

SOUTHERN CALIFORNIA SUNBELT DEVELOPERS, INC.

IBLA 97-462, 99-165

Decided January 12, 2001

Appeal from two decisions of the Acting Area Manager, Ridgecrest (California) Resource Area, Bureau of Land Management, readjusting rental for a right-of-way and terminating the right-of-way grant. CACA-13771.

IBLA 99-165 Dismissed; IBLA 97-462 Affirmed.

1. Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Timely Filing

A notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing on a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

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

An annual rental charge for a right-of-way will be affirmed where an analysis of the record establishes that the BLM decision setting the rental was in accordance with the underlying appraisal on which the new rental was based and an adequate explanation for BLM's actions is provided.

APPEARANCES: Dan W. Baer, President, Southern California Sunbelt Developers, Inc., Brea, California; Richard S. Smith, Acting Area Manager, Ridgecrest (California) Resource Area, Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Southern California Sunbelt Developers, Inc. (SCSD), has appealed from two decisions of the Acting Area Manager, Ridgecrest (California) Resource Area, Bureau of Land Management (BLM), involving right-of-way grant CACA-13771. The first appeal (IBLA 97-462) is from a May 20, 1997, decision readjusting the rental for that right-of-way. The second appeal (IBLA 99-165), which is hereby consolidated with the first, is from a December 17, 1998, decision terminating that right-of-way.

The right-of-way, for 200 acres in SW¹/₄ and W¹/₂SE¹/₄, sec. 26, T. 32 S., R. 35 E., Mount Diablo Meridian, Kern County, California, was originally granted to the Airtricity Corporation (Airtricity) effective February 18, 1984, for a term of 30 years (subject to renewal), pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761-1771 (1994). The right-of-way grant authorized the construction, operation, and maintenance of wind turbine generators for the production and sale of electricity generated by wind energy, as well as electric transmission lines, access roads, and related facilities on approximately 200 acres of land situated in Kern County, California. On October 1, 1986, BLM approved the assignment of the right-of-way to SCSD.

[1] BLM's December 17, 1998, decision (IBLA 97-462) held that the right-of-way was terminated for failure to adhere to the terms and conditions of the grant. It informed SCSD that the decision could be appealed to this Board in "accordance with regulations contained in Title 43 CFR Part 4 and the enclosed Form 1841-1" and that, if an appeal was taken, the "Notice of Appeal must be filed in this office (at the above address) within 30 days from the receipt of this decision."

The applicable regulation, 43 C.F.R. § 4.411(a), provides:

A person who wishes to appeal to the Board must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal. A person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service.

(Emphasis supplied.) Within the meaning of this regulation, "filing" means being received in the office of the officer who made the decision, in this case, the Ridgcrest Resource Area Office, BLM. See 43 C.F.R. § 2804.1(a); State of Alaska, 70 IBLA 369 (1983).

The return receipt in the file shows that SCSD received BLM's decision on December 21, 1998. ^{1/} The running of the 30-day appeal period began the next day, so that the notice of appeal was required to be filed no later than January 20, 1999. SCSD's notice of appeal was not filed with BLM until Monday, February 1, 1999, and was thus clearly not timely filed.

The regulations provide a 10-day grace period in some limited circumstances excusing late filing of a notice of appeal:

(a) Grace period for filing. Whenever a document is required under this subpart to be filed within a certain time and it is not received in the proper office during that time,

^{1/} SCSD acknowledges in its statement of reasons (SOR) in IBLA 99-165 that it received the decision on Dec. 21, 1998. (SOR, IBLA 99-165 at 1.)

the delay in filing will be waived if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed. Determinations under this paragraph shall be made by the officer before whom is pending the appeal in connection with which the document is required to be filed.

43 C.F.R. § 4.401(a). As noted above, the notice of appeal was filed on Monday, February 1, 1999, which was within the 10-day grace period. ^{2/} Nevertheless, the provision is of no comfort to SCSD, as the notice of appeal was not "transmitted" to BLM before the end of the 30-day appeal period in which it was required to be filed.

