

1953

Roland E. Cranford and Fred C. Clemore v. H. Spencer Gibbs et al : Brief of Plaintiffs and Appellants

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Carvel Matisson; John T. Vernieu; Gustin, Richards & Matisson; Attorneys for Plaintiffs and Appellants;

Recommended Citation

Brief of Appellant, *Cranford v. Gibbs*, No. 7931 (Utah Supreme Court, 1953).
https://digitalcommons.law.byu.edu/uofu_sc1/1860

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT of the STATE OF UTAH

ROLAND E. CRANFORD, sometimes known as
Roland Cranford, and FRED C. CLEMORE,
sometimes known as Fred Clemore,

Plaintiffs and Appellants,

— vs. —

H. SPENCER GIBBS, sometimes known as H. S.
Gibbs, and IDA PEARL GIBBS, husband and
wife; DELONE JENSEN, sometimes known as
Dalone Jensen and also as Delone R. Jensen, and
ESTELL JENSEN, husband and wife; W.
DANA GIBBS, sometimes known as Dana Gibbs,
and VERLIE GIBBS, husband and wife;
HOWELL MINING COMPANY, a corporation;
R. H. T. DUNSMORE and JANE DOE DUNS-
MORE, husband and wife; URBAN JOHNSON
and JANE DOE JOHNSON, husband and wife;
PHIL ROSEQUIST AND ROSE ROSEQUIST,
husband and wife; WALTER J. CROPPER and
AILEEN CROPPER, husband and wife; MAN-
TON C. GIBBS and FLORA B. GIBBS, husband
and wife; RICHARD R. KENNEDY, sometimes
known as Richard Kennedy, and ANITA GAE
KENNEDY, husband and wife; FIRST DOE;
SECOND DOE; THIRD DOE; FOURTH DOE;
FIFTH DOE; and SIXTH DOE; and all other
persons unknown claiming any right, title, in-
terest or estate in or lien upon the mining claims
described in Plaintiffs' Complaint and in the
pleadings herein adverse to Plaintiffs' ownership
or clouding their title thereto,

Defendants and Respondents.

BRIEF OF PLAINTIFFS AND APPELLANTS

Appeal from the District Court of the Sixth Judicial District
in and for the County of Sevier
HONORABLE JOHN L. SEVY, JR., *Judge*

CARVEL MATTSSON
and

JOHN T. VERNIEU
FOR GUSTIN, RICHARDS & MATTSSON
Attorneys for Plaintiffs and Appellants

RECEIVED

SEP 28 1953

LAW LIBRARY
U. of U.

INDEX

	Page
STATEMENT OF FACTS.....	2
STATEMENT OF POINTS.....	9
ARGUMENT	10
1. That the evidence and testimony offered and received by the trial court was and is entirely insufficient to justify the decision made and the decree rendered.....	10
A. Original location of Defendants' Yellow Canarie Claims in the Area #1 along the Old Piute County Highway, approximately two miles northeast of Marysvale, Utah	11
B. Subsequent moving of Defendants' Yellow Canarie Claims by Defendants to Area #2 located approximately two miles north of their original point of establishment and without new recordation of notices of location or compliance with other statutory requirements	21
C. Manner and method of location of Plaintiffs' Claims....	30
D. Subsequent acts of Defendants in moving, amending, modifying, confusing and overlapping Claims in Area #2, including the making of conflicting new locations	38
2. That the Decree entered herein is against the law.....	44
A. Defendant H. Spencer Gibbs, having once established his Yellow Canarie Claims at a given location, is thereafter bound by his acts and declarations and he may not subsequently claim new ground in an entirely different physical area (Area #2) under the priority date of his original location in Area #1 without compliance with law as to the location of the Claims in the new area.....	44
B. The amended Notices of Location of Defendants' Yellow Canarie Claims do not cure the fatal defects in their original Notices.....	51
C. Plaintiffs, having complied with every affirmative legal requirement for the locations of the three Juanita Claims and the Debra Fraction #10, and being free from any fraud or deception therein, in	

INDEX—(Continued)

	Page,
equity and justice should not be divested of their rights by reason of the subsequent destruction, movement or obliteration of their stakes and monuments by others.....	57
D. Application of the doctrine of "good faith".....	59
3. That the trial Court committed error in law.....	64
4. That on the basis of the evidence and record in this cause, new Findings of Fact, Conclusions of Law and Judgment in favor of Plaintiffs should be entered.....	65
5. That the trial Court committed error in denying Plaintiffs' Motion for a New Trial.....	65
CONCLUSION	65

TABLE OF CASES

Bair v. Anderson, 98 Colo. 532, 58 P. 2d 484.....	49
Bismark Mountain Gold Mining Co. v. North Sunbeam Gold Co., 14 Idaho 516, 95 P. 14.....	57, 60
Bonanza Consol. Min. Co. et al. v. Golden Head Min. Co., 29 Utah 159, 80 P. 736.....	50
Book v. Justice Mining Co., 58 F. 106.....	59
Brown et al. v. Levan et al., 4 Idaho 794, 46 P. 661.....	49
Brown v. Murphy, 97 P. 2d 281.....	61, 63
Bunker Hill & Sullivan Mining and Concentrating Co. v. Empire State-Idaho Mining and Development Co., 134 F. 268	56
Copper Globe Min. Co. v. Allman et al., 23 Utah 410, 64 P. 1019	47
Dennis v. Barnett, 85 P. 2d 916.....	62
Eaton v. Norris et al., 131 Cal. 561, 63 P. 856.....	63
Farmington Gold Min. Co. v. Rhymney Gold & Copper Co., 20 Utah 363, 58 P. 832.....	50
Gobert v. Butterfield et al., 136 P. 516.....	56, 58

INDEX—(Continued)

TABLE OF CASES—(Continued)

	Page
Golden Fleece Gold & Silver Mining Co. v. Cable Consolidated Gold & Silver Mining Co., 12 Nev. 312.....	49
Hammer v. Garfield Mining etc. Company, 130 U.S. 291.....	46
Johnson v. Ryan, 43 N.M. 127, 86 P. 2d 1040.....	61, 63
Johnson v. Young et al., 18 Colo. 625, 34 P. 173.....	55
Londonderry Mining Co. v. United Gold Mines Co., 38 Colo. 480, 88 P. 455.....	61
McCann et al. v. McMillan et al., 129 Cal. 350, 62 P. 31.....	50
Miehlich et al. v. Tintic Standard Mining Company, 60 Utah 569, 211 P. 686.....	48
Moore v. Steelsmith, 1 Alaska 121.....	59
Morrison et al. v. Regan, 8 Idaho 291, 67 P. 955.....	57
Moyle v. Bullene et al., 7 Colo. A. 308, 44 P. 69.....	55
Mutchmor v. McCarty, 149 Cal. 603, 87 P. 85.....	50
Nelson et al. v. Smith et al., 42 Nev. 302, 176 P. 261.....	49
Nichols et al. v. Ora Tahoma Mining Co. et al., 151 P. 2d 615	58
Olivero v. Eleganti et al., 61 Utah 475, 214 P. 313.....	10
Ringling v. Mahurin et al., 59 Montana 38, 197 P. 829.....	49
Sackville v. Mann et al., 135 P. 2d 1014.....	55
Stanley v. Stanley, 97 Utah 520, 94 P. 2d 465.....	11
Steele v. Preble, 158 Or. 641, 77 P. 2d 418.....	59
Strepy et al. v. Stark et al., 7 Colo. 614, 5 P. 111.....	55
Sullivan et al. v. Sharp et al., 33 Colo. 346, 80 P. 1054.....	55
Walton v. Wild Goose Mining Company, 123 F. 209.....	50
Washington Gold Min. & Mill. Co. v. O'Laughlin, 46 Colo. 503, 105 P. 1092.....	49, 56
Wells v. Davis et al., 22 Utah 322, 62 P. 3.....	50
Wiltsee v. King of Arizona Min. & Mill. Co., 7 Ariz. 95, 60 P. 896	48

STATUTES

Utah Code Annotated 1953, Section 40-1-2, Subsections 1, 2, 3 and 4.....	45
Utah Code Annotated 1943, Section 55-1-2.....	45
Utah Code Annotated 1953, Section 40-1-3.....	46
Utah Code Annotated 1943, Section 55-1-3.....	46
Utah Code Annotated 1953, Section 40-1-4.....	46
Utah Code Annotated 1943, Section 55-1-4.....	46
Utah Rules of Civil Procedure, Rule 59 (a).....	65

TEXTS

36 Am. Jur. Mines and Minerals, Section 94, p. 346.....	59
Annotation, 7 L.R.A. N.S. 763 (particularly p. 856).....	61
40 C.J. Mines and Minerals, Section 212, p. 801, n. 64.....	59
2 Lindley on Mines, 3d Ed. Section 375, pp. 889, 890, n. 68.....	59
Shamel, Mining, Mineral and Geological Law, Section 530.....	59
1 Snyder on Mines, Section 399.....	59

IN THE SUPREME COURT

of the

STATE OF UTAH

ROLAND E. CRANFORD, sometimes known as
Roland Cranford, and FRED C. CLEMORE,
sometimes known as Fred Clemore,

Plaintiffs and Appellants,

— vs. —

H. SPENCER GIBBS, sometimes known as H. S. Gibbs, and IDA PEARL GIBBS, husband and wife; DELONE JENSEN, sometimes known as Dalone Jensen and also as Delone R. Jensen, and ESTELL JENSEN, husband and wife; W. DANA GIBBS, sometimes known as Dana Gibbs, and VERLIE GIBBS, husband and wife; HOWELL MINING COMPANY, a corporation; R. H. T. DUNSMORE and JANE DOE DUNSMORE, husband and wife; URBAN JOHNSON and JANE DOE JOHNSON, husband and wife; PHIL ROSEQUIST AND ROSE ROSEQUIST, husband and wife; WALTER J. CROPPER and AILEEN CROPPER, husband and wife; MANTON C. GIBBS and FLORA B. GIBBS, husband and wife; RICHARD R. KENNEDY, sometimes known as Richard Kennedy, and ANITA GAE KENNEDY, husband and wife; FIRST DOE; SECOND DOE; THIRD DOE; FOURTH DOE; FIFTH DOE; and SIXTH DOE; and all other persons unknown claiming any right, title, interest or estate in or lien upon the mining claims described in Plaintiffs' Complaint and in the pleadings herein adverse to Plaintiffs' ownership or clouding their title thereto,

Defendants and Respondents.

Civil No. 7931

BRIEF OF PLAINTIFFS AND APPELLANTS

This is an action to quiet title to certain mining claims situate in the Durkee Mining District, Piute County, Utah, wherein the Defendants counterclaimed

to quiet title in themselves to conflicting mining claims. Plaintiffs appeal from a Decree of the Sixth Judicial District Court in and for Piute County, Utah, which determined that Plaintiffs' mining claims were without any validity and were subsequent and inferior to the mining locations of the Defendants and by which the Court quieted title in the Defendants H. Spencer Gibbs, sometimes known as H. S. Gibbs, W. Dana Gibbs, sometimes known as Dana Gibbs, Delone Jensen, sometimes known as Dalone Jensen and also as Delone R. Jensen, Manton C. Gibbs, Richard R. Kennedy, sometimes known as Richard Kennedy, and Walter J. Cropper. Appellants also appeal from the Order of said Court denying their Motion for a New Trial. These Appellants contend that the lower Court has misapplied proven facts and that said Decree is clearly against the weight of the evidence, sufficient to merit a reversal of said Decree or a new trial of this cause upon the merits.

