

1980

## Kenneth N. Silliman and Utah Alloy Ores, Inc. v. Rex T. Powell, et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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KENNETH SILLIMAN, and )  
UTAH ALLOY ORES, INC., a )  
Utah corporation, )

Plaintiffs-Appellants, )

vs. )

REX T. POWELL, et al, )

Defendants-Respondents. )

Case No. 17054

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RESPONDENTS' BRIEF

\* \* \*

Appeal from the Judgment of the  
Seventh Judicial District Court of Grand County  
Honorable A. John Ruggeri, Judge Pro Tem

\* \* \*

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IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH SILLIMAN, and )  
UTAH ALLOY ORES, INC., a )  
Utah corporation, )

Plaintiffs-Appellants; )

vs )

REX T. POWELL, et al; )

Defendants-Respondents. )

Case No: 17054

RESPONDENTS' BRIEF

\* \* \*

STATEMENT OF THE NATURE OF THE CASE

This case involves conflicting unpatented lode mining claims located in Grand County, Utah in which each party seeks to quiet title in itself.

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 Court, 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 pages 679-81). A settlement of all issues between plaintiffs-appellants and Rowe defendants was stipulated to soon after trial on May 14, 1979 and was recorded June 5, 1979. Following the trial, all remaining parties then submitted briefs to the Court which issued its Memorandum Decision on August 30,

1979 finding the issues in favor of defendants-respondents and against plaintiffs-appellants. Respondents then submitted the proposed findings of fact and conclusions of law stating that for the assessment years ending September 1, 1973 through September 1, 1977 \$100.00 of labor was not performed nor improvements made as required by 30USCA Section 28 on Appellants' claims involved in this action which conflicted with defendants' claims. And that, therefore, the subsequent re-locations made by defendants-respondents over appellants claims were valid. These proposed findings and conclusions were approved by the Court despite appellants' objections.

The Court then entered its Decree dated February 13, 1980 quieting the title of defendants-respondents in their mining claims against plaintiffs-appellants.

Appellants characterization of the disposition of the case from the lower Court to the effect that "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" \* is in error. There is no statement in either the findings of fact, conclusions of law or the decree quieting to title to warrant such a conclusion and any attempt to mangle the words of the Court in such a fashion is entirely unjustified.

\* Appellants' Brief, page 3.



Further comment on the nature of the testimony and evidence introduced by appellants as to the performance of assessment work will be reserved until later in this brief.

#### RELIEF SOUGHT ON APPEAL

Defendants-respondents seek an affirmance of the judgment of the Trial Court.

#### STATEMENT OF THE MATERIAL FACTS

The statement of facts hereinafter set forth relates to the position of the respondents Powells in the above action and is limited to the facts, circumstances and periods of time that are pertinent to the Powell mining claims.

The appellant, Kenneth Silliman, is the successor in interest from Utah Alloy Ores to approximately 84 mining claims in the Yellow Cast mining district in Grand County. Utah Alloy Ores acquired the claims from various locators at different times and then within the past few years conveyed them to Silliman. Silliman was the Utah agent for Utah Alloy Ores which had most of its principals in the State of Ohio. While in the employ of Utah Alloy Ores, Silliman did assessment work for the company and directed their Utah operations for an extended period of time. Silliman has owned the claims in question during the period of Powells' involvement in the mining district.

While all but eight of appellants 84 claims could be labeled, "contiguous", the claimed contiguity is not that normally associated with mining claims. Appellants' claims stretch over a distance of more than four miles with groups of multiple claims



being connected often by only a single point of reference. (Plaintiffs' Exhibit No. 11 and 12).

Powells are the original locators of their claims. Dan Powell testified that at the time, he along with the other Powells, located these claims, they made an inspection of the area they proposed to locate and found no indication of prior claims. They found no location monuments, no location papers, no corner monuments, and no evidence that recent assessment work had been done in the area. At the time they located these claims they considered the area open for location.

The Powell claims being challenged in this case were located as follows:

<u>CLAIMS</u>	<u>DATE OF LOCATION</u>
Yellow Cats 3-18, 4A, 6A, 8A, 10A	April 1974
Yellow Cats 1, 2, 19-22, 2A, 12A, 14A 16A, 18A, 20A & 22A	Aug. 1975
Brad 3-12	June 1975
Brad 2, 13-22	July 1975
Brad 1	July 1976
White Sands 0, 1-8, A-H	June 1975
White Sands 11, 9-13	Sept. 1975
Joe 1	Sept. 1975
Joe 2	Nov. 1975
Mark 00, 0, 1-10, A, B, C, D, E	August 1975

At all times subsequent to the location of these claims the Powells have been actively engaged in developing the claims and the natural resources found thereon.

The assessment years ending September 1, 1973, 1974 and 1975, are the critical assessment years under law that requires owners of claims to do their annual assessment work on the claims by September 1, of each calendar year. The testimony of Powells' and other defendants at trial was that there was no assessment work being done in the areas where they located claims in the respective years. There was no ore mined nor drilling performed during the critical years for Powells and no physical evidence on the ground that any work had been done. Powells, who in good faith located these claims and expended considerable time and money thereon, were challenged by Appellant claiming to be a prior owner of the claims when he filed suit against respondents on January 10th, 1977.

On pages 7 through 10 of Appellants' brief, appellants question the good faith of respondents Powells in locating their claims involved in this lawsuit. The weight of the testimony introduced at trial together with the Court's Findings and Conclusions point to the good faith of the Powells and all other respondents in locating their respective claims.

Testimony of Dan Powell and other respondents established the fact that not only were appellants' claims not distinctly marked and easily identifiable in the field but that respondents made diligent efforts to find any markings whatsoever of prior claims and to check their findings with the Grand County Recorder's Office. (Testimony of Dan Powell, transcript of March 22, 1979 pages 555-556).

On Friday, March 23, 1979 the testimony of Dan Powell concerning what he observed in the field at the time the Powell claims were located was as follows:

Q (By Mr. Frandsen) During the period when you were staking the claims, did you see Kenneth Silliman in the area?

A At the time I was staking the claims?

Q Yes.

A. No.

Q Did you see any of his equipment there?

A No.

Q Did you see any evidence of assessment work such as work on the roads or on particular claims?

A None whatsoever

Q Did you see any evidence of assessment work such as work on the roads or on particular claims?

A None whatsoever.

Q Did you see any claim monuments that could be identified with the Silliman or Utah Alloy Ores claims?

A None.

Q Did you see any notices of location?

A None.

Q Did you see any other paper that would identify claims with Silliman or Utah Alloy Ores?

A No. I didn't know anything about Kenneth Silliman or Utah Alloy Ores until Mr. Silliman called me.

Q When was that, that he called you?

A It was in the fall, September of 1976.

(transcript of March 23, 1979 pages 606-607)

The testimony of respondent Mary J. Teare regarding

evidences of appellants claims located on the ground is substantially the same as that of Dan Powell's and is as follows:

Q Now, the area where you were locating this group of Lone Indian claims, is that in the vicinity of the area marked "orange" on Exhibit 11 on the eastern side of group of claims in question?

