

Editor's note: Reconsideration denied by orders dated May 18, 1978 and Jan. 5, 1979; Appealed – stipulated dismissal and remand, Civ. No. 79-0042-G (S.D. Calif. Sept. 27, 1982)

JAMES W. SMITH

IBLA 76-144

Decided March 10, 1978

Appeal from determinations of the California State Office, Bureau of Land Management, imposing increased rental for communication site right-of-way LA 0163131.

Affirmed as modified and remanded.

1. Communication Sites–Rights-of-way: Generally

A communication site right-of-way granted on September 2, 1959, pursuant to the Act of March 4, 1911, 43 U.S.C. § 961 (1970), is subject to the periodic reappraisal under the terms of the specific grant and applicable regulations then in effect, 43 CFR 244.21(b) and (f) (1954).

2. Communication Sites–Rights-of-way: Generally

Second party utilization of a communication site right-of-way granted on September 2, 1959, pursuant to the Act of March 4, 1911, 43 U.S.C. § 961 (1970), is subject to BLM authorization under the governing regulation, 43 CFR 244.18(a) (1954).

APPEARANCES: James W. Smith, pro se;

Miriam Hendricksen, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This appeal stems from determinations 1/ of the California State Office, Bureau of Land Management (BLM), requesting the payment of arrears rentals and imposing revised rental charges for appellant James W. Smith's communication site right-of-way LA 0163131.

1/ Two BLM decisions, dated April 11, 1975, and February 2, 1977, are involved herein. The sequence of events comprising the involved

Appellant was granted this right-of-way on September 2, 1959, pursuant to the Act of March 4, 1911 (36 Stat. 1253), as amended, 43 U.S.C. § 961 (1970). ^{2/} The grant encompassed an acre upon public land within the NE 1/4 sec. 23, T. 18 S., R. 1 E., San Bernardino meridian, San Diego County, California. The grant was for a term of 50 years and the rental was \$55 per annum.

The regulation in effect at the time of the grant, 43 CFR 244.21(b) (1954), provided that the charge "for micro wave relay and communication sites other than radio and television broadcast sites shall be based upon the value of the land, but in no case will the annual charge be less than fifty dollars (\$50) per site.

43 CFR 244.21(f) (1954) further provided:

(f) At any time not less than five years after either the approval of the right-of-way or the last revision of rental charges thereunder, the authorized officer, after reasonable notice and opportunity for hearing, may review such charges and impose such new charges as may be reasonable and proper commencing with the ensuing calendar year.

During 1974, appellant's right-of-way was reappraised at \$1,500 annual rental. ^{3/} The BLM advised appellant that his right-of-way

fn. 1 (continue)

procedural history of this case is recited in the Board's Order of May 3, 1977, accepting the appeal. Said Order is appended to this decision.

^{2/} This Act was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2743, 2793, but existing right-of-way grants continue under the terms of its issuance. See FLPMA, section 509(a), 90 Stat. 2781, 43 U.S.C.A. § 1769 (Supp. 1977).

^{3/} The revised regulations in effect at the time are 43 CFR 2802.1-7(a) and 1-7(e). They provide as follows:

"(a) Except as provided in paragraphs (b) and (c) of this section, the charge for use and occupancy of lands under the regulations of this part will be the fair market value of the permit, right-of-way, or easement, as determined by appraisal by the authorized officer. * * *

"(e) At any time not less than five years after either the grant of the permit, right-of-way, or easement or the last revision of charges thereunder, the authorized officer, after reasonable notice and opportunity for hearing, may review such charges and impose such new charges as may be reasonable and proper commencing with the ensuing charge year."

had been reappraised at \$1,500 annually, for the lease year commencing January 1, 1976. It requested appellant to pay arrears rentals and to remit increased rentals, subject to protest or adjustment as a result of a hearing to be held in the matter of the rental increase. BLM further advised appellant that at least six secondary users of his site (other parties owning equipment thereon) were unauthorized users who were required to comply by filing the appropriate applications with BLM.

Appellant does not take issue with the merits of the reassessment of his right-of-way. Rather, appellant's contention is that the terms of his grant and the regulations then in effect operate to prohibit any reappraisal of his interest and therefore bar any reassessment of his rental. He suggests that an immutable 50-year contract was entered into which rendered his interest immune from the application of 43 CFR 244.21(f) (1954), supra, and that he has paid in full for his right-of-way. ^{4/} Appellant further contends that under the terms of his grant BLM has no authority to regulate secondary users of his right-of-way who have obtained his approval. Appellant requests a hearing on this issue and for the purpose of learning the identity of those BLM employees who applied 43 CFR 244.21(f) (1954), supra, retroactively to his grant. Statement of reasons, pp. 18, 33. ^{5/}

In its answer to the statement of reasons, BLM contends that by the terms of appellant's grant and the regulations then in effect, the rental rate may be increased to reflect the increased value of the site. BLM further contends that secondary users are not exempt from regulation by BLM.

