

SIERRA PRODUCTION SERVICE

IBLA 88-28

Decided March 11, 1991

Appeal from a decision of the Caliente Resource Area Manager, Bureau of Land Management, offering a noncompetitive occupancy lease and requiring fair market rental. CA 19078.

Affirmed in part, set aside in part and remanded.

1. Appraisals--Federal Land Policy and Management Act of 1976: Leases

Sec. 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1988), authorizes the Secretary to lease public lands for various uses including the development of small trade or manufacturing concerns. 43 CFR 2920.0-6(a) requires that land use authorizations be issued only at fair market value. An appraisal of fair market rental value for a commercial use lease will not be set aside on appeal if appellant fails to show error in the appraisal method used or fails to show by convincing evidence that the charge is 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.

2. Appraisals--Federal Land Policy and Management Act of 1976: Leases--Trespass: Generally

A decision determining back rental for a period of unauthorized use of a site used as an oil well servicing facility will be set aside and remanded where the record fails to establish how BLM arrived at the determination of past annual fair market rental value.

APPEARANCES: William A. Anderson, Esq., Bakersfield, California.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Sierra Production Service (Sierra) has appealed from a decision of the Caliente Resource Area, California, Bureau of Land Management (BLM), dated August 31, 1987, which offered Sierra a noncompetitive occupancy lease pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (1988), at an annual rental charge of \$3,600. BLM required Sierra to furnish a \$5,000 bond, pay \$3,600 for the first year's rental and \$2,400 representing one-fifth of the \$12,000

payment for 6-years' back rental for unauthorized use. BLM explained that Sierra would be billed yearly for the remainder of \$12,000 at \$2,400 per year over the 5-year term of the lease.

On July 23, 1970, BLM issued B&G Service Company a special land use permit (SLUP) for lands located in sec. 24, T. 31 S., R 22 E., Mount Diablo Base and Meridian, California, to be used for the purpose of operating a well service business. The term of the SLUP extended from July 23, 1970, to July 22, 1980. In November 1974, B&G Service Company was purchased by Sierra. Proper fees were paid during the 10-year term of the SLUP.

By letter dated July 10, 1980, BLM informed Sierra that the SLUP would soon expire and advised Sierra to submit a temporary use application. Sierra submitted an application dated August 15, 1980, but it appears that BLM took no action on it.

On May 27, 1986, Sierra filed an application for a lease under section 302 of FLPMA, 43 U.S.C. § 1732 (1988), for the lands in issue. In a land report dated May 12, 1987, the BLM realty specialist recommended that the lease be offered subject to appropriate conditions and stipulations.

The property located about 7 miles northwest of Taft, California, in Kern County, was appraised as of July 3, 1987, using the market data approach. In his report the appraiser determined that the highest and best use of the land was for an oil well service facility. The appraiser explained that most of the private land around Taft is owned by Santa Fe Energy Company or the major oil companies in the area. He noted that many of the oil-related businesses have their facilities on property rented from fee owners, and that Sierra is leasing the adjoining property upon which most of its facilities are located from Sun Exploration and Production Company (Sun). Consequently, the appraiser stated that it was not difficult to locate good comparable rental data for use in estimating rental for the subject land.

The appraiser compared the subject tract to four comparable private leases for oil-related business purposes in the Taft area. Comparable No. 1 involved a lease for 3 acres of adjoining land from Sun to Sierra. The appraiser concluded that this lease and the subject lease are identical in that they are adjoining properties leased and used by Sierra as an oil well service facility. Annual rental for comparable No. 1 is \$3,600 and the term of the lease is 5 years (Appraisal at 11).

The appraiser explained that the other three comparables support the rental being paid by Sierra to Sun. The appraiser noted that the rental for 2 acres for comparable No. 2 is set at \$1,400 per year and is based on a 1983 appraisal. The lease is reappraised at least every 5 years. According to the appraiser, an upward adjustment for time would likely increase the rent closer to \$3,600 since the rent paid by Sierra to Sun for the period from June 1981 to June 1986 was \$1,000 per year and similar to the \$1,400 per year of comparable No. 2 based on a 1983 appraisal. The appraiser stated that comparables Nos. 3 and 4 are less at \$1,800 per year and that

this is attributable mostly to the fact that the lease terms are monthly. The appraiser pointed out that the 5-year term for comparables Nos. 1 and 2 is much more desirable to a lessee than the monthly term offered in comparables Nos. 3 and 4 (Appraisal at 13).