A Yes, it is.

Q What did you discover to be the reason for locating your claim 1, Lone Indian?

A We discovered-well, it was just that. We found the two old portals in this cleft and they were abandoned. There was no current markers or papers to be found anywheres in the vicinity, and it looked as though they were abandoned claims.

Q Did you see any monuments at all?

A No sir, not at that time.

Q Were there any Affidavits or assessment notices on the portals of those claims?

A No sir.

The testimony of these two witnesses and that of other respondents in this case establish the fact that appellants' claims were not distinctly marked so as to be readily identifiable in the field. The number of respondents made parties to this action by appellants and who, appellants claim, overstaked appellants' prior claims, is evidence enough to support respondents testimony that at the time of location there was no evidence of prior claims on the ground and that respondents' claims were located in good faith. Certainly, anyone interested in maintaining and working his claims, would protect his interest by properly and adequately marking the claims on the

ground so as to avoid potential conflicts such as those involved in this case. In the deposition of plaintiff, Silliman, taken on March 2, 1979, Mr. Silliman said himself that this was the fourth law suit involving these particular claims since his involvement with the claims on May 2, 1948. (Deposition of Kenneth Silliman, page , published into the record at trial on March 22, 1979. See Transcript pages 412 and 413.)

Additional factors to be considered in establishing respondents' good faith in locating the claims and appellants' apparent abandonment of the claims are the discrepancies contained in various maps introduced into evidence at the trial regarding the location of individual claims. An examination of appellants Exhibits No.'s 1 and 11 and respondents' Exhibit No. 56 which collectively reveal the results of the J. Bene 1956 and 1965 surveys, the R.S. Kaiser 1956 Survey, the G. H. Newell 1956 Survey, the Moab 1954 Survey, the J. E. Keogh 1956 Survey, the J. E. Keogh 1978 Survey, the Steele 1953-54 Survey, and the R. D.-9 Map of 1940, reveals major differences in the actual physical location of many of appellants' claims. These differences make it difficult, if not impossible, to ascertain exactly where appellants' claims are located on the ground and create a major obstacle for those desiring to locate additional claims on what open ground remains in the area.

Careful consideration of these facts as well as other evidence and testimony brought out at the trial leads to the



conclusion that at the time respondents Powells located their claims in 1974, 1975 and 1976 there was no indication whatsoever on the ground of prior claims and therefore no way of ascertaining the existence of such claims. There were no location monuments, no location papers, no corner monuments, no assessment notices, no evidence that assessment work had recently been performed, nor any other indication that the area in question was currently being worked and the natural resources thereon developed.

On pages 11 through 16 of Appellants' Brief, appellants set forth the assessment work claimed to have been done by them during the critical assessment years for the Powell Claims. On pages 11 and 12, appellants attempt to establish a blanket \$50.00 per hour figure for all work claimed to have been done on their claims for the assessment years ending September 1, 1974 through September 1, 1978. This \$50.00 figure was apparently contrived from Silliman's testimony that he charge approximately \$27.50 to \$30.00 an hour to perform Cat work similar to that claimed to have been performed on the Silliman Claims for third parties. (Transcript at 407.) To achieve the balance of the \$50.00 per hour figure claims an additional \$20.00 to \$22.50 an hour for supervisory fee for his alleged presence on the claims. It should be pointed out, however, that the rate Silliman claimed he would charge third parties for performance of Cat work similar of that claimed to have been performed on appellants' claims was apparently a 1979

rate Silliman would have charged at the time of trial and not the market rate during the years 1972 through 1975, which are the critical assessment years for the Powells. It should also be noted that while some supervision of the performance of assessment work by the owner of the claims is important, it is not necessary, nor is it the custom, for the owner of the claims to be physically present on the claims during the entire time the assessment work is performed. In fact, where no drilling is performed, as was the situation in the facts presented by this case, it would only be necessary for the owner of the claims to make minimal supervision of the alleged assessment work period.

As indicated earlier, Silliman claimed that the \$50.00 per hour rate applied for the entire period of over ten years (i.e. 1966-1976). Fifty dollars per hour was a convenient figure for Mr. Silliman to use because, when multiplied by the number of hours Silliman claimed to have worked on the claims, the result is a figure higher than the \$8,400.00 required by law to hold the claims. That \$50.00 per hour for D-6 Cat work in any of the critical assessment years far exceeds the reasonable value or worth of such work is brought out by the testimony of disinterested third parties called by the respondents to testify at trial. All of these expert witnesses had had experiences in owning and operating D-6 and other sizes of caterpillar tractors and all testified to a rate that was the going rate in Grand County substantially under the \$50.00 per



hour rate claimed by Silliman.

Testimony of Jay D. Wilson, owner of C & W Contracting Co., and familiar with the operation of D-6 and other size caterpillar for more than twenty years, was that for the years 1969 and 1971 the rate was \$14.00 per hour and \$16.00 per hour respectively. A witness called by Powells, Mr. James T. Boulden, who owns and operates a number of D-6 and other tractors out of the Moab area, testified that the going rates for the years 1972, 1973, 1974, and 1975, the critical assessment years for the Rowells, were \$15.00 per hour, \$17.00 per hour, \$20.00 per hour, and \$23.00 per hour, respectively. (Transcript of March 23, 1979, pp. 648 and 829.) Mr. Boulden's figures were introduced into evidence as Exhibit 82.

The cost per hour increased each year with the cost of inflation and the cost of doing this type of work and the highest rate in Moab and Grand County area in 1979 was \$40.00 per hour. This highest rate is substantially less than the \$50.00 per hour rate which Silliman claimed has existed since 1966. That Silliman is inaccurate in his statement about the rate per hour is substantiated by the fact that he claimed that the \$50.00 rate applied for the full ten year period. This is obviously wrong and the rates have gradually increased over a period of time from \$15.00 per hour in 1972 to \$40.00 per hour in 1979.

Another important factor in determining the amount of assessment work that Silliman did, if any is the amount

of fuel consumed by the D-6 Cat while working on the claims. In the transcript of March 23, 1979, pp. 667-668, Mr. D. H. Blackstone, a former independant Cat operator, testified that a D-6 cat would consume on the average four gallons of fuel per hour. If Mr. Silliman worked his D-6 for the hours that he claims, he would have used in excess of 900 gallons of diesel fuel. This would certainly require him to purchase it from some wholesaler which in turn would give him a sales ticket to show this purchase. When he cannot do this, nor show that the fuel was transported to the claims, the conclusion is that he only worked on the claims for a few days during these critical years and did not use a great deal of diesel fuel and did not require a bulk purchase.

In pages 13 through 16 of Appellants' brief, appellants set forth both the amount and character of assesment work claimed to have been performed by Silliman during the critical assessment years for the Powells. Before commenting on each of these three assessment years, it is important to point out the credibility accorded to appellant Sillimans testimony given at trial by the Trial Court. In its Memorandum Decision, the Court indicated that the complex and varied testimony "impels the Court to adopt a theory of a case which most completely, as far as practical, harmonizes the testimony of all the witnesses, thusly not requiring the Court to reject as intentionally false any of the testimony. Under this mandate, the Court has given such weight and credibility to the testimony of each witness

as, in the Court's judgment, each is entitled to." Then, in further commenting upon appellant Sillimans testimony, the Court in Finding No. 18 stated that:

"The testimony of Plaintiff on assessment work for the various years was apparantly reconstructed by plaintiff after the present suit was filed as to dates, the type of work performed and the value of said assessment work 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."

