

FIRST BROADCASTING OF NEVADA, INC.

IBLA 89-449

Decided August 9, 1991

Appeal from a decision of the District Manager, Carson City, Nevada, Bureau of Land Management, requiring payment of rental due for communication site right-of-way. N-38886.

Set aside and remanded.

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

Where BLM has set the annual rental charge for a communication site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charge and remand for a reappraisal and any necessary recalculation of such charges.

APPEARANCES: Stanley D. Klein, President, First Broadcasting of Nevada, Inc.

OPINION BY ADMINISTRATIVE JUDGE GRANT

First Broadcasting of Nevada, Inc. (FBN), has appealed from a decision of the District Manager, Carson City, Nevada, Bureau of Land Management (BLM), dated April 18, 1989, requiring payment of the rental due for communication site right-of-way N-38886. The decision noted that the appraisal of the site had been completed and the fair market rental had been determined to be \$2,700 per year. The District Manager required that rental in the amount of \$15,750 be paid to BLM for the period from issuance of the right-of-way on February 28, 1984, to December 31, 1989.

Effective February 28, 1984, BLM issued a 30-year right-of-way to FBN, pursuant to 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 (560 by 480 feet) for an AM radio station. The site includes two 180-foot guyed antenna towers, a communication building, and an access road located on 6.83 acres of land situated within the E $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 28, T. 20 N., R. 19 E., Mt. Diablo Meridian, Nevada. The right-of-way grant was issued subject to the expressed obligation of the holder to pay rental "on the basis of the fair-market value of uses

authorized by [the] grant" upon billing by BLM. In addition the holder agreed that the grant was subject to the applicable regulations governing rights-of-way contained in 43 CFR 2800.

The record shows an appraisal of the subject tract was requested March 6, 1984, by the Carson City District Manager. However, an appraisal of the estimated fair market rental value of this right-of-way was not completed until 1989 when an appraisal report was prepared by a BLM appraiser and was subsequently approved by the Chief, Branch of Appraisal.

In the report, the appraiser calculated the fair market rental value of the subject right-of-way employing the comparable lease method of appraisal. ^{1/} The appraiser concluded that the highest and best use of the subject property was for communication site use. Consequently, he selected five communication site leases in Nevada, Idaho, and California for analysis and comparison. The appraiser compared these leases with the subject right-of-way on the basis of various pertinent factors affecting rental value: time of lease issuance, location, tenure, size (acreage), access, and power (Appraisal Report at 19-20). The comparable leases established a range of rental values from \$7,474 to \$1,885 per year.

After rating the subject right-of-way as either inferior or superior to the comparable leases and making certain adjustments for the differences, the appraiser concluded that the fair market rental value of the subject site as of February 28, 1984, was \$2,700 per year (Appraisal Report at 32).

Based on the appraisal report, the District Manager required FBN to pay the rental due through December 31, 1989, in the amount of \$15,750.

FBN has appealed from the District Manager's decision, challenging the BLM appraisal for the principal reason that BLM failed to include the adjacent BLM communication site lease for AM radio station KOH as a comparable in establishing the rental value for appellant's lease. In its statement of reasons (SOR) for appeal FBN points out that the KOH site of 24 acres is located approximately 660 feet from appellant's smaller lease site of 6 acres and both sites are sufficiently similar that the KOH lease should be a very strong factor in determining the appraisal value for this lease. FBN objects that it did not receive adequate notice and an opportunity for a hearing as provided by 43 CFR 2802.1-7(e) and therefore requests that a hearing be granted to review the matter of the "erroneous and incomplete appraisal" (SOR Argument at 3-4).

[1] Section 504(g) of FLPMA, as amended, 43 U.S.C. § 1764(g) (1988), requires the holder of a right-of-way issued pursuant to FLPMA to pay annually in advance the "fair market value thereof as determined by the Secretary." Similarly, 43 CFR 2803.1-2(a) requires the holder of a

^{1/} In its appraisal report, BLM correctly defined fair market rental value as "the amount in cash, * * * for which in all probability the right to use the facility would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desires but is not obligated to use the site" (Appraisal Report at 9).

right-of-way to pay "fair market rental value as determined by the authorized officer applying sound business management principles and, so far as practicable and feasible, using comparable commercial practices." MCI Telecommunications Corp., 115 IBLA 117, 120 (1990).

Where BLM has appraised the fair market value of a right-of-way, we have consistently held that such appraisal will not be overturned on appeal unless there is demonstrated error in the appraisal method used or convincing evidence establishes that the appraised value is excessive. In the absence of a showing of error in the appraisal method used, a BLM appraisal may generally be rebutted only by another appraisal. Big Sky Communications, Inc., 110 IBLA 213, 214 (1989); Tortoise Communications, 105 IBLA 193, 194 (1988), and cases cited therein.

