

OREGON BROADCASTING CO.

IBLA 88-396

Decided May 15, 1991

Appeal from a decision of the District Manager, Lakeview District Office, Bureau of Land Management, establishing rental for communication site right-of-way OR-35373.

Affirmed.

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

Where BLM granted appellant a communication site right-of-way under Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1988), subject to a future appraisal, application of 43 CFR 2803.1-2(c)(3)(ii), providing that BLM may establish an estimated rental fee, collect a deposit in advance, and adjust the advance deposit upon receipt of an approved fair market appraisal, was not a prohibited imposition of a retroactive rental.

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

Generally, the proper appraisal method for determining the fair market rental value of non-linear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

APPEARANCES: Carl M. Brophy, Esq., Medford, Oregon, for appellant; Donald L. Duskin, Oregon State Office, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Oregon Broadcasting Company has appealed from a decision by the District Manager, Lakeview District Office, Bureau of Land Management (BLM), dated March 24, 1988, increasing the rental rate for communication site right-of-way OR-35373. On October 14, 1983, BLM granted right-of-way OR-35373 to Oregon Broadcasting under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1988), for the construction, operation, and maintenance of a communication site facility, access road, and powerline on Stukel Mountain, located 10 miles southeast of Klamath Falls, Oregon. BLM issued the right-of-way grant, which affected portions of secs. 15, 3, 4, 5, and 10 of T. 40 S., R. 10 E., Willamette Meridian, Klamath County, Oregon, for a 20-year term. The right-of-way grant provided for an "estimated annual rental, subject to adjustment by formal appraisal," of \$750, and reserved BLM "the right to reappraise the right-of-way at intervals not exceeding 10 years and to collect any additional fair market rentals that may be determined by the reappraisal." Oregon Broadcasting uses the site for broadcasting KOTI-TV in the Klamath Falls area.

BLM completed its appraisal of the estimated fair market rental of right-of-way OR-35373 on August 18, 1987, concluding that the initial rental of \$750 per year for the right-of-way was "far below fair market rental in 1983." Relying on this appraisal, BLM issued the March 24, 1988, decision providing for a rental rate increase for the Stukel Mountain right-of-way from \$750 to \$2,900 annually for the period from October 14, 1983, through October 13, 1988, and from \$750 to \$3,200 annually beginning October 14, 1988. The decision stated that back rent for the 1983 through 1987 rental years amounted to \$10,750 and was currently due and payable.

In its statement of reasons (SOR), Oregon Broadcasting advances two primary arguments. First, it maintains that although the right-of-way provides for an "estimated annual rental subject to adjustment by formal appraisal, it is neither appropriate nor equitable that the appraisal should be delayed for several years and that the rental then be made retroactive to the original date of the grant. The retroactivity of rentals should not extend back past the current rent year, October 14, 1987 to October 13, 1988" (SOR at 2). Second, Oregon Broadcasting asserts that "the current rental and the rental for the period commencing October 14, 1988 should in no event exceed \$1,800 per year, which is the fair market rental determined by the Bureau of Land Management for a comparable television transmitter site on King Mountain in Jackson County, Oregon." *Id.* According to Oregon Broadcasting, "[t]he rental for the King Mountain site reflects a fair market rental, and \* \* \* there is no justification for a greater rental charge for the transmitter site of Oregon Broadcasting on Stukel Mountain." *Id.* at 3. We will address these arguments in turn.

[1] The Board has consistently rejected Oregon Broadcasting's first argument. In Jim Doering, 91 IBLA 131 (1986), BLM issued a communication site right-of-way on September 24, 1981, to Doering providing for annual rental payments of "\$900 per annum, estimated and subject to adjustment by

formal appraisal." Based on an appraisal completed on January 10, 1984, BLM issued a decision stating that the fair market rental value of the right-of-way was \$3,600 per year, retroactive to 1981. The Board upheld BLM's action, citing 43 CFR 2803.1-2(b) (1981). That regulation authorized BLM, in issuing rights-of-way under 43 CFR Part 2800, to "establish an estimated rental fee and collect this fee in advance with the provision that upon receipt of an approved fair market value appraisal the advance rental fee shall be adjusted accordingly." <sup>1/</sup> We stressed that "[u]nder the program allowing pre-appraisal use, the estimated rental fee is subject to retroactive adjustment upon receipt of the approved fair market value appraisal." 91 IBLA at 133; see also Mountain States Telephone & Telegraph Co., 79 IBLA 5 (1984).

