

INTERIOR BOARD OF LAND APPEALS

John D. Wayne d.b.a. Basis Surveying, Inc.

161 IBLA 140 (April 13, 2004)

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JOHN D. WAYNE
d/b/a BASIN SURVEYING, INC.

IBLA 2000-284

Decided April 13, 2004

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, denying a protest of dependent resurvey, Group Number 954 NM.

Appeal dismissed.

1. Rules of Practice: Appeals: Dismissal--Rules of Practice:
Appeals: Standing to Appeal--Surveys of Public Lands:
Dependent Resurveys

The Board will dismiss an appeal from a BLM decision dismissing a protest of a dependent resurvey where the appellant fails to demonstrate that he has been adversely affected by such dismissal since he has no legally cognizable interest which will be affected by the resurvey. The appeal is also properly dismissed where a quarter corner to the survey is surrounded by private land.

APPEARANCES: John D. Wayne, Basin Surveying, Inc., Farmington, New Mexico.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

John D. Wayne, Licensed Surveyor d/b/a Basin Surveying, Inc., appeals from a May 4, 2000, decision of the New Mexico State Office, Bureau of Land Management (BLM), rejecting his protest of dependent resurvey Group Number 954 NM, completed in October 1999 and approved on December 9, 1999. The singular purpose of the appeal is to challenge BLM's reliance in its 1999 dependent resurvey on the work of a particular surveyor for placement of a quarter corner surrounded by private land.

On December 10, 1999, BLM approved the “Field Notes for the Dependent Resurvey of a Portion of the West Boundary, and Portions of the Subdivisional Lines and the Subdivision of Sections 19, 20, 23, 26, and 27,” T. 29 N., R. 10 W., New Mexico Principal Meridian. In the field notes, BLM relied on a quarter section corner found on the western boundary line of sec. 30 identified in a private survey conducted by surveyor Cecil B. Tullis, as described on a plat dated February 22, 1992. (Field Notes at 2.)

The record shows that Wayne is a registered surveyor. Wayne and Tullis have both conducted surveys of the relevant private lands around the quarter section corner, and disagree with each other over the proper location of the corner. As a result of this dispute, Wayne submitted a protest “to challenge the re-establishment of and the official placement of” the west quarter corner in sec. 30, T. 29 N., R. 10 W., New Mexico Principal Meridian. (Protest at 1.)^{1/} Wayne stated that he and Tullis had been hired by private parties engaged in a longstanding dispute and seeking to obtain surveys of land in the vicinity of the questioned quarter corner. He accused Tullis of establishing a boundary advantageous to his own client and debated BLM’s reliance on Tullis’ information. He submitted information from a complaint filed against Tullis and heard by the Board of Registration for Professional Engineers and Surveyors, State of New Mexico, In the Matter of Cecil Tullis, PS Certificate No. 9672, Case No. 98-97-49 (May 5, 1999).

BLM dismissed the protest by decision dated May 4, 2000. BLM explained both its reliance on Tullis’ affidavit testimony and also its conclusion that the transcript of the hearing in the cited matter before the Board of Registration supports the BLM dependent resurvey.

Wayne appealed. In his SOR, Wayne presents his dispute with the BLM’s reliance on “the testimony of Surveyor Tullis.” (SOR at 1.) Wayne asks that the Board adopt and accept his own placement of the quarter corner. Wayne fundamentally rejects Tullis’ view that the location of the quarter corner can be

^{1/} In his protest, Wayne identified the challenged point as the “East Quarter Corner, Section 30.” The State Director asserted that there was confusion “about the precise corner you have called into question.” (Decision at 1.) “Mr. Wayne expressed his concern about the 1/4 corner between sections 25 and 30 in T. 29 N., on the line between ranges 10 and 11 W. We, therefore, assume it is this corner you are trying to reference, and it is this corner position we will address.” *Id.* In his statement of reasons (SOR), Wayne acknowledges confusion and accepts BLM’s identification of the disputed corner.

identified and argues that the location should be based on proportionate measurement. (Protest at 2.)

[1] As a threshold matter, we examine Wayne's standing to pursue this appeal. An appellant must be both "party to the case" and have a legally cognizable interest that is "adversely affected" by BLM's decision in order to have standing to pursue and appeal to the Board. 43 CFR 4.410(a); Wyoming Outdoor Council, 156 IBLA 377, 379 (2002); El Paso Electric Co., 146 IBLA 145, 147-48 (1998). Wayne protested the decision to approve the dependent resurvey and is therefore a party to the case as a result of filing the protest.

