



NV ENERGY

181 IBLA 307

Decided September 27, 2011



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

NV ENERGY

IBLA 2010-239

Decided September 27, 2011

Appeal from a decision by the Nevada State Office, Bureau of Land Management, which determined the fair market value for making a one-time rental payment to convert a linear right-of-way into a perpetual easement. N-85228.

Set aside and remanded.

1. Appraisals--Federal Land Policy and Management Act of 1976:
Sales--Public Sales: Generally

A determination of fair market value under the Federal Land Policy and Management Act of 1976 will not be overturned unless the appellant demonstrates, by a preponderance of the evidence, that the appraisal relied on to determine value used a fatally flawed methodology, failed to consider a relevant factor bearing on value, used inappropriate data, or erred in its calculations. In the absence of a demonstrated appraisal error, an appellant may meet its burden on appeal by submitting an appraisal to rebut and show that the appraisal relied upon by BLM does not, in fact, represent the fair market value of the appraised property interest.

2. Appraisals--Federal Land Policy and Management Act of 1976: Sales--Public Sales: Generally

In determining the fair market value of a less-than-fee property interest under the Federal Land Policy and Management Act of 1976, BLM may properly rely on an appraisal valuing that interest as a percentage of fee value based on the percent of use taken from the fee by that interest.

3. Appraisals--Federal Land Policy and Management Act of 1976: Sales-
-Public Sales: Generally

In determining the fair market value of a perpetual easement, where BLM relies on an appraisal valuing such a less-than-fee interest at a percentage of fee value based on the fee use taken by that interest, BLM need not consider other easements or rights-of-way that also affect fee use because they must be considered separately to ensure that the United States receives no less than fair market value for each such property interest.

4. Appraisals--Federal Land Policy and Management Act of 1976: Sales-
-Public Sales: Generally

Where BLM determines the fair market value of a perpetual easement based upon an appraisal, it must identify the information relied on to value that less-than-fee interest and the record must be sufficient for the Board to objectively verify whether its valuation of that easement was reasonable. Absent an adequate record supporting its valuation of the easement, the Board will set aside BLM's determination of fair market value.

5. Appraisals--Federal Land Policy and Management Act of 1976: Sales-
-Public Sales: Generally

When considering other sales to form an opinion of fair market value, an appraisal must consider discernable differences between those sales and the property being appraised and make adjustments necessary for proper comparison. Where significant, discernable differences exist and the appraisal fails adequately to address them, it may not be properly relied on by BLM to determine fair market value of the appraised property interest.

APPEARANCES: William E. Peterson, Esq., Reno, Nevada, for Appellant, Janell M. Bogue, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

NV Energy has appealed from a June 17, 2010, decision by the Deputy State Director, Nevada State Office, Bureau of Land Management (BLM), that determined the fair market value for making a one-time rental payment to convert a linear right-of-way (ROW) for an overhead power line into a perpetual easement.¹ NV Energy contends that BLM's determination exceeds the fair market value of the easement, claiming that BLM relied on a fundamentally flawed appraisal that used an inappropriate methodology and failed to consider factors necessary for properly determining fair market value. As explained below, we affirm the methodology used but find there are material omissions and errors in the appraisal's valuation of the easement and, therefore, set aside BLM's decision and remand this case for further action.

Background

BLM granted NV Energy a non-exclusive, term ROW (N-58888) on April 30, 1995, for a power line crossing public lands in various sections of T. 22 S., Rs. 59 and 60 E., Clark County, Nevada, Mount Diablo Meridian. See Serial Register Pages for N-58888. It later put 15 parcels of public land up for sale in the Las Vegas metropolitan area (143.24 acres).² See 73 Fed. Reg. 11950 (Mar. 5, 2008). Among those parcels is Parcel 13 (Parcel), a vacant lot in N $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of sec. 19 that is subject to NV Energy's ROW that abuts the Blue Diamond Road and totals 4,855 square feet (0.111 acres). Three weeks after BLM's announcement of possible sale, NV Energy applied for the conversion of its term ROW into a perpetual, non-exclusive easement if the Parcel was transferred out of Federal ownership. See 43 C.F.R. § 2807.15(b).³ BLM docketed its conversion application as N-85228.

¹ NV Energy has two other appeals raising similar claims that are currently pending before the Board and docketed as IBLA 2010-140 and IBLA 2010-142. As their facts and circumstances are different, they will be addressed separately at a later date.

² Congress promulgated the Southern Nevada Public Land Management Act (SNPLMA), Pub. L. No. 105-263 § 4(a), 112 Stat. 2343 (Oct. 19, 1998), to allow BLM to sell public land within a specific boundary around Las Vegas, Nevada. When BLM conducts a public land sale under SNPLMA, it is subject to section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1713 (2006), and applicable land sale regulations at 43 C.F.R. Part 2710. See 112 Stat. at 2344 ("the Secretary, in accordance with this Act [and] the Federal Land Policy and Management Act of 1976 . . . is authorized to dispose of lands within the boundary of . . . Clark County, Nevada").

