

JIM DOERING

IBLA 85-419

Decided March 20, 1986

Appeal from a determination of the California Desert District Office, Bureau of Land Management, setting rental fees for communication site right-of-way CA 8738.

Affirmed.

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

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease appraisal.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Fees--Rights-of-Way: Federal Land Policy and Management Act of 1976

Sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), authorizes the Secretary of the Interior to charge less than fair market value for right-of-way rental. However, a for-profit business whose principal source of revenue results from subleasing communication facilities is not entitled to a reduction or waiver of a rental fee based on fair market value merely by providing a service to Government agencies or representatives of Government agencies.

APPEARANCES: Brian D. McKay, Esq., Alhambra, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Jim Doering has appealed from a January 14, 1985, decision of the California Desert District Office, Bureau of Land Management (BLM), determining rental charges due for communication site right-of-way CA 8738.

On September 24, 1981, right-of-way CA 8738 was granted to Doering for a communications site and access to the site. The site is an irregular

shaped lot in NE 1/4 SW 1/4, sec. 12, T. 10 N., R. 2 W., San Bernardino Meridian (Black Mountain, Flash Two Peak), near Barstow, California. The lot contains approximately 10,000 square feet of land. The grant provided that annual rental payments would be "\$ 900 per annum, estimated and subject to adjustment by formal appraisal."

A comparable rent appraisal was completed by BLM on January 10, 1984, and the annual fair market rental value for CA 8738 was set at \$ 3,600. Doering was notified of the appraisal and the rent value in a notice dated January 31, 1984, but did not appeal from that decision. In this decision BLM stated the rental in the amount of \$ 3,600 was due for the period December 24, 1984, through December 23, 1985. In a second decision, dated January 14, 1985, BLM advised appellant the first letter was in error, the annual rental for the period commencing September 24, 1984, was \$ 3,600 in accordance with the appraisal, and an additional payment of \$ 8,100 was due for the 3-year period from September 24, 1981, to September 23, 1984. 1/ Doering appealed the second BLM decision.

In his statement of reasons, Doering argues that the rental assessed (\$ 3,600) is excessive for the rights granted and that the estimated amount (\$ 900) more closely represents fair market value. He asserts the following factors are indicative of the true market value: (1) the grant is not an exclusive right; (2) communication service is for a small market area; and (3) market demand is sharply declining due to the abundance of space made available through other rights-of-way granted by BLM in this area. He states he relied on the estimated rental value when he constructed a communications building at the site and contracted to provide communication services. 2/ He claims his rental income cannot be increased because of contract obligations and argues the return on his investment at the appraised rental amount (1%) therefore demonstrates the excessiveness of BLM's appraisal. Appellant also cites 43 CFR 2803.1-2(c)(3) and asserts a lesser fee would be applicable in this situation because he provides a valuable benefit to the public. He claims his tenants are Federal and local Government agencies benefitting from the rates he charges. 3/ In his supplemental statement of reasons, 4/ Doering presents two local communication site arrangements as being more comparable. He claims these examples represent a rate structure more comparable to the estimated \$ 900 rental amount. He challenges the process used when choosing the comparable rights-of-way reviewed in BLM's appraisal and asserts that several important factors were not adequately considered. Appellant argues the "income approach" of appraisal was improperly rejected by the appraiser in favor of "market comparison."

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1/ The latter amount represented the difference between the appraised fair market value and the estimated rent paid.

2/ After the right-of-way was granted, Doering constructed a 360-square-foot building on the site at an approximate cost of \$ 40,000.

3/ Appellant lists his tenants as: Federal Bureau of Investigation, Hi Desert Communications (providing local services for United States Army Intelligence), and the Police Department of the City of Barstow.

4/ By order of the Board of Land Appeals dated January 14, 1986, a copy of the appraisal report was forwarded to appellant. An opportunity was provided for submission of a supplemental statement of reasons.

