

LIABILITY AND ABANDONED MINES

Liability of NPS and its employees is one of the major concerns that arises whenever abandoned mines are considered. Concern is warranted because many mines present an opportunity for serious injury or death. In addition, mines are man-made features. The hazards associated with them are expected to be known, monitored, and actively managed to a much greater extent than natural features. This section presents some background on liability, some of the specific cases involving abandoned mines, and appropriate actions to demonstrate the conscientious management of abandoned mines.

As land managers and custodians of the public resources, NPS has a responsibility to visitors to offer an opportunity to enjoy the parks with a reasonable degree of safety. Likewise, NPS employees should be able to work in an environment that is free of undue risks to life and health. Some natural and man-made hazards exist in parks. Courts have found that visitors can reasonably be expected to recognize and avoid most obvious hazards. But, when hazardous conditions are unusual or hidden, courts have found that there is a responsibility to provide warnings or take steps to mitigate the hazards.

Prior to 1945, the U.S. Government maintained sovereign immunity from damage claims. For an individual to collect retribution for damages caused by a government act, or an employees action, required a special act of Congress. After Congress found itself dealing with numerous such actions, the Federal Tort Claims Act of 1945 was passed. Under this act, the Federal government and its agents could be sued and were, in essence, to be treated like a private party. Negligence was the standard to be applied as defined by each State.

When the United States or an employee is accused of negligence, there are two principal defenses that are applicable to park management, the discretionary function defense and recreational use statutes.

THE DISCRETIONARY FUNCTION DEFENSE

The discretionary function defense is based on the Federal manager's ability to make decisions within their area of authority and responsibility. The Federal government cannot be found negligent for deciding on a course of action that is generally accepted and is within the scope of authority; even if that action results directly or indirectly in injury or death. However, and this is a critical point, a manager cannot use discretion to avoid responsibility.

NPS has stated a responsibility to provide for a safe visitor experience (NPS Management Policies, 1989). In addition, land managers have a responsibility to have a basic knowledge of

the resources they manage, including the hazards that are present. Therefore, the discretionary function defense would be a weak tool when used to defend a lack of knowledge of an abandoned mine or the hazards that exist there.

The U.S. Justice Department is sometimes reluctant to use the discretionary function defense in cases that involve a single injury or death. It is important that the concept of this defense not be weakened by an adverse decision in a relatively minor case, such as a single death in an abandoned mine. This would greatly reduce the effectiveness of this defense in cases involving major catastrophes or large-scale injury to the public (i.e., airline crashes or fallout from nuclear testing). The importance of this for parks is that in a case involving an injury in a park, even where managers used appropriate discretion, might well be settled out of court, with a settlement being paid by the park.

RECREATIONAL USE STATUTES

The other major tools for defending the Federal land manager are Recreational Use Statutes. Most states have adopted these statutes to protect landowners from suit when a member of the public enters their land for the purpose of recreation and is injured. Without this kind of protection, many private landowners would not allow any public recreation on their property. The public would lose recreation opportunities and the landowner would have to go to great effort and expense to exclude visitors. These laws apply to the NPS because the Federal Tort Claims Act of 1945 says that the U.S. Government is to be treated as an individual.

Most recreational use statutes contain some exceptions or have been held to have exceptions by the courts. One exception, called "consideration," says that recreational use statutes will not protect a person who collects money for the use of the land. This will probably apply to parks that collect entrance fees. However, collecting a fee specifically for camping does not necessarily exempt the remainder of the park from the protection of a recreational use statute. There is some state-to-state variability in the treatment of consideration.

Recreational use statutes are also limited when a park employee makes an "express invitation" to use the resource. This occurs when a park representative, or even park literature, assures a visitor that a mine, road, camp ground or other area is safe. Once that commitment is made, the NPS is no longer protected by recreational use statutes should an injury occur. This exception should not prevent us from being good hosts and providing useful information to visitors, but we should be perfectly honest when discussing hazards that might be present. NPS was unable to use the recreational use statute to support the defense in a recent case where a ranger at Yellowstone National

Park told visitors that it was safe to camp in an area, and the visitors were subsequently attacked by a bear.