Appellant has not challenged BLM's use of the comparable lease method of appraisal. We have long held that such method is the preferred method for determining the fair market rental value of communication site rights-of-way when there is adequate data. Harvey Singleton, 101 IBLA 248, 250 (1988); Full Circle, Inc., 35 IBLA 325, 333, 85 I.D. 207, 211 (1978); see 43 CFR 2803.1-2(c)(3)(i) (rental for non-linear rights-of-way including communication sites based on "market survey of comparable rentals").

Appellant, however, finds error in BLM's application of the chosen method in this case, focusing on the appraisal's failure to consider or distinguish the adjacent lease issued to KOH in 1979 at a rental of \$2,100 per year. Appellant indicates that this is the most significant comparable lease and that it should have been considered because it was also issued for an AM radio station using two towers on the site and because of its close proximity to the FBN site, 660 feet away. Appellant states that when the BLM appraiser was asked why the KOH lease was not included in the appraisal of the FBN site he responded, "I am not going to use a government lease to set the value on the property" (SOR Facts at 4).

From our review we note that the BLM appraisal report included five comparable leases in Nevada and neighboring states for evaluation and comparison with the FBN site. The appraisal report noted in its market analysis that "the greatest weight should be given to properties most comparable to the property under appraisal, applying the three tests of proximity in time, proximity in location and similarity" (Appraisal Report at 18). It further noted that adjustments must be made for differences because no two properties are identical (Appraisal Report at 19).

It must be acknowledged from review of the record that none of the leases considered are as close in proximity to the subject site as the KOH lease. Indeed, one comparable was located in California and one in Idaho. Clearly, as to proximity in location the KOH lease would be far more appropriate than the other comparables and would have the most direct bearing on any appraisal of an adjacent lease. Further, it appears that the KOH site is used for a similar purpose, *i.e.*, AM radio broadcast.

As appellant has indicated, although there are several references to the KOH lease site in the report, there is no specific indication in the appraisal why this lease was not considered. The only basis given in the record for disregarding the KOH lease appears in a memorandum to the file from the appraiser, dated April 21, 1989, in which he refers to a conversation with appellant that day concerning objections to the BLM appraisal. When appellant indicated the rent was excessive and should be less than the amount established for the KOH site, the appraiser noted: "I replied that the KOH site was appraised in 1979 and should have been reappraised in 1984 and that a reappraisal at that time would have resulted in an increase in their rent."

As for this difference in proximity of time, it is true that some allowance or adjustment may be required for the KOH lease which was issued in 1979. However, two of the comparable leases were also issued in 1979, and two were older yet, issued in 1972 and 1977. One more recent comparable was issued in 1986. The comparison table in the appraisal report (Appraisal Report at 30) does show that the rentals relied upon for the older leases in 1979 were established at later dates in 1982 and 1983, while the rental for the 1972 lease was established in 1982. The rental for the 1977 lease was set at issuance in 1977. If the KOH lease is considered too old to warrant consideration as a comparable, or lacking sufficient similarities, the appraiser could have considered an upward adjustment to accommodate the 5-year difference or weighted its applicability for these reasons.

We are not persuaded, considering the reasons appearing of record, that the rental charge for the KOH lease should not have been considered or distinguished in the BLM appraisal. The Board has previously held that while no reversible error is shown where an appraisal of fair market value relies on private rather than Government lease transactions where the latter are not comparable, if nearby Government sites are similar they should either be used or an explanation given of why they were not considered. Full Circle, Inc., *supra* at 334, 85 I.D. at 211-12. Our review of the record indicates that BLM has failed to show that the KOH lease is an unreliable indicator of the fair market rental value of the subject right-of-way either because it is not comparable to that right-of-way or because the rental charged under the lease is not reflective of the interplay of free market forces. Under these circumstances, we are compelled to set aside the appraisal and remand to allow consideration of the KOH lease. Richard Boulais, 107 IBLA 109, 113 (1989).

With respect to appellant's request for a hearing regarding the appraisal of the right-of-way, we note that the regulation cited by appellant in support of the hearing request was promulgated prior to enactment of FLPMA to apply to rights-of-way issued under earlier statutory authority. See American Telephone & Telegraph Co., 61 IBLA 343 (1982). This regulation does not apply to rights-of-way issued pursuant to Title V of FLPMA. The regulations implementing Title V of FLPMA, unlike regulations implementing prior statutory authority, do not provide for a hearing as a matter of right on the question of the propriety of a fair market rental value determination by BLM. Richard Boulais, *supra* at 110 n.1. A hearing will only be ordered now, pursuant to 43 CFR 4.415, where the Board determines that there is

a material question of fact. In light of our finding that it is appropriate to remand the appraisal for further analysis, we find it appropriate to deny the hearing request.

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 set aside and the case is remanded to BLM for further action consistent herewith.

C. Randall Grant, Jr.
Administrative Judge

I concur:

John H. Kelly
Administrative Judge