

1957

Glen E. Fuller et al v. Mountain Sculpture, Inc. : Brief of Appellants

Utah Supreme Court

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



Part of the [Law Commons](#)

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

Peter M. Lowe; Attorney for Appellants;

Recommended Citation

Brief of Appellant, *Fuller v. Mountain Sculpture, Inc.*, No. 8576 (Utah Supreme Court, 1957).
https://digitalcommons.law.byu.edu/uofu_sc1/2688

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

me

In the
Supreme Court of the State of Utah

GLEN E. FULLER, et al.,
Plaintiff-Respondents,

vs.

MOUNTAIN SCULPTURE, INC., et
al.,
Defendant-Appellants.

} Case No.
8576

BRIEF OF APPELLANTS

PETER M. LOWE,
Attorney for Appellants.

TABLE OF CONTENTS

	Page
APPELLANTS' BRIEF	
STATEMENT OF FACTS	1-4
APPELLANTS' POINTS	4-5
ARGUMENT	5
POINT I. AS A MATTER OF LAW PLAINTIFFS' PLACER CLAIM MUST BE RECTANGULAR AND BE ORIENTED NORTH-SOUTH AND EAST-WEST	5-8
POINT II. AS A MATTER OF FACT PLAINTIFF INTENDED THAT HIS PLACER CLAIM BE ORIENTED NORTH-SOUTH AND EAST- WEST	8-11
POINT III. PLAINTIFF'S NOTICE OF LOCA- TION IS INSUFFICIENT AND HIS CLAIM WAS NOT ADEQUATELY MARKED UPON THE GROUND	11-16
CONCLUSION	17-19

CASES CITED

Book v. Justice Min. Co., CC. Nev. 1893, 58 F. 106	14
Brockbank v. Olbion Min. Co., 1905, 29 U. 367, 81 P. 863	14
Brown v. Levan, 46 P. 661, 4 Idaho 794	13
Clark v. Pueblo Quarries, 1939, 86 P. 2d 602, 103 Col. 402	12
Darger vs. LeSieur, 9 U. 192, 33 P. 701	12
Dennis vs. Barnett, 1938, 85 P. 2d 916, 30 Cal. App. 147	12

TABLE OF CONTENTS—Continued

	Page
Erwin vs. Perego, Utah 1899, 93 F. 608	14
Gibbons v. Frazier, 68 U. 182, 249 P. 472	14
Jose v. Houck, C. A. Cal. 1948, 171 F. 2d 211	11
Laughing Water Placer, 34 L. D. 56	7
Livingstone Oil & Gas Co. vs. Shasta Oil Co., Tex. Civ. App., 114 S. W. 2d 378, 381	9
McCann vs. McMillan, 62 P. 31, 129 Cal. 350	13
Miehlick v. Tintic Standard Min. Co., 60 U. 469, 211 P. 696	15
Plaqueminis Oil & Dev. Co. vs. State, 23 So. 2d 171, 176; 208 La. 425	9
Rialto No. 2 Placer Mining Claim, 34 L. D. 42	7
Snow Flake Fraction, 37 L. D. 250	6
Vevelstad v. Flynn, C. A. Alaska 1956, 230 F. 2d 695 ..	15
Warnock v. DeWitt, 11 U. 324, 40 P. 205	14
Willeford v. Bell, 1897, 49 P. 6 Cal.	14
Wood Placer Claim, 32 L. D. 198	6

OTHER AUTHORITIES

Section 40-1-3, U. C. A., 1953	14
Title 30, Sec. 35, U. S. C. A.	5
Title 30, Sec. 28, U. S. C. A.	13
28a Words & Phrases, 408	9

In the
Supreme Court of the State of Utah

GLEN E. FULLER, et al.,
 Plaintiff-Respondents,

 vs.

MOUNTAIN SCULPTURE, INC., et
al.,
 Defendant-Appellants.

}
Case No.
8576

BRIEF OF APPELLANTS

STATEMENT OF FACTS

The dispute between the parties in this appeal involves mining claims which were filed on land in Section 18, T 13 N, R 13 W, Salt Lake Base and Meridian. The land in question is a United States Government Section open for the locating and filing of mining claims and is chiefly valuable for building stone (TRS 165). This section is within the territorial boundaries of Utah and is located in Northwestern Box Elder County in an area generally known

as Park Valley. In May, 1955, plaintiff posted his notice of placer claim location on a cedar tree which notice has the following description (Ex. 11 and Ex. 22) :

“Beginning at Monument #1, upon which is placed this Location notice, being about 175 feet south of the campsite at the mouth of Rock Canyon—where the tall cottonwood trees are located—at the creek crossing on the west side thereof; and running thence 2,640 feet north generally along the creek and up the hillside to Monument #2, consisting of stone; thence west down said hill and across creek and up other side to and beyond top of ridge to clearing to stone Monument #3, a distance of 1,320 feet; thence south down hill 2,640 feet to Stone Monument #4; thence East 1,320 feet along the base of hill to point of beginning at this Monument #1.”