[1] Under section 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), the holder of a right-of-way is required to pay annual advance rental equal to the fair market value rental of the right-of-way. This value is customarily established by an appraisal. BLM may allow use of a right-of-way prior to a formal appraisal, provided an estimated rental fee is received in advance. 43 CFR 2803.1-2(b); Mountain States Telephone and Telegraph Co., 79 IBLA 5 (1984). Under the program allowing pre-appraisal use, the estimated rental fee is subject to retroactive adjustment upon receipt of the approved fair market value appraisal. Id. at 7.

The Board will generally affirm a right-of-way rental appraisal unless appellant is able to demonstrate error in the appraisal method used by BLM or shows by convincing evidence that the charges are excessive. Glover Communications, Inc., 89 IBLA 276 (1985); Southern California Gas Co., 81 IBLA 358 (1984). In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal generally may be rebutted only by another appraisal. Id.

In the appraisal report at issue, BLM uses the comparable lease method of appraisal to determine fair market value. This is the preferred method for appraising the fair market value of communication sites when sufficient comparable rental data is available. Glover Communications, Inc., supra at 277; Mountain States Telephone and Telegraph Co., supra at 8-12. On January 10, 1984, BLM prepared an appraisal report for four separate communication site right-of-way grants (including appellant's) in the NE 1/4 SW 1/4, sec. 12, T. 10 N., R. 2 W., SBM (Flash Two Peak). As a basis for his determination, the BLM appraiser considered rental data for six right-of-way leases between private parties selected from the appraisal file of the California State Office, BLM. Although the comparable tracts are not in the immediate vicinity of CA 8738, the appraisal report noted that information on recent private transactions involving communication sites in the Barstow, California area was extremely limited. The only recent local transaction noted by the appraiser was a renewal of an older lease agreement which included unusual terms, rendering it inappropriate for use in formulating comparable market data.

Detailed information for each of the six private communication site rental agreements used for comparison was appended to the appraisal analysis. CA 8738 and the other three communication site rights-of-way were compared to the six selected sites with respect to the following factors: market location, physical characteristics, access and site amenities, electronic versatility, exclusive use, tenure, time, and size. The BLM appraiser ranked the sites at issue as being superior, inferior, or comparable to the comparison site for each factor and then made an overall comparison. 5/ The BLM appraiser concluded:

5/ The following six leases were reviewed:

<u>Lease No.</u> <u>(State Office Files)</u>	<u>Location</u>	<u>Comparison to</u> <u>Rental</u>	<u>CA 8738 site</u>
21	Marble Mountain (San Bernardino County)	\$ 1,800/yr.	Clearly Inferior

The cited leases show a rather wide range of \$ 1,800 to over \$ 12,000 per year. The first two, Marble and Sycamore give an indication for non-population oriented apparent single user sites, with Flash II clearly superior. Edom and McKittrick give an indication for multi-user, population oriented sites with the subject inferior. Both Toro and Tuscan Buttes give good indications for a medium density use towards a relatively small population, with the Tuscan Buttes Site considered being the most comparable.

Based upon these, and other known leases, it is my opinion that the fair market rental for a site on Flash II as of December 7, 1983 is \$ 3,600 per year.

Appraisal Report for Rights-of-Way Atop Flash II, at 14.

Appellant challenges BLM's selection of the sample sites. The burden is on appellant to show by convincing evidence that the charges are excessive. In his challenge to BLM's appraisal, appellant states he is unable to retain professional appraisers to challenge BLM's decision but presents two examples of communication site transactions in the Barstow area. The first example is a 2-acre communication site with improvements which, according to appellant, recently sold for \$ 20,000. The second site is a 60' x 250' lot rented under a 30-year lease at \$ 2400 per year (with a consumer price index adjustment limited to 7% per annum). Appellant also claims fees assessed by the U.S. Forest Service for licensees of communication sites on national forest lands in the area would be substantially less than the rental amount determined by BLM. <sup>6/</sup> Appellant, however, submits no comparison of his examples and the subject location, other than a comparison of the population served. His presentation is not sufficient to allow a

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fn. 5 (continued)

