

UNO BROADCASTING CORP.

IBLA 89-468

Decided September 23, 1991

Appeal from a decision of the Yuma District Office, Bureau of Land Management, fixing rental for communication site AZAR-033035.

Affirmed in part and vacated in part.

1. Administrative Procedure: Standing--Appraisals--Rules of Practice: Appeals: Standing to Appeal

The assignee of an unapproved assignment of a right-of-way has standing to appeal from a decision increasing the rental of the right-of-way.

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 nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of fair market rental value for a communication site right-of-way will be affirmed on appeal if an appellant fails to show error in the appraisal methods used or fails to show by a preponderance of the evidence that the charges are in excess of the fair market rental value.

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

Where the Bureau of Land Management is precluded by statutory proviso from expending funds in fiscal year 1991 to increase the fees charged for communication site rights-of-way, a decision reappraising the fair market rental value of the right-of-way may be vacated in part to reflect the lack of authority to collect the reappraised rental prior to Oct. 1, 1991.

APPEARANCES: Roy E. Ryan, Yuma, Arizona, for appellant; Fritz Goreham, Esq., Office of the Field Solicitor, Phoenix, Arizona, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE GRANT

UNO Broadcasting Corporation (UNO) has appealed from a decision of the Yuma District Office, Bureau of Land Management (BLM), dated March 29, 1989. The decision fixed the rental for communication site AZAR-033035 at \$6,000 per year commencing April 20, 1989. Use of this communication site as a television relay site was first authorized by a BLM decision of July 15, 1965, granting right-of-way AZAR-033035 to Desert Telecasting Company, Inc. <sup>1/</sup> Subsequently, by decision dated September 29, 1988, assignment of the communication site right-of-way to Sun Country Broadcasting, Inc., for purposes of FM radio broadcast was approved by BLM. Lands embraced in this right-of-way are located on Telegraph Pass in the Gila Mountains, east of Yuma, Arizona.

BLM's decision of March 29, 1989, cited the regulations at 43 CFR Part 2800 as authority for agency review of appellant's rental obligation. Regulation 43 CFR 2803.1-2 provides that the holder of a right-of-way grant shall pay annually, in advance, the fair market rental as determined by the authorized officer applying sound business management principles and, so far as practicable and feasible, using comparable commercial practices. This regulation also provides that BLM may reduce or waive the rental payment if, inter alia, the holder provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary.

The record contains an appraisal report prepared by BLM's Arizona State Office Appraiser. This report examined the rentals paid by the holders of nine comparable TV and FM broadcast sites. A comparison of AZAR-033035 with these nine sites was made with particular regard to coverage, agreement date, access, lease terms, electric power, and topography (Appraisal report, Feb. 9, 1989, at 27-29). After ranking AZAR-033035 as either superior or inferior to these nine sites, the appraiser determined by the comparable lease method that \$6,000 was the appropriate annual rental for the site at issue.

UNO appealed BLM's decision of March 29, 1989, and set forth its objections in a pleading filed April 27, 1989, quoted in full below:

UNO Broadcasting Corporation, the owner of radio station KTTI-FM, holds this right-of-way pursuant to an assignment made March 28, 1989. We have received Sue E. Richardson's letter of March 29, 1989, which contained notice of drastic increase in the annual rent. We hereby give notice of our appeal, pursuant to regulations set forth at 43 CFR Sec. 4.411.

Our reasons for this appeal include the following:

1. That \$6,000 exceeds the fair market rental required by 43 CFR Sec. 2803.1-2; and

<sup>1/</sup> The effective date of the grant was stated in the decision as Apr. 20, 1965.

2. That rental payment should be reduced or waived pursuant to 43 CFR Sec. 2803.1-2(b)(2)(ii), since FM radio service "provides without charge \* \* \* a valuable benefit to the public \* \* \*."

On May 26, 1989, counsel for BLM filed a combined motion to dismiss and answer. Therein, the Field Solicitor argued that UNO had no standing to appeal because an assignment of right-of-way AZAR-033035 to UNO was as yet unapproved. Technically, the Field Solicitor contended, until the assignment has been approved by BLM, UNO is not a party to the case and does not have the right to appeal under 43 CFR 4.410. Alternatively, the Field Solicitor maintained that UNO had failed to demonstrate that the appraisal method employed by BLM was erroneous or that the appraised value of AZAR-033035 was excessive.

A brief review of the record suggests that as of the date of BLM's decision, March 29, 1989, BLM had not approved an assignment of AZAR-033035 to UNO. The clearest indication of this fact appears on the face of the decision, which names Sun Country Broadcasting, Inc., as addressee, not UNO. The record identifies Sun Country Broadcasting as a party interested in transferring its Yuma radio station and right-of-way AZAR-033035 to UNO.

[1] If as the Field Solicitor contends, the assignment of AZAR-033035 is as yet unapproved by BLM, it does not follow that UNO lacks standing to appeal. Case law makes clear that an assignee pursuant to an unapproved assignment has standing to appeal from decisions adverse to its interests. Tenneco Oil Co., 63 IBLA 339, 341 (1982); Rosita Trujillo, 20 IBLA 54, 55 n.1 (1975). There can be no doubt that BLM's decision fixing rent at \$6,000 per year, an increase from the \$650 annual rent paid previously, is adverse to UNO's interests.

[2] More relevant to our review of this appeal is the Field Solicitor's argument that UNO has failed to demonstrate that BLM's appraisal method was erroneous or that the \$6,000 rental was excessive. When 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); Chalfont Communications, 108 IBLA 195, 196 (1989); Tortoise Communications, 105 IBLA 193, 194 (1988).

Appellant has not established error in BLM's use of the comparable lease method of appraisal. We have long held that this method is the preferred method for determining the fair market rental value of communication site rights-of-way when there is adequate data. Mountain States Telephone & Telegraph Co., 109 IBLA 142, 145 (1989); 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 rental"). Appellant's conclusory statements challenging BLM's fair market value determination lack a factual basis and do not satisfy the burden of proof which necessarily rests with UNO as appellant. Particularly lacking also is any factual support for the conclusion that UNO provides without charge a valuable benefit to the public.

[3] Subsequent to submission of the pleadings in the appeal, the Department of the Interior and Related Agencies Appropriation Act of 1991, P.L. 101-512, 104 Stat. 1915 (1990), was enacted on November 5, 1990. Section 321 of the Act provides:

None of the funds provided in this Act may be expended by \* \* \* the Bureau of Land Management to implement a new fee schedule or increase the fees charged for communication site use of lands administered by the \* \* \* Bureau of Land Management above the levels in effect on January 1, 1989.

104 Stat. 1977.

This statute was first construed in Communications Enterprises, Inc., 120 IBLA 146 (1991), an appeal involving, as here, an increase in the rental fixed by BLM for a communication site right-of-way. The Board found in that case that BLM's increase in rental was proper, but held that the statute precluded BLM from collecting this increased rental prior to October 1, 1991. Although BLM's decision increasing the rental predated enactment of the statute, any effort to collect the additional rental prior to October 1, 1991, would require an expenditure of funds in violation of the statutory proviso, the Board stated. 120 IBLA at 152 n.7.

BLM's decision setting the fair market rental of right-of-way AZAR- 033035 at \$6,000 per year is properly affirmed. Pursuant to the terms of the 1991 Appropriations Act, however, it appears that BLM is without authority to collect this increased amount prior to October 1, 1991.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Yuma District Office is affirmed in part and vacated in part.

---

C. Randall Grant, Jr.  
Administrative Judge

I concur:

---

R. W. Mullen  
Administrative Judge