The envelope in which SCSD's notice of appeal was mailed bears a postmark of January 22, 1999, 1 day after the expiration of the time allowed to file a notice of appeal. ^{3/} A notice of appeal is "transmitted" within the meaning of that regulation when it is delivered to a United States Postal Service office or deposited in a mail box, or when it is given into the possession of an independent delivery service. United States Forest Service, Alaska Region, 124 IBLA 336, 338, n.2 (1992); John W. Monzel, A-28817 (Aug. 31, 1961). The postmark is deemed to establish the date of transmittal unless satisfactory evidence is presented to support a contention that the mailing occurred at an earlier date. Barodynamics, Inc., 135 IBLA 352, 354 (1996); Bryan Cooley, 71 IBLA 299, 300 (1983); Daniel Ashley Jenks, 36 IBLA 268, 270 (1978); David R. Smith, 33 IBLA 63, 66 (1977); Edward Malz, 33 IBLA 22, 24 (1977); Richard L. Triplett II, 32 IBLA 369, 370 (1977); David W. Gregg, 32 IBLA 293, 294; and cases cited. Although SCSD does contend that the notice of appeal was mailed on January 19, 1999, the date it was signed, it has provided no evidence to support that contention. We conclude accordingly that SCSD's notice of appeal was not transmitted before the end of the appeal period, so that the provisions of 43 C.F.R. § 4.401 do not apply.

The timely filing of a notice of appeal is necessary to establish the jurisdiction of the Board over the appeal; the late filing of a notice of a notice of appeal deprives the Board of jurisdiction over the matter

^{2/} The grace period expired on Saturday, Jan. 30, 1999, when BLM's offices were closed. Accordingly, the deadline for filing was extended until Monday. See 43 C.F.R. § 4.22(e).

^{3/} The envelope shows that BLM refused delivery on Jan. 25, 1995, because postage was due. SCSD then remailed the Notice in another envelope with a postmark of Jan. 28, 1999, and that was received by BLM on Feb. 1, 1999. It is unnecessary to resolve the question whether the date of transmittal was on Jan. 22 (the date the notice was first mailed) or Jan. 28 (the date the notice of appeal was mailed with adequate postage), as the appeal is untimely in either event.

appealed and necessitates dismissal of the appeal. See, e.g., Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969); Pressentin v. Seaton, 284 F.2d 195 (1960); Thelma M. Eckert, 120 IBLA 367 (1991); Ilean Landis, 49 IBLA 59 (1980). Since SCSD's notice of appeal was not timely filed and was not transmitted within the period in which filing was required, it was untimely, and the Board has no available course other than to dismiss its appeal.

[2] However, the fact that the right-of-way grant has been terminated does not moot the appeal of the decision of May 20, 1997 (IBLA 97-462). That decision readjusted rental for right-of-way CACA-13771, and any increase in rental would still be due for the period from January 1, 1996, to the date the grant was terminated. By Order dated September 4, 1997, we stayed implementation of that decision pending substantive review by this Board. We now dissolve our stay and affirm BLM's decision of May 20, 1997.

By letter dated September 14, 1995, BLM notified SCSD that, following requests by a number of wind energy right-of-way holders that the rentals and royalties which they were paying be re-evaluated, it had decided to reappraise the fair market value of all wind energy rights-of-way. BLM informed SCSD that it intended to contract with a third party to conduct this reappraisal. BLM advised that the appraisal would probably not be completed before the January 1, 1996, billing date for the right-of-way, but that another decision would be issued after completion of the appraisal implementing the new rental effective retroactively to January 1, 1996. When originally issued to Airtricity, the rental for CACA-13771 was a 4-percent royalty based on production.

