

MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO.

IBLA 82-921; IBLA 83-125

Decided February 2, 1984

Appeal from decisions of the Colorado State Office and the Montrose District Office, Bureau of Land Management, establishing rental for communication site rights-of-way. C-25241, C-25361, and C-25361-A.

Affirmed.

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

Where BLM granted appellant's rights-of-way for communication sites under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1976), subject to a future appraisal, application of 43 CFR 2803.1-2(b) providing that BLM establish an estimated rental fee, collect the fee in advance, and adjust the advance rental fee upon receipt of an approved fair market appraisal, is not a prohibited imposition of a retroactive rental.

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

The preferred method for appraising the fair market value of nonlinear rights-of-way, including microwave transmission sites, is the comparable lease method of appraisal where there is sufficient comparable rental data and appropriate adjustments are made for differences between the subject sites and other leased sites.

APPEARANCES: Steven Miller, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Mountain States Telephone and Telegraph Company (Mountain Bell) has appealed from two decisions of the Bureau of Land Management (BLM) determining the annual fair market value rental for certain communication site rights-of-way.

On October 27, 1977, BLM granted Mountain Bell right-of-way C-25241 under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1976), for a microwave relay passive reflector and tower location site for a 30-year term. The site encompasses 0.23 acre of public land in the SW 1/4 sec. 28, T. 41 N., R. 7 W., New Mexico principal meridian, San Juan County, Colorado. The right-of-way was granted subject to formal appraisal, but a \$1,000 advance rental deposit was required of Mountain Bell. Following an appraisal completed in February 1982, the Colorado State Office, BLM, issued a decision on May 13, 1982, informing Mountain Bell that the annual fair market value of the right-of-way was \$350 for each year from October 1977 through September 1987.

On January 19, 1978, BLM granted Mountain Bell rights-of-way C-25361 and C-25361-A under Title V of FLPMA for two other microwave passive reflector sites for 30-year terms. These sites are located in sec. 36, T. 45 N., R. 8 W., New Mexico principal meridian, Ouray County, Colorado. Each site contains 0.23 acre. The rights-of-way also were granted with a \$1,000 advance rental deposit for each site, subject to formal appraisal. The appraisal was completed in February 1982 and on October 4, 1982, the Montrose District Office, BLM, issued its decision informing Mountain Bell that the rental was \$350 per year per site for the rental period January 19, 1978, through January 18, 1983.

In its statements of reasons for both appeals, appellant explains that at the time of the granting of the rights-of-way, BLM regulations provided that the charge for use and occupancy of a right-of-way was the fair market value as determined by appraisal and that at any time after 5 years the charges due under the grant could be reopened and reappraised. Appellant points out that it was not until 1980 that 43 CFR 2803.1-2(b) was promulgated, allowing BLM to establish an estimated rental fee, collect the fee in advance, and then adjust the advance rental fee upon receipt of an approved fair market value appraisal. Appellant contends that 43 CFR 2803.1-2(b) can only be applied prospectively and that any attempt by BLM to collect rental payments under this provision for periods prior to 1980 is invalid.

Appellant asserts that retroactive application is inconsistent with FLPMA, 43 U.S.C. § 1764(g) (1976), which states in pertinent 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." (Emphasis added.)

Appellant concludes that since FLPMA does not address retroactive rental and because 43 CFR 2803.1-2(b) was not promulgated until 1980, it should not be required to pay additional back rental amounts as set forth in BLM's decisions.

[1] We recognize that an administrative regulation, especially one which has the effect of creating an obligation, cannot be construed to operate retroactively unless the intention to that effect unequivocally appears. Miller v. United States, 294 U.S. 435, 439, reh'g denied, 294 U.S. 734 (1935); Kin-Ark Corp., 45 IBLA 159, 166, 87 I.D. 14, 18 (1980). However, as a general proposition, new procedural regulations may be promulgated with retroactive

effect. Sun Oil Co. v. Federal Power Commission, 256 F.2d 233 (9th Cir. 1958, cert. denied, 358 U.S. 872 (1958)). See Mountain States Telephone & Telegraph Co., 60 IBLA 221, 223 (1981). 1/

Moreover, in BLM's decisions granting appellant's rights-of-way, item H. specified: "Required Fair Market Value Payment: \$1,000 advance rental deposit has been paid pending completion of formal appraisal." Attached to the decisions were "Terms and Conditions of Grant." Item 17 provided in pertinent part:

Payment of the fair market value for the right-of-way upon a determination thereof by an authorized official of the Bureau of Land Management. The amount specified in item "H", "Details of Grant", is merely a deposit to insure payment of rent, and is not to be construed as having any relationship whatsoever to the fair market value of the right-of-way.