This conclusion by the Court was developed after hearing six full days of testimony and reviewing over 100 exhibits introduced at trial.

In all three assessment years critical to the Powells appellants attribute a substantial part of their claimed assessment work to "road maintenance and re-habilitation work." Using appellants own figures as set forth on page 14 of appellant's brief, 153 of 203 total hours claimed as assessment work for the year ending September 1, 1974 involved road maintenance and re-habilitation work. For the assessment year ending September 1, 1975, 197 of 212 total assessment work claimed were spent in road maintenance and re-habilitation. It should be noted that these 107 hours claimed to have been spent in maintaining and re-habilitating roads during the assessment year ending September, 1975 came after two prior assessment years in which well over 150 hours were spent each year in maintaining and re-habilitating roads in the same general area.

Respondents' exhibit No. 61, 63, 64 and 65 introduced into evidence at the trial are photographs taken at various locations within the area in question by respondent Powells in 1975 and 1977. The following testimony of Dan Powell relating to Exhibits 61 and 64 is indicative of testimony given at trial on all four of these exhibits.

Dan Powell's testimony as to Exhibit No. 61, a photograph taken in 1975 of the northeastern portion of the area in dispute, is as follows:

Q Did you locate the Brad claims in that general area northeast of camp?

A Yes, we did.

Q When you were down there locating, did you take a photograph of part of the camp area and the road leading up on to the northeast from the camp?

A Yes, we did. I took photos of that area. That is when we started the Brad claims.

Q Now, what was your purpose in taking a photo?

A To show what the area looked like.

(WHEREUPON, defendants Powells' Exhibits 61-65 were marked for identification)

Q (By Mr. Frandsen) I show you defendants' Exhibit 61 and ask you to identify that.

A. That's the photo looking south on those Brad claims that we had located.

Q And does that show one of the old camp houses?

A It shows three of them in the first picture.

Q There are two photos that are tacked together?

A There are two, yes.

Q What's that just northeast of the main building that is shown there?

A Its an old truck that is turned over.

Q Is that one of the principal roads that leads up there?

A Yes, its is.

Q When was that photo taken?

A This photo was taken in June of 1975.

Q When was it developed?

A July, 1975.

Q Does it have the developers date stamped on there?

A It does, on both pictures.

Q does that picture fairly represent the area shown on there?

A It does.

...  
Q (By Mr. Frandsen) Calling your attention to the road that's shown there, do you observe items there that you could point out that would show the condition of the road and its maintenance?

A Rocks, sagebrush, all kinds of bushes growing out to the middle of it. It hasn't been maintained for years.

(Transcript of March 23, 1979, pp. 618, 619, 620, 621)

Dan Powell's testimony as it relates to Exhibit No. 64, a photograph taken of the area in 1975, is as follows:

Q (By Mr. Frandsen) Here is Exhibit 64 which is another photo. Can you identify it?

A Yes, I can.

Q What is it?

A That is a photo of the area to the northeast of camp, upon top of this mesa or plateau. When you get up



there, it levels off and goes out through some flat country. It kind of rolls and it elevates toward the East.

Q Is that a road across the bench then that continues on from the Silliman camp road?

A It is.

Q Is that one you classify as one of the principal roads there?

A Yes, I'd say it was.

Q When was that taken?

A At the same time.

Q Was it developed at the same time?

A Developed the same time.

Q Does that fairly show the condition of that road?

A It does.

MR. ANDERSON: Could you indicate on the map again where that one is?

THE WITNESS: (Witness complied).

Q Were there characteristics on that road that were shown?

A There is a big clump of sagebrush that has grown halfway into the road from South, and its pretty big.

(Transcript of March 23, 1979, pp. 623, 624).

Under the law Silliman would have to do \$8,400.00 worth of assessment work for the particular assessment year in order to hold the claims in question and avoid forfeiture and such assessment work would have to benefit each claim in the area. Silliman testified that he did do the work in the area for the critical years on Powells' locations by performing road maintainenace work and some preparation of

drilling sites with a D-6 Cat that he owned and had on the claims. By his own testimony, he did no drilling and mined no ore in these critical Powell years.

Respondents' Exhibits No.'s 61, 63, 64, and 65 are fair and accurate representations of some of the principal roads in the disputed area during the critical years for the Powells. These photographs show rocks, grass, bushes, and even more importantly, large sagebrush growing in the middle of the roads on which appellant Silliman claims to have performed maintenance work in satisfaction of the annual assessment work requirement. Certainly, the roads shown in these photographs, which, contrary to the after-the-fact allegations of appellants that the roads depicted were little used and therefore little maintained, (Appellants' brief page 20.) were principal roads in the area where appellants claims are located, (Transcript at pages 618-627) had not been maintained for a substantial period of time prior to the taking of the photographs

Despite the repeated assertions throughout Appellants' brief that substantial evidence of the performance of the assessment work was presented by appellants at trial, the findings of the Trial Court were specifically to the contrary. In its memorandum decision the Court stated that "the evidence of the plaintiffs does not convince the Court that sufficient or adequate assessment work was done in order to hold the conflict area involved. Testimony of the other witnesses defined an ostensible lack of assessment work...." In its



Finding No.18 the Court further elaborated upon the alleged performance of road re-habilitation and maintenance by appellant by stating:

"Some of the roads that plaintiff claimed to have made and improved with the bulldozer and blade had grass and sod growing between the vehicle tracks in the years plaintiff claimed to have done the roadwork and in these areas plaintiff did not sustain the Burden of Proof that adequate assessment work had been done to hold said claims."

For the assessment year ending September 1, 1973 appellants also claim to have constructed drill sites on a few of their claims. (Appellant's Brief, page 13.) Examination of respondents' Exhibit No. 58 will show that even were said drill sites constructed as alleged, they were constructed on claims located over one mile from the Powell claims located in April of 1974. The Court, in Finding No. 18, commenting specifically on appellants' failure to satisfy the group assessment work "to benefit" requirement indicated as follows:

"A substantial portion of the assessment work was done off the particular mining claims and plaintiff has the burden to show that the assessment work that was done benefited each particular claim in the amount of \$100.00 for each assessment year. Plaintiff has failed to sustain this burden of proof."

In all three assessment years critical to the Powells appellant, Silliman, at trial was able to testify not only as to the type of work performed, but as to the location of the alleged performance of the work, the months said work was allegedly performed, and the number of hours worked in each said month

However, in Mr. Silliman's deposition of March 2, 1979, less than three weeks prior to trial, he testified that he had no written records as to the dates and length of time that he was allegedly on the claims with the cat. He had no record of purchases of fuel, no record of hours from the hour meter on the D-6 tractor, no record of incurring any expense or purchasing any other supplies that he may have used, no repair records on the Cat, no employment records where he may have hired someone to go with him onto the claims and assist him or be a cat operator, no diary or calendar or record of any kind where he could substantiate his oral testimony. (Deposition of Kenneth Silliman, pp. 14-16).