STATEMENT OF FACTS

This action was commenced by the filing of an Application for Appointment for Guardian Ad Litem for Roland E. Cranford, a minor, one of the Plaintiffs, on October 11, 1950 (R. 1). Thereafter the Court made and entered its Order appointing Lucy H. Cranford Clemore as such Guardian Ad Litem (R. 4). Plaintiffs' Complaint (R. 6) was filed November 1, 1950. In it, Plaintiffs alleged that on or prior to the 31st day of May, 1950, the premises therein described as Juanita #1, #2 and #3 Mining Claims were vacant, unoccupied and unclaimed

lands of the United States of America, subject to location under the mining laws thereof; that upon said date, the Plaintiffs and one Kent F. Clemore entered upon and explored said premises and found thereon rock in place bearing valuable minerals; and that thereupon they located and appropriated as and for mining claims said properties in the manner and method therein stated, including the erection and location of monuments and the posting and recording of written Notices of Location. Plaintiffs also alleged that on or prior to the 20th day of July, 1950, the premises therein described as Debra Fraction #10 Mining Claim was vacant, unoccupied and unclaimed lands of the United States of America, subject to location under the mining laws thereof; that upon said date the Plaintiffs and one Kent F. Clemore entered upon and explored said premises and found thereon rock in place bearing valuable minerals; and that thereupon they located and appropriated as and for mining claim said property in the manner and method therein stated, including the erection and location of monuments and the posting and recording of written Notices of Location. It was then alleged that said Plaintiffs, at all times since said respective locations, have remained in possession of said claims and have worked and improved the same in compliance with the mining laws and customs of Utah and the United States of America.

Plaintiffs then alleged in their Complaint that the Defendants pretended to have, own and claim certain alleged mining claims referred to as Yellow Canarie #1, #2

and #3, Yellow Canarie Fraction and Yellow Canarie Fraction #2 in the same physical area as Plaintiffs' Claims, and conflicting therewith, and that by reason thereof Defendants claimed some right, title, interest or equity in and to the claims of the Plaintiffs, or some part thereof, and that said right, title, interest or equity thus claimed by Defendants was without any validity whatsoever insofar as it conflicted with Plaintiffs' claims. Plaintiffs prayed for a Decree quieting their title.

By way of Answer (R. 15) the answering Defendants H. Spencer Gibbs, sometimes known as H. S. Gibbs, and Ida Pearl Gibbs, husband and wife, W. Dana Gibbs, sometimes known as Dana Gibbs, and Verlie Gibbs, husband and wife, Delone Jensen, sometimes known as Dalone Jensen and also as Delone R. Jensen, and Estell Jensen, husband and wife, Manton C. Gibbs and Flora B. Gibbs, husband and wife, Richard R. Kennedy, sometimes known as Richard Kennedy, and Anita Gae Kennedy, husband and wife, and Walter J. Cropper and Aileen Cropper, husband and wife, and Phil Rosequist and Rose Rosequist, husband and wife, denied all of Plaintiffs' allegations except for the recordation of Plaintiffs' Notices of Location. Said Defendants also counterclaimed (R. 16) and alleged that on or prior to the respective dates therein mentioned extending from April 25, 1949, to September 27, 1950, the premises therein described as Yellow Canarie #1, #2 and #3, Yellow Canarie Fraction, Yellow Canarie Fraction #1, #2 and #4 (*italics ours*) were vacant, unoccupied and unclaimed lands subject to loca-

tion under the mining laws of Utah and the United States of America; that upon specific dates therein named, certain of said answering Defendants entered upon said lands and located and appropriated the same for mining claims; and that said Defendants have at all times remained in possession thereof and have worked and improved said claims in compliance with law. Defendants alleged that Plaintiffs' pretended claims in the same area were without any legal validity whatever insofar as they conflicted with Defendants' claims, and prayed for a Decree quieting their title.

By Amended Answer and Counterclaim (R. 23) the same Defendants alleged the recording of certain Amended Notices of Location on Yellow Canarie #1, #2 and #3 Mining Claims. They also added to the list of Claims upon which they were seeking to quiet title the following: Independence, Independence Fraction, Anita Gae #1, Grover Gibbs Fraction, Grover Gibbs Fraction #2, Lucky Strike #2, and the Claim known as the "Fraction".

Plaintiffs' Reply (R. 32) denied each and every allegation of Defendants' Amended Counterclaim.

After the trial, the Court made and entered Findings of Fact and Conclusions of Law (R. 38) in substantial conformity to the allegations of said Amended Counterclaim, and by Decree (R. 50) quieted title in the Defendants named therein to all of the claims set forth in said Amended Counterclaim except that in neither the Findings and Conclusions nor Decree is any mention made

whatsoever of the Grover Gibbs Fraction, Yellow Canarie Fraction #1, #2 and #4, all four of which Claims the Counterclaiming Defendants sought to quiet title to in their Amended Counterclaim. The objections urged to said Findings of Fact and Conclusions of Law and to said Decree in Plaintiffs' Motion for a New Trial (R. 53) went to the insufficiency of the evidence to justify the Judgment and Decree entered; that the Judgment and Decree were against the law, and that the Court committed error in law. Plaintiffs' Motion for a New Trial was denied by Order of the Court dated October 14, 1952 (R. 54).

Subsequent to the location of Plaintiffs' claims, Kent F. Clemore, one of the locators thereof, and his wife, conveyed to the Plaintiff, Fred C. Clemore, all of their right, title and interest in and to the Juanita #1, #2 and #3, and Debra Fraction #10 Mining Claims, Exhibit 7.

At the commencement of the trial, the action was dismissed without prejudice as to the Defendants R. H. T. Dunsmore and Jane Doe Dunsmore, husband and wife; Urban Johnson and Jane Doe Johnson, husband and wife; First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe and Sixth Doe, and any and all unknown defendants named in the action (R. 73). The sole remaining Defendant who did not Answer and Counterclaim, Howell Mining Company, a corporation, filed no responsive pleading, made no appearance, the action was not dismissed as to it, its default was never entered, and the

Court's Decree contained no judgment for or against this Defendant.

Uranium-bearing ores were discovered in commercial quantities in the area surrounding Marysvale, Piute County, Utah, in the year 1948 (R. 566). This discovery started a "Uranium Rush" and a large number of mining claims were located by various persons, including 65 claims by the Defendant, H. Spencer Gibbs (R. 313). Plaintiffs contend that on April 25, 1949, the Defendants H. Spencer Gibbs, Dana Gibbs and Delone Jensen located two mining claims referred to as Yellow Canarie #1 and Yellow Canarie #2, and that said claims were originally established two miles northeast of Marysvale, Utah, along the old Piute County Highway leading from Marysvale to Monroe, Utah. Plaintiffs further contend that some time thereafter said mining claims and the monuments and markers in connection therewith were moved from their original physical locations along said old County Highway to an entirely new area located one and one-half to two miles north of the point of original location. No new Notices of Location were posted, nor were new Notices recorded, as required by law, at that time, reliance being had upon the original Notices of Location and the recordings thereof. Hence, Plaintiffs take the position that Defendants' claims as moved and re-established in the new area were and are null and void, and that therefore this land was vacant and unoccupied and subject to location and appropriation as and for mining claims by the Plaintiffs, who located their

claims in said new area prior to the actual date of recordation of amended Notices on the original Yellow Canarie Claims, or the location of new and additional claims in said new area.

Plaintiffs' case is grounded upon the long established principal of law that once a locator of mining claims establishes his claims at a given location, erects discovery monuments and corner stakes, and posts and records Notices of Location, describing the physical location of said claims by reference to some natural object or permanent monument as will identify the claims, he is thereafter bound by his own actions and declarations and he may not at a later date move the physical location of said claims to a new area and claim this as his own by relying upon his original locations and recordings and the priority they otherwise would give him. Instead, if he desires to locate a new area, he must do so in full compliance with the Statutes the same as if the original locations in the abandoned area had never been made and must start anew and take each required step without seeking to gain any benefit or priority out of the original locations.

In this Brief and for purposes of clarity, the area where Plaintiffs contend that Defendant H. Spencer Gibbs originally located his Yellow Canarie Claims, which is located approximately two miles northeast of Marysvale, Utah, along the east side of the Old Piute County Highway, and which is shown on Plaintiffs' Exhibit 6 midway between the N. and S. boundaries of Section 16,

Township 27 South, Range 3 West, Salt Lake Meridian, and near the west boundary of said Section 16, will be hereinafter referred to as "Area #1". Also, the area where Plaintiffs contend that the Defendants subsequently moved the Yellow Canarie Claims without any compliance with governing law as to posting and recording of new Notices of Location and where the Defendants chose to locate numerous other conflicting and overlapping claims for the purpose of confusing the entire situation and camouflaging their moving and transplanting of the Yellow Canarie Claims, which area is situated near the center of Section 4, Township 27 South, Range 3 West, Salt Lake Meridian (Plaintiffs' Exhibit 5) and is outlined in a red square on Plaintiffs' Exhibit 6, will hereinafter be referred to as "Area #2".

The testimony and evidence concerning these and other matters is voluminous and will be reviewed in detail in connection with the arguments hereinafter made.

STATEMENT OF POINTS

POINT 1.

THAT THE EVIDENCE AND TESTIMONY OFFERED AND RECEIVED BY THE TRIAL COURT WAS AND IS ENTIRELY INSUFFICIENT TO JUSTIFY THE DECISION MADE AND THE DECREE RENDERED.

POINT 2.

THAT THE DECREE ENTERED HEREIN IS AGAINST THE LAW.

POINT 3.

THAT THE TRIAL COURT COMMITTED ERROR IN LAW.

POINT 4.

THAT ON THE BASIS OF THE EVIDENCE AND RECORD IN THIS CAUSE, NEW FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT IN FAVOR OF PLAINTIFFS SHOULD BE ENTERED.

POINT 5.

THAT THE TRIAL COURT COMMITTED ERROR IN DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL.

ARGUMENT

POINT 1.

THAT THE EVIDENCE AND TESTIMONY OFFERED AND RECEIVED BY THE TRIAL COURT WAS AND IS ENTIRELY INSUFFICIENT TO JUSTIFY THE DECISION MADE AND THE DECREE RENDERED.

This is an action in equity. The scope of review on appeal in equity cases is clearly settled in this jurisdiction.

“This Court is authorized by the State Constitution to review the findings of the trial court in equity cases, but the findings of the trial courts on conflicting evidence will not be set aside unless it manifestly appears that the court has misapplied proven facts or made findings clearly against the weight of the evidence.”

Olivero vs. Eleganti, 61 Utah 475, 214 P. 313.

To the same effect is *Stanley vs. Stanley*, 97 Utah 520, 94 P. 2d 465, in which the Court collates the authorities on this point. We concede, therefore, that Plaintiffs, in order to succeed on this appeal, have the burden of convincing this Court that the lower Court misapplied proven facts and made Findings clearly against the weight of the evidence. For convenience and clarity, the pivotal issues of fact upon which a correct determination depends will be grouped and argued as follows:

A. Original location of Defendants' Yellow Canarie Claim in Area #1 along the old Piute County Highway, approximately two miles northeast of Marysvale, Utah.

B. Subsequent moving of Defendants' Yellow Canarie Claims by the Defendants to Area #2 located approximately two miles north of their original point of establishment and without new recordation of Notices of Location or compliance with other statutory requirements.

C. Manner, method and place of location and establishment of Plaintiffs' claims in Area #2.

D. Subsequent acts of Defendants in moving, amending, modifying, confusing, and overlapping claims in Area #2, including making of conflicting new locations.

A. ORIGINAL LOCATION OF DEFENDANTS' YELLOW CANARIE CLAIMS IN THE AREA #1 ALONG THE OLD PIUTE COUNTY HIGHWAY, APPROXIMATELY TWO MILES NORTHEAST OF MARYSVALE, UTAH.

