

1957

G. T. Rummel et al v. K. R. Bailey, Jr. et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

No. 8622

UNIVERSITY, UTAH

MAY 3 1958

G. T. RUMMEL, et al., APPELLANTS
(PLAINTIFFS)

K. R. BAILEY, JR., et al., RESPONDENTS
(DEFENDANTS)

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1958

Clerk, Supreme Court,

Appellants' Brief

Appeal from the Seventh Judicial District Court
in and for San Juan County, Utah.

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IN THE SUPREME COURT OF THE STATE OF UTAH

G. T. RUMMEL, M. M. HARDIN,
MATHEW P. ROWE and ROY M.
EIDAL, doing business as LA
SALLE MINING COMPANY, a
partnership,

Appellants (Plaintiffs),

—vs.—

K. R. BAILEY, JR., and JOLENE
BAILEY, husband and wife; E. J.
HALL and RUTH HALL, husband
and wife; MILTON C. NIELSON and
ESTELLA NIELSON, husband and
wife; F. G. McFARLANE and S. R.
HULLINGER,

Respondents (Defendants).

Case
No. 8622

Appellants' Brief

Appeal from the Seventh Judicial District Court
in and for San Juan County, Utah.

STATEMENT OF CASE

Appellants were plaintiffs below. Respondents were
defendants below. The parties will be referred to herein
as they appeared in the trial court.

This is an equity suit in which plaintiffs seek to quiet their title to their Red Canyon Nos. 1 through 11 unpatented mining claims in San Juan County, and to secure an accounting for ore mined and sold by defendants. The principal defendants, Bailey, Hall and Nielson by Counter Claim assert title in themselves as to the conflict area by virtue of alleged prior location of their claims, known as Maybe Nos. 1 to 4, Red Fry Nos. 1 to 4 and Cedar Mesa No. 5 Mining Claims. The relative position and exact geographical conflict between the claims are shown by Exhibit P-97. The claims are located on Public Domain of the United States in what is known as White Canyon. The surface areas may fairly be described as rough. See U. S. Geological Survey Map, Exhibit P-4.

As will be hereinafter pointed out, plaintiffs concede that they have not established a discovery on other than their Red Canyon No. 6 and Red Canyon No. 9 claims. Plaintiffs' Red Canyon No. 6 claim conflicts with portions of defendants' Maybe Nos. 2, 3, 4, and Red Fry No. 1 locations. Plaintiffs' Red Canyon No. 9 claim conflicts with portions of defendants' Red Fry No. 1 and Cedar Mesa No. 5 locations (Exh. P-97). Plaintiffs contend that all of defendants' claims are wholly without validity.

It is felt that the following chronological outline will be helpful:

April 2, 1953: Date of Notices of location of defendants' Maybe Nos. 1, 2, 3, 4, and Red Fry Nos. 1, 2, 3, and 4 claims. (Exhs. D-40, D-41)

July 24, 1953: Application for Oil and Gas Lease Serial Utah 010245 filed under the Mineral Leasing Act of February 25, 1920, as amended (41 Stat. 437; 30 USCA 181), by Henry Marks, covering all of land in controversy. (Exh. P-25, R. 975*, Exh. P-97)

August 7, 1953: Oil and Gas Lease Serial Utah 010245, dated as of September 1, 1953, issued to Henry Marks pursuant to said application. (Exhs. P-25, P-26)

August 18, 1953)

August 24, 1953): Dates of Notices of Location of plaintiffs' Red Canyon Nos. 1 through 9 claims and Red Canyon No. 10 claim respectively (said Notices having been posted about September 15, 1953, as hereinafter discussed). (Exh. P-36)

September, 1953: AEC drill hole No. 78 completed on plaintiffs' Red Canyon No. 6 claim (portion in conflict with defendants' Maybe No. 3 claim) with discovery of ore in hole at depth in the Shinarump formation. This was shortly prior to posting of said Red Canyon Nos. 1-10 Notices. (R-182)

October 1 and 2, 1953: Respective dates of Amended Notices of Location of plaintiffs' Red Canyon Nos. 6 and 7 claims, posted on said dates. (Exh. P-36)

October 3, 1953: Date of Amended Notices of Location of plaintiffs' Red Canyon Nos. 9 and 10 claims and Notice of Location of plaintiffs' Red Canyon No. 11 claim, posted on said date. (Exh. P-36)

*(R-975) refers to page 975 of the Record on Appeal. Similar form is used throughout this Brief for reference to the Record on Appeal.

October, 1953: AEC drill holes Nos. 95 and 98 completed on plaintiffs' Red Canyon No. 6 claim (portions in conflict with defendants' Maybe Nos. 3 and 6 claims respectively) with discovery of ore in holes at depth in the Shin-arump formation. (R. 209, 182-3)

December 15, 1953: Date of Notice of Location of defendants' Cedar Mesa No. 5 claim. (Exh. D-40)

December 31, 1953: AEC drill hole No. 109 completed on plaintiffs' Red Canyon No. 9 (portion in conflict with defendants' Red Fry No. 1) with discovery of ore in hole at depth in Shin-arump formation. (R. 209, 181)

April 28, 1954: Date of defendants' Notice of Lease Application as to Cedar Mesa No. 5, (Exh. D-40) posted on said date under provisions of U. S. Atomic Energy Commission Domestic Uranium Program Circular 7 (10 CFR 60.7) (hereinafter referred to as "Circular 7"). The record does not show that defendants filed any Lease Application with AEC pursuant to this Notice or that defendants filed with AEC any Withdrawal of Lease Application as required by Public Law 585, 83d Congress (68 Stat. 708; 30 USCA 501). The record does affirmatively show (Exh. D-40, p. 9 of Supplement, certified by abstractor May 1, 1956) that the abstractor was, in the county records, "unable to find any Withdrawal of Lease Application for Cedar Mesa No. 5," such recording being required under Public Law 585.

