra at Encl. 1-2, in which it is recommended the provisions of comparable private leases "be related, point by point, to BLM grants."

or discontinued if found by the Secretary to be necessary, without liability or expense to the United States, so as not to conflict with the use and occupancy of the land for any authorized works which may be hereafter constructed thereon under the authority of the United States.

Clearly an appraisal should assess the fact that a grantee could be evicted after constructing a valuable building.

The decision should be set aside and the case remanded. The record herein, together with new evidence submitted, should then be considered under the FLPMA and the Uniform Appraisal Standards.

Joseph W. Goss
Administrative Judge