The first issue is whether by the terms of the grant and the regulations then in effect the rental rate can be increased to reflect the increased value of the site.

[1] Appellant concedes that his right-of-way was granted pursuant to the regulations in effect on September 2, 1959. These regulations, as well as the document approving the right-of-way,

^{4/} He suggests that the total rental for the 50-year term of the right-of-way is \$2,750, and that he has paid \$3,060. Therefore, he reasons he is entitled to a refund of \$310.

^{5/} Since the original statement of reasons was filed, appellant has submitted additional materials which he has styled "Appeal" and an additional "statement of reasons." These materials pertain to the question of BLM authority to regulate secondary users and will be considered in relation thereto.

offer no support for the theory that an immutable contract was entered into or that the right-of-way could not be reappraised to reflect its current value. ^{6/} On the contrary, 43 CFR 244.7 (1954) specifically described the nature of the interest conveyed as "an easement, license, or permit in accordance with the terms of the applicable statute." Section 244.9(m), which appellant recognized as a governing provision in his letter of application for the right-of-way, subjected the grant "to the express covenant that it will be modified, adapted, or discontinued, if found by the Secretary to be necessary * * *." The crucial regulation, of course, was section 244.21(f) permitting review of charges and imposition of new charges. We are unable to discover any facts of record which would support the theories advanced by appellant. The embellishments he would attach to his interest are simply not cognizable under the regulations in effect when his right-of-way was granted, and are not defensible within the perimeter of the present regulations, 43 CFR 2802.1-7(a) and (e). ^{7/}

Appellant has failed to show how he has been deprived of some right by the application of the regulations to his interest. We conclude that there is no merit in this portion of the appeal.

[2] The second issue is whether, as appellant alleges, BLM lacks authority to regulate secondary users on his right-of-way. This allegation is unsupported in view of the pertinent regulation in effect at the time of the grant. That regulation, 43 CFR 244.18(a) (1954) provided:

(a) Any proposed transfer, by assignment, lease, operating agreement or otherwise, of a right-of-way acquired under any of the acts, except the act of March 3, 1891 (26 Stat. 1101; 43 U.S.C. 946-949), must be filed in triplicate in accordance with § 244.3 for approval; must be accompanied by the same showing of qualifications of the assignee as is required of applicants; and must be supported by a stipulation that the assignee agrees to comply with and be bound by the terms and conditions of the right-of-way. No assignment will be recognized unless and until approved.

Nothing in appellant's grant or in any other regulation then in effect permitted appellant to lease or grant use of a portion of his right-of-way to another party without BLM authorization. We conclude that by the terms of the specific grant and the regulations then in

^{6/} We note that appellant did not dispute the increase in annual rental from \$55 to \$400, and paid annual rental at the higher rate for a number of years.

^{7/} See note 3, supra.

effect, secondary users of appellant's site are not exempt from regulation by BLM. We emphasize that the grant to appellant was for his use of public land for a communications facility. The grant was not intended, or couched as *carte blanche*, to permit utilization of the land by others without BLM's sanction.

On the two issues discussed herein appellant has offered no proof, which, if established, would impel different legal conclusions from those reached in the decision below. Under these circumstances a hearing is not appropriate and the request therefor is accordingly denied. Kathryn Eluska, 23 IBLA 284 (1976). Such denial is without prejudice to appellant's right to a hearing pursuant to 43 CFR 2802.1-7(e) on the issue of the rental increase.

Therefore, 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 to the extent that they recognize the right of the Government to increase the annual rental charge after notice and opportunity for hearing, and that subleasing of the right-of-way is forbidden without BLM authorization. The record is remanded for further appropriate consideration.

Frederick Fishman
Administrative Judge

We concur.

