



DAVID HANSON

182 IBLA 94

Decided March 12, 2012



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

DAVID HANSON

IBLA 2011-218

Decided March 12, 2012

Appeal from a decision of the Oregon State Office, Bureau of Land Management, declaring a tunnel site abandoned and void because the site was not located properly or held in good faith. ORMC 155045.

Vacated and remanded.

1. Tunnel Sites: Generally

The failure to maintain monuments does not, by itself, necessarily invalidate a claim, particularly when there are factual questions about the absence of the monuments. Such issues are best addressed in a contest proceeding.

2. Tunnel Sites: Determination of Validity: Abandonment

The lack of diligent work on a tunnel site results only in an abandonment of the right to undiscovered veins in the tunnel, not abandonment of the tunnel site itself.

3. Tunnel Sites: Determination of Validity: Abandonment

Development rights in a tunnel site can be abandoned, similar to abandonment of a right-of-way, through an intent to abandon coupled with an act of abandonment. However, the payment of annual maintenance fees can be evidence of a lack of intent to abandon a tunnel site.

4. Tunnel Sites: Determination of Validity

An allegation that a tunnel site is not being held in good faith is best decided in a setting that facilitates the presentation of evidence and the examination of witnesses, and is usually addressed in a contest proceeding.

APPEARANCES: David Hanson, Tygh Valley, Oregon, *pro se*.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

David Hanson has appealed a decision of the Oregon State Office, Bureau of Land Management (BLM), dated August 8, 2011, declaring the Hole in the Wall tunnel site (ORMC 155045) abandoned and void, because the site was not properly located or held in good faith. Because we question several of the bases for BLM's decision, and determine that the matter is more appropriately considered in a contest proceeding to determine the validity of the tunnel site, we vacate BLM's decision.

Background

BLM records indicate that appellant located the tunnel site on January 1, 2000, within sec. 9, T. 11 S., R. 3 E., Willamette Meridian, in Linn County, Oregon. Lot 3, which is essentially the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of sec. 35 and contains 40.24 acres. BLM's decision raises several issues with respect to the tunnel site, specifically BLM inspectors not being able to identify location monuments describing the tunnel site boundaries, the failure of appellant to file a mining plan of operations with the U.S. Forest Service, and the lack of any evidence of continued surface or subsurface exploration associated with the tunnel site. BLM's decision concludes, "[d]ue to a lack of diligence in the development of the tunnel site, your site is declared forfeit."

In his notice of appeal (NOA), appellant states that the only requirements for maintaining a tunnel site "are an intent to keep and the payment of any dues," which he asserts are current. NOA at 1. As for the absence of location monuments, appellant states that "we can assume that you have vandal [sic] in the area and would expect the forest service to enforce vandalism. . . . We will be up in the near future to replace any boundry [sic] markers not there." *Id.*

A tunnel site under the Mining Law is "run for the development of a vein or lode, or for the discovery of mines." 30 U.S.C. § 27 (2006). Federal regulations describe such a site as

a subsurface right-of-way under Federal land open to mineral entry. It is used for access to lode mining claims or to explore for blind or undiscovered veins, lodes, or ledges not currently claimed or known to exist on the surface.

43 C.F.R. § 3832.41; see *Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transportation Co.*, 196 U.S. 337, 357 (1905) ("A tunnel is not a mining

claim . . . it is only a means of exploration.”); *United States v. Swanson*, 119 IBLA 53, 62, 98 I.D. 185, 190 (1991) (“Tunnel sites are not mining claims but rights-of-way.”). The act of locating a tunnel site includes erecting a monument with the attached location notice “at the face of the tunnel, which is the point where the tunnel enters cover.” 43 C.F.R. § 3832.42(a), (b). It also may involve “[p]lacing stakes or monuments on the surface along the boundary lines of the tunnel at proper intervals as required under state law from the face of the tunnel for 3,000 feet or to the end of the tunnel, whichever is shorter.”¹ 43 C.F.R. § 3832.42(c). The owner of a tunnel site has the right of possession of unknown veins or lodes within 3,000 feet from the face of the tunnel, but “failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.” 30 U.S.C. § 27 (2006); *see* 43 C.F.R. § 3832.44(c).

Bases for BLM’s Decision

BLM asserts several different specific grounds for its decision. The decision itself is confusing, because the decision is captioned **Tunnel Site Declared Abandoned and Void**, and yet the body of the decision declares the site “forfeit.” Decision at 1. Notwithstanding that discrepancy, we will address BLM’s stated grounds individually.

Failure to Properly Monument the Tunnel Site

The decision states that, based on a review of the claim file and on field inspection of the site, BLM concluded that “the Tunnel Site was not located properly.” *Id.* More specifically, the decision says that “[t]he field inspection^[2] failed to identify any location monuments describing the property boundaries, centerline or portal entry.” Initially, we question whether property boundary monuments are required in the absence of a state law requirement. *See supra* n.1. And, we find no requirement for marking a tunnel site’s centerline.³ *See* 43 C.F.R. § 3832.42.

¹ It is questionable whether boundary monuments are required in this case, as Oregon law does not appear to provide for locating tunnel sites and, therefore, does not require that tunnel boundaries be monumented. *See* OR. REV. STAT. ch. 517 (2011).

² The decision does not specify which field inspection provided this information. The record contains 10 brief inspection reports bearing dates from Oct. 10, 2001, through July 18, 2011. Although none of these reports mentions the presence of appropriate tunnel site monuments, none specifically indicates the absence of such monuments.