May 21, 1954: Date of plaintiffs' Notices of Lease Application as to Red Canyon Nos. 1 through 11 claims, posted on said date under provisions of said Circular 7. (Exh. P-36)

June 25, 1954: Date of AEC acknowledgment of filing with AEC plaintiffs' Lease Application No. O.G. 1021 embracing the Red Canyon Nos. 1 through 11 tracts (those tracts covered by said Notices of Lease Application). (Exh. P-37)

September 1, 1954):

September 25, 1954): Dates of plaintiffs' Amended Notices of Location as to plaintiffs' Red Canyon Nos. 1 through 9 claims, and 10 and 11 claims, respectively, posted on said date "for the purpose of correcting any errors in the original location, description or record, or validity * * *, and for the purpose of obtaining the benefits" of Public Law 585, said Amended Notices having been recorded September 29, 1954. (Exh. P-36)

September 30, 1954: Date of defendants' Amended Notice of Location as to defendants' Cedar Mesa No. 5, posted on said date "for the purpose of correcting any errors in the original location, description or record, or validity * * *, and for the purpose of obtaining the benefits" of said Public Law 585, said Amended Notice having been recorded October 21, 1954. (Exh. D-40)

October 7, 1954: Date of recording copy of withdrawal of plaintiffs' Lease Application No. O. G. 1021, above mentioned, the original of said withdrawal having been forwarded to AEC on September 29, 1954. (Exhs. P-36 and P-38)

Trial was had to the Court, the presentation of evidence lasting seven days. The record is lengthy, and it is the intention of counsel to refer to the same as briefly and as fairly as possible.

Plaintiffs' title was initiated in the following manner: In the first part of September, 1953, two agents and employees of plaintiffs, Richard F. Pasco and Irving W. Andrews, went into the area for the purpose of prospecting, having been drawn there by reports of drilling by The Atomic Energy Commission, (R-91) an agency of the United States government. This agency is commonly referred to, and is hereinafter referred to, as the AEC.

Richard F. Pasco, one of plaintiffs' agents who assisted in the location of plaintiffs' claims, is a University of Utah graduate in geology. Prior to his employment by plaintiffs he had been employed as an AEC geologist (R-85); he was not in the employment of plaintiffs at the time of the trial (R-87).

The plaintiffs located their claims in September, 1953, although their agent predated the certificates to August, 1953. Plaintiffs relied for discovery upon the following: The property, as noted above, was being drilled by the AEC and cores and cuttings from the drill holes were found, observed and examined. In the opinion of plaintiffs the ore bearing cores found and observed by them indicated that it would be worthwhile to locate claims, which they then did.

The evidence also developed that the Public Domain of the United States, upon which these claims were located, was made the subject of an oil and gas lease granted by the United States acting through the Bureau of Land Management of the Department of the Interior;

the application for and issuance of this oil and gas lease, a copy of which was introduced in evidence as Exhibit P-26, precluded the making of mining locations after July 24, 1953, unless the claims were validated pursuant to Public Law 585, 83d Congress, which became effective August 13, 1954. The law pertaining to the effect of the withdrawal of the area from mining location, and the necessity of the defendants having made a discovery and of having taken all other steps to perfect a valid and effective mining location on Public Domain of the United States prior to the date of July 24, 1953, will be reviewed and discussed at a later part of this brief.

Defendants claim their title was initiated by Milton C. Nielson. At the time Nielson did the acts relied upon he was acting as an agent and employee of the two other defendants, Hall and Bailey. His interest in the claims in litigation was acquired at a subsequent date. According to the testimony of the defendant Nielson, lines 22-30, p. 24, of his deposition, the defendant E. J. Hall prepared and wrote the location certificates for the defendants' claims in Monticello, handed them to the defendant Nielson, who was paid \$1,000.00 by Hall and Bailey to erect location monuments on an indefinite number of claims. (See his deposition p. 34) At the time Nielson performed these acts he was a full time employee of Walker Lybarger, which firm was performing work in the area for the AEC (Exhs. P-28 through P-35). During the period of time Nielson allegedly erected the location monuments, he certified, by signing the pay-

roll, that he worked full time and drew travel pay (R-552 lines 4-5), although at the time his deposition was taken he testified that he was not on the Walker Lybarger payroll at the time he erected the monuments. This witness made no attempt to discover ore on the defendants' claims either at the time he asserts he put up the location monuments or afterwards. (See lines 28-30, p. 8, lines 24-30, p. 9, line 1, p. 10, and lines 23-25, p. 11 of his deposition). The testimony of this witness was that his acts were confined to the erection of location monuments, that he not only made no attempt to discover ore on any of the claims, but that in fact he made no discovery on any of the claims. At lines 6-9, p. 15 of the deposition this witness, upon having the following question propounded to him, "Question: You didn't make any discovery of ore on any of the claims?" answered as follows: "Answer: No, sir." The witness affirmed this fact again at lines 19-25, p. 18 of his deposition.

The defendant Nielson acquired a one-third interest in these claims subsequent to the time he allegedly put up the location monuments. (Lines 25-26, p. 34 of his deposition)

The mining claims in question are located on an uplift, the geological formation on surface being known as the Mossback. At the trial the defendant Nielson testified that he had seen "sandstone lenses" on top of the Mossback. Substantial production of uranium has been encountered in the general area, all coming

out of the Shinarump and no production or even exploration has taken place in the Mossback.

The case was orally argued to the Court and Findings of Fact and Conclusions of Law were entered. The trial Court did not permit the taking of a record at the time of oral argument and the making of the Court's oral decision from the bench. In making his decision from the bench the Court verbally announced that in his opinion what he referred to as the "Comstock Law" (General Mining Laws of 1872, 17 Stat. 91, 92; 30 USCA 23, 28) should be changed, and it was his decision that the defendants be awarded and given all of the mining claims lying underneath the "sandstone lenses," which had been observed by the defendants. There was no finding by the Court, either verbally from the bench or in his written findings, as to which of the claims, if any, were in fact situated beneath the "sandstone lens."

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT ERRED IN HOLDING PLAINTIFFS' CLAIMS INVALID BECAUSE OF FRAUD.

POINT II.

THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE AND APPLY ESTABLISHED LAW AS TO WHAT CONSTITUTES A VALID DISCOVERY ON A LODE MINING CLAIM.

POINT III.