Pursuant to contract, Stephen J. Herzog, an employee of Robert Ford & Associates, Inc., conducted an appraisal of BLM sites within the area of the San Geronio and Tehachapi Passes in Southern California, including right-of-way CACA-13771, which was inspected between April 9, 1996, and April 23, 1996. The appraisal report, which was submitted to BLM on May 28, 1996, included a section specifically addressing CACA-13771, as well as general sections applicable to all of the sites appraised. ^{4/} The report extensively reviewed both the historic development of and recent trends in the wind energy industry. Several negative factors presently facing the industry were noted, including the expiration of favorable contracts between wind energy producers and electrical utilities (referred to as "Interim Standard Offer No. 4" or "SO4" contracts), likely resulting in a diminution in income for wind projects; the determination of the Federal Energy Regulatory Commission (FERC) that the Biennial Resource Plan Update (BRPU) adopted by the California Public Utilities Commission (CPUC) in 1993 (which had provided a major stimulus to the wind industry) violated FERC's

^{4/} The section addressing CACA-13771 will be cited as "CA-13771 Appraisal," the portion of the report giving an overview of the industry will be cited as "Appraisal Overview," and the section identified in the appraisal as Final Conclusions will be cited as "Appraisal Conclusions."

"avoided cost" regulation; and, of particular impact, CPUC's subsequent ruling of December 20, 1995, which provided a blueprint for the complete restructuring of the electrical industry in California.

In appraising CACA-13771, the appraiser first applied the highest and best use analysis, because "[t]he conclusion as to the best use of the property assists in the selection of comparable properties." (CACA-13771 Appraisal at 8.) The appraiser examined market expectations about the quality, condition, and configuration of improvements and intensity of development. Id. He explained that highest and best use analysis followed a four step process:

1. Determine what uses are legally permissible[;] 2. Of the legally permissible uses, [determine] which are physically possible; 3. Of the physically possible and legally permissible uses, [determine] the ones which are financially feasible[; and] 4. [F]inally, of the uses which meet all of the restrictions examined in the preceding steps, [determine] which single use is maximally productive. That use is the highest and best use.

Noting that Kern County does not consider the land to reside within its jurisdiction because the right-of-way is under Federal ownership, the appraiser stated that, if it were under the County's jurisdiction, the zoning would probably be a combination of wind energy, industrial, highway commercial, and rural residential. He concluded that any probable use would be physically possible but that, because the general real estate market in the area had been depressed for years, the demand for any development, except for wind energy, was insufficient to justify development. Moreover, the appraiser determined that the site's physical characteristics, including the high wind found there, made it unattractive for alternate uses. However, he also noted that the site had reasonably good access and relatively mild terrain. (CACA-13771 Appraisal at 9.)

In the third step of the process, the appraiser concluded that new commercial development of wind energy was not in general financially feasible. He stated that he was unaware of any wind energy being privately developed in California and noted that no new power purchase agreements were available which provided purchase prices for energy that made new development feasible. (CACA-13771 Appraisal at 10.) Because prices in preexisting SO4 contracts were sufficiently high, it was feasible to continue operation of an existing facility. However, the appraiser warned that it was probable that the contract had an inferior SO1 contract, and even that contract was likely no longer in force due to nonperformance. Indeed the appraiser noted that "[p]art of the dismantling of the subject improvements was reportedly motivated by moving the turbines from the sub-ject site to another of the holder's sites which had an SO4 contract." Id.

Considering both the wind resource present and the status of the power purchase agreement, the appraiser determined that development of

CACA-13771 for wind energy was not feasible but might become feasible in 5 to 10 years with improved technology for wind energy, coupled with higher prices for alternate fuels and support from the legislature. Thus, he concluded that the most productive use of the site was as an investment for future wind energy production and the highest and best use "as if vacant" was to hold it for that future development, when the market improved. (CACA-13771 Appraisal at 10-11.)

