

DWIGHT L. ZUNDEL

IBLA 81-24

Decided June 18, 1981

Appeal from a decision of the Idaho State Office, Bureau of Land Management, setting the rental charges for use and occupancy of communication site right-of-way I-016361.

Affirmed.

1. Appraisals -- Communication Sites

Comparison of the subject communications site right-of-way with other similar sites under lease is an appropriate appraisal method for determining fair market value when current and reliable rental data for comparable sites is available.

2. Appraisals -- Communication Sites

Appraisals of rights-of-way for communications sites will be upheld if there is no error in the appraisal methods used by the Bureau of Land Management and appellant fails to show by convincing evidence that the charges are excessive.

APPEARANCES: Dwight L. Zundel, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Dwight L. Zundel (appellant) appeals the decision of the Idaho State Office, Bureau of Land Management (BLM), dated August 12, 1980, determining the annual rent appellant must pay for use of communication site right-of-way I-016361.

Appellant was first granted his right-of-way for use of the site on June 25, 1965, under the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1970) (repealed, Federal Land Policy and Management Act of 1976 (FLPMA) section 706, 90 Stat. 2743, 2793). The grant was for a term of

50 years. Over the ensuing years the rent was increased pursuant to applicable regulations from its original \$95 per 5-year term to \$495 for the 5-year period ending June 24, 1980.

On March 11, 1980, BLM approved a reappraisal of the fair market value of appellant's right-of-way which established a rental value of \$550 per year for the 5-year period beginning June 25, 1980. Appellant was notified of the reappraisal and revised rental by letter of March 17, 1980, which granted him the opportunity of a hearing to challenge the higher rent. Subsequent to the hearing, the decision of BLM confirmed the reappraised rental value of \$550. Appellant then took this appeal while paying the new assessment "under protest."

The relevant regulation governing rental for this right-of-way, 43 CFR 2802.1-7(a) (1979), states in part that "the charge for use and occupancy of lands under the regulations of this part will be the fair market value of the * * * right of way * * * as determined by appraisal by the authorized officer." ^{1/}

Fair market value is subject to change, sometimes drastic, over time. Periodic reappraisals are authorized under 43 CFR 2802.1-7(e) (1979), which states:

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.

In the instant case, the BLM appraisal was grounded on the comparable lease method, for which the Board has stated a preference in appraisals of communication sites, where sufficient data is available. Full Circle, Inc., 35 IBLA 325, 85 I.D. 207 (1978). Five comparable communication site leases were used in the analysis, and each was evaluated and compared with appellant's site on the basis of seven characteristics: Time, coverage, location, access, physical character, electric power, and overall. These factors are further explained in the appraisal report as follows:

^{1/} This is consistent with the current statutory provision governing rights-of-way, Section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1976), which states in part: "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 * * *," and the new implementing regulation, 45 FR 44533 (July 1, 1980) (to be codified at 43 CFR 2803.1-2).

Time considers the age of the lease and the effect of passing time on rental prices.

Coverage considers the area and the population which can be served or covered from the site or in the case of point-to-point systems coverage considers the distance from adjoining sites in the system. Sites which can reach a greater distance will have more value.

Location considers the distance from the site to the market and the isolation of the site. The distance to the market has a relationship on the types of equipment and the quality of some communication systems. The distance may also affect maintenance costs.

Access considers construction, security and maintenance involved in access to a site. Sites with seasonal or helicopter access will have less value than sites with all weather access.

Physical Character considers topography, soils (rockiness), vegetation (timber), and any other physical influence on the location which would limit the size and/or number of sites, and would affect the construction, operation and or maintenance of the facilities.

Electric Power reflects the availability and dependability of power at the site. Sites with commercial electricity will have more value than sites with power from generators.

Overall reflects the overall comparison of the subject with the comparables considering the relative importance of the individual factor comparisons.

The BLM appraisal report compared appellant's site to each of the other five sites under lease in terms of these characteristics and determined which leases were inferior and which were superior to appellant's right-of-way grant. The rentals charged for the five leases were then compared and an appropriate rental value for appellant's site was determined to be \$550 per year.

At the hearing requested by appellant, he voiced two major objections to BLM's appraisal. Appellant argued that frequency limitations imposed by the Federal Communications Commission (FCC) on his operation require use of a higher frequency signal than is optimal (ultrahigh frequency (UHF) in lieu of the very high frequency (VHF)) and that this restricts coverage more than BLM recognized. Further, appellant

alleged that the site at issue in this case is not sufficient for complete coverage of the Pocatello area due to the presence of physical barriers to signal reception which create shadows. Usage of the subject site is supplemented by appellant through use of an additional site. These same basic contentions are raised again on this appeal.

Testimony at the hearing from Larry W. Shiflet, the BLM appraiser, established that in appraising fair market value for the subject site two-way radio repeater sites (as opposed to sites involving other forms of radio frequency communication) were used for comparison (Tr. 9-10). The frequency limitation imposed by the FCC may limit coverage, but it does not impair the validity of the appraisal to the extent that it is based on a comparison with other sites subject to similar frequency limitations.

Appellant testified that the hills in Pocatello cause a problem in coverage requiring use of another repeater at a second site to cover the entire city for the police (Tr. 18-19). Shiflet conceded that BLM is not in a position to do an "electronic survey" of the site coverage (Tr. 22). The testimony, however, failed to establish that the subject site was unique in having some dead spots in the coverage or what difference in the value of the subject site this would make.

When asked at the hearing if he knew of any leases which would indicate the appraisal was too high, appellant responded by referring to the Fort Hall lease (the second of the comparable leases considered by BLM in the appraisal) and appellant's lease from Teleprompter at Kimport (Tr. 26). However, appellant acknowledged the latter lease is on State land (Tr. 19). Testimony of the BLM appraiser established that the State makes no attempt to determine and charge fair market value for their sites and the rental charge is below fair market value (Tr. 20, 27-28).

Although the Ferry Butte communications site lease on the Ft. Hall Indian Reservation has an annual rental of \$250, it was issued November 1, 1972, and is nearing the end of its 10-year term. Testimony at the hearing confirmed that rental rates have increased greatly in the past decade. A more recently issued communications site lease, dated June 1, 1978, on Teakean Butte for two-way radio repeater studied by the appraiser had an annual rental of \$600. At the conclusion of his analysis, the appraiser considered appellant's lease to be superior to the Ferry Butte lease in value, although inferior to the Teakean Butte lease. This creates considerable support for the appraised value of appellant's right-of-way.

The appraisal of the value of a right-of-way will be upheld on appeal if no error is shown in the appraisal method and appellant fails to show by convincing evidence that the charge is excessive.

B & M Service, Inc., 48 IBLA 233, 238 (1980); Full Circle, Inc., *supra* at 336, 85 I.D. at 213. In the absence of compelling evidence that a BLM appraisal is erroneous, such an appraisal generally may be rebutted only by another appraisal. Upon review of the record, including the appraisal report and the hearing, it is apparent that appellant has not made the necessary showing.

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

C. Randall Grant, Jr.
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Bruce R. Harris
Administrative Judge