THE TRIAL COURT ERRED IN HOLDING THAT A VALID DISCOVERY HAD BEEN MADE ON DEFEND-

ANTS' MAYBE NOS. 1, 2, 3, 4 AND RED FRY NOS. 1, 2, 3, 4 OR ON ANY OF THEM PRIOR TO JULY 24, 1953, AND IN HOLDING THAT A DISCOVERY HAD BEEN MADE ON DEFENDANTS' CEDAR MESA NO. 5 AT ANY TIME PRIOR TO SEPTEMBER 25, 1954.

SUMMARY OF ARGUMENT

Defendants' Notices of Location of their Maybe Nos. 1, 2, 3, 4 and Red Fry Nos. 1, 2, 3, 4 claims are dated April 2, 1953, and were recorded April 17, 1953, notwithstanding the fact that defendants do not claim to have monumented the corners of their claims until June, 1953. The weight of the evidence shows, plaintiffs submit, that no such monuments were erected in the area in conflict until after September, 1953. The filing with the Bureau of Land Management of an application for an oil and gas lease on July 24, 1953, and the issuance of an oil and gas lease by the United States pursuant to that application, precluded the making of any valid mining claim or the perfecting of any therefor made invalid mining claim on the lands covered by that oil and gas lease subsequent to the filing of said application and prior to the enactment of Public Law 585. *Filtrol Company v. Brittan and Echart*, 51 L.D. 649; *U. S. v. U. S. Borax Company*, 58 I. D. 426; *Monolith Portland Cement Company v. J. R. Gillbergh, et al.*, 61 I.D. 43. In order, therefore, for defendants' Maybe Nos. 1, 2, 3, 4 and Red Fry Nos. 1, 2, 3, 4 claims to be upheld as valid claims defendants must have made upon each of said claims a valid discovery of mineral or mineral bearing rock in place prior to July 24, 1953.

Public Law 585 permitted the location after that date of mining claims on public lands covered by a mineral lease application or a mineral lease. Said law also made express provision whereunder a mining location made between December 31, 1952, and February 10, 1954, could be validated by the filing of an amended notice of location within 120 days after enactment of that law. Defendants took no steps whatsoever to obtain the benefits of that law as to any of their Maybe Nos. 1, 2, 3, 4 or Red Fry Nos. 1, 2, 3, 4 claims by compliance with the conditions which it prescribed for the obtaining of such benefits. Defendants had not made on any one of their claims a valid discovery before the filing of said oil and gas lease application and their Maybe Nos. 1, 2, 3, 4 and Red Fry Nos. 1, 2, 3, 4 claims are, therefore, without validity. Had defendants complied with the provisions of that Act they could have claimed and obtained the benefits of the discoveries which, subsequent to said oil and gas application, were made by AEC but they did not do so.

Defendants' Cedar Mesa No. 5 claim was located December 15, 1953. It was subsequent to plaintiffs' location and amended location of the Red Canyon No. 9 claim with which it conflicts. The said Cedar Mesa No. 5 was, of course, invalid when located. That defendants recognized this is shown by the fact that they, on April 28, 1954, posted a Notice of Lease Application under AEC Circular 7, and by the fact that on September 30, 1954, they filed an Amended Notice of Location for the purpose of obtaining the benefits of Public Law 585, but the record does not show that

defendants ever filed with AEC a Lease Application in accordance with Circular 7 or that defendants ever filed with AEC a Withdrawal of Lease Application as required by Public Law 585. The record affirmatively shows that no Withdrawal of Lease Application was ever recorded as required by Public Law 585. There is no basis on which the Cedar Mesa No. 5 claim could have any priority antedating September 30, 1954, on which the above mentioned Amended Notice of Location was posted. That date was even subsequent to the filing by plaintiffs on September 25, 1954, of plaintiffs' second Amended Notice of Location as to its Red Canyon No. 9 claim.

The discoveries on plaintiffs' Red Canyon Nos. 6 and 9 claims were made in drilling conducted by AEC during September, October, November and December, 1953. Plaintiffs knew of said discoveries and examined the cores showing ore in the Shinarump formation at a depth of several hundred feet below the surface. Plaintiffs adopted, as they were entitled to, these discoveries. The original locations made by plaintiffs in September, 1953, and the amended locations made by plaintiffs in October, 1953, were invalid when made because they covered lands embraced within an oil and gas lease issued under the Mineral Leasing Act. Plaintiffs' said claims, other than their Red Canyon Nos. 6 and 9, were further invalid because of lack of discovery. On February 10, 1954, in recognition of the preclusion of mining locations on lands covered by an application or lease under the Mineral Leasing Act AEC promulgated its Circular 7 (10 C.F.R. § 60.7) prescribing a procedure

for the granting of uranium leases as to lands so closed to mining location. Under said Circular the first procedural step was the posting on the claim tracts of Notices of Lease Application. This plaintiffs did on May 21, 1954. As contemplated by Circular 7, such Notices were recorded May 27, 1954. Also as contemplated by Circular 7, plaintiffs filed with AEC their lease application which was assigned by AEC No. O.G. 1021.

Section 1 of Public Law 585 enacted by Congress August 13, 1954, granted to one who had located a mining claim after December 31, 1952, and before February 10, 1954, the right to validate said claim, with relation back to the date of otherwise valid location, within 120 days from the date of said Act by (1) posting and recording an amended notice of location and (2) withdrawing the lease application filed with AEC and (3) recording a notice of a filing of such withdrawal.

Plaintiffs complied with all of these steps.

Section 3 of Public Law 585 granted to one who had followed the procedures of Circular 7 a preference right to locate a mining claim within 120 days after the enactment by complying with similar specified conditions. Plaintiffs did everything required to obtain the benefits of section 3 of the Act as well as the benefits of section 1 of the Act.

If the hereinafter discussed pre-dating of plaintiffs' location certificates posted in September, 1953, had any effect upon the date of related priority of plaintiffs' Amended Notices of Location posted September 25, 1954,

pursuant to Public Law 585, such effects could not exceed this:

1. That plaintiffs' Red Canyon No. 6 would relate back to the Amended Notice posted October 1, 1953;
2. That plaintiffs' Red Canyon No. 7 would relate back to the Amended Notice posted October 2, 1953;
3. That plaintiffs' Red Canyon No. 9 would relate back to the Amended Notice posted October 3, 1953; and
4. That plaintiffs' Amended Notices as to the Red Canyon Nos. 1, 2, 3, 4, 5 and 8 would relate back to the Notices of Lease Application posted May 21, 1954

Of course no such relation back could establish a priority in advance of the date of discovery on a particular claim and such relation is therefore of importance only in respect to plaintiffs' Red Canyon Nos. 6 and 9 claims on which discoveries were made.