To the same effect is Jancur, Inc., 93 IBLA 310 (1986), in which BLM issued a communication site right-of-way to Jancur in 1982 with an estimated rental of \$400 per year, subject to adjustment upon receipt of an approved fair market value appraisal, as provided by 43 CFR 2803.1-2(b) (1981). In 1984, after appraisal, BLM determined the fair market rental to be \$3,000 per year, retroactive to 1982. On appeal to the Board, Jancur argued, *inter alia*, that making the increase retroactive was unfair. Relying upon Jim Doering, *supra*, and Mountain States Telephone & Telegraph Co., *supra*, the Board again rejected this argument, stating that "BLM may allow use of a right-of-way prior to a formal appraisal, provided an estimated rental fee is received in advance." 93 IBLA at 312. We reject appellant's argument here as well.

[2] The preferred method for appraising fair market value of nonlinear rights-of-way, including communication sites, is the comparable lease method, where there is sufficient comparable rental data and appropriate adjustments are made for differences between the subject site and other leased sites. Communications Enterprises, Inc., 105 IBLA 132 (1988); High Country Communications, Inc., 105 IBLA 14 (1988); American Telephone & Telegraph Co., 77 IBLA 110 (1983); see 43 CFR 2803.1-2(c)(3). An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the charges are excessive. Absent a showing of error in the choice of appraisal methods used, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive. See, e.g., Southern Pacific Transportation Co., 116 IBLA 164 (1990); Pacific Bell, 104 IBLA 66 (1988); Mesa Broadcasting Co., 94 IBLA

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<sup>1/</sup> The current version of this regulation, 43 CFR 2803.1-2(c)(3)(ii), promulgated on July 8, 1987 (52 FR 25820), is identical in all material respects:

"To expedite the processing of any grant or permit covered by paragraph (c)(3) of this section, the authorized officer may estimate rental and collect a deposit in advance with the agreement that upon completion of a rental value determination, the advance deposit shall be adjusted according to the final fair market rental value determination."

381 (1986). However, even though an appellant does not submit a formal appraisal, if he submits information which leaves questions regarding the method of analysis of the comparable leases, the Board will set aside BLM's decision and remand the case for further appraisal. Lone Pine Television, Inc., 113 IBLA 264, 267 (1990); Communications Enterprises, Inc., *supra* at 135; Denver & Rio Grande Western Railroad Co., 58 IBLA 4 (1981). Our review of the record, set forth below, demonstrates that Oregon Broadcasting has not met this standard.

Oregon Broadcasting's communication site is located on Stukel Mountain, which, according to BLM's appraisal report, "is the second highest peak within 25 miles of Klamath Falls and is considered to provide the best location for line of sight radio transmission to Klamath Falls" (Appraisal Report at 4). Moreover, "[t]he top of this promontory is \* \* \* used for broadcasting television and radio signals due to its good coverage of the area." *Id.* Accordingly, BLM determined the fair market rental value on the basis of the highest and best use of the land as a "communication site for the reception and sending of radio and micro-wave signals." *Id.* at 6.

BLM employed the "market data approach" in conducting its appraisal of the Stukel Mountain communications site right-of-way, noting that such approach involves a comparison of "current sales or leases of properties similar to the subject, after adjustments for differences, to arrive at an estimation of fair market value," and is the "most equitable and accurate method of estimating fair market rental." *Id.* at 6-7. BLM reviewed 75 leases of communication sites in Oregon and Washington, but disregarded most because of major differences with the Stukel Mountain site.

BLM compared the Stukel Mountain site with four communication site leases which it deemed most similar. First, BLM considered a lease on the Cannery Mountain site that is used as a broadcasting site for KCRF, an FM radio station. Adjusted to the date of BLM's appraisal, the annual rental for this lease was \$2,438. BLM found the Stukel Mountain site to be superior to the Cannery Mountain site since the "Klamath Falls area \* \* \* has a much larger population than the Lincoln City area where the [Cannery Mountain] site is located." *Id.* at 11. It should be noted that BLM's record does not establish the rental history of the KCRF-FM lease and is actually in conflict as to what the rental was when the Appraisal Report was prepared. The Appraisal Report contains a data work sheet for this lease indicating both that the rental is \$200 per month and \$1,200 per year. One of these figures is obviously incorrect. On February 12, 1988, BLM issued an amendment to its Appraisal Report to determine the fair market rental of appellant's lease in 1983. This amendment indicates that the annual rental in 1983 was \$1,200 per year. Finally, the Appraisal Report contains an apparent reference to the KCRF-FM lease on Cannery Mountain indicating that the rental started at \$1200 per year in 1981 and was increased by the Portland, Oregon, Consumer Price Index (Portland CPI) (Appraisal Report at 7). In its Appraisal Report, for purposes of establishing the fair market rental of appellant's lease in 1988, BLM adopted the \$200 per month figure, or \$2,400 per year, without explaining these discrepancies (Appraisal Report at 11). Further, BLM adjusted this amount