17	Sycamore Canyon (Riverside County) \$ 2,500/yr.	Inferior
2	Tuscan Buttes (Tehama County) \$ 3,600/yr. (adjusted by CPI)	Comparable
38A	Toro (Riverside County) \$ 5,340/yr.	Superior
26B	Edom Hill (Riverside County) \$ 6,000/yr.	Superior
66A	McKittrick Summit (Kern County) \$ 10,200/yr.	Clearly Superior

<sup>6/</sup> We are unable to substantiate appellant's depiction of assessed fees for a U.S. Forest Service right-of-way as anything more than an isolated incident for which the details are undisclosed. The Forest Service must also assess fair market value for use and occupancy of a right-of-way. See 36 CFR 14.26(a).

conclusion that the rental amount as determined by BLM exceeds the fair market value. Accordingly, appellant has failed to show by a preponderance of the evidence that the charges are excessive.

[2] Appellant asserts he qualifies for a reduced rental fee. The Departmental regulation he relies upon, 43 CFR 2803.1-2(c), reads:

No fee, or a fee less than fair market rental, may be authorized under the following circumstances:

(1) When the holder is a Federal, state, or local government or any agency or instrumentality thereof, excluding municipal utilities and cooperatives whose principal source of revenue is customer charges.

(2) When the holder is a nonprofit corporation or association which is not controlled by or is not a subsidiary of a profit making corporation or business enterprise.

(3) When a holder provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary.

This regulation was promulgated to implement the following portion of section 504(g) of FLPMA:

(g) 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: \* \* \* Rights-of-way may be granted, issued, or renewed to a Federal, State or local government or any agency or instrumentality thereof, to nonprofit associations or nonprofit corporations which are not themselves controlled or owned by profitmaking corporations or business enterprises, or to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary concerned, or to a holder in connection with the authorized use or occupancy of Federal land for which the United States is already receiving compensation for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest.

The legislative history of FLPMA contains the following comments on section 504(g):

This subsection provides that no right-of-way shall be issued for less than "fair market value" as determined by the Secretary. The proviso at the end of the subsection qualifies this standard where the application is a State or local government or a nonprofit association. In this case, the right-of-way may be granted for such lesser charge as the Secretary determines to be equitable under the circumstances. However, it is not the intent of this Committee to allow use of national resource land without charge except where the holder is the

Federal Government itself or where the charge could be considered token and the cost of collection would be unduly large in relation to the return received.  
[Emphasis added.]

S. Rep. No. 583, 94th Cong., 1st Sess. 72-73 (1975). The Board has interpreted section 504(g) to provide that free use of rights-of-way applies to agencies of the Federal Government and to those situations where the charge is token and the cost of collection unduly large. See Big Horn Canal Association, 76 IBLA 283 (1983). Based on the foregoing, we are unable to conclude that contracting to provide communication facilities for a Government agency would automatically enable the holder of a right-of-way to qualify for a reduced rental charge.

The purpose for which appellant contracted to provide services for the Government agencies identified was to generate a profit from the revenues received. Appellant has not demonstrated that his services were offered at a reduced rate in order to provide a public benefit. The governing statute and regulations specifically provide that the holder must provide a benefit without charge or at a reduced rate. Although we recognize appellant entered into contracts to provide services, based on the assumption his adjusted rental charges would be in an amount similar to BLM's pre-appraisal estimate, we are unable to afford relief from the express language of the statute and regulations. <sup>7/</sup> In fact, we must conclude it was not his initial or present intent to provide the services to the governmental agencies at a rate less than he would have charged private sector users. Accordingly, we must affirm in this decision to assess the full fair market value rental amount.

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.

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R. W. Mullen  
Administrative Judge

We concur:

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Franklin D. Arness  
Administrative Judge

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Will A. Irwin  
Administrative Judge.

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<sup>7/</sup> It would appear he initial estimate was in error. This is regrettable, and we would recommend greater care be used when setting the rental to be charged pending appraisal. By doing so, difficulties resulting from major increases in rental amounts could be avoided.