Defendants' Cedar Mesa No. 5 claim, which conflicts with plaintiffs' Red Canyon No. 9 claim, was not located until December 15, 1953, which was two and one-half months subsequent to the posting of the first Amended (and not pre-dated) Notice of Location of plaintiffs' Red Canyon No. 9 claim. Defendants' Cedar Mesa No. 5 claim was invalid because (apart from its conflict with plaintiffs' prior Red Canyon No. 9 claim) it was located on ground covered by the above mentioned oil and gas lease. The record shows that defendants did not comply with Public Law 585 in respect to said

Cedar Mesa No. 5 claim and thereafter said claim could have no priority in advance of September 30, 1954, when the Amended Notice of Location was filed with respect thereto. That date was five days subsequent even to the second Amended Notice of Location of plaintiffs' Red Canyon No. 9 claim posted September 25, 1954. Apart from these considerations, the record shows that there was no discovery on defendants' Cedar Mesa No. 5 claim even at the time of trial. So that there may be no confusion it should be pointed out that the discovery which was made on plaintiffs' Red Canyon No. 9 claim was made on a portion of said claim which was not embraced within defendants' Cedar Mesa No. 5.

The trial court's finding (Finding 7, R. 58) that the pre-dating of plaintiffs' notices of location on their Red Canyon Nos. 1 through 10 claims was "for the purpose and intent of defrauding Defendants and other locators" is in direct conflict with the evidence. The trial court's conclusion that plaintiffs' Red Canyon Nos. 1 through 11 claims were invalid is wholly without support in the record and disregards the facts and the law in so far as said conclusion relates to plaintiffs' Red Canyon Nos. 6 and 9 claims. The trial court should have found for plaintiffs and against defendants as to plaintiffs' Red Canyon Nos. 6 and 9 claims. As to the remainder of plaintiffs' claims, the court's conclusion of invalidity was warranted on the basis of, and only on the basis of, lack of proof of discovery. As to each of defendants' claims the court should have found them to be invalid. There was no proof of discovery on plaintiffs' Maybe Nos. 1, 2, 3, 4 and Red Fry Nos. 1, 2, 3, 4

claims, or any of them, prior to the filing of the above mentioned oil and gas lease application and discovery thereafter could not avail defendants because they did not seek or obtain the benefits of Public Law 585. As to defendants' Cedar Mesa No. 5 claim, no discovery at any time was shown.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN HOLDING PLAINTIFFS' CLAIMS INVALID BECAUSE OF FRAUD.

In announcing his unreported decision some eight weeks after all evidence was submitted, the trial judge stated at the outset that he found plaintiffs' mining locations to have been located fraudulently and that all of plaintiffs' claims were, therefore, void. After making this sweeping statement, no other or further consideration was given by him to the several acts of plaintiffs in effecting their mining locations and discoveries.

The fact situation with respect to this particular issue is quite simple and is without conflict. The original location notices on defendants' Maybe and Red Fry claims were dated April 2, 1953, and were recorded on April 17, 1953. It is observed immediately, therefore, that any irregularity in the dating of plaintiffs' claims could not adversely affect the defendants since they do not contend that anything occurred between the date of such notices and the date of posting which could be of any materiality as to defendants' asserted rights.

When plaintiffs' agents went into the White Canyon area during the fore-part of September, 1953, they heard that defendants asserted the existence of mining locations in this general area, but no specific information was available as to where the claims might be found if they then existed upon the ground. Plaintiffs' agents contacted defendant Hall and asked him to go upon the ground and show plaintiffs defendants' corners which defendants refused to do. (R-454-5) Plaintiffs' agents then examined the conflict area and found no evidence of defendants having erected monuments in the area. (R. 114-5, 237) They thereupon determined to make mining locations of their own.

Against this background of general rumor and defendants' evasiveness, it is understandable that plaintiffs' agents became apprehensive as to just what might happen as soon as they began monumenting their discoveries. They were not seeking to "jump" or pre-date anyone's claims, because they did not believe that any claims existed. These notices should have been dated in September, 1953, and they were in fact dated August 18, 1953.

Richard F. Pasco testified that at the time plaintiffs' claims were located he saw no evidence of other claims in that area. (R. 114-115)

Irving W. Andrews testified to like effect. (R. 237)

W. D. Mathews, who worked as a surveyor in the conflict area in performance of work for AEC during

and prior to September, 1953, testified that the only monuments he saw in the conflict area were those of plaintiffs' Red Canyon claims. (R. 358-361)

Jay W. Smith, a geologist for AEC who was in the conflict area from November, 1952, into July, 1953, and again in September and October, 1953, testified that the only monuments he found were those of plaintiffs' Red Canyon claims. (R. 872-875)

In a signed statement made November 23, 1953 (Exh. P-78), Earl Bielz stated that when in the general area on June 2 and 3, 1953, with Bailey and Hall, the claims which they staked were "on the Shinarump rim under the heavy white rim," which would explain why others did not observe defendants' monuments since that area under the rim is not part of the conflict area. After defendant Hall had flown to Colorado to see Bielz, Bielz repudiated his earlier statement. (Exh. P-78, R. 747)

The trial court has erred in holding plaintiffs' mining locations void on account of fraud for the following reasons:

(1) No evidence was tendered or received establishing fraud upon *anyone* in so far as plaintiffs' original locations are concerned. The pre-dating injured no one.

(2) There was no pleading by defendants of fraud which would entitle them to rely upon the pre-dating of plaintiffs' notices as constituting fraud.

(3) None of plaintiffs' October Amended Notices of Location were pre-dated and even if the original Location Notices by some legerdemain were found fraudulent and void, the Amended Notices in and of themselves were and are complete, and unassailable in so far as their regularity is concerned.

We shall consider the foregoing points in the order stated.

