

ALYESKA PIPELINE SERVICE COMPANY

IBLA 2003-237, et al.

Decided October 13, 2005

Appeals from annual Letter Decisions issued by the Alaska State Office, Branch of Pipeline Monitoring, Bureau of Land Management, determining the fair market rental value for segments of the Trans-Alaska Pipeline System Right-of-Way. AA-05847, et al.

Set aside and cases remanded.

1. Appraisals--Mineral Leasing Act: Rentals--Oil and Gas: Pipelines: Rights-of-Way--Rights-of-Way: Act of February 25, 1920--Rights-of-Way: Oil and Gas Pipelines

Letter Decisions determining rental for a pipeline right-of-way issued pursuant to sec. 28 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 185 (2000), based upon an appraisal of fair market rental value, will be set aside and remanded where the administrative record does not adequately support the appraisal method and result.

2. Appraisals--Mineral Leasing Act: Rentals--Oil and Gas: Pipelines: Rights-of-Way--Rights-of-Way: Act of February 25, 1920--Rights-of-Way: Oil and Gas Pipelines

Letter Decisions based upon an appraisal prepared by an outside contractor jointly for BLM and the State of Alaska for the Trans-Alaska Pipeline System will be set aside and remanded when the outside contractor accepted a special instruction from BLM and the State dictating that rental be calculated using an “encumbrance of rights” factor of 100 percent, and the administrative record does not provide a rational basis for the special instruction.

APPEARANCES: Thomas E. Meacham, Anchorage, Alaska, for appellant; Regina L. Sleater, Esq., Office of the Regional Solicitor, Alaska Region, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Alyeska Pipeline Service Company (Alyeska or APSC), agent for the Owner Companies of the Trans-Alaska Pipeline System (TAPS), has appealed a series of Letter Decisions issued by the Alaska State Office, Branch of Pipeline Monitoring, Bureau of Land Management (BLM), each “regarding 2003 annual rental billings for right-of-way use charges, rental charges, and related billings” assessed by BLM for rights of use and occupancy granted by the United States to TAPS Owner Companies under the January 23, 1974, Agreement and Grant of Right-of-Way for TAPS (TAPS Agreement or TAPS Right-of-Way, attached to Alyeska’s Statement of Reasons (SOR) as Exhibit 1).<sup>1/</sup> Alyeska owes annual rentals to BLM pursuant to Section 8 of the TAPS Agreement, which was issued for an initial term of 30 years, and renewed effective January 23, 2004, for an additional term of 30 years.

Section 8.A. of the TAPS Agreement provides that the TAPS Owner Companies “shall pay to the United States, annually and in advance, the fair market rental value of the Right-of-Way, as determined by the Secretary. (Such rental value is hereinafter called the ‘Use Charge’).” (SOR at 3; Exh. 1 at 5.) As explained by Alyeska, the authority of BLM’s authorized officer to determine and assess the Use Charge, under the TAPS Agreement derives from section 28 of the Mineral Leasing Act, as amended, 30 U.S.C. § 185 (2000), as implemented in 43 CFR 2883.1-2 and 2803.1-2(a).

BLM annually notifies Alyeska of the rentals for the succeeding year in Letter Decisions pertaining to specific segments of the Federal TAPS Right-of-Way and the Federal lands underlying TAPS-related facilities. Until 2002, BLM calculated TAPS rentals based upon fair market rental values derived from BLM’s own land appraisals. As Alyeska explains, “[t]he last such appraisal upon which annual rentals were based before 2002 was the internal BLM appraisal, dated 1995 and reviewed periodically.” (SOR at 4.) In 2002, BLM decided that, instead of having BLM perform or update an internal appraisal to determine the fair market rental value of the TAPS lands for the 2003 and subsequent rental years, it would participate jointly with the State of Alaska in contracting for a single Federal/state appraisal from the private appraisal firm Black-Smith & Richards (B-S&R) of Anchorage, Alaska (TAPS or B-S&R Appraisal), for use in determining annual rentals for Federal and state lands

---

<sup>1/</sup> All exhibits cited in this opinion were submitted by Alyeska.

occupied by TAPS facilities. The Letter Decisions <sup>2/</sup> subject to this opinion were all based upon the B-S&R Appraisal, dated December 3, 2002.

Alyeska's first appeal, filed on February 10, 2003, references a series of Letter Decisions dated January 7, 2003 (AA08863, et al. (\$3,097.67)), January 9, 2003 (FF012505/AA005847 (\$198,735.30)), January 9, 2003 (AA031239 (\$1,770.62)), January 13, 2003 (FF084966 (\$100.00)), January 15, 2003 (AA077245/FF020105 (\$21,414.91)), and January 30, 2003 (AA008817 (24,777.88)), "regarding 2003 annual rental billings for right-of-way use charges, rental charges, and related billings" assessed in accordance with the B-S&R Appraisal. The Board docketed this appeal as IBLA 2003-237.

Alyeska filed an "Amended Notice of Appeal from a December 15, 2003, Letter Decision approving Alyeska's application for amendment to TUP FF08824, "for conducting the 2003 Maintenance Integrity Investigations" at PLMP 575.17 to 756.86, and imposed additional rental representing increased acreage based upon the B-S&R Appraisal. The Board docketed this appeal as IBLA 2004-115.

On February 7, 2003, Alyeska filed a "First Amended Notice of Appeal" from a BLM Letter Decision dated February 5, 2003 (F021770 (\$3,965.71)), which concerns the 2003 annual rental or use charge assessed against Alyeska under the TAPS Agreement, and shares the common denominator of the B-S&R Appraisal with Alyeska's appeal from the January 2003 decisions. The Board docketed Alyeska's appeal from that Letter Decision as IBLA 2005-5. <sup>3/</sup>

---

<sup>2/</sup> Alyeska's appeal of the Jan. 9, 2003, Letter Decisions for 13 communication site "related facilities" (billing notices FF012505 and AA-005847 (\$23,018.06)) has been segregated and docketed with IBLA 2003-245, concerning the Gulkana Microwave Site, because the basis of BLM's fair market rental value determination in those Letter Decisions was not the TAPS Appraisal but rather "BLM's Calendar Year 2003 Communication Uses Rental Schedule (BLM Information Bulletin No. 2003-005)." See note 3 infra.

<sup>3/</sup> In this "First Amended Notice of Appeal," Alyeska recounted that one of the two referenced Jan. 9, 2003, Letter Decisions concerned "BLM file number AA-31239 (Gulkana Microwave Site)." The use charge for the Gulkana Microwave Site was not based upon the B-S&R Appraisal, but rather upon the "application of BLM's Calendar Year 2003 Communication Uses Rental Schedule (BLM Information Bulletin No. 2003-005)" in determining the annual rental for AA-31239. Alyeska suggested that the Board sever its appeal regarding the annual rental for AA-31239 from the remainder of Alyeska's appeals. The Board agreed, docketing Alyeska's appeal from the Gulkana Microwave Site appeal as IBLA 2003-245.

