

*Sickels Mining Laws &
Decisions of GLO*

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U. S. MINING LAWS,

AND THE

DECISIONS

OF THE

Commissioner of the General Land Office

AND THE

SECRETARY OF THE INTERIOR

THEREUNDER;

TOGETHER WITH THE CIRCULAR INSTRUCTIONS FROM THE GENERAL LAND
OFFICE, AND FORMS FOR ESTABLISHING PROOF OF CLAIMS; ALSO,
THE DECISIONS OF THE SUPREME COURT OF THE
UNITED STATES UNDER THE MINING ACTS.

By D. K. SICKELS,
GENERAL LAND OFFICE, WASHINGTON, D. C.

SAN FRANCISCO:
A. L. BANCROFT AND COMPANY,
LAW BOOK PUBLISHERS, BOOKSELLERS AND STATIONERS.
1881.

SUTRO TUNNEL

the legislature of his State or Territory. The local courts are open for those particular adjustments which this office can not reach; and I conclude that the present demand is entirely outside what, in the proper execution of said laws, can be legitimately claimed or conceded. I therefore decline to grant the application; and in conformity to the views herein set forth, I hereby revoke my letters to the Register and Receiver, of August 26, 1874, and to John A. Dix, Esq., of April 24, 1875, so far as they conflict with this decision, and decline to except by name and survey any mine whatever in said town.

Duly notify all parties in interest hereof, allow sixty days for appeal, and thereafter promptly report to this office.

Very respectfully,

S. S. BURDETT, *Commissioner.*

No. 13. SUTRO TUNNEL.

1. The words "discovered" and "developed" have separate and distinct meanings. Known lodes when intersected by the main tunnel might be greatly benefited and "developed" thereby.

2. Right was given to construct a tunnel along any lode discovered or developed by the main tunnel.

3. The fact that a mine is located more than two thousand feet from the main tunnel will not prevent the Sutro Tunnel Company from collecting royalty from the owners thereof, *provided* it can show conclusively that the mine has been drained, benefited, or developed thereby.

4. At whatever distance, if the mine is so benefited, etc., the condition should be inserted in the patent.

DEPARTMENT OF THE INTERIOR,

WASHINGTON, August 30, 1878.

By Sec. of the Interior

SIR: I have considered the case of the Sutro Tunnel Company v. the Occidental Mill and Mining Company, situated on the Brunswick lode, Silver Star Mining District, Storey County, Nevada, on appeal from your decision of December 4, 1877, adverse to the Occidental Company.

The facts of this case are as follows, viz.: On September 10, 1873, the Occidental Mill and Mining Company made proof of their compliance with the requirements of the mining laws, and entered the lands embraced in the mill and mining claims of said company, containing 34 67-100 acres in the E. half of S. W. quarter section 33, township 17 N., range 21 E., and sections 4 and 9, township 16 N., range 21 E., Mount Diablo Meridian. On June 5, 1875,

Messrs. Shellabarger and Wilson, attorneys for the Sutro Tunnel Company, filed the following protest against the issuance of patent for the Occidental Mine, viz.: "The Sutro Tunnel Company, as assignee and successor in interest of A. Sutro, under the act of Congress of July 25, 1866, entitled 'An act granting to A. Sutro the right of way and granting other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada,' respectfully shows that the claim described as above in the application made and now pending in your office is either within two thousand feet of the tunnel of said company, and therefore, under the provisions of said act, not patentable, or else is within that district in which all claims or mines will be drained, benefited, or developed by said tunnel, and the owner of said claim holds the same subject to the condition named in the third section of said act.

"And said Tunnel company hereby demands that if said claim is within the two thousand feet aforesaid (such fact being ascertainable by the public records), no grant or patent be issued therefor, and hereby protests against the issuing of any such grant or patent; or if said claim is not within the said limit of two thousand feet, the said Tunnel company hereby demands that the condition named in the third section of the act be inserted in any grant from the United States for said claim without the insertion of said condition."

On August 14, 1876, Messrs. Shellabarger and Wilson, on behalf of said Tunnel company, filed a statement, in which they alleged that the Occidental mine was on a lode which had already been drained by the Sutro Tunnel, in consequence of which this mine, which for a long time had been flooded with water, had been thoroughly drained, which fact had been recently discovered; they therefore asked that a hearing be ordered to enable them to prove said allegations.