Appellant was on notice at the time the rights-of-way were granted as to the procedure being used by BLM. We fail to see that appellant has been prejudiced by the application of 43 CFR 2803.1-2(b).

We do not find that application of 43 CFR 2803.1-2(b) is in conflict with section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1976). The language of section 504(g) clearly requires annual advance payments after the fair market value has been determined by BLM. Thus, a right-of-way applicant obtains a distinct advantage, in that use of the right-of-way does not have to be deferred pending BLM's accomplishment of an appraisal. We do not regard this as a prohibited imposition of a retroactive rental.

[2] Next, appellant asserts that the fair market rental of \$350 per year determined by the appraisal for the use of each site is excessive. Appellant incorporates by reference all objections presented on appeal in American Telephone & Telegraph Co. (AT&T), 77 IBLA 110 (1983), which involved the reappraisal of microwave transmission site rights-of-way. 2/

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1/ In Mountain States Telephone & Telegraph Co., supra, the easement for a right-of-way was issued pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1976), and was not conformed to FLPMA, 43 U.S.C. §§ 1701-1782 (1976), in accordance with section 509(a) of FLPMA, 43 U.S.C. § 1769(a) (1976). Therefore, the Board held that 43 CFR 2803.1-2(d), which was issued pursuant to FLPMA and allows rental adjustment without a prior hearing, could not be applied retroactively. The Board remanded the case to BLM for determination under 43 CFR 2802.1-7(e) (1979), the regulation in effect when the right-of-way was granted, which provided that charges for use and occupancy of a communication site on public lands may be revised after notice and opportunity for a hearing.

2/ Following review of the Board's AT&T decision, appellant withdrew its objections to the \$350 annual rental for right-of-way C-25241. See Further Statement of Reasons, IBLA 82-921. Therefore, the remaining discussion pertains to the appeal in IBLA 83-125 concerning the appraisal of rights-of-way C-25361 and C-25361-A.

One of the issues in that case centered on the highest and best use of the property being appraised. AT&T contended that the highest and best use of the larger parcel for which either the subject site or any "comparable" site was either leased or sold is not determinative of the highest and best use of the smaller parcel itself. AT&T explained that all subject sites at the time of the taking were unimproved and without power or access; that they were each surrounded by miles of similar desolate hills; that none of them possessed any distinguishing or unique characteristics; and that the highest and best use of each site was found to be for investment speculation -- no different from the miles of surrounding land. AT&T contended that the fact that they were small sites taken from a larger governmental holding should make absolutely no difference to the appraiser in determination of highest and best use or in the selection of comparable market data. The Board found that all parties were in agreement that the land involved has a highest and best use for investment speculation. The Board held that where the specific parcel for which a lease is sought differs in highest and best use from the remainder of a larger parcel of which it is a part, the proper highest and best use will be that of the specific parcel. But, the Board noted, the larger parcel must be considered when the question of consequential damages to the remaining land is at issue.

The essence of AT&T's argument was that the consideration of communication lease comparables requires advertance to the use of the parcel being leased, and therefore, cannot be allowed. AT&T argued that the fact that a user may intend a use which does not conform with the existing use of the surrounding land or larger parcel is wholly irrelevant either in determination of highest and best use or in the estimate of fair market value. The Board found AT&T correct insofar as the determination of highest and best use was concerned, but wrong in seeking to apply this standard to the ascertainment of the fair market value of the sites in question. The Board decided that it is proper to refer to intended use in ascertaining what are comparable transactions and stated as follows:

As we noted in Pacific Power & Light Co., 65 IBLA 50, 54 (1982), "The crucial issue, in any event, is not so much that of highest and best use as that of the value of the land. Viewed in perspective, highest and best use is merely a tool to determine what is, in fact, a comparable sale." The desired goal of any property appraisal is to determine fair market value, for purposes of either sale or rental. In American Telephone and Telegraph Co., [25 IBLA 341 (1976)], we noted that all of the parties agreed that, in the context of 43 CFR 2802.1-7(a) (1976), fair market value "is the amount in cash, or in 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 desires but is not obligated to so use." Id. at 349-50. In such a construct, however, reference to the intended use is absolutely essential. By way of example, a 20-acre parcel of land may have a highest and best use for livestock grazing. A private owner, who was willing to rent his land for forage purposes at a relatively low rate, would not necessarily offer the same rate of rental to a

corporation who intended to use his land for tailings disposal. Rather, quite apart from the ability or willingness of the corporation to pay higher rental, the use to which the land was to be put would properly be considered in setting the fee. It is, indeed, a reality of the marketplace that rentals are dependent, to a lesser or greater extent, upon the intended use of the lessee.