³ ROWs granted pursuant to FLPMA convey a limited right to use the public lands
(continued...)

Prior to or shortly after its *Federal Register* announcement, BLM requested a determination of the “reserve price” for the Parcel from the Appraisal Services Directorate (ASD), a component of the Department. See Secretarial Order No. 3251 (Nov. 12, 2003). This task was delegated to Lubawy & Associates, Inc. (Lubawy), a private land appraisal firm. Lubawy determined that the Parcel is zoned H-2, General Highway Frontage District, within a “major development projects” zoning district slated for urban development once the land is sold into private ownership. See Lubawy’s Self-Contained Appraisal Report dated Apr. 7, 2008 (Lubawy Appraisal), at 4. While the Parcel contains 5.00 acres, Lubawy identified its “net” size as only 3.12 acres due to road ROWs crossing the land.⁴ It noted that NV Energy’s ROW encumbered the land but included it within the net acreage because it did not “appear to adversely affect the development potential of the parcel.” *Id.* at 7.⁵ Lubawy collected data from similar land sales in the area during 2006 and 2007 and found their average price per acre was \$615,000.⁶ Multiplying that price by the net acres available for sale, it valued the Parcel at \$1,918,800, which was rounded to \$1,919,000 (\$14.119 per net sq. ft.). *Id.* at 22; *see id.* at 12-21.⁷

³ (...continued)

identified in the grant, and in the event of a subsequent sale or transfer of the underlying land, BLM may convert a term ROW into a perpetual ROW or a perpetual easement and either retain or transfer its rights and responsibilities for and under that ROW/easement to the purchaser. 43 C.F.R. § 2807.15(b). See “Final BLM Policy and Procedures for Issuance of Long Term Right of Way Grants and Easements,” June 2007 (BLM Easement Policy), at 4, 40.

⁴ Lubawy reduced the gross acreage for land encumbered by the Blue Diamond Road (1.58 acres) and by Tee Lane and Chieftain Street (collectively, 0.3 acres) because those ROWs preclude any use of the land surface.

⁵ We infer from Lubawy’s appraisal that even though Parcel 13 was encumbered by NV Energy’s ROW, it did not believe that encumbrance would affect what a prospective buyer would be willing to pay for the Parcel.

⁶ There are three common appraisal approaches in ascertaining a property’s fair market value: (1) the comparable sales approach; (2) the income or capitalization of income approach; and (3) the cost approach. See *The Appraisal of Real Estate*, 11th ed. (Chicago: Appraisal Institute, 1996), 90-91. In a sales comparison approach, the appraiser analyzes the sale of properties similar in size, zoning, highest and best use, location, and other factors, makes adjustments to compensate for differences between and among those sales, and uses that array of comparable values to estimate the value of the appraised property. *Id.* at 397, 404. Lubawy used the comparable sales approach for its appraisal of the Parcel.

⁷ The reasonableness of the Lubawy Appraisal and its methodology are borne out by
(continued...)

ASD Appraisal of the Applied-for Easement

Following its receipt of NV Energy's application for a permanent easement, BLM requested ASD to appraise its value. Ron Hawkins, a Nevada Certified General Appraiser with ASD, was assigned that task. He first turned to *The Uniform Appraisal Standards for Federal Land Acquisitions* 5th ed. (Chicago: Appraisal Institute, 2000) (*Uniform Federal Standards*), to determine what methodology to use in assessing the easement's value. See Hawkins Appraisal Report dated June 5, 2008 (ASD Appraisal). These standards state that the "preferred method of valuing easements is to use a before and after analysis." *Uniform Federal Standards*, Section B-11 (Partial Acquisitions), at 50. Under that method, the appraiser weighs appropriate factors⁸ to determine the value of a parcel before and after it is encumbered by a Federal easement, with the difference representing not only the fair market value of the easement itself, but also damages to property affected by the easement (*i.e.*, lands within its parent parcel that are not overlain by the easement). See *id.* at 50-51; ASD Appraisal at 4.

Hawkins did not use the before and after method because he considered it "unwarranted in view of the nature of the minor acquisition." ASD Appraisal at 4 (quoting *Uniform Federal Standards*, Section B-11, at 51). Instead, he stated he would apply an exception listed in those Standards, the "taking + damages to the remainder" technique (T+D). ASD Appraisal at 3-4. Unlike the before and after method, T+D separately determines the value of the property interest taken and the reduced value of property not taken, which are combined to represent just compensation for that taking. See *Uniform Federal Standards*, Section B-11, at 51.

Hawkins neither inspected the Parcel nor the lands involved in the comparable sales he considered, basing his analysis solely on data in ASD files. ASD Appraisal at 4. He selected four sales from the ASD data to determine market value, eliminated the low sale, and valued the Parcel at \$615,000 per acre based on his adjusted values for the three other comparable sales. Hawkins found the ASD data indicated that

⁷ (...continued)

the fact that the high bid was \$1,926,000 (less than \$8,000 more than Lubawy's estimated value). BLM accepted that bid and patented Parcel 13 to Diamond Park, LLC, on Jan. 13, 2009, subject to "Easement N-85228" that had been earlier granted to NV Energy. See Patent No. 27-2009-0005.