The very essence of fraud is that someone must be injured or defrauded. The irregularity in the dating of plaintiffs' Notices did not cause defendants to be defrauded or even remotely affected. Had plaintiffs dated their original Notices so that the same ante-dated April 2, 1953, then defendants might be in a position to complain, but such is not the case. There is no conflict between the dates on the respective Location Notices. Defendants Notices are dated April 2, 1953, and plaintiffs' Notices are dated four months later, on August 18, 1953.

Defendants did not plead that they had been defrauded or injured by reason of said irregularity. In *Muldoon et al. v. Brown et al.*, 21 Utah 121, 59 P. 720-721, this Court stated:

"If such location notice is fraudulently dated anterior to the time of its actual location, in order to place the claimant's location in advance of or more advantageous to that of another locator, it should be considered as fraudulent; and when a party seeks to avoid the effect of such

notice, relying upon such fraud, the fraud should be pleaded.” (Emphasis supplied.)

At the trial (R. 426, 427) defendants’ counsel read from 58 C.J.S. at page 97 the following statement:

“If the locator fraudulently antedates his notice to defeat another location, it is void.”

At that time the trial court stated (lines 5-10, R. 427):

“Well, I think you have got to make some more showing than has been made now, for he (Pasco) said he did it not to defraud anybody else but because of his low regard for the ethics of everybody else that was in there, he was afraid they were going to cheat him, and that’s why he says he did it, and that wouldn’t necessarily be to defraud, would it?”

Notwithstanding the foregoing, counsel for defendants prepared and the trial court signed the following finding No. 7 (R. 58):

“At the time of locating said claims by plaintiffs herein, they pre-dated their notices of location to the 18th day of August, 1953, with the purpose and intent of defrauding Defendants and other locators.”

We believe the foregoing analysis and authorities amply establish the prejudicial error in the finding that plaintiffs’ original locations were fraudulent.

The trial court completely disregarded the legal significance of plaintiffs’ Amended Notices. Between August 18, 1953, the date on plaintiffs’ original locations,

and the dates of plaintiffs' Amended Notices, defendants did not post or file as to their Maybe Nos. 1, 2, 3, 4 or their Red Fry Nos. 1, 2, 3 or 4 notices of any kind or description involving the conflict area, and there is nothing whatsoever to indicate any such posting or filing by other locators. There were, therefore, no intervening rights.

In discussing the right of locators to file amended location notices, *Lindley on Mines*, 3rd Ed., page 926, states:

“But in the nature of things, this right exists throughout the mining regions, independently of statutory regulations. The supreme court of California held, at a time when there was not a statute in that state on the subject, that if locators have any apprehension as to the sufficiency of their original location, there is no reason why they should not be permitted to modify or amend it.”

POINT II.

THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE AND APPLY ESTABLISHED LAW AS TO WHAT CONSTITUTES A VALID DISCOVERY ON A LODE MINING CLAIM.

The trial court committed two fundamental errors in this case. The other aberrations we complain of flow naturally from those two basic errors. The first error resulted from the trial court's misconception of the fraud question which we believe we have fully demonstrated above.

The second and equally or more serious basic error results from the court's failure to recognize and apply the well established rule that an actual discovery of ore in place is essential to a valid mining location and from the court's disregard of the legal effect of the oil and gas lease application, Circular 7 and Public Law 585.

To understand this discovery question and the reasoning of the trial court a few words of explanation are necessary. The surface of the conflict area is the exposed Mossback which is a member of the upper Chinle formation. Approximately 300 to 600 feet below this formation is the Shinarump. It is from this Shinarump formation that all of the ore has been mined and extracted from the conflict area, or from other properties in the general area. The drift into that ore zone on the conflict area was driven from the west. The ore belt, zone, or "channel" as it is sometimes called, was exposed on the extreme west of the mountain at a point removed from the conflict area. On the opposite side of this mountain a discovery of ore had already been made in the deep lying Shinarump formation and mining was in progress. (R. 585)

It was theorized by some that an ancient stream which ran over the earth's then surface meandered through this area connecting the east and west ore exposures in the Shinarump formation. Water, ancient and modern, courses a devious path and it was therefore pure conjecture as to whether or not the east and west channel exposures were related. Dr. Leland Stokes, head of the Department of Geology of the University

of Utah, and an eminent geologic and uranium authority, long before this lawsuit arose had occasion to study the channeling in this particular conflict area and he concluded and reported before this trial and also testified at this trial that in his opinion these particular east and west exposures were from different Shinarump channels and that they were unrelated. (R. 948)

The AEC during the summer of 1953 undertook to try to locate and delineate the course of the channel whose exposure was visible to the west of this mountain and, as aforesaid, at considerable distance from the claims in controversy. This it did by the only actual method possible — a drilling program. At first even the AEC drilled in the wrong direction — its initial series of holes were barren. (R. 198-199) It then shifted its rigs to the south and finally discovered the course of the channel. The AEC personnel then continued to drill in a general easterly direction gradually defining the course of the meandering channel in the underlying Shinarump formation.

Good news has swift feet. Word spread rapidly that the AEC had discovered ore. The first non-barren ore hole was bottomed August 18, 1953. (R. 199) The conflict area was staked by plaintiffs in the forepart of September, 1953, and for the reasons hereinafter stated we maintain that defendants' monuments were actually placed upon the ground not earlier than September, 1953. Defendant Bailey met plaintiff Andrews in the area September 18, 1953. (R. 271) The discovery had been made — everyone then knew it — the cores along-

side the core holes demonstrated it. There was a race to stake.

No surface discovery was made by anyone. The surface of the conflict area is from 300 to 600 feet or more above the Shinarump ore horizon. The Mossback surface was barren of significant mineralization in April, 1953, and has been barren ever since. No one prospected that area from 1953 until a few weeks before the trial when defendants in a desperate drive to make a case for surface discovery went with their men (Geologist Davis and friend Bronson) into the area in search for evidence to be presented at the trial. Then for the first time did defendants take samples for assay. The assays obtained meant nothing, for the Mossback formation had produced nothing and promised nothing.