AT&T, 77 IBLA 110, 114-15 (1983).

The Board concluded that assuming that relevant site differences can be discounted, comparable leases for communication sites, negotiated by private parties in arm's-length transactions, involving land whose highest and best use is retention for speculative investment, are the best evidence of fair market value, for they are, in fact, the result of the meeting of the minds between a willing buyer and a willing seller. The Board held that the comparable lease rental approach in determining the fair market value is permissible, and that such comparable rentals are properly limited to those for similar communication sites.

AT&T contended that it is improper for BLM to use rental data from improved communication site leases because the availability of access and power makes them noncomparable. In AT&T, 25 IBLA at 352, we held that a reappraisal "should be based upon the physical condition of the right-of-way at the time the user properly commenced occupancy or at the time of grant thereof, whichever was earlier, with value adjusted to present value in that condition."

The Board stated a first user right-of-way should be reappraised by reference to its unimproved state. Therefore, in order to insure comparability when using improved leases, the appraiser must adjust for that factor. For Mountain Bell's sites, the appraiser stated in his report that the sites were inferior to the three rental sites used for comparison in regard to access. As for power, the appraiser stated that the subject sites were comparable to two of the rental sites and inferior as to one of the rental sites. Appellant has presented no evidence that BLM cannot make proper adjustments to comparables when access and power are present. While special care may be needed to properly adjust for the presence or absence of such amenities, we find that such adjustments are not unusual in real estate appraisals. AT&T, 77 IBLA 110, 118 (1983).

AT&T argued that it is improper for BLM to use rental data from communication site leases, stored in the Denver Data Bank, because of differences in highest and best use. In AT&T, 77 IBLA at 118, we found that to the extent that AT&T's objection goes to the use of comparable rental data where the highest and best use of the underlying land is something other than "investment speculation," we agreed with appellants and directed that such data not be used. However, insofar as AT&T's objection related to the use of comparable communication site lease data where the highest and best use of the land is for "investment speculation," we rejected their arguments for the reasons given above. In appellant's case, the appraiser used comparable communication site lease data, but failed to state whether or not the highest and best use of the land is for "reinvestment speculation."

AT&T contended that it was improper for BLM to use renegotiated leases as comparables because they may manifest a drastically altered bargaining relationship between the parties. We determined to disallow the use of renegotiated private leases as comparables in view of the substantial danger that, owing to the disparity in bargaining power, the lessor took advantage of his dominant position. AT&T, 77 IBLA at 118-19. However, the Board distinguished between use of renegotiated private leases and the use of renegotiated governmental leases as comparable leases. The Board noted that inequality of bargaining power does not arise in Government renegotiations. The Board explained that unlike the situation in private renewals where the lessors are normally neither constrained by statutory authority nor subject to independent review of the fairness of their assessment, the Government can only properly charge fair market value and cannot exact a premium based on inordinate bargaining leverage. Therefore, the Board found that there is no valid reason to bar the use of renegotiated governmental leases as comparable leases.

AT&T contended that it was improper for BLM to use private communication site leases as comparables because of qualitative differences between BLM rights-of-way and private leases. AT&T pointed out that BLM rights-of-way differ in that all grants provide for discontinuation or modification by the Secretary, nonexclusivity, and rental revision every 5 years. Each of these provisions is mandated by Departmental regulation.

The Board responded to that contention as follows:

We have recently recognized that the terms and conditions of BLM rights-of-way, where they differ from private lease comparables, may affect comparability, and that BLM appraisers properly took these differences into account. These differences included the possibility, even though deemed remote, of discontinuation or modification by the Secretary, nonexclusivity, and rental revision every 5 years. We note that, in some cases, private leases may be comparable to BLM rights-of-way with respect to certain terms and conditions. In such a situation, no adjustment need be made. But, in evaluating the comparability of private leases, BLM should take into account all of the differences which might affect fair market value. It may be that provision for lease termination, nonexclusivity, and the like may have only a limited effect upon fair market value. Absent evidence of this, however, we are not disposed to rule upon this question at the present time. If BLM believes that certain differences between private comparables and Government leases have no effect on ultimate comparability for valuation purposes, the basis for its belief must be documented.

AT&T, 77 IBLA at 119-20.

In appellant's case the appraiser stated that communication sites on privately owned land were used in his field research. The appraiser did consider the "time" factor which is one condition of a BLM lease that may differ from a private lease comparable. Time relates to the rental date of the subject site compared to the lease date of the site used for comparison.

This factor is important because rents, following the economic trend, have increased with inflation and most leases have adjustment clauses with 5-year periods. The appraiser stated that the rental date of the subject site is superior to one of the rental sites and comparable to the other two sites.