⁸ These factors include date of sale, rights conveyed, financing terms, conditions of sale, zoning, highest and best use, legal encumbrances, property location, physical characteristics, and available utilities. See *Uniform Federal Standards* at 14-24.

easements “are generally valued at 50% of the unencumbered value” and valued this easement at \$34,300 (\$615,000 per acre x 0.111 acres x .5).⁹ *Id.*

BLM accepted the ASD Appraisal and decided to offer a perpetual easement to NV Energy upon relinquishment of its ROW and a one-time rental payment of \$34,300. *See* 43 C.F.R. §§ 2806.26, 2807.15(b). NV Energy accepted that offer, made full payment to BLM, and executed its proffered easement documents. By decision dated January 12, 2009, BLM accepted relinquishment of the ROW and approved the conveyance of this easement to NV Energy. It patented the Parcel to Diamond Park LLC the next day. *See supra* note 7.

Appeal and Remand of the ASD Appraisal

NV Energy appealed BLM’s January 2009 decision, which was docketed as IBLA 2009-119. NV Energy contended that BLM had accepted a flawed appraisal report, arguing that it failed to take into proper account the effect of setback requirements to value the easement or identify the information relied on to determine its fair market value. Statement of Reasons (SOR) in IBLA 2009-119 at 1, 6, 7-12. In support, NV Energy submitted an appraisal by Glenn Anderson, a licensed general appraiser with the Anderson Valuation Group, LLC, that concluded the fair market value of a permanent easement for this overhead power line was \$6,800. SOR, Ex. 5, Anderson Appraisal Report dated Mar. 11, 2009 (Anderson Appraisal). Like Hawkins, Anderson used a percentage of use taken from the fee to value the easement, but whereas Hawkins stated 50% was appropriate, Anderson concluded the use taken should only be 10% because the easement is wholly within a State road setback that would preclude construction once the land is in private ownership. *See* Anderson Appraisal at 75 (“it is my opinion that the acquisition of the easement only minimally diminishes the functional utility of this component of the site and of the larger property”). Based on his determination that the unencumbered fee was worth \$14.00 per square foot,¹⁰ Anderson calculated the value of the easement at \$6,800 (4,855 sq. ft. x \$14.00 per sq. ft. x .10).

BLM responded by requesting that its valuation of the easement be set aside and remanded to reconsider the ASD Appraisal, prepare a supplemental or new

⁹ We refer to Hawkins’ methodology as “percentage use taken,” which is essentially the “T” in the T+D technique. We do so to avoid confusing his method with the T+D technique. As further discussed below, the appraiser assigns a utilization factor of the easement to the fee so as to identify the reduced value of the fee based on the percentage of use taken by the easement, hence percentage of use taken.

¹⁰ Although Lubawy valued the reserve price at \$14.119 per net square foot, as of Apr. 4, 2008, Anderson valued the land at slightly less on Feb. 23, 2009.

appraisal (if necessary), and ensure that its appraisal contained sufficient information and data to show a clear rationale for its decision. We granted that request by Order dated July 9, 2009, which left NV Energy's easement in effect while its fair market value was reconsidered by BLM.

Revised ASD Appraisal on Remand

Hawkins revised his appraisal and valued the easement at \$51,400, an increase of \$17,100 over his earlier appraisal. Hawkins Appraisal Report dated Feb. 1, 2010 (Revised ASD Appraisal). Although stating he would use T+D, he recognized there was no "D" to be considered. *See id.* at 12 ("there are no damages to the remainder"). Hawkins continued:

When the taking plus damages method is used, the value of the part sold (easement) is its value as a part of the whole (i.e., larger parcel), and the easement area is not valued as a separate parcel; i.e., the appraiser does not perform a separate highest and best use analysis or find sales of easement areas to determine an easement area unit price. However, comparable easement sales are found in the market to determine a site utilization factor to be applied to the easement area.

Id. He described the utilization factor as the percentage of use taken by the easement from the fee for that land. *Id.* at 13.

Hawkins selected five easement sales from ASD data for comparative analysis, Revised ASD Appraisal at 14-26, which we refer to as his "5 Easement Dataset." He then calculated utilization factors by dividing the easement sale price (per sq. ft.) by the fee value of its parent parcel (per sq. ft.):

- Easement 1 is for an underground water line (33,892 sq. ft.) that was purchased in 2001 for \$32,600 (\$1.13 per sq. ft.). It bisected a 50+ acre parcel (2,265,120 net sq. ft.) that is zoned Commercial Tourist and currently occupied by a resort casino. Hawkins stated the value of the parcel was \$6,800,000, which would be \$3.00 per sq. ft. ($\$6.8 \text{ million} \div 2.265 \text{ million sq. ft.}$), but he valued the parcel at an "average" of only \$2.25 per sq. ft. to calculate a utilization factor of 50% ($\$1.13 \div \2.25).
- Easement 2 is for an underground pressure reduction valve (375 sq. ft.) that was purchased in 2003 for \$2,850 (\$7.60 per sq. ft.) on a 29,661 sq. ft. parcel zoned Local Business upon which a restaurant was later constructed. Hawkins stated the parcel was worth \$450,000 (\$15.17 per sq. ft.) and calculated the utilization factor for this easement at 50% ($\$7.60 \div \15.17).
- Easement 3 is for a transmission line (23,566 sq. ft.) that was purchased by NV Energy in 2008 for \$759,000 (\$32.22 per sq. ft.) and located on a