to \$2,438 without explanation (Id.), probably to account for inflation. As discussed below, while these problems call into question the validity of using the KCRF-FM lease as a comparable, BLM's appraisal may nevertheless be affirmed.

Second, BLM considered another communication site lease on Stukel Mountain for radio station KLAD, for which the annual rental was \$3,000. BLM deemed this lease to be similar "overall," since they are both in the same area and are served by the same road. Third, BLM compared Oregon Broadcasting's right-of-way with a lease on Coburg Ridge for "a TV transmitter site with excellent coverage of the Eugene-Springfield area," used by KEZI-TV and KPNW-FM. Id. at 13. Annual rental for the Coburg Ridge site has been \$2,400 since 1980 and will continue at that rate through 1990. In BLM's opinion, the Coburg Ridge site is inferior to the Stukel Mountain site due to its location. BLM regards this rental as "below economic rent." Id. at 13. Fourth, BLM considered the Rose Mountain site, which is used as a television transmitter site for KVAL-TV. The annual rental for the Rose Mountain site was established in 1974 at \$2,400, and is adjusted at one half the Portland consumer price index annually. Annual rental for the Rose Mountain site, as adjusted to represent its value in 1987, was \$4,368.

Oregon Broadcasting did not submit another appraisal of the Stukel Mountain site, but rather filed an October 14, 1987, appraisal report and a consequent rental determination decision dated December 4, 1987, with respect to Oregon Broadcasting's King Mountain communication site. The King Mountain appraisal report was prepared by Richard Gilbert, who also appraised the Stukel Mountain site. He appraised the fair market rental for the King Mountain site at \$1,800 annually. Oregon Broadcasting contends that "[t]he rental for the King Mountain site reflects a fair market rental, and \* \* \* there is no justification for a greater rental charge for the transmitter site of Oregon Broadcasting on Stukel Mountain" (SOR at 3).

Oregon Broadcasting asserts that two of the four leases with which Gilbert compared the King Mountain site were also among the four with which he compared the Stukel Mountain site. According to Oregon Broadcasting, Gilbert deemed both the Stukel Mountain site and the King Mountain site to be superior to "the Cannery Mountain site" and concluded that Stukel Mountain and the King Mountain sites are both inferior to the Coburg Ridge lease. Oregon Broadcasting raises the question why, if these leases are truly comparable, Gilbert appraised the fair market rental value of the Stukel Mountain lease at \$2,900 annually from 1983 through 1987 and \$3,200 in 1988, while appraising the King Mountain lease at \$1,800. Oregon Broadcasting concludes that

[i]t is evident, therefore, from a review of both the Stukel Mountain and King Mountain appraisals, and the "comparables" used by the appraiser \* \* \* that an objective fair market rental determination for the Stukel Mountain site produces a rental lower than that of the fair market rental determination for the communications site of Oregon Broadcasting at King Mountain.

(SOR at 8-9). In Oregon Broadcasting's opinion, the rental for the Stukel Mountain site should not exceed \$1,800 per year, the rental for the King Mountain site.

In further support of the argument that BLM's appraisal of the fair market rental value of the Stukel Mountain site is excessive, Oregon Broadcasting has submitted to the Board an affidavit by Bill G. Kirk, an engineer with Oregon Broadcasting who is "thoroughly experienced and familiar with communication sites, and in particular with the communication sites located on King Mountain and Stukel Mountain, as well as numerous other Oregon Broadcasting communications sites" (SOR at 3). In his view, "the critical features that are considered in selecting a television transmitter site" are: (1) "[t]he area \* \* \* can be covered with clear signals from the transmitter site"; (2) "[t]he availability of good road access to the site"; and (3) "[a]vailability of adequate electric power for the facilities at the site" (Affidavit at 1 (Exh. C to SOR)). He states that "[t]here is substantially better access and electric power availability at King Mountain than at Stukel Mountain," and that "King Mountain has a considerably larger coverage area, both geographically and with respect to the numbers of receivers served from that site (three times more than Stukel Mountain)." *Id.* at 2. Thus, Oregon Broadcasting implies that the rental for its Stukel Mountain lease should be no more than the \$1,800 per year assessed by BLM for its King Mountain lease.