AT&T also contended that the rental data used in the reappraisals was unreliable because of the divergence between the low and high comparables. As OAD No. 77-30 notes, where rental data is acquired over a broad geographic area, such data should indicate a "reasonably uniform pricing pattern" such that "[d]ifferences between sites can be identified and by careful analysis some sites can be eliminated as comparables while adjustments or comparisons may be made for others." The Board explained that this is not to suggest that rental data must fall within a fairly narrow range, only that differences be explained by reference to some discernible market factor, whether it be the physical characteristics of the sites or the motivations of the parties. Here, Mountain Bell offered no evidence to establish that either all data is inherently unreliable or that BLM will be unable to identify and exclude truly anomalous comparables.

AT&T argued that the BLM rental data was unreliable on the ground that the rental values determined to represent fair market value of a leasehold bore no reasonable relation to the underlying fee value. The premise of AT&T's argument was that the rental value determined by the comparable lease method of appraisal should be somewhat similar to the value of the underlying fee determined by the comparable sales method of appraisal when subjected to a reasonable rate of return. In this sense, the comparable lease and comparable sales method of appraisals should be mutually reinforcing and appellants contended that they were not.

In reviewing some of the comparables used by BLM in developing fair market value in the AT&T case, J. A. Gallagher, who conducted an independent appraisal for AT&T, noted that most of the rentals used exceeded the fair market value of the underlying estate. He arrived at this conclusion by assuming that the rental represented a 10 percent rate of return on the value of the underlying base fee and then computing the per acre value. He concluded that, for "Comparable #049" the effect of an annual rental charge of \$1,800 was to value the land under lease at \$6,000,000 per acre. Obviously, the land was not worth anything near this amount. Thus, he concluded that the comparables were, by and large, meaningless and must, therefore, be presumed to be the result of inequality of bargaining power.

We responded to AT&T's contentions as follows:

The problem, however, is that this approach simply has no meaning insofar as communication site rentals are concerned. In *B & M Service, Inc.*, 48 IBLA 233 (1980), appellant made a similar argument objecting to an annual rent of \$500 for a site consisting of .003 acre. Appellant argued that this was, in effect, a rental rate of \$166,667 an acre (which would, under AT&T's analysis, represent a fee value of \$1,666,700 an acre), and further complained that the most comparable site was also assessed at \$500

even though it consisted of .23 acre, or 76 times more land. In rejecting this argument, the Board noted that application of the mathematical formula advanced by the appellant, assuming that the comparable site was correctly valued, would result in a finding that the fair market value of its site would be approximately \$6.57 annually, which, we noted even appellant had not suggested represented fair market value. In B & M Service, Inc., supra, the Board concluded "as regards communication sites, the size of the site is not of particular importance in ascertaining fair market value. \* \* \* While size may become a relevant factor in determination of rental when the area granted is above the average, even then, the rental is not directly related to the number of acres." Id. at 237.

AT&T, 77 IBLA at 121-22.

We reaffirm our conclusion in B & M Service, Inc., supra, that there is simply no direct mathematical correlation between size of a communication site and fair market rental, particularly where the size is in the subacre category.

In AT&T appellant contended that the rental data in the reappraisals were materially inaccurate and not adequately verified. These charges were documented. Mountain Bell has failed to submit any such documentation in this case.

We conclude that, under the guidelines enunciated in AT&T and reiterated here, BLM may use the comparable lease method of appraisal in appraising the subject properties.

Appraisals of rights-of-way for communication sites will be upheld if there is no error in the appraisal methods used by BLM and the appellant fails to show convincing evidence that the charges are excessive. Donald R. Clark, 70 IBLA 39 (1983).

An individual challenging a determination of fair market value made by officials of BLM bears the burden not only of establishing that errors in methodology occurred, but must also show that such errors had a direct causal relationship to the determination of fair market value so that figures derived by BLM are excessive. While appellant has suggested generalized error in BLM's approach, it has failed to establish how these errors directly impacted upon the specific assessments at issue. Thus, appellant has not met its burden.

The final issue which AT&T raised was whether BLM adequately took into account the benefits resulting to unleased Government land from the provision of access and power to the leased lands by appellant. This argument is not applicable to the present case because Mountain Bell's case involves an appraisal determining original charges for the use and occupancy of the communications sites whereas the AT&T case involved a reappraisal establishing increased rental charges. At the time of the appraisal, there was no power on appellant's site and access was a rough and rocky jeep trail.

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.

Edward W. Stuebing  
Administrative Judge

We concur:

James L. Burski  
Administrative Judge

R. W. Mullen  
Administrative Judge

