

PINNACLES TELEPHONE CO.

IBLA 92-487

Decided October 4, 1995

Appeal from a decision of the District Manager, Bakersfield District Office, Bureau of Land Management, issuing communications site right-of-way grant and determining rental pending appraisal. CACA 29507.

Affirmed as modified in part, appeal dismissed in part.

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

In order to expedite issuance of rights-of-way, the regulations authorize BLM to estimate rental and collect an advance deposit subject to adjustment upon completion of an appraisal of the fair market rental value. When the estimated rental is charged on a calendar year basis, the annual estimated rental is properly prorated on a monthly basis for the first (partial) year of the right-of-way.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals--Rules of Practice: Appeals: Dismissal

An appeal of the rental charge for a communications site right-of-way based on a preliminary rental estimate by BLM under 43 CFR 2803.1-2(c)(3)(ii) is premature prior to an appraisal of the fair market rental value and is therefore properly dismissed.

APPEARANCES: Rex Bryan, President, Pinnacles Telephone Company.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Pinnacles Telephone Company (Pinnacles), has appealed from a May 13, 1992, decision of the District Manager, Bakersfield District Office, Bureau of Land Management (BLM), issuing communications site right-of-way grant CACA 29507. The decision also determined the rental for the right-of-way for the period May 1 through December 31, 1992, subject to revision upon completion of a formal appraisal.

The right-of-way is located on Sampson Peak in the NW¼, sec. 31, T. 17 S., R. 12 E., Mount Diablo base line and Meridian, California, and was granted to appellant effective May 8, 1992, for a 30-year term, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1988). By the terms of the grant, appellant received the right to "construct, operate, maintain, and terminate a microwave repeater site" approximately 15 feet wide by 15 feet long containing 0.005 acre.

In an April 10, 1992, memorandum to the District Manager, the appraisal staff stated that due to priority demands, they were unable to provide the appraisal requested by BLM in a timely manner. The memorandum provided a "reasonable estimate of the rental value" of the Sampson Peak site, explaining that a preliminary estimate is not an "initial rental determination," but is sufficient to issue the right-of-way pending formal appraisal. Based on information available and without the benefit of inspection, the staff concluded that the rental value of the proposed facility is estimated to be \$3,800 per year. The staff stated that this figure is subject to revision upon completion of a full appraisal of the site.

In its May 13, 1992, decision, the District Manager, in accordance with the Departmental regulation 43 CFR 2803.1-2, determined the rental for May 1 through December 31, 1992, to be \$3,800, subject to revision upon completion of a formal appraisal.

In its statement of reasons appellant asserts that the apparent rental charge of \$6,514.20 per year ^{1/} is much too high for the Sampson Peak site. Appellant explains that it is installing microwave towers on five sites to improve phone service to its dozen subscribers in the Idria Exchange. Appellant asserts that this will bring service to its remote Idria subscribers. Appellant believes that it should be providing "good economical service to this remote area for the good and safety of the public." According to appellant it should be charged no more than \$50 per site per year.

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 right-of-way to pay "fair market rental value as determined by the authorized officer applying sound business management principles and,

^{1/} Appellant apparently calculated an annual rental charge of \$6,514.20 based on BLM's rental estimate of \$3,800 for a 7-month period. Although the period May through December constitutes an 8-month period, we take note of appellant's point that the \$3,800 estimate was applied by BLM to a period of less than a year.

so far as practicable and feasible, using comparable commercial practices." First Broadcasting of Nevada, Inc., 120 IBLA 240, 241-42 (1991); MCI Telecommunications Corp., 115 IBLA 117, 120 (1990).

[1, 2] Rights-of-way may be issued subject to later determinations of the annual rental payment pursuant to 43 CFR 2803.1-2(c)(3)(ii) which provides that, in order "[t]o expedite the processing of any [right-of-way] grant, * * * 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." See Alaskan M.D.S., Inc., 130 IBLA 13, 14-15 (1994); Voice Ministries of Farmington, Inc., 124 IBLA 358, 360 (1992). The relevant regulation provides in part that annual rent billing periods shall be set or adjusted to coincide with the calendar year (January 1 through December 31) by proration on the basis of 12 months. 43 CFR 2803.1-2(a). Further, when the right-of-way is issued with an effective date before the 15th day of the month (as is the case here), the last month of the calendar year shall not be counted. Id. Thus, BLM misapplied the regulation in determining the estimated rental to be applied for the period from May 8, 1992 (effective date of the grant) to December 31, 1992. As the estimated rental is \$3,800 per year (or \$316.67 per month), the amount due from May through December (not counting the last month) should be \$316.67 times 7 months for a total of \$2,216.67.

In its decision informing appellant that the right-of-way had been approved BLM specifically advised appellant that the \$3,800 rental was "subject to revision upon completion of a formal appraisal." As the appraisal staff stated in the April 10, 1992, memorandum, the \$3,800 figure is a "preliminary estimate." Because the \$3,800 is only an estimate rather than the rental value determined by an appraisal, appellant's appeal of this figure is premature. Once the rental has been determined by an appraisal, appellant may appeal that determination. To the extent that it challenges the fair market rental value which must be determined by appraisal, appellant has not shown that it is adversely affected by BLM's preliminary estimate and therefore lacks standing to appeal that issue. See Colorado Environmental Coalition, 125 IBLA 287, 289-290 (1993); Salmon River Concerned Citizens, 114 IBLA 344, 348 (1990).

Appellant presents several reasons why it feels the \$3,800 estimate is excessive. This information should be presented to BLM for consideration when undertaking the appraisal. Appellant also implies that it may be seeking a reduction or waiver of the rental. Section 504(g) of FLPMA provides authority for the Secretary of the Interior to charge less than fair market rental value in certain specified circumstances. See 43 CFR 2803.1-2(b)(2). Included among these are those situations where a right-of-way is granted to "nonprofit corporations * * * [or where the] holder * * * provides without or at reduced charges a valuable benefit to the public." 43 U.S.C. § 1764(g) (1988).

In addition, 43 CFR 2803.1-2(b)(2) further authorizes BLM to waive or reduce rental where it determines "that the requirement to pay the full rental will cause undue hardship on the holder/applicant and that it is in the public interest to reduce or waive said rental." Voice Ministries of Farmington, Inc., *supra* at 362; Lone Pine Television, Inc., 113 IBLA 264,269-70 (1990). To the extent that appellant is seeking to qualify for such relief, it may submit information to BLM relating to a reduction or waiver of rental so that BLM may consider the applicability of the regulations to appellant's situation.

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 modified, in part, and the appeal is dismissed in part.

C. Randall Grant, Jr.
Administrative Judge

I concur:

James L. Bymes
Chief Administrative Judge