Plaintiffs' Exhibit 6 consists of two United States

Geographical Survey Quadrangle Sheets stapled together showing all of the outstanding physical characteristics of the land surrounding Marysvale, Utah, and involved in this litigation. These sheets bear a date of 1945 and show existing conditions as of that time. They show, among other things, that a "graded road" extends in a northerly direction from Marysvale, Utah, into Sections 21, 16 and 9 of Township 27 South, Range 3 West of the Salt Lake Base and Meridian (R. 118). A. R. Shelton, licensed United States Mineral Surveyor, fixed the location of the area now covered by Plaintiffs' and Defendants' disputed mining claims (Area #2) as being in Section 4, Township 27 South, Range 3 West of the Salt Lake Base and Meridian, and he enclosed said area in a red penciled square on Exhibit 6 (R. 118). *This is the same area as shown by Plaintiffs' Exhibit 5*, which is a large map of Area #2, prepared by Mr. Shelton, and which will be referred to in detail hereinafter.

Shelton testified that Exhibit 6 shows that the road above referred to does not enter or approach the area now in dispute (Area #2) but that it by-passes it to the south by a distance of one mile (R. 119). According to Exhibit 6 and according to the testimony of Pratt Seegmiller, the original discoverer of uranium in the Marysvale area who also owns mining claims in Area #2 (R. 204), there was neither road nor trail of any nature going into, crossing or approaching the area included in the red square on Exhibit 6 (R. 120), which is the area involved in the present litigation, prior to the discovery

of uranium in Area #2 in 1948. This was true when Defendants' claims were located in 1949 (R. 204).

Plaintiffs' Exhibit 12 is the original Notice of Location for Defendants' Yellow Canarie #1 Mining Claim. The instrument bears the signature of H. Spencer Gibbs and is dated April 25, 1949. It refers to the location of said Claim as being "one mile east of Sevier River on Old County Highway two miles North East of Marysvale, Utah".

Defendants' Exhibit "B" is a copy of the original Location Notice of Defendants' Yellow Canarie #2 Claim. It is dated April 25, 1949. The location of this Claim is therein stated as follows: "Joins Yellow Canarie #1 on the north end line and is located two miles northeast of Marysvale, Utah along Old County Highway". Defendants' Exhibit "C" is a copy of the original Location Notice of Defendants' Yellow Canarie Claim #3 dated June 7, 1949. The location of this Claim is therein stated as follows: "Joins Yellow Canarie west side line #2". The physical location of the three claims described in these Notices of Location was the subject of much of Plaintiffs' evidence.

Fred C. Clemore, one of the Plaintiffs, an experienced miner, who resided at Marysvale, Utah, testified that prior to December, 1949, he had heard certain "rumors and gossip" concerning the original location of the Yellow Canarie Mining Claims and the subsequent moving of these claims to new locations (R. 132). During April or May, 1950, Pratt Seegmiller, the original dis-

coverer of uranium-bearing ores in the Marysvale area, pointed out to Clemore the exact original location of the Yellow Canarie Claims, including the large pinnacle or cone-shaped formation of yellow colored rock which served as the discovery monuument (R. 135). The ground shown to Clemore was Area #1 located approximately one and one-half miles south of the area enclosed in the red square (Exhibit 6) and immediately adjoined the right or east side of the Old County Highway as it extends north from Marysvale, Utah (R. 136). Clemore fixed the location of this area with an "X" or cross in ink upon Exhibit 6 near the letters "BM" in the north-west quarter of Section 16, Township 27 South, Range 3 West, Salt Lake Base and Meridian (R. 164), and he testified that the coloration of the rock here is distinctly yellow (R. 165). He testified that he was present at this spot when the original Notice of Location of Defendant H. Spencer Gibbs on Yellow Canarie #1 was found at the base of a cone-shaped discovery monument (R. 166).

Leonard Anderson, a resident of Elsinore, Utah, for 55 years, who is part owner of certain mining claims in or near the disputed area, testified (R. 197 to R. 201) that he had regularly traveled over the road leading from Marysvale, Utah, across the Sevier River and thence north to Monroe, Utah, for a number of years. During all of this time the road had been commonly known to the witness as "the Old Monroe Road" (R. 198), and it had never entered, approached or crossed the area now in dispute between Plaintiffs and Defendants (Area #2).

Pratt Seegmiller, a resident of Marysvale for 15 years and the owner of mining claims north of the area in dispute in this action, testified (R. 204) that he was very familiar with the road referred to above. For many years, the name commonly applied to this road has been "the Old County Highway". This witness testified that at no time in his knowledge did this road enter the area (Area #2) where Plaintiffs' and Defendants' Claims are now located and where Mr. Seegmiller's Claims are likewise situated, but is removed therefrom a distance of about two miles. A road now enters that area but it has been constructed recently and since the uranium development, it was not there when the claims in dispute were located, and it is not now and never has been a part of the Old County Highway (R. 204).

In June of 1949, Seegmiller had a conversation with the Defendant, H. Spencer Gibbs (R. 208 to R. 210) concerning the fact that Mr. Seegmiller had discovered on his Freedom Claims which are located immediately north of the area covered by Plaintiffs' Exhibit 5 (R. 203), Location Notices, location monuments and markers referring to the establishment of the Yellow Canarie Claims in that area. Seegmiller recalled distinctly that the Notice referred to Yellow Canarie Claim #2 and stated ". . . two miles northeast of Marysvale, Utah, along the old county highway" (R. 209). In said conversation Seegmiller said (R. 210) :

"Well, I said, 'the Old County Highway would never have run up here, you must have made a

mistake putting such a notice out there', and he said 'Well, it must have been up through here', and when I objected he said, well, he used to run a saddle horse up here a few years ago."

However, we note that Gibbs' counsel took a different view of the location of said highway at the trial, for at R. 204 appears the following:

"BY MR. MELVILLE: Your Honor, I object. We don't claim that the old county road goes through there. There is no question about that fact, and we will stipulate to it."

Subsequently, Mr. Seegmiller made an investigation to determine the exact original location of the Yellow Canarie Claims. Early in July of 1949 he discovered at a point located 300 feet from the Old County Highway, approximately two miles north of the Marysvale Railroad Depot, a natural monument of yellow-colored rock in a pinnacle-like formation and under a pile of rocks on said monument a can containing the Notice of Location for Yellow Canarie #1, bearing the signature of H. Spencer Gibbs as the locator (R. 215 and 216). Seegmiller identified Plaintiffs' Exhibit 12 as being the identical Notice of Location he thus discovered in place at this point (R. 216). He fixed this place or point on the U. S. Geological Survey Map, Exhibit 6, with a rectangular mark near the center of Section 16 in the general Area #1. This point is less than one-half the total distance from Marysvale to the area now in dispute between Plaintiffs and Defendants. The natural coloration of the rock outcrop-

pings in this area is distinctly yellow (R. 218). This agrees with Clemore's description of Area #1 (R. 164 and R. 165), the testimony of Roland Lund (R. 257), John T. Vernieu (R. 261) and Ethel Seegmiller (R. 245).

By contrast, Clemore testified that the predominate color of the natural rock outcroppings in Area #2 before removal of overburden is grayish red (R. 165). Pratt Seegmiller was of the same opinion (R. 219), as was his wife, Ethel Seegmiller (R. 245).

Plaintiffs' Exhibit 15 is a photograph of the original location of Yellow Canarie #1 at the point marked by Seegmiller on Plaintiffs' Exhibit 6, showing the location monument in the foreground and the County Highway in the background with Mr. Seegmiller's truck parked thereon (R. 220). This photograph was taken about July 10, 1949, by Seegmiller or his wife.

Ethel Seegmiller, the wife of Pratt Seegmiller, corroborated her husband's testimony regarding the finding of the location monument and Notice of Location of Yellow Canarie #1 in Area #1 along the Old County Highway (R. 242-243). She identified Plaintiffs' Exhibit 12 as the identical Notice of Location found on the scene (R. 244). She also corroborated the testimony of other of Plaintiffs' witnesses about the location and identity of the "Old County Road" and about the yellow coloration in the Area #1, and testified as to the absence of yellow coloration in Area #2 before the overburden is removed (R. 245).

Roland Lund, a resident of Marysvale for 19 years,

testified that he was very familiar with the road running north and east of Marysvale, Utah, commonly known as the "Old County Highway", and that he had traveled it on many occasions (R. 254). In the summer of 1950, Mr. Lund, while hunting, discovered a monument approximately four feet high situated fifty feet east of said road and approximately two miles northeasterly of Marysvale upon which were written words and figures referring to the monument as being one of the corner stakes of a Yellow Canarie Claim (R. 255). Lund described the coloration of the rock outcroppings in this area as being predominately yellow. Mr. Lund was employed as a miner on the Freedom Claims at the time of the trial, and he estimated that the Freedom #2 Claim, which is shown by other evidence to be in Area #2, was approximately two miles northerly of the point of his discovery of the Yellow Canarie monument along the "Old County Highway".

John T. Vernieu, one of Plaintiffs' counsel, testified (R. 259 to 261) that on August 9, 1951 (five days before the trial) while inspecting the original location of Yellow Canarie #1 along the Old County Highway at a point approximately one and one-half to two miles northeast of Marysvale, in the company of Fred C. Clemore, he came upon the original Notice of Location of Yellow Canarie #1, Exhibit 12. It was found in a tobacco can under a pile of rocks at the top of a rock pinnacle about 300 feet east of the road (R. 260). It was stipulated between counsel that the signature on Exhibit 12 was that of Defendant H. Spencer Gibbs (R. 261).

We submit that the foregoing testimony and evidence clearly establish that Yellow Canarie Claims #1, #2 and #3 were originally located by the Defendant H. Spencer Gibbs on April 25, 1949, April 25, 1949, and June 7, 1949, respectively, at a point approximately two miles north and east of Marysville, Utah, along the Old Piute County Highway (Area #1). The original location monument and Notice of Location for Yellow Canarie #1 were observed in this area by four witnesses at times extending from early July, 1949, to August 9, 1951, and one of the corner monuments of one of these claims was seen by a fifth witness in Area #1 in the summer of 1950. Plaintiff Clemore went so far as to say that it was "rumor and gossip" that the Yellow Canarie Claims were originally located in Area #1 and they thereafter had "flown" (R. 132) to Area #2. Furthermore, the Location Notices for Yellow Canarie #1 and #2 which were admittedly prepared by Defendant Gibbs, who after all should best know the true location of his claims, recite upon their faces, both by reference to fixed and well-defined points (on or along Old County Highway and two miles northeast of Marysville), that they are located precisely where Plaintiffs' witnesses testified that they found evidence of the same, and Yellow Canarie #3 is tied to that same Area #1 by the recital in the Location Notice thereof that it joins Yellow Canarie #2. We think it significant that Defendants' record is barren of any direct denial of the original location of these claims along the Old County Highway. Moreover, as early as April 29, 1949, Defendant H. Spencer Gibbs *knew* that the area

where he now contends that his Yellow Canarie Claims are located (Area #2) *was not* two miles northeast of Marysvale, Utah, as he stated in his original Notices of Location on Yellow Canarie Claims #1 and #2, but rather that it was in fact four miles north of Marysvale, Utah, as Plaintiffs' Exhibits 5 and 6 clearly show it to be, for on *April 29, 1949, four days after the location of Yellow Canarie Claims #1 and #2*, Gibbs located his alleged Lucky Strike #2 in Area #2 and he fixed its location as being "south of Pratt Seegmiller's Freedom Claim #3 and about four miles north of Marysvale" (Defendants' Exhibit K, and R. 372 and 373). Defendants' own map of Area #2 (Exhibit "AA") and Defendants' Exhibit Z, when construed together, show that Freedom Claim #3 and the alleged Lucky Strike #2 Claim are not more than 1500 feet north of where Defendant H. Spencer Gibbs contends that his Yellow Canarie Claims were properly located. Yet his own declarations as contained in the Notices of Location above referred to, if they are to be believed, would of necessity place Lucky Strike #2 and Yellow Canarie #1, #2 and #3 at least two miles apart. We are confident that this Court will look beyond the flimsy film of confusion and the subterfuge thrown up by Gibbs to gloss over his obvious removal of the Yellow Canarie Claims from their original locations in Area #1 to new and greener pastures in Area #2. Surely, Defendants should be bound by their own declarations contained in their Notices of Location and ought not now to be permitted to deny by indirection their own locations.