- 312,760.8 sq. ft. parcel zoned General Commercial. Hawkins stated that parcel was worth \$12,029,000 (\$38.46 per sq. ft.) and calculated the easement's utilization factor at 84% ($\$32.22 \div \38.46).
- Easement 4 is for an underground drainage pipe that was purchased in 2009 for \$16,200 (\$12.96 per sq. ft.) on a 12,500 sq. ft. undeveloped residential lot. Hawkins stated that lot was worth \$270,000 (\$21.60 per sq. ft.) and calculated the easement's utilization factor at 60% ($\$12.96 \div \21.60).
 - Easement 5 is for underground drainage (7,385 sq. ft.) that was purchased in 2009 for \$35,743 (\$4.84 per sq. ft.). It is on a 36,603 sq. ft. parcel in a General Industrial District that Hawkins valued at \$295,000 (\$8.06 per sq. ft.). He calculated the utilization factor of this easement at 60% ($\$4.84 \div \8.06).

Hawkins analyzed the 5 Easement Dataset, determined that each of its four underground easements sold at a site utilization factor of roughly 50%, and concluded that neither zoning nor the parcels' location affected his calculated factors. Revised ASD Appraisal at 26; *see id.* at 27-28. The only aboveground easement in his dataset was for an electrical transmission line (84% of use taken), which he considered was reasonable because of its tall towers and underground support anchors. *Id.* at 27; *see id.* at 24.¹¹ He also "checked to see if lands located in the setback areas sold for a different utilization than lands in the developable area" and found that only 4% of Easement 1 could not be built on, two-thirds of a small easement for the underground valve in Easement 2 was within a road setback, and half of the drainage easement along the boundary of the vacant lot in Easement 4 was beyond its 5 foot setback. *Id.* at 26. He then stated: "This data supports the conclusion that lands in the setback area sell at the same site utilization factor as the buildable area lands." *Id.*

Based on his 5 Easement Dataset, statements attributed to Matt Lubawy that underground easements are typically 50% and "high voltage power lines are 75% to 90% of fee value," and an easement value matrix appearing in an article in *Right of Way* magazine,¹² Hawkins opined that a "50% site utilization factor for underground

¹¹ Hawkins considered a second aboveground easement but gave it little weight because its price probably reflected a site utilization factor greater than 100%, which he believed was due to the owner retaining a lawyer and his negotiating a settlement under threat of litigation. Revised ASD Appraisal at 27; *see infra* Discussion.

¹² The matrix referred to by Hawkins is from "Easement Valuation" by Donald Sherwood, which appeared in the May/June issue of *Right of Way*. Sherwood's Easement Valuation Matrix in that article differentiates easements based on their impact to surface uses and where they are located on the parent parcel: Railroads, roads, and overhead transmission lines are assumed to have a "severe"

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easements, a 75% site utilization factor for single pole above ground transmission line[s], and an 85% site utilization for above ground transmission lines located on towers with multiple legs appear to be well supported in the market.” Revised ASD Appraisal at 28. Since NV Energy’s existing single-pole power line probably reflects the “highest site utilization” for the easement area, Hawkins applied a 75% factor to calculate its value at \$51,400 (\$615,000 per acre x 0.11145 acres x .75). After his appraisal was reviewed and found to be adequate by a colleague, BLM accepted it and issued a decision on June 17, 2010, declaring the easement’s value to be \$51,400.¹³ This appeal timely followed.¹⁴

Discussion

[1] When BLM transfers land out of Federal ownership, it may convert an existing ROW into a perpetual easement. *See* 43 C.F.R. § 2807.15(b); *see also* 43 U.S.C. §§ 1702(f), 1761(a)(4) (2006). Such a conversion is not free, as the grantee must make a one-time rental payment that represents the fair market value of the easement. *See* 43 C.F.R. § 2710.0-6(c)(5); 43 U.S.C. § 1713(d) (2006). The question here presented is whether BLM properly determined the fair market value of NV Energy’s easement under FLPMA. As stated in *George A. Weitz, Inc.*, 158 IBLA 194 (2003):

It is well established that such a determination will not be overturned unless the appellant demonstrates, by a preponderance of the evidence, that BLM’s appraisal methodology was fatally flawed, that it failed to consider a relevant factor bearing on value, used inappropriate data,

¹² (...continued)

impact and valued at 90-100% of fee, with less impacting easements valued for less (e.g., an easement allowing “balanced use” by the fee owner and easement holder is generally valued at 50% of the fee); an easement along a property boundary or on “unusable” land is valued at 26-49% of fee; but if within a “setback,” an easement typically sells for between 11% and 25% of the fee. *Id.* Sherwood states his matrix “should be used only as a guide to general effects” and that each easement “must be reviewed on an individual basis and evaluated using market evidence as opposed to speculation and guesswork.” *Id.*

¹³ Although the initial ASD Appraisal was remanded, BLM retained the purchase price earlier paid by NV Energy (\$34,300). Upon receipt of this June 2010 decision, it paid the \$17,100 remainder to BLM.

