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Kenneth N. Silliman and Utah Alloy Ores, Inc. v. Rex T. Powell, et al : Brief of Plaintiffs-Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH N. SILLIMAN and UTAH ALLOY ORES, INC., a Utah corporation,	)	
Plaintiffs-Apellants,	)	Appeal No. 17054
vs.	)	
REX T. POWELL, et al.,	)	
Defendants-Respondents.	)	

BRIEF OF PLAINTIFFS-APPELLANTS

* * *

APPEAL FROM THE DECREE OF THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR GRAND COUNTY, UTAH

THE HONORABLE A. JOHN RUGGERI, JUDGE PRO TEM

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KENNETH N. SILLIMAN and UTAH ALLOY ORES, INC., a Utah corporation, Plaintiffs-Apellants, vs. REX T. POWELL, et al., Defendants-Respondents.	Appeal No. 17054

BRIEF OF PLAINTIFFS-APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

This suit was commenced by plaintiffs-appellants to quiet title to their unpatented lode mining claims in the unorganized mining district known as Yellow Cat, located in Grand County, Utah, after defendants-respondents attempted to locate claims overlying those of appellants, to recover damages for slander of title, and to recover treble damages under Utah Code Ann. § 40-1-12 (1953), for ores wrongfully removed from some of said claims.

DISPOSITION OF THE CASE IN THE LOWER COURT

This matter was tried before the Honorable A. John Ruggeri, Judge Pro Tem of the Seventh Judicial District in and for Grand County, sitting without a jury, on March 19-23, 1979,

and on April 3, 1979. During the trial, defendant Penromer Co. Ltd. entered into a stipulation of settlement with plaintiffs-appellants and with Powell defendants (Trial Transcript, Friday, March 23, 1979 at 679-81). A settlement of all issues between the plaintiffs-appellants and Rowe defendants was stipulated to soon after trial on May 14, 1979, and was recorded June 5, 1979. All remaining parties then submitted briefs to the court which issued its Memorandum Decision August 30, 1979, in favor of the defendants-respondents. When respondents finally submitted proposed findings of fact and conclusions of law in late January 1980, appellants made formal objections to the failure of the findings to specify, inter alia, the value of assessment work done benefitting appellants' claims. Objections were also made to the mischaracterization of the settlement between appellants and Rowe defendants, to the inclusion of findings of fact on issues settled between the parties, and to conclusions of law based on the objectionable findings (Record at 262-64). As approved by the court in unaltered form, these findings and conclusions stated that appellants failed to meet their alleged burden of showing that the assessment work done by appellants for assessment years ending September 1, 1973, through September 1, 1977, was sufficient in both character and amount to meet the requirements of 30 U.S.C. § 28, and thus the court found that the relocations subsequently made by defendants-respondents over appellants' claims were valid.

Although appellants showed that substantial assessment work had been done for their claims, the court in effect ruled that since it found the work insufficient to satisfy the assessment requirement as to all claims, the work was insufficient to meet the requirement as to any claims. The court's failure to make any findings as to the actual value of the assessment work done by the appelllants apparently resulted from this conclusion.

The final decree of the court, entered February 13, 1980, while in some measure correcting the findings as to the nature of the stipulations of settlement entered into between appellants on the one hand and the Rowe and Penromer defendants on the other hand (though misstating the date of the appellants-Penromer stipulation as March 22, 1979, instead of March 23, 1979), otherwise quieted title to all claims in conflict in the respondents. The decree also dismissed appellants' damage claims, dissolved a temporary restraining order and temporary injunction previously entered prohibiting respondents from removing or selling uranium ore from the claims in conflict until entry of the final judgment, and awarded respondents their costs. The Findings of Fact and Final Decree were later amended by court order of March 12, 1980, adding six mining claims of Powell respondents included in their counterclaim, but inadvertently omitted from the original findings and decree.

A motion for new trial pursuant to Rule 59 of the Utah Rules of Civil Procedure based on the discovery of new evidence and accompanied by supporting affidavits was made by appellants March 12, 1980, and denied the same day. The notice of appeal was also filed March 12, 1980.

RELIEF SOUGHT ON APPEAL

Appellants request that this Court reverse and vacate the judgment and findings of the Seventh Judicial District Court for Grand County, and remand this case for a new trial on the issue of the adequacy and sufficiency of the assessment work performed by appellants on their claims during the period September 1, 1972, through September 1, 1978.

STATEMENT OF THE FACTS

This lawsuit was filed by appellants January 10, 1977, to quiet title to eighty-four (84) unpatented lode mining claims and one millsite situated in the Yellow Cat mining district in Grand County, Utah. These claims of appellants are valuable principally for their uranium and vanadium deposits. Virtually all of the claims are situated more or less along a three and one-half to four-mile long axis extending from the Little Pittsburgh No. 8 in the northeast corner to the Molly Hogans and the Silver Moon in the extreme southwest corner. All but eight (8) of the 84 claims are part of a single, continuous, multi-branching chain of overlapping and

immediately adjoining claims. (See Plaintiffs' Exhibits nos. 11 and 12.)

Twenty-six of the appellants' claims were originally located prior to 1937 and were deeded to appellant Utah Alloy Ores, Inc. in 1937. The balance of the claims were located by Utah Alloy Ores, Inc. during the years 1938 through 1956 (Plaintiffs' Exhibit No. 2). In February and December of 1976, appellant Kenneth N. Silliman acquired in his own name from appellant Utah Alloy Ores, Inc. all but three (3) of the 84 claims. (Plaintiffs' Exhibit 29.) Also in 1976, appellant Silliman, with members of his immediate family, became a controlling shareholder of Utah Alloy Ores, Inc. (Trial Transcript [hereinafter Tr.] at 279).

Since May 1948, appellant Kenneth N. Silliman has been associated with the property at issue in this suit and with plaintiff Utah Alloy Ores, Inc. (Tr. at 278-79). Appellant Silliman first began performing assessment work on the claims in 1948 and from the early 1950's he has served as Utah Manager and as a Director of Utah Alloy Ores, Inc. (Tr. at 281-82). In those capacities appellant Silliman has, from the early 1950s, been very much involved with the development of the claims and the drilling and mining thereon, with the hiring of miners, with the negotiation of contracts, both with drilling companies and with receiving stations, and with the negotiation of leases of the claims both to others and to himself (Tr. at 281-82). During the period 1948 to 1972, there was continuous mining

activity on appellants' claims (Tr. at 312). During those years, appellant Silliman built roads servicing the claims (Tr. at 306), performed other assessment work on the property (Tr. at 307, 315), assisted in the location of new claims and in the posting of notices (Tr. at 291), hauled ore from the claims (Tr. at 283, 310-11), and supervised mining activities on the claims (Tr. at 311). Appellant Silliman also managed drilling exploration of the area for a subsidiary corporation of Utah Alloy Ores, Inc. (Tr. at 314) and evaluated drilling logs and established the course of the drilling program (Tr. at 314-15, 328). He also consulted with numerous outside geologists about the mining claims in the Yellow Cat area (Tr. at 315, 351). In short, appellant Silliman became thoroughly familiar with the places on these claims where drilling had been done and ore had been mined, or where there was an outcrop of anything that would indicate the presence of mineralization (Tr. at 300).

The dispute in this case arose as a consequence of the attempted location by respondents, in the years 1974 to 1978, of claims overlying those of appellants. The first of these conflicting claims to be located was a group of twenty (20) claims located by respondents Powells in April 1974. Another sixty-eight (68) claims were located by Powells the summer of the following year during the period June 16, 1975 to August 23, 1975. Nine (9) more claims were located by Powells from September 18, 1975 to July 12, 1976, for a total of ninety-seven (97) Powell claims (Defendants' Exhibit 60). The

greater number of these claims conflict with one or more of all except about a dozen of appellants' 84 claims.