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

MAY 3 1977

IBLA 76-144 : LA 0163131

JAMES W. SMITH

:
: Right-of-Way
:
: Appeal accepted

ORDER

On May 30, 1975, appellant herein filed a statement of reasons in his appeal of a letter from the California State Office, Bureau of Land Management, informing him of a proposed increase in rental for his right-of-way LA 0163131 and granting him the right to a hearing under the provisions of 43 CFR 2802.1-7(e). The letter from the California State Office was dated April 11, 1975. On May 5, 1975, appellant had requested that the hearing be scheduled not prior to 120 days from May 11, 1975. On September 4, 1975, this Board issued an order suspending consideration of the appeal until after a decision was reached in the appeal of American Telephone and Telegraph Co., docketed as IBLA 72-336 et al. No further action was taken on Smith's appeal. The Board issued a decision in the American Telephone and Telegraph case on June 30, 1976, 25 IBLA 341.

By Order of January 25, 1977, the Board recited the above sequence of events, and then went on to note that the "decision" which appellant purported to appeal was not a final decision within the contemplation of the applicable regulations, citing 43 CFR 4.410. The Board noted:

[s]ince it is our view that the case will not be ripe for review until after the contemplated hearing has been held and an appealable decision has been rendered, we are dismissing the appeal and remanding the case file to the State Office for further action in compliance with 43 CFR 2802.1-7(e) and the Board's decision in American Telephone and Telegraph, *supra*.

Upon receipt of the case file the State Office, on February 2, 1977, issued a decision holding the right-of-way for cancellation pending compliance with certain provisions of the regulations. Among the matters covered in this decision was a requirement that appellant within 30 days file the rental arrears for the years 1976-1977:

[A]t the increased rate of \$1,500 annually (Total \$3,000) subject to protest or pay the old rental rate of \$400 annually (\$800 total) subject to adjustment upon issuance of a decision by the Bureau as a result of a hearing to be held in the matter of the rental increase.

Additionally, the State Office required appellant to submit evidence that the receiver site was not abandoned, obtain approval for unauthorized secondary use of the site, and file an application under the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, to amend his right-of-way to include access rights.

On February 28, 1977, the decision of February 2, 1977, was modified to include the following paragraph:

This decision is interlocutory. Upon failure to comply with the requirement herein set forth within the time provided a decision shall be issued holding the right-of-way cancelled subject to the right to appeal.

Nevertheless, on March 5, 1977, appellant filed a notice of appeal contending that he was adversely affected by the demand for accrued rental. The case files were thereupon sent to this Office.

We note initially that we adhere to the principles implicit in the Board's Order of January 25, 1977: no appeal lies absent a final decision of an authorized officer of the Bureau of Land Management. However, our review of the case file indicates that because of a misapprehension on our part, the letter of April 11, 1975, which appellant had originally sought to appeal, was a final decision when viewed in light of appellant's contentions. Our Order of January 25, 1977, was premised on an assumption that appellant was objecting to the method and manner of the reassessment of the rental value of his right-of-way. In such case, the letter of April 11, 1975, was clearly not a final decision. It now appears that appellant's contention is that, quite apart from the present rental value of his right-of-way, the terms of his grant and the applicable regulations in effect at the time he took his grant operate to prohibit any reassessment of his rental. Indeed, appellant contends that he has, in fact, paid the entire 50-year rental due on his right-of-way and therefore no money is presently owing to the Government. Additionally, he appears to contend that under the terms of his grant the Government has no authority to regulate secondary users of his site, who have obtained his approval. When viewed in this light, we have determined that the letter of April 11, 1975, was a final decision within the contemplation of 43 CFR 4.410.

We have, therefore, decided to accept the appeal. We believe that the following questions are involved herein:

1. By the terms of the specific grant, LA 0163131, and the regulations then in effect, can the rental rate be increased to reflect the increased value of the site? See 43 CFR 244.21(b) and (e) (1954).

2. Assuming the answer to the first question is in the affirmative, what is the proper test for assessment: the value of the land, see 43 CFR 244.21 (1954), or the fair market value of the permit, see 43 CFR 2802.1-7(a)? Is there a different result depending upon which test is applied?

3. By the terms of the specific grant and the regulations then in effect, are secondary users of appellant's site exempt from regulation by the BLM? See 43 CFR 244.7 and 244.18 (1954).

As regards the other matters raised in the State Office decision of February 2, 1977, involving abandonment and the necessity of filing an application under the Federal Land Policy and Management Act of 1976, it is the Board's view that these matters are clearly interlocutory at the present time and the Board does not contemplate making any rulings thereon. The Board's only concerns at the present time are those enumerated above, and only matters relating thereto should be briefed at this time.

We are aware of the desire of both the appellant and the State Office that this case be quickly decided. Accordingly, we will give the appeal expedited consideration.

Newton Frishberg
Chief Administrative Judge

We concur.

Douglas E. Henriques
Administrative Judge

Frederick Fishman
Administrative Judge