Glen Fuller prepared the placer notice (Ex. 11 and 22) May 13, 1955, in his office and testified that he then went to the area in question and located his corners in accordance with the notice (TRS 113 1. 19-23); Fuller testified that he put the notice in a “weather protected box”, tacked it to the box and covered it with a covering of shellack and nailed the whole thing to a cedar tree.

In the summer of 1955, the defendants prospected the area and saw the location notice and attempted to establish the boundary lines but were unable to do so (TRS 197-199); by examining the records in Box Elder County recorder's office the defendants saw a copy of the Notice (Ex. 11) with the Plaintiff's name on it (TRS 198); in October, 1955, Richard Hatch and Warren O'Gara went to Glen Fuller's office to discuss the plaintiff's claim; Glen Fuller

stated that his claim was where he was working and that his lines ran on the cardinal points of the compass—East and West and North and South—from his starting point (TRS 199 1. 1-30; TRS 295 1. 1-10); Ex. 13 was used by Fuller to illustrate the lay of his claim and the place he was working; defendants told Mr. Fuller that they intended to locate and file on a claim immediately to the west of him and that they wanted to know how his boundary lines ran (TRS 297 1. 8-19); In January, 1956, defendants made their location and filed their placer claim covering in essence Lots 1 and 2 of Section 18, T 13 N, R 13 W, SLBM; the plaintiffs became immediately aware of this filing by defendants; in April, 1956, defendants built a road to Lots 1 and 2; on April 13, 1956, plaintiffs brought this action for an injunction and to quiet title as between the parties to a certain alleged conflict area; the matter came on for hearing on April 24, 1956, upon an order to show cause why there should not be an injunction pendente lite but the matter was continued for the reason that the Court would not grant such an order because of the inadequate description of plaintiffs claim (TRS 51 1. 19), and plaintiff was permitted time in which to get a survey of his claim; On May 9, 1956, the case was tried on its merits and plaintiff's surveyor brought in a survey of the placer claim (Ex. 16) which boundary lines varied from the true cardinal directions of the compass about 30 degrees; Surveyor Gilgen stated that he did not use plaintiff's location notice (Ex. 11 and 22) in making his survey but went in a reverse traverse and surveyed to markers pointed out by Mr. Fuller except for the northeast corner which was built at the time

of the survey (TRS 69, 1. 2-30; P. 70, 71, 72). Mr. Gilgen testified that his survey (Ex. 16) does not correspond with Mr. Fuller's location notice (Ex. 11; TRS 83, 84, 85 and 86); the defendants produced the evidence by their surveyors that by using Mr. Fuller's placer claim point of beginning and using the cardinal directions and distances of that notice that Mr. Fuller's claim would be rectangular in shape, oriented North and South and would be east of defendants' claim without any conflict area (Ex. 14, TRS 38 1. 26-30; TRS 39, 1. 1-4 and Ex. 16); the lower Court returned its judgment that as to the placer claim of plaintiff it was oriented as shown in Ex. 16 and that it was superior to defendants' claim; the defendants appeal the decision of the lower Court both as to questions of law and fact. All additional facts deemed pertinent are referred to in the argument under the various points raised.

STATEMENT OF POINTS

POINT I

AS A MATTER OF LAW PLAINTIFFS' PLACER CLAIM MUST BE RECTANGULAR AND BE ORIENTED NORTH-SOUTH AND EAST-WEST.

POINT II

AS A MATTER OF FACT PLAINTIFF INTENDED THAT HIS PLACER CLAIM BE ORIENTED NORTH-SOUTH AND EAST-WEST.

POINT III

PLAINTIFF'S NOTICE OF LOCATION IS INSUFFICIENT AND HIS CLAIM WAS NOT ADEQUATELY MARKED UPON THE GROUND.

ARGUMENT

POINT I

AS A MATTER OF LAW PLAINTIFFS' PLACER CLAIM MUST BE RECTANGULAR AND BE ORIENTED NORTH-SOUTH AND EAST-WEST.