The other unresolved claims conflicting with those of appellants are twelve (12) located by Teares, or their predecessors in interest, five (5) in the period June 4 to August 25, 1977, and seven (7) more located in the interval September 4, 1977 to May 10, 1978 (Defendants' Exhibit 78). All of these Teare claims were located after the filing of this lawsuit on January 10, 1977.

The parties agree that the area in dispute was open to location under federal law at the time the parties located their respective claims except insofar as the land may have been withdrawn by the prior location of other mining claims. All respondents, with the exception of the Rowes who have entered into a separate stipulation of settlement with appellants, have also admitted that appellants' claims were located prior to those of respondents (Record at 116). The only evidence offered at trial on the issue of whether the land occupied by appellants' claims had previously been located by others not parties and thus made unavailable for location by appellants failed to demonstrate such prior location by anyone else (Plaintiffs' Exhibit 2, Defendants' Exhibit 18, Tr. at 174-79, 205, 211, 216-17, 660-62, 931-33).

By stipulations, the parties have agreed that there is no issue of the discovery of ore on each of appellants' claims with the exception of Little Pittsburgh 1, Little Pittsburgh 2,

Mineral Alloy 2, Mineral Alloy 3, Telluride 4 and Parco 1 (Tr. at 548-49 and Stipulation for Settlement of Issues between Plaintiffs and Rowe Defendants, dated May 14, 1979, part of the Record on appeal but erroneously not numbered as a part thereof). However, at the trial uncontroverted evidence established that ore was mined and shipped from Little Pittsburghs 1 and 2 in the period 1951 to 1954 (Tr. at 17-18, 38, 57-58, 383-84). In 1954, at least 50 tons of ore were mined and shipped from Parco 1 (Tr. at 386). Also, drilling in 1952 on Telluride 4, Mineral Alloy 2, and Mineral Alloy 3 revealed the presence of uranium oxide ore fairly evenly distributed with a concentration of eight one-hundreths of one per cent (.08% U3O8) (Tr. at 383-86).

An engineering student hired to survey the existing claims of appellant in 1953 and 1954 testified that almost all discovery monuments were then in place on the ground with discovery notices posted, that many corner monuments were found, and that where missing or in need of improvement, the corner and discovery monuments were reconstructed and that all missing notices of location were replaced (Tr. at 9-11, 28-29). This work was attested to by appellant Silliman (Tr. at 288-89, 491-92, 936-37). The balance of appellants' claims, located in 1956 after the land was reopened to entry, were marked by discovery and corner monuments placed there by appellant Silliman, who also posted appropriate notices of location on the newly located claims (Tr. at 937-39). Notices

of location for all the foregoing claims to which appellants assert title were subsequently recorded (Plaintiffs' Exhibits 2, 27, Tr. at 283-85).

The trial court seems to have implicitly recognized that all requirements for the valid location of appellants' claims were met as it directed its findings only to the issues of abandonment and the adequacy of the assessment work done by appellants (R. at 121-22).

When some of the claims were later surveyed in 1956 and again in 1965, many of appellants' corner monuments were still standing, and those that were not were re-erected or replaced (Tr. at 62-63, 65, 75-76, 78-79, 81-82, 108, 494-96). During the 1970s, whenever appellant Silliman saw corner monuments that were down, he re-erected them (Tr. at 498-500). When in 1978, after the filing of the suit, some of the appellants' claims were resurveyed, the surveyor noted the presence of many of appellants' corner monuments, though some but not all of the notices identifying the claims delineated by the monuments had been removed or obliterated over time (Tr. at 125-29, 130). Respondents also introduced evidence tending to show that some of appellants' monuments or notices had deteriorated or otherwise been lost over the years prior to respondents' attempted relocation of appellants' claims (Tr. at 565, 575, 583, 593, 632-33, 683-84, 688, 730, 792, 795-96, 813-14, 842-43, 895). Yet, as respondents acknowledged seeing old monuments and mine workings, the thrust of their

observations went not to a complete absence of markings but merely to respondents' difficulty in identifying in the field the extent, ownership, and current status of the old claims (Tr. at 565, 632-37, 638, 675-76, 682-84, 690, 730-31, 797 800, 842, 891, 895).

The Powell respondents testified they "asked around" and otherwise attempted to ascertain the current owners and status of possibly conflicting claims that might be prior to their own and that this undertaking did not disclose appellants' interest (Tr. at 565-67, 632-638). This was contradicted by evidence that Mr. Bene, one of the previous surveyors of some of the appellants' claims, told Powells in August 1975, while on the property in issue to survey Powells' newly located claims, that he thought appellants had a current and valid interest in the same area (Tr. at 73-75). This conversation was denied by respondent Dan Powell (Tr. at 610-13), who admitted, however, that Powells understood the law to say that monuments on the ground need not be maintained once properly erected (Tr. at 594). Mr. Bene further stated that Powells' response to being informed of appellants' interest in the property was to say the validity of this interest turned on "whether the assessment work has been done during the last few years" (Tr. at 75).

Extensive testimony was heard at trial on the nature and sufficiency of the assessment work performed by appellants to meet the annual one hundred dollars ($100) worth of labor

per claim required by 30 U.S.C. § 28 for the assessment years ending September 1, 1973, through September 1, 1977. These were the years immediately preceding the dates of respondents' attempted relocation of appellants' claims.

Most of the appellants' assessment work was done with a Caterpillar D-6 B bulldozer with a 12 1/2-foot blade, which was owned by appellant Silliman (Tr. at 306-307). The bulldozer was operated primarily by appellant Silliman, although occasionally appellant's son Blaine Silliman operated the bulldozer as well. An outside party was once hired to operate the bulldozer for a day or two (Tr. at 398-400). Appellant Silliman typically operated the bulldozer 10 to 12 hours a day while performing the assessment work, and occasionally up to 14 hours a day (Tr. at 401). Silliman's objective was to work at least 200 hours a year doing assessment work for the benefit of appellants' claims (Tr. at 402, 445). Appellant Silliman calculated the value to his claims of his personal operation of the bulldozer or that of another operator working under his direct supervision at $50 per hour (Tr. at 407). While appellant Silliman was not actually paid $50 per hour by appellant Utah Alloy Ores, Inc., this was apparently because Silliman had the claims under lease from 1961 on, and a condition of the lease was that he perform the assessment work (Tr. at 475). Even working for other parties on other property, appellant Silliman would charge approximately $30 an hour (Tr. at 405-407).

Respondents attempted to produce evidence of a lower valuation per hour for the assessment work done by appellants by introducing testimony that in 1971 one independent contractor charged $16 per hour for a D6 Caterpillar with an operator (Tr. at 648). However, respondents' witness testified that rates had gone up tremendously since that time. Furthermore, the quoted rate did not include any charge for the supervision of such an outside operator necessary to insure that the proper work was done to develop the claims. Another independent operator testified for respondents that for the operation of a D6 Caterpillar with a blade on it he charged $15 per hour in 1972; $17 in 1973; $20 in 1974; $23 in 1975; $25 in 1976; $30 in 1977; $34 in 1978; and $40 in 1979 (Tr. at 830). Again, these rates did not apparently include any charge for the supervision of this work by the owner of the mining claims. Furthermore, this contractor stated that he would charge an additional amount for the time necessary to haul the Caterpillar to and from the job site. The rates for hauling the equipment to the job site and back were usually within a dollar or two of what was charged for the operation of the Caterpillar (Tr. at 831).

Much of the assessment work during the years in issue was done by appellant Silliman with his bulldozer in stripping or removing the overburden from potential ore bodies, in constructing drill sites for future drilling, in preserving the existing mine workings, and in maintaining and improving

existing roads and constructing new roads on or about appellants' claims. These roads facilitated the development and mining of these claims by providing access to the claims and the ore bodies thereunder for drilling rigs, ore trucks, and all other necessary vehicles (Tr. at 306, 349-83).

