

DONALD R. CLARK  
C. REINHART & SON, INC.  
HARTWELL EXCAVATING CO.

IBLA 76-313  
IBLA 76-325  
IBLA 76-328

Decided January 31, 1979

Appeals from three decisions of the Idaho State Office, Bureau of Land Management, revising rental charges for appellants' communication site rights-of-way I-603, I-2939, and I-2566.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Regulations:  
Applicability--Rights-of-Way: Generally

Applications for rights-of-way on public lands pending on Oct. 22, 1976, are to be considered as applications under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), but existing regulations will govern the administration of public lands to the extent practical until new regulations are promulgated.

2. Appraisals--Communication Sites--Rights-of-Way: Generally--Words and Phrases

As used in 43 CFR 2802.1-7, "fair market value" of a communication site right-of-way is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desired but is not obligated to so use.

3. Appraisals–Communication Sites–Rights-of-Way: Generally

The comparable lease method of appraisal of microwave communication sites, which involves the comparison of comparable rental data from other leased sites with data from the subject site, is the preferred method of determining the fair market rental value of the right-of-way where there is sufficient comparable data available.

Appraisals of rights-of-way for communication sites will be upheld if no error is shown in the appraisal methods used by the Bureau of Land Management and the appellant fails to show by convincing evidence that the charges are excessive. Where an appellant has raised sufficient doubt that the Bureau properly considered the highest and best use of a right-of-way in determining comparability of other sites as a basis for the use charges, the case may be remanded for the Bureau to reconsider whether a further appraisal or adjustments in the appraised values should be made.

4. Account: Payments–Appraisals–Communication Sites: Rights-of-Way: Generally

Where a grantee seeks renewal of a right-of-way for a communication site, the Bureau of Land Management should require an advance annual payment at the rate formerly charged until a new fair market value rate may be established by appraisal. In the absence of contrary directives, the guideline in 43 CFR 2802.1-7(e) should be applied to renewals of existing rights-of-way. Increased charges may not be imposed retroactively, but may be only imposed by the authorized officer, after reasonable notice and opportunity for hearing, beginning with the next charge year after the officer's decision.

5. Accounts: Payments–Appraisals–Rights-of-Way: Generally

Interest may be imposed on use charges for right-of-way sites depending on considerations of fairness and equity. In the

absence of contrary directives, interest may be imposed for occupancy of a site where use charges should have been imposed at the same rate as past permitted use. Also, interest may be imposed on increased charges for the period commencing with the date from which increased charges are established.

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

Under sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C.A. § 1764(g) (West Supp. 1978), payments for use of right-of-way sites should be on an annual basis at the fair market value unless the annual payment would be less than \$100. Therefore, although lands may be appraised for a longer future period of time, lump-sum payments for future years may not be demanded for amounts exceeding the statutory amount; instead charges for such amounts should be made on an annual basis.

7. Communication Sites—Rights-of-Way: Act of March 4, 1911

Where there are multiple users on the same communication site each user is individually responsible for the fair market rental value of his authorized use.

8. Administrative Procedure: Hearings—Communication Sites—Hearings—Rights-of-Way: Act of March 4, 1911—Rules of Practice: Hearings

The notice and opportunity for hearing envisaged by 43 CFR 2802.1-7(e) requires at a minimum that the lessee be provided with a copy of the appraisal report, that he be permitted to appear before the decisionmaker, that the decisionmaker not be the person who made or approved the appraisal, and that adequate records of the hearing conducted pursuant to the regulations be maintained.

9. Rights-of-Way: Generally—Rules of Practice: Appeals: Remand for Hearing

Where, on appeal, application for renewal of communication site rights-of-way was approved subject to condition of a lump-sum payment of an increased rental without a hearing, the decisions below will be set aside and the cases remanded for hearing and for other revisions consistent with principles enunciated in Board decisions to be followed in renewal of communication site rights-of-way and in setting increases in the amount of rental for such sites.