This does not confirm that he has the requisite legally cognizable interest, however. Kendall's Concerned Area Residents, 129 IBLA 130, 136-37 (1994). As we noted in Ron and Margery A. Martin, 130 IBLA 238, 241 (1994), "dismissal of their protest does not automatically render them adversely affected." In the context of a challenge to a dependant resurvey, Wayne must show that he has a right, claim, title, or interest in land adjacent to or affected by the boundary in sec. 30. Mark Einsele, 147 IBLA 1, 5 (1998).

Wayne does not possess such an interest. In his protest, he explained his relationship to this matter as follows:

It is important to note that the respective clients of Mr. Tullis and Mr. Wayne are adjacent landowners and relatives. They are, and have been for many years, involved in a dispute over the location of the boundary between their lands. Mr. Tullis and Mr. Wayne were engaged to locate the boundary. Mr. Wayne[']s survey is dated June 23, 1995 and Mr. Tullis was hired by his client, after he became aware of Mr. Wayne's survey which Mr. Tullis's client didn't like. The location by Mr. Tullis of the quarter corner is in the most advantageous location for his client.

(Protest at 2.) Thus, Wayne's concern in this matter focuses on any potential conflict that may exist in a dependent resurvey with one he performed for a client as a paid professional. His involvement with this matter is found in his relationship with that client.^{2/}

^{2/} In considering matters of qualification to represent others before the Department under 43 CFR 1.3, we have held that an individual or business performing a service for a client is not qualified to appear before the Board on behalf of that client. See Leonard J. Olheiser, 106 IBLA 214, 215 (1988); Robert G. Young, 87 IBLA 249, 250 (continued...)

Such concern with respect to a BLM action, however, does not constitute a cognizable legal interest. Wyoming Outdoor Council, 153 IBLA 379, 282-83 (2000). Wayne must demonstrate that his interest was “adversely affected” in the context of 43 CFR 4.410(a). We have held:

The interest of Appellant affected by the Decision under review must be a legally cognizable interest and the allegation of adverse effect must be colorable, identifying specific facts which give rise to a conclusion regarding the adverse effect. National Wildlife Federation v. BLM, [129 IBLA 124 (1994)] at 127; Powder River Basin Resource Council, 124 IBLA 83, 89 (1992). While the interest affected need not be a property or economic interest, a deep concern for a problem is not enough. Robert M. Sayre, 131 IBLA 337 (1994). This Board has recognized that the use of the land involved or ownership of adjacent land may encompass a sufficient interest. The Wilderness Society, 110 IBLA 67, 70 (1989). Nevertheless, we have held that the threat of injury and its effect on the Appellant must be more than hypothetical. Missouri Coalition for the Environment, 124 IBLA 211 (1992); George Schultz, 94 IBLA 173, 178 (1986). The threat of injury must be real and immediate before standing will be recognized. Salmon River Concerned Citizens, 114 IBLA 344 (1990).

El Paso Electric Co., 146 IBLA at 147-48.

Expressly considering claims by those interested in the impacts of surveys on the public lands, such as Wayne’s here, we have found them to provide an insufficient basis upon which to assert standing to appeal. In State of Missouri, Department of Natural Resources, 142 IBLA 201, 207 (1998), the State appealed BLM’s resurvey and a section corner marking the boundary between public and private lands, asserting both a responsibility for surveys within its jurisdiction and the role of parens patriae, acting on behalf of private landowners. The State argued that BLM’s location

^{2/} (...continued)

(1985), cited in Klamath Siskiyou Wildlands Center, 155 IBLA 347, 350 (2001); Ganawas Corp., 85 IBLA 250, 251 (1985). This rule is based on the principle that such a party does not have sufficient interest in the matter to always provide the best representation and may even have at times conflicting concerns. J. C. Trahan, 74 IBLA 15, 16 (1983) (purpose of the rule is to protect those who do business with the Department from the risk of inadequate or false representation). Wayne does not purport to represent a client here. Thus, 43 CFR 1.3 is not directly implicated.

of the questioned corner will “cause[] considerable discord in the ownership of private lands in th[e] area.” The Board dismissed the appeal for lack of standing, holding that the State’s interest in seeing that BLM properly performs its resurvey duties is insufficient to afford standing to appeal and the State’s role of acting on behalf of private landowners does not equate to having an adversely affected interest upon which it can base its appeal. *Id.*; see Blaine County Board of Commissioners, 93 IBLA 155, 157-58 (1986).

In Robert M. Sayre, 131 IBLA at 339, the appellant challenged a resurvey and BLM’s placement of the boundary line between two sections. The appellant admitted that he had no interest in any land in the subject township or land potentially affected by the placement of the boundary line. He informed the Board that he was simply a registered land surveyor whose “interest in this matter is the correct restoration of the original survey in this area to its true original position.” *Id.* at 339. We dismissed his appeal.