By your letter of August 19, 1876, a hearing was ordered before the local officers, to determine whether this mine had been drained, benefited, or developed by the Sutro Tunnel. The hearing commenced before the local officers on October 4, 1876, but the testimony was not transmitted

↗ Transcribed at U.S.A.R.

to your office until November 9, 1877. Much of this testimony was not signed by the witnesses, and lacked the jurats of the local officers, and you refused to consider it as evidence in the case. Your action in rejecting said testimony is approved, for the reasons stated.

Commissioner's decision.

You decided that although the testimony did not conclusively establish the fact that said mine had been drained, benefited, or developed by the tunnel, the Tunnel company had nevertheless made out a *prima facie* case, and were entitled to have the condition contained in the third section of the Sutro Tunnel Act of July 25, 1866, inserted in the patent to be issued for said mine, and the right of the tunnel company to royalty could then be settled by the courts.

On February 25, 1869, your predecessor, Mr. Commissioner Wilson, addressed a letter to Mr. Sutro, in which he discussed at length the rights and privileges granted by the Tunnel Act of July 25, 1866, and held that the only mines or lodes affected by said act were the following:

"1. The mines on the Comstock lode. 2. Those lying within two thousand feet of the proposed line of said tunnel. 3. Such new lodes as may be discovered or developed by the construction of the tunnel, the existence of which remained unknown until thus brought to light."

This decision was affirmed by my predecessor, Secretary Cox, on July 5, 1870.

It is contended by counsel for the mining company that the above mentioned decision is final and conclusive against the tunnel company, upon the points raised in this controversy, and that said questions are *res judicata*.

Mr. Bouvier (2 Law Dict. p. 465) states the law of *res judicata* to be as follows: "In order to make a matter *res judicata* there must be a concurrence of the four conditions following, viz.: Identity of the things sued for, identity of the cause of action, identity of the persons and parties to the action, identity of the quality of the persons for or against whom the claim is made."

The records of your office show that the decision of Commissioner Wilson was drawn out by letters from Mr. Sutro, relative to his rights under the tunnel act. The Occidental

Mill and Mining Company was not a party to that proceeding, and is not, therefore, estopped by it; neither can said company take advantage of said decision by way of estoppel, because it was a stranger to the record.

Questions discussed.

The questions involved in this case may be briefly stated as follows, viz.:

1. Has the Sutro Tunnel Company proven that the Occidental mine has been drained, benefited, or developed by its tunnel?

2. If the proof shows that the mine has been drained, benefited, or developed by said tunnel, but that it is located outside of the limit of two thousand feet named in the act of July 25, 1866, is the Tunnel company entitled to have the condition contained in the third section of said act inserted in the patent to be issued for said mine?

The testimony in this case shows that the northerly end of the Occidental mine is situated about three thousand one hundred feet in a southerly direction from shaft No. 3 of the Sutro Tunnel; that the trend of said mine is nearly north and south, the dip to the east, and that the strata of the country run nearly north and south; that said mine is worked through two tunnels; that in 1872, several miners' inches of water (174,054 gallons, or 20,333 cubic feet each) flowed from the lower of those tunnels, and was used for milling purposes by the Occidental Company; that when the pumps were at work at shaft No. 3 of the Sutro Tunnel, there was a marked diminution in the flow of water in said mine, and that the mine has now become dry; that shaft No. 3 has been sunk to the depth of four hundred and fifty-nine feet, but not to the level of the Sutro Tunnel.

It is also shown that in running the second tunnel of said mine, water was encountered at about eight hundred feet, where the ledge was struck; that there is a seam of clay from three to four feet in thickness, very close to the east casing of said mine, and that in running the Sutro Tunnel similar clay was taken out; that the mouth of the second tunnel of said mine is situated about five thousand feet from shaft No. 3 of the Sutro Tunnel, with mountains and valleys intervening. The level of the Sutro Tunnel is shown to be about one thousand six hundred feet below the upper crop-

pings, and about one thousand two hundred feet below the second tunnel of said mine; it is also shown that large quantities of water were encountered in the Sutro Tunnel from a point one thousand four hundred feet east to a point nine hundred feet west of shaft No. 3.

} Brunswick

While the testimony presented does not show conclusively that said mine has been drained, benefited, or developed by said tunnel, I agree with you in the conclusion that it does show *prima facie* that said mine has been drained, although this conclusion is reached only by tracing effects to what must be considered their real causes.

Upon the second proposition, it is claimed by counsel for the Tunnel Company, that said condition must be inserted, because said company is authorized to run a branch tunnel on the Brunswick lode.