¹⁴ NV Energy filed its SOR on Oct. 18, 2010, with exhibits that included the Lubawy Appraisal, the ASD Appraisal, the Anderson Appraisal, and the Revised ASD Appraisal. BLM filed its Response (Answer) on Dec. 17, 2010.

erred in its calculations, or that the rental arrived at does not, in fact, represent the right-of-way's fair market rental value.

158 IBLA at 198 (citations omitted); accord *Spanish Springs Pilots Association, Inc.*, 167 IBLA 284, 289-90 (2005), *aff'd*, *Spanish Springs Pilots Association, Inc. v. U.S. Dep't. of Interior*, 328 Fed. Appx. 365 (9th Cir. 2009); see *Ted Lapis*, 178 IBLA 62, 70 (2009); *Peter J. Mehringer*, 177 IBLA 152, 161 (2008). In the absence of a demonstrated appraisal error, an appellant may meet its burden on appeal by submitting an appraisal to rebut and show the appraisal relied upon by BLM does not, in fact, represent the fair market value of the appraised property interest. See, e.g., *Wesfrac, Inc.*, 153 IBLA 164, 168 (2000), and cases cited; *Alyeska Pipeline Services Company*, 167 IBLA 112, 118 (2005); see also *Spanish Springs Pilots Association, Inc.*, 167 IBLA at 290.

NV Energy contends the decision on appeal is in error because it is based on the Revised ASD Appraisal, which it claims used an improper methodology, failed to take into proper account an overlapping easement, and is not adequately supported by identified information. We separately address each of these claims below.

I. NV Energy has not shown error in the methodology used by Hawkins in the Revised ASD Appraisal.

NV Energy claims the Revised ASD Appraisal was required to use the before and after method specified by the *Uniform Federal Standards*. SOR at 4-7. BLM responds by quoting directly from those standards:

Although the before and after method of valuation is required by these Standards when the government acquires easements (because it measures what the owner has lost, not what the government has gained), use of the before and after method of valuation is not required when the government sells an easement interest. Agencies are, therefore, free to consider the value of the easement to the acquirer as well as the diminution to the government's [retained] property by reason of the encumbrance.

Answer at 4 (quoting *Uniform Federal Standards*, Section B-20 (Easements), at 64). No method for valuing an easement is specified by rule or BLM policy. See 43 C.F.R. §§ 2806.25, 2806.26; Appraisal Policy Manual, dated Oct. 1, 2007; BLM Easement Policy, *supra* note 3. We reject Appellant's assertion that BLM was required to use the before and after method to value this easement.¹⁵

¹⁵ Appellant asserts that Lubawy used the before and after method to determine the
(continued...)

[2] NV Energy also challenges the methodology actually used in the Revised ASD Appraisal, asserting that its methodology is unorthodox and inappropriate for valuing easements. See SOR at 13-16. While NV Energy claims this methodology “is not recognized in the law or the literature practice and methodology,” it was the same method/technique used by NV Energy’s appraiser to value the easement and rebut the ASD Appraisal. See Anderson Appraisal at 11; *supra* Background. Moreover, the Board has repeatedly upheld BLM’s using a percentage of use taken to determine fair market value under FLPMA. See, e.g., *Spanish Springs Pilots Association, Inc.*, 167 IBLA at 296 (airport lease worth 85% of fee value); *George A. Weitz, Inc.*, 158 IBLA at 197 (land for an irrigation pump, pipeline, and pond valued at 95% of fee); *Meyring Livestock Co.*, 69 IBLA 110, 111 (1983) (irrigation ditch ROW represents 95% of fee value). While the Board set aside the factors used in *Alyeska Pipeline Service Co.*, 167 IBLA at 118-23, and *Western Slope Gas Co.*, 61 IBLA 57, 63 (1981), we did so because the record in those cases did not support the percentage use calculated and determined by BLM.