If a judge feels that a landowner knowingly disregarded the presence of a hazardous situation, he can make a finding of "willfulness" and rule out the use of the recreational use statute. In making a determination of willfulness, the judge is evaluating whether the landowner willingly disregarded a hazardous situation, when a normal person would have corrected it to prevent injury to his or herself or visitors. This has implications for NPS when abandoned mines are inventoried while funds may not be available to correct the hazards that are found. As pointed out in the discussion of the Campbell case below, willfulness can be avoided by having a formal AML program, even if funds are not sufficient to address every hazard immediately.

CASE STUDIES

There are three cases involving injuries or fatalities in abandoned mines that are useful examples for discussing the liability associated with abandoned mines. Two occurred in NPS parks and one occurred on BLM lands.

Campbell v. United States

In 1981, a 14-year-old boy, Von Campbell, and his 16-year-old friend set off to explore a mine shaft near their home. They had thought about this expedition for some time and were prepared with rope, water, gloves and a homemade torch. After testing the shaft for depth, they tied the rope to a nearby tree and, with some reluctance, Von Campbell began a descent. He stopped shortly after entering the shaft because the crumbling wall was injuring his hands. He was unable to climb up or down, and his friend could not pull him up. Von lost his grip and fell to the bottom of the shaft suffering a broken femur and other injuries. As a result, his left leg is permanently shorter than the right.

The Folsom Resource Area Office of BLM was responsible for managing the area and had an AML program. It was a small program with only one employee, a heavy equipment operator, devoting half of his time to the inventory and remediation of abandoned mine hazards. BLM had inventory records of at least five shafts in the vicinity of the shaft where the accident occurred, but had not determined whether these shafts were truly abandoned or on active claims located nearby. No actions had been taken to mitigate the hazards at these shafts.

The judge found in favor of the United States and BLM. The finding stated that the hazard was open and obvious, the boys knew of its existence and the fact that it was hazardous, as evidenced by their preparations. Campbell had made a voluntary and reasonable decision to assume the risk of entering the shaft. He also found that BLM had used appropriate discretion in

allocating limited funds and staff to their AML program. They had staff working on the problem and were in the process of inventorying and correcting hazards even though they had not made much progress. BLM could not be expected to devote all of their resources to an abandoned mine program and neglect other management responsibilities.

This case points out the need for a formal AML program in each park that has abandoned mines, **even if** the resources are not available to address all of the problems immediately after they are identified. It is appropriate for an agency to work toward an ultimate solution within budgetary and staffing constraints.

Eimer v. United States

In June of 1984, Bill Eimer, his family and some friends were visiting Death Valley National Monument. They were at the abandoned Keene Wonder Gold Mine and Bill and a friend decided to make the arduous hike to the upper workings. There they discovered an interesting adit that did not look particularly hazardous. Bill entered the adit without a light. Darkness did not stop his progress as the adit was straight. Once his eyes adjusted, the light entering the mouth of the adit appeared sufficient to illuminate the entire adit to its terminus about 300 feet in. Unfortunately, this was an illusion. The illuminated end of the adit was actually light projected on the far wall of a large stope, a void left where a large amount of ore was removed. Bill could not see this because a few rocks on the floor appeared to shade the floor of the adit. In actuality, there was no floor. He fell about 20 feet into an area of large boulders sustaining severe head and back injuries. In spite of a heroic effort on the part of his friend and park staff to rescue him, Bill died before reaching a hospital.

The Keene Wonder Mine and several other mines are important historic resources in Death Valley and attract many visitors. They are located on park maps, mentioned in brochures and have road signs directing visitors to the sites. The park had known that some of the mines were hazardous and had posted signs stating "MINE HAZARD AREA" at many of the sites. The Keene Wonder Mine had been inventoried for hazards but that specific adit was "not explored for deep hazards." The adit was scheduled for closure, but funds that were planned for the closure were used for part of a large project to stabilize the spectacular historic tramway that carried ore from the mine to the mill on the valley floor.

This case was settled prior to going to trial. The Justice Department was willing to settle in part because NPS was vulnerable on several points. The warnings provided were inadequate. Bill Eimer may have heeded the warning that the area was hazardous. He entered the adit carefully, and only went as far as he could see. Since old mines are an attraction to the area and recognized as **valuable resources by the park, the park**

has a responsibility to provide adequate warnings. These warnings must be sufficiently detailed so that a reasonable person can make an informed decision to avoid the hazard.