After determining the highest and best use, the appraiser used the sales comparison approach to determine the site value of right-of-way CACA-13771 "as if vacant." This approach involved a comparison of the appraised property with other similar properties which had been sold or offered for sale in the open competitive market. This comparison was then used in estimating the leased fee interest in the right-of-way. (CACA- 13771 Appraisal at 11.) The appraiser reviewed nine Tehachapi sales and found three which were the most similar to right-of-way CACA-13771, having been purchased for wind energy production and appearing to have less than ideal wind resources present. The review of the three sites indicated that prospective wind energy sites were selling for between \$750 to \$1,000 per acre, but the appraiser warned that all of the sales took place prior to the cancellation of the BRPU, when new development of wind energy was considered feasible and new power purchase agreements were expected to be available. However, while cancellation of the BRPU depressed the wind energy market, the appraiser concluded that the situation was not permanent, but that at some point, possibly in 10 to 20 years, wind energy would be able to effectively compete without subsidization. (CACA-13771 Appraisal at 14.) Thus, he found that the right-of-way had investment potential. ^{5/}

The appraiser determined that a modern 40 meter rotor diameter, 500 kW wind turbine would probably be installed on a 2.5 rotor diameter by 10 rotor diameter spacing in this area and that each turbine would probably require approximately 10 acres, meaning that there would be an average installed capacity of 50 kW per acre. Therefore, assuming that CACA-13771 would have 8,000 kW on 200 acres, it would have approximately 40 kW per acre, or 80 percent of what new development would have been on the comparable properties. (CACA-13771 Appraisal at 14.) ^{6/} The appraisal concluded that if there were a power purchase contract in place, which would make it financially feasible to operate, the right-of-way would merit a value conclusion of approximately \$750 per acre. However, because there did not appear to be a contract, the appraiser looked at Tehachapi Sale 3, which was a sale

^{5/} We recognize that section B 5 of the right-of-way grant allows BLM to order that the grant be relinquished if BLM determines that the authorized uses are no longer needed. However, in its decision BLM specifically stated that the rent was being adjusted for a reasonable time period to facilitate repowering. (Decision at 2.)

^{6/} This figure was derived from the fact that in 1989 the site had an installed capacity of 8 MW and the SO1 contract had an as-available capacity of 8,000 kW. (CACA-13771 Appraisal at 7.)

of 80 acres in the area which had no wind energy potential. That land sold for \$625 per acre. He then determined that a value per acre slightly above \$625 but well below \$750 was appropriate for CACA-13771. Therefore, the 200 acres encompassed by CACA-13771 were estimated to have a value of \$650 per acre or \$130,000. (CACA-13771 Appraisal at 14.)

The Income Approach was used to estimate the market value of the leased fee interest and to supplement the Sales Comparison Approach. This analysis was considered important due to the recent trends in the industry and the lack of available sales data after the BRPU was disallowed. Under this approach the estimated market rent was capitalized to estimate the market value of the leased fee interest. Thus, it was necessary to determine the estimated market rent.

As part of the consideration of market rent, the appraisal considered what would be an appropriate royalty. It noted that the lease comparables indicated a royalty range of between 2 to 7 percent of gross energy sales, but recommended a royalty of 3 percent of gross revenues, given the eroding market facing wind energy generation. (CACA-13771 Appraisal at 11.) In recommending this royalty rate, the appraisal considered and rejected a flat annual payment based on installed megawatt capacity, arguing that conversion to a flat payment system would not be feasible until stable market conditions existed. (CACA-13771 Appraisal at 12.)