On March 30, 2003, Alyeska filed a “Second Amended Notice of Appeal” from two additional BLM Letter Decisions dated February 10, 2003 (FF088241), both of which pertain to APSC Letter No. 03-19549. In one Letter Decision, BLM approved Alyeska’s application for an amendment to the “current pipeline maintenance Temporary Use Permit [TUP] FF088241, for conducting the 2003 Mainline Integrity Investigations at PLMP’s 168.0, 168.28, 168.89, and 168.96.” BLM approved the application for amendment, imposing additional rentals amounting to \$417.75 for the increased acreage based upon the B-S&R Appraisal. In the second Letter Decision, BLM approved Alyeska’s application for an amendment to TUP FF088241 for Mainline Integrity Investigations at PLMP’s 732.01 and 732.84, imposing additional rentals amounting to \$405.36 for the increased acreage based upon the B-S&R Appraisal. Alyeska’s “Second Amended Notice of Appeal” from these two Letter Decisions was docketed separately as IBLA 2005-6.

On June 17, 2003, Alyeska filed an “Amended Notice of Appeal” from a BLM Letter Decision regarding APSC Letter No. 03-19550, dated June 6, 2003 (FF012505, FF088241), in which BLM approved Alyeska’s application for amendment to TUP FF088241, for conducting Mainline Integrity Investigations at PLMP’s 168 through 732.84. BLM stated that “[a]ll locations have been permitted except PLMP 576.35 and 577.17,” for which BLM imposed additional rental amounting to \$84.68 for the increased acreage based upon the B-S&R Appraisal. The Board docketed Alyeska’s appeal from the June 6, 2003, Letter Decision as IBLA 2005-7.

Alyeska filed an “Amended Notice of Appeal” on June 23, 2003, from a BLM Letter Decision regarding APSC Letter No. 03-19550 dated June 6, 2003 (FF012505, FF088241), in which BLM approved Alyeska’s application for amendment to TUP FF088241, “for conducting the 2003 Mainline Integrity Investigations” at PLMP 576.35 and 577.17, and imposed additional rental amounting to \$84.68 for the increased acreage based upon the B-S&R Appraisal. The Board docketed Alyeska’s appeal from this Letter Decision as IBLA 2005-175.<sup>4/</sup>

---

<sup>4/</sup> The record does not contain any further notices of appeal, notwithstanding the following assertion in Alyeska’s SOR: “Following Alyeska’s initial appeal of the Authorized Officer’s TAPS billing notices for the 2003 rental year, the Authorized Officer also issued TAPS rental billing notices for the 2004 and 2005 calendar years. In turn, Alyeska has filed timely appeals of these subsequent billing notices, and has amended its original Notice of Appeal dated February 4, 2003.” (SOR at 10-11.) The Board docketed Alyeska’s first appeal as IBLA 2003-237, and then docketed subsequent “amendments” to that appeal as received. Alyeska states that “[s]ome of these later amendments may have been assigned other IBLA file numbers, but they all relate to the original issue in appeal number IBLA 2003-237.” Id. at 11. In terms of Board procedure, this decision applies only to those matters specifically identified  
(continued...)

Alyeska claims that the B-S&R Appraisal caused “a drastic increase in the annual rentals for the federal TAPS lands,” a level of increase that Alyeska asserts is “not due to any commensurate rise in the fair market fee value of the Federal TAPS lands between the last updated BLM appraisal and 2002.” (SOR at 4-5.) Alyeska notes that the annual Federal rentals that were charged by BLM for 2002, the last year before BLM applied the B-S&R Appraisal, totaled \$96,638.71. By contrast, in 2003, the first year the B-S&R Appraisal was applied, “the total annual rentals escalated to \$225,632.17,” and rentals have “remained at that general level or higher ever since, with \$221,958.87 in rentals billed in 2004, and \$241,234.24 in rentals billed in 2005.” Id. at 5; see Affidavit of Peter C. Nagel, Exh. 3.

Alyeska explains that in resolving issues regarding an earlier appraisal of state TAPS lands, the State of Alaska committed to working with Alyeska and BLM to develop a common appraisal methodology for appraising the TAPS right-of-way. (SOR at 5.) Alyeska contends that this commitment was “only partially fulfilled” because the final instructions given B-S&R “contained requirements and considerations that Alyeska believes were not supported by the facts or law, and form the basis of the present appeal.” Id. According to Alyeska, the B-S&R Appraisal is contrary to 43 CFR 2803.1-2 for four primary reasons, summarized below.

First, Alyeska states that “the attempted development of a ‘common appraisal methodology’ resulted in errors” in the final B-S&R Appraisal. Alyeska claims that because of instructions given by BLM, B-S&R failed to accurately apply the “encumbrance of rights” factor<sup>5/</sup> in its appraisal. Alyeska defines this factor as “a determination of the percentage of the landowner’s fee simple rights or value that the landowner has conveyed to the lessee by the right-of-way grant and its associated use authorizations.” (SOR at 6.) Alyeska states that “[t]he B-S&R appraisers were inexplicably instructed by BLM to apply an encumbrance of rights factor of 100 percent to the federal TAPS lands.” Id. Alyeska states that “[i]n no instances is the encumbrance of rights factor actually at 100 percent, which the B-S&R appraisers were instructed to apply.” Id. at 7.

Alyeska contends that in misapplying the encumbrance of rights factor, BLM’s authorized officer has “denied equal protection to the TAPS Owner Companies

---

<sup>4/</sup> (...continued)

herein. If there are other properly filed appeals from additional Letter Decisions, it is incumbent upon the parties to bring them to the Board’s attention. See 43 CFR 4.411(a).

<sup>5/</sup> Alyeska states that “[t]he ‘encumbrance of rights’ factor is also known in the appraisal profession as the ‘easement to fee simple ratio,’ the ‘utilization factor,’ or the ‘use rate.’” (SOR at 6.)

because he applied a 100 percent encumbrance of rights factor to the B-S&R Appraisal from 2003 through 2005.” Id. at 8. According to Alyeska, during the same period, BLM applied an 80 percent encumbrance of rights factor to two other comparable Federal pipeline rights-of-way in Alaska, i.e., the Trans-Alaska Gas System (TAGS) and the Alaska Natural Gas Transmission System (ANGTS). Id. at 8-9.)

Second, Alyeska claims that “[t]he percentage of fair market value that is used to calculate the annual rental rate must be reduced to take into account the fact that the Grant rental rate cannot be directly compared to normal lease rates for undeveloped land leases in the commercial market,” and that “[t]he Grant imposes much more onerous financial, reporting and other performance burdens on TAPS Owner Companies than are found in the commercial marketplace.” Id. at 7.

Third, Alyeska claims that the B-S&R Appraisal “failed to account for the costs of development of large, unsurveyed areas when it determined that a downward value adjustment of only \$25 per acre should be applied to the large unsurveyed tracts of federal TAPS right-of-way, when the per-acre value of these tracts was analyzed against comparables that were surveyed tracts of 160 acres.” Id. at 7-8. In Alyeska’s view, in adjusting comparable properties, B-S&R should have accounted for “multiple development expenses related to preparing a remote, unsurveyed tract of 640 acres or larger for sale as 160-acre tracts.” Id. at 8.