APPEARANCES: Donald R. Clark, pro se; M. B. Hiller, Esq., of Idaho Falls, Idaho, for appellant C. Reinhart & Son, Inc.; Clyde G. Charles, Vice President, for appellant Hartwell Excavating Co.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

These appeals are brought from separate decisions of the Idaho State Office, Bureau of Land Management (BLM), dated October 20, 1975, approving appellants' applications for renewal of their individual communication site rights-of-way under 43 U.S.C. § 961 (1970), subject to the condition of a lump-sum payment of the revised rental in the amount of \$1,800 prorated per grantee for the 8.48-year term of the renewal grant from July 12, 1972, to December 31, 1980. The three appeals involve concurrent right-of-way grants for the same tract of public domain land. As the cases arise from a similar factual situation and present similar legal issues, they have been consolidated herein for purposes of decision.

Contentions on Appeal

The essential contention of each appellant in his or its statement of reasons for appeal is that the revised rental value established for the right-of-way is unreasonably high and in excess of fair market value. More specifically, appellant Donald R. Clark (Clark) in IBLA 76-313 contends that the proposed rental rate would destroy his business, not only because of the high charge to him, but also because of the equally high charge levied against his customers (apparently referring to the other appellants in this case who held concurrent grants). Clark alleges this is unfair in view of his investment in the location.

C. Reinhart & Sons, Inc. (Reinhart), appellant in IBLA 76-325, alleges that the charge set for use of the right-of-way is far in excess of fair market value when it is considered that the land involved is only a fractional part of an acre and that all improvements to the parcel as well as maintenance of ingress and egress have

have been at the expense of users of the parcel. Counsel for this appellant has also requested a hearing regarding the charge.

The contention of Hartwell Excavating Co. (Hartwell) in IBLA 76-328 on appeal is simply that the proposed charge for the right-of-way is too high and not reflective of fair market value.

#### Factual Background

Clark was granted <sup>1/</sup> the initial communication site right-of-way (I-603) for the subject tract of land described as Site 5, located within the S 1/2 NE 1/4 of sec. 14, T. 2 N., R. 32 E., Boise meridian, Idaho. The grant was effective July 12, 1967, and was issued for a term of "5 years subject to renewal upon compliance with the terms, conditions and stipulations of the grant." The purpose of the grant was the installation of a small building, radio tower, and radio equipment for transmission and receipt of radio signals. At the time of the grant, the fair market value of the site was determined to be \$460 for the 5-year grant and this lump-sum rental was paid in advance by appellant.

On July 19, 1972, Clark was sent a letter advising him: 1) that his right-of-way grant expired July 12, 1972; 2) that if renewal of the grant was desired, a written request should be filed; and, 3) that a new appraisal would be required to determine the current fair market value rental. Clark filed a written request for renewal of the right-of-way on August 2, 1972.

Clark subsequently received the decision of BLM dated October 20, 1975, from which this appeal is brought. The decision informed him that the regulations provide for review of charges for right-of-way grants at any time not less than 5 years after the grant and, further, that the charge should reflect the fair market value of the right-of-way as determined by appraisal. The decision is apparently based on an appraisal report of the subject right-of-way appearing in the file.

The term of the renewal of the right-of-way on which the appraisal is based is 8.48 years from July 12, 1972, to December 31, 1980. The report compares the subject site with other communication sites under lease in the State of Idaho and concludes that the fair market value of the site in terms of rental is \$650 per year as of

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<sup>1/</sup> The right-of-way was granted under authority of the Act of March 4, 1911, 43 U.S.C. § 961 (1970). This Act was repealed by section 706 of Federal Land Policy and Management Act. However, section 709 of FLPMA, 43 U.S.C. § 1769 (1976), provides that no existing right-of-way shall be terminated but that the Secretary of the Interior may, with consent of the holder of the right-of-way, cancel the original right-of-way and in its stead issue a new right-of-way pursuant to Title V of FLPMA.