In order to arrive at a decision in favor of Defendants and against Plaintiffs, the lower Court must necessarily have concluded that the Yellow Canarie Claims #1, #2 and #3 were not located and established originally in Area #1. To reach such conclusion the Court must have ignored or misapplied the proven facts relative to their original physical location in Area #1, brought out by the Plaintiff Clemore and several disinterested witnesses, non-parties to this action. Any determination to such effect is clearly contrary to the evidence and against the weight thereof.

B. SUBSEQUENT MOVING OF DEFENDANTS' YELLOW CANARIE CLAIMS BY DEFENDANTS TO AREA #2 LOCATED APPROXIMATELY TWO MILES NORTH OF THEIR ORIGINAL POINT OF ESTABLISHMENT AND WITHOUT NEW RECORDATION OF NOTICES OF LOCATION OR COMPLIANCE WITH OTHER STATUTORY REQUIREMENTS.

In considering the facts and discussions under the instant Argument "B" devoted to the moving by Defendants of their claims from Area #1 to Area #2, we respectfully urge the Court to keep in mind the original physical locations of said claims in Area #1 as shown by the discussion under Argument "A" above. The proof clearly shows that Yellow Canaries, #1, #2 and #3 were originally established in Area #1. Subsequently, they were found to be in Area #2, the Defendants at all times relying on their original location dates to give priority in time. All the items pointed out in Argument "B", when considered in the light of the facts developed by Argu-

ment "A", including dates, descriptions, geographical and physical characteristics of the two areas, spelling of the word "Canarie", amendments to locations, etc., lead to the conclusion that Defendants' claims "flew" from Area #1 to Area #2, thus living up to their ornithological appellations.

Plaintiffs' Exhibit 5 is a large map prepared in August and November, 1950, by A. R. Shelton, licensed United States Mineral Surveyor (R. 89 and 92). This map covers substantially the same area as the property herein referred to as Area #2 which is included in the red square in Plaintiffs' Exhibit 6, in Section 4, Township 27 South, Range 3 West, Salt Lake Base and Meridian, but is in great detail. The map shows the exact location of all monuments and corner stakes as determined by Mr. Shelton to be actually existing upon the ground. Defendants' Yellow Canarie Claims #1, #2 and #3 are designated in yellow thereon.

The discovery monument containing a notice of location dated April 25, 1949, and the northwest corner stake of Yellow Canarie #1 are shown in the upper righthand corner of the map (Northeast part of Area #2). The north and east sides thereof are shown in broken lines because the northeast corner stake was not found by Shelton (R. 90). The only markers Mr. Shelton found defining the south end line of a Yellow Canarie Claim in the area covered by the upper part of Exhibit 5 referred to the southwest corner, south end center and southeast corner of Yellow Canarie #2.

In the lower center of Exhibit 5, being the south central part of the area covered thereby, are found various references to stakes and markers shown thereby to be Yellow Canarie #2 and #3. *Yellow Canarie #3 is on the left or west and Yellow Canarie #2 is on the right or east* (R. 98 and R. 99). Within the boundaries of Yellow Canarie #3 was found a location monument containing a Notice of Location signed by H. Spencer Gibbs and others dated June 7, 1949. Within the boundaries of Yellow Canarie #2 was found a location monument and Notice of Location bearing date of April 25, 1949. The monuments and markers for Yellow Canarie #2 and #3 were "surveyed in" by Shelton between November 28 and November 30, 1950 (R. 89 and 98). Additional location monuments and corner stakes referring to other claims purportedly located by Defendants in the same area were also shown on Exhibit 5, but these will be dealt with at a later point herein.

The major part of the Defendant H. Spencer Gibbs' testimony was directed to a detailed recital of the purported manner of establishing and locating the Yellow Canarie Claims in Area #2. According to Gibbs, Yellow Canarie #1 was established by him and his son, Dana Gibbs, south of the Prospector Claims in the south central part of Area #2 on the morning of April 25, 1949 (R. 266). Thereafter, and on the same day, Gibbs contends he went some 3,000 feet north of Yellow Canarie #1 where he established Yellow Canarie #2 (R. 269). *Thus, as originally located, Gibbs states that Yellow Canarie #2 was north of Yellow Canarie #1.*

Notices of Location on these claims were recorded April 26, 1949. Early in May, 1949, Gibbs says that he and Richard Kennedy staked the claims and erected corner monuments (R. 271). Gibbs acknowledged that these Claims as originally located in Area #2 had end lines well within the Prospector Claims (R. 271). *Gibbs says that he and Delone Jensen then established Yellow Canarie #3 on June 7, 1949, south of the Prospector Claims and west of Yellow Canarie #1 (R. 276), although the description in the Notice of Location of Yellow Canarie #3 says that it is west of Yellow Canarie #2 (Exhibit 3).*

Robert Dunsmore, also known as R. H. T. Dunsmore, and Urban Johnson, two of the defendants in this action against whom the Complaint was dismissed, testified that they assisted Mr. Gibbs in the staking of Yellow Canarie #1 and the north end line of Yellow Canarie #2. This occurred on June 13, 1949, and the work was performed under the direction of H. Spencer Gibbs (R. 232 and 233, and R. 247). They testified that Yellow Canarie #1 was staked out as the north claim, and that Yellow Canarie #2 was staked as the south claim, so that the north end line of Yellow Canarie #2 was the same as the south end line of Yellow Canarie #1. Yellow Canarie #1 began at the northwest corner of Prospector Claim #2 and extended south over this claim from that point (R. 233 and R. 247). This testimony conflicts directly with that of the Defendant H. Spencer Gibbs as to the locations of Yellow Canarie #1 and #2.

Thereafter, the original Notices of Location of the three Yellow Canarie Claims were amended. The original location of Yellow Canarie #1 was amended by Defendants' Exhibit "D". It is dated April 25, 1949, but recorded June 28, 1950. This amended Notice recites that its purpose is to "*more fully describe this claim location to correct previous mistakes and discrepancies.*" Exhibit "E", the amendment of Yellow Canarie #2, is also dated April 25, 1949, but recorded June 27, 1950, and it recites that it was made "*... for the purpose of more fully describing the position to adjoining claims also to correct corner posts numbers the changing of location notice by persons unknown to me.*" Exhibit "F", the amendment of Yellow Canarie #3, is dated December 5, 1950, but recorded on December 7, 1950. It was made "*... for the purpose of correcting any errors in the original location and more accurately and definitely describing and defining the location ...*"

Under cross-examination H. Spencer Gibbs acknowledged that the amendments to the Yellow Canarie Claims had the effect of changing their size and shape despite recitals contained in Exhibits "D", "E", and "F" to the contrary (R. 325). Also, Gibbs acknowledged (R. 327) that the amendments on Yellow Canarie #1 and #2 were not made on the date recited thereon, but were actually made on the dates recorded, that is, on June 28, 1950, and June 27, 1950. We quote from R. 327 as follows:

"Q. Yellow Canarie #3 had been located between the time of making your original location of

Yellow Canarie #1 and the time you made your amendment of #1; is that right?

A. The amendment was after we had located the Canarie #3.

Q. But you still went back and relied on the original location priority as of April 25, 1949?

A. Yes, sir.

Q. Now, on your amended Notice of Location #1, you say in the line just above the words, names of locators, 'Located this 25th day of April, 1949'. You didn't make the amendment on that date, did you?

A. Well, that . . .

Q. Answer the question. Did you make the amendment on that date?

A. No.

Q. Whenever did you make the amendment?

A. Whenever it says on the paper.

Q. June 28, 1950; isn't that right?

A. That is the date."

We submit that the testimony of Shelton and Gibbs clearly establishes that the Yellow Canarie Claims "flew" to new locations approximately one and one-half miles north of their original locations along the Old Piute County Highway. There can be no doubt that there is substantial evidence of the reestablishment of the Yellow Canarie Claims in Area #2 (Plaintiffs' Exhibits 5 and 6). However, we most earnestly contend that the weight of the evidence clearly establishes that the Yellow Canarie Claims previously had been located some distance south,

their original physical locations having been in Area #1. If this basic premise of Plaintiffs' case is established, then the conclusion appears to us to be obvious, to-wit: that these claims were moved to new and different locations at some date between their original date of location along "the old county highway" in 1949, and the filings of amended Notices of Location in 1950, the Amended Notices having been made subsequent to Plaintiffs' Locations.

Gibbs at all times relied upon his original Notices of Location on the Yellow Canarie Claims to establish priority of time, even though these Notices recited upon their faces that the claims were situated one and one-half to two miles south of the place where they are now shown to be, Exhibit 5. The amendments to the original locations were made on June 28, and December 5, 1950, more than a year after the original locations. These amendments, Defendants' Exhibits "D", "E", and "F", do not purport to be *new locations*, but they recite that *they* are made "... to more fully describe this claim location to correct previous mistakes and discrepancies", Exhibit "D"; also, "... for the purpose of more fully describing the position to adjoining claims also to correct corner post numbers ...", Exhibit "E"; and also "... for the purpose of correcting any errors in the original location of more accurately and definitely describing and defining the location ...", Exhibit "F". However, Gibbs may have denominated the purpose of these amendments, we submit that the evidence clearly establishes that the real

purpose thereof was a belated attempt to cover up his moving the claims to a totally new and different area and to place on record descriptions which would conform to his transfer.

The amended Notice of Location on Yellow Canarie #1, Exhibit "D", fixes the location of the Claim in 1950 as being south of the Buddy some 875 feet. The Buddy Claim is north of the area shown on Plaintiffs' Exhibit 5. This is at least one and one-half miles north of any point to which the Yellow Canarie #1 Claim was tied by its original Notice of Location, Exhibit 12. If the amendment was made merely to correct the original location, Gibbs would have found it unnecessary to change the physical location by such amendment to an entirely new and different area one and one-half miles north of the original location. The same is true of the amendment of Yellow Canarie #2, Exhibit E. This amendment recites that as of June 27, 1950, the claim is situated north of the Prospector Claims. The Prospectors are located in the north part of the area shown by Plaintiffs' Exhibit 5. This is about four miles north and east of Marysvale, Utah. The original Notice of Location for Yellow Canarie #2, Exhibit "B", recites that the Claim is only two miles northeast of Marysvale, Utah. If Gibbs made the amendment merely to correct the original Notice of Location for this claim, why was it necessary for him to amend the location and tie it to an entirely new and different area?

Further, the original Notice of Location on Yellow Canarie #3, Exhibit "C", recited that the Claim joined

the west side line of Yellow Canarie #2. By reference to the description contained in the original Location Notice of Yellow Canarie #2, this would mean that Yellow Canarie #3 was located in Area #1. Plaintiffs' Exhibit 6 shows that Area #1, which is about two miles northeast of Marysvale, Utah, would be in the northwest quarter of Section 16, Township 27 South, Range 3 West, Salt Lake Meridian. However, in his amendment to Yellow Canarie Claim #3, Gibbs saw fit to change the location of the claim to a point near the center of Section 4, Township 27 South, Range 3 West of the Salt Lake Base and Meridian, for he used these words, Exhibit "F", "... The discovery monument of this claim is situate 2565 feet South and 1626 feet East of the Northwest corner of Section 4, Township 27 South, Range 3 West of the Salt Lake Base and Meridian, ...". This is one and one-half to two miles north of the place to which original Notice of Location for Yellow Canarie Claim #3 was tied. Again we must ask, if Gibbs was relying upon the original physical location of the Yellow Canarie #3 claim when he amended his location thereof, why did he see fit to fix the location of the Claim by amendment at a point one an one-half to two miles north of the place where his original Notice of Location established the claim?