More specifically, the assessment work for appellants' claims, broken down year by year, included the following:

For the assessment year September 1, 1972, to September 1, 1973

1. Drill sites at least 20 feet wide built on the Little Pittsburgh claim nos. 3, 4, 5, 6, and on Allor 11 and Allor 12 which drill sites were used two or three years later for actual drilling.

2. Normal road maintenance and rehabilitation that included widening roads to facilitate the passage of larger equipment on the property and the reducing of grades on hills too steep to be negotiated by trucks and drill rigs.

3. Stripping of overburden on the Little Pittsburgh claims nos. 3 and 4.

Date	Hours
October 1972	63
November 1972	65
August 1973	84
Total	212

At $50 per hour this equals $10,600 (Tr. at 349-55). Assessment work valued at $8,400 would have been sufficient to preserve all of appellants' eighty-four (84) claims, had all 84 been located over during the following year, which they were not.

Powells located twenty (20) claims on April 12, 1974, hoping to take advantage of alleged deficiencies in the assessment work performed by appellants during 1972-1973.

These Powell claims conflict with the following eight (8) claims of appellants:

Allor 21-23;
Molly Hogan 1 & 2;
Telluride 5, 8 & 9.

(Compare Plaintiffs' Exhibit 12 with Defendants' Exhibit 58.)

For the assessment year September 1, 1973 to September 1, 1974

1. Approximately 20 hours work stripping the overburden on Memphis 1 and Memphis 4.

2. Clearing drill sites on Little Pittsburgh No. 4 for the subsequent Bogner drilling [1976-77 & 1977-78] and approximately 20 to 25 hours work clearing drill sites on Telluride 8 and 9.

3. Approximately 10 hours work building dams around the portals on Allor 12 with the construction of ditches to carry water away from the mines so they would not be unduly damaged.

4. Road maintenance and rehabilitation work.

Date	Hours
March 1974	110
August 1974	93
Total	203

At $50 per hour this equals $10,150 (Tr. at 355-59, 445-46).

Powells located sixty-eight (68) claims in June through August of 1975, hoping to take advantage of alleged deficiencies in the appellants' assessment work for 1973-1974. These Powell claims conflict with the following sixty-eight (68) claims of appellants:

A 1-3;
Allor 1-9, 11-13, 15-23, & 26-33;
CB 1, 2, & 4-7;
Little Pittsburgh 3-8;
Memphis 1-4;

Mineral Alloy No. 2;
Molly Hogan 1 & 2;
Parco 2, 5-7, 10, 23, & 25;
Skinney & Skinney No. 1;
Telluride 2-4, 7-8, 12, 18 & 25.

(Compare Plaintiffs' Exhibit 12 with Defendants' Exhibit 58.)

For the assessment year September 1, 1974, to September 1, 1975

1. Approximately 30 hours preparing drill sites on Parco 23.

2. About 20 hours preparing drill sites on Telluride 8 and 9 and on Allor 21 and 23.

3. Twenty hours opening the portal on Telluride 8 and 9 and repairing the access road to the mine portal from the haulage roads.

4. Thirty hours work stripping overburden on Little Pittsburgh 3 and 4.

5. Five hours doing portal repair work on Allor 12.

6. Road maintenance and rehabilitation including specifically the portions down to and around the Silver Moon, to Little Pittsburgh 1 and 2 and over to Allor 12.

Date	Hours
September 1974	90
August 1975	122
Total	212

At $50 per hour this equals $10,600 (Tr. at 359-61, 446-48).

The nine remaining Powell claims located between September 18, 1975, and July 12, 1976, in hopes of taking advantage of the alleged forfeiture for failure to do adequate assessment work in 1974-1975, conflict with the following twenty-two (22) claims of appellants:

A 2; Allor 6-7, 13, 16-19, 24, 26-28, & 33;
Memphis 2 & 3;
Parco 6-7, 10, & 23;
Telluride 1, 7, & 18.

(Compare Plaintiffs' Exhibit 12 with Defendants' Exhibit 58.)

For the assessment year September 1, 1975 to September 1, 1976

1. More drill sites were built on Parco 23.

2. Road maintenance and rehabilitation on all of the primary roads in the area including specifically about 10 hours work on the road from Allor 1 across Mineral Alloy 2 and 3 and Little Pittsburgh 2; and stripping on Little Pittsburgh 1 and Little Pittsburgh 2.

Date	Hours
February 1976	95
August 1976	132
Total	227

At $50 per hour this equals $11,350 for the work done by appellant Silliman with his bulldozer.

Additionally, on August 25, 1976, drilling work was commenced by Schumacher Drilling and supervised by appellant Silliman along a line or "fence" from Allor 12 along Little Pittsburgh 6, Little Pittsburgh 5, Allor 11 to Little Pittsburgh 3 and 4. Though the drilling rig broke down August 26th, repairs were soon made and drilling recommenced September 12, 1976 and was completed by about September 20, 1976. Some 21 holes were drilled for a total distance of 3,065 feet at a charge per foot of $3 for probing, drilling, and logging resulting in a total bill of $9,195 (Tr. at 361-70, 388, 533-34). The total value of all assessment work done by appellants during this assessment year was, therefore, $20,545.

The Teare claims named Lone Indian 1-5, located the following summer between July 4, 1977, and August 25, 1977, conflict with the following eight Silliman claims:

Allor 1 & 2;
Little Pittsburgh 1 & 2;
Mineral Alloy 2 & 3;
Telluride 4 & 25.

(Compare Plaintiffs' Exhibit 11 with Plaintiffs' Exhibit 107; Tr. at 976-78.)

Assessment year from September 1, 1976 to September 1, 1977

1. About five hours road work in the area of Little Pittsburgh 1 and 2, Mineral Alloy 2 and 3, and Telluride 4 which was stopped by Mr. Teare while Silliman was working on Mineral Alloy 2 and 3.

2. More drill sites built on Parco 23.

3. General road maintenance and rehabilitation in the area of all the claims.

Date	Hours
August 1977	210

At $50 per hour this equals $10,500 for bulldozer work.

Additionally, drilling work was done on Little Pittsburgh 3 and 4, Allor 12, and on Telluride 8 and 9 by J & J Drilling [Bogner] for a total distance of 1,060 feet at a charge of $2 per foot for a total bill of $2,120 paid by appellants. This drilling penetrated ore bearing formation and was evaluated by appellant Silliman. These holes were logged by Idaho Mining Company for an additional charge of $600 (Tr. at 371-76, 388). The total value of assessment work done by appellants during this assessment year was, therefore, $13,220.

Seven more claims were located by Teares after the period of this work during the interval September 4, 1977 to May 10, 1978, which claims conflict with the following claims of appellant:

Mineral Alloy 2 & 3;
Parco 1;
Telluride 4.

(See Defendants' Exhibits 83 and 85; Tr. at 906-913.)

For the assessment year September 1, 1977, to September 1, 1978

1. More drill site work on Parco 23. Portal repair work on Parco 23.

2. About eight hours work repairing roads on Little Pittsburgh 1 and 2, Mineral Alloy 2 and 3, and Telluride 4.

3. General maintenance and road rehabilitation work on the main roads used when drilling or otherwise moving across appellants property from one extremity of the area to the other.

Date	Hours
March 1978	105
April 1978	90
Total	195

At $50 per hour this bulldozer work equals $9,750.

Again, more drilling was done by Bogner on Allor 12, Little Pittsburgh 6, Little Pittsburgh 5, Little Pittsburgh 4, and on Telluride 8 and 9 and on Memphis 1 through 5. These holes were drilled on some of the drill sites prepared during the previous four years. Bogner drilled 2,110 feet at a charge of $2 per foot for a total bill of $4,220. The holes were logged by appellant Silliman's son and evaluated by the Sillimans (Tr. at 376-81). The total value of assessment work

done by appellants during this assessment year was, therefore, $13,970.

