

BIG SKY COMMUNICATIONS, INC.

IBLA 88-62

Decided August 21, 1989

Appeal from a decision of the Butte, Montana, District Office, Bureau of Land Management, establishing rental for communication site right-of-way M-67042.

Affirmed.

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

An appraisal of fair market rental value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

APPEARANCES: Werner G. Nistler, Jr., Chairman, Big Sky Communications, Inc., Beaverton, Oregon, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Big Sky Communications, Inc. (Big Sky), has appealed a September 25, 1987, decision of the Butte, Montana, District Office, Bureau of Land Management (BLM), determining the annual fair market value rental for communication site right-of-way M-67042 to be \$1,500 per year.

On August 7, 1987, BLM issued communication site right-of-way M-67042 to Big Sky, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. || 1761-1771 (1982). 1/ The site, which

1/ A special stipulation included with the grant provided: "The broadcast building and the tower shall be installed in the exact location of the abandoned Lumber Enterprises building and tower. The Holder shall remove the existing green building and tower from public land when installing the new equipment" (Grant Exh. A at 1).

is 40 by 40 feet and covers .037 of an acre, is located in the NE[^] SE[^], sec. 34, T. 12 N., R. 6 W., Principal Meridian, Lewis and Clark County, Montana. BLM granted the right-of-way subject to a formal appraisal and Big Sky submitted an advance rental payment of \$25.

Using the comparable lease method of appraisal, BLM appraised the fair rental value of the site at \$1,500 annually as of September 16, 1987. To obtain the appraised value, BLM compared four leases to the subject right-of-way on the basis of six factors. Those factors are the date of issuance, annual rental, electronic coverage, access, power, and stipulations. The appraiser first compared each of the other sites to Big Sky's right-of-way with respect to each factor separately, then determined whether as a whole each lease was superior or inferior to the subject communication site. Finally, the appraiser estimated the fair market value of Big Sky's site, based upon the time adjusted rent for the other sites.

Appellant presents two arguments on appeal. 2/ First, it claims the appraised value is higher than other sites and gives as an example a site in Lewiston, Idaho, which allegedly reaches a much larger population than the subject right-of-way. It asserts that the rent for both a building and the ground at Lewiston is about the same as the BLM appraised value of the communication site in this case, even though appellant must construct its own building. Appellant provides no further particulars on the Lewiston site. Second, it claims that because of its willingness to bear the economic burden of removing the existing building and tower and the fact that its improvements "will enhance and beautify" the area, it should be entitled to a reduced rental of \$300 per year.

[1] Pursuant to 43 U.S.C. | 1764(g) (1982), the holder of a right-of-way is required to pay rental annually in advance for the fair market value of the right-of-way when this value is established by an appraisal, although BLM may allow use of a right-of-way prior to a formal appraisal. Jim Doering, 91 IBLA 131, 133 (1986). 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. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal. Chalfont Communications, 108 IBLA 195, 196 (1989); Denver & Rio Grande Western Railroad Co., 101 IBLA 252, 254 (1988). The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease method of appraisal. Chalfont Communications, supra.

2/ In addition, Big Sky requests a modification of its right-of-way in order to allow utilization of a guy-supported tower, rather than construction of a self-supporting tower, which is presently authorized. Such a request may be made of BLM, not this Board. The decision under appeal does not address this issue. Thus, it is not properly before the Board. See 43 CFR 4.410.

Appellant has not shown that there was error in the appraisal method used by BLM or that the appraised rental charge is excessive. Its claim regarding the existence of the Lewiston site is unsupported by any evidence. Thus, there is no basis on which to compare that site with the communication sites selected by BLM as comparables. In addition, although appellant asserts that a proper rental should be \$300 per year, there is no indication that it utilized another appraisal in arriving at that amount. Thus, appellant has failed to rebut the BLM appraisal with another appraisal.

Appellant suggests that, because its activities will enhance the aesthetics of the site, its rental payment should be reduced. This argument accompanies its claim that the expense of removing the existing structures should result in decreased rental. Both of these arguments are without merit. The record shows that BLM's appraisal considered the effect of stipulations on fair market rental value, and specifically addressed appellant's removal responsibility. In comparing appellant's site with the other leases, BLM analyzed the "Lease Stipulations" factor. In each instance, BLM found appellant's site to be inferior based in part on the removal stipulation. Thus, BLM's fair market rental determination included consideration of the costs of removal. Furthermore, even if appellant could establish that its actions would beautify the mountain, such a claim would be based on the fact that it eliminated the existing structures, a requirement which received proper consideration from BLM in its fair market rental value analysis.

Accordingly, 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.

Bruce R. Harris
Administrative Judge

I concur:

James L. Burski
Administrative Judge