Kirk emphasizes that in order to use Stukel Mountain for communication site purposes, Oregon Broadcasting had to install a "phase master," a "device that permits a single-phase line, which is the line available at Stukel Mountain, to be utilized as a power source for a transmitter when three-phase power is unavailable." *Id.* at 2-3. Installation of this phase master cost Oregon Broadcasting \$13,000. Kirk states that "[f]or efficient and reliable operation at the Stukel Mountain transmitter site, three-phase power should be installed," requiring "a major expenditure of approximately \$115,000.00." *Id.* at 3. Moreover, "road installation and improvement costs that were incurred in the Stukel Mountain site totalled approximately \$28,000.00, and because of the harsh climate in the Klamath Falls area and the steepness of the grade, the road is difficult and expensive to maintain." *Id.* He asserts that

the revenue producing capability of the facilities at Stukel Mountain is significantly less than the facilities at King Mountain, and had we any indication that the initial rental of \$750 per year would, in a relatively short period, be more than quadrupled, we would have felt compelled to consider alternative sites for the transmitting facilities now located at Stukel Mountain.

*Id.* He contends that BLM failed to adequately consider these site-related cost factors in its appraisal of the Stukel Mountain site.

In its answer, BLM responded to appellant's contentions regarding the alleged superiority of the King Mountain site and other contentions presented by appellant. Kirk testified in his affidavit for appellant that

the distance of a transmitting communications site from either the broadcast station it serves or a population center is not of primary significance. He explained that so long as the transmitting facilities at the communications site can transmit a grade "A" signal to the broadcast station, distance is not a factor (Affidavit at 2). BLM responds that, from King Mountain, only the area around Medford can receive a class A urban signal, that Grants Pass and several other smaller communities cannot be reached with a class A signal, and that additional translators are needed to get adequate coverage (Answer at 1). The BLM appraiser considered that the 44,000 Medford population reached from King Mountain was similar to the 50,000 population coverage in Klamath County from Stukel Mountain (Answer at 2). Also, in evaluating the Stukel Mountain site, BLM's appraiser considered the difficult intermodulation problems and signal interference on King Mountain as detriments which were not present on Stukel Mountain. Id.

Kirk's affidavit indicated that the road access and power availability are better at King Mountain than at Stukel Mountain. BLM responds that the appraiser found that Stukel Mountain is a shorter distance from Klamath Falls than King Mountain is to Medford, and that he considered the shorter distance for maintenance to have an impact upon the relative value. As for road construction and reconstruction, the appraiser's use of three leases where road construction was needed provided comparables that addressed this consideration. Id.

Kirk noted the value of having three phase power. BLM states that a single phase 12KV power line serves the Stukel Mountain and the mountain commands rents from \$3,000 to \$4,320 per year utilizing the power as it now exists. Id. at 3.

BLM points out that, contrary to Oregon Broadcasting's references to the "Cannery Mountain site," BLM actually used two different comparables on Cannery Mountain for the King Mountain and Stukel Mountain appraisals. The comparable lease used for the Stukel Mountain appraisal was an FM station, a site requiring development costs and comparable to the subject site on Stukel Mountain. The comparable lease used for valuation of Oregon Broadcasting's lease for a secondary site on King Mountain was a TV cable lease on Cannery Mountain, which was a similar secondary developed site. Id. at 3.

Oregon Broadcasting argued that revenue returned from King Mountain is greater than that from Stukel Mountain because King Mountain has a greater receiving audience. BLM responds that analyses of rental assessment based upon revenue is value-in-use and not proper appraisal technique. Id. at 3.

Oregon Broadcasting contended that KLAD, an AM and FM radio station was not a comparable lease for the Stukel Mountain appraisal. BLM explained that the appraiser utilized the only commercial lease located on Stukel Mountain for comparison. According to BLM, commercial radio station sites lease for less than commercial TV sites. BLM regards private leases of commercial stations to be good comparables to consider as a basis for rental evaluation. Id. at 3.

Oregon Broadcasting noted that development cost of power for comparable No. 4 on Rose Mountain was not addressed in BLM's appraisal report. BLM responds that the Rose Mountain site was developed by the lessee during 1954-55 with a nominal power development cost assessed by Douglas Electric Company which levied costs via power charges. Road access was thought to have existed to some extent at that time, but the lessee had to improve the road quality. Id. at 4.