The appraisal also examined the question of establishing a minimum rent. Pointing out that a tenant's underdevelopment or total failure to develop a site would negatively impact the Government, the appraisal concluded that minimum rent should be set close to but somewhat below the level of royalties that might be anticipated from full energy development. This would both protect the interests of the Government in obtaining fair value for the use of the land and provide an incentive to the lessee to maximize development of the right-of-way. (CACA-13771 Appraisal at 12.) The appraisal posited the following formula for determining the minimum rent:

$$\text{Minimum rent} = (\text{The greater of installed capacity or capacity specified in power purchase agreement}) \times (8766 \text{ hours per year}) \times (\text{Capacity factor of } 25\%) \times (3\% \text{ royalty}) \times (\text{Power sales price of } \$0.04 \text{ per kWh}) \times (75 \text{ percent}).$$

(CACA-13771 Appraisal at 13.) Applying this formula and assuming 8,000 kW of capacity, the appraisal concluded that the minimum rent for right-of-way CACA-13771 should be \$16,000 (rounded up from \$15,779), which equated to \$2 per kW of potential capacity or \$80 per acre. (CACA-13771 Appraisal at 13.)

The appraisal stated that given the risk levels in the wind industry business a capitalization rate of 12 percent was appropriate for the minimum rent of \$16,000. Capitalizing \$16,000 at 12 percent yields \$133,333 or \$667 per acre. Thus the right-of-way value by the Income Approach was determined to be \$135,000 (rounded up) which supports the value determined by the Sales Comparison Approach.

While asserting that these figures were in line with recent market data, the appraisal concluded that, because the site did not appear to

be able to produce energy for sale on a profitable basis, anyone wishing to develop the site for wind energy should be given a lower initial rent during the holding and development phase. The appraiser determined that an appropriate minimum rent prior to the availability of a new power purchase agreement would be 8 percent of the site value of \$130,000 or \$10,000 (rounded down from \$10,400). (CACA-13771 Appraisal at 13.) That would be \$50 per acre per year.

Following receipt of the appraisal, BLM contracted with another private appraiser, David J. Yerke, to provide an appraisal review. His November 1, 1996, Appraisal Review Report noted that, subsequent to the completion of the original appraisal, the State of California had adopted California State Assembly Bill No. 1890, which provided for the total restructuring of energy generation and delivery within California. While the appraisal review noted that some of the anticipated effects of this legislation had been considered in the original appraisal (see Appraisal Review Report at 13), it also suggested that the legislation, as adopted, was likely to negatively impact wind energy producers at a greater level than originally contemplated.

In a November 4, 1996, letter prepared in response to a request by Yerke, Herzog asserted that for sites not currently developed, a reasonable rental rate would be 8 percent of the value conclusion indicated in the appraisal, as opposed to the range of 8 to 10 percent which he concluded was properly applied to other sites. Herzog stated that it was common for land use to be based on a percentage of the value of the land and that in such land use agreements, annual rent generally fell in the range of 8 to 10 percent in the private sector.

In its May 20, 1997, decision, BLM informed SCSD that, because its right-of-way was nonoperational, it fell into the category of rental based upon 8 percent of the land value. Noting that generally a rent based on land value would be less than rent based on projected wind energy power production, the decision stated that BLM was prepared to adjust rent to 8 percent of the land value for reasonable time periods to facilitate repowering. ^{7/} The value of the land was noted as \$650 per acre and the rental was calculated as 8 percent of that figure. The rent was calculated for 80 acres and noted as \$4,160 for 1996 and \$4,160 for 1997, totaling \$8,320. (Decision at 2.) ^{8/} Because the rental was retroactive to January 1, 1996, rental was due for 1996 and 1997.

^{7/} However, it also warned that a repowering (replacing old wind turbines with state-of-the-art equipment), which would increase the installed capacity, would justify recalculating the rent based on the new capacity.

^{8/} On Sept. 29, 1997, noting that the correct acreage is approximately 200 acres, BLM requested that the case be remanded in order to rescind the May 20 decision and issue a decision using the correct acreage. By Order dated Nov. 6, 1997, this Board denied that request, stating that if BLM's decision were affirmed it could issue an amended decision applying the per-acre rental rate to the correct acreage. The rental calculated for 200 acres would be \$10,400 if not rounded down.

