

Editor's note: Overruled to the extent inconsistent with U.S. v. Albert Parker, 82 IBLA 344, 91 I.D. 271 (Sept. 12, 1984)

UNITED STATES
v.
LIVINGSTON SILVER, INC.

IBLA 79-306

Decided September 19, 1979

Appeal from decision of Administrative Law Judge Robert W. Mesch, dismissing complaint with respect to tunnel and tunnel site location. Idaho 13364.

Affirmed.

1. Mining Claims: Tunnel Sites

Under 30 U.S.C. § 27 (1976) the Tunnel Site Act, a mining contest complaint charging that a tunnel site was not being worked with reasonable diligence is properly dismissed with respect to such charge where it sought to have such tunnel site declared null and void, but the statute provides only that the consequence of failure to work a tunnel site is the forfeiture of right to all undiscovered veins therein.

APPEARANCES: Erol R. Benson, Esq., Office of the General Counsel, United States Department of Agriculture, Ogden, Utah, for contestant/appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

The Department of Agriculture (appellant) appeals from that portion of the February 27, 1979, decision by Administrative Law Judge Robert W. Mesch, which dismissed its complaint with respect to the Livingston Tunnel and Tunnel Site location, situated in sections 3, 4, 9, and 10 in unsurveyed T. 9 N., R. 16 E., Boise meridian, Custer County, Idaho.

The complaint, filed August 30, 1977, on behalf of the U.S. Forest Service, Department of Agriculture, charged, inter alia, that the tunnel site was "not being worked with reasonable diligence" and requested that it be declared null and void.

The relevant statute, 30 U.S.C. § 27 (1976), recites:

Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; 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.

R.S. § 2323.

In his decision, the Judge stated his interpretation of this law as follows:

I construe the tunnel site provision as a recognition by Congress that tunnels were and would be driven (1) across unappropriated public lands outside the boundaries of mining claims as a necessary incident to the development of veins or lodes previously located, Cf., Rights of Mining Claimants to Access Over Public Lands to Their Claims, 66 I.D. 361 (1959); and (2) as a means of exploring for and discovering "blind" veins or lodes pursuant to the congressional declaration in section 1 of the 1872 Act that "all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration," 30 U.S.C. § 22. I believe the sole purpose of the section was simply to give the owners of such tunnels a preference right as against subsequent lode claimants to appropriate, under other provisions of the mining laws, any undiscovered or "blind" veins or lodes found in or on the line of such tunnel and within 3,000 feet from the portal of the tunnel. In other words, the tunnel site provision does not create or grant any rights to run or drive a tunnel for the development of a vein or lode, or for the discovery of mines. These rights are inherent in and a necessary part of the mining laws. The section did no more than grant a preference right, under prescribed conditions, to the owners of such tunnels over locations made by other parties after the commencement of the tunnel.

Decision, pp. 7-8.

In the remainder of his decision the Judge recounts the evidence and explains his dismissal of the tunnel site claim as follows:

The tunnel site in question was located in 1926. The evidence does not reveal whether any tunnel was driven between 1926 and 1960. When E. H. Swanson acquired the properties in 1960 he commenced work on a tunnel. The tunnel was driven in alluvium for a distance of about 80 feet. It collapsed in 1975. There is no evidence that any veins or lodes were discovered in the tunnel commenced in 1960. The contestees assert that the tunnel is valuable as a means of removing ore and water from the Livingston Mine, which is apparently patented property, and as a means of extracting ore that might be found on apparently unpatented lode claims in the vicinity.

The Forest Service contends that the Livingston Tunnel and Tunnel Site location should be declared invalid because "[t]he tunnel site is not being worked with reasonable diligence as prescribed by law (30 U.S.C. § 27)." As I construe the tunnel site provision, the charge made by the Forest Service, if true, would simply mean that the owners of the tunnel site have lost their preference right as against a subsequent lode claimant, to appropriate, in the manner described in other provisions of the mining laws, any vein or lode discovered in the tunnel. I am not aware of why the Forest Service has any concern over the question of whether the owners of the tunnel site location have lost the preference right granted by the tunnel site provision. I do not believe the Forest Service has any basis or reason to challenge the tunnel site location on the ground specified in the contest complaint.

While I am hesitant to express a gratuitous opinion, it might serve a useful purpose in this case. It seems to me that upon the withdrawal of the lands in 1972 from acquisition under the mining laws, the contestees lost the implied right to continue to run the tunnel for the discovery of mines pursuant to the Congressional invitation in section 1 of the 1872 Act and, in addition, the preference right granted by the tunnel site provision became inoperative. If no veins or lodes were discovered in the tunnel prior to the withdrawal or if a discovery was made, but the vein or lode was not appropriated by the location of a lode mining claim prior to the withdrawal, it would appear that the tunnel site location is now meaningless and of no effect. The withdrawal, and any conclusion that the tunnel site is no longer effective, would not, however, affect any rights the contestees might otherwise have to run the tunnel for the purpose of removing ore from patented or valid mining claims.

Decision, pp. 8-9.

Appellant argues first that the Secretary's regulations evince the intent to treat tunnel sites as any other mining claim, *i.e.*, to declare them void under certain circumstances. In this connection appellant cites 43 CFR 3833 containing the procedures for the recordation of unpatented mining claims, mill sites or tunnel sites. 43 CFR 3833.0-5(d) defines a "tunnel site" as a tunnel located pursuant to 30 U.S.C. § 27, and section 3833.4 provides that the failure to file the recordation instruments required by the subpart shall constitute "an abandonment of the . . . tunnel site and it shall be void." But appellant ignores the clear statutory provision, embodied in 43 U.S.C. § 1744(b) (1976), rendering tunnel sites expressly subject to the recordation requirements. In essence, the mandate is that of the Congress and not merely of regulation.

Appellant argues further that the Judge should have declared the tunnel site void because the land involved was withdrawn from location by 16 U.S.C. § 460aa-9 (1976), and because there was no diligent construction of a tunnel on the site. Appellant contends that the Judge's ruling leaves the United States without an administrative remedy against the tunnel site. Appellant, however, has failed to cite any specific authority impelling the conclusion that the law envisages such an administrative remedy in the circumstances of this case.

Appellant's second argument is equally devoid of merit. The withdrawal effected by 16 U.S.C. § 460aa (1976) was subject to valid existing rights. In any event, as it relates to the tunnel site, this point was adequately covered, and we see no error in the Judge's rationale.

[1] Appellant's last argument was considered at length in the part of the Judge's decision we have excerpted. 30 U.S.C. § 27 (1976) simply does not provide the sanction sought by appellant. Instead, it provides as a consequence of failing to diligently work a tunnel site that the owner of such site forfeit the right to all undiscovered veins. A tunnel site is akin to a right-of-way, Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 182 U.S. 499 (1901), and not subject to patent, Creede and Cripple Creek Mining, etc., Co. v. United Tunnel Mining, etc., 196 U.S. 337 (1905). Thus a declaration of nullity would be superfluous and there is no need for any further administrative remedy. As the Judge observed from the circumstances of the case before him, the tunnel site location is meaningless and of no effect.

We conclude that the Judge properly dismissed that portion of the complaint relating to the tunnel site. Appellant has demonstrated no error in the ruling.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Douglas E. Henriques
Administrative Judge