The work done during this assessment year is relevant as showing the good faith of appellants in continuing to develop their mining claims even after commencement of the suit, although respondents did not attempt to locate additional mining claims conflicting with those of appellants in the period following this assessment year.

Appellant Silliman testified at trial that he did not go over each and every road each year as some of the roads either did not need much work or were not being used sufficiently to justify the work (Tr. at 963-65). He did affirm, however, that over a period of about three years, almost every road would be checked or maintained with the possible exception of those going to Parco 1, Parco 3, and Parco 3 East (Tr. at 382-83). Appellants' primary concern was not to maintain every road on the property, but only those main or principal roads whose use was expected to be more frequent and necessary for the transport of drills and other equipment to the claims. However, maintenance work was intentionally omitted from the short stretch of road leading to the main camp where buildings and equipment were located to reduce the possibility of looting (Tr. at 449-51, 963).

When respondents questioned the value of appellants' annual program of maintenance of the principal roads, especially for years when no drilling or mining equipment was

carried over those roads, appellant Silliman pointed out that the annual flashflooding and sand drifting in the area has a cumulative effect that would not allow for the saving of any significant amount of repair work or time if postponed for any period of time (Tr. at 536-37). Furthermore, when appellants offered to prove the increased size of more modern drilling and mining equipment in justification of appellants' improvement program of road widening, respondents' objection was sustained by the court (Tr. at 323).

Respondents also questioned whether appellants performed all of the assessment work they claimed to have done (Tr. at 963-65). Respondents attempted to show that not all of this work claimed by appellants was performed by introducing photographs of roads that obviously had not been improved or maintained for a while (Defendants' Exhibits 61-65, Tr. at 618-27). Three of the five photos depicted either the road leading to the main camp that Silliman had already testified he purposely did not maintain to prevent looting (Tr. at 449-50), or another road in the same area that had long since been abandoned (Tr. at 450). The two other photographs, Exhibits 63 and 65, taken in 1977, showed little used and therefore little maintained roads in areas where Powells had attempted relocations over two years previously.

Respondents also offered vague testimony to the effect that those attempting to relocate claims in the disputed area noticed little or no evidence of recent assessment work (Tr at

606, 709, 842). Yet respondents introduced nothing else to contradict the detailed recital of assessment work performed by appellants for their claims, although respondents did try to bolster their weak attack on the quantity of assessment work performed by appellants by implying Silliman's memory and credibility were suspect since he produced virtually no written records from the time the assessment work was done to verify his account of that work (Tr. at 346, 420-26). When later Silliman discovered a few such records, they were promptly disclosed and tendered (R. at 285-95). Furthermore, respondents introduced nothing to contradict the tendency of the work done by appellants to benefit their claims or to show that this work was done with any other intent than to develop the claims. Indeed, evidence of assessment work done by respondents showed they had engaged in the same type of road work, drill site excavation, and drilling as appellants (Tr. at 653-58, 750-53, 800-811, 967-73).

Appellant Silliman repeatedly testified to his intent to benefit all of his claims with his general roadwork program and to his belief that all the claims actually were so benefitted by this work (Tr. at 349, 355, 358-59, 361-62, 373, 378-79, 535). He substantiated this belief by testifying to the way in which the underlying uranium was deposited along trends paralleled by the overlying mining claims. He pointed out that information yielded from one area of the claims also benefits the other areas. Thus roads required to explore and

service one part of the claims also benefit even outlying portions of the larger group of claims (Tr. at 535).

Silliman's testimony on this point was buttressed by that of Mr. James R. Andrus, an exploration geologist with twenty-two years of experience in exploring for and mining uranium, who had examined the area of appellants' claims in the company of Silliman and another geologist and mining engineer of his employer, Energy Fuels Nuclear, Inc. (Tr. at 225-27, 230-32). Andrus testified that the results of the mining on appellants claims demonstrated that the uranium there was "in trend" (Tr. at 234). He went on to say that where a trend is established, it is there for five miles and can be used almost that far (Tr. at 242). When pressed by counsel for respondents as to how far the benefit extended from any drill hole, Andrus advocated an exploration program of widely-spaced drilling at intervals of approximately one-half mile, but he refused to limit the benefit from even barren holes to such a limited distance (Tr. at 239-41). Continuing, Andrus stated that with a knowledge of the presence of a trend and something about how it was situated, drilling up on the Little Pittsburgh claims in the northeast corner of appellants' group could well benefit claims down in the far southwest corner such as the Allor 23 (Tr. at 242-43). Although he indicated that a small mining operator, due to limited funds and the inability to explore out very far, might only receive benefit within a 500 foot radius from a drill hole, he also stated that given the history of

appellant's claims, he "would look as far as the claims that I controlled would allow me to look" (Tr. at 248, 240). Finally, he indicated that the results for each hole drilled, when added together with the results of all previous exploratory efforts in the area, contribute positively to an overall picture and understanding of the ore formations in the general area (Tr. at 267). No attempt was made to rebut this expert testimony with testimony from another witness.

ARGUMENT

I.

THE LOWER COURT MISAPPLIED THE STANDARDS OF LAW APPLICABLE TO THE COMMON DEVELOPMENT OF ASSOCIATED MINING CLAIMS.

Once validly located on ground open to location under federal law, an unpatented mining claim may continue to be held by the original locators or their successors free of any interest asserted by those who subsequently attempt to locate the same area as long as the requirements of 30 U.S.C. § 28 are met. In part, those requirements read:

> On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. . . . but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original

> locators, their heirs, assigns, or legal representatives, have not resumed work on the claim after failure and before such location.

In a leading decision of the United States Supreme Court holding that the owner of a group of adjoining mining claims need not seek a separate patent for each, Justice Field for the majority of the Court noted that under the Act of May 10, 1872 containing the provision just quoted:

> Labor and improvements within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, that is, to facilitate the extraction of metals it may contain, though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvements consist in the construction of a flume to carry off the debris or waste material.

Smelting Co. v. Kemp, 104 U.S. (14 Otto) 636, 655 (1882).

The nature of the annual labor requirement for claims held in common was elaborated upon by the Court the following year in a case squarely presenting the issue of the satisfaction of the above statute. Jackson v. Roby, 109 U.S. 440 (1883). The plaintiff was the senior locator of several adjoining mining claims. A flume was built to carry the waste material from the mining work on one of the claims to an adjoining claim. The claim where the tailings were deposited was covered by such waste to an extent greater than one-third of its area. No other work on or for the benefit of the half-buried claim was shown. The Court held that the plaintiff

had established no right to the adjoining claim on the receiving end of the flume. Justice Field, speaking for a unanimous Court, declared at 444:

> The contention of the plaintiff was made upon a singular misapprehension of the meaning of the act of Congress, where work or expenditure on one of several claims held in common is allowed in place of the required expenditure on the claims separately. In such case the work or expenditure must be for the purpose of developing all of the claims. It does not mean that all the expenditure upon one claim which has no reference to the development of the others will answer.

The Court continued its elaboration of the benefit requirement for the common development of claims in Chambers v. Harrington, 111 U.S. 350 (1884). In this case, on appeal from the Supreme Court of the Territory of Utah whose decision is reported at 3 Utah 94, 1 P. 362 (1882), the primary issue was whether the sinking of a shaft in one claim benefited two other adjoining claims so as to preserve them from relocation by an adverse party. In affirming the finding of the trial court that the adjoining claims were so benefitted, the Utah Court quoted from Mt. Diablo Mill & Mining Company v. Callison, Fed. Cas. No. 9886, 5 Sawyer 439, 9 Morr. Min. Rep. 616, 632-33 (C.C. Nev. 1879), as follows:

> Work done outside of the claim, or outside of any claim, if done for the purpose or as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim as if done within the boundaries of the claim itself. One general system may be formed, well adapted and intended to work several contiguous claims or lodes, and when such is the case, work in furtherance of the system is work on the claims intended to be developed by it.