We conclude it is reasonable for an easement to be valued at some fraction of the unencumbered fee value because the fee owner can still use the land within the easement area, which is also supported by BLM’s rulemaking that established an annual rent schedule for linear ROWs and new rules to implement BLM policy for making a one-time rental payment for a perpetual ROW or easement on lands being transferred out of Federal ownership. 73 Fed. Reg. 65040 (Oct. 31, 2008); see 43 C.F.R. §§ 2806.25, 2806.26. Its schedule is the product of 4 factors: per acre zone value x encumbrance factor x rate of return x annual adjustment factor. 73 Fed. Reg. at 65042. In this rulemaking, BLM “determined that a 50 percent EF [Encumbrance Factor] is a reasonable and appropriate component for use in the rent formula” and is now reflected in its rent schedule. *Id.* at 65048 (citing the Sherwood Easement Valuation Matrix); see *supra* note 12. The payment for a perpetual ROW is the annual rent for the appropriate zone on the schedule (determined by appraisal or market data), divided by a 5.27% rate of return less a 10-year inflation factor; the payment for a perpetual easement “should be determined by an appraisal or acceptable market information . . . [to] reflect the value of the rights transferred to [the applicant] based upon similar transactions in the private sector,” which then lets “market conditions set these amounts (e.g., comparable sales data).” 73 Fed. Reg. at 65056, 65057.

¹⁵ (...continued)

“reserve price” for Parcel 13, which impelled BLM to use that method to value this easement. SOR at 7-8. Since the property interest there and here considered are significantly different (fee vs. less-than-fee), we are unpersuaded that the Lubawy Appraisal necessarily supports NV Energy’s claim that BLM was required to use the before and after method in this case.

In sum, we find the percentage of use taken method or technique used by Hawkins (and Anderson) is neither unorthodox, inappropriate, unprecedented, or illogical and reject Appellant's claims and arguments to the contrary.

II. *NV Energy has not demonstrated that the Revised ASD Appraisal failed to take into proper account an overlapping ROW.*

[3] Appellant contends the Revised ASD Appraisal also failed adequately to consider existing use restrictions from a pipeline ROW, in which the easement is wholly located, and conflicts with the Lubawy Appraisal's determination that this easement and ROW do not affect potential uses of the site or adversely affect the fee rights to be transferred. SOR at 8 (quoting Lubawy Appraisal at 19); *see id.* at 7-8, 10. While BLM does not directly address these claims in its Answer, it does quote from the Easement Policy:

Each ROW shall be treated separately, even if co-located (wholly or partially overlaps) with other ROWs, when computing the one-time rental payment. In other words, no discounts or adjustments shall be made for co-located ROWs as each ROW holder is liable for full rental value to the United States regardless of co-location.

Answer at 6 (quoting BLM Easement Policy at 14).

We accept as a given that the BLM Easement Policy enables it to receive more than 100% of fair market value by separately patenting the fee, conveying easements, and granting perpetual ROWs. The Lubawy Appraisal made no adjustment for the land affected by this easement and ROW, and it is uncontested that fair market value was received when BLM patented that land to Diamond Park, LLC. *See supra* note 7. The Revised ASD Appraisal valued this aboveground easement at 75% of the fee and indicated that the co-located underground ROW would be valued at over 50%. While BLM may receive over 225% of fair market value by segregating the fee into separate parts, such is not prohibited by FLPMA. To the contrary, it states BLM shall not sell a property interest for "less than" fair market value. 43 U.S.C. § 1713(d) (2006); *see* 43 C.F.R. § 2710.0-6(c)(5) ("in no case shall lands be sold for less than fair market value"). The fact that multiple purchasers may simultaneously acquire separate interests to meet their individual needs and circumstances (commercial, aesthetic, or other) does not impel this Board to consider them in combination or suggest that the United States should receive "no more than" fair market value for the fee (*i.e.*, the total bundle of rights subject to sale and disposition under FLPMA). *See Uniform Federal Standards*, Section B-13 (The Unit Rule), at 53-54 (the unit rule requires a property to be valued as a whole, not as the sum of its component elements, and that an easement must be valued separately).

III. *The Revised ASD Appraisal omitted information that materially affected its estimate of fair market value.*

[4] NV Energy contends the Revised ASD Appraisal omitted information that skewed his utilization factors and resulted in an excessive valuation of the easement. It principally claims that Hawkins failed to identify or explain how he determined the value he gave to each parcel in his 5 Easement Dataset to calculate utilization factors, to show how those easement sales are comparable, and to consider properly their differences before using them to value this easement. See SOR at 11-15. BLM does not respond to these claims but asserts that the Revised ASD Appraisal “fully complies with applicable regulation and policy.” Answer at 8. We find from our review of the record and the Revised ASD Appraisal that it is inadequate and insufficiently supported in the record for this Board to objectively verify whether its valuation of this easement was reasonable. See *Alyeska Pipeline Service Co.*, 167 IBLA at 118-23; *Kitchens Production, Inc.*, 152 IBLA 336, 345 (2000);¹⁶ see also *Yukon River Tours*, 156 IBLA 1, 9 (2001), and cases cited; *Oregon Broadcasting Co.*, 119 IBLA 241, 244 (1991). As explained below, we set BLM’s decision aside and remand this case for further action.