July 12, 1972. As the same tract of land is used concurrently by all the appellants, the rental was prorated among them to arrive at an annual rental of \$216.67 per grantee. The lump-sum rental for the 8.48-year term payable in advance as of July 12, 1972, was computed. Adjustments in the form of interest from July 12, 1972, to October 1, 1975, were made to this figure to arrive at the sum of \$1,800 per grantee payable as of October 1, 1975, to cover the rental for the term of the right-of-way from July 12, 1972, to December 31, 1980. Clark was informed that his application for renewal of the right-of-way would be held for approval for 30 days pending receipt of the lump-sum rental payment.

On October 8, 1969, appellant Reinhart was granted a subsequent (concurrent) communication site right-of-way (I-2939) on the same tract of land for the purpose of installing radio transmitting and receiving equipment. This grant also expired by its terms on July 12, 1972. Appellant paid a rental charge of \$25 in advance for the grant.

Reinhart was advised by letter from BLM dated July 18, 1972, that its right-of-way had expired on July 12, 1972. Reinhart was further informed that if renewal of the grant was desired, it should file a written request with BLM accompanied by an advance rental payment in the amount of \$25. A renewal application and a rental payment in the amount of \$25 was filed by Reinhart with BLM on August 7, 1972.

Subsequently, BLM issued a decision dated September 27, 1972, renewing Reinhart's right-of-way grant for an additional 5-year term expiring on July 12, 1977. The rental rate for the term was set at \$25.

Reinhart also received a decision from BLM dated October 20, 1975, with respect to renewal of appellant's right-of-way from which this appeal is brought. The substance of the decision is the same as the decision of the same date sent to Clark. Essentially, Reinhart was advised that reappraisal of the charge for the right-of-way was required to bring it into line with fair market value. This appellant was informed that the reappraised value was \$650 per year as of July 12, 1972; that appellant's pro rata share of the value for the 8.48-year term of renewal from July 12, 1972, to December 31, 1980, was \$1,800; and that appellant's application for renewal would be held for approval pending receipt of the rent.

Appellant Hartwell Excavating Co. was also granted a subsequent (concurrent) right-of-way (I-2566) for the purpose of installing radio transmitting and receiving equipment on the same tract of land effective January 28, 1971. Like the other grants, the term of the grant expired July 12, 1972. Hartwell also paid a lump-sum advance rental of \$25 for the term of the grant.

A letter dated June 4, 1973, was sent by BLM to Hartwell stating that the right-of-way had expired July 12, 1972. This appellant was

advised that if renewal of the grant was desired, a written request for renewal should be filed accompanied by an advance rental payment in the amount of \$25. Hartwell subsequently filed a written request for renewal of the right-of-way together with a \$25 advance rental payment on June 8, 1973.

Hartwell, like the other appellants in this case, received a decision of BLM dated October 20, 1975, regarding renewal of its right-of-way. The substance of the decision is the same as the decisions of the same date received by the other appellants. Hartwell was told that reappraisal of the charge for the grant was required to bring it into line with fair market value. Appellant was advised that the reappraised value was \$650 per year as of July 12, 1972; that appellant's pro rata share of the value for the 8.48-year term of renewal from July 12, 1972, to December 31, 1980, was \$1,800; and that appellant's application for renewal would be held for approval pending receipt of the rent.

The following issues are raised in these three cases:

- (1) To what extent does Title V of the Federal Land Policy and Management Act of 1976 (hereinafter cited as FLPMA), 905 Stat. 2743, and existing regulations affecting rights-of-way on public lands govern the instant cases?
- (2) What is "fair market value" as used in 43 CFR 2802.1-7?
- (3) How is fair market value determined in the appraisal of microwave communication sites?
- (4) Where a grantee seeks a renewal of a right-of-way for a communication site, what is the method of payment and for what past or future periods may the increased charges be imposed?
- (5) In what circumstances may interest be imposed on increased charges for a right-of-way site?
- (6) Under section 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C.A. § 1764(2) (West Supp. 1978), when should payments be made?
- (7) If there are multiple users of the same right-of-way site, may the rental be prorated?
- (8) In the case of an increase in right-of-way charges, is a hearing required, and, if so, what kind of hearing?

