

1957

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

G. T. RUMMELL, H. M. HARDIN,
MATHEW P. ROWE and ROY
M. EIDAL, doing business as
LA SALLE MINING COM-
PANY, a partnership,
Appellants (Plaintiffs),

— vs. —

K. R. BAILEY, JR., and JOLENE
BAILEY, husband and wife; E. J.
HALL and RUTH HALL, hus-
band and wife; MILTON C.
NIELSON and ESTELLA NIEL-
SON, husband and wife; F. G.
McFARLANE and S. R. HUL-
LINGER,
Respondents (Defendants).

UNIVERSITY UTAH

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Case
No. 8622

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Clerk, Supreme Court, Utah

Respondents' Brief

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NIELSON and ESTELLA NIEL-
SON, husband and wife; F. G.
McFARLANE and S. R. HUL-
LINGER,
Respondents (Defendants).

Case
No. 8622

Respondents' Brief

STATEMENT OF FACTS

The Respondents join with the Appellants in refer-
ring to the parties as they appeared in the trial court,
the Respondents being the Defendants and the Appellants
being the Plaintiffs. In general the Defendants agree
with statement of facts made by the Plaintiffs. However,
Defendants desire to call the court's attention to a few

facts which relate to the Defendants' case and show Defendants' position perhaps a little more clearly. As was indicated by the Plaintiffs, this action was brought by the Plaintiffs to quiet title to certain mining claims in San Juan County, State of Utah. The Defendants, Bailey, Hall and Nielson counterclaimed to quiet title to mining claims covering the same conflict area. Although the claims differ by name, Plaintiff's Exhibit No. 4 shows the relative location of the mining claims of Plaintiffs and those of Defendants. The area in general was referred to at trial and will be referred to in the brief as the "conflict area."

In the Spring of 1953, the Defendants, Bailey and Hall employed the Defendant, Nielson, to locate some mining claims for them in the Red Canyon area of the White Canyon Mining District. Prior to the location of these mining claims, the Defendant Milton C. Nielson, had been engaged in prospecting and locating mining claims for a period of twenty years. (R. 520) Mr. Nielson was also familiar with the White Canyon, Red Canyon and Fry Canyon area having prospected the same and frequented these canyons on prior trips. (R. 521, 522, 523) During this time, Mr. Nielson also observed that there was a channel going through the Moss Back formation in the Fry and Red Canyon area and that this channel had a definite mineralization and copper stain. This particular area had been observed by the Defendant Milton C. Nielson, in 1952. (R. 623) Pursuant to an arrangement with the Defendants K. R. Bailey, Jr., and E. J. Hall, Mr. Nielson in the latter part of March, 1953, or

early April, 1953, located ten mining claims known as the Maybe Nos. 1, 2, 3, and 4, Red Fry Nos. 1, 2, 3, and 4, Lucky and Chance. (R. 550) Plaintiffs' Exhibit No. 2 shows the general channeling that goes under the Moss Back formation between Red Canyon and Fry Canyon. Shortly before Mr. Nielson went into the area to locate the claims for the Defendants Hall and Bailey, he had gone into the area to prospect it and that he had a geiger counter with him and observed the sandstone lens on top of the Moss Back formation in the conflict area which gave him a very good count. He said, "I was quite amazed at the count I got out of it." He found quite a bit of mineralization (black copper he called it), and was also amazed at the thickness of this particular lens or sandstone formation to be found in that area and place. This lens covers the conflict area. (R. 524) In June of 1953, the Defendant, K. R. Bailey, together with a Mr. Earl Bielz went into the area and put up the corner posts on all of the claims. (R. 583, 584 and Exh. D59) This same procedure was followed in locating the claims known as Prize, Sure Bet and Cinch and the other claims located by the Defendants herein.

The Plaintiffs in their brief have abandoned all rights to any claims except the Red Canyon No. 6 and Red Canyon No. 9. There appears to be no conflict on the other claims of the Defendants herein except those referred to by the Plaintiffs and conflicting with these two particular claims, and therefore there should be no doubt but that this court should affirm the judgment as to all other claims. There has been no argument about the complete-

ness of the notices of location placed on the claims or the recording thereof in the office of the County Recorder. These are all shown by Defendants' Exhibits Nos. 40, 41 and 42. Plaintiffs take issue with the validity of Defendants' mining claims upon one particular point. That the claims had no discovery and that the monuments were not erected prior to July 24, 1953, upon which date an oil and gas lease application was filed with the United States Department of the Interior and covering part of this area.

STATEMENT OF POINTS

The issues raised by the Plaintiffs will be consolidated under the following headings:

I. THE FINDING OF THE COURT THAT THE DEFENDANTS BAILEY AND HALL HAD A VALID DISCOVERY AND PROPERLY LOCATED MINING CLAIMS PRIOR TO JULY 24, 1953, INsofar AS THE MAYBE NOS. 1, 2, 3, and 4, AND RED FRY NOS. 1, 2, 3, and 4 ARE CONCERNED IS AMPLY SUPPORTED BY THE EVIDENCE.