We think that this Court will find the answer to these questions to be obvious. There can be but one answer—the three Yellow Canarie Claims were moved by Gibbs to new and entirely different locations some time after their original establishment, and Gibbs saw fit to lend

some measure of respectability to his original locations by belated changes in the descriptions through amendments. He wanted to rely upon his original Location Notices in order to establish his priority of location. After movement of the Claims to "new and greener pastures," it was necessary to adjust somehow the descriptions to conform to the physical facts. It is acknowledged that no one actually saw Gibbs or any other of the Defendants move the Yellow Canarie Claims from their original locations along the Old Piute County Highway, about two miles northeast of Marysvale, Utah, to their new location in the area covered by Plaintiffs' Exhibits 5 and 6. The evidence is very largely circumstantial. Even so, we contend that the evidence is so strong in Plaintiffs' favor and so clearly establishes the movement of the Yellow Canarie Claims to an entirely new and different area without benefit of new and independent locations and recordings that the trial Court's apparent Findings to the contrary were clearly against the weight of the evidence sufficient to merit a reversal of its decision by this Court.

C. MANNER AND METHOD OF LOCATION OF PLAINTIFFS' CLAIMS.

The three Juanita Mining Claims and the Debra Fraction #10 Mining Claim were located within the area outlined in red in Section 4, Township 27 South, Range 3 West, Salt Lake Meridian, Plaintiffs' Exhibit 6, Area #2. These Claims are outlined in blue on Plaintiffs' Exhibit 5. Juanita Claims #1, #2 and #3 were located on

May 30, 1950, by Kent F. Clemore, Fred C. Clemore and Roland E. Cranford, and the Notices of Location thereof were recorded on May 31, 1950, Plaintiffs' Exhibits #1, 2 and 3. Debra Fraction #10 Claim was located by said persons on July 20, 1950, and the Notice of Location was recorded on July 31, 1950, Plaintiffs' Exhibit 4. Subsequent to the location of said claims, Kent F. Clemore and wife quitclaimed all of their right, title and interest in the Claims to the Plaintiff Fred C. Clemore, Plaintiffs' Exhibit 7.

Fred C. Clemore testified that during the spring of 1950 he became interested in the mining property within Area #2. Information came to him regarding the establishment of the Yellow Canarie Claims within this area (R. 134). He examined the recorded Notices of Location for the Yellow Canarie Claims in the office of the Piute County Recorder (R. 139). At this time no Amended Notices of Location on the Yellow Canarie Claims had been recorded. The original Notices of Location then of record identified the location of these claims as being situated two miles northeast of Marysvale, Utah, and along the Old County Highway (R. 140). From the reading of said Notices, which by virtue of the recitals therein referred to the Claims as being in Area #1, and by reason of the fact that Clemore had observed certain Yellow Canarie monuments and stakes within the area herein referred to as Area #2, he concluded that the Yellow Canarie Claims had been moved from their original locations in Section 16 and had "flown" to one and one-

half to two miles north into the Area #2 in Section 4 without benefit of new recordings or other compliance with statutory requirements. He therefore concluded that the ground covered by the Yellow Canarie Claims in Section 4, Exhibits 5 and 6, was vacant land and was open to location for mining claims (R. 183). On May 30, 1950, Clemore and Roland Cranford went into Area #2 covered by Exhibit 5 for the purpose of locating mining claims. Clemore described the natural coloration of the terrain in this area as being grayish red, as distinguished from the predominate yellow coloring of the terrain in Section 16, where the Yellow Canarie Claims were originally located (R. 165).

After Plaintiffs located the boundaries of adjoining claims and ascertained that they were not interfering therewith (R. 141 and 149), they dug into the ground in search of an ore discovery. Uranium bearing ores were identified in place by Clemore through the use of a Geiger Counter on all three of the properties located as Juanita Claims (R. 141). Assays were also made by Clemore and in Salt Lake City, Utah (R. 142). Thereafter, location monuments consisting of rock piles with 2x4's placed in the middle thereof were erected on the sites, and Notices of Location were prepared and placed in tobacco cans under the monuments on each of the claims (R. 142). Juanita Claim #1 was located as the middle or central claim, and Juanita #3 and #2 were located west and east thereof, respectively (R. 142-143). Copies of the original Notices were filed for record the

next day, May 31, 1950. The discovery monuments for Juanita Claims #1 and #2 were identified and "surveyed in" by A. R. Shelton at the time he prepared Exhibit 5 (R. 103) in substantially the same position as originally established. The discovery monument of Juanita #3 was not identified or "surveyed in" by Shelton, but Clemore fixed the location thereof with a circled cross approximately one-half inch south on Exhibit 5 of the south boundary of the Prospector #4 Claim at a point approximately 20 feet east of an access road which now crosses the claim (R. 147). The corner and end center stakes on Juanita #1 and #2 were erected on May 31, 1950. While erecting the same, Clemore observed, within the area located by him, monuments, stakes and markers referring to the Yellow Canarie Claims. *At this time Yellow Canarie #2 was situated in the same area as the location of Juanita #2, and Juanitas #1 and #3 were located in the same general area as Yellow Canarie #3* (R. 150). Clemore did not observe sufficient markers or monuments in this immediate area to enable him to identify the existence of any Yellow Canarie #1 Claim. Clemore testified that at the time of location of his Juanita Claims he did not find any evidence of conflict between his Juanita Claims and any other claims of the Defendants, although he made a careful search of the area (R. 154), nor were any markers or stakes found referring to the location of Anita Gae, Lucky Strike #2, Grover Gibbs Fraction, Fraction, or Yellow Canarie Fractions #1, #2 and #4 within the boundaries of the Juanita Claims (R. 155). However, at a later date, mark-

ers and monuments referring to the location of this area by Defendants under Claim names last set forth above began to appear in this area.

Debra Fraction #10 Claim was located by Clemore and Cranford on July 20, 1950, and a copy of the original Notice of Location was recorded on July 31, 1950. This claim is shown in the northeast part of the area covered by Exhibit 5, and is outlined in blue (R. 156). Some evidence of the Yellow Canarie Claim #2 was observed near the south boundary of this Claim at the time of location (R. 159). The same procedure with reference to determination of boundaries of adjoining claims, discovery of uranium-bearing ores in place, erection of discovery monument, preparation, posting and recording of Notice of Location, and staking of corner and end center monuments as was followed in locating the Juanita Claims, was employed by Clemore on the Debra Fraction #10 (R. 157).

Beginning as early as June 10, 1950, and on at least three different occasions thereafter (R. 610), Clemore found that several of the monuments, Location Notices and corner stakes on the Juanita Claims had been moved by unknown persons to new and different locations, or had been obliterated entirely. The location monuments, Notices of Location, and some corner stakes of Juanita #2 were moved to a point within the boundaries of Prospector Claim #3 (R. 148). These monuments, along with copies of the original Location Notices, were replaced by Clemore in their original positions south of the north

solid blue line of Juanita #1 and #2, being the north end line thereof, as often as he found that they had been disturbed (R. 171). On June 26, 1950, after observing that his monuments and stakes had been obliterated and moved a second time, Clemore obtained certain "claim cups", Exhibit 14, and he buried one containing the name of each claim at the discovery monument of each of his Juanita Claims (R. 171). All of these "claim cups", except for Juanita #3, were in position at the site of the original location monuments as of May, 1951, although the actual monuments and many of the other markers had been obliterated a third time. The discovery and location monument of Juanita #3 was destroyed some time prior to this by excavation work of the Defendants (R. 172). Such of the corner stakes and location monuments of Plaintiffs' Juanita #3 as remained in place in November, 1950, were identified and "surveyed in" by A. R. Shelton on Exhibit 5. Clemore further testified that as of recent date a number of stakes and monuments referring to new mining locations claimed by the Defendants began to make their appearance within the boundaries of the Juanitas and the Debra Fraction #10.

We contend that the weight of the evidence clearly shows that Plaintiffs Clemore and Cranford complied with every affirmative legal requirement for the valid location of Juanita #1, #2 and #3, and Debra Fraction #10 Mining Claims, and that they were fully entitled under said evidence to a Decree of the lower Court quieting their title thereto. It is admittedly true that Plain-

tiffs' three Juanita Claims conflict with and cover substantially the same ground as Defendants' Independence Claim and two of the three Yellow Canarie Claims *as now situated*. Also, Defendants' Debra Fraction #10 Claim conflicts with and covers substantially the same ground as Defendants' Anita Gae, Grover Gibbs Fraction, "Fraction", and the other of Defendants' Yellow Canarie Claims. We confess that we find it impossible, and we sincerely state that this Court will find it impossible, to determine from the evidence and from the testimony of Defendant H. Spencer Gibbs exactly where in Area #2 he *now* contends each of the Yellow Canarie Claims is located. The constant shuffling back and forth in Area #2 of the Yellow Canarie Claims will be dealt with in more detail under a separate heading hereinafter. Suffice it to say at this point that a careful examination of the original Notices of Location of the Yellow Canarie Claims, the testimony and maps of Plaintiffs' and Defendants' own surveyors, and the testimony of Defendant Gibbs and other witnesses clearly show that the Yellow Canarie Claims have shuttled back and forth across Area #2 at least three times since they "floated" into this Area.

Plaintiffs take the position that the Yellow Canarie Claims, as now established on the ground covered by Juanita #1, #2 and #3 and Debra Fraction #10, were void and of absolutely no effect by reason of their having been "transplanted" from their original site two miles northeast of Marysvale, Utah, and "along the Old County

Highway” to this new area without benefit of any compliance with the statutory requirement of posting and recording *new* Notices of Location showing the true and correct location of said Claims. Therefore, the land now occupied by the Yellow Canarie Claims on Exhibit 5 was open and unoccupied ground, subject to location for mining claims by the Plaintiffs on the dates of location of their Claims.

The testimony of Clemore with respect to the manner and method of location of Juanita #1, #2 and #3 and Debra Fraction #10 Claims was clear and uncontroverted and is substantiated by the physical evidence of such of the discovery monuments and corner stakes as remained in place at the time A. R. Shelton surveyed the area, Exhibit 5. Defendants attack these locations, not by any direct evidence going to the failure of Plaintiffs to properly locate their claims pursuant to statutory requirements, or to locate them in the areas Plaintiff Clemore testified to, but rather by a great labyrinth of confusing, contradictory and self-serving testimony that certain of Plaintiffs’ monuments and corner stakes were observed by them in other areas and within the boundaries of other claims.

Plaintiffs do not dispute this. In fact, Clemore testified that on at least three different occasions after his original discovery and staking work had been completed, he found that his monuments and stakes had been moved onto other claims, and Exhibit 5 shows that certain of the Juanita and Debra Fraction #10 monuments and

stakes were in fact within the boundaries of the Prospector and Independence Claims as of November, 1950. However, a close inspection of the record will show that *all* of the evidence concerning the movement of these monuments and stakes fixes the time of movement substantially *after* Plaintiffs' original discoveries. We submit, therefore, that such evidence begs the question, and utterly fails to destroy the validity of Plaintiffs' claims. We deem it to be the clearly established law that once having validly located their claims, Plaintiffs were not required, as a matter of law, to preserve the original monuments and stakes against meddlesome persons or trespassers or the acts of Defendants themselves, so long as they did everything reasonably possible to preserve their original positions.

D. SUBSEQUENT ACTS OF DEFENDANTS IN MOVING, AMENDING, MODIFYING, CONFUSING AND OVERLAPPING CLAIMS IN AREA #2, INCLUDING THE MAKING OF CONFLICTING NEW LOCATIONS.