Until the reappraisal and readjustment, SCSD had paid a royalty of 4 percent of the annual gross revenues for the right-of-way. This royalty resulted in payments to BLM ranging from a high of \$18,592 in 1990 to a low of \$147 in 1995 when production capacity was 72 kWh. (CACA-13771 Appraisal at 7, 8.) There is no indication that SCSD paid any royalty in 1996 or 1997 that might offset the rental for those years.

SCSD submitted two requests for stay. Both were received by BLM on June 23, 1997. In its petition dated June 17, 1997, SCSD argued that the appraisal was in direct contradiction to an August 31, 1987, opinion from the Department of the Interior's Solicitor's Office mandating a royalty of 4 percent gross sales in lieu of annual rental; the right-of-way grant made no provision for reappraisal and BLM had no authority to compel reappraisal of the right-of-way grant; BLM had failed to qualify its designated appraiser; the appraisal itself was flawed, rendering its conclusions invalid; and the land value which formed the basis of BLM's base rent calculation was not realistic and therefore unreasonable.

The same arguments were raised in a June 19, 1997, petition where two additional arguments were presented. SCSD asserted that it was owed reparations from BLM due to a 1995, BLM "Stop Work Order" which resulted in the premature and involuntary closure of the park and these monies more than offset any rental which might be due and also that BLM failed to provide any authority which allowed it to compel rents retroactively.

SCSD claims that BLM made no attempt to introduce evidence of Herzog's or Yerke's credentials and thus SCSD is left to accept them and the product of their work at mere face value. It submits that the tenuousness of Herzog's vision is evident in his failure to predict the deregulation of energy rates which it asserts would result in a negative impact to the wind energy industry. It argues that the appraisal derives from pure speculation as to what the appraiser anticipates future events will be and there is no basis in reason. Furthermore, SCSD contends that the appraiser "produces no evidence of any familiarity with the wind energy industry and no acquaintance with its complexity." (June 17 Petition at 11.)

SCSD asserts that BLM inexplicably affixed a value of \$650 per acre to the land when its own appraiser noted that property value in general had declined substantially and that the real estate market had essentially disappeared around the beginning of 1990. (June 17 Petition at 7, citing Appraisal Overview at 121.) It also notes that the appraiser stated that the market for wind energy had declined in recent years and would not improve for years and, furthermore, that the site appeared to not be one of the better wind resource areas and that no new power purchase agreements were available. *Id.* at 8. SCSD states that in 1995 the right-of-way grant

produced only \$3,669 of income, less in 1996 and even less in 1997, yet BLM is seeking annual rental of \$4,160. (June 17 Stay Petition at 7.)^{9/}

In reply, BLM argues that it has authority under section 504(g) of FLPMA, 43 U.S.C. §§ 1764(g) (1994), and the regulations at 43 C.F.R. § 2803.1-2(d)(2)(ii) ^{10/} to reappraise rights-of-way and adjust rentals to reflect current fair market value. It avers that it is not bound by the Solicitor's opinion because of the law and regulations. It also maintains that both the appraiser and the review appraiser were well qualified to appraise wind energy rights-of-way and that the statement of qualifications for the appraiser was provided to SCSD as part of the appraisal. BLM asserts that SCSD has failed to provide any evidence that the appraiser was unqualified and, moreover, that the appraisal shows that the appraiser had an in-depth understanding of the wind energy industry.

BLM also argues that the SCSD has failed to establish errors in the appraisal itself and has not rebutted the BLM appraisal with another appraisal. Furthermore, it points out that SCSD has not challenged the 8-percent figure but has merely contended that the appraisal was flawed and the land value not realistic and therefore unreasonable. (Reply at 2.) BLM notes that SCSD has not suggested what it believes is the value of the land nor presented any evidence that the value the appraiser arrived at was unreasonable. Finally, BLM contends that SCSD is not due any reparations from BLM as a result of the Stop Work Order issued in 1995 because the issue is moot and therefore irrelevant to this appeal. (Reply at 3.)