The first and third sections of the act entitled "An act granting to A. Sutro the right of way, and granting other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July 25, 1866, are in the following words, viz.:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That for the purpose of the construction of a deep draining and exploring tunnel to and beyond the 'Comstock lode,' so called, in the State of Nevada, the right of way is hereby granted to A. Sutro, his heirs and assigns, to run, construct, and excavate a mining, draining, and exploring tunnel; also to sink mining, working, or air shafts along the line or course of said tunnel, and connecting with the same at any point which may hereafter be selected by the grantee herein, his heirs or assigns. The said tunnel shall be at least eight feet high and eight feet wide, and shall commence at some point to be selected by the grantee herein, his heirs or assigns, at the hills near Carson river, and within the boundaries of Lyon county, and extending from said initial point in a westerly direction seven miles, more or less, to and beyond said Comstock lode, and the said right of way shall extend northerly and southerly on the course of said lode, either within the same, or east and west of the same; and also on or along any other lode which may be discovered or developed by the said tunnel."

"SEC. 3. *And be it further enacted*, That all persons, companies, or corporations, owning claims or mines on said Comstock lode, or any other lode drained, benefited, or developed by said tunnel, shall hold their claims subject to the condition (which shall be expressed in any grant they may hereafter obtain from the United States) that they shall contribute and pay to the owners of said tunnel, the same rate of charges for drainage or other benefits derived from said tunnel or its branches as have been or may hereafter be named in agreement between such owners and the companies representing a majority of the estimated value of said Comstock lode, at the time of the passage of this act." (14 Statutes at Large, pp. 242, 243.)

Under the first section, I think it is clear that neither the tunnel nor its branches can be lawfully constructed along any lode except where the right of way is granted. By the words "and also on or along any other lode which may be discovered or developed by the said tunnel," the right to construct branch tunnels is made contingent upon either the discovery or development of a lode other than the Comstock.

The record shows that the Brunswick lode was discovered many years before the passage of the act of July 25, 1866, and the Occidental mine was located thereon in March, 1863. This lode was not, therefore, "discovered" by the tunnel. This narrows the inquiry to the single question whether the Sutro tunnel has "developed" the Brunswick lode. *

Developed.

Mr. Commissioner Wilson was of the opinion that the word "developed" as used in the first section of the act above quoted was simply interpretive of the word "discovered" and signified one and the same thing. I am unable to agree with Mr. Wilson's construction of this section. The words "discovered or developed" as used therein, have reference, in my opinion, to separate and distinct events, the happening of either of which was sufficient to perfect a grant of the right of way, and its necessary consequences. Many lodes had already been discovered on the line of the projected tunnel at the time the act was passed, and it is not

to be presumed that the law-makers, by the use of the word "discovered," had reference to them, or deemed them capable of discovery by the Sutro tunnel, yet there was every reason for believing that they might be developed thereby. If the word "discover" did not refer to known lodes, and the words "or developed" are subordinate to and interpretive of that word, it follows as a logical sequence that the words "and also on or along any other lode which may be discovered or developed by said tunnel," granted no right of way except along blind lodes discovered in the tunnel. Such a construction would be equivalent to a nullification of this important part of the grant. It can not be doubted that a known lode, when intersected by the main tunnel, might be greatly developed thereby; and if it was so intersected and developed, there can be no reasonable doubt that the right of way was granted for the construction of a branch tunnel along it, and the right to royalty would necessarily follow when the several mines located thereon were drained, benefited, or developed thereby.

Main tunnel.

I am of the opinion, therefore, that the right to construct a tunnel was granted along any lode discovered or developed by the main tunnel, and that this right can not be restricted unless there is something in the act which in terms, or by necessary implication, limits its operation. That such limitation does not exist is clear, I think, from the language used in the third section of the act, which provides that "all persons, companies, or corporations owning claims or mines on said Comstock lode, or any other lode drained, benefited, or developed by said tunnel, shall hold their claims subject to the condition," etc. There is nothing in this language to indicate a limitation of the right of the Sutro Tunnel Company to extend their explorations. On the contrary, the language seems to imply that those explorations may be extended to any distance, and that all persons, companies, or corporations, whose mines were drained, benefited, or developed thereby, shall be liable to pay the royalty agreed upon in the stipulation mentioned, provided always that the lode was discovered or developed by the main tunnel.

Branches.