Based on an analysis of the available data, it was the appraiser's opinion that the best indication of a reasonable, fair rent to be charged Sierra for the use of approximately 5 acres for oil well service facilities is the \$3,600 per year being paid by Sierra to Sun for the adjoining property. The appraiser reasoned that if Sierra is currently paying Sun \$3,600 per year for use of 3 acres based on a recently renewed 5-year lease (June, 1986) then a fair rent due the United States for use of the adjoining 5 acres should be near \$3,600 per year. The appraiser recommended that the rental under the proposed 5-year lease be set at \$3,600.

As for the back rent due the United States for Sierra's use from 1981 to present, the appraiser recommended a rental of \$1,000 per year based on the rental that Sierra paid to Sun for the same period. On August 31, 1987, the area manager signed the Categorical Exclusion Record recommending that no Environmental Assessment or Environmental Statement be prepared. An attachment to this document revealed that he approved the proposed action to issue the lease but decided that the back rental for the period 1981 to 1987 be assessed at the rate of \$2,000 per year, for a total back rental payment of \$12,000. He felt this was an equitable payment for the period of unauthorized use, based on the appraisal of the subject property.

In its decision dated August 31, 1987, BLM stated that FLPMA authorizes BLM to lease public lands for commercial purposes, such as Sierra's facility, and to require fair market rental for the use of these lands. Also, BLM referred to 43 CFR 2920.1 and 2920.7 which require BLM to collect any back rental for unauthorized use, ensure environmental protection, and allow BLM to require a bond. <sup>1/</sup> Therefore, BLM offered Sierra a lease with the requirement of funds for a \$5,000 bond, a \$3,600 check for the first year's rental, and a \$2,400 partial payment for the \$12,000 back rental.

In its statement of reasons Sierra describes the subject land as arid wasteland with the only redeeming factor being the oil-rich subsurface which is not in issue. Sierra points out that it leased the area from 1975 to 1980 for \$150. Sierra asserts that although the parcel consists of 4.84 acres, the useful land area consists of approximately 1.9 acres. According to Sierra the remainder of the property consists of drainage ditches, irregular unusable property, or roadways used by others.

Sierra states that gas and electricity on the site are provided by Sierra or its predecessors. Sierra asserts that Sun has extended a 2-inch waterline approximately 2 miles from the West Kern Water District facilities to bring water to the site, without which development would have been

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<sup>1/</sup> In its decision BLM cited only 43 CFR 2920.7, and omitted 43 CFR 2920.1-2 which provides for back rental.

impossible. Sierra notes that there is no ground water underlying the leased parcels or elsewhere in the general vicinity. Sierra states that since the proposed lease is for surface rights only, Sierra is required by section 5(a) and 8(a) of the lease to remove improvements when the lease terminates or if they interfere with mineral development. <sup>2/</sup>

Sierra does not object to paying fair market rental value for the proposed lease or for back rental but does object to paying the rental determined by the BLM decision. Sierra asserts that the rental rate for the Sun lease (comparable No. 1) should not be the basis for the rental for the lease in question. According to Sierra, the Sun lease does not reflect the current market value of the lease for two reasons: (1) Sun provides potable drinking water to the site; (2) Sierra operates five well-pulling rigs for Sun on a lease in the immediate area and in other locations within the State in which Sierra has an annual gross revenue exceeding \$1,000,000 per year.

Sierra asserts that a survey of the area indicates a fair market rental value of approximately \$20 per acre per year, and that property with substantial highway frontage is offered for sale at \$400 to \$500 per acre with little or no sales occurring. Sierra contends that there is no justification for a rental rate of \$743.80 per acre per year for surface rights that could not be sold for \$400 to \$500. Sierra points out that when computed on net usable acreage, the yearly rental for the BLM land is \$1,894.74 per acre per year.