While we respect appellant’s professional interest regarding the proper restoration of the line between secs. 25 and 26 (as established by the 1871 survey), such concern does not rise to the level of a legally cognizable interest that has been adversely affected by BLM’s dismissal of his protest for procedural reasons, and thus its implicit refusal to consider the merits of his substantive challenge to the 1948 and 1983 dependent resurveys. See Sharon Long, 83 IBLA 304, 308 (1984). Nor will appellant’s general interest in seeing that BLM properly fulfills its surveying duties under 43 U.S.C. § 772 (1988) suffice to confer standing.

Therefore, we conclude that appellant lacks standing to bring the instant appeal, and it must be dismissed for that reason. See Wilogene Simpson, 110 IBLA 271, 275-76 (1989); Alice L. Alleson, 77 IBLA 106, 108 (1983). This is particularly true in a case such as this when the landowners who were involved in the earlier protest of the dependent resurveys did not appeal the BLM decision denying the protest.

131 IBLA at 340.

Application of this precedent demonstrates that Wayne’s appeal must be dismissed. Wayne makes no assertion of any interest which has been adversely affected other than to state that he had once performed a survey which is at odds with a survey on which BLM relies. We may speculate as to injury to pecuniary interests or reputation, but there is nothing to suggest that those scenarios have

occurred or are even likely to occur.^{3/} Thus, on the record before us, Wayne has not demonstrated that he has been adversely affected by the decision being challenged. His concern does not give rise to a legally cognizable interest which has been adversely affected, especially where the landowners have not protested or appealed.

It is worth noting as well that the quarter corner in question appears not to be located on the public land. The controversy fueling Wayne's protest is the differing opinion on the boundary between adjacent private landowners, which boundary employs the quarter corner in question. This quarter corner was the beginning point in "Restoring the Dependent Resurvey Executed by Devendorf and Eiffert in 1909-10 and Approved in 1910." (Field Notes of the Dependent Resurvey of Township 29 North, Range 10 West, of the New Mexico Principal Meridian, in the State of New Mexico at 2.) However, this corner, and the boundary line of which it is a part, did not define public lands but was employed to ascertain other boundaries of public lands within the township. This is the situation found in James C. Boussios, 130 IBLA 342, 344 (1994):

[As] BLM lacks the authority to resurvey private land boundaries where, although originally surveyed under the rectangular survey system, there is no longer adjacent public land, it is clear that any action taken by BLM will not affect any such boundary. Rather, any action is properly regarded as being solely for BLM's own purposes. The act of accepting a corner as genuine is often taken to aid in the demarcation of distant public land boundaries. Thus, corners along section lines where the land on either side of the line has passed into private ownership are identified and used as "control points" (see Frank Lujan, 40 IBLA 184, 185 (1979)), and the line itself can be viewed as a "control line."

^{3/} Wayne's reference to In the Matter of Cecil Tullis, PS Certificate No. 9672, Case No. 98-97-49 (May 5, 1999), does not change this result. Wayne's client, Sullivan, filed the complaint, challenging Tullis' survey methods and placing of the corner point in question here. (Complaint filed Apr. 29, 1998.) After a hearing, the Board of Registration reprimanded Tullis "in that he failed to provide an adequate description of all monuments found or set, failed to clearly state the basis of bearing, failed to show location of any evidence of a boundary or line of occupation * * *." In the Matter of Cecil Tullis at 3. The Board of Registration, however, did not nullify Tullis' survey or adjudicate the quality of the evidence it employed. BLM cited this result in the May 4, 2000, protest decision, noting that the proceeding neither justified nor condemned Wayne's determination to proceed with the proportionate measurement.

We dismissed the appeal in Boussios for lack of standing, as it was clear that the resurvey of public lands did not affect private lands and the proper location of the disputed boundary between private holdings is a matter to be resolved between the landowners. 130 IBLA at 344. “So far as such a boundary is concerned, BLM’s resurvey of the corners has no legal effect; any effort to do so would be a ‘legal nullity.’ * * * BLM’s placement of a control line is not binding either on the affected private landowners or, in the event of a dispute between such landowners, on a court of competent jurisdiction.” ^{4/} Ron and Margery A. Martin, 130 IBLA at 242. Thus, the private landowners whose boundary abuts the corner at issue are not “adversely affected” by BLM’s resurvey inasmuch as there is no legal effect of the resurvey as to their lands. It follows that Wayne, who is not a nearby private landowner but was hired by one, does not have standing to appeal here.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

Lisa Hemmer
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

^{4/} BLM’s resurvey could provide evidence in a private dispute of where the original corners were located. Indeed, a corner accepted by BLM might carry some persuasive weight in the dispute. However, as the court stated in United States v. Hudspeth, 384 F.2d 683, 688 n.7 (9th Cir. 1967), it would not constitute conclusive evidence regarding the location of the private land boundary.