Concerning the specific time Silliman allegedly performed assessment work during the assessment year ending September 1, 1973, Silliman's testimony at the deposition was as follows:

Q Do you recall specific weeks that you were down there, or days?

A I am sorry, but I can't.

(Deposition of Kenneth Silliman, March 2, 1979 page 18, line 7 thru 9)

For the assessment year ending September 1, 1974, Silliman testified that he spent approximately 20 hours stripping the overburden on Memphis 1 and Memphis 4. (Appellant's Brief page 14.) However, at his deposition taken only a few days earlier, Silliman testified that the only assessment work performed by him during the year ending September 1, 1974 was maintaining and re-habilitating roads and the construction of a few

drill sites, and that he could not recall the exact claims on which any of the work was allegedly performed. When asked what other type of assessment work he did during that year in addition to road work and preparation of drilling sites, Silliman answered "None". ( Kenneth Silliman Deposition, March 2, 1979 pages 22-25).

Also during his deposition, Mr. Silliman testified as to the area covered by him in maintaining the roads during the critical assessment years for the Powells as follows:

Q Are you saying that in 72-73 you went over every road and again in 73-74 you went over every road?

A Yes.

Q And actually worked on every single road?

A Yes.

Q Each year?

A Yes.

Q Approximately how many miles of road are there on these mining claims?

A I'd say in the neighborhood of 20, 25 miles.

(Deposition of Kenneth Silliman, page 23).

Mr. Silliman further testified as to the extent of his work as follows:

Q Alright, let's zero in on the cat work done on those roads. Was that on all of the roads again just like the previous three years?

A All the claims, that's correct.

Q Not one road was missed?

A I don't believe so.

(Deposition of Kenneth Silliman, page 30.)

During his deposition, Mr. Silliman testified that because he had kept no written records of time spent and work performed on the claims that he could give no exact break-down of how many hours he had spent doing assessment work on the claim in any particular month or any particular year, but rather, that he would go down periodically on the claims and work for ten days or so at a time. (Deposition of Kenneth Silliman, page 16.). In Silliman's testimony at trial, however, he was able to give months and days in the particular months that he was on the claims and testified extensively from notes that he had prepared prior to the trial as follows:

Q Can you tell us how many hours you worked during this period?

A The 1972-73 assessment year?

Q Yes, and as best you can, the time that you did that period.

A October 1972, 63 hours; November 1972, 65 hours, August 73, 84 hours; total of 212 hours.

Q What is your judgment as to the reasonable value per hour of this work?

A I believe this was fifty an hour also.

Q Have you made a calculation as to what the total value of that work would be?

A That would be \$10,600.00.

Q Calling your attention now to the next period, namely September 1, 1973-September 1, 1974, what work did you do during that period? Let me ask you first what type of work you did?

A Cat and Dozer work.

Q Same type of work you did the previous year?

A Yes.

...

Q Now, how many hours did you spend that year?

A This is in 1973-74 year?

Q That's correct.

A In March 1974, 110 hours; and August 1974, 93 hours, making a total of 203 hours.

Q What is your judgment as to the reasonable value of that work per hour?

A I believe fifty dollars an hour is a reasonable amount.

Q Have you made calculations as to the total value of that? And if so, what is it?

A \$10,150.00.

Q Now, lets go to the next period which is September 1, 1974-September 1, 1975. What work did you do during that period?

...

Q How many hours did you spend during that period?

A This is in 19-

Q September 1, 1974-September 1, 1975?

A I have September 1974, 90 hours; August 1975, 122 hours; making a total of 212 hours.

Q And what's your judgment as to the value of that work per hour?

A Fifty dollars an hour.

Q And the total value then would be?

A \$10,600.00.

(Transcript March 21, 1979, pp. 355, 356, 359, 361).



Also on that same day, March 21, 1979, Mr. Silliman testified that he did not work on all the claims in the area but that it was his opinion that the work done benefitted each claim. Mr. Silliman, however, failed to testify as to how each particular claim was benefitted by the work he allegedly performed.

As can be readily seen from a comparison of Mr. Silliman's testimony on March 2, 1979 and March 21, 1979, his recollection of the assessment work allegedly performed on the claims had greatly improved. In his earlier testimony of March 2, 1979, Mr. Silliman could not give the hours, days, or even months in which he was on the claims. Less than three weeks later, however, he was able to give the Court an exact break-down to the hour of time spent on the claims in each particular year.

Mr. Silliman's testimony as to the area covered during his alleged work on the claims also changed in the course of the trial as additional evidence, particularly exhibits such as respondents' exhibits No.'s 61, 63, 64 and 65 were introduced. This mutation in Mr. Silliman's testimony is evidenced by the following excerpt taken from the April 3, 1979 transcript:

Q Now, is it your testimony that each year you went on each of these roads, the main roads, and also the roads that lead up to the particular claims?

A No.

Q What is your testimony on that?

A That I went on most of the main roads and others

that might be needed, which are minor roads and shown on the map that I didn't mark in red.

Q So your testimony now is that you didn't go on each and every road?

A No, I didn't go on each and every road.

...

Q Well, haven't you changed your position since you were here a little over a week ago and you saw some of the photographs that were introduced in evidence to show the condition of the road? And now you say that you did not go on each and every road each year; isn't that true?

A No, I don't believe I have changed my position at all.

Q You had your deposition taken, did you not?

A That is true.

Q It was taken here on March 2, 1979. Were you not asked these questions, and did you not give these answers? And I am reading from page 23 beginning at line 5. MR. ANDERSON: Maybe we ought to let him look at the deposition.

(WHEREUPON the witness was given a copy of the deposition)

Q ( By Mr. Frandsen) Were you not asked these questions, and did you not make the answers? Now, I'll read:

QUESTION: Are you saying that in 72-73 you went over every road and again in 73-74 you went over every road?

ANSWER: Yes.

QUESTION: And actually worked on every single road?

ANSWER: Yes.

QUESTION: Each year?

ANSWER: Yes.

Q Now, wasn't that your testimony?

A Yes.

Q And as you testified at the t



A. Yes.

(Transcript of April 3, 1979, pp. 963,964,965)

The above quotations taken both from the deposition of appellant Silliman and from the trial transcript clearly point out the mutation in Silliman's testimony from the time his deposition was taken on March 2, 1979 to the time he testified at trial less than three weeks earlier and even from the time that Silliman testified near the beginning of the trial to the time he testified near the end of the trial. It is this evolution in Silliman's testimony that caused the Trial Court to find that "the testimony of plaintiff on assessment work for the various years was apparently reconstructed by plaintiff after the present suit was filed as to dates, the type of work performed and the value of said assessment work....". (Findings of Fact, No. 18). Further comparison of the deposition of Kenneth Silliman with the Trial transcript of the assessment years not critical to the Powells, ie, the assessment years ending September 1, 1976 through 1978 will point out the same inconsistencies and changes in Silliman's testimony as have been shown for the three years immediately preceeding.