II. PLAINTIFFS FAILED TO PROVE THAT THEY HAD ANY VALID MINING CLAIMS IN THE RED CANYON NO. 6 and NO. 9, BECAUSE THEY FAILED TO SHOW ANY DISCOVERY OF ORE BY THEMSELVES AND FAILED TO PROPERLY LOCATE THE CLAIM KNOWN AS RED CANYON NO. 9.

III. THE PLAINTIFFS, BY BACK-DATING THEIR CLAIMS, PERPETRATED A FRAUD AND THE CLAIMS ARE VOID.

ARGUMENT

POINT I

THE FINDING OF THE COURT THAT THE DEFENDANTS BAILEY AND HALL HAD A VALID DISCOVERY AND PROPERLY LOCATED MINING CLAIMS PRIOR TO JULY 24, 1953, INsofar AS THE MAYBE NOS. 1, 2, 3, and 4, AND RED FRY NOS. 1, 2, 3, and 4 ARE CONCERNED IS AMPLY SUPPORTED BY THE EVIDENCE.

The appropriate sections of the law relating to the location of mining claims are found in 30 U.S.C.A. Sec. 23 and Sec. 28 and in U.C.A. 1953, 40-1-2, 40-1-3 and 40-1-4. The substance of these code provisions require that the location must be made upon the public domain and that the locator shall have made a discovery of the vein or lode within the limit of the claim located and then distinctly mark upon the ground the claim not to exceed 1500 feet by 600 feet and by posting a notice of location upon the ground containing the name of the locator, the name of the claims, the date of location, and the number of feet with the general direction of the side lines of the claim. Within 30 days after the location of the property, the notice of location must be recorded in the office of the County Recorder. In the principal case, no issue has been raised by the Plaintiffs as to the forms of the notice of location, all of which were introduced in evidence (Exh. D, 40, 41 and 42) and likewise, no issue is raised as to the fact that this was open public domain in April, May and June and up until July 24, 1953. The sole issue raised by the Plaintiffs is whether or not there was any discovery

upon the claims of the Defendants prior to July 24, 1953. The extent of ore necessary on the property to constitute the discovery has been summarized in 36 *Am. Jur. MINES AND MINERALS*, Sec. 87, page 339:

“Although the requisites of a discovery are not prescribed by statute, a great number of decisions laid down the rule that the showing of mineral must be of character that a person of ordinary prudence, whether he is a miner or not, would feel justified in expending further time and money in development of the property in view of the prospect of profit. While a discovery cannot be predicted upon an imaginary or conjectural existence of minerals, it is not required that the deposits shall be sufficiently extensive to yield any specific quantity, or even to pay operating expenses at the time. Thus, when a lode explorer finds rock in place, containing mineral, he may be said to have made a discovery, whether the mineral is rich or poor. If the discovery is upon any portion of the apex on the course or strike of the vein found within the limits of the claim, it is a sufficient discovery to entitle the locator to obtain title, but it is not enough that outcroppings on the surface indicate the existence of lodes or veins that may bear valuable deposits.

“It seems that the requirements for a discovery are more liberal in a controversy between two mineral claimants than in one between a mineral explorer and a person seeking the land for agricultural purposes.

“The question whether there has been a discovery of mineral as will sustain a mining location is one of fact.”

Let us examine some of the record as to the discovery on the Defendants' claims: Milton C. Nielson is a man who had been engaged in prospecting and staking mining claims for a period in excess of twenty years and had prospected the area of the particular claims and the general White Canyon area prior to the location of these claims. (R. 522, 523) Mr. Nielson was familiar with the geology and the types of structure and location of the Happy Jack mine which is considered as a multi-million dollar uranium mine located in the White Canyon area. In Mr. Nielson's opinion the channeling, the outcropping of mineralization, copper and so forth, were similar in the White Canyon area to that on the north side of the Red Canyon where the conflict is located. (R. 522) Prior to 1953 he had observed the channeling and mineralization in the area of the Red and Fry Canyons. (R. 523) It is important to note that he had been one of the locators of the Gizmo mine located in Fry Canyon and which is just across a Wingate bluff from the particular property in question in this case and is contiguous on the east. There was a known channel of ore on the Gizmo claims at the time of the location of the claims in the conflict area by the Defendants. Mr. Nielson testified that in the latter part of March, or the first part of April, 1953, that he staked the claims in the conflict area (R. 524) and that before he had staked those claims he testified:

“I was in that area, and had a counter with me. I remember very well. I particularly remember a sandstone lens that is up on top of the Moss Back Formation, and I had this counter on it; and I was quite amazed at the count I got out of it.