Notwithstanding SCSD's assertions to the contrary, the regulations under which the right-of-way was issued clearly provided that rental fees could be "readjusted whenever necessary to reflect current fair market value." 43 C.F.R. § 2803.1-2(d) (1984). Under such provisions, the authority of BLM to adjust right-of-way rentals to adequately reflect fair market value of the use of the land has been affirmed many times by the Board. See, e.g., Southern California Sunbelt Developers, Inc., 148 IBLA 19, 29 (1999); Richard Campbell, 137 IBLA 280 (1997); Southern Pacific Transportation Co., 116 IBLA 164 (1990).

The Solicitor's opinion that SCSD argues prevents BLM from readjusting the rent is a July 23, 1987, opinion from the Office of the Regional Solicitor, Sacramento, interpreting section B.7 of the right-of-way grant,

^{9/} At the time SCSD filed its request for stay it did not realize that the rental figure had been incorrectly calculated based on 80 acres and that BLM was actually seeking rental of \$10,000.

^{10/} The regulation was added in 1995. It provides that: "Rights-of-way may be reviewed on a case-by case basis 10 years after issuance * * * to determine whether rents are appropriate." The regulation in effect at the time the right-of-way was granted, 43 C.F.R. § 2803.1-2(d), stated that the rental fees could be "readjusted whenever necessary to reflect current fair market value."

which set the terms of rental and royalty. The opinion advised BLM that the terms of the grant waived annual rental fees after the first 2 years. The opinion does not state that BLM may not reappraise the right-of-way or readjust its rental or royalty. Indeed, the last paragraph of the opinion states that "[s]hould the Area Manager determine that the current rental, as reflected in the right-of-way grant does not represent fair market value, it may initiate a site rental fee requirement pursuant to the provisions of 2803-1-2(d)." (Opinion at 2.) Thus, it specifically recognized BLM's authority to adjust rental. Moreover, section B.1. of the right-of-way grant states that the "Holder agrees to comply with all the applicable regulations contained in 43 CFR 2800." Thus, SCSD has agreed to comply with the regulations which include the adjustment of rental.

Under section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1994), the holder of a right-of-way is required to pay rental annually in advance for the fair market value of the right-of-way when this value is established by an appraisal. Michael D. Dahmer, 132 IBLA 17 (1995); Alaskan M.D.S., Inc., 130 IBLA 13, 15 (1994); Quality Broadcasting Corp., 126 IBLA 174, 188 (1993). Such value is considered the amount "for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desires but is not obligated to so use." Michael D. Dahmer, *supra* at 24; Qwestar Service Corp., 119 IBLA 65, 67 (1991), *citing* American Telephone & Telegraph Co., 25 IBLA 341, 349-50 (1976).

In determining fair market value of nonlinear rights-of-way, the Board has noted that the preferred method is the comparable lease approach, provided that there is sufficient comparable rental data and appropriate adjustments are made for differences between the subject site and other sites used for analysis. *See, e.g.,* William J. Colman, 134 IBLA 375, 379-80 (1996); Michael D. Dahmer, *supra* at 24. The Board has also held on numerous occasions that a party challenging an appraisal determining fair market value is generally required to either show error in the methodology used in determining fair market value, or alternatively, submit its own appraisal establishing fair market value. Southern California Sunbelt Developers, Inc., *supra*. *See generally* Voice Ministries of Farmington, Inc., 124 IBLA 358, 361 (1992); High Country Communications, Inc., 105 IBLA 14, 16 (1998).

The BLM decision discussed and provided a justification for the use of a flat rent based on installed capacity, but it did not apply that rent to CACA-13771. The readjusted rental for CACA-13771 was based on 8 percent of the value of the land as vacant with its highest and best use being future wind energy production. ^{11/} BLM's decision explained that it

^{11/} The expense of site rehabilitation was a concern of the appraiser and this Board in Southern California Sunbelt Developers, Inc., *supra*. However because this right-of-way was valued as vacant that issue does not arise here.

used 8 percent of the value to facilitate repowering. SCSD has not suggested what it believes the value of the land is or challenged the use of 8 percent in determining rental.