In their statement of the facts appellants attempt to mitigate respondents' Exhibits No. 61, 63, 64 and 65 by alleging that the roads depicted in said Exhibits were either "little used" or the roads from which "maintainenance work was intentional omitted..." to reduce the possibility of looting " (Appellants'

Brief pages 19 and 20). It should be noted, however, that this testimony came at trial only after these four exhibits were introduced into evidence.

Appellants', in their brief, also attempt to soften Silliman's remarkable improvement in memory from the time of his deposition to the time of trial by alleging that appellants, were, at trial, able to produce some written records. (Appellants' Brief page 21) A review of the pages of transcript cited by appellants in their brief to substantiate this allegation will reveal, however, that the only records produced were Notices of Location and Survey Maps of the area having nothing to do with assessment work.

Appellants', in their brief, set forth assessment work allegedly performed by them during the year ending September 1, 1978 in an apparent effort to attempt to show their good faith in developing the claims even though this year was not a critical assessment year for any of the defendants' involved. Appellants' Brief states that the work done in 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. Respondents contend that this after-the-fact assessment work was performed too late and that the word "even" in the above quoted sentence should be replaced by the

word "especially".

ARGUMENT

ANSWER TO APPELLANTS' POINT I--THE TRIAL COURT DID NOT ERR APPLYING THE STANDARDS OF LAW APPLICABLE TO THE COMMON DEVELOPMENT OF ASSOCIATED MINING CLAIMS.

Appellants attack on the Trial Court's decision as set forth in their Issue No. 1 appears to revolve around two major premises:

A. The Trial Court mis-applied the law as it relates to group assessment work.

B. The Trial Court mis-applied the law as it relates to the validity of road work in satisfying the annual assessment work requirement.

Respondents response to appellants arguments concerning Issue No. I will address each of these points individually. 30

U.S.C.A. Section 28 states that:

On each claim located after the 10th day of May, 1872, and until a patent has been issued therefore, not less than \$100.00 worth of labor shall be performed or improvements made during each year...and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be opened to relocation in the same manner as if no location of the same had ever been made...

The purpose of required annual assessment work on a claim (30 U.S.C.A. Section 28), is to "assure that the holder of the mining claim shall give substantial evidence of his good faith, and to discourage the holding of mining claims without development or intention to develop to the exclusion of others who might improve such ground if opportunity was afforded

Chambers vs Harrington, Utah 1884, 4 Sup. CT. 428, 11 U.S. 350, 28 Ed. 452. 30 U.S.C.A. Section 28, therefore, imposes a good faith requirement upon the holder of a mining claim that he exert at least a reasonable effort to develop that part of the nation's natural resources over which he has control and of which he is in possession. It certainly was not the intent of Congress in passing the act to permit a person to hoard up large amounts of mineral-laden land, hold such land out of competition for any possible unearned increment, and then exploit the natural resource inherent to the land at his leisure. It can also be argued that the holder of a mineral claim, who, in the age of the deflated dollar, attempts to retain control over his claims by performing the near century old statutory minimum amount of work of \$100.00 on each of his claims, has not acted in good faith and in accordance with the purpose of the statute. Especially during an energy shortage period like we have today should the development of the nation's natural resources be encouraged wherever possible. Defendants-respondents therefore urge the Court to carefully consider the purpose of the law in reaching its decision in this case.

30 U.S.C.A. Section 28, after mandating the performance of at least \$100.00 worth of annual work or improvements upon each mining claim, continues to state that "where such claims are held in common, such expenditure may be made upon any one claim..." For assessment work performed off a group of claims to apply towards the satisfaction of the annual assessment



requirement for each of the claims, the claims must be contiguous have a common ownership or an interest in responsibility to do the assessment work, and the work done must tend to benefit each of the claims. Chambers vs Harrington, supra.

Soon after the enactment of 30 U.S.C.A. Section 28, the United States Supreme Court delineated the extent to which work and improvements extraterritorial to a given claim might legally pertain to it. In Jackson vs Roby, 109 U.S. 440 (1883), a case cited by appellants in their brief (Appellants Brief, pages 24 and 25), even though the decision of the Court in that case is contrary to appellants interests in the present matter, the senior locator contended that he had held the location in question by work and improvements in that he had constructed a flume from adjoining locations which were presently being mined to the area in question and deposited waste upon it. The Court, speaking through Mr. Justice Field, rejected the assertion stating:

The contention of the plaintiff was made upon a singular mis-apprehension of the meaning of the act of Congress where the 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 others will answer...

It often happens that for the development of a mine upon which several claims have been located, expenditures are required exceeding the value of a single claim, and yet without such expenditures the claim could not be successfully worked. In such cases it has always been the practice for

the owners of different locations to combine and to work them as one general claim; and expenditures which may be necessary for the development of all of the claims may then be made on one of them. The law does not apply to cases where several claims are held in common, and all the expenditures made are for the development of the others. In other words, the law permits a general system to be adopted for adjoining claims held in common, and in such case the expenditures required may be made, or the labor be performed upon any one of them.

The Court then went on to say that in this case no work had been done for the general improvement of all the claims, and ruled in favor of the subsequent locator.

In the case of Chambers vs Harrington, supra, decided the year following the Jackson vs Roby decision, the Court stated that the assessment work done upon one of the number of adjoining claims held in common to the amount required to be done upon all of them for the year "is sufficient to hold all of them if it is clearly shown that it was intended as the annual assessment work upon all the claims and it was of such a character that it would inure to their benefit and would facilitate the extraction of minerals from each of the claims." (Emphasis added.)

Although the general rule is that the burden of proof concerning performance of assessment work is upon the party contending that the required work was not done, Hammer vs Garfield Mining and Milling Company, 130 U.S. 291 1889, in group assessment work situations, this general principle is subject to an important qualification. The burden of proof in

the first instance is still upon the party asserting a forfeiture, but he makes out a prima facie case by showing that no work was performed within the boundaries of the claim in question. The burden then shifts to the prior locator to prove that he performed the work for the claim outside of its boundaries and that the work, in fact, tends to benefit that claim. That is, even as against a relocater, a prior locator has the burden of proving that his work has the required relationship toward development of the location. The rule was stated in Hall vs Kearney, 18 Colorado 505, 33 P. 373 (1893):

Although the burden of proving a forfeiture is always upon the party relying upon the same, in this case the burden was discharged, prima facie, by showing that no work during the year 1884 had been done upon either the Randolph or Roscoe lodes, or within the surface boundaries of either of these claims. If labor was, in fact, performed upon adjacent property that might be considered as development work for these claims, as contended, it evolved upon Kearney and Nolan and not upon Hall, to show affirmatively such facts.

In Pinkerton vs Moore, 66 N.M. 11, 340 P.2d 844 (1959), the Court held that reconnaissance work did not constitute valid assessment work stating that "where assessment work is not done within the boundaries of a mining claim, burden is on the claimant not only to show that work done was intended as assessment work on the claim, but also that it was of such a character that it would inure to the benefit of the claim." (Emphasis added.)