The adit should have been explored to see if it contained hidden hazards. If it was considered too hazardous to explore, then it would have been rated a severe hazard and made a top priority for closure. Even if it had not been closed by 1984, the park would have been in a better position to defend its actions. Mine hazards should be evaluated with the curious and uninformed visitor in mind.

The decision to complete more stabilization rather than close those adits may have been an appropriate use of management discretion. The tram system was nearly intact, it represented a spectacular feat of engineering, and it was in eminent danger of collapse. Failure of any component of the system would have sent shock waves through the cables damaging other structures. In hindsight, mine closures should have been included as part of the project. The cost increase would have been less than 10%.

Jeffery v. United States

In May 1970, the Jeffery and La Blanc families were visiting Lake Mead National Recreation Area. They were riding dirt bikes in the vicinity of Katherine Landing and the Treasure Vault Mine. They had been advised by a ranger that they could not ride off-road in the recreation area and that there were mines in the vicinity. Though they were advised to go outside the park boundary for riding, they were apparently unaware of the location of the boundary and began riding in the vicinity of the mine. The father of the La Blanc family arrived at a mine waste pile. He rode slowly up the 3-foot-high bank then stopped because he was on the brink of a conical pit that surrounded an open mine shaft. Mr. Jeffery rode past Mr. La Blanc and, unable to stop, slid toward the shaft, grasping a piece of lumber that was over the shaft at the last moment. Douglas Jeffery was immediately behind his father. He was also unable to stop and could not grab the lumber or his father. Douglas fell 165 feet to his death.

NPS knew of the shafts. The subdistrict ranger had inventoried mines in the area and described their hazards in a memorandum in January 1969. There were no warnings or barriers at the mine. A notice posted at the camp ground listed the rules for off-road vehicle use, but did not mention the hazards. The court found NPS negligent for not maintaining the area in a reasonably safe condition or giving adequate notice of the hazardous conditions that were present. The court awarded the Jeffery's \$135 000 plus court costs. This case points out the need to take at least minimal action when extreme hazards such as this particular shaft are known. It is at least as important to post warnings of hazards in the area as it is to post regulations. Park files should have included not only a record that the site was known, but a record of the actions to be taken.

Even if no action had been taken, the expressed intent to correct the hazard would have strengthened the park's position considerably.

RECOMMENDED ACTIONS

- * Have a formal, proactive program to identify and mitigate abandoned mine hazards.

Having a recognized program will help change the balance of sympathy. It is far better to explain why the program had not corrected a specific hazard, than to explain why there is no program.

- * Have an AML inventory.

This will provide the information needed to find out if the park has any severe hazards warranting immediate attention, and to seek funds to correct the problem. A good inventory will insure that limited funds are expended on the most important sites.

To not inventory mines and rely on a lack of knowledge as a defense is folly. As a land-management agency, we have the responsibility to know what resources exist. When visitors can easily find out about abandoned mines from topographic maps, brochures, trail guides, asking local residents, or even asking park staff, a manager would be negligent in not also knowing about these sites.

- * Document decisions.

If discretionary function is to be a viable defense, it is important that there be a record of decisions. A record will also help avoid a finding of willfulness by demonstrating there were good reasons for the actions that were taken.

REFERENCE: Sharrow, 1991, 2nd handout.

- * Provide adequate warnings.

Warnings must explain the hazards in sufficient detail that the visitor can make a rational decision to avoid the danger. These warnings should be located as warranted by the number and type of mine hazards in the area. Locations may include at the mine site, at visitor contact stations, in pamphlets and guides, or given orally during visitor contacts. In spite of all warnings, some people will put themselves in danger. This is evidence of their negligence, not the Park Service's.

- * Explore mines for deep hazards, if possible, or document decisions not to explore.

The persons evaluating mine hazards should approach mines as a curious visitor would. If a visitor would be enticed inside a mine, the inventory should include an evaluation of underground hazards. Particular attention should be given to surprises and problems that a visitor without a light or other proper equipment might encounter. The persons evaluating mine hazards must be properly equipped, trained, and should not subject themselves to undue hazards. If an opening cannot be entered safely, it definitely should not be entered, but must be assigned the highest hazard ranking.

- * Do not imply complete safety where it does not exist.

Visitors should never be told that a mine is completely safe. Underground workings are never completely safe, and most above ground features have at least a moderate risk due to rotten wood, sharp metal, fractured rock and general deterioration. Visitors should always be told to use caution and specific hazards should be cited if they are known.