

DENVER & RIO GRANDE WESTERN RAILROAD CO.

IBLA 81-449

Decided September 15, 1981

Appeal from a decision of the Colorado State Office, Bureau of Land Management, determining the fair market rental of communications site right-of-way C 28233.

Set aside and remanded.

1. Appraisals--Communication Sites--Eminent Domain--Evidence: Generally--Federal Land Policy and Management Act of 1976

Under the Uniform Appraisal Standards for Federal Land Acquisitions (1973), evidence of sums paid by condemning authorities for similar properties, regardless of whether condemnation proceedings have begun, is inadmissible to determine the fair market value of a particular property.

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

Where the current fair rental value of a communications site right-of-way has been determined in accordance with accepted appraisal procedures and the lessee contends that the rental is excessive, the burden is upon the lessee to prove by positive, substantial evidence that the appraisal is in error. However, where the lessee has provided sufficient evidence on appeal to engender substantial doubt as to the data utilized and the conclusion reached in the appraisal report, the matter will be remanded for reconsideration.

APPEARANCES: H. A. Phillips, Director, Land and Contract Dept., Denver and Rio Grande Western Railroad Co., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The Denver & Rio Grande Western Railroad Company appeals from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated February 3, 1981, determining the fair market rental of a right-of-way for communication site C 28233 to be \$1,000 per year. Appellant's right-of-way application was submitted pursuant to section 501(a) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1761 (1976), authorizing the Secretary to grant rights-of-way for transmission or reception of radio, television, telephone, telegraph, and other electronic signals.

The gist of appellant's argument on appeal is that the \$1,000 annual rent is too high. BLM arrived at this figure by considering the rents derived from three communication sites which it regarded as comparable to that in the instant case. Appellant takes exception to BLM's practice, arguing that BLM incorrectly excludes from its comparative analysis those rents paid by condemning authorities, such as a governmental body or railroad, for comparable communication sites.

The method used by BLM in setting appellant's annual rent involves a minor alteration of the comparable sales approach set forth in the Uniform Appraisal Standards for Federal Land Acquisitions. 1/ The comparable sales approach provides that the best evidence of the fair market value of land is to be found in arm's length transactions of similar properties. Inasmuch as no sale is contemplated in the instant case, BLM used the rents received by three private lessors of properties that it deemed comparable in arriving at the \$1,000 annual rent. The aforementioned Uniform Appraisal Standards have been accepted by the Department of the Interior as a guide for all bureaus and offices. 602 DM 1.3; American Telephone and Telegraph Co., 25 IBLA 341 (1976).

Under section 504(g) of FLPMA, the holder of a right-of-way must pay the fair market value of such right-of-way as determined by the Secretary. 2/ Fair market value is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the right

1/ These standards were the product of the Federal Interagency Land Acquisition Conference in 1973.
2/ Newly-issued regulations appearing at 43 CFR 2803.1-2 (1980) are consistent with this policy. Rental fees may be adjusted whenever necessary to reflect current fair market value (1) as a result of reappraisal of fair market values which shall occur at least once every 5 years, or (2) as a result of a change in the holder's qualifications. 43 CFR 2803.1-2(d)(1).

to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desires but is not obligated to so use. Full Circle, Inc., 35 IBLA 325 (1978); American Telephone and Telegraph Co., *supra*;

[1] BLM's practice of excluding rentals paid by condemning authorities from its comparative analysis is consistent with the Uniform Appraisal Standards. Although phrased in terms of sales rather than rentals, the Uniform Appraisal Standards are otherwise on point:

Price paid by a condemner for similar property: Based upon a variety of reasons, e.g., that such payments are in the nature of compromise to avoid the expense and uncertainty of litigation and so are not fair indications of market value, that such evidence complicates the record, confuses the issue, is misleading, and especially in condemnation cases, raises collateral issues as to the conditions under which such sales were made, the overwhelming view of the various federal courts is that the sum paid by the condemner for similar land, even if condemnation proceedings have not begun, is inadmissible. However, there is a small minority view under which evidence of purchases by the condemner is admitted on the theory that objection to this type of evidence goes to its weight, not its competency.

[Footnotes omitted.]