The above questions are answered in two recent lead cases by the Board involving rights-of-way. These are Full Circle, Inc., 35 IBLA 325 (June 19, 1978); and Circle L, Inc., 36 IBLA 260 (August 15, 1978).

Issues (1)-(6) are resolved by Full Circle, which held:

[1] Applications for rights-of-way on public lands pending on October 22, 1976, are to be considered as applications under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2743, but existing regulations will govern the administration of public lands to the extent practical until new regulations are promulgated.

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[2] \* \* \* As used in 43 CFR 2802.1-7, "fair market value" of a communication site right-of-way is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desired but is not obligated to so use.

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[3] The comparable lease method of appraisal of microwave communication sites, which involves the comparison of comparable rental data from other leased sites with data from the subject site, is the preferred method of determining the fair market rental value of the right-of-way where there is sufficient comparable data available.

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Appraisals of rights-of-way for communication sites will be upheld if no error is shown in the appraisal methods used by the Bureau of Land Management and the appellant fails to show by convincing evidence that the charges are excessive. Where an appellant has raised sufficient doubt that the Bureau properly considered the highest and best use of a right-of-way in determining comparability of other sites as a basis for the use charges, the case may be remanded for the Bureau to reconsider whether a further appraisal or adjustments in the appraised values should be made.

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[4] Where a grantee seeks renewal of a right-of-way for a communication site, the Bureau of Land Management should require an advance annual payment at the rate formerly charged until a new fair market value rate may be

established by appraisal. In the absence of contrary directives, the guideline in 43 CFR 2802.1-7(e) should be applied to renewals of existing rights-of-way. Increased charges may not be imposed retroactively, but are only imposed by the authorized officer, after reasonable notice and opportunity for hearing, beginning with the next charge year after the officer's decision.

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[5] Interest may be imposed on use charges for rights-of-way sites depending on considerations of fairness and equity. In the absence of contrary directives, interest may be imposed for occupancy of a site where use charges should have been imposed at the same rate as past permitted use. Also, interest may be imposed on increased charges due on an annual basis for the years prior to payment of such amount. [This means interest may be imposed on increased charges for the period commencing with the date from which increased charges are established.]

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[6] Under section 504(g) of the Federal Land Policy and Management Act of 1976, payments for use of right-of-way sites should be on an annual basis at the fair market value unless the annual payment would be less than \$100. Therefore, although lands may be appraised for a longer future period of time, lump-sum payments for future years may not be demanded for amounts exceeding the statutory amount; instead charges for such amounts should be made on an annual basis.

[7] Issue (7) relating to prorating rental charges among multiple users and issue (8) relating to holding a hearing and the kind of a hearing required where charges are increased are covered by Circle L, supra.

Thus, with respect to whether charges should be prorated among multiple users, Circle L states:

In American Telephone and Telegraph Co., supra, the Board discussed the difference between a primary user of a communications site and a secondary user of the same site. Therein the Board followed the definitions of a primary user as "the first occupant on a particular microwave site location" and secondary users as "any subsequent occupants of the same microwave site who enter on the site and construct their own facilities." 25 IBLA

at 351, n.10. The thrust of the discussion therein was that appraisals of grants to primary users should not reflect the increase of value to sites where the increase was the result of improvements which the primary user had made on the site. However, where secondary users were involved it was stated that it would be proper to have the charges reflect the fact that the sites were improved. This analysis, too, is obviously premised on the assumption that proration of costs among multiple users is not a proper method of ascertaining the value of the individual communications site. Accordingly, upon reconsideration of the correctness of the annual rental assessment the State Office may not permit proration of rental among multiple users.