The United States Supreme Court affirmed the decision of the Utah Court finding the adjacent claims benefitted by the shaft on the other claim. It borrowed the same language quoted by the Utah Court for its statement of the benefit requirement and added to it, at 111 U.S. 353, the following:

> When several claims are held in common, it is in the line of this policy to allow the necessary work to keep them all alive, to be done on one of them. But obviously on this one the expenditure of money or labor must equal in value that which would be required on all the claims if they were separate or independent. It is equally clear that in such case the claims must be contiguous so that each claim thus associated may in some way be benefitted by the work done on one of them.

Three main elements of the rule for the development of claims held in common emerge from a consideration of the classic passages set out above. First, the work must actually tend toward the development of the claims; i.e., it must benefit the claims by leading to the extraction of the minerals in place under the claims. Secondly, the work must be intended to benefit the claims. In other words, the efforts expended must have as their purpose the eventual extraction of the minerals. Finally, the work must be so organized as to benefit or lead to the development of the entire group of claims held in common. A reformulation of this final element may also assist. The government's interest is to see that as much of the minerals in the ground are extracted as possible. Work benefitting only one or a few but substantially less than all claims will not accomplish this result. Therefore, there

should be some systematic approach that will tend to the development of substantially all the claims held in common and intended to be developed as a group.

Mining claims are often best mined on a consolidated basis. Yet it may be virtually impossible to simultaneously develop all claims at one and the same time. Therefore, if work is so organized that it tends to the benefit of all the claims, even though work at any one moment may be concentrated on one or a few claims, this third element would be satisfied. This Court succinctly captured the essense of this third element in Nevada Exploration & Mining Co. v. Spriggs, 41 Utah 171, 124 P. 770, 773 (1912), where it noted:

> We think that what is intended by the use of the term "system" or "general system" of work means simply this: That the work, as it is commenced on the ground, is such that, if continued, will lead to a discovery and development of the veins or ore bodies that are supposed to be in the claims, or, if these are known, that the work will facilitate the extraction of the ores and minerals. This latter purpose is well illustrated by the Supreme Court of Colorado in Doherty v. Morris, 17 Colo. 105 [28 P. 85], where it is held that the construction of a wagon road leading to and making the claims accessible was sufficient as assessment work to prevent forfeiture of the claims.

Ample evidence was presented at trial supporting the adequacy of the character of the assessment work performed by appellants for the benefit of their claims. The continued exploration and development program advocated by Mr. Andrus, an expert geologist who had examined the area in dispute, could not be accomplished without roads suitably maintained to provide access to the claims. Drilling in the most propitious

locations could not be accomplished without the excavation of suitable drilling sites. Pockets of shallowly deposited ore could not be extracted without the removal of the overburden. Furthermore, the drilling that was done in 1976, 1977, and 1978 gave evidence of appellants' good faith in engaging in the preparatory work already described. Therefore, the performance by appellants of these and other activities on and for the benefit of their claims was unmistakably work tending to develop the claims, thus fulfilling the first of the three elements outlined.

Appellant Silliman testified that as to each assessment year in issue, he intended the assessment work he performed to benefit the entire group of claims owned by Utah Alloy Ores, Inc. or himself. Such testimony could only have come from him because no one else performed any significant amount of the assessment work. Inferences from objective facts support this view. Appellant Silliman's long and continual association with the property that had been actively mined and explored for over 20 years uniquely qualified him to appreciate the uranium deposits as yet unremoved. As lessee and later owner of these claims, Silliman had every incentive to develop the claims and extract the uranium lying thereunder. A great deal of ore had already been mined from these claims over the more than twenty years Silliman had been associated with the property. There could be no purpose to the work he performed in the period 1972 to 1978 except the purpose of satisfying the

assessment requirements. Thus, the intent or purpose element was clearly met.

Testimony on the tendency of the work performed to develop the entire group of claims owned by appellants was given not only by appellant Silliman but also by geologist Andrus. Andrus testified that the uranium deposits in the area were clearly situated along a trend substantiated by previous mining activity to extend for probably five miles. He further testified that the claims overlay the trend of the mineral deposits and that, given what he knew of the geological formations and the previous activity in the area, he would, as an expert, continue exploration and development work as far as the claims extended. He indicated that the configuration of drilling holes made in prior years was such as to maximize the information yield that could be expected therefrom. Finally, he testified that each additional drill hole, whether barren or not, yields information which, when added to what is already known of the area, assists in adding more detail to the overall picture of the mineral deposit. The work carried on by Mr. Silliman was such that it would lead, if continued, to the discovery of new ore bodies and the extraction of known deposits. No attempt was made to offer additional testimony to refute this evidence which establishes the presence of a general system well adapted and intended to benefit all of appellants' claims by leading to the extraction of the underlying uranium. Such a system, tending to develop all

claims, satisfies the requirements of the third element outlined above.

Yet the trial court made findings to the effect that not only was this assessment work insufficient in quantity, but that it was deficient in character. The trial court's Finding of Fact No. 18, reads in part:

> The testimony of plaintiff on assessment work for the various years was apparently re-constructed by plaintiff after the present suit was filed as to dates, the type of work performed and the value of said assessment and there was no substantial testimony showing plaintiff's intentions at the time the work was performed as to the claims the work would benefit and the extent and amount of such benefit.
>
> Some of the assessment work claimed by plaintiff was roadwork repeated each year over existing roads. There was no evidence as to which claims were benefitted by the road work and the extent in value of the road work as to any particular claims. Some of the assessment work was on millsites. There was no evidence that this work on millsites benefitted any particular claims or groups of claims, and there was no evidence that any mills has been erected on the millsites, and no evidence that plaintiff intended to construct any mills on any of the millsites.
>
> . . . .
>
> By reason of the above the Court is unable to make a finding as to the value of assessment work performed by plaintiff on any particular claim or groups of claims for any of the assessment years in question.

Record at 145-46.

The finding erroneously assumes that work in one location on appellants' claims cannot benefit claims located elsewhere along the chain of adjoining and overlapping claims overlying the trend of mineral deposition unless discrete benefit values can be assigned to specific individual claims.

The trial court's approach demands that the total benefit of such work accruing to an extended area of mineralization be broken down into artifically small and somewhat arbitrary segments that may be conveniently matched with individual claims or smaller groups of claims forming only part of a larger group. This ignores not only the facts in this case but the basic rationale for allowing claims to be developed by a common plan. Indeed, one requirement of a common development scheme is that the work tend to benefit substantially all the claims. Jackson v. Roby. It will only rarely be the case in such circumstances that the benefit accruing to each claim from such work may be precisely calculated. Accordingly, appellants submit that the trial court did not correctly apply the law to the facts of the present case. This is prejudicial error requiring reversal.

Further indications that the trial court did not adequately understand or apply the rules of law explained above for the development of claims held in common are contained in the trial court's reference in Finding of Fact No. 18 to assessment work on millsites. First, appellants claim but one millsite. Secondly, nowhere in his testimony does appellant Silliman explicitly mention work on a millsite. Thirdly, millsites are not subject to the annual labor requirement. 2 Lindley on Mines § 638 (3rd ed. 1914). However, the trial transcript is replete with references to drill sites upon which significant work was expended to prepare the sites for later

drilling, actually prosecuted, in many cases, within two to four years. It certainly appears that the trial court confused both the facts and the law applicable thereto.