The defendants sometime prior to trial date apparently realized their dilemma: They were relying upon claims which had a paper priority date of April 2, 1953. An oil and gas lease application by a third party not involved in this suit and covering the conflict area had been filed under the Mineral Leasing Act on July 24, 1953. (Exh. P-25)

Defendants were confronted with the necessity of trying to establish a discovery prior to July 24, 1953, sufficient to validate their claims. Since no discovery in the Shinarump under the conflict area had then been made, their only possibility was to assert discovery in the barren Mossback.

It is not surprising that defendants were able to get low geiger readings and assay reports from the

exposed sandstone ledges in the Mossback formation. But these were not of sufficient significance to induce anyone to spend time or money in prospecting in that formation. Every miner on the Plateau and every lawyer who deals with them knows the insatiable eagerness which possesses the prospector who thinks he has found significant mineralization to immediately sack up a sample of his discovery and hasten off to the assayer to learn just what he has discovered. The very fact that no such thing was done by any of the defendants is persuasive. Defendants claim to have made this discovery in early 1953. Not one of them chipped a sample for assay until their legal dilemma dawned upon them a few weeks before trial time three long years later — 1956. Apparently this fact appeared singular to the trial judge for said he, speaking of defendant Bailey's lack of curiosity about the latter's observation of the sandstone ledges,

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“Well, I don't just know how to measure excitement here. It didn't excite him enough to send the sample in for assay.” (R. 665, line 25)

Contrary to the general understanding the presence of uranium in minute quantities is almost universal. It was proven at the trial that the common earth on the Court House lawn at Monticello registered radio-activity at a percentage equivalent to the radio-activity in the Mossback sandstone lens pointed out by defendants. Mr. McPherson, formerly connected with the exploration department of the AEC at Grand Junction, Colorado stated:

"A. Well, we went out — well, first we started in the motel over here, and we probed down in the soil there, and it showed .28. Then we went in the dirt north of the courthouse here, and the probe lying in the ground showed double background, and soil north of the building here showed .08 to .12, and in another place it showed .04 to .14 and a little bit of coal out there, we laid the probe on that and showed .05.

Q. Would you consider that a likely place to prospect in view of those readings?

A. No, I wouldn't." (R. 935)

Defendants also sought to establish some connection between the unproductive Mossback formation and the Shinarump channel below. Dr. Stokes pointed out that they are unrelated. (R. 948)

The allotted space for this entire brief could be devoted to a narration of evidence disproving discoveries in the Mossback but we believe that a reading of the full record will clearly show that they were non-existent.

To constitute a valid discovery upon a lode mining claim there must be an actual finding within the limits of that claim of mineral or mineral bearing rock in place, sufficient to warrant a reasonably prudent man in the expenditure of further time and money in a reasonable expectation of developing pay or commercial ore. That requirement includes two elements: First, mineral or mineral bearing rock in place must be found within the limits of the claim; but that does not suffice, for the second requirement is that the so found mineraliza-

tion must have a significance which would warrant a pursuit of the so found mineralization in a reasonable expectation of developing pay or commercial ore. Both elements are necessary. There is no discovery merely because one might feel warranted in prospecting in the hope of finding a discovery. Discovery consists of something more than a general concept that the mountain might have possibilities. Plaintiffs challenge defendants to point out, with record, references and support, just when and just where defendants made their discovery on the Maybe No. 1; just when and where they made their discovery on the Maybe No. 2; just when and where they made their discovery on the Maybe No. 3; just when and where they made their discovery on the Maybe No. 4; just when and where they made their discovery on the Red Fry No. 1; just when and where they made their discovery on the Red Fry No. 2; just when and where they made their discovery on the Red Fry No. 3; just when and where they made their discovery on the Red Fry No. 4; and just when and where they made their discovery on the Cedar Mesa No. 5.

If defendants or anyone else found in the Mossback mineral in place which would justify a reasonable man in expending further time and money in exploring the same, why is it that not ten cents was expended by the AEC, the defendants, the plaintiffs or anyone else in exploring the same? The answer is this: The formation which had produced in the area, and the only formation which had produced in the area, was the Shinarump, and that was hundreds of feet below the barren Mossback.

Dr. Stokes, after being qualified not only as an expert geologist but as one experienced in the practical ways of prospectors, was asked:

“Q. Do you have an opinion as to whether or not a reasonably prudent miner or prospector would have spent time and money in pursuing the showing in the sandstone lens above the Mossback rim in an effort to discover ore?

A. I have an opinion.

Q. Will you state your opinion.

A. Whether a prudent miner would spend time and money in pursuing the evidences or leads that he would see in the sandstone above the Mossback on the contested property?

Q. Correct.

A. My answer is no, I don't think such a man would do such a thing.

Q. Why do you say that, Dr. Stokes?

A. Mainly from the fact that he did not pursue it there or at any other place that I know of in that district. If it is worth pursuing, some one should have pursued it. That is one reason. In the other place, of course, it should be obvious of course that his returns would be very meager. He would probably lose money trying to mine that kind of material.” (R. 943-945)

The great amount of time and money which defendants spent shortly before the trial in an effort *ex post facto* to find a discovery where none had been found and where there had been no prospecting can

only be explained in context of defendants' legal dilemma.

All the while this court room drama was unfolding, the trial court kept departing on a mental excursion of his own upon which, at least at the outset, neither counsel for plaintiffs nor counsel for defendants were wont to travel.

The trial court kept remonstrating:

How can there be any question of discovery in this case? There is an ore exposure in the Shinarump to the east of the conflict area. There is an ore exposure in the Shinarump to the west of the conflict area. Does anyone have the temerity to say that a reasonable man wouldn't stake claims in between? In this situation, to use his word, the "Comstock" lode law that a locator must find mineral in place is not applicable.