The rationale for the shift of the burden of proof



has been explained as follows:

It is not a legal presumption that all labor done outside a claim by the owner is performed as representation work. If so performed, and it was intended as required annual labor, the fact must be peculiarly within the knowledge of the claimant; and one charging a forfeiture can hardly be expected to be informed as to all work which may have been performed off the claim, or to the intention or purpose thereof. Sherlock vs Leighton, 9 Wyoming 297, 63 P. 580 (1901).

The imposition of the burden on the senior locator is justified. He is the one who is aware of the relationship, if any, between the work and the location for which it is claimed. He should be required to come forth with his information. It is his duty to present a factual case demonstrating that the outside work or improvements tend to facilitate the extraction of such minerals as the location may contain.

The Court's finding on this particular issue is as follows:

The testimony of plaintiff on assessment work for various years was apparently reconstructed by plaintiff after the present suit was filed as to dates, the type of work performed and the value of said assessment work and there was no substantial testimony showing plaintiffs' intentions at the time the work was performed as to the claims that the work would benefit and the extent and amount of such benefit.

...A substantial portion of the assessment work was done off the particular mining claims and plaintiff has the burden to show that the assessment work that was done benefited each particular claim in the amount of \$100.00 for each assessment year. Plaintiffs failed to sustain this burden of proof. (Findings of Fact, No. 18).

In addition to these statements in the Court's

Findings of Fact, the Court, in its Memorandum Decision, concluded with respect to this particular issue as follows:

An additional element confronts the Court with reference to the apparent lack of assessment work. If claims are grouped so that assessment work is allocated to the entire group or groups, some showing must be made that the entire group or groups indeed derive some benefit. In this case, where the groupings are so diversified and spread, the Court finds it difficult to find that roadwork claimed as assessment work, on roads that in no way connect or service diversified groups of claim, satisfies requirements of the law and regulations mandating an intention to hold.

In their brief appellants contend that the Court's Findings on this Issue "erroneously assume 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 discreet benefit values can be assigned to specific individual claims." (Appellants' Brief, page 30.) This mangle interpretation of the Court's Ruling is entirely unjustified. Nowhere in the Court's ruling does the Court demand that the total benefit of the claimed assessment work accruing to an extended area of mineralization be broken down into segments and matched with individual claims or groups of claim as appellants allege. (Appellants' Brief page 31). Never at any time during the trial or in any of the hearing subsequent thereto did the Court imply that such was the law. The Court's ruling was that "plaintiff has the burden to show that the assessment work that was done benefited each particular claim in the

by the Court is in complete harmony with the requirements with 30 U.S.C.A. Section 28, and the subsequent interpretations given thereto by various courts.

Respondents contend, therefore, that the Court did not mis-apply the law on this particular issue, but, rather that the testimony and evidence presented by appellants at trial was so incredulous that the Court was unable to find any facts favorable to appellants. This assertion is substantiated by the Court's finding that "the testimony of plaintiff on assessment work for the various years was apparantly reconstructed by plaintiff after the present suit was filed as to dates, the type of work performed and the value of said assessment work," (Finding No. 18) as well as the inconsistencies in appellants testimony and evidence as partially presented in the statement of facts contained herein. Again, it is respondents position that the Trial Court did not err in applying the law to the facts on this particular issue, but that appellants failed to present any evidence at trial to sustain their burden of proof.

Addressing the second issue raised in appellants' brief under the heading argument I, respondents concede that the construction and maintainence of roads of access to and from claims has generally been considered to be labor or improvement for annual assessment work. There are, however, many exceptions and qualifiers to this general rule.

Sec. 28 of Title 30, U.S. Code, provides that for

each located, unpatented mining claim upon the public domain, "not less than \$100.00 worth of labor shall be performed or improvements made during each year." The Federal Statute, with two exceptions not hereapplicable, contains no express criteria for determining the sufficiency of particular work or improvements. It is thus left largely to case law to define the nature of acceptable work. The fundamental concepts and principles of assessment work performance, as invariably stated by the Courts, are that the work must be performed in good faith, Sampson vs Page, 129 Cal. App. 2d 356, 276, P. 2d 871 (1954), and must tend to develop the claim and facilitate the extraction of ore therefrom. St. Louis Smelting Company vs Kemp, 104 U.S. 636 (1882).

Those terms are not just phrases, but rather the heart of the requirement for assessment work, and often they are overlooked in the desire to hold claims by perfunctuary work for future development and evaluation. Regardless of how economically or technologically reasonable delay or postponement of development work may be, labor or improvement expended only nominally and without the intent or tendency to actually develop a claim is inadequate.

The Utah Supreme Court recognized this principle by stating:

Underlying our mining law is a basic policy of encouraging the discovery and development of valuable resources by rewarding and protecting individuals who locate mineral deposits and show good faith and diligence in developing their



It seems inescapable that the purpose of requiring assessment work is to require evidence of diligence in developing the claims. To induce such development and to avoid the speculative appropriation of public lands without mineral development under the guise of mining claim locations, the specific statutory requirement for annual work was imposed.

The "work" or "labor" upon or "improvement" of a claim must be narrowly defined and construed if it is to meet the intended criteria and purpose of prescribed annual assessment work. Simply expending time, effort, or money for claims is inadequate.

The U.S. Supreme Court in Cole vs Ralph, 252 U.S. 286, (1920), offered the following definition of work:

To work a mining claim is to do something toward making it productive such as developing or extracting an ore body after it has been discovered.

At an even earlier date, the U.S. Supreme Court after reviewing and commenting upon the "evil" of blanket locations which are not developed, but which might prevent other parties from developing those lands, stated that the purpose of the requirement of annual assessment work was:

To require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith and to show that he was not acting on the principal of "the dog in the Manger." Chambers vs Harrington, 111, U.S. 350 (1884).



Whenever one considers the suitability of labor or improvements for satisfaction of the requirement of annual assessment work, the ultimate question to be answered is whether or not that labor or improvement is directed toward the actual development of the mining claim as mining property, as contrasted to the speculative holding of lands without concrete and practical efforts being made toward their actual and immediate development. There is nothing necessarily illegal or immoral about speculative holdings of claims without development work and perhaps there are sound economic reasons to warrant it, but such claims are not entitled to protection under the present law in absence of such activity.

The good faith of the claimant in the performance of his labor is a very significant factor. It relates to his intention to expeditiously develop his claim as a mine, as contrasted to delay, subterfuge or exploitation of it for non-mining purposes. The Utah Supreme Court in Chamberlain vs Montgomery, 1 Ut. 2d 31, 261 P. 2d 942, defined "good faith" as a "bona fide intention to develop the land and use mineral resources."

A Federal Court dealing with the situation arising in Nevada recognized the real problem when it pointed out that in the conduct of any contest over performance or non-performance of annual assessment work, one party will be magnifying the extent and character of the work, and the other minimizing it, and it is ultimately necessary for the Court to decide the issue

on the basis of whether or not there was a bona fide attempt on the part of the senior locator to develop the land and mineral found thereon.