Sierra contends that BLM has shown no reason for the requirement of a \$5,000 bond with BLM as security for the lease. Sierra points out that it and its predecessor have been in possession of the property for approximately 17 years and have always paid the rental promptly.

Sierra concludes that erroneous assumptions were made in BLM's appraisal and that the fair market rental value does not exceed \$100 per year. Sierra offers to submit an appraisal in the event a hearing is required, but suggests a better approach would be to revise the appraisal upon which BLM's rental decision is based.

[1] Section 302(b) of FLPMA authorizes the Secretary to lease public lands for various uses including the development of small trade or manufacturing concerns. 43 U.S.C. § 1732(b) (1988). Applicable regulations are found at 43 CFR Part 2920. These regulations require that land use authorizations be issued only at fair market value and only for uses that conform with BLM plans, policy, objectives, and resource management programs. 43 CFR 2920.0-6(a). Under 43 CFR 2920.1-1, BLM may authorize "[a]ny use not specifically authorized under other laws or regulations and not specifically forbidden by law" including "residential, agricultural, industrial, and commercial" uses. See Steve Medlin, 115 IBLA 92 (1990). 43 CFR

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<sup>2/</sup> Sierra refers to section 8(a) of the lease but does not mention section 5(a) which is actually the section requiring that a lessee remove the improvements upon termination of the lease.

2920.1-2 provides that any use other than casual use without authorization shall be considered a trespass. Under this regulation, a person in trespass shall be liable to the United States for the administrative costs incurred by the United States as a consequence of such trespass and the fair market value rental of the lands for the current year and the past years of trespass. 43 CFR 2920.1-2(a).

The fair market value in this case was determined by BLM in its appraisal report approved July 28, 1987. Generally, appraisals will not be set aside on appeal unless an appellant is able to show error in the appraisal method used by BLM or demonstrate by convincing evidence that charges are excessive. Phyllis E. Lewis, 113 IBLA 376 (1990); Gerald L. Overstreet, 112 IBLA 211 (1989); Lawrence Dupuis, 99 IBLA 174 (1987).

In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal. Big Sky Communications, Inc., 110 IBLA 213 (1989); Chalfont Communications, 108 IBLA 195 (1989); Denver & Rio Grande Western Railroad Co., 101 IBLA 252 (1988).

In this instance Sierra has applied to lease this site and has been offered a lease by BLM at a fair market rental. The rental value has been determined by BLM only after an analysis of the site with comparable sites has been undertaken. From our review we find that Sierra has not shown that there was error in the appraisal method used by BLM or that the appraised annual rental charge of \$3,600 per year is excessive.

In his report the appraiser offers an analysis of four comparables in the area, considering the differences and similarities of these tracts with the subject lease site in arriving at the fair market value. He explains that the 3-acre Sun lease on the adjoining property (comparable No. 1) creates "an almost perfect comparable." The appraiser points out that Sierra's facilities lie on both the subject site and the Sun property; that the rental of \$3,600 per year based on a \$100 per acre per year rate is current, being renewed for 5 years as of June 1986; that Sierra is making identical uses of both the subject site and the site leased from Sun; <sup>3/</sup> and that all structures and improvements related to the oil well service business are owned by Sierra (Appraisal at 13).

Sierra criticizes BLM's appraisal, contending that the adjacent Sun lease used as a comparable does not reflect fair market value for the term 1986-1991 or for the back years of 1980-1986 because Sun provides water to the premises. Sierra also states that Sun provides water to the subject site. Accepting as true Sierra's statement that there is no water on the site except that provided by Sun, the question becomes whether the cost of water on the site in this specific situation actually affects its fair market rental value. Sierra has made no assertion that it pays Sun for

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<sup>3/</sup> The appraiser notes that a residence for the foreman of Sierra is located on the property leased from Sun and may be slightly more important to their overall operation.

providing water to the subject site. (Cf. MCI Telecommunications Corp., 115 IBLA 117 (1990), a case in which appellant was required to pay \$1,800 annually to maintain access across either private land leading to the subject site or other private land.) The answer to this question can only be determined by analyzing the market data to see whether the cost of obtaining water affects the rental charged in comparable private lease transactions. In his report, the appraiser specified only that water was available on the four comparable sites. Neither Sierra nor BLM has provided an analysis of the market data which establishes that the cost of obtaining water generally affects the fair market rental value of a site. See MCI Telecommunications Corp., 115 IBLA at 126. Sierra has not shown that the cost of obtaining water affects the fair market rental value of the site. Similarly, Sierra has not shown that the fact that the lease requires the removal of improvements in some situations affects the fair market rental value.