The area in question is upon federal land which has been surveyed (TRS 35 1. 19-24) and the land is chiefly valuable for building stone and thus comes under the provisions of the law relating to placer claims. Title 30, Sec. 35 USCA reads in part as follows:

"Claims usually called 'placers'—shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.—all placer-mining claims located after the 10th day of May, 1872, shall conform as near as practicable with the United States System of public-land surveys, and the rectangular subdivisions of such surveys, * * *."

The meaning of the words "shall conform as near as practicable with the United States System of public-land

surveys, and the rectangular subdivisions of such surveys" has been extensively dealt with. The last controlling Land Department decisions read in part as follows:

Wood Placer Claim 32 L. D. 198

"The department held that Section 2331 (Title 30, Sec. 35 USCA) applies to placer locations upon both surveyed and unsurveyed land. The words in Sec. 2331 'system of public land surveys and the rectangular subdivisions of such surveys' when applied to unsurveyed lands simply means that claims should, if practicable, have East-West and North-South bounding lines, and that the claim should be rectangular, if practicable."

Snow Flake Fraction 37 L. D. 250, reads in part as follows:

"The department hereby especially approves the decision in the Miller Placer Claim Case (30 L. D. 225). The question, which again arose in the case of *Wood Placer Mining Company* (32 L. Ed. 198) and upon which the entry was then held for cancellation, was considered at length upon review. One of the claims involved was nearly one and three quarters miles in length, and the general course of both was Northeasterly and Southwesterly in direction. The department overruled the contention therein that the conformity requirement of the statute had no application to placer locations upon unsurveyed lands (the claims being on unsurveyed land) and held that in such cases the locations, if practicable, should be rectangular in form, with east-and-west and north-and-south boundary lines, and otherwise approximating conformity to the public-survey system within the limits of practicability. This case is reaffirmed.—Conformity is required if practicable."

“Rialto No. 2 Placer Mining Claim 34 L. D. 42

“A location under the mining laws does not of itself amount to an appropriation of land in such a sense as to preclude the inclusion of the same, or parts thereof, within the limits of a subsequent location, subject to such existing rights as may be thereafter maintained under the prior location; and the fact that a placer location, if made to conform to legal subdivisions of the public surveys, would embrace all or a portion of the land covered by a prior location, is not a sufficient reason for failure to conform the placer location to legal subdivisions, as required by section 2331 of the Revised Statutes.”

“Laughing Water Placer 34 L. D. 56

“The mining laws contemplate that in all cases, except in instances where impracticable so to do, placer mining locations must be made in conformity with the system of public-land surveys, that is, rectangular in form and of dimensions corresponding to appropriate legal subdivisions, and with east-and-west and north-and-south boundary lines.”

Thus it is seen that where practicable the claim must be rectangular and the lines must be oriented on the cardinal points of the compass. The claim in question in the location notice uses the proper courses but the survey introduced by the plaintiff is at substantial variance to the notice and the system of government land survey. The area is surveyed and the surveyors for both sides tied the area into that government survey without difficulty. The entire area of the two placer claims are covered with building stone which extends on both sides of the creek. The terrain is such that cattle graze over almost the entire area

and a person can ride horseback over the area, or drive a jeep. (TRS 183 1. 19-30; TRS 185 1. 5-15; TRS 312 1. 8-19; TRS 306 1. 24-30.) There is no substantial evidence in the record to show a justification for non-conformity. Some hint was given that there were other claims in the area but Mr. Fuller stated that they were all lode claims but one which was not identified (TRS 15 1. 3, 4, 16, 17).

The lower Court misconceived the law in respect to conformity (TRS 352 1. 17-22); the lower Court merely spoke in terms of a rectangle without giving any weight to the requirement that boundaries be parallel with the cardinal points of the compass. The decision of the lower Court in this respect should be reversed.

POINT II

AS A MATTER OF FACT PLAINTIFF INTENDED THAT HIS PLACER CLAIM BE ORIENTED NORTH-SOUTH AND EAST-WEST.

At the outset it must be noted that the plaintiff, Glen Fuller, is a practicing lawyer acquainted with mining and mining law (TRS 294 1. 20-25). Mr. Fuller personally prepared the placer location notice in his office and then (according to his testimony) he went to the area and located the corner monuments "in accordance with the descriptions laid out in that placer notice" (TRS 113 1. 17-23). The notice description itself (Ex. 11) uses the courses of "North", "South", "East" and "West". The courts have

been unanimous in defining these words as meaning cardinal directions.