Central to Hawkins’ appraisal is the 5 Easement Dataset he used to calculate utilization factors and inform his conclusions. Each utilization factor was calculated by dividing the price paid for the easement by the “market value” of its parent parcel, but we are unable to discern from the record how he determined those market values and whether they were adjusted for the time between the purchase of the fee and the sale of an easement.¹⁷ Thus, neither this Board (nor Appellant) can objectively verify

¹⁶ In reviewing a BLM decision establishing the annual rent for a communications site ROW based on an appraisal, the Board stated:

It is incumbent upon BLM to ensure that its decision is supported by a rational basis, and that such basis is stated in the written decision and is demonstrated in the administrative record accompanying the decision. The recipient of the decision is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board. Lacking the information necessary to conduct an objective, independent review of the basis for the decision, an administrative decision is properly set aside and remanded.

Kitchens Production, 152 IBLA at 345 (citations omitted).

¹⁷ An appraiser must document, *inter alia*, the dates and terms of sale for each comparable property, highest and best use, present use price, and the appraiser’s supported opinion as to whether the price paid for the comparable property interest

(continued...)

whether the “market value” stated by Hawkins is reasonable, leaving us to speculate on the accuracy or correctness of his calculated utilization factors and conclusions on the value of this easement. Accordingly, this omitted information warrants our setting aside and remanding this matter to BLM, but there are also other questions raised by Appellant that are not answered by BLM, the record, or the Revised ASD Appraisal.

[5] When considering other sales to form an opinion on the value of the property interest being appraised, “the basic elements of comparison to be considered” include the rights conveyed, market conditions, zoning, development status, and both current and reasonably foreseeable uses. *See Uniform Federal Standards*, Section B-4 (Sales Comparison Approach to Value), at 37. An appraiser must therefore consider discernable differences between the appraised property and those sales and then make adjustments necessary for proper comparison. *Uniform Federal Standards*, Section A-17 (Value Estimate by the Sales Comparison Approach), at 20; *see Ted Lapis*, 178 IBLA 62, 75 (2009); *Peter J. Mehringer*, 177 IBLA at 166; *Daniel E. Brown*, 153 IBLA 131, 137-39 (2000); *Mountain States Telephone & Telegraph Co.*, 109 IBLA 142, 145 (1989). Absent appropriate adjustment, a BLM appraisal cannot be affirmed. *See Confidential Communications Co.*, 126 IBLA 349, 351 (1993); *Paul R. Scott*, 76 IBLA 143, 144 (1983). Thus, where significant, discernable differences exist and the appraisal fails adequately to address them, it may not be properly relied on by BLM to determine the fair market value of the appraised property interest.

NV Energy contends that Hawkins’ analysis of his 5 Easement Dataset erroneously concluded that locating an easement within a setback or other nonbuildable area has no effect on its value and failed properly to consider differences between and among those easements and this easement. SOR at 10-13. Appellant correctly states that only three of the easements in that dataset were even partially within a setback or nonbuildable area, whereas this easement abuts the Blue Diamond Road and is wholly within its setback. *Id.* at 12-13.¹⁸ We note the matrix

¹⁷ (...continued)

represented market value at the time that interest was sold. *See Uniform Federal Standards*, Sections A-13 (Factual Data) and A-17 (Value Estimate by the Sales Comparison Approach) at 15, 20-22. Reporting this information enables the Board (or an appellant) to verify the comparability of the properties selected to the property being appraised.

¹⁸ As described by Hawkins, only 4% of Easement 1 was on nonbuildable land where it went under railroad tracks, half of Easement 4 was within a road setback, and
(continued...)

relied on by Hawkins to form his opinion of value indicates that both the type *and* location of an easement affect its value, and while it indicates a severely impacting overhead transmission line may be valued at 90-100%, it also states that such an easement within a setback would be valued at only 11-25% of the fee. *See supra* note 12. Differences between easements that are only partly within a setback area with an easement that is entirely within a setback were largely ignored by Hawkins and are unaddressed in the record. A remand to consider and analyze those differences is warranted in this case.

The above deficiencies in considering and analyzing the effect of the Blue Diamond Road setback are especially troubling in light of the Anderson Appraisal submitted to rebut the ASD Appraisal. *See supra* Background. As we have stated on many prior occasions, an appellant may successfully challenge a determination of fair market value by submitting its own appraisal to rebut a BLM appraisal. *See, e.g., Wesfrac, Inc.*, 153 IBLA at 168; *Alyeska Pipeline Services Company*, 167 IBLA at 118. In this case, Anderson's rebuttal appraisal valued the easement at 10% of fee value because it was wholly within the setback for the Blue Diamond Road:

The Acquisition of this 7-foot wide easement which resides entirely within the set-back area, is considered to have limited effect on the development potential and use of the property. For this reason, the property owner retains the majority of the rights in this portion of the site as the easement acquisition only minimally diminishes the portion of the property due to the location within the set-back. Using a percentage as factored against the underlying fee value, results in an indication of the value of the permanent easement area.

