

Appeal from a decision of the Redding, California, Area Manager, Bureau of Land Management, requiring payment of rental for communication site right-of-way CA-12929.

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.

APPEARANCES: Bob Breck, Vice President, Jancur, Inc., for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Jancur, Incorporated (Jancur), appeals from a December 5, 1984, decision of the Redding Area Manager, Bureau of Land Management (BLM), Redding, California, requiring payment of \$8,200 for rental of a communication site right-of-way CA-12929.

The right-of-way, consisting of an area 15 feet by 15 feet located on West Redding Ridge in lot 73, sec. 5, T. 31 N., R. 5 W., Mount Diablo Meridian, California, was originally granted to appellant on October 4, 1982, pursuant to section 501(a)(5) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a)(5) (1982). BLM's decision granting the right-of-way permitted "[c]onstruction, utilization, and maintenance of a communications building upon public lands to be used as a FM transmitter site (KEWB Radio)." The decision specified a 15-year term, and provided for a rental of "\$400 per year (estimated, subject to adjustment upon receipt of an approved fair market value appraisal) 43 CFR 2803.1-2(b)." By the terms of the grant, Jancur agreed that "the annual rental shall be paid in advance, subject to the BLM's right to appraise and collect additional fair market value rental when warranted."

On October 24, 1984, BLM completed its appraisal of the estimated fair market value rental of the right-of-way. Based upon the appraisal, BLM issued its December 5, 1984, decision determining the rental to be \$3,000 per year beginning October 4, 1982, the date the right-of-way grant was issued to Jancur.

In determining the total rental due as of the date of its decision, BLM calculated that the rental due for the period October 4, 1982, to October 3, 1983, was \$2,600 (\$3,000 rental due minus \$400 estimated rental paid). The same amount was deemed due for the period October 4, 1983, to October 3, 1984. An additional \$3,000 was deemed due for the period October 4, 1984, to October 3, 1985. Total rental due and payable was \$8,200. BLM called for payment of \$8,200 upon receipt of its decision and bill, and informed Jancur that failure to pay the rent in a timely manner could result in action to terminate the right-of-way grant. ^{1/}

On appeal Jancur asserts this is not a typical communications site. Jancur explains that it operates KEWB-FM, a class A low power FM radio station licensed to Anderson-Redding. Jancur alleges that as a result of FCC requirements, its transmitter location is unique because of its low elevation, which is not attractive to other communication firms. It further alleges it "will not be generating income from the site as other communication site right-of-way holders do." (Statement of Reasons at 1).

Jancur contends the 15 feet by 15 feet plot is "sitting on a ridge in a sparsely populated area and virtually unusable by anyone else at this time." (Statement of Reasons at 2). Jancur asserts that the \$3,000 per year rental fee, a 750 percent increase over the estimated \$400 per year rental fee, is too high. It states this rental is equivalent to the rental for a nice apartment located in Redding or a small house in the area of the right-of-way. Jancur also expresses its opinion that making the increase retroactive is unfair and that immediate payment in full is beyond its capability.

[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

^{1/} The BLM decision also set forth the following information:

"If you appeal this decision, you must either pay the adjusted rental under protest or pay the 'old' rental due and request a Secretarial waiver from payment of the disputed rental pending the outcome of your appeal. If a Secretarial waiver is desired, you must submit the following documents to this office together with your notice of appeal: (1) an agreement to set aside any amount disputed in an interest bearing account or similar financial arrangement, (2) agreement to pay any amount due to the Bureau of Land Management at the time of the final administrative decision, along with interest at the rate of 6-month treasury bills as of the date that the rental was due and compounded quarterly, and (3) a statement of reasons for the appeal."

The file shows Jancur submitted \$400 on Jan. 7, 1985. There is nothing in the file to indicate Jancur has requested a Secretarial waiver.

right-of-way. Jim Doering, 91 IBLA 131, 133 (1986); Horizon Communications, 91 IBLA 399, 400 (1986); Glover Communications, Inc., 89 IBLA 276, 277 (1985). 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); Jim Doering, *supra*; Mountain States Telephone & Telegraph Co., 79 IBLA 5 (1984).

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., *supra*; Southern California Gas Co., 81 IBLA 358, 359 (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. Jim Doering, *supra*; Glover Communications, Inc., *supra*; Mountain States Telephone & Telegraph Co., *supra* at 8-12.

In his appraisal report dated October 24, 1984, the appraiser stated that the land in question has a highest and best use as a communication site and that its rental can best be determined by comparing it with what is being paid for similar use at similar sites. For comparison, the appraiser selected five leases from the appraisal file of the California State Office, BLM, which were urban sites with the lessees in the broadcasting business and dependent upon advertising revenue. He explained these sites were similar to the subject site. This site was compared to the five selected sites with respect to time of issuance, location, site amenities (access to a road and commercial electricity), electronic versatility, and character of land (ease of construction).

Of the five leases analyzed showing a range in rental and population of service area, one site serves an area with a population similar to that served from the subject site. Based largely upon this lease, as supported by the other data, with a downward adjustment due to slight population differences, it was the appraiser's opinion that the fair market rental of the rights granted under CA-12929 is \$3,000.

Appellant makes a general assertion that the rent determined by BLM is excessive when compared to rents charged for residential use in the vicinity. However, appellant has shown no error in the appraisal methods used by BLM, nor has it provided another appraisal or any evidence that the charges are excessive, particularly in light of the rental rates for similar leases. Appellant has failed to show by a preponderance of evidence that the charges are excessive.

Appellant contends that making such a large increase retroactive is unfair. 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. Jim Doering, supra; Mountain States Telephone & Telegraph Co., supra at 7. Because this provision for retroactive rental adjustment was specifically set forth in the right-of-way grant, appellant was aware of the possibility of a rental increase when the right-of-way was granted. We fail to see that appellant has been prejudiced by the application of 43 CFR 2803.1-2(b). 2/

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.

R. W. Mullen
Administrative Judge

We concur:

John H. Kelly
Administrative Judge

Kathryn A. Lynn
Administrative Judge
Alternate Member

2/ A more careful initial evaluation by BLM may, however, have avoided the shock of having the rental value increased by 750%.