We do not agree with SCSD that the appraiser showed no familiarity with the wind energy industry or failed to explain the value he affixed to the land. ^{12/} The appraiser considered the eroding market for wind energy production and the effect of the cancellation of the BRPU in estimating market rent and determining the value of the land. (CACA-13771 Appraisal at 11, 14.) He concluded that if the right-of-way had a power purchase contract in place which would make it financially feasible to operate, it would merit a value conclusion of approximately \$750 per acre. However, because there appeared to be no such contract, the appraiser looked at the sale of 80 acres which had no wind energy potential and then adjusted the value of CACA-13771 down from \$750, which was the low value for other wind energy sites, to \$650 or slightly above the tract that had no wind energy potential. (CACA-13771 Appraisal at 14.) Thus, this land was not valued at any "special" value to existing users but at its value in the general marketplace. See generally Exxon Corp., 106 IBLA 207 (1988); American Telephone & Telegraph Co., 77 IBLA 110 (1983).

SCSD claims that BLM failed to provide any authority to compel rents retroactively. In its September 14, 1995, letter BLM informed SCSD that the right-of-way would be reappraised in order to establish fair market rental but, because the appraisal would probably not be completed prior to the next billing date, the bill might not represent fair market value and that after the appraisal was completed a decision would be issued implementing the new rental retroactive to January 1, 1996. Section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1994), requires the holder of a right-of-way to pay annual rental in advance equal to the fair rental of the right-of-way. When an appraisal establishing fair rental has not been completed, BLM may allow use of the right-of-way provided an estimated rental fee is received in advance. The requirement to pay the difference between estimated and appraised rental values is not a prohibited imposition of a retroactive rental. Michael D. Dahmer, *supra* at 19; Jancur, Inc., 93 IBLA 310, 312 (1986); Jim Doering, 91 IBLA 131, 133 (1986).

SCSD has also argued that BLM now seeks rental that is higher than the income produced by the right-of-way. While this is true, it is also true, as the appraiser noted, that a prudent landowner will not allow the use of land without compensation. If there were no minimum rent required, a landowner could easily be in a situation where the site is either not developed or under-developed. In 1995, SCSD paid a royalty of \$147 when

^{12/} We also reject SCSD's assertion that BLM failed to qualify its appraiser. The appraiser's statement of qualifications was part of the appraisal that was provided to SCSD and the qualifications of the review appraiser were included as part of the review report. The accuracy of those statements has not been challenged nor has SCSD offered any evidence that either appraiser is unqualified. It has simply expressed its view that the appraiser evidenced no familiarity with the wind industry.

production capacity was 72 kWh. (CACA-13771 Appraisal at 7, 8.) ^{13/} As there is apparently no longer any production on the right-of-way the Government would receive no compensation and SCSD would have no incentive to repower the site and the site would not be available to any other party that might desire to repower. However, except in certain instances not applicable here, BLM is required to assess fair market rental for a right- of-way grant. 43 U.S.C. § 1764(g) (1994); 43 C.F.R. § 2803.1-2(a).

SCSD has not established error in the appraisal or BLM's use of the 8-percent figure, nor has it submitted its own appraisal establishing fair market value. In the absence of a showing that the appraised annual rental charge is excessive, rental valuation is properly upheld.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from in IBLA 97-462 is affirmed and IBLA 99-165 is dismissed. The stay issued on September 4, 1997, in IBLA 97-462 is dissolved.

James P. Terry
Administrative Judge

I concur:

John H. Kelly
Acting Chief Administrative Judge

^{13/} As to SCSD's argument that it was due substantial monetary reparation from BLM due to the 1995 "Stop Work Order," we note that the issue is not before the Board.