Road work has often been sustained as valid assessment work. In Doherty v. Morris, 17 Colo. 105, 28 P. 85 (1891), cited with approval by this Court in Nevada Exploration and Mining Co. v. Spriggs, as already noted, no ordinary development work was done within the surface boundaries of the claim found by the Supreme Court of Colorado to have been preserved from relocation by the construction of a wagon road up a gulch to the claim and to an adjoining claim. At 28 P. 86, that court stated:

> We do not hesitate to assert that labor performed by the owner of a mine in constructing a wagon road thereto for the purpose of better developing and operating the same may be treated as a compliance with the law relating to annual assessment work thereon.

The Washington State Supreme Court has upheld the validity of road work when contested in Sexton v. Washington Mining and Milling Co., 55 Wash. 380, 104 P. 614 (1909) and in Florence-Rae Copper Co. v. Kimbel, 85 Wash. 162, 147 P. 881 (1915). California district courts of appeal have done the same in Ring v. United States Gupsum Co., 62 Cal. App. 87, 216 P. 409 (1st Dist. Ct. App. 1923); Lind v. Baker, 31 Cal. App. 2d 631, 88 P.2d 777 (4th Dist. Ct. App. 1939) (rebuilding a private road leading to several mining claims after it was washed out in a flood); and Brown v. Murphy, 36 Cal. App. 2d

161, 97 P.2d 281 (4th Dist. Ct. App. 1939) (the repair after each rain of a good road leading to a group of claims).

In Pinkerton v. Moore, 66 N.M. 11, 340 P.2d 844 (1959), the New Mexico Supreme Court found reconnaissance work inadequate in character but treated the repair of access roads as so patently beneficial to mining claims that it upheld this road work as valid in character virtually as a per se matter. The federal district court in United States v. 9,947.71 Acres of Land, 320 F. Supp. 328 (D.C. Nev. 1963), seemed to be of the same view.

The federal government, speaking through an acting solicitor of the Department of the Interior in an opinion entitled Rights of Mining Claimants to Access Over Public Lands to their Claims, 66 I.D. 361 (1959), noted at 364 that:

> The Department has recognized that roads were necessary and complementary to mining activities. It early adopted the policy of recognizing work done on the construction of roads to carry ore from mining claims as legitimate development work accreditable to the claims as assessment and patent work.

The solicitor's opinion went on to note that this early policy, after a brief hiatus at the turn of the century, was reaffirmed in Tacoma & Roche Harbor Lime Co., 43 L.D. 128 (1914). This case held that road work is to be considered proper assessment work along the lines suggested by Lindley in Sections 629 and 631 of his treatise. Lindley notes the necessity of roadways to develop mining claims and acknowledges that expenditures to build roads for this purpose may be credited toward assessment requirements. He cautions, however,

that roads are not necessarily mining improvements and urges that roads built or maintained for other purposes do not represent legitimate assessment work.

The road work performed by appellants satisfies these common sense conditions. The roads built and maintained by appellants on or leading to their claims were constructed exclusively for mining purposes.

Though this Court has not had many opportunities to pass on the sufficiency of road work as assessment work, one such case was New Mercur Mining Co. v. South Mercur Mining Co., 102 Utah 131, 128 P.2d 269 (1942), cert. den. 319 U.S. 753 (1943). There, the road work in question was the construction of a road commenced the day before the end of the assessment year. While this Court held that the claimants could not rely upon this work to satisfy the annual assessment requirement, the reason for that holding was expressly given: The claimants "failed to prove that they built the road." 128 P.2d at 272. Had such proof been made, there is no intimation in the opinion that the road work would have been disallowed.

Indeed, in Knight v. Flat Top Mining Co., 6 Utah 2d 51, 305 P.2d 503 (1957), this Court upheld the findings of the trial court that repairing a pathway for access to claims was adequate resumption of assessment work to preserve the claims from relocation, and that the repair of existing roads to be used in transporting ore that was to be mined later from the claims was also good assessment work.

Appellants concede that the determination of the adequacy of assessment work is normally a matter for the trier of fact. E.g., 2 Lindley on Mines § 630, at 1555. Yet respondents introduced no evidence rebutting the beneficial character of appellants' assessment work. Respondents restricted their attack to the sufficiency of the quantity of the assessment work done. A statement made by this Court in New Mercur seems particularly apropos:

> Appellant introduced no evidence discrediting the above testimony; hence, it remains undisputed. There does not appear in the record any evidence that the work was a subterfuge, or done in bad faith. On the contrary, there appears nothing but uncontradicted testimony that the work was practical, tending to develop the claims, and that it was done in good faith, ... One general system was conceived and well adapted in light of the physical surroundings and the geological information then available. (Citations omitted.)

128 P.2d at 273. The situation in the present case is exactly that described above by the Court in New Mercur.

Although it is not clear from the obscurity of the trial court's Memorandum Decision and the findings later entered, it may be that the trial court thought the work of appellants did not satisfy the "general system" requirement for the development of claims held in common. If so, this was error at variance with what this Court stated in Nevada Exploration and Mining Co. v. Spriggs, 124 P. at 772, to-wit:

> There is some direct and positive evidence from expert miners and mining engineers in the record that the shaft and the drifts as constructed tended to develop the whole group of claims, and that the work was also proper as prospecting work. We think the trial court was right in not substituting his own judgment for that

> of the mining men and engineers. The courts should be very slow, indeed, in holding that certain work is not calculated to develop certain mining claims, or is not proper prospecting work, when there is competent evidence that such is the effect of the work in question, and where there is no evidence to the contrary.

Appellants respectfully submit that the trial court in the case at bar erred as a matter of law in demanding that the road maintenance and improvement program of appellants should be credited to only those particular claims upon which the physical labor was actually expended in any given year or to those few claims so immediately proximate thereto that might properly be said, in different circumstances, to be the only claims forseeably benefitted by such work. Here, appellants' road work, as undertaken on or leading to any particular claim in the group, inured to the benefit of all other claims controlled by appellants due to the extent and orientation of the underlying ore bodies.

In addition to the three requirements set forth above, it is often suggested that Chambers v. Harrington, supra, established another requirement, that is, that the claims being developed as a group all be contiguous. E.g., 2 Lindley on Mines, § 630 at 1551 (3rd ed. 1914). Yet Lindley notes that the Supreme Court of Colorado, in Hain v. Mattes, 34 Colo. 345, 83 P. 127 (1905), concluded that, to quote Lindley at 1551, "the decisions asserting or assuming the necessity for contiguity are mere dicta, and that contiguity is a non-essential." He then notes that the California Supreme Court, in Big Three Mining

Company v. Hamilton, 157 Cal. 130, 107 P. 301, 305 (1910), was of the same opinion. Lindley then states, at page 1552 of his treatise:

> If work done outside of a group of claims can be credited to such group, it would seem logical that work on a noncontiguous claim should be so credited, provided, of course, that the work responded to the general test of group development -- that is, that the work done tends to develop all the claims in the group.

The Rocky Mountain Mineral Law Foundation agrees with this latter statement.

> Many of the cases which allow certain types of work performed off a claim to count as assessment work only if performed on contiguous claims, recognize that other types of work performed off a claim may count as assessment work even if performed outside the boundaries of contiguous claims. [The passage from Smelting Company v. Kemp set out above is then quoted.] Roads to provide access to claims and ditches to provide water for mining, will satisfy as assessment work even though constructed outside of the claim boundaries. Assessment work may be performed on patent land, or even vacant public domain. Accordingly, it would seem that the continguity test is unrealistic, and that the true test should be whether the work tends to benefit the particular claim. (Footnotes omitted.)