And fourth, Alyeska asserts that B-S&R “improperly enhanced the value of some lands as having access to consumer electrical service, when, in fact, the electricity is limited to a 138kv high-tension transmission line.” Id. According to Alyeska, nearby consumer electricity considered by B-S&R to be a “value-adding attribute” at certain locations “would require expensive voltage step-down transformers, distribution lines, and related facilities to produce distribution electricity.” Id. Thus, argues Alyeska, it was error for B-S&R to add value for Federal lands near a 138kv high-tension transmission line.

[1] Section 28(a) of the MLA, 30 U.S.C. § 185(a) (2000), authorizes BLM to issue right-of-way grants across the Federal lands for “pipeline purposes for the transportation of \* \* \* natural gas.” The grantee must pay to the Department the fair market rental value of the right-of-way “as determined by the Secretary.” 30 U.S.C. § 185(l) (2000); Alaska Pipeline Company, 164 IBLA 149, 151 (2004); Wesfrac, 153 IBLA 164, 167 (2000). The Department’s regulation for MLA rights-of-way, 43 CFR 2883.1-2, requires right-of-way holders to make rental payments in accordance with provisions of 43 CFR 2803.1-2, the regulation governing rentals for rights-of-way issued under Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (2000). That regulation requires the holder of a right-of-way grant to pay annually in advance “the 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.” 43 CFR 2803.1-2(a). “Such value represents 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 use.’” Alaska Pipeline Company, 164 IBLA at 152; Wesfrac, 153 IBLA at 167, quoting Questar Service Corp., 119 IBLA 65, 67 (1991). As noted in Alaska Pipeline Company, “[w]e have held that rental value determinations may be made on the basis of ‘comparable leases, which is the preferred approach and, thus, consistent with comparable commercial practices, as required by 43 CFR 2803.1-2(a).” 164 IBLA at 152, quoting Rock Creek Joint Venture, 138 IBLA 6, 13 (1997).

In Wesfrac, Inc., the Board set forth the proper standard for reviewing a fair market rental value for an MLA right-of-way:

An appraisal of a fair market rental value for a right-of-way grant will not be set aside unless the appellant demonstrates error in the appraisal method used by BLM or shows 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. See Amoco Corp., 139 IBLA 96, 99 (1997); Rock Creek Joint Venture, 138 IBLA at 13 and cases cited; see also 4-H Partnership, 149 IBLA 161, 166 (1999).

153 IBLA at 167-68; see also Alaska Pipeline Company, 164 IBLA at 152.

In evaluating Alyeska’s four points of error against these criteria, most particularly the first involving the special instruction adopting the 100 percent encumbrance of rights factor, we are confronted with an administrative record which is insufficient for us to determine whether the special instruction rests upon a rational basis. In Citicasters Co., 166 IBLA 111, 118 (2005), the Board set aside BLM’s rental determination and remanded the case “instructing BLM to develop a record supporting a rational basis for BLM’s decision to establish the fair market rental value” for the right-of-way. The Board found it impossible to determine, from the record, whether there was a rational basis for the appraisal method and result. For the reasons that follow, the rationale in Citicasters Co. applies herein.

#### The “Encumbrance of Rights” Factor

[2] Alyeska contends that B-S&R erred in basing its appraisal of the fee interest in Federal and state TAPS right-of-way and related lands upon a “special

instruction” to the effect that the lands are encumbered 100 percent by the rights granted to the TAPS Owner Companies. Alyeska asserts that the instruction, and B-S&R’s appraisal based thereupon, are contrary to the notion that B-S&R “reach[ed] an independent conclusion that the 100 percent encumbrance of rights factor was correct.” (SOR at 12.)

Alyeska offers the following explanation as to how B-S&R’s 100 percent encumbrance of rights determination came about:

The adoption by the BLM of a 100 percent encumbrance of rights factor was first described in the letter of August 22, 2002 from Michael S. Redfield, BLM Contracting Officer’s Representative, to Diane Black-Smith of B-S&R. See Alyeska’s Exhibit 6. The Redfield letter did not reach an independent conclusion that a 100 percent encumbrance of rights factor was correct. Instead, Mr. Redfield stated that the reviewers “concur” in the conclusion that he believed was earlier reached by Ms. Black-Smith. Id. However, the evidence shows that Ms. Black-Smith’s presumed “conclusion” (i.e., that the 100 percent encumbrance of rights factor was factually correct), was not her independent conclusion at all, but was instead an instruction given B-S&R by Judy Robinson, the State of Alaska’s right of way appraisal agent, and endorsed by the Authorized Officer’s representative. The B-S&R appraisal at page 5 states under “Interest Appraised,” that,

The right-of-way lands are appraised according to the following special instruction:

“As required by Alaska Statute 38.35.140, [<sup>6/</sup>] market rent will be ‘based on the appraised fair market value of the land’ with no allocation made for rights granted or retained.” [Footnote.]

---

<sup>6/</sup> Alaska Rev. Stat. § 38.35.140(a) provides: “The lease price for a right-of-way lease shall be the annual fair market rental of the state land included in the right-of-way based on the appraised fair market value of the land. The lease price is payable annually in advance on or before the anniversary of the lease. The appraised fair market rental value shall be adjusted at five-year intervals and charges or adjustments shall be made based on a reappraised annual rental value \* \* \*.” (Emphasis added).

The footnote states: “Provided by Judy A. Robinson, SR/WA, Review Appraiser, State of Alaska Department of Natural Resources (10/31/2002 ).”

The referenced instruction from Ms. Robinson was in the form of an e-mail message to B-S&R dated October 31, 2002, and simply stated, in conclusory fashion,

As required by Alaska Statute 38.35.140, market rent will be “based on the appraised fair market value of the land” with no allocation made for rights granted or retained.

See Alyeska’s Exhibit 7, p.1. The entirety of the federal official’s review of this “required” instruction consisted of the following e-mail message: “The special instruction sounds good to me.” Exhibit 7, p. 2.

(SOR at 12-13; see also Reply at 10.) We will observe at this juncture that this may or may not constitute the entirety of BLM’s review of the special instruction. The record contains nothing more on the subject. Therefore, we do not know whether this constituted the entirety of BLM’s review of the encumbrance of rights factor and of the special instruction, or on what BLM’s concurrence was based.

Alyeska argues that the state’s interpretation of Alaska Statute (AS) 38.35.140 is in error, and that in any event, because the state’s interpretation of the “requirement” of AS 38.35.140 is contrary to the fair market value requirement of 43 CFR 2803.1-2, it is not binding on the United States. (SOR at 13.) Alyeska asserts that the statute is clear that there is no requirement that each right-of-way across state land be assessed on a 100 percent encumbrance of rights factor, i.e., 100 percent of the fee simple value of the land times the annual rental rate. Rather, the state annual rate rental is to be the “annual fair market rental of the state land included in the right-of-way \* \* \*.” Alyeska claims that both the TAPS Agreement and the State of Alaska lease at 17.C. (Exh. 8) make it clear that the TAPS owners are granted a non-exclusive right-of-way and that the Owner Companies do not exclusively possess their Federal or state rights-of-way. Alyeska argues that the fact that TAPS owners are granted a non-exclusive possession of both Federal and State of Alaska rights-of-way “must necessarily be reflected in the degree that the specified “state land [is] included in the right-of-way.” This, Alyeska contends, “is the essence of the encumbrance of rights factor.” (SOR at 14; Reply at 13-14.)