BLM concludes that since the comparable leases of communication sites support the determination of fair market rental, its decision establishing the rental should be affirmed.

Our assessment of the information submitted by appellant is that it is not sufficient to demonstrate that appraisal methods used by BLM are incorrect. Consequently, only another appraisal which establishes by convincing evidence that the rental charges are excessive, would justify setting aside the BLM decision. See Southern Pacific Transportation Co., supra; Mesa Broadcasting Co., supra. Kirk's opinion does not establish that the BLM analysis was faulty, and we are not persuaded by his opinion that defects exist in the BLM appraisal process to warrant setting the decision aside.

The Stukel Mountain appraisal compared four lease sites to the subject lease site based on use, location, coverage, power, and access. The rights-of-way are located on Cannery Mountain, Stukel Mountain, Coburg Mountain, and Rose Mountain. The property deemed most similar to the subject site was another communication site located on Stukel Mountain because it had the same coverage, access, and power as the subject site. The Stukel Mountain comparable lease transaction was confirmed in September 1987, with KLAD 960, Inc., the lessee. Rental for the lease term 1985 to 1987 was reported at \$250 per month. After adjustments for time, the rental was estimated to be \$3,170. Under "Other Comments" on the lease data form, the appraiser stated: "KLAD is negotiating now to extend lease until 1998. Anticipate they will pay the same amount as they are paying now \$250/month. Feel new Lessee who would come to Mt. would pay much higher rent estimate \$500/month." The subject lease was appraised at \$2,900 for the period from October 14, 1983, through October 13, 1988. Beginning October 14, 1988, the rental was determined to be \$3,200.

The fact that annual rental of \$3,000 was actually being paid from 1985 forward for a site on Stukel Mountain (the KLAD lease), highlights the reality that BLM's determination of fair market rental was properly based on considerations of what the market will bear. Kirk does not address the comparable lease located on Stukel Mountain. He does not suggest that the subject is not comparable, that the rental reported is not the actual rental paid, or that the rental is out of line with other actual rental rates for Stukel Mountain.

Although appellant, through Kirk's affidavit, was able to allege limitations of the subject lease similar to the concerns we found significant in Lone Pine, supra, BLM was able to find a comparable lease for the KLAD 960, Inc., transmitter. As a result, site-related considerations, including the limitations alleged by Kirk, would presumably have been taken into account

when the parties negotiated the rental for that lease. In sum, Kirk failed to address the critical facts that one of the comparables was a lease on the same site as the subject right-of-way and that, despite the presence of the shortcomings that Kirk alleges, KLAD 960, Inc., was willing to pay \$3,000 per year rental to use the site for radio broadcasting. We find that the appraised fair market rental of \$2,900 for the period from October 14, 1983, through October 13, 1988, and the fair market rental of \$3,200 for the period beginning October 14, 1988, was proper.

The King Mountain appraisal also considered four comparable leases. One of the leases considered was for the KEZI-TV and KPNW-FM broadcast facility on Coburg Ridge, which BLM also considered in the Stukel Mountain appraisal. The other sites were on Harness Mountain - annual rental \$1,361; North King Mountain - annual rental \$1,415; and Cannery Mountain (cable TV head-end receiver) - annual rental \$1,633. All of the leases were considered inferior to the King Mountain site except the Coburg Ridge lease which "has excellent coverage of the Eugene - Springfield area, making it superior." The lease site on Cannery Mountain was determined to be the most similar.

Appellant, through Kirk, argues that King Mountain is superior to Stukel Mountain as a communications site. Further, Kirk asserts that the appraisals of its Stukel Mountain site and its King Mountain site have two comparables in common, implying that the appraisals ought therefore to result in similar rental. As it is being assessed rental of only \$1,800 per year for its lease on King Mountain, appellant thus argues that the rental for its lease on Stukel Mountain should be no more than \$1,800. We reject this argument.