In Michael S. Deering, 33 IBLA 142 (1977), we held that an appraisal by BLM will be upheld unless appellant shows error by substantial and positive evidence in the method or facts upon which the appraisal is based. As quoted above, both the Uniform Appraisal Standards and existing case law 3/ support BLM's disregard of condemned interests in the instant case. No error having been shown in this respect, BLM's appraisal is properly upheld against the charge that the rents paid by condemning authorities were incorrectly excluded.

As set forth above, BLM calculated appellant's \$1,000 annual rent by comparing the subject right-of-way with three other rights-of-way deemed comparable. In this analysis, the subject site was rated as either inferior, superior, or comparable to each of the three sites on the following features: size, access, location, and physical characteristics. In addition, BLM considered whether the rents attributable to the three comparable sites had been recently set.

3/ Slattery Company v. United States, 231 F.2d 37, 41 (5th Cir. 1956), and cases cited therein at n.4. See also Nash v. D.C. Redevelopment Land Agency, 395 F.2d 571 (D.C. Cir. 1967), for a minority view.

On appeal, appellant maintains that the availability of access roads and electric power were overemphasized by BLM in its appraisal. Appellant notes that its microwave sites are inspected once every 2 months and its VHF sites once every 10 months. Four-wheel drive vehicles will be used in the summer and snow machines in the winter for inspection purposes. Its recent installations, appellant maintains, are solar powered, and hence electric service is not a necessity or a major concern.

In arriving at the rental figure at issue, BLM appraised the site sought by appellants for its highest and best use, i.e., as a communications site. In so doing, BLM properly considered the features of the site rather than the needs of appellant. The availability of electric power and access roads are proper considerations in comparing properties. Uniform Appraisal Standards at 9-10. In the absence of evidence that access and electric power normally are of no value to the holder of a communications site right-of-way, we believe BLM properly considered these factors. On the basis of appellant's submissions on appeal, we cannot find that BLM overemphasized the importance of these features.

[2] Appellant has also provided the Board with information concerning numerous rights-of-way, including data as to site location, size, agreement date, term, and annual rental, in an effort to show that an annual rental of \$1,000 is excessive. The assembled data, while impressive, is inadequate by itself to show conclusive error in BLM's reliance on the rentals derived from its three sample properties. Access to the rights-of-way listed by appellant is not reflected in appellant's information. Furthermore, a number of the lessees involved in appellant's list of rights-of-way are Governmental bodies, such as the Federal Aviation Agency and the Colorado Division of Communications, which probably possess the authority to condemn.

Nevertheless, the data provided by appellant with regard to 56 other sites, many of which were negotiated in a period contemporaneous with the accomplishment of the subject appraisal, are sufficient to engender substantial doubt as to the propriety of the data utilized by BLM and the conclusion reached. Since appellant's data were introduced into the record for the first time on appeal, we assume that the BLM appraisal personnel have not had an opportunity to consider them.

Moreover, our review of the record reveals that on Nine Mile Hill, the location of the subject site, there are five other communications sites held by different lessees of BLM. There is no explanation in the appraisal report of why these sites were not taken into account, or why it was preferable to use as comparables more remote sites, including one as far away as Rock Springs, Wyoming.

In view of these concerns, it is appropriate that the matter be remanded to BLM for reconsideration of the appraisal. This is

not to be regarded as an order to conduct a reappraisal unless upon reconsideration such is indicated in the opinion of the BLM official responsible. However, the data and questions referred to above must be considered and addressed in the course of review and their disposition indicated in the case file.

Upon conclusion of the reconsideration, BLM will provide Denver & Rio Grande Western Railroad Company with a supplemental decision establishing the rental, which may be the same as, or higher, or lower than that set at present. The supplemental decision will, of course, be subject to appeal.

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 set aside, and the case is remanded for further action consistent herewith.

Edward W. Stuebing
Administrative Judge

I concur:

Anne Poindexter Lewis
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE PARRETTE CONCURRING:

Although I concur with the result in this case, I do not agree that there is substantial doubt as to the propriety of the comparables utilized by BLM in establishing the rental value of the site in question. There is no valid reason to exclude these data, any more than there is sufficient reason to exclude the data supplied by the appellant. In my view, all relevant data -- and, particularly, all relevant comparables -- should be taken into account by BLM in establishing fair market value.

Bernard V. Parrette
Administrative Judge