[8] As to the right to a hearing on increased charges on the renewal of a right-of-way use, we note that in Circle L, the primary user, Circle L, was granted a right-of-way in accordance with 43 CFR 2234.1-6(e), now 2802.1-7(e), at an annual rental. Approximately 5-1/2 years later, an increase was announced for the ensuing year and for the next 5-year period. About the time of the announced increase, a second user began using the same right-of-way. Circle L states:

We also wish to address the question of the procedures to be utilized in reassessing the correctness of the \$600 evaluation. The regulations require "reasonable notice and opportunity for hearing." 43 CFR 2802.1-7(e). In American Telephone and Telegraph, *supra*, this Board eschewed any attempt to establish rigid procedures of universal applicability which would be applied to the hearing contemplated by this regulation. Rather, the Board sought to permit a degree of flexibility which would allow the State Offices to fashion procedures which might vary in individual cases owing to necessary exigencies, but which would provide all licensees with essential procedural protections. In Full Circle, Inc., 35 IBLA 325 (1978), this Board held that

The comparable lease method of appraisal of microwave communication sites, which involves the comparison of comparable rental data from other leased sites with data from the subject site, is the preferred method of determining the fair market rental value of the right-of-way where there is sufficient comparable data available.

We do not intend, herein, to formulate any universal procedure. But we do believe that certain elements are so basic to the concept of a fair hearing that their

absence vitiates the entire process. First, we believe it is absolutely essential that when a licensee objects to a proposed reassessment he be provided with a copy of the appraisal report which served as a basis for the increase. This was done in the instant case. Then, after permitting the licensee sufficient time in which to peruse the appraisal as well as develop those arguments and data which he believes might bring the appraisal into question, he must be afforded an opportunity to present his views to the decision-maker. The author of the appraisal should be available for interrogation at that time. What is crucial is that the deciding officer cannot be the same person who made or approved the appraisal upon which the request for increased rental was based.

When the licensee desires to exercise his right to present his views in person, the State Office must endeavor to preserve a clear record of what transpired at the meeting. This does not mean that each such encounter must be recorded or a verbatim transcript thereof provided, though either of these two procedures would clearly be permissible. What is necessary at a minimum is that notes be taken, and included in the case file, which indicate the specific contentions of the licensee. Should any documentary support for his position be presented by the licensee such submissions must also be preserved in the case file.

In the instant case, the State Office decision recites that a meeting was held on May 19, 1975. No other record of this meeting appears in the case record. In the future the State Office is requested to clearly document all such meetings.

[9] Applying the above standards to the instant cases, we note: We find that a hearing should be held in accordance with the standards set forth in Circle L, supra, in order to allow the user of the right-of-way to present his or its views about the proposed increase in rental charges. As was pointed out in Circle L, supra, the rental rate may not be increased for at least a 5-year period from the date of the grant (See 43 CFR 2802.1-7(e)). Also, the increase may not take effect retroactively. Rather, the increased charges may be imposed by the authorized officer, after reasonable notice and opportunity for hearing, commencing with the next charge year after the officer's decision. The increased rental may not be prorated among the three users herein but each individual user must pay the fair market value of his authorized use. We do not know whether all of the appellants have paid the annual use charges for the communication site from the date of the renewal until the time the increased rental is effective. In any event, as was stated in Full Circle, supra, a user cannot have

the use of the site free. Therefore, the appellants should pay, if they have not already paid, the annual charges at the original rate for the use of the site until the increased rental is effective, and they should pay interest on any amount of those charges that is due and unpaid.

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 set aside, and the cases are remanded for reconsideration of the rental charges in conformity with the opinion above.

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Anne Poindexter Lewis  
Administrative Judge

We concur:

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Edward W. Stuebing  
Administrative Judge

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Frederick Fishman  
Administrative Judge