We cannot here do justice to the fascinating narrative contained in the record of the restless and unremitting "flight" of the Yellow Canarie Claims back and forth across Area #2 subsequent to their entry thereupon. We will call attention to the significant facts and leave it to the Court to read the record and draw its conclusions therefrom concerning the motives behind the shuffle of these claims.

Since Defendant H. Spencer Gibbs stoutly maintained that his Yellow Canarie Claims were originally lo-

cated in Area #2, he must of necessity rely upon his original Notices of Location for these Claims to give him the priority in time required for this area. No matter how said Notices of Location may be interpreted upon other points, we submit that upon this issue they are susceptible of but one interpretation, to-wit: As originally located, whether in Area #1 or #2, Yellow Canarie Claim #1 was the south claim, Exhibit "A." Yellow Canarie #2 was north of Yellow Canarie #1, Exhibit "B" (R. 329). Yellow Canarie #3 was west of Yellow Canarie #2, Exhibit "C". Under cross-examination, Defendant H. Spencer Gibbs fixed the discovery monument of his Yellow Canarie #1 (as he contended he originally located it, but which is now shown as Yellow Canarie #2 on Exhibit 5, being the southeast Yellow Canarie Claim) by placing a red "X" on said Exhibit 5 just south of the southwest corner of Prospector Claim #3 (R. 313-4). By following the directional course of Yellow Canarie #1 as contained in the Notice of Location, Exhibit "A", it is obvious that Yellow Canarie #1 extended 750 feet north from said red "X", directly over and into Prospector #3. In fact, Gibbs acknowledged (R. 320) that his north end line of Yellow Canarie #1, as he contended he originally located it, was on the common sideline of Prospector #2 and #3, Exhibit 5. The south end line of Yellow Canarie #1 he fixed as being midway between the present north and south end lines of Yellow Canarie #2, the southeast Yellow Canarie Claim, as shown on Exhibit 5 (R. 321). Gibbs also admitted that the south end line of Yellow Canarie #1 as he contends he originally located it was

moved south from its original location to connect up with the north end line of Independence Claim (R. 322). He says he also moved the north end line of Yellow Canarie #1 south a distance of about 700 feet. This was done for the obvious reason that Yellow Canarie #1, as he says it was placed originally, lay directly over Prospector #3. It was necessary to move the Claims south to avoid a conflict with the prior Prospector Claims (R. 325). The net result of this maneuver was to leave a wide gap between the north end line of Yellow Canarie #1 (now shown as Yellow Canarie #2 on Exhibit 5) and the south end line of Yellow Canarie #2 (now shown as Yellow Canarie #1 on said Exhibit and on Defendants' Exhibit "AA"). This is directly contrary to the description contained in the Notice of Location of Yellow Canarie #2, Exhibit "B", as it states therein that Yellow Canarie #2 *joins* the north end line of Yellow Canarie #1.

The Amended Notice of Location for Yellow Canarie #1, Exhibit "D", recites on its face that Yellow Canarie #1 as amended "*joins Yellow Canarie Claim #3 east side line.*" Therefore, by Defendants' own recorded declarations, sometime subsequent to the original establishment of Yellow Canarie Claims in Area #2, the Yellow Canarie #3 was moved from its original location west of Yellow Canarie #2, being the northeast Yellow Canarie Claim as Gibbs says he located them and as they are described in the original Notices of Location, Exhibits "A", "B", "C", south to a point where its east side line joined the west side line of Yellow Canarie #1, the southeast Yellow Ca-

narie Claim. The net result of this maneuver was to make Yellow Canarie #3 and #1 parallel in position, completely contrary to their descriptions and to their original placements. According to Gibbs' latest and best estimate, the Claims remained in this position as of the date of trial, that is, Yellow Canarie #3 is west of Yellow Canarie #1; Yellow Canarie #2 is north of both Yellow Canarie #1 and #3, but that there is a wide gap between the north end line of Yellow Canarie #1 and the south end line of Yellow Canarie #2. In this connection, it is interesting to note that Gibbs' testimony concerning the present relative positions of the Yellow Canarie Claims in Area #2 was directly contrary to his testimony concerning said matters at his Deposition prior to the trial (R. 331).

When the original positions of the Yellow Canarie Claims in Area #2 are projected onto Exhibit 5 in relation to the locations thereon of the Prospector Claims, the reasons why Gibbs was so anxious to move Yellow Canarie #1 and #3 to new areas become apparent, no matter how this dubious shuffle might have to be consummated. The fact of the matter is that Gibbs was not well acquainted with Area #2 and existing Claims there when he moved the Yellow Canaries into that area. In order to place their locations in the same relative positions they occupied in Area #1 and as required by his Notices of Location, he was forced to place the north half of Yellow Canarie #1, the south half of Yellow Canarie #2, and all of Yellow Canarie #3 directly over the prior and existing Prospector Claims. As soon as Gibbs discovered this

fact, he shuttled these three claims around in a frantic attempt to avoid conflict with the Prospector group, and yet to preserve his original location date.

Furthermore, wherever Gibbs may choose to place the present location for these Yellow Canarie Claims in Area #2, we note that the stakes and monuments observed on the ground in connection with these claims in 1950 and prior to this action by A. R. Shelton and as "surveyed in" by him on Exhibit 5, show that Yellow Canarie #1 was then the north claim, that Yellow Canarie #2 was south thereof, and that Yellow Canarie #3 was west of Yellow Canarie #2. Hence, we think that it may be said that the Yellow Canarie Claims had changed positions once again. We note with satisfaction, and we feel certain that the Court will recognize the significance of the fact, that Defendants' own engineer and surveyor, George H. Ryan, established the locations of the Yellow Canarie Claims on his map, Exhibit "AA", in substantial conformity to Shelton's survey of the area. A careful examination of these two maps will show that there is no material conflict between them as to the location of the Yellow Canarie Claims in Area #2 from physical evidence thereof upon the ground. The fact remains that both surveys and maps disagree with Gibbs' own testimony.

Thus it becomes apparent that even after the Yellow Canarie Claims came into Area #2, *not a single one of them* remained quiescent. Like true, frustrated warblers, the Yellow Canarie Claims hopped back and forth,

around and about, at the direction of their owner. We assert that, even assuming that the Yellow Canarie Claims had their original origin in Area #2, which we deny, still the fact of their constant unremitting movement across Area #2 renders them void and of no legal effect as valid mining locations. The orderly development of mining locations abhors such flaunting of the letter and spirit of every rule of mining law.

To further camouflage the invalidity of the Yellow Canarie Claims, to further confuse the situation, and in a frantic effort to bolster his obviously invalid locations, Gibbs then proceeded to amend his Yellow Canaries, Exhibits "D", "E", and "F", and introduced into the same Area #2 entirely new, conflicting and overlapping claims as follows: Independence, Exhibit "G"; Independence Fraction, Exhibit "H"; Anita Gae #1, Exhibit "I"; Grover Gibbs Fraction, Exhibit "J"; Fraction, Exhibit "L"; Yellow Canarie Fraction, Exhibit "M"; Yellow Canarie Fractions #1, #2 and #4, Exhibits "O", "P" and "Q". The ultimate confusion is such that in the Findings and Decree, no mention is made of several claims covered by Defendants' Exhibits and testimony. Title to one claim (Grover Gibbs Fraction #2) is quieted although there is no proof in the record of any such claim. Further, no attempt is made in said Decree to show the location of any of Defendants' Claims, which ones are valid and which invalid as covering the same ground and discoveries, and how, where, and with which of Defendants' Claims the Plaintiffs' Claims conflict. We share the

confusion of Defendants' counsel and the lower Court and appreciate and understand their inability to determine the actual locations of Defendants' Claims and the identity of the Claims on which Defendants are actually relying.

POINT 2.

THAT THE DECREE ENTERED HEREIN IS AGAINST THE LAW.

Appellants respectfully take the position that in view of all of the testimony and evidence in this case, the refusal of the trial Court to enter a Decree quieting Plaintiffs' title to the three Juanita Mining Claims and to the Debra Fraction #10 Mining claim was and is contrary to law. We contend that a proper application of proven facts to governing principles of law by this Court will require a reversal of the Decree entered by the lower Court with directions to enter a new Decree quieting Plaintiffs' title. We base this contention upon the following:

(A) DEFENDANT H. SPENCER GIBBS, HAVING ONCE ESTABLISHED HIS YELLOW CANARIE CLAIMS AT A GIVEN LOCATION, IS THEREAFTER BOUND BY HIS ACTS AND DECLARATIONS AND HE MAY NOT SUBSEQUENTLY CLAIM NEW GROUND IN AN ENTIRELY DIFFERENT PHYSICAL AREA (AREA #2) UNDER THE PRIORITY DATE OF HIS ORIGINAL LOCATION IN AREA #1 WITHOUT COMPLIANCE WITH LAW AS TO THE LOCATION OF THE CLAIMS IN THE NEW AREA.

The policy and general purpose declared by the several acts of the Federal Congress relating to the ac-

quisition of rights in the public domain for mining purposes has been to encourage the orderly and economic development of the country's mineral resources. The several states have power to regulate the location of mining claims where such regulations are not in conflict with the Federal Constitution and Laws. In this jurisdiction, beginning with the laws of 1899, our Legislature has enacted regulatory and procedural laws for the orderly location of mining claims. These laws are found in Title 40, Chapter 1, Utah Code Annotated, 1953, being the same provisions as Title 55, Chapter 1, Utah Code Annotated, 1943. We quote the pertinent sections of said laws as follows:

“40-1-2. Discovery Monument—Notice of Location—Contents.

The locator, at the time of making a discovery of such vein or lode must erect a monument at the place of discovery and post thereon his notice of location which shall contain:

1. The name of the claim.
2. The name of the locator or locators.
3. The date of location.
4. If a lode claim, the number of linear feet claimed in length along the course of the vein each way from the point of discovery, with the width claimed on each side of the center of the vein, and the general course of the vein or lode as near as may be, *and such a description of the claim, located by reference to some na-*

tural object or permanent monument as will identify the claim . . .”

“40-1-3. Boundaries to be Marked.

Mining claims and millsites must be distinctly marked on the ground so that the boundaries thereof can be readily traced.

“40-1-4. Copy of Location Notice to be Recorded.

Within thirty days after the date of posting the Location Notice upon the claim, the locator or locators, or his or their assigns, must file for record in the office of the county record of the county in which such claim is located a substantial copy of such Notice of Location . . .”

We regard it as too well settled to require citation of authorities that the Notice of Location referred to in 40-1-2 above is required for the purpose of proper identification of the physical location of a mining claim, and when said Notice is properly recorded it furnishes constructive notice to all the world of the contents contained therein and establishes a priority of location *for the claim described in said Notice*. For the purpose of securing the definite and plain description of a mining claim which the above cited statutes require and to direct attention in a general way to the locality in which the claim can be found, the statutes provide that the record of mining claims shall contain a description of the claim by reference to some natural object or permanent monument (*Hammer vs. Garfield Mining etc. Company*, 130 U.S. 291).

We are prepared to acknowledge, and we recognize

it to be the law, that if the original Notices of Location of the Yellow Canarie #1, #2 and #3 as recorded by Defendant H. Spencer Gibbs on April 26, April 26, and June 8, 1949, respectively, Exhibits "A", "B", and "C", had properly described said claims by reference to natural objects or permanent monuments sufficient to identify the same and to give constructive notice to subsequent locators and if, in addition, said Claims had then been located correctly on the ground in Area #2 and in accordance with the Notices, then Gibbs would have had a clear priority of location as to Yellow Canarie #1; and Yellow Canaries #2 and #3 would not have conflicted with Plaintiffs' Juanita Claims. By the same token, we deem it to be the law that if the descriptions contained in said Notices of Location did not properly describe said Claims with reference to natural objects or permanent monuments as to identify the land actually claimed by Gibbs, then said Notices of Location were legal nullities and any priority claimed thereunder is subsequent and inferior to the rights of an intervening locator who meets the requirements of law regarding mining locations. The same result would follow if the prior claims were not correctly established on the ground.