His consistent and erroneous assumption appears to have been that valid claims can be staked on projection or upon the assumption that inasmuch as ore shows on either side of the mountain a man may make valid locations in the middle without actual discoveries. The following excerpts from the trial court's statements during the course of the trial are sufficient to demonstrate his erroneous thinking on the basic subject of discovery:

"THE COURT: * * * I think that the discovery of 1872 mines may not work with uranium * * *." (R. 94)

"THE COURT: * * * Well, I am a little afraid that since Congress refuses to do anything

about the Comstock Lode law that the courts may have to. * * *” (R. 853)

“THE COURT: * * * While I know geologic formations in the Comstock Lode law have been thrown out still I am not of the opinion that it can be ignored in the uranium field, and I would not limit counsel. He may be properly leaving that out thinking that our Supreme Courts may hold to the old law * * *.” (R. 932)

The error which has resulted in this case stems not solely from the adoption of an erroneous theory of discovery by the trial court. The mischief arises from the fact that the trial court did not write his own findings. Defendants drafted them and defendants, although having unequivocally announced their acceptance of the court’s “forward looking” position with respect to discovery, were uneasy passengers on that excursion with respect to discovery and they drew findings, not on the theory indicated by the court but upon the basis of asserted surface discoveries which were, as the record shows, never made.

Under the mining laws of the United States there are but two kinds of mining claims: placer mining claims and lode mining claims. There is no mining law which differentiates a mining location the objective of which is the production of uranium from a mining claim located with the objective of producing any other mineral. The mining claims involved in this action are lode mining claims and the legal principles applicable thereto are the same in every respect as those located in anticipation of the production of gold, silver, lead or any

other mineral. There can be no dispute as to the necessity of discovery to support the validity of any one of defendants' claims or any one of plaintiffs' claims.

This court, in *Gibbons et al. v. Frazier et al.*, 68 Utah 182, 249 P. 472, 473, succinctly stated the requirement:

“As applied to the location in question, there were at least two essential facts required by Rev. St. U.S. §§2320, 2324 (U. S. Comp. St. §§ 4615, 4620 (30 USCA §§23, 28)), viz: (1) The discovery of mineral within the claim; and (2) the marking of the location on the ground so that its boundaries may be readily traced. Lindley on Mines, § 328. *Until the requirements of law are complied with, a location is not perfected.*” (Emphasis supplied.)

There were no discoveries on any of the claims involved in this action until those discoveries were made by AEC in its drilling. Those discoveries by AEC were after July 24, 1953, when the above mentioned oil and gas application was filed. Plaintiffs could and did avail themselves of those discoveries as to their Red Canyon Nos. 6 and 9 claims because they took those steps which were necessary to validate their claims and obtain the benefits of Public Law 585.

This Court, in *Pitcher et al. v. Jones et al.*, 71 Utah 460, 267 P. 184, 186, stated:

“Nor is it essential that the locator of a mining claim should be the first discoverer of a vein or lode in order to make a valid location, and if it appears that the locator knew at the time

of making his location that there had been a discovery of a vein or lode within the limits of his location, he may base his location upon it and thus avoid the necessity of making a discovery for himself. 18 R.C. L. 1122; 40 C.J. 785."

Defendants' claims had not been perfected by discovery when said oil and gas lease application was filed and the AEC discoveries availed defendants nothing because they did not take those steps necessary under Public Law 585 to validate their claims.

That to constitute discovery on a lode mining claim there must be such a finding on the claim of mineral or mineral bearing rock in place as would warrant the expenditure of further time and money in a reasonable expectation of developing pay or commercial ore is so well established as not to require citation.

The word "lode" has a common heritage with the word "lead" and those words in mining are generally used interchangeably. The finding of slight mineralization in a lode, lead, or vein can constitute discovery under circumstances where the following of that lode, lead or vein offers a reasonable prospect of success in the encountering and development of pay or commercial ore. The finding of equivalent slight mineralization in a sedimentary formation, the further prospecting of which would not be justified in any reasonable expectation of developing pay or commercial ore therein, could not constitute discovery. We are confident that the court will recognize this vital distinction. The "sandstone lens" which defendants claim to have observed in the Moss-

back formation presented nothing to justify its prospecting. Defendants did not prospect it. It promised no lead to anything other than worthless rock. It is, of course, common knowledge that the Shinarump underlies the barren Mossback. But this mere geological orientation could no more constitute a discovery than could the mere existence and observation of an anticline be deemed to constitute a discovery of oil or gas.

POINT III.

THE TRIAL COURT ERRED IN HOLDING THAT A VALID DISCOVERY HAD BEEN MADE ON DEFENDANTS' MAYBE NOS. 1, 2, 3, 4 AND RED FRY NOS. 1, 2, 3, 4 CLAIMS OR ON ANY OF THEM PRIOR TO JULY 24, 1953, AND IN HOLDING THAT A DISCOVERY HAD BEEN MADE ON DEFENDANTS' CEDAR MESA NO. 5 CLAIM AT ANY TIME PRIOR TO SEPTEMBER 25, 1954.

The trial court found (Finding 2, R. 57) that Milton C. Nielson made a valid discovery on each of defendants' Maybe Nos. 1, 2, 3, 4, and Red Fry Nos. 1, 2, 3, 4 claims on or prior to April 2, 1953. Plaintiffs submit that such finding cannot be sustained under the record in this case. No drilling was started in the conflict area until after July 24, 1953. The ore-bearing Shinarump under the conflict area was completely and deeply buried.

Defendant Nielson was no neophyte. He was not only acquainted in the general area — he had mined and prospected that area. (R. 520-521) He of course was acquainted with the operations of his partner, brother-in-law and witness at the trial Donald V. Blake. Blake was the owner of the "Gizmo" mine which we

have referred to as being on the eastern side of the mountain. His mine was in the Shinarump formation. Nielson well knew that the possibility of finding ore existed in the Shinarump and not in the Mossback.

Before plaintiffs discovered that Nielson was a secret partner in defendants' venture his deposition was taken at Price, Utah. That deposition is short and we urge the reviewing court to read it — or in any event to read pages 8, 13 and 15. A reading of Nielson's deposition in which he categorically states that he made no "discovery of ore on any of the claims" (Deposition, p. 18) belies his "refreshed" recollection at the trial.

Between the time of the taking of defendant Nielson's deposition and the trial, it would appear that he was awakened to the fact that a discovery was necessary to the validity of the claims and that the discovery must have been made prior to July 24, 1953. At the time his deposition was taken, Nielson testified he neither saw nor attempted to discover any ore on Maybe No. 1. (Deposition, p. 8, lines 12 to 30) He further testified that he subsequently did not go back and make any discovery. At lines 23-25, p. 8 of his deposition, he states that he made no discovery on Maybe No. 2. The same testimony was given as to Maybe No. 3 at lines 13 to 18, p. 13 of his deposition. The same statement, i.e. he made no discovery on any of the claims, is found at lines 6 to 8, p. 15 of his deposition.