In Alyeska’s view, “[t]he instruction from Robinson to B-S&R elevated this distortion of Alaska Statute 38.35.140(a) to a level of statutory mandate, a mistake that the BLM’s representative adopted without critical examination, as a federal requirement.” (SOR at 14-15.) Moreover, BLM’s assertion that the 100 percent

encumbrance of rights factor was based on B-S&R's independent conclusion has been shown to be in error. Alyeska maintains that the result of the State's erroneous interpretation of AS 38.35.140(a) has "been compounded by the federal government's adoption of its error" by permitting "the State to 'double dip' its revenues, by assessing rentals from several right-of-way holders of the same rights on state land parcels, based upon an erroneous belief that each holds a 100 percent encumbrance of the State's land, notwithstanding reality, nor the terms of the respective leases." Id. Alyeska points out that by "accep[ting] without question the State of Alaska's 'instruction' to appraisers based on a faulty and presumed 'mandate' of AS 38.35.140," viewing the non-exclusive Federal land rights granted for TAPS operations as if those rights were exclusive rights of occupancy, BLM abused its discretion and breached its duty under 43 CFR 2803.1-2(a) to determine the "fair market rental value, \* \* \* applying sound business management principles and \* \* \* using comparable commercial practices." (SOR at 16; see also Reply at 7-8.)

Alyeska emphasizes that the TAPS Agreement is clear that the Owner Companies' rights to use the Federal lands are non-exclusive. Section 11.C. of the TAPS Agreement provides:

There is reserved to the United States the right to grant additional permits or easements for rights-of-way to third parties for compatible uses on, or adjacent to, the lands subject to the Right-of-Way. Before the United States grants an additional right-of-way or permit for a compatible use, the United States will notify Permittees of its intentions and shall consult with Permittees before taking final action in that regard.

(SOR at 17, quoting TAPS Agreement, Section 11.C., Exh. 1). Alyeska interprets this provision as consistent with 43 CFR 2881.1-1:

It is clear from the applicable regulations that the United States is required to retain all land use rights not specifically granted the holder, to retain its capability to permit other compatible uses of the same federal lands, and to retain all economic value of surface and subsurface resources not granted. See 43 CFR [ ] 2881.1-1. The legal existence and economic value of these retained federal land interests must be factored into the Authorized Officer's determination of the percentage of encumbrance of the federal fee interest that TAPS grant imposes. [Footnote omitted.]

(SOR at 17.)

Alyeska states that it employed an experienced Alaska appraiser, Alan G. Olson, to review the final B-S&R appraisal, and submits Olson’s review as Exhibit 12 to its SOR (Olson’s Review). Alyeska explains that Olson has been directly involved in appraising aspects of TAPS from 1975 through 2000. For example, “[t]he King/Olson 1999 appraisal of the Federal TAPS lands, referred to in Olson’s Review, was accepted by the applicable federal official on February 14, 2000,” but it “was never applied by BLM to determine the annual rentals or use charges under the Grant.” (SOR at 18, n.5.) Olson noted that B-S&R had considered the “history of Alaska appraiser’s independent conclusions of encumbrance of rights percentages for the TAPS right-of-way (ranging between 40% for underground sections of the pipeline to 75% for both underground and above-ground sections).” (Olson’s Review, Exh. 12, at 5.) In addition, he reviewed the 27 Industry Practices Interviews conducted by B-S&R, noting that 10 specifically related to oil and pipeline companies and agencies. See B-S&R Task II–Research Industry Practices, Report, Exh. 11. He summarized the topical interviews as follows:

<u>Interviews</u>	<u>Encumbrance of Rights*</u>
2	100% of fee value
1	100% of assessed land value
1	Up to 100%
3	50% - 100%
1	50% - 75% of buried pipe
1	90% - 100% for above-ground pipe
1	25% -50% (66% for corridor)
1	25% -40% as a starting range

\* Of fee land value, unless otherwise noted.

(Exh. 12 at 5.) In analyzing the encumbrance of rights factor, and based upon this data, Olson claims that had

the B-S&R appraisers been given the opportunity to apply their evaluation of industry practices, historical data of independent conclusions relating to the TAPS right-of-way by other Alaska appraisers, and fully consider the non-exclusive use by [Alyeska] for the TAPS right-of-way (shared with other users), it is expected that a conclusion at less than 100% would occur (possibly the same or similar to 75% concluded in the King/Olson 1999 appraisal of federal lands).

(SOR at 18, quoting Olson’s Review, Exh. 12 at 4 (emphasis supplied by Alyeska).) Olson thus assumed that B-S&R was not given the opportunity to apply the

evaluation of industry practices developed during Task II,<sup>7/</sup> and there is nothing in the record showing otherwise. While there is a letter from Redfield to B-S&R acknowledging that B-S&R's interim conclusion was that the right-of-way was fully encumbered, and advising B-S&R to "proceed with Task Orders 3 & 4," the record does not show that B-S&R in fact proceeded with Task III.

Further, Alyeska contends that it has been denied equal protection of the laws because BLM has approved appraisals of two other significant mineral leasing pipeline rights-of-way in Alaska that "parallel the TAPS right-of-way, and traverse the same federal lands" involved in the TAPS Agreement. (SOR at 19.) In both cases, BLM has applied an encumbrance of rights factor of 80 percent. Those two pipeline systems (the Trans Alaska Gas System (TAGS) and the Alaska Natural Gas Transportation System (ANGTS)) were both issued under the same statutory authority as TAPS, granting the right-of-way holders a non-exclusive right to occupy and use the Federal lands within the right-of-way. The ANGTS Grant provides the grantee a "non-possessory, nonexclusive right to use certain FEDERAL LANDS." (SOR at 20, quoting ANGTS Grant, Exh. 14, at 3.) The TAGS Grant "specifies that the United States reserves the right to grant additional rights to third parties within the right-of-way, in terms nearly identical to those found at section 11.C. of the TAPS Grant." (SOR at 20; Exh. 15, at 9.)

Alyeska emphasizes that each of the billing notices, or Letter Decisions, for TAGS and ANGTS was issued "after the Authorized Officer accepted the 2002 B-S&R appraisal of the TAPS right-of-way, and concurrent with his application of the B-S&R appraisal to determine TAPS Owners' annual rentals for 2003 and subsequent years." (SOR at 21.) Thus, Alyeska maintains that "the TAGS and ANGTS right of way holders continue, through 2005, to pay annual rentals on an encumbrance of rights factor of 80 percent--yet the TAPS Owners are required to pay annual rentals from 2003 forward, based on a mandated 100 percent encumbrance of rights factor." (SOR at 21.) Significantly, Alyeska charges that BLM's "Authorized Officer has never offered any factual or legal reason for his distinction between the 80 percent encumbrance of rights factor he has applied to the ANGTS and TAGS pipeline rights-of-way, and the 100 percent factor he has applied to TAPS." Id. Alyeska insists that "[w]ithout any legal or factual justification for such a discrepancy, his 100 percent factor cannot stand." Id. In addition, Alyeska submits that this unequal and detrimental evaluation of the TAPS Grant encumbrance of rights factor by BLM, "constitutes a continuing denial of equal protection of the laws to Alyeska and the TAPS Owners in violation of the Constitution of the U.S." Id.