2 American Law of Mining § 7.18 (1979).

This Court, though perhaps responsible for originating the contiguity requirement in Harrington v. Chambers, 3 Utah 94, 1 P. 362, 371, in what is arguably dicta, has already given limited recognition to the principle that work on a claim not strictly contiguous to another may qualify as assessment work for both claims. This occurred in the New Mercur opinion. The case is most often cited for its exposition of the community of interest principle, considered below. In the course of its

survey of the prior case law, however, this Court quoted an extended passage from Hain v. Mattes, to the effect that work on one claim, intended to benefit and actually benefitting another claim, is sufficient in character as assessment work for both claims regardless of whether the two claims are actually contiguous. In New Mercur, this Court approved the statement of law from Hain v. Mattes except as to claims separated by territory owned by a stranger (an exception made out of apparent concern for a desire to avoid countenancing trespasses). 128 P.2d at 274, 276.

Appellants respectfully submit that contiguity, as the most strict degree of proximity, is probative of the extent of the actual benefit conferred on one claim by work on another, but that actual benefit can accrue without contiguity. Appellants' eight claims not contiguous with the main body of their claims did actually benefit from appellants' assessment work and should be preserved.

To the extent community of interest is a further, distinct requirement for the common development of claims, that requirement is also satisfied in this case. The essence of the requirement is that there must be privity between the owner of the claim for which the work was performed and the owner of the property where the work was executed. As mentioned, New Mercur Mining Co. v. South Mercur Mining Co. is the leading case on the topic. The facts of that case revealed that A owned one group of claims and B owned an adjoining group of claims. The

third party C had a lease from B with an option to purchase, and C also had a lease from A. The lessee, C, performed work in a tunnel upon a patented claim in B's group. This Court found that the work tended to benefit the claims owned by A and that the lessor-lessee relationships constituted sufficient privity. The Court concisely stated the community of interest principle in the following language from 128 P.2d at 275:

> [T]here must be some common right in the assessment work. The owner or owners of the claims whose continued possessory right is made to depend on the development work must have a legal relationship to the work if it is to inure to the benefit of the claim or claims for which it is contended it was done.

Where, as in the case at bar, the assessment work was performed by the lessee and later owner of a largely contiguous body of claims, or under his direct supervision, there could be no clearer satisfaction of the community of interest requirement.

The trial record plainly shows that appellants' assessment work satisfied all requisite conditions imposed by law for the common development of their mining claims. By not so finding, it is apparent that the trial court misapplied the law to the facts, as well as made clearly erroneous findings of fact relating to the quality of the assessment work.

II.

THE TRIAL COURT ERRED IN ITS ALLOCATION OF THE BURDEN OF PROOF ON THE PERFORMANCE OF THE ASSESSMENT WORK.

The law does not favor forfeitures. Knight v. Flat Top Mining Co., 6 Utah 2d 51, 305 P.2d 503 (1957); New Mercur Mining Co. v. South Mercur Mining Co., 102 Utah 131, 128 P.2d 269 (1942). As this Court noted in New Mercur:

> Because of this reluctance on the part of the law, ordinarily the party claiming the forfeiture of a title must both plead and establish it by clear and convincing proof. (Citations omitted.)

128 P.2d at 272.

The policy of avoiding forfeitures has received broad support though the rule has been variously formulated. The Arizona Supreme Court, following the lead of the New Mexico Supreme Court in Winslow v. Burns, 47 N.M. 29, 132 P.2d 1048 (1943), stated:

> And as between a prior locator in possession and a subsequent locator, the evidence of the prior locator will be viewed in the most favorable light it will justify.

Bagg v. New Jersey Loan Co., 88 Ariz. 182, 354 P.2d 40, 45 (1960). Likewise, the Supreme Court of Wyoming adheres to the view that good faith attempts to comply with the law by a prior locator are to be construed liberally by the courts so as not to defeat the prior locator's claim by technical criticism.

Western Standard Uranium Co. v. Thurston, 355 P.2d 377, 388 (1960).

This Court terms this approach favoring the senior locator an "indubitably sound principle, universally applied by courts in controversies over mining claims where forfeiture due to failure to do the assessment work is in question" in Morgan v. Sorenson, 3 Utah 2d 428, 286 P.2d 229, 231 (1955), where it quoted Emerson v. McWhirter, 133 Cal. 510, 65 P. 1036, 1038 (1901), as follows:

> Where a valid location of a mining claim has been made, and work done thereon in good faith, possession maintained, and no evidence appears from which an intention to abandon may be inferred, the courts should construe the law liberally, to prevent forfeiture.

Although appellants have the burden to show by substantial evidence that work performed outside the boundaries of any claim forming part of a group being commonly developed was both intended to develop the claim and did actually tend toward its development, that does not in any sense alter the ultimate burden of persuasion (or risk of nonpersuasion, as it is sometimes called) borne by respondents to show by clear and convincing proof that insufficient assessment work was done to create a forfeiture. The rule in New Mercur, which fails to distinguish between the two very different burdens (see McCormick on Evidence §336, 2nd ed. 1972), is not to the contrary. It merely states that a claimant who performs work off a claim has the burden to show "that the work was done for the development of all the claims and was so intended." 128

P.2d at 272. The reason for this "burden" is that such information is peculiarly within the claimant's knowledge. Where, as in this case, the appellants offered the only proof as to the benefit of work performed, respondents could not possibly be entitled to a forfeiture of appellants' claims. Clear and convincing rebuttal evidence would have been required. Only such an interpretation furthers the policy of favoring the first locator in a contest with a subsequent locator.

Of course, wherever appellants performed assessment work within the boundaries of any claim, they had no burden at all to demonstrate that the work benefitted those claims. It is presumed that claims on which work is actually done benefit from that work where the work is of proper character. In order to cause forfeiture of those claims, respondents would have to show by clear and convincing proof that no work was actually done on those claims and that work done elsewhere did not benefit those claims. Appellants submit that this course was not followed by the trial court.

The following portion of the trial court's Memorandum Decision reveals the improper framework used by the judge to evaluate the evidence presented.

> The evidence of the Plaintiffs does not convince the Court that sufficient or adequate assessment work was done in order to hold the conflict areas involved. The testimony of the other witnesses define an ostensible lack of assessment work, coupled with a general deterioration of corner and discovery monuments indicative of abandonment brought on by the discontinuance of the productive mining venture that existed in the years prior thereto.

Record at 121.

Clearly, "an ostensible lack of assessment work" does not rise to the level of clear and convincing proof that adequate assessment work was not performed, which is what the law requires before the respondents can prevail.

The concluding phrase of the quoted passage reflects further confusion in the court's mind. The court seemed to treat the deterioration of corner and discovery monuments as objective evidence indicative of abandonment and used that "evidence" to buttress the "ostensible lack of assessment work." This confuses two very distinct concepts in the law of mining -- abandonment and forfeiture. In 2 Lindley on Mines § 643, at 1596-98, the distinction is expressed as follows:

> Abandonment is always a question of intention.
>
> In forfeiture the element of intent is not involved. It rests entirely upon the statute, and involves only the question, whether the terms of the law have been complied with.
>
> Abandonment operates instanter. Where a miner gives up his claim and goes away from it without any intention of returning, and regardless of what may become of it, or who may appropriate it, an abandonment takes place, and the property reverts to its original status as part of the unoccupied public domain. It is then publici juris, and open to location by the first comer.
>
> Forfeiture is not complete until someone else enters with intent to relocate the property.
>
> Abandonment may occur at any time, even after full compliance with the law as to performance of annual labor. Forfeiture will only ensue upon the lapse of the statutory period, on failure to represent the claim, and upon entry and location by another.

The language and holding of Knight v. Flat Top Mining Co., 6 Utah 2d 51, 305 P.2d 503 (1957), show that this Court makes the same distinction between the two doctrines. In that quiet title action, the trial court's finding that two claims had been neither abandoned nor forfeited was sustained on appeal, although no assessment work at all had been performed for a period of several years until the assessment year immediately prior to the time when an attempted relocation of the claims was made. This Court apparently thought that the performance of assessment work, even though of disputed character and following a period where no work at all was performed on the claims, so clearly negatived the requisite intent to abandon that abandonment was not even addressed as an issue in the appellate opinion.