This Court has on at least two occasions applied this rule to varying factual situations. In the early case of *Copper Globe Mining Company vs. Allman et al*, 23 Utah 410, 64 P. 1019, this Court held:

"A mining location is not perfected until all of the essential statutory requirements are per-

formed. A locator of a mining claim only acquires exclusive right to the possession of the claim when all of the necessary requirements for a location are observed; and, if he neglects to perform any necessary requirements within the time prescribed by statute, his attempted location is of no avail against an intervening location peaceably and regularly made and covering the same ground, although he shall have performed the neglected requirement after the inception of the second location."

In the later case of *Miehlich et al vs. Tintic Standard Mining Company*, 60 Utah 569, 211 P. 686, this Court held:

"Where a notice of location of a mining claim failed to describe the land claimed and no amended notice was posted and recorded describing the boundaries until after other parties had located a conflicting claim, the latter, having met all of the requirements of the statutes relative to the holding of their claim were properly awarded the conflict area."

In *Wiltsee vs. King of Arizona Mining & Milling Company*, 7 Arizona 95, 60 P. 896, the Supreme Court of Arizona held regarding a situation where the locator changed the easterly end of the claims from where it was first located by his Location Notice to a point 800 feet northerly as fixed by the Location Certificate, as follows:

"If a locator of a mining claim, when posting his notice of location, in addition to giving the general course of his vein, places monuments at the center of each end line thereof, thus giving

definite notice to subsequent locators as to the meaning of his notice, he is bound thereby, and cannot thereafter, during the time prescribed by law for perfecting his location, change the course of his location to the prejudice of intervening rights."

Also, the Supreme Court of Colorado has adopted the same rule in the case of *Washington Gold Mining & Milling Company vs. O'Laughlin*, 46 Colorado 503, 105 P. 1092, wherein the identity of the claims as situated upon the ground varied materially from the wording of the Location Notice:

"Where the original location certificate of a mining location was insufficient because so defective as to prevent one from identifying or designating the claim on the ground, an amended certificate could not include other or different territory so as to injure intervening rights."

To the same effect are *Golden Fleece Gold & Silver Mining Company vs. Cable Consolidated Gold & Silver Mining Company*, 12 Nev. 312; *Nelson vs. Smith*, 42 Nev. 302, 176 P. 261; *Ringling vs. Mahurin*, 59 Montana 38, 197 P. 829; *Bair vs. Anderson*, 98 Colo. 532, 58 P. 2d 484.

The Idaho Supreme Court has held in the case of *Brown vs. Levan*, 4 Idaho 794, 46 P. 661, as follows:

"Where the description and reference to a natural object or permanent monument is of such a character that a mining engineer could not find the claim from the Location Notice and where it is such that the claim may be floated anywhere

to suit the ground or to cover ore that may have been since discovered, it is clearly such a Notice as cannot furnish a foundation for a valid location."

The Supreme Court of California has likewise held in the case of *Mutchmor vs. McCarty*, 149 Calif. 603, 87 P. 85, where a Notice of Location of a lode claim failed to contain a description of the claim by a reference to a natural object or permanent monument by which it could be identified as required by the Revised Statutes of the United States, Section 2324, it was ineffective for any purpose.

See also *Walton vs. Wild Goose Mining Company*, 123 F. 209; *McCann vs. McMillan*, 129 Calif. 350, 62 P. 31.

The sufficiency of the location of a mining claim with reference to natural objects or permanent monuments, ordinarily is a question of fact (*Bonanza Consolidated Mining Company vs. Golden Head Mining Company*, 29 Utah 159, 80 P. 736; *Wells vs. Davis*, 22 Utah 322, 62 P. 3; *Farmington Gold Mining Company vs. Rhymney Gold and Copper Company*, 20 Utah 363, 58 P. 832). We submit that the weight of Plaintiffs' evidence concerning the actual location and identity of the natural objects and fixed monuments referred to in the Notices of Location of Yellow Canarie Claims #1 and #2 (Exhibits "A" and "B") to-wit: "Along Old County Highway two miles northeast of Marysvale, Utah," when considered in the light of Defendants' evidence, was sufficient to

require the trial Court to conclude that Defendant Gibbs located his Yellow Canarie Claims along the east side of the Old Piute County Highway approximately two miles northeast of Marysville, Utah, (Area #1) and not in Area #2 as he now contends. Furthermore, even in Area #2 and considering only Defendants' evidence, their claims were not validly located but were moved back and forth, around and about, until finally not even the Defendants knew where their claims were. Furthermore, we contend that the trial Court should have found as a matter of law that because of the variance between the declarations contained in Defendants' Notices as to location and the actual locations thereof on the ground their claims were defective.

For all these reasons, the locations of the Yellow Canarie Claims in Area #2 were void and no priority should have been awarded to Defendant Gibbs thereon. The orderly development of mineral lands on the public domain requires such a ruling to prohibit the odious practice of "floating" claims from one area (Area #1) to another (Area #2) or within the boundaries of one area (Area #2), in order to grab up every valuable location site as its value becomes known. A location of a mining claim must be good when made, and each claimant must stand on his own location and may take only what it will give him under the law.

(B) THE AMENDED NOTICES OF LOCATION OF DEFENDANTS' YELLOW CANARIE CLAIMS DO NOT CURE THE FATAL DEFECTS IN THEIR ORIGINAL NOTICES.

Exhibits "D", "E" and "F" are amended Notices of Location for the Yellow Canarie Claims #1, #2 and #3, respectively. Although these Notices recite that their purpose was "... to more fully describe this claim location to correct previous mistakes and discrepancies ...", Exhibit "D"; "... for the purpose of more fully describing the position to adjoining claims also to correct corner post numbers the changing of location notice by persons unknown to me ...", Exhibit "E"; and "... for the purpose of correcting any errors in the original location, of more accurately and definitely describing and defining the location *and of taking in and acquiring any ground that may have become open to location since the making of said original location ...*", Exhibit "F"; nevertheless, a comparison of the descriptions of the ground actually sought to be claimed by these Amended Notices of Location with the descriptions contained in the corresponding original Notices for the Yellow Canarie Claims, Exhibits "A", "B" and "C", and a consideration of the testimony of H. Spencer Gibbs concerning his real intention in amending the Yellow Canarie Claims will, we feel, convince this Court that the ultimate purpose of said Amended Notices of Location was to change the relative positions of said Claims in Area #2, to alter the physical size and shape of the Claims, and to take up entirely different ground under a priority date of the original Notices of Location for the respective Claims. We assert that amendments of this type are absolutely void under the law, and therefore the amendatory correc-

tions sought to be achieved thereby do not relate back to the date of original location of said Claims.

The original Notice of Location of Yellow Canarie #1 describes a mining claim 1500 feet in length by 600 feet in width, and it fixes the location thereof in Area #1. By Defendant Gibbs' own admission, the Amended Notice of Location on Yellow Canarie #1, Exhibit "D", describes a claim 300 feet in length and 600 feet in width (R. 326) but places the location thereof in an entirely new and different area (Area #2). Further, Gibbs admitted on the one hand that the net effect of this amendment was to reduce Yellow Canarie #1 by four-fifths of its original size (R. 326), but on the other hand, he maintained that the Claim *as amended* covered the same identical ground as before the amendment (R. 326). The original Notice of Location of Yellow Canarie #2, Exhibit "B", fixed its location north of Yellow Canarie #1 and "along Old County Highway". By amendment, Exhibit "F", the location of the claim is tied to the north side line of the Prospector Claims in Area #2 as shown on Exhibit 5. The record is so replete with evidence of fact that the Old Piute County Highway referred to in the original Notice of Location of Yellow Canarie #2 is removed from any point in Area #2 by approximately two miles that we will make no further reference to the matter. Comparing the location of this Claim as set forth in the original Notice of Location thereof with the purported location as attempted to be established by its Amended Notice of Location, it is obvious that the amendment of Yellow Canarie

#2 describes a new and different claim in an entirely new and different area.

In the original Notice of Location of Yellow Canarie #3, Exhibit "C", the Claim is fixed as being west of Yellow Canarie #2. By amendment thereof, Exhibit "F", the position of Yellow Canarie #3 is likewise placed west of Yellow Canarie #2, *but the more significant fact is that the amendment of Yellow Canarie #1, Exhibit "D", says that Yellow Canarie #3 was then west of Yellow Canarie #1.* We challenge the Defendant to show to this Court how it is possible for Yellow Canarie #3 after amendment to be west of Yellow Canarie #1, when originally it was west of Yellow Canarie #2, unless the Claim by amendment had been moved substantially south of its original position. A claim 1500 feet long cannot be stretched to twice its length. It is at once obvious that by amendment Yellow Canarie #3 was moved to a point south of its original position. All of the physical evidence on the ground found by both A. R. Shelton and George H. Ryan, the Engineers and Surveyors, substantiates this fact. Their maps clearly show that after amendment in 1950 the position of Yellow Canarie #3 had radically changed from its original position as the northwest Claim located west of Yellow Canarie #2.

We contend that since the original Notices of Location for the Yellow Canarie Claims were void, the fatal defects therein contained could not be cured by amendment of said Claims, even assuming that the amendments in all respects complied with governing law. In support

thereof we cite to the Court the leading Colorado case of *Sullivan et al vs. Sharp et al*, 33 Colo. 346, 80 P. 1054, wherein it is held as follows:

“The right of a locator to file an additional certificate (amendment) can only avail him where there was an original location valid though imperfect.”

In the more recent case of *Sackville vs. Mann et al.*, 135 P. 2d 1014, the Supreme Court of Colorado affirmed the rule above cited and held as follows:

“Where the original location of a mining claim was void, such a void location cannot be made valid by filing an additional location certificate (amendment) under statute providing for the filing of an additional certificate to cure a defective original certificate.”

See also *Johnson vs. Young*, 18 Colo. 625, 34 P. 173; *Strepy vs. Stark*, 7 Colo. 614, 5 P. 111; and *Moyle vs. Bullene et al*, 7 Colo. A. 308, 44 P. 69.

Moreover, even if the Court determines that the original Notices of Location on the Yellow Canarie Claims were not void, still, for the factual reasons outlined above, the subsequent amendments to the Yellow Canarie Claims are nevertheless invalid since they constitute an attempt to add new and different ground and to acquire new and different rights in the Defendants to the prejudice of Plaintiffs' lawful rights in Area #2 and which had accrued between the date of original location of the

Yellow Canarie Claims and the dates of amendments thereto.

The Supreme Court of California in the case of *Gobert vs. Butterfield, et al*, 136 P. 516, has held:

“An amended notice of location of a mining claim relates back to the original Notice notwithstanding intervening locations, *if made to cure obvious defects in the original notice without including any new ground.*”

The Federal rule appears to be identical. *Bunker Hill & Sullivan Mining & Concentrating Company vs. Empire State - Idaho Mining & Development Company*, 134 F. 268, holds as follows:

“While a mining location may be amended without the forfeiture of any rights acquired by the original location except such as are inconsistent with the amendment, no new right can be had which is inconsistent with those acquired by other locators made between the dates of the original and such amended location.”

In the *Washington Gold Mining & Milling Company vs. O'Laughlin* case, *supra*, the Supreme Court of Colorado has held:

“Where the original location certificate of the mining location was insufficient because so defective as to prevent one from identifying or designating the claim on the ground, an amended certificate could not include other or different territory so as to injure intervening rights.”

See also *Morrison et al vs. Regan*, 8 Idaho 291, 67 P. 955; *Bismark Mountain Gold Mining Company vs. North Sunbeam Gold Company*, 14 Idaho 516, 95 P. 14.