---

<sup>7/</sup> The TAPS Renewal Appraisal defines its objective in Task II as "[r]esearch[ing] the prevailing [right-of-way] practices in use in the private sector \* \* \* in order to determine how pipeline companies purchase rights-of-way, what is the basis of the price, and what are the factors that influence price." (Exh. 5, Vol. 1, at 12.)

In its answer, BLM contends generally that B-S&R properly determined that 100 percent was the appropriate rate for the encumbrance of rights factor under the TAPS Agreement. BLM discounts Alyeska's contention that B-S&R had been "instructed" to employ the 100 percent rate contrary to AS 38.35.140. BLM states that state statutes have no bearing on BLM's decision to accept B-S&R's appraisal as correctly establishing the value of the TAPS Right-of-Way. "Whether the appraisal also satisfies State law is irrelevant," pronounces BLM, and that portion of Alyeska's SOR "which addresses state law questions will be disregarded." (Answer at 2.) Further, regarding what Alyeska calls a violation of equal protection in the differing treatment of the TAGS and ANGTS right-of-way holders, BLM states: "The fact that the holder of one right of way may be required to pay more than the holder of another, different, right of way is not probative." Id.

BLM reminds us that Olson found the B-S&R appraisal to be "complete, with adequate and relevant data, and generally proper adjustments of data where applicable." Id. at 5, quoting Olson's Review, Exh 12, at 4.<sup>8/</sup> Recognizing that Olson "proceeds to point out parts of the appraisal where he would have made different conclusions had he been performing the appraisal," BLM correctly emphasizes that "the test of whether the appraisal adopted by [BLM] meets the standard set forth in the BLM regulations is not whether all other appraisers would agree with every part of the appraisal, but rather whether there is convincing evidence that the fair market determination is erroneous." (Answer at 5-6, citing 4-H Partnership, 149 IBLA 161, 166 (1999), and Regina B. Perry, 142 IBLA 278, 281 (1998)). BLM then states: "This APSC has not and cannot do since even the appraiser [Olson] who was hired by APSC to review the approved appraisal, concluded that the approved appraisal was proper." (Answer at 6.)<sup>2/</sup>

More specifically, BLM disputes Alyeska's claim that B-S&R did not make its own independent determination as to the encumbrance of rights factor. BLM reviews the series of "Tasks" outlined in its contract with B-S&R for preparation of the appraisal, with the work "divided into a series of tasks which were dependent on Agency (BLM) approval of one task's results before the appraiser could proceed to the

---

<sup>8/</sup> Olson states, however: "My review, in effect, is considered to be an appraisal for the reason that I differ with the opinion of values by Black-Smith & Richards, Inc. and have developed my own opinions of value, or at least I am providing suggestions of what values may be if various revisions are considered and made by the B-S&R appraisers." (Olson's Review, Exh. 12, at 2.)

<sup>2/</sup> In its Reply, Alyeska points out that Olson did "not agree with the appropriateness of some methods and techniques" employed by B-S&R, and that if the B-S&R appraisers were to reconsider those methods and techniques, different "annual rental values would occur." (Olson's Review, Exh. 12, at 4.)

next task.” (Answer at 7; see Order for Supplies or Services, Exh. 2, at 3-4.) BLM states that B-S&R received authorization from BLM’s representative to proceed with Tasks III and IV (see Aug. 22, 2002, Letter from BLM to B-S&R, Exh. 6), with particular reference to B-S&R’s “conclusion regarding the percentage of encumbrance to be used (developed through tasks I and II).” (Answer at 7.) In this letter, BLM states that in discussions between its reviewers and B-S&R, B-S&R stated its “interim conclusion that the right-of-way is fully (100%) encumbered by the authorized use,” and that BLM’s “reviewers concur in this conclusion.” Id. BLM concludes that it was B-S&R’s professional determination to use the 100% encumbrance of rights factor.

BLM disputes Alyeska’s equal protection argument, questioning how the adoption of the B-S&R appraisal, with its 100 percent encumbrance factor, is in violation of the Constitution. Id. at 10. BLM denies the existence of any Constitutional right that all holders of rights-of-way are entitled to the same encumbrance rate. Rather, BLM insists that “[e]ach right-of-way holder is merely entitled to a rent determined by a proper appraisal under the regulations applicable to the BLM,” which occurred in this case. BLM contends, contrary to Alyeska’s assertion, that because “other unconstructed rights-of-way,” i.e., those held by ANTGS and TAGS, “which are inferior (subject) to TAPS had an encumbrance rate of 80% determined to be proper in 1997 does not mean that [a] 100% rate for TAPS in 2002 is somehow erroneous.”<sup>10/</sup> Id. at 10.

In its reply, Alyeska disputes BLM’s claim that it “cannot demonstrate any errors in either the appraisal methodology or the conclusion of fair market value.” (Reply at 3.) In all fairness, we must agree with Alyeska that BLM quoted out of context one passage from Olson’s Review favorable to the B-S&R Appraisal, i.e., “I consider the B-S&R appraisal to be complete, with adequate and relevant data, and generally proper adjustments of data where applicable.” (Reply at 4, quoting Olson’s Review, Exh. 12, at 4.) The following passage shows the statement quoted by BLM in proper context:

Other than not including what I consider to be a key comparable for the segments south of Copper Center (copy attached to this report), I

---

<sup>10/</sup> BLM acknowledges that in the 1997 appraisal of the ANGTS and TAGS rights-of-way, the appraiser did not “believe it was appropriate to use a percentage of rights factor of 100% since 100% of rights in fact are not being granted by the subject grants, and so used 80 percent.” (Answer at 8, quoting ANGTS and TAGS Appraisal, Exh. 16, at 19.) BLM nevertheless insists that the appraiser’s “market research indicated that 100% was the most used factor,” and urges that B-S&R used that factor in accordance with 43 CFR 2803.1-2(a), which requires use of “comparable commercial practices” to the extent practicable and feasible.

consider the B-S&R appraisal to be complete, with adequate and relevant data, and generally proper adjustments of data where applicable. Based on reasons discussed in this review report, I do not agree with the appropriateness of some methods and techniques (e.g., literal use of ATF [across-the-fence] method which effectively values portions of some segments and corridors). As a result of my review of the BS&R appraisal, I have developed opinions of value which are included in my discussions of segments and have provided various potential annual rental values of both federal and state lands that reflect what might be appropriate under various conclusions that can occur as a result of reconsiderations by the B-S&R appraisers. [Emphasis added by Alyeska.]