The word "branches" indicates that it was contemplated that more than one branch tunnel would be run, otherwise the word "branch" would have been used. The fact, therefore, that the Occidental mine is situated more than two thousand feet from the main tunnel, will not prevent the Sutro Tunnel Company from collecting its royalty from the owners of said mine, providing it shall conclusively establish the fact that said mine has been drained, benefited, or developed thereby; and while it is true that the testimony in this case does not conclusively show that the Brunswick lode was cut by the Sutro tunnel, nor that the Occidental mine has been drained, benefited, or developed thereby, still it does appear *prima facie* that said lode was cut by the Sutro tunnel, and that it has been drained thereby; and as there is no limitation in the act as to the distance at which mines shall be situated from said tunnel, if drained, benefited, or developed thereby, which would exempt them from the condition of the third section, I am of the opinion that Mr. Sutro, his heirs and assigns, are entitled to have the condition provided in the third section inserted in the patent for said mine, when the same issues.

Counsel for the Sutro company urge that the condition prescribed in the third section shall be inserted in all patents for mines situated within a reasonable distance of said tunnel, whether located upon the Comstode lode or some other lode, and whether within or without the limit of two thousand feet named in the act.

I am unable to concur in this view. The right to royalty to Mr. Sutro, his heirs or assigns, was granted on the condition that the owners of mines should pay a certain royalty, providing their mines were drained, benefited, or developed by the proposed tunnel. If the mines are not drained, benefited, or developed by said tunnel, the act does not give to Mr. Sutro, his heirs or assigns, the right to collect any royalty. Whether the Sutro Tunnel Company is entitled, therefore, to such right must always be a question of fact to be established by proof; and while it is true that the condition prescribed in the third section of said act should be inserted in patents issued for mines on testimony establishing *prima facie* that said mine has been

drained, benefited, or developed, still I am of the opinion that said condition should not be inserted in any patents except in patents for mines located upon the Comstock lode, unless it be made to appear *prima facie* that the mine or mines have been drained, benefited, or developed by said tunnel.

Your decision is affirmed for the reasons stated, and the papers transmitted with your letter of March 30, 1877, are herewith returned.

Very respectfully,

C. SCHURZ, *Secretary.*

Commissioner of the General Land Office.

NO. 14. Clause inserted in patents for mines upon the Comstock lode, in favor of the Sutro Tunnel grant.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

WASHINGTON, D. C., March 8, 1873.

ADOLPH SUTRO, Esq., *Washington, D. C.*

SIR: Referring to your letter of the twenty-seventh ultimo, I have to state that the Register and Receiver at Carson City, Nevada, were instructed, on the twenty-ninth July, 1870, of the construction which has been given the act of Congress approved July 25, 1866, "granting to A. Sutro the right of way and granting other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada."

The instructions contained in said letter, of which you have been furnished a copy, are still in force.*

In issuing patents for the Comstock lode, or those in the immediate vicinity thereof, the following clause was inserted, viz.:

Condition.

"That the claim hereby granted and conveyed shall be subject to the condition specified in the third section of the act of Congress approved July 25, 1866," granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada, "and the grantee herein shall contribute and pay to the owners of the tunnel, con-

* See decision of Secretary of the Interior, August 30, 1878. No. 13. *← Above.*

structed pursuant to said act, for drainage or other benefits derived from said tunnel or its branches, the same rate of charges as have been or may hereafter be named in agreement between such owners and the companies representing a majority of the estimated value of said Comstock lode, at the time of the passage of said act, as provided in said third section."

By reference to the inclosed circular you will perceive that both the acts of July 9, 1870, and May 10, 1872, contain clauses guarding the rights of the owners of the Sutro tunnel.

The land which is embraced by the location of the tunnel has been withdrawn from sale, in accordance with said letter from this office of July 29, 1870.

Very respectfully, etc.,

WILLIS DRUMMOND, *Commissioner*.

NO 15. Public lands containing deposits of diamonds, are subject to location and sale under the mineral laws.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., September 3, 1872.

SIR: Your letter of the twentieth ultimo, submitting for instructions the question whether "diamond claims" can be entered and patented under the mining acts of Congress, was received and submitted to the Attorney-general for his opinion thereon. I transmit herewith a copy of his opinion on the subject, under date of the thirty-first ultimo. I concur in the views therein set forth, and they will guide your official action in cases of this character. The letter of Hoyt and Sears, accompanying yours, is herewith returned.

Very respectfully,

W. H. SMITH, *Acting Secretary*.

HON. WILLIS DRUMMOND, *Com'r General Land Office*.

[Inclosure.]

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., August 31, 1872.

HON. C. DELANO, *Secretary of the Interior*.

SIR: I have the honor to acknowledge the receipt of your communication of the twentieth instant, submitting for my official opinion the question whether or not title to public