However, good faith alone is not enough. The Supreme Court of New Mexico has said that the general rule with regard to the character of "ground work" that must be performed to qualify as assessment work is that not only must the work be done in good faith, but the work must also directly tend to develop and protect the claim and to facilitate the extraction of ore therefrom.

Work tending to develop the claim within the meaning of the statute has been defined as:

An artificial change of the physical condition of the earth in, upon, or so reasonably near a mining claim as to evidence a design to discover mineral thereon or facilitate its extraction, and in all cases the alteration must reasonably be permanent in character. Fredericks vs Klauser, 52 Ore. 110, 96 P. 670, (1908).

A Federal Court in Alaska stated that it was necessary to show that the "work was reasonably calculated to lead to the extraction of ore..." Flynn vs Velvesta, 119 F. 93 (1954).

Although the construction and maintenance of roads of access to and from claims has generally been considered to be labor or improvement for annual assessment work, this is only true where such road work was performed in good faith and directly related to the development of the claims or facilitation of the extraction of minerals therefrom. Like any other form

of labor or improvement, road work must be performed in good faith and bear a close relationship to mine development.

In a March 1, 1979 seminar, the Rocky Mountain Mineral Law Foundation applied the above developed principles of law and determined that "repetitive road work, especially road maintenance" does not qualify as annual assessment work. (The Mining Law of 1872, pp. 4-22). This conclusion was the consensus of hundreds of lawyers and scholars who devote a great percentage of their time to mining law and who are recognized on a national level as experts in their field.

In Kirk Patrick vs Curtiss, 138 Wash. 333, 244 P. 571 (1926), the Washington Court dealt with a situation in which a claimant had employed a consulting engineer to go to the district in which the claim was situated and to find a suitable location for a road to be constructed to haul ore. The engineer made three trips and examined three potential routes. This was held not to constitute annual assessment work because it did not bear the necessary direct relationship to actual mining development.

This examination of the applicable statutes, case law, and authority relating to assessment work has revealed that the character of labor or improvement which will be acceptable for Sec. 28 of Title 30 U.S. Code, is determined in part by its physical nature, but mostly by the good faith of the locator, his intent to develop a mine by his performance, and its direct and reasonable adaptability to that end, and that

repetitive road work does not meet these requirements.

As heretofore mentioned, where the assessment work claimed to have been performed is not done within the boundaries of a mining claim, as is normally the case with road work, the burden is on the claimant to show that the work was actually done, that the work, if done, had a reasonable value of at least \$100.00 per claim, and that such work inured to the benefit of each and every claim.

Applying these principles of law to the facts of the present case, it becomes readily apparent that appellants have failed to perform the required assessment work on the claims, and thereby, forfeited all rights thereto upon the subsequent good faith relocation of the claims by the respondents.

In his own testimony Silliman stated that during the critical assessment years for the Powells, the assessment work performed by him consisted exclusively of road maintenance work and some preparation of drilling sites with the D-6 Cat that he owned and had on the claims. At no time during these years did he do any drilling or mining on these claims. During this period of time all the main roads were already in. It was not a situation where they built new main roads. There were some new roads built on particular claims to get into a particular drill site or proposed drill site. To improve these roads all that was done was drop the blade and fill in the ruts that were created by the winter storms and grade off some loose material that may have accumulated on the



Also, doing road work beyond claims that already had accessibility to the County Road system and the short private roads necessary to get to the County road, would not be of any benefit to these claims that are close to the County road. Even if road maintainance were valid assessment work, the most that could be claimed would be the distance from the County road to that particular claim. To claim road work beyond that claim is claiming something that is not needed and does not benefit the particular claim close to the County Road. From an examination of these facts and principles of law, it becomes readily apparent that the road work performed by the appellants, if performed at all, was not performed with the intention of developing the land and exploiting the mineral found thereon, but rather was only performed as a token satisfaction of the assessment work requirement and that because such road work did not substantially increase claimaints' accessibility to the claims that such work did not tend to develop the claims or facilitate the extraction of ore therefrom. Such token satisfaction of the assessment work requirement is certainly contrary to the policy of 30 U.S.C.A 28, of encouraging the development of our Nation's natural resources.

The Court's finding with respect to this particular issue was that:

Some of the roads that plaintiff claimed to have made and improved with a bulldozer and blade had grass and sod growing between the vehicle tracks in these years plaintiffs claimed to have done the road work and in these



areas plaintiff did not sustain the burden of proof that adequate assessment work had been done to hold said claims. (Findings of Fact, N. 18).

Plaintiffs have failed to satisfy the requirements of 30 U.S.C.A. Section 28 by failure to perform assessment work sufficient in both quantity and character on plaintiffs' mining claims that are conflicting with defendants' mining claims in this action for the assessment years ending September 1, 1973, 1974, 1975, 1976 and 197.. (Conclusions of Law No. 1)

Never at any time did the Court indicate or find that the construction and maintainance of roads was not valid assessment work. What the Court did find and hold, however, was that the character of the work allegedly performed by appellants was neither a "construction" nor the "maintainance" of roads as required by law, but rather that the road work claimed as assessment work, if performed at all, was performed only in token satisfaction of the assessment work requirement and was not necessary and did not tend to benefit or develop the claims involved.

In the case cited by appellants in their brief upholding the performance of roadwork as valid assessment work, almost without exception "construction" of roads was involved on only a very small number of claims, usually 10 or less, rather than the 84 claims involved in this matter. The one case cited by appellants that did involve the repair of existing roads, Knight vs Flat Top Mining Company , 6 Utah 2d 51, 305 p.

2d 503 (1957), (Appellants' Brief, pg. 34), no assessment work had been performed on the roads or on the claims at all for a period of several years prior to the performance of the road repair. (Appellant's brief pg. 44). Testimony by appellants in the present case, however, as partially presented in the statement of facts herein, showed that appellant Silliman claim to have gone over each and every road existing on the claims during each and every assessment year critical to the Powells. Apparently the trial court felt that such road work, if performed at all, was both unnecessary and non-productive to the development of appellants' claims.

## II. TRIAL COURT DID NOT ERR IN ALLOCATING THE BURDEN OF PROOF ON THE PERFORMANCE OF ASSESSMENT WORK.

While respondents concede that the law does not favor forfeitures at the same time, the law does not make forfeiture an impossibility. There is nothing contained in the record of this case to indicate that the Trial Court did not view the facts in a light most favorable to appellants, the senior locators, in deciding the case in favor of defendants-respondents. In its Memorandum Decision the Court indicated that it "has given such weight and credibility to the testimony of each witness as, in the Court's judgment, each is entitled to"

In group assessment work situations the general principle of law as it pertains to forfeitures (Appellants' Brief pg. 40), is subject to an important qualification. The Burden of Proof in the first instance is still upon the parties asserting

the forfeiture, but he makes out a prima facia case by showing that no work was performed within the boundaries of the claim or claims in question. The burden then shifts to the prior locator to prove that he performed the work for the claim outside of its boundaries and that the work, in fact, tends to benefit that claim. That is, even as against a re-locator, a prior locator has the burden of proving that his work has the required relationship toward development of the location.