Id. Alyeska is correct that Olson's differences with B-S&R's "methodology and conclusions would significantly affect the determination of fair market values of the affected pipeline segments evaluated in the B-S&R appraisal," and that "[t]hese differences are substantial, in method and in their effect on value." (Reply at 5.)

Alyeska points out the incorrectness of BLM's assertion that Alyeska "could have submitted its own appraisal for the Board to compare with the BLM approved appraisal," but that "[t]his was not done." Id. at 6. On the first page of his review, Olson states:

The purpose of my review is to ascertain whether the appraisal by B-S&R fairly represents the conditions that relate to the use of federal and state lands by APSC for the TAPS right of way and adequately supports their conclusions of annual rental values. My review, in effect, is considered to be an appraisal for the reason that I differ with the opinions of values by Black-Smith & Richards, Inc. and have developed my own opinions of value, or at least I am providing suggestions of what values may be if various revisions are considered and made by the B-S&R appraisers. [Emphasis added.]

(Olson Review, Exh. 12, at 2.) Contrary to BLM's statement, it is clear that Olson considered his review to be an independent appraisal.

In addition, Alyeska shows that the 1999 King-Olson Appraisal, which Alyeska identified but did not include in its SOR, concerned the "fair market value – for annual rental purposes under Section 8 of the TAPS Agreement and Grant – of the lands included within the federal TAPS pipeline Grant." (Reply at 6; see Exh. 1, at 5.) Noting that "BLM apparently did not use this appraisal in 2000 or subsequently to determine the annual rentals for the federal TAPS lands," Alyeska refers specifically to the conclusion reached in the King-Olson Appraisal as to the

encumbrance of rights factor: “Based upon the factual circumstances of the TAPS guideline and the absence of any right of exclusive right-of-way use by Alyeska, King and Olson determined that the ‘encumbrance of rights’ factor should be 75 percent, and not 100 percent, except where temporary use permits (which granted exclusive use) were involved.” (Reply at 6-7; Olson-King Appraisal Review Report, Exh. 25, at 8-12; Olson’s Review, Exh. 12, at 5 (emphasis added by Alyeska).)

Alyeska challenges BLM’s claim that B-S&R “independently concluded, based on its professional judgment, that a 100 percent ‘encumbrance of rights’ factor was proper, and should be applied to the TAPS appraisal,” arguing that “[a]pplication of the 100 percent ‘encumbrance of rights’ factor was not the result of any impartial, unbiased professional appraiser’s judgment, but was instead a specific instruction from the clients (BLM and the State of Alaska) to B-S&R.” (Reply at 7 (emphasis added by Alyeska)). Alyeska’s review of the documentation is as follows:

Mr. Johnson was informed by Judy A. Robinson of the State; that the State desired a special instruction to B-S&R that they were to use a 200 percent “encumbrance of rights” factor because state law required it. Ms. Robinson requested, “Rick, if you concur with this special instruction, please forward it to BSR via your email and cc: me. Thanks.” Mr. Johnson’s response, which in effect constituted BLM’s parallel instruction to B-S&R to apply the 100 percent factor to federal lands, was, “The special instruction sounds good to me.”

(Reply at 8.) Alyeska is correct that “[t]his represents the sum total of BLM’s analysis and consideration of the “encumbrance of rights” factor, before BLM required B-S&R to apply this special instruction to the federal TAPS lands.” For Alyeska, the

unavoidable conclusion must arise that the state-law ‘100 percent’ interpretation was driving the BLM’s application of this special instruction to federal lands, particularly when there exists no BLM analysis of why – as a matter of federal law or fair market value considerations – such a special instruction was required for the appraisal of federal lands.

(Reply at 8-9.)

It is possible that Robinson’s communication to Johnson, that if he “concur[red] with this special instruction, please forward it to BSR via your email and cc: me,” was the culmination of other discussions concerning the 100 percent encumbrance of rights factor; however, there is little in the record to bolster such speculation. The record simply does not support a conclusion that B-S&R, or

BLM, for that matter, independently determined that a 100 percent factor was appropriate.

Alyeska takes further issue with BLM's assertion that B-S&R's encumbrance of rights determination was "developed through tasks I and II," and so amounted to an independent determination. In developing information necessary to compile the encumbrance of rights factor, B-S&R deemed it necessary to conduct a series of 27 interviews concerning industry practice on the subject, with B-S&R's "Task II Report" dated July 23, 2002, being the result. (Reply at 10; see Exh. 11.) Based upon the results of its interviews, B-S&R advised BLM that "a significant number of transactions will reflect a general range from 25% to 100% of the fee value." (Exh. 11 at 16.) Clearly, there was a "wide range of encumbrance of rights in the 27 interviews conducted" by B-S&R, and "particularly among the 10 pipeline entities interviewed (with the encumbrance factor ranging from 25 percent to more than 100 percent)." (Reply at 11-12; Exhs. 11 and 12.)

As to BLM's argument that the Board is without authority to declare a law or regulation unconstitutional, Alyeska states that "[i]t has simply asked the Board to hold that the actions of BLM – in carrying out laws and regulations whose constitutionality is not questioned – has resulted in an arbitrary result, and in an unconstitutional denial of due process and equal protection of the laws to Alyeska." (Reply at 18, citing U.S. Const. Amend. V and XIV.) Alyeska views it as within the Board's authority "to determine that BLM's unequal and detrimental treatment of Alyeska regarding the 'encumbrance of rights' factor has resulted in an arbitrary and unconstitutional application of existing laws and regulations to Alyeska by BLM, and to order BLM to rectify this unfair and unconstitutional treatment." (Reply at 18.) Alyeska says that BLM "treats an appraiser's conclusions as \* \* \* subjective whim," rather than "objective fact-finding and rational conclusion." (Reply at 18-19.)

In its reply, Alyeska contradicts BLM's response to its claim of unequal treatment as compared to existing lessees of identical BLM lands. Alyeska shows that both the TAGS and ANGTS leases are non-exclusive, and that they each apply an encumbrance of rights factor of 80 percent, not 100 percent. (Reply at 16; Exhs. 14-16.) Alyeska states that the fact that the TAGS and ANGTS pipelines are "unconstructed" is irrelevant to the BLM appraisal process, and that the terms under which rights-of-way were granted to the TAGS and ANGTS entities do not depend on the construction of either pipeline. Alyeska refers to the leases as "place-holders" for purposes of preserving the lessees' land rights should the "pipeline proposals become commercially viable." (Reply at 17.) BLM is required to appraise the value of its lands "without consideration of the future value of land with pipeline improvements in place." Id. (emphasis added by Alyeska).

The Appraisal Report for the ANGTS and TAGS rights-of-way, in Alyeska's view, reflects an independent determination of an 80 percent encumbrance of rights factor for those rights-of-way:

A consideration which has not been discussed to this point is 43 CFR 2803.1-2. These are the 1987 regulations which implement a fee schedule, by county, for linear rights-of-way on public lands. These regulations were established in the normal manner of regulations, with extensive research and public involvement. The fee schedule applies unless market information indicates a value of 10 times greater than the fee schedule, per 43 CFR 2803.1-2(c)(1)(v). \* \* \* These regulations use a percentage rights (impact adjustments in the regulations) factor of 70% for non-energy rights-of-way and 80% for energy rights-of-way. The effect of these regulations is that in the lower 48 states, [BLM] does not do appraisals on linear rights-of-way. Since this is not a fee schedule, I do not believe the regulations require using 80% rights in an appraisal, although it should be considered.