³ The posted location notice must, of course, include the course or direction of the
(continued...)

[1] As for the absence of a monument at the face of a tunnel site, we have held that “failure to maintain monuments may make it more difficult for a claimant to establish that discoveries exist on specific claims, but it does not, by itself, necessarily, invalidate the claim. See *United States v. Christensen*, A-27549 (May 14, 1958).” *United States v. Pool*, 78 IBLA 215, 218 (1984) (emphasis in original). It is a closer question if the absence of monuments makes it impossible to locate a claim on the ground, but in this case, the location notice recorded with BLM by the claimant described the tunnel site as being located “950 feet from the following natural object or permanent monument in the vicinity: rock outcropping, next to Dads Creek Township 12 S Range 34 E Section 9.” Notice of Mining Location, Hole in the Wall Mine, ORMC 155045, Administrative Record. And, considering the frequency of BLM site inspections, BLM apparently had little difficulty in locating appellant’s tunnel site.

Although a tunnel site claimant must monument the site in accordance to regulatory requirements, “the subsequent obliteration of these monuments does not invalidate the claim where the destruction is not caused by the claimant[.]” *United States v. Pool*, 78 IBLA at 217. Here, the claimant asserts that the absence of monuments at the site may be a product of vandalism, NOA at 1, clearly raising an issue of fact that is best addressed at a contest proceeding, as would an allegation that appellant had never monumented the tunnel site. See *United States v. Pool*, 78 IBLA at 217. BLM “is entitled to determine, for its own purposes, the validity of tunnel-site claims with respect to undiscovered veins in the same way it determines the validity of lode and placer claims. . . . It is, therefore, appropriate for [BLM] to make a finding concerning whether a tunnel-site claim has or has not been properly located.” *United States v. Parker*, 82 IBLA 344, 381, 91 I.D. 271, 293 (1984).

Failure to Diligently Develop the Tunnel Site

The decision states that “no Mining Plan has been filed with the US Forest Service and no evidence of continued surface or subsurface exploration was found.” Decision at 1. The field inspection reports, reporting the results of inspections from 2001 through 2011, document some excavation work by hand in 2003 and some use and mining in 2005, but no evidence of “diligent work” on the tunnel site from 2005 through 2011. The decision concludes that “[d]ue to a lack of diligence in the development of the tunnel site, your site is declared forfeit.” Decision at 1.

³ (...continued)

tunnel, its height and width, and the course and distance from the face of the tunnel to some permanent well-known natural object or permanent monument. 43 C.F.R. § 3832.42(b).

[2] The Mining Law requires reasonable diligence in working on a tunnel site, and “failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.” 30 U.S.C. § 27 (2006). BLM’s regulations mirror that requirement. *See* 43 C.F.R. § 3832.44(c). But, the lack of diligent work results only in abandonment of the right to undiscovered veins in the tunnel, *not* abandonment of the tunnel site itself.

[T]he Tunnel Site Act clearly distinguishes between the right to undiscovered veins on the line of a tunnel and the right to use the tunnel for development of a mine. Failure to diligently prosecute the tunnel for 6 months does not constitute a statutory abandonment of the right to use the tunnel site for development purposes.

United States v. Swanson, 119 IBLA 53, 61 (1991) (citations omitted).

[3] However, we have held that those development rights can be abandoned, based upon evidence comparable to that demonstrating abandonment of a right-of-way. “Abandonment of a right-of-way may be predicated upon a showing that the means of enjoyment of the right-of-way have long been in a state of disrepair. . . . Abandonment occurs immediately when an intent to abandon exists along with an act of abandonment.” *Id.* at 62 (citations omitted). In this case, BLM provides evidence of the absence for many years of mining activities associated with the tunnel site. But, appellant’s payment of annual maintenance fees since location of the tunnel site can be evidence of a lack of intent to abandon. *See id.* at 63. Under these circumstances, the issue of whether appellant has abandoned use of the tunnel site for development purposes is best addressed by an examination of evidence through a contest proceeding. *See, e.g., United States v. Parker*, 82 IBLA at 378-82.

Tunnel Site is Not Being Held in Good Faith

[4] Finally, the decision states that appellant’s tunnel site is not being held in good faith. Decision at 1. We gather from the enumeration of issues raised in the decision that BLM views the lack of monumentation of the site, appellant’s failure to file a mining plan with the U.S. Forest Service, and the apparent absence of continued surface or subsurface exploration at the site as cumulative evidence of appellant’s lack of good faith in holding the tunnel site. *See id.* The question of good faith, or its absence, is best decided in a setting that facilitates the presentation of evidence and the examination of witnesses, and is usually addressed in a contest proceeding. *See, e.g., United States v. Page*, 119 IBLA 12, 15 (1991); *United States v. McMullin*, 102 IBLA 276, 281-82 (1988).

Conclusion

BLM voided appellant's tunnel site because of alleged lack of diligent development, and because of alleged faulty location of the site and appellant's bad faith. BLM's decision resulted from a misapplication of the mining law, and an effort to adjudicate factual issues that are historically, and most reasonably, addressed in a contest proceeding. BLM is well aware of that process, and we suggest that it proceed accordingly. *See, e.g.*, BLM Handbook H-3870-1, Chapter IV Government Contests.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is vacated and remanded to BLM for appropriate action.

/s/
H. Barry Holt
Chief Administrative Judge

I concur:

/s/
James F. Roberts
Administrative Judge