Without more, we urge upon the Court the necessity of establishing in this jurisdiction the rule of authority prevailing in the other western mining states that amendments of Notices of Location to mining claims of the type before the Court are void and of no curative effect whatsoever and do not relate back to the priority date of the original Notices of Location.

(C) PLAINTIFFS, HAVING COMPLIED WITH EVERY AFFIRMATIVE LEGAL REQUIREMENT FOR THE LOCATIONS OF THE THREE JUANITA CLAIMS AND THE DEBRA FRACTION #10, AND BEING FREE FROM ANY FRAUD OR DECEPTION THEREIN, IN EQUITY AND JUSTICE SHOULD NOT BE DIVESTED OF THEIR RIGHTS BY REASON OF THE SUBSEQUENT DESTRUCTION, MOVEMENT OR OBLITERATION OF THEIR STAKES AND MONUMENTS BY OTHERS.

As we read the record we conclude that the only direct attack made upon Plaintiffs' mining locations by the Defendants other than their assertion that their Yellow Canarie Claims were prior in time in Area #2 to those of the Plaintiffs, which assertion we feel we have shown to the Court to be entirely fictitious, is their testimony that certain of Plaintiffs' monuments and corner stakes were observed *by them* in other areas and within the boundaries of other claims. As heretofore pointed out, Plaintiff Clemore acknowledged that his markers and monuments had been moved onto other claims at least three different times subsequent to his original locations,

and Exhibit 5 shows that this condition existed in November, 1950, all in spite of every preventive measure Clemore could take. We call attention to the fact, however, that all of the evidence on this point comes either from the Defendants themselves or from their agents. We feel, therefore, that such evidence should be cautiously considered in the light of possible self-preserving motives.

Moreover, it is well settled law that a locator, having complied with statutory requirements for the location of his claims, cannot be divested of his lawful rights therein by the removal or obliteration of his monuments and stakes. We cite as authority for this proposition the recent decision of the Nevada Supreme Court in the case of *Nichols et al. vs. Ora Tahoma Mining Company et al*, 151 P. 2d 615, wherein the Court discusses this matter at length and holds as follows:

“The general rule is that when a location is once sufficiently marked on the surface so that its boundaries can be readily traced and all other acts of location are performed as required by law, the right of possession is fully vested in the locator, and he cannot be divested of his right by the removal or obliteration or destruction of the monuments, stakes, marks or notices done without his fault, while he continues to perform the necessary work upon the claim.”

To the same effect is *Gobert vs. Butterfield*, from the California Supreme Court, *supra*, wherein the Court holds on this point:

“If a mining claim is sufficiently marked on the ground, and all necessary acts of location are

done, the right thereby acquired by the locator cannot be divested by the subsequent obliteration of the location marks or removal of the stakes without the locator's fault, and the fact that the stakes cannot afterwards be found places no inference against the sufficiency of the original markings."

See also *Book vs. Justice Mining Company*, 58 F. 106; *Steele vs. Preble*, 77 P. 2d 418; *Moore vs. Steelsmith*, 1 Alaska 121; 2 *Lindley on Mines*, 3rd Ed., Section 375, Page 890, n. 68; 1 *Snyder on Mines*, Section 399; 36 *Am. Jur. Mines & Minerals*, Section 94, Page 346; *Shamel, Mining Mineral and Geological Law*, Sec. 530; 40 *C.J. Mines and Minerals*, Sec. 212, p. 801, n. 64.

(D) APPLICATION OF THE DOCTRINE OF "GOOD FAITH."

Plaintiffs located their Debra Fraction #10 and three Juanita Claims in Area #2 with prior knowledge of the fact that Defendants had fraudulently "floated" their Yellow Canarie Claims from Area #1 into Area #2, and that therefore Defendants' Claims were utterly void. Realizing the fraudulent conduct of the Defendants and knowing of the complete invalidity of Defendants' purported locations in Area #2, Plaintiffs made a peaceful entry in Area #2 pursuant to their lawful rights as citizens of the United States to locate mining claims upon open and unoccupied public lands. Plaintiffs acted in complete good faith for they did no more than they had a lawful right to do. On the other hand, Defendants' conduct from the beginning date of April 25, 1949, and the original locations as of that date in Area #1 continuing

up to and including the trial itself and including the "floating" of their Claims from Area #1 to Area #2, the shuffling of their locations in Area #2, their acts in amending and moving existing claims, changing relative positions, and adding new, overlapping and conflicting claims were obviously fraudulent as to both the United States and all other parties interested in Area #2, and demonstrate an utter lack of that "good faith" required of those who seek to locate mining claims.

If Defendants had been in good faith, they could have made entirely new and complete locations in Area #2 when they finally entered that Area, but instead they sought to preserve the priority dates given them, if they succeeded in their fraud, by their original locations in Area #1. When they entered Area #2 they knew of prior claims in that Area, so in an attempt to defeat and ante-date those claims they relied on "floating" instead of "locating". The instant action is a result of that fraudulent conduct on Defendants' part.

Appellants fully agree with the salutary doctrine of law that in possessory actions of this type *good faith* upon the part of one locating mining claims is a factor to be concluded. Several of the cases heretofore cited make reference to this doctrine. In *Bismark Mining Company vs. North Sunbeam Company*, *supra*, the Court said:

"It is the well settled doctrine of all of the later decisions that location notices and records should receive a liberal construction to the end of upholding a location made in good faith."

Said case also quotes with approval the following from *Londonderry Mining Company vs. United G. M. Company*, 38 Colo. 480, 88 P. 455, as follows:

“Every case where this question is raised must therefore depend upon its own circumstances. As previously stated, the purpose of such location certificate is to give notice to subsequent locators; and if by reasonable construction the language descriptive of the status of a claim, aided or unaided by testimony, will do so it is sufficient in this respect. In other words, the object of requiring a reference to a natural object or permanent monument is to furnish means by which to identify the claim, and whatever reference will accomplish this object satisfies the law.”

It is said in the annotation entitled *Location of Mining Claims*, in 7 L.R.A., N.S. 763, as to the purpose of the requirement of marking upon the ground, at Page 856:

“The object of the law in requiring the location of the mining claim to be marked upon the ground is to fix the claim and prevent swinging or floating so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be able to ascertain exactly what has been appropriated in order to make the locations upon the residue.”

See also *Johnson vs. Ryan*, 43 N.M. 127, 86 P. 2d 1040. This doctrine is well stated in the California case of *Brown vs. Murphy*, 97 P. 2d 281, wherein the Court said:

“A person who knows that a mining claim is in the actual possession of another cannot honestly

believe that it is vacant and subject to entry and relocation; and the entry under such circumstances cannot be made in good faith unless it is made upon some right or color of right or claim of legal right to make the entry. Such a claim of right must exist before the entry to constitute good faith in making the entry.

“If it does not exist, the entry is made without color of right or color of title and is an entry in bad faith for actual possession in another is prima facie evidence of title in the possessor and is protected in the law against lawless invasion without right or color of right, but one who has a title and present right of possession may also take peaceable possession of what he claims to be his own.”

But the Court also qualifies the application of this doctrine as follows:

“It is true, generally speaking, that any competent locator, for the purpose of negotiating a location for himself, may enter upon mineral land of the United States *which is not covered by valid subsisting location*, even though it be in the actual possession of another, but still said entry must be peaceable and in good faith.”

A careful consideration of the cases and authorities above cited will show that the prohibition against subsequent entry upon areas already in the possession of a prior claimant applies to situations where there had been but a very technical or unimportant failure on the part of the prior claimants to comply with the law regarding the location of mining claims. In *Dennis vs. Barnett*,

85 P. 2d 916, the description contained in the Notices of Location was somewhat vague, but still sufficient to properly identify the location of the claim. In *Johnson vs. Ryan*, supra, there had been a failure to record the Notices of Location, although every other requirement of law had been complied with. In *Eaton vs. Norris*, 63 P. 856, the relocater had "been watching the Plaintiff during the summer of 1897, to see if he did the required amount of assessment work on his claim" (page 857). In *Brown vs. Murphy*, supra, the parties seeking to relocate the claims relied upon the fact that the exterior boundaries of the claims had not been marked and that there existed discrepancies or variations in the instruments comprising the owner's chain of title. The evidence further showed that the relocater had been on the premises on numerous occasions for several years prior to the action, had taken samples of ore therefrom with the permission of the owners of the claims, and had unsuccessfully attempted to lease the property from the known owners prior to the action.

We contend that the facts and evidence presented to the trial Court clearly negative the application of any "good faith" doctrine herein in favor of Defendants. In the case at bar, the Yellow Canarie Claims as located in Area #2 were not merely defective by reason of a technical non-compliance with the letter of the law, but *were absolutely void*. For the numerous reasons heretofore stated said Claims had violated the fundamental precepts of basic mining law. After all, the object of the law

in requiring the location of a mining claim to be marked upon the ground is *to fix the location of the claim and to prevent floating* so that those who are looking for unoccupied ground may be able to ascertain exactly what has been appropriated in order to make locations upon the residue. Liberality in the interpretation of Location Notices to the end that honest though inept locations will be protected must somewhere give way to the prerogative of other miners to pursue their lawful rights on the public domain. Otherwise, a truly chaotic condition will result and the Courts will be led into the greivous error of encouraging the "floating" of claims at the caprice of any locator who, having once placed his claim, thereafter finds a "greener pasture." If Defendants are allowed to succeed in this action and if their conduct is countenanced by this Court, the orderly development of the Marysvale uranium area and of other mineral sections will be jeopardized. Our Courts will be confronted with numerous cases involving the "floating" of claims, and no locator will be safe from the "jumping" of his claim by one who moves into a more valuable area a claim he has located originally in a section which proves to be of little or no value. Justice and fair dealing require a reversal of the Decree and judgment of the lower Court.

POINT 3.

THAT THE TRIAL COURT COMMITTED ERROR IN LAW.

Plaintiffs make no separate argument relative to the

lower Court's rulings on admission of evidence at the trial.

POINT 4.

THAT ON THE BASIS OF THE EVIDENCE AND RECORD IN THIS CAUSE, NEW FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT IN FAVOR OF PLAINTIFFS SHOULD BE ENTERED.

For the reasons set forth above, Plaintiffs submit that they are entitled to new Findings, Conclusions and Decree in their favor.

POINT 5.

THAT THE TRIAL COURT COMMITTED ERROR IN DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL.

Plaintiffs assert that for all the reasons set forth above, the lower Court committed error in denying their Motion for a New Trial, and submit that said Court, pursuant to Rule 59(a) of Utah Rules of Civil Procedure, should have made New Findings, Conclusions and Judgment in Plaintiffs' favor.

CONCLUSION

Appellants contend that the evidence and testimony presented to the lower Court clearly entitle them to a Decree quieting their title to their Juanita #1, #2 and #3 and Debra Fraction #10 Claims against each and every claim of Defendants conflicting therewith and subject only to the paramount title of the United States of America, and preventing, enjoining and restraining the De-

fendants from asserting any right, title or claim in and to the mining claims of the Plaintiffs above described. The pivotal question of the case is simply this: Was the ground located by Plaintiff Fred C. Clemore as the Juanita #1, #2 and #3 and Debra Fraction #10 Claims open and unoccupied land subject to location for mining claims on their respective dates of location by Plaintiff? We have confidence that this Court will answer said question affirmatively in Plaintiffs' favor. All other questions presented by the evidence clearly resolve themselves in Plaintiffs' favor for the record is silent upon any other attack upon Plaintiffs' locations. The result of the Defendants' present position in this action is on its face so grossly inequitable as to be unconscionable. We submit that for all of the reasons heretofore stated, the decision of the trial Court should be reversed.

Respectfully submitted,

CARVEL MATTSSON

and

JOHN T. VERNIEU

FOR GUSTIN, RICHARDS & MATTSSON

Attorneys for Plaintiffs and Appellants