Anderson Appraisal at 11; *see id.* at 75 (“the rights acquired for the purposes of the easement, in my opinion, reduce the bundle of rights that the owner has in this component of the property by only 10%”). BLM responds by urging the Board to disregard the Anderson Appraisal because its reference to an existing power line on Parcel 13 is contrary to BLM policy requiring that a perpetual easement be valued without regard to any other easement or ROW. Answer at 9-10 (citing Anderson Appraisal at 74 and BLM Easement Policy at 14). We are unpersuaded that the Anderson Appraisal should be disregarded simply because it included a statement BLM finds objectionable, particularly since that statement had no discernable effect on Anderson's valuation of this easement based on its being located entirely in a setback area. The failure by Hawkins on remand of the ASD Appraisal to mention the Anderson Appraisal or its opinion of value, which are supported by the same matrix

¹⁸ (...continued)

two-thirds of the small easement for an underground valve in Easement 2 was near a street and within its setback. *See Revised ASD Appraisal* at 14-17, 20-21, 26.

he relied on to revise his earlier appraisal, is inexplicable. See Revised ASD Appraisal at 28; *supra* Background.

NV Energy also claims the easement sales in Hawkins' 5 Easement Dataset are so dissimilar to this easement as to render them not comparable at all. See SOR at 15 (Hawkins took "the ratio between the price of an apple and an orange to compute the value of a pear"). Easements 1 and 2 were purchased nearly 10 years ago, and the development status of the parent parcels on their market valuation dates is unstated by Hawkins. More importantly, four were underground easements and only one aboveground easement was included in his dataset. As to that easement, Easement 4 was for a transmission line on tall towers, whereas the easement being appraised was for a single pole power distribution line. Those data provide general support for valuing an easement based on type, as in Sherwood's matrix and Matt Lubawy's statements that underground easements are generally valued at 50% and high voltage transmission lines are typically valued at 75-90% of fee. See Revised ASD Appraisal at 28; *supra* note 12. However, they neither support nor demonstrate that 75% is the appropriate utilization (encumbrance) factor for valuing this easement.¹⁹

Each easement in the 5 Easement Dataset appears to have been purchased by an entity with the authority to condemn that property interest, as is here claimed by Appellant. See SOR at 15. When using comparable purchases by an entity with condemnation power, the appraiser must establish that such purchases were made without compulsion, coercion, or compromise, and that the purchase price otherwise represents fair market value. See *Uniform Federal Standards*, Sections B-18 (Price Paid by a Government Entity for Similar Property), D-9 (Comparable Sales Requiring Extraordinary Verification and Treatment), at 60-61, 88-93. Fair market value under FLPMA is generally what a willing buyer and seller would agree to, not what may be agreed to under threat of condemnation or protracted litigation. There is no record evidence showing that Hawkins considered this factor. Thus, the utilization factors he calculated and relied upon to value this easement are of questionable relevance to

¹⁹ NV Energy separately asserts Hawkins misapplied the easement-to-fee-simple-ratio technique recognized in appraisal literature. SOR at 14-15 (citing "Easement to Fee Simple Value Ratios for Electric Transmission Line Easements: A Common Sense Approach" by Gordon Green, *Appraisal Journal* (July 1992), and "Impact of Electrical Power Transmission Line Easements on Real Estates Values" by Clark & Treadway, *Appraisal Institute* (1992)). According to Appellant, that technique requires the appraiser to pair similar easements with their parent parcels, such that it can then be assumed that they represent the proper ratio to use in valuing the appraised easement. *Id.* Since this easement is different in kind and effect from those in the 5 Easement Dataset, NV Energy claims Hawkins "perverted" that technique by applying it to this easement; BLM has provided no response to that claim.

our determining what fair market value is or may be in this case. A remand is warranted to consider this issue.

We infer from BLM's October 2008 rulemaking that it generally considers a less-than-fee interest to be worth 50% of the fee and that an appraisal may identify a different, more appropriate encumbrance factor based on the local market and specific circumstances presented. *See* 73 Fed. Reg. at 65047-48, 65056 ("when the land a grant encumbers is being transferred out of Federal ownership, the most accurate and current market data should be used to determine the one-time rental payment"). To depart from this regulatory rule of thumb requires a proper appraisal that is supported by an adequate record. *Id.* Although this presumptive factor applies only to ROWs, it is not irrelevant to our determining whether a BLM appraisal of a perpetual easement adequately identified its supporting data and properly analyzed that data to determine fair market value, particularly since BLM stated such an appraisal "will reflect the value of the rights transferred to [the applicant] based upon similar transactions in the private sector, and may or may not be the same as a one-time payment for a perpetual [ROW]." 73 Fed. Reg. at 65057. There is simply no record support suggesting that Hawkins considered any easement similar to this easement either in terms of type (aboveground single pole) or location (entirely within a setback).

NV Energy has not only pointed to substantial omissions and significant errors in Hawkins' analysis that could have materially affected his opinion of fair market value, but also submitted its own appraisal to rebut his analysis and opinion. BLM has not responded to those claims on appeal; they are neither addressed in the Revised ASD Appraisal nor resolved by our review of the record. We therefore set aside BLM's decision relying on that appraisal and remand this matter for further action consistent with this opinion.

Therefore, 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 is set aside and remanded.

_____/s/_____
James K. Jackson
Administrative Judge

I concur:

_____/s/_____
James F. Roberts
Administrative Judge