On trial, this witness, who had then been joined as a party to the action, had a different story to relate from

the witness stand. He testified (R. 524) that he remembered a "sandstone lens" on top of the Mossback formation, that he had a counter, and was amazed at the count! When he saw this is not shown. On cross-examination (R. 545) he declared that at some earlier date he had seen some copper stain in the conflict area. In direct opposition to his testimony on deposition, defendant Nielson testified on trial that he made discovery on Maybe No. 2 before he put up the location monuments. This "discovery" was supposedly made sometime in 1952, the year preceding the location of the defendants' claims. He did not say where anything was that he claimed to have seen. Plaintiffs submit that proof of discovery on a mining claim requires more than such illusive generality. Each claim must stand on its own feet as to what was found and when and where.

The following appears in Nielson's deposition:

"Q. You didn't make any discovery of ore on any of the claims?

A. No, sir." (Deposition, p. 15, lines 6 to 8)

The witness has impeached himself and destroyed his credibility.

The trial court found (Finding 4, R. 57) that on June 2 and 3, 1953, K. R. Bailey, Jr., and Earl Bielz made a valid discovery on each of defendants' Maybe Nos. 1, 2, 3, 4 and Red Fry Nos. 1, 2, 3, 4 claims. Plaintiffs submit that such finding cannot be sustained under the record in this case.

Bailey first saw the conflict area June 2, 1953. (R. 582) It is not contended by defendants that Bailey made discovery on June 2 or 3, 1953, in the Shinarump formation underlying the conflict area. Defendants contend he made his discovery on the exposed Mossback formation. Let us read every word Bailey stated at the trial concerning his alleged acts of discovery. Mr. Frandsen is questioning Bailey on direct examination concerning the Mossback sandstone ledge or lens, which Bailey observed on June 2, 1953: (R. 586, 587)

“Q. What kind of a rim?

A. Well, I couldn't tell from there, but later I examined it, and it was of a sandstone texture.

Q. * * * while you were there on that trip, did you make a further examination of this sandstone rim that Milt pointed out to you?

A. I didn't examine the rim too closely. I crossed where this rim leads quite a few times in the course of our work there, and I examined fragments that had come from this rim, and in one place *I think I looked* at the rim. I I don't know whether I chipped anything from this rim or not. I don't think I did at that time, but I examined the rock, and it appeared to be — have carbon in it and also seemed to be some what I took to be iron leach in some of the sandstone.”

On June 3, 1953, Bailey crossed a canyon to the west and located some claims there (R. 590) and then returned to locate some Cedar Mesa claims not in the conflict area. (R. 657) On these claims, with which

we are not concerned, he observed some "brown mineralization." (R. 592)

Mr. Frandsen then asked:

"Q. Just tell us what you did Ken.

A. And I believe that was all before leaving the area." (R. 592)

Counsel for defendants, apparently being unsatisfied with the state of the record relative to Bailey's discovery, within a few minutes returned to the subject on further direct examination: (R. 595)

"Q. Did you make any specific check on these claims for the presence of ore or mineralization?

* * *

"MR. JENSEN: I have it in my notes that he's already answered this — of these rocks showing down from the rim, and now he is going over it again.

"THE COURT: (to Mr. Bailey) Did you say you think you have?

A. I think that's correct.

THE COURT: I didn't recall — the objection will be sustained."

Counsel then asked Bailey if he observed mineralization under the Mossback in the Shinarump formation, which, of course, did not involve the conflict area, and Bailey answered affirmatively. (R. 596)

There is no purpose in multiplying words. The foregoing verbatim transcript of anything and everything said by Bailey simply proves that he neither discovered

anything nor thought he discovered anything in the conflict area on June 2 and 3, 1953.

Even a cursory reading of the transcript shows there is no evidence to sustain the finding that Bailey "made a discovery of mineralization and metals in rock in place" on each of the claims on June 2 and 3, 1953. Such a finding defies explanation.

In its Finding No. 6 (R. 57, 58) the trial court found that defendants Hall and Bailey on December 15, 1953, "found mineralization and rock in place on Cedar Mesa No. 5."

Counsel have diligently and repeatedly searched the record of the testimony of Hall and Bailey in an attempt to find any evidence of discovery on Cedar Mesa No. 5, either on December 15, 1953, or on any other date. We submit that the testimony of Hall is devoid of anything remotely related to discovery on Cedar Mesa No. 5; likewise, is the testimony of Bailey.

Plaintiffs challenge defendants to point this Court's attention to any evidence showing any discovery at any time on defendants' Cedar Mesa No. 5.

The trial court's finding (Finding No. 9; R. 58) that plaintiffs had made no discovery on their Red Canyon Nos. 1 through 11 claims is clearly in error to the extent that it relates to plaintiffs' Red Canyon Nos. 6 and 9

claims. The record is clear as to the discoveries made by AEC in its above discussed drilling on plaintiffs' Red Canyon Nos. 6 and 9 claims. Plaintiffs' knowledge of, adoption of and right to adopt these discoveries is hereinabove discussed and, for that reason, such error, although relied upon, has not been made the subject of a separate point and section of this Brief.

CONCLUSION

Plaintiffs submit that the Findings and the Decree are not supported by the law or the evidence. If the law requiring discovery is to be abrogated, that abrogation must be by Congress. If the requirement is to have any reality and be not mere fiction, and the decided cases establish its reality, it requires more than the bland assertion of locators that they saw a "sandstone lens" on the mountain where their claims were located — a lens in a formation nowhere shown to have been productive.

We submit that the title of plaintiffs as to their Red Canyon Nos. 6 and 9 claims should be quieted in them against defendants and that this Court should direct the trial court to enter such a decree, to require defendants to account to plaintiffs for ores removed by them from plaintiffs' said Red Canyon Nos. 6 and 9 claims and to find and decree that the validity of none of the claims involved in this action other than said

Red Canyon Nos. 6 and 9 claims has been established
in this action.

Respectfully submitted,

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