“Generally, the words ‘North’, ‘South’, ‘East’, and ‘West’, when used in a land description, mean, respectively, ‘due north’, ‘due south’, ‘due east’, and ‘due west’.”

Plaquemins Oil & Dev. Co. vs. State, 23 So. 2d 171, 176; 208 La. 425.

Livingstone Oil & Gas Co. vs. Shasta Oil Co., Tex. Civ. App., 114 S. W. 2d 378, 381.

28a Words & Phrases, 408.

Mr. Fuller knew at the time of preparing his notice that Sec. 18 was open to entry and location; and that the J. J. Kunzler section immediately to the west was patented ground and he was concerned about encroaching on that property (TRS 29 1. 18-22). Using Ex. 1, Mr. Fuller went West from his location notice $\frac{1}{4}$ mile and thought that he was on the Section line (TRS 33 1. 11-13; 1. 25-27; TRS 26 1. 24-29).

Now Mr. Fuller is a lawyer and in the face of his explanation of what he thought he was doing and the position that he thought he was in on Section 18, it is inconceivable that he intended to extend his claim in a North-west-Southeast orientation which would (according to his stated belief) put a major part of the claim on the Kunzler property. Thus, Mr. Fuller must have intended his side lines to be North-South and East-West.

In addition to all of these things Mr. Fuller told Richard Hatch and Warren O’Gara, in October, 1955, that

his claim was laid out on the cardinal points of the compass (TRS 199, 200, 201 and 295 1. 1-10). Mr. Fuller did not controvert this testimony even though he took the stand afterward in rebuttal. In defendants' presence Mr. Fuller drew a sketch (Ex. 13) to show the relationship of his road, the creek, and the side lines of his claim. Mr. Fuller testified that "the placer claim is cut generally diagonally with a creek that runs in a northwesterly direction" (TRS 114 1. 4-5). Exhibit 13 discloses this fact and thus even if Mr. Fuller had not stated that his boundary lines ran North-South and East-West, it is elementary geometry that where the diagonal of the rectangle runs Northwest the sides will be on the cardinal points.

Mr. Fuller stated that his claim was where he was working. All of the evidence shows his actual work to be east of and parallel to the defendants' claim (TRS 39 1. 16; 230 1. 4-21; 280 1. 4-30; 281 1. 1-18-. In addition, Mr. Fuller stated that the green rock on the east side of the creek was in his claim (TRS 296 1. 8-16) and Ex. 13 shows this claimed rock which would not be included unless the boundary lines ran North-and-South and East-and-West (Ex. 21, TRS 241 1. 7-20).

Finally in preparing Ex. 13 it is a matter of common knowledge that the top of a sheet of paper is taken as "North" by a lawyer in sketching lot lines which fact Mr. Fuller admitted in Court (TRS 344 1. 19-28; 345 1. 21-25); and the east side line on the sketch crosses over the creek at the beginning point and does not follow the course of the creek at all.

In view of the uncontroverted evidence it is clear that as a matter of fact Mr. Fuller intended his placer claim to be two square forty acre tracts oriented North-and-South and East-and-West (TRS 15 1. 20-23). It is to be noted that defendants did not post their notice and locate their claim for another three months after Hatch, O'Gara and Fuller had their discussion and Ex. 13 was made. Thus Mr. Fuller was satisfied with his statement as to directions until this law suit was started and after defendants had posted their notice and located their claim.

POINT III

PLAINTIFF'S NOTICE OF LOCATION IS INSUFFICIENT AND HIS CLAIM WAS NOT ADEQUATELY MARKED UPON THE GROUND.

The first ground upon which it is asserted that the plaintiffs' placer notice was insufficient is because it did not have the names of the locators on it. Sec. 40-1-2 UCA 1953, requires that the notice of location posted on the claim contain the names of the locators. It has been held that to fail to do so renders the notice invalid.

"Where posted notices of location of mining claims failed to disclose the names of the locators, the notices were insufficient under this section."

Jose v. Houck, C. A. Cal. 1948, 171 F. 2d 211.

Mr. Fuller testified that he shellacked the notice after putting it in a "weather protective box" yet two witnesses who saw the notice within six weeks after it was posted

found no names and took a picture of the notice (TRS 194 1. 8-26; 266 1. 1-6; Ex. 23). Three other witnesses saw the notice between that time and trial day, a period of less than a year, and the names of the locators were not on the notice (TRS 299 1. 16-29; 163 1. 25-27; 164 1. 1-9; 181 1. 20-21 and 188 1. 24-28). After this lawsuit was started plaintiffs put their names on the notice (Ex. 25; TRS 222 1. 10).