\* \* \* \* \*

I do not believe it is appropriate to use a percentage rights factor of 100%, since 100% rights in fact are not being granted by the subject grants. \* \* \* Discarding Oregon's free rural grants and Idaho's charging 100 percent rights on timber lands, the percentage rights issue comes down to \* \* \* Bureau fee schedule regulations charging 80% rights.

I conclude the percentage rights which should be charged for the subject rights-of-way is 80% of fee simple market value.

(Exhibit 16 at 18-19.) This conclusion appears based upon what Alyeska claims is missing from B-S&R's analysis: an independent evaluation of the market involved.

In this connection, we observe that in Alaska Pipeline Company, supra, we affirmed a BLM decision/appraisal applying an 80 percent encumbrance of rights factor. Therein, we rejected the appellant's claim that an encumbrance of rights factor of 50 percent should have been employed rather than the 80 percent factor employed by BLM, considering the nonexclusive nature of the right-of-way. We ruled that Alaska Pipeline Company had failed to demonstrate error in the appraisal report which examined 10 comparables, and that BLM properly applied the 80 percent encumbrance of rights rate determined by the appraiser to be appropriate. Unlike the objective and independent appraisal process shown in Alaska Pipeline Company, B-S&R applied the special instruction required by Alaska and BLM in applying a 100 percent encumbrance factor. That factor was at odds with the range of

encumbrance percentages shown among the 10 pipeline entities considered in B-S&R's Task II Report, which, as Alyeska points out, appears pre-empted by the special instruction imposing a 100 percent encumbrance factor. See Reply at 12. Alyeska concludes that the 100 percent encumbrance factor is inconsistent with the encumbrance of rights rate applied in the ANGTS and TAGS rights-of-way, and is contrary to the unequivocal terms of the TAPS Agreement and applicable regulations.

Alyeska offers the following analysis, with which we agree:

If three parallel leases are currently issued or renewed by BLM in Alaska for petroleum pipeline purposes under the same statutory authority, and all specifically grant the lessees non-exclusive rights, and two of the leases apply an "encumbrance of rights" factor of 100 percent, there can be only two possible explanations: First, the appraiser has acted (or has been instructed by the client to act) arbitrarily or subjectively, which is legally impermissible.

Or second, there are factual distinctions that the appraiser found in the determination of "fair market value" between the two "80-percent" leases and the "100 percent" lease, and the appraiser has identified, quantified and applied these distinctions as to the three leases. No such distinctions have been identified in the present situations. [Footnote omitted.]

(Reply at 19.) Alyeska stresses that the rent to be charged is "not an issue of entitlement but of basic objectivity and fair determination of facts in the appraisal process." (Reply at 18.) While we agree with BLM that a right-of-way holder does not have a Constitutional right to a specific encumbrance of rights rate, there is no doubt that a right-of-way holder does have a right to be free from an unequal application of the applicable statute and implementing regulations.

The B-S&R Appraisal all but guaranteed that the issue of what rights were granted or retained was moot, given that the definition of the "interest appraised" expressly stated that the right-of-way lands were to be appraised according to the special instruction. We cannot conclude from the record that the instruction reflected an independent determination or exercise of professional judgment by B-S&R as to the encumbrance of rights factor, as in the case of the TAGS and ANGTS rights-of-way, where BLM focused on the reality of what rights were actually granted or retained and the obvious impact on value. It seems that had BLM and Alaska desired the exercise of professional judgment on this issue there would have been no requirement for the "special instruction."

Based upon the record before us, we are unable to determine whether or not the 100 percent encumbrance of rights factor was the result of B-S&R's impartial and unbiased judgment, and not the result of the special instruction. While BLM argues that B-S&R based the special instruction upon information gathered in completing Tasks I and II, and that the special instruction reflects a 100 percent encumbrance of rights factor arrived at as the result of independent research and judgment on B-S&R's part, we cannot conclude either way. Whether the instruction has a rational basis is a question impossible to answer based upon this record. As in Citicasters Co., 166 IBLA at 118, we must set aside the subject Letter Decisions and remand them to BLM for the development of a record supporting whatever encumbrance of rights factor is selected and applied to the TAPS Agreement. As we stated in Citicasters Co., "it is incumbent upon BLM to provide an administrative record which adequately supports its fair market rental determination." Id. at 116.

#### Reduction of Annual Rental Rate for Uncommon Performance Burdens

We will now consider whether BLM abused its discretion in not reducing the percentage of fair market rental value in the B-S&R Appraisal to account for the increased burdens of the Agreement on the TAPS Owner Companies that are not "comparable commercial practices." This, according to Alyeska, violates 43 CFR 2803.1-2(a), which requires BLM to determine the fair market rental value by "applying sound business management principles, and, so far as practicable or feasible using comparable commercial practices."

Alyeska contends that the B-S&R Appraisal "fails to recognize the added – and distinctly non-commercial – burdens of the TAPS Grant, or to apply a reduced rental rate commensurate with these additional burdens of the TAPS Grant that exceed normal commercial practices." (SOR at 22.) Alyeska asserts that B-S&R's appraisal determined that a reduced rental rate of 8 percent should be applied to the fair market value of the Federal lands covered by the TAPS Agreement, and that this percentage rate was premised on prevailing commercial practices, albeit "the appraisers undertook no examination of the provisions of the Grant itself to determine whether they were 'comparable' to the practices that exist in the commercial market regarding the leasing of raw land." Id.

In his review of the B-S&R appraisal, Olson estimated that an annual rental rate of 8 percent of fee land value was appropriate, "based primarily on market data from throughout Alaska." He states: "Historically, since 1991, various rental rates have been estimated between 7½% and 8½% (7½% by King in 1991, 8% by BLM in 1995, 8½ percent by Hines in 1997, and 8% by King/Olson in 1999)." (Olson's Review, Exh. 12, at 5.) He states that he is on record with his opinion that a market rental rate closer to 7% would be reasonable, considering the complexities of the TAPS Agreement, including unusual restrictions and costs borne by Alyeska, such as:

(1) common carrier status required; (2) reimbursement of mandatory oversight expenses incurred by the Joint Pipeline Office; (3) local hire requirements; (4) surveillance and maintenance requirements; (5) providing housing and quarters for state employees; and (6) strict liability language in the Federal grant and state lease. Id. at 5-6.

Alyeska maintains that by placing a monetary value on the “most financially onerous” obligation, that of reimbursement for lease monitoring expenses by the Joint Pipeline Office, costs the TAPS Owner Companies approximately \$3.5 million annually, a reimbursement that “is 15 times the annual rental assessed by the Authorized Officer for TAPS, even under the [Letter Decisions] appealed from here.” (SOR at 23; see Second Affidavit of Peter C. Nagel, Exh. 19.) Notwithstanding this extraordinary cost, Alyeska emphasizes “nowhere in the B-S&R appraisal is the rental rate reduced (or even discussed) to account for this extraordinary discrepancy between this provision of the Grant and normal commercial leasing practices – the very practices that the appraisers believed gave them the basis for determining an applicable annual rate of 8 percent.” Id.