Appellant is wrong in its statement that BLM used two identical lease transactions as comparables in both the Stukel Mountain and King Mountain appraisals. It is true that, as appellant states, the lease at Coburg Ridge for KEZI-TV's and KPNW-FM's broadcasting facility was used as a comparable in both appraisals. However, appellant's assertion that BLM used the same lease on Cannery Mountain as a comparable in both appraisals is not true. Instead, BLM used two different and distinct lease interests, issued for different purposes and with different annual rentals, both of which are situated on Cannery Mountain. The Cannery Mountain lease used as a comparable for the King Mountain appraisal was for a "head-end receiver for cable TV" and produced annual rental of only \$1,320. The Cannery Mountain lease that BLM used as a comparable for the Stukel Mountain appraisal was for a radio broadcasting facility for KCRF-FM (a use more consistent with the use of the subject lease for television broadcasting) and evidently produced annual rental of \$2,400.

As there is only one lease interest in common between the subject appraisal and the King Mountain appraisal, and in view of the disparity in the level of uses that the subject and the King Mountain sites were being put to, it is not surprising that the appraisals resulted in widely differing rental. The difference in rental between the subject and the King Mountain sites is not impeached because the appraiser used one common comparable. This difference is explained where the appraiser found appellant's

King Mountain lease substantially less valuable than the Cannery Mountain broadcasting lease, while finding its Stukel Mountain lease more valuable than the King Mountain lease, but still less valuable than the Cannery Mountain lease.

While we do not rule out the possibility that an appellant could impeach an appraisal by pointing to another, lower BLM appraisal of an identical right-of-way, appellant has failed to establish that the King Mountain lease and the subject site are identical. BLM has explained in considerable detail in its answer why King Mountain is inferior to Stukel Mountain as a communications site. In these circumstances, the King Mountain appraisal is irrelevant, notwithstanding that it has one comparable in common with the subject appraisal.

In closing, we note that BLM's appraisal report for the Stukel Mountain lease is not without problems. First, as noted above, the report's rental history of the KCRF-FM lease, used as comparable No. 1, is contradictory and apparently incomplete. Second, although the report indicates that the Portland CPI would be used in the appraisal to adjust the comparable leases to the date of appraisal (Appraisal Report at 8), no calculations are included showing how the adjusted rental was calculated. The report also fails to distinguish between actual rental and rental "after time adjustment" for Leases Nos. 1 and 4, listing these amounts as the same (Appraisal Report at 11). Finally, the report contains references to various leases that are not used as comparables for determining the rental in connection with consideration of "time adjustment" (Appraisal Report at 8), "location" (Appraisal Report at 9), and "power and access" (Appraisal Report at 10). We perceive no reason for including leases in the Appraisal Report if they are not also used as comparables in determining the rental value.

Despite these problems, in view of appellant's failure to show that BLM failed to take into account significant differences between the comparables on which it based its appraisal and the subject lease or to discount the significance of the existence of a lease on the same site for a similar purpose, BLM's decision is properly affirmed.

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.

Gail M. Frazier  
Administrative Judge

I concur:

David L. Hughes  
Administrative Judge

## ADMINISTRATIVE JUDGE ARNESS DISSENTING:

The only issue of substance raised by this appeal is whether the administrative record made by BLM supports the decision under review. As the majority opinion explains in confusing detail, the appraisal that provides a foundation for the decision to assess appellant at an increased rate for the communication site on Stukel Mountain is problematic at best. The appraisal is internally inconsistent and, by finding sites valued lower than Stukel Mountain to be nonetheless comparable thereto, leaves questions concerning the method of analysis used by BLM to compare lease values. While the majority opinion tries to explain the "widely differing rental" found in a site considered, despite this anomaly, to be comparable by discovering "a disparity in the level of uses," this technique is unpersuasive unless the engineering evidence submitted during appeal by appellant's expert Kirk is also discredited. It is his data establishing relevant elements of proper communications site evaluation that engenders substantial doubt about the methods employed by the BLM appraisal, and requires the decision to be set aside to permit further evaluation. See Denver & Rio Grande Western Railroad Co., 58 IBLA 4, 7 (1981). Although BLM has replied to this evidence provided during appeal, it has not explained inconsistencies that Kirk's data revealed in the BLM appraisal. As a consequence, the analysis provided by the appraisal is revealed to be materially defective. In appraisal cases where the record is not adequate to support the action taken, BLM's decision must be set aside and the case remanded to permit further appraisal. Thomas L. Sawyer, 114 IBLA 135 (1990); Lone Pine Television, Inc., 113 IBLA 264 (1990); Communications Enterprises, Inc., 105 IBLA 132 (1988); Denver & Rio Grande Western Railroad Co., supra.

Because the record as presently constituted is inadequate to support the conclusion reached by the majority opinion, I must respectfully dissent.

Franklin D. Arness  
Administrative Judge