The next reason why the location notice is insufficient is because it failed to contain a description with sufficient detail as to permit the location of the claim upon reasonable efforts. The law on this point is as follows:

“The essential requirement of a mining claim location notice is that it must be so described and identified that the location can be found or located from the description by anyone interested in doing so.”

Dennis vs. Barnett, 1938, 85 P. 2d 916, 30 Cal. App. 147.

“A notice of location which describes the ground in such a way as to be incapable of identification is insufficient.”

Darger vs. Le Sieur, 9 U. 192, 33 P. 701.

“Provisions of this section concerning location of placer claims were designed to secure a definite description, one so plain that the claim can be readily ascertained, and a reference to some natural object or permanent monument is named for that purpose.”

Clark v. Pueblo Quarries, 1939 86 P. 2d 602, 103 Col. 402.

"Where the description and reference to a natural object or permanent monument is of such a character that a mining engineer could not find the claim from the location notice, and where it is such that the claim may be floated anywhere to suit the ground or to cover ore that may have been discovered, it is clearly such a notice as cannot furnish a foundation for a valid location."

Brown v. Levan, 46 P. 661, 4 Idaho 794.

McCann v. McMillan, 62 P. 31, 129 Cal. 350.

In this case it becomes obvious that the description in the notice is insufficient under the above authorities, *if the description prepared by the plaintiff's surveyor is correct* as to what the actual placer claim was at the time of posting the notice. The plaintiff's plat description (Ex. 16) was obtained by going in a reverse traverse and at an angle of variance of about 25 degrees from the course in the location notice (TRS 69 1. 2-30; 71 1. 7; 72 1. 4-8); certainly the notice of claim does not give anyone, even an engineer or surveyor, sufficient information to find a description such as is in Ex. 16.

Closely akin to the foregoing problem is the one of marking the location upon the ground, the law is stated as follows:

Title 30, Sec. 28, USCA reads in part:

"* * * the location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of location, and such a description of the claim or claims located by reference to

some natural object or permanent monument as will identify the claim * * *."

Sec. 40-1-3, UCA 1953 reads:

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

"The location of a mining claim must be so distinctly marked on the ground, so that its boundaries can be readily traced."

Gibbons v. Frazier, 68 U. 182, 249 P. 472.

"The purpose of requiring the marking of boundaries of the surface of the claim is to fix the claim and prevent floating or swinging, so that other persons who are looking for unoccupied ground may ascertain exactly what has been appropriated and make their locations with reference thereto."

Book v. Justice Min. Co., CC. Nev. 1893, 58 F. 106.

"A locator who has filed his notice, but fails to mark his boundaries on the ground, assumes the risk of the accrual of intervening rights of third parties."

Brockbank v. Olbion Min. Co., 1905, 29 U. 367, 81 P. 863.

Erwin v. Perego, Utah 1899, 93 F. 608.

Warnock v. DeWitt, 11 U. 324, 40 P. 205.

"The boundary should be marked upon the ground so that any person of reasonable intelligence could go upon the ground either with or without a copy of the notice of location and readily trace the claim out and find its boundaries and limits."

Willeford v. Bell, 1897, 49 P. 6, Cal.

Vevelstad v. Flynn, C. A. Alaska 1956, 230 F. 2d 695.

"In action to determine right of possession to certain conflict areas arising out of locations of mineral lands, wherein it appeared that defendants location notice posted and filed of record failed to describe land intended to be claimed by locators, and no amended location notice was filed until after plaintiffs had located land, it was held that plaintiffs having met requirements of both federal and state statutes relative to claim they were entitled to conflict areas."

Miehlick v. Tintic Standard Min. Co., 60 U. 469, 211 P. 696.

The lower court in fact found that the plaintiff had failed to mark his corners properly (TRS 349 1. 23-30; 350 1. 11-18). The location notice states that monument #2 was stone but the plaintiff and his surveyor built monument #2 (northeast corner) for the purpose of the survey after this lawsuit began (TRS 76 1. 11-26; Ex. 38, 39 and 46); the location notice states that monument #3 (northwest corner) is stone but Mr. Fuller pointed out a large white rock to his surveyor in a field of large white rocks (TRS 75 1. 9-14; 171 1. 1-30; 190 1. 2-10; 235 1. 25; 233 1. 3-13; 234 1. 15-29; Ex. 34, 35, 36 and 37), and further Mr. Fuller stated that he "located the corner monuments in accordance with the descriptions laid out on that placer notice" (TRS 113 1. 21-23). By this we may infer that Mr. Fuller "built" the corner monuments but Mr. Fuller picked out a large white rock (one among many) for his surveyor to survey to as his northwest corner. Mr. Fuller's surveyor did not