In the present case the performance of substantial assessment work by appellants for the benefit of their claims so plainly eliminated the issue of abandonment that any further consideration of the issue by the trial court was improper. Furthermore, it was manifest error for the trial court to use evidence relating solely to the issue of abandonment as evidence on the issue of the sufficiency of the assessment work to prevent a forfeiture. Indeed, the trial court's making of inferences adverse to appellants from the temporary cessation of active mining on the claims beginning in 1972 only compounded the error. As the Supreme Court of the United States has recently noted, "[t]he holder of a federal mining claim, by

investing $100 annually in the claim, becomes entitled to possession of the land and may make any use, or no use, of the minerals involved." Andrus v. Charlestone Stone Products Co., Inc., 98 S.Ct. 2002, 2009 (1978).

The inferences, made by the trial court from the deterioration of corner and discovery monuments, were also improper under the rule of law relating to the necessity for maintenance of such monuments. As stated by the Nevada Supreme Court in Nichols v. Ora Tahoma Mining Co., 62 Nev. 343, 151 P.2d 615, at 622 (1944):

> 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 this 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. (Citations omitted.)

This jurisdiction follows the same rule. Miehlich v. Tintic Standard Mining Co., 60 Utah 569, 211 P. 686, 690 (1922).

The Nevada court, in applying this rule to the facts of that case which appear remarkably similar to those in the case at bar, noted, at 151 P.2d 623:

> When the Albert claims were originally located, the requisite location monuments and markings were placed upon the ground. Some of them were still there when defendants' claims were located. The record does not show that defendants took any notice of these monuments, made any inquiry of plaintiffs regarding the boundaries of the Albert claims, or made any attempt to ascertain the lines of the senior locations.

Accordingly, the Nevada court held that under the facts presented, there was no abandonment or forfeiture validating the claims subsequently located by defendants.

By not following these rules of law in the evaluation and weighing of the evidence presented in the present case, the trial court committed prejudicial error which demands reversal.

III.

THE TRIAL COURT ERRED BY NOT APPLYING THE DOCTRINE OF APPORTIONMENT.

Even assuming, for the sake of argument, that the trial court correctly determined that the amount of assessment work done on appellant's claims for the years in question was insufficient in quantity to save all of appellant's claims from relocation, there is yet another reason why the trial court's decision must be reversed and the case remanded. Under the doctrine firmly established by this Court, acting unanimously, in Utah Standard Mining Co. v. Tintic Indian Chief Mining & Milling Co., 73 Utah 456, 274 P. 950 (1929), the district court committed reversible error by failing to determine the value of the assessment work indisputably performed by appellants, which value should have been applied by the court to preserve a corresponding number of appellants' claims actually benefitted by this work from relocation by respondents. This was not an

inadvertent failure of the trial court, inasmuch as appellants formally objected to the absense of such findings from the proposed findings of fact and cited Utah Standard as authority in support of their position.

In Utah Standard, the plaintiff brought an action to quiet title to ten unpatented mining claims which conflicted with some 13 of 22 mining claims previously located by defendants. The plaintiff sought to prove that defendants' claims were subject to relocation for failure to perform assessment work. Defendants introduced evidence at trial establishing that they had excavated a tunnel for a distance of about 75 feet at a value variously estimated at $25 to $30 per foot and that about two miles of road leading to the claims had been improved which roadwork was valued at six to nine hundred dollars. The plaintiff introduced evidence in rebuttal that led the trial court to find that 62.2 feet of tunnel work was done at a minimum value of $15 per foot for an undisputed value of $930. Apparently, the trial court did not find that the road work conferred any value. On appeal, this Court reversed the decision of the trial court and remanded the case for a new trial, apparently for a redetermination of the value of the work indisputably performed. In reaching this result, this Court also held that even if the valuation figures determined by the trial court were to stand, sufficient work was done to preserve at least nine of the thirteen claims in conflict from relocation. At 274 P. 951, this Court noted:

> There is no principle of law that we are aware of which asserts that, if the owner of a group of 22 claims undertakes to do the annual work for that group, as a consolidated group, and performs only the labor necessary for nine claims, he loses the benefit of that work on nine claims, provided it is in fact performed on one of the nine claims in such a way as to benefit the remaining eight, as well as the one upon which performed. In this case what is called the "big tunnel" is located on Tintic Indian Chief Claim No. 3, and projects slightly into the territory of Tintic Chief No. 2. The work was performed upon the claim which seems to be the most important one of the group. Inasmuch as the defendants indisputedly [sic] performed the work on this claim, they cannot lose the benefit of it.

In the case at bar, it is likewise undisputed that appellants performed significant assessment work. Even disregarding for the moment the substantial roadwork done within the boundaries of one or more claims, which work was viewed with a jaundiced eye by the trial court, appellants also stripped overburden off potential ore bodies, constructed drill sites for future drilling, some of which drilling was performed during later assessment years, and did other work to preserve existing mine workings. No evidence was introduced by respondents to show that either this work was not performed or that it had no value for the mining claims. Nevertheless, the trial court refused to determine the value of this work in any year.

Appellants willingly concede that cost, defined as that which was expended in terms of money for the performance of assessment work, is not necessarily equal to the value of that work. Indeed, value may far exceed cost. To quote Volume 2, § 635, of Lindley's treatise at 1579:

> Mere expenditure is not of itself sufficient. The work must tend to develop the claim and be of the reasonable value claimed.
>
> Cost is an element in establishing value, and while not conclusive, strongly tends to establish the good faith of the claimant.
>
> It is not material whether the labor performed is paid for or not, provided it is done at the instigation of the owner. The fulfillment of the provision of the law lies in the performance of the labor or the making of the improvements required, and not in the payment for it.

Therefore, under the facts here present, it could hardly be controverted that the value of the assessment work performed by appellants, including the supervisory component of the work performed by appellant Silliman, substantially exceeds the fifteen to twenty dollar per hour figure indicated by respondents' evidence. Thus, under the apportionment doctrine of Utah Standard, even were there sufficient reason, which there is not, to reject the fifty dollar per hour valuation of appellants and to replace it with another slightly lower figure, the decision of the trial court in this case must be reversed for failure to preserve from relocation as many claims as would qualify with a new valuation figure.

In this case it is not known whether the assessment work of appellants was insufficient in quantity to cover all their claims, because the trial court refused to make any finding as to the work's value. Following Utah Standard, a new trial must be had for a determination of that value.

It should be noted, however, that inasmuch as not all 84 of appellants' claims were ever located over in any single

year, the apportionment rule may well have no application to the instant case.

CONCLUSION

For the trial court's failure to properly apply the standards of law relating to the group development of claims held in common, for its failure to properly allocate the burden of proof, for its failure to make findings necessitated by the doctrine of apportionment, and for manifest confusion on what the facts were and on which facts were relevent to a determination of the issues in this case, or for any one of those errors, the trial court's decision should be reversed, all findings vacated, and this matter remanded for a new trial on the limited issue of compliance with the requirements of 30 U.S.C. § 28.

Respectfully submitted this 18th day of July, 1980.

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing Brief of Appellants were served upon counsel for each of the respondents by mailing the same, postage prepaid, to Duane A. Frandsen, of Frandsen, Keller & Jensen, attorneys for Respondents Powells, Professional Building, Price, Utah 84501, and to Aldine J. Coffman, Jr., of Coffman and Coffman, attorneys for Respondents Teares, Rowes & Penromer, at 59 East Center Street, Drawer J, Moab, Utah 84532, this 18th day of July, 1980.

John K. Mangum