Sierra also contends that the Sun lease does not reflect the current market value of the subject lease because Sierra performs oil service work for Sun. Sierra has not shown how this fact affects market value. We do not understand how this argument is beneficial to Sierra. On the contrary it seems that Sun might charge Sierra a lower rental because of the working relationship in which case the true fair market rental for the Sun lease would be higher.

Sierra asserts that a survey of the area indicates that the fair market value of the property is approximately \$20 per acre per year; that further investigation shows that property with highway frontage is offered for \$400 to \$500 per acre with little or no sales occurring; and that the yearly rental on the net usable acreage of the property computes at \$1,894.74 per acre. However, Sierra has failed to rebut BLM's appraisal with another appraisal. See Gerald L. Overstreet, 112 IBLA at 215.

[2] We find that BLM's decision establishing a fair market rental for the site at \$3,600 per year for the 1986-1990 term is justified. However, we question BLM's rental rate of \$2,000 per year for back rental. In Attachment A to the Categorical Exclusion Record approved August 31, 1987, the area manager approved the proposed action to lease the site but assessed back rental for the period 1981-1987 at \$2,000 per year for a total back rental of \$12,000. He stated "I feel this to be an equitable payment for the period of unauthorized use, based on the appraisal for the subject property." No explanation for rejecting the \$1,000 rental determination based on the appraisal report is included in the record. In its decision, BLM also failed to explain the basis for assessing rental at \$2,000 per year. The appraiser stated that the best indication of back rental due the United States for unauthorized use from 1981 through 1987 is the \$1,000 per year paid by Sierra to Sun for the same period (Appraisal at 14). <sup>4/</sup> In

<sup>4/</sup> By letter dated July 10, 1980, BLM notified appellant that its Special Land Use Permit C-1-1621 "expires on July 22, 1980." Thus, the period of

its decision BLM has doubled the rental as determined by the appraiser and has offered no justification for doing so. Since BLM has failed to provide a reasonable basis for that portion of its decision setting back rental at \$2,000 per year, we set aside that part of the BLM decision and remand the case to BLM for proper determination. See Colorado Interstate Gas Co., 94 IBLA 306 (1986). On remand BLM shall issue a new decision explaining how it arrived at the back rental and supplement the file accordingly.

Sierra argues that a bond is not necessary in this instance. Under 43 CFR 2920.7(g), the authorized officer may require a bond or other security satisfactory to such officer to insure the fulfillment of the terms and conditions of the land use authorization. A Conversation Record in the case file dated May 29, 1987, shows that BLM's Daniel Vaughn contacted Jones Construction, Inc., to inquire about equipment rental rates. The following calculation was made:

Normal size backhoe: \$70/hr  
Rough truck for hauling: \$65/hr

Estimate about 16 hrs work time for each of above to restore the site.  $16 \times \$70/\text{hr} \times 2 = \$2,240$ .

Vaughn noted that in a previous conversation with J&M Land Restoration, he was quoted rates for reseeding at about \$150-\$200 per acre, totaling approximately \$1,000 (4.8 acres X \$200). Vaughn determined that a bond should be required in the amount of \$3,240 (\$2,240 + \$1,000) rounded off to \$5,000. We find that BLM's decision to require a bond to insure that the premises are properly restored is reasonable and that the amount is justified by equipment rental and reseeding costs.

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 as to the rental charge of \$3,600 per year and the \$5,000 bond and set aside as to back rental and remanded.

Gail M. Frazier  
Administrative Judge

I concur:

Franklin D. Arness  
Administrative Judge

fn. 4 (continued)

unauthorized used for which back rent is due would run from July 1980 through July 1987, which would be 7 years as opposed to 6 years as referenced in the decision.