In Pinkerton vs Moore, 66 M.M., 11, 340 P. 2d 844 (1959), the Court held that reconnaissance work did not constitute valid assessment work, stating that "where assessment work is not done within the boundaries of a mining claim, the burden is on the claimant not only to show that the work done was intended as assessment work, but also that it was of such a character that it would inure to the benefit of the claim.

In the present case a Trial Court was "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" (Findings of Fact, No. 18). This inability of the Court to make such a finding was the result of appellants failure to produce any credible evidence at trial to warrant a finding to the contrary. This conclusions is substantiated by the Court's further finding that "the testimony of plaintiff on assessment work for the various years was apparantl re-constructed by plaintiff after the present suit was filed..."

Appellants further argue that whatever assessment work



was performed within the boundaries of any claim, respondents had the burden to show that no work was actually done on each such claim and that the work done elsewhere did not benefit those such claims. (Appellants' Brief, page 42). Respondents contend that the latter part of that statement requiring respondents to show that the work performed off the claim did not benefit such claim does not correctly state the law and refers the Court to the recitation of cases earlier in this brief relating to this issue. Respondents take further issue with appellants contention that respondents had the burden to show that no work was actually done on claims where appellants allegedly performed assessment work. Respondents contend that the initial burden, even where work is done upon the claims themselves is upon the prior locator to establish not only that the work was done upon the claims, but that the value of the work upon each and every claim was in excess of \$100.00. The Trial Court's inability to make a finding as to the value of assessment work performed by appellant on any particular claim clearly indicates that appellants failed to sustain this burden at trial. (Findings of Fact No. 18).

Respondents contend that the points raised by appellants in their brief are not issues of law, but, rather issues of fact. The rule of review of issues of fact is that all of the evidence and every inference and intendment fairly arising therefrom should be taken in the light most favorable to the findings made by the trial court." Rummell vs Bailey, 7 Utah 2d 137, 320 P.2d 653

(1958), citing Jensen vs Logan City, 96 Utah 53, 83 P.2d 311 (1938) and Toomer's Estate vs Union Pac. R. Co., 121 Utah 37, 239 P. 2d 163 (1951).

In a case of very recent issue this Court has stated:

The overriding principle which is applicable to all of the plaintiffs' contentions in attaching the findings and judgment are the standard and often repeated rules: that the findings of the trial court are entitled to a presumption of validity; that we assume he believed those aspects of the evidence favorable to his findings; and that, if there is substantial evidence to support the findings and judgment, they will not be disturbed." Dan L. Powell, et al vs Atlas Corporation, et al, filed July 21, 1980.

This Powell vs Atlas Corporation, filed July 21, 1980, case was tried before the same trial court as was the present case, but a different judge. Each case involved six complete days in trial, substantial testimony and other forms of evidence being received. In the Powell vs Atlas case the principle issue was whether or not group assessment work performed by a senior locator benefited the senior locator's claims. The trial court ruled that it did and this Court refused to overturn that ruling. In the instant case the principle issue is whether or not assessment work allegedly performed by appellants benefited a group of appellants claims or any claim within said group. The same trial court sitting in the Powell vs Atlas case ruled that it did not. Respondents urge that this finding of the trial court which, during the period of the trial, became extremely familiar with the facts of the case, is "not clearly against the preponderance of the



evidence" and should not be disturbed.

III. THE TRIAL COURT DID NOT ERR BY NOT APPLYING THE DOCTRINE OF APPORTIONMENT.

In considering satisfaction of the annual assessment requirement, it is necessary to remember that it is \$100.00 worth of labor or improvement that is required. Stated another the measure is the value of the work performed or improvements made and not the amount paid for the work or improvements. Norr vs United Mineral Products Co., 61 Wyo. 386, 158 P. 2d, 679, (1945).

The contract price or actual payment of \$100.00 ore more per claim is not a conclusive determination that the work was worth that amount. In ascertaining the value of labor or improvements, the "reasonable worth" is the test, and this is measured in terms of dollars, not time expended or men employed. Norris, supra. An arbitrary fixing of the value of labor, even encompassed within a local rule, is not valid, so that such a rule decreeing that one day's work was worth \$5.00, and twenty days work constituted full satisfaction of requirement for annual assessment work, has been disregarded by the courts. Penn vs Oldhauber 24 Mont. 287, 61 P. 649 (1900).

The requirement of 30 USCA Section 28, is that not less than \$100.00 worth of labor shall be performed or improvements made during each year "on each claim". For the sake of argument, if a senior locator had 100 claims and performed \$80.00 worth of assessment work on each and every claim, or a total of

\$8,000.00, this work would not be sufficient to hold even one claim. It is imperative that each claim to which assessment work is thought to be applied be benefited to the extent of at least \$100.00.

Contrary to the repeated allegations of appellants in their brief that assessment work was performed on the claims during the assessment years in question, such was not the finding of the trial court. In fact, the trial court found to the contrary, stating that:

The testimony of plaintiff on assessment work for the various years was apparently reconstructed by plaintiff after the present suit was filed as to dates, the type of work performed and the value of said assessment work....

...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....

Because of the above, the assessment work claimed by plaintiff to satisfy the annual assessment work requirement is not of such a character or amount to benefit the entire group of plaintiffs' claims to an extent of \$100.00 for each claim. (Finding No. 18).

As pointed out in the Statement of Facts herein appellant at trial, failed to substantiate their claims that:

1. The assessment work claimed to have been performed by appellants during the critical assessment years was actually performed and;
2. That the value of the alleged assessment work, even if performed, was sufficient to benefit any of appellants' claims

to the extent of \$100.00 in any of the critical assessment years. The reason the Court refused to apply the doctrine of apportionment in this case was that, after considering all the testimony and evidence, the Court was unable to make a finding that any one particular claim of appellants was benefited in any critical assessment year by the alleged assessment work performed in the amount of \$100.00.

#### SUMMARY

Even though characterized by appellants as issues of law, the issues before the Court are all essentially factual. The trial judge, after hearing six full days of testimony, determined all the issues in favor of respondents and against appellants and giving "such weight and credibility to the testimony of each witness as, in the Court's judgment, each is entitled to", (Memorandum Decision), and decided that appellants failed to satisfy the requirements of 30 U.S. C.A. 28 by failing to perform assessment work sufficient in both quantity and character on plaintiffs' mining claims that are conflicting with defendants' mining claims in this action for the assessment years ending September 1, 1973, 1974, 1975, 1976 and 1977, and that by reason thereof the areas within which respondents herein located their mining locations were open to re-location at the time respondents located said claims.

Under the applicable law, the evidence supports the decision of the trial court in favor of respondents and the same should be affirmed.

DATED this 5<sup>th</sup> day of September, 1980.

*Duane A. Frandsen*

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CERTIFICATE OF MAILING

I hereby certify that on the 5<sup>th</sup> day of September, 1980 I mailed three (3) copies of the foregoing Respondent's Brief, postage prepaid, addressed to attorneys for appellants as follows:

Brent D. Ward  
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*Dabli Christensen*  
SECRETARY