use the location notice for surveying but surveyed to monuments pointed by Fuller and prepared Ex. 16 as a result of this work. From an examination of the location notice no one could guess that the Northwest corner was a large white rock, nor could a person determine which big white rock was the proper one. Mr. Fuller testified in the first hearing that his Northwest corner was a white rock with a cedar tree by it (TRS 14 1. 16-18), but the Northwest corner Mr. Fuller pointed out to his surveyor was a white rock with a Mountain Mahogany tree in the vicinity (TRS 233 1. 3-13; 234 1. 15-29; Ex. 36, 37, 38); but all of this information concerning the Northwest corner could not be found from the notice or by a traverse of that notice description. According to the location notice Monument #4 was stone; but Mr. Fuller pointed out a blazed Cedar tree with a ring of rocks around it (Ex. 47); Fuller's notice stated that Monument #4 was west of the point of beginning and was of stone, but the surveyor went southwest from the point of beginning to a cedar tree ringed with rocks; there was no way to find Mr. Fuller's Monument #4 from reading the location notice because even had a person "guessed" or "experimented" with a reverse traverse (clockwise instead of counter clockwise as required by the notice) he could not have guessed that he should go Southwest instead of West, nor could a person have "guessed" to look for a cedar tree with a ring of rocks around it instead of a "monument of stone". Thus the Court below was eminently correct in his determination of fact that Mr. Fuller was negligent "in not getting his corners marked" (TRS 349 1. 24).

CONCLUSION

From a review of the evidence and the law it is clear that the lower Court ignored the requirement of the law that where practicable a placer claim must conform to the system of public land survey and be rectangular in shape. The plaintiff's placer claim sustained by the Court below runs almost diagonally to the system of public land survey and the evidence fails to show any substantial justification for its failure to conform. The claims of plaintiffs and defendants do not conflict when plaintiffs' claim is oriented North-South and East-West, and in addition the plaintiffs would still retain all of the area that they have been working.

The great weight and preponderance of the evidence shows that Mr. Fuller wrote his notice of location with the conformity requirement of the law in mind, he being a lawyer acquainted with mining law, and then went out to the area for the purpose of establishing his corners "in accordance with his location notice". In the process of locating his placer claim Mr. Fuller stated that he went "west" from his location notice about $\frac{1}{4}$ mile (1320 feet) at which point he believed that he was on the west section line of Section 18. Having such a belief it is inconceivable that Mr. Fuller would intend to run the west side line of his claim in a Northwest direction which would of necessity put the major part of his claim on the patented land of J. J. Kunzler and thus it would be invalid. Then in addition to this it stands uncontroverted in the record that Mr. Fuller told Mr. Hatch and Mr. O'Gara that his boundary lines were on the cardinal points of the compass and he

drew exhibit 13 to show this fact. The defendants did not post their notice, locate their claim, and file their notice claim until three months after the conversation with Mr. Fuller which is also a strong indication that he intended a north-and-south and east-and-west direction to his boundaries.

The location notice posted by Mr. Fuller was insufficient because it did not name the locators, and also because it did not contain a description which could be readily traced on the ground. Of course taking the description in the notice in accordance with its courses and distances a claim can be traced which is oriented north and south and rectangular in shape which lies alongside and to the east of defendants' placer claim. However, it is impossible to trace out a claim as described by Mr. Fuller's surveyor (Ex. 16) by reference to the location notice or by any traverse, course, distance, or monument mentioned therein.

The lower Court found as a fact that Mr. Fuller failed to mark his corners properly. Therefore under the law it must be determined that both the notice and the location is insufficient. At the very least it must be determined that Mr. Fuller failed to describe the land in his notice that he "intended" to claim, and that he made no amendment to his notice even though he had ample time to do so after defendants had told him that they were going to locate as close to him as they could on his west side (TRS 297 1. 8-19) (which is also uncontroverted in the evidence), and thus any priority Mr. Fuller may have had has been lost

and defendants claim should be held to be prior in respect to such conflict areas as may exist between the two claims.

The judgment of the lower Court should be reversed and defendants be given the prayer of their counter-claim.

Respectfully submitted,

PETER M. LOWE,
Attorney for Appellants.