Alyeska points out that, in addition, the TAPS Agreement “includes 18 pages of stipulations that contain a number of additional, detailed contractual burdens on the TAPS Owner Companies that must be fairly weighed by the appraisers in determining whether, and to what extent, their analysis of rental rates in the commercial, raw-land leasing sector should guide their determination of a valid annual rate for the Grant.” (SOR at 23; see Exh. 19.) B-S&R, Alyeska maintains, fails to consider the cumulative effect of these TAPS Agreement requirements in reaching a justifiable and fair annual rental rate. Assertedly, the appraisers again relied on the “flawed comparison with commercial leasing practices that the appraisers have presumed, without support or discussion, to be ‘comparable.’” Id. “This failure,” it contends, “constitutes a violation of 43 CFR 2803.1-2(a).” Id. Alyeska urges the Board to grant a hearing to determine “a proper annual rental rate, particularly weighing the TAPS Grant against normal commercial practices in the leasing of raw land.” Id.

BLM counters that Alyeska “appears to be arguing that there are no comparable commercial practices for TAPS because of increased burdens imposed by the Grant.” (Answer at 6.) However, BLM asserts that “[t]his was considered by the appraiser as part of task 1 of the BLM contract,” citing Exhibit 2 at 3. BLM states that the fact that Alyeska does not agree with the appraiser’s conclusions is not probative, given that Alyeska could have submitted its own appraisal but failed to do so. BLM reasons that Olson’s review confirmed that the approved appraisal was proper, even though he might have reached a different conclusion. (Answer at 6.)

Alyeska challenges BLM's claim that it has not submitted another appraisal, stating that its SOR refers to the 1999 King/Olson appraisal, a copy of which Alyeska has attached to its Reply. See Alyeska's Exh. 25. Notwithstanding the significant burdens placed on Alyeska under the terms of the TAPS Agreement, King/Olson in 1999 did not conclude that a rate of 8 percent, as distinguished from the encumbrance of rights factor, was not supported by the facts. To the contrary, King/Olson agreed with B-S&R in using an 8 percent rate in that appraisal, notwithstanding Olson's opinion at that time that this figure could be as low as 7 percent. We note that the ANGTS reappraisal, submitted by Alyeska as Exhibit 16, determined the market rental rate as of January 1, 1998, at 8 percent, consistent with the King/Olson (1999) TAPS appraisal. That reappraisal stated: "A brief survey of landowners in Alaska states the 8% rate of return used in the 1995 Reappraisal is still the current market rental rate." (Alyeska's Exh. 16 at 27.)

On balance, we find that Alyeska has failed to demonstrate that B-S&R's use of the 8 percent market rate is erroneous or excessive. Alyeska offers little more than a difference of opinion on the subject. We uphold BLM's calculations based upon the 8 percent rate. See Alaska Pipeline Company, 164 IBLA at 152; Wesfrac, Inc., 153 IBLA at 167-68.

#### Costs of Developing Large, Unsurveyed Areas

Alyeska asserts that the B-S&R appraisal fails to adequately account for the cost of developing comparable large unsurveyed tracts of land. In analyzing sales of comparable tracts of 160 acres in size, the B-S&R appraisal contained a downward adjustment of \$25 per acre of the fair market value for costs associated with large unsurveyed tracts of land traversed by TAPS. (SOR at 23-24.) Alyeska charges that an adjustment of at least twice that amount or more should have been employed by B-S&R as the cost necessary for bringing unsurveyed tracts of land larger than 160 acres to ultimate sale and development, citing Olson's Review at 5. Alyeska states that B-S&R used a "larger parcel" analysis which "recognized only the costs of survey as a factor reducing the fair market value of unsurveyed TAPS tracts." (SOR at 24.)

Again, we are not persuaded, based upon this record, that Alyeska has demonstrated error in B-S&R's downward adjustment of \$25 per acre for developing large unsurveyed tracts of land. See Alaska Pipeline Company, supra; Wesfrac, Inc., supra.

#### Adjustment for Availability of Distribution Electricity

Alyeska contends that the appraisal inappropriately attributed increased values to Segments 15 and 17 of the right-of-way due to the asserted proximity to "electrical service." The "electrical service" is in fact a 138kv high-tension transmission line

owned by Golden Valley Electric Association (GVEA) and the Copper Valley Electric Association (CVEA). In his review, Olson states that B-S&R's appraisal deemed the CVEA and GVEA 138kv electric transmission lines that are generally parallel and close to the TAPS right-of-way, through various segments, "to be equivalent to distribution electricity for the purpose of appraisal." (Olson's Review, Exh. 12, at 7.) Olson states "the cost to step down a 138kv transmission line to a distribution level is approximately \$500,000 plus the cost of developing a distribution facility." Id. Olson faults B-S&R for having "compar[ed] sales of properties that do have distribution electricity as being equal." Id. Olson concluded that "[a]ppropriate downward adjustments for the areas where only the transmission lines exist would result in a lower annual rental value overall." Id.

Alyeska offers no support for its assertion that B-S&R erred in attributing increased value to certain segments of the TAPS Right-of-Way, based on the "proximity of electrical service." Alyeska merely states that Alyeska will incur "significant costs" in gaining access to distribution electricity, and so B-S&R should have made a "downward adjustment" in the valuation of certain tracts. (SOR at 24-25. Olson makes the obvious observation that "appropriate downward adjustments" will result in "lower annual rental." Such suggestions, without more, fail to meet the standard followed in Alaska Pipeline Company, surpa, and Wesfrac, Inc., supra.

Accordingly, we find the current record to be insufficient for determining the reasonableness of the special instruction, which B-S&R appears all but dictated by BLM and the State of Alaska to follow. The record does not demonstrate how BLM used comparable commercial practices to arrive at the 100 percent encumbrance of rights factor (see 43 CFR 2803.1-2(a)) in determining the amount that a knowledgeable user would be willing to pay to a knowledgeable owner willing but not obligated to grant the use. Alaska Pipeline Company, 164 IBLA at 152; Wesfrac, Inc., 153 IBLA at 167; Questar Service Corp., 119 IBLA at 67. We therefore set aside and remand the Letter Decisions on appeal, to the extent they are based on the special instruction, for the development of a record supporting a rational basis for whatever encumbrance of rights factor is selected and applied by BLM. Otherwise, while we appreciate Alyeska's differences of opinion as to the other points of dispute in B-S&R's appraisal considered herein, we do not find that Alyeska has demonstrated error in B-S&R's methodology, or that BLM's rental charges based thereon are excessive.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Letter Decisions appealed from are set aside and remanded for action consistent with this opinion.

---

James F. Roberts  
Administrative Judge

I concur:

---

Christina S. Kalavritinos  
Administrative Judge