There was quite a little bit of mineralization, black copper, I call it, and it was amazing the thickness of this particular lens of sand to be found at that place." (R. 524)

Mr. Nielson further testified that he prospected the Shinarump and found that in the contact between the Shinarump and the Moenkopi there was a definite channel and that it had a copper outcrop, a very definite copper mineralization. (R. 525) He said:

"Well, there is a channel that goes through the Mossback mesa up at Fry. It goes through on the east, southeast side, and comes out on the southwest side, a definite channel with tremendous mineralization and copper stain on the outcrop." (R. 523)

He also found that it gave a good reading on the geiger counter and he said the thing that was interesting to him was the thickness of the lens. Mr. Nielson further testified that he had prospected this area from the Mossback rim back to the base of the Wingate bluff. He further testified that after he had prospected this area he met with Ed Hall and made out the notice of location and the map to cover this particular area. (R. 526) Then he went from the conversation with Ed Hall back into the conflict area and there located the claims based upon this discovery which he had made. (R. 527) Mr. Nielson then described in detail how the locations were made and the monuments placed on the claims. (R. 529-530) Mr. Nielson then took a brown crayon and marked on Plaintiffs' Exhibit No. 4, the place that he recalled the sandstone lens appearing. (R. 532, 533) On the day following the

location of these claims, the Maybe Nos. 1, 2, 3, 4, and Red Fry Nos. 1, 2, 3, 4, the witness, Mr. Nielson, went to the area below the Mossback rim and staked some additional claims based upon the mineralization and the copper showing on the contact of the Moenkopi and Shinarump formation. (R. 535) At a subsequent date in June, 1953, the Defendant Ken Bailey, together with Mr. Earl Bielz came into the area to stake the corners of all the claims and the witness, Mr. Nielson, showed Mr. Bailey the sandstone lens that he had prospected and also the monuments that he had placed. (R. 538) Upon cross-examination, Milt Nielson was asked whether or not he was looking for mineralization while he was out prospecting. His answer was, "That was my purpose always in prospecting is looking for mineralization." (R. 546)

Mr. Nielson described the manner in which he set up the discovery monuments on the mining claims. (R. 528, 535) In discussing this, Mr. Nielson said that he set up the discovery monument along the sandstone lens on the top of the Moss Back Rim and under that procedure he would step off a distance of approximately 600 feet and then set up a monument. (R. 528) Then he set up some monuments at the contact of the Moenkopi and Shinarump formation. At this place he established the monument at the point of the mineralization that he observed. (R. 535) This was the manner in which he located the Maybe Nos. 1, 2, 3, and 4, Red Fry Nos. 1, 2, 3, and 4, and the Lucky and Chance claims. (R. 536) At a subsequent date, Mr. Nielson then returned to the area with Mr. Bailey and Mr. Earl Bielz and pointed out the monuments to them in

order that they could put up the corner monuments. (R. 538) Mr. Nielson had been back within a matter of a few months of the trial to observe whether or not the monuments were still located as he had placed them and he testified that they were. (R. 539) On cross-examination, Mr. Nielson testified that he was familiar with the general White Canyon area and that he was also familiar with the area in which the Happy Jack mine is located and he testified that the geology between the Maybe mine or the properties in conflict herein and the Happy Jack mine were similar. (R. 542) Mr. Nielson testified that he was most concerned about the sandstone formation and the channeling system (R. 547) and did not pay too much attention to the green stain. (R. 547) It should be observed that the Defendant, Nielson, was employed as a powder man for the Walker-Lybarger Construction Company about the time of March and April, 1953, and that as such he was building roads in the area of the White Canyon and Red Fry group. That during this time he was frequently in and out of these various canyons. At the trial he was unable to put down the exact date in which he may have established these monuments but was certain that it was the latter part of March or the first part of April of 1953, and before the date that the notices of location bear. (R. 551) At the times that Mr. Nielson had observed these location monuments after they were originally put up, they were as he had placed them and that they had not been moved. (R. 555)

Mr. Nielson was cross-examined in particular about the discovery he had made on the Maybe No. 2 claim, and

upon his cross-examination stated that he had made discovery before the location of the claims. He stated, "I said I seen ore before I made these — put up these discovery monuments." (R. 560) He also testified on cross-examination about the Maybe No. 3 claim in particular and said that he had made discovery upon that claim before the location. (R. 561) Point is made by counsel in their brief that the Defendant Nielson testified on his deposition that he had made no discovery of ore on the claims. Reference is only made in the brief of the counsel to the deposition of the witness. However, in the record (R. 562, 563) the witness says that he had made the discovery before the time that he placed the monuments out there on the property and that he was never asked whether or not he had made a discovery before in his deposition. Milt Nielson when he was asked on redirect about the statement made in his deposition said that he was referring to the time that he put up the monuments. (R. 576, See also R. 578 on re-cross-examination.)

The Defendant E. J. Hall was called as a witness and testified that he, too, was familiar with the geological formations in the area from his discussions with other people. (R. 430) That the Happy Jack mine and the Gizmo property were located in the same proximity. (R. 431) That he was engaged in the business of selling mining equipment and frequently talked to people who were interested in mining in the White Canyon area. (R. 429, 430) He knew that uranium ore had been discovered in the Gizmo area prior to March of 1953. (R. 431) Prior to March of 1953, Mr. Hall and Mr. Bailey had discussions

with Mr. Nielson about the location of the the mining claims in the Red Fry area. (R. 433, 434) Pursuant to these discussions they made out notices of location at the home of Mr. Hall and delivered these to Mr. Nielson for the purpose of making the locations. (R. 434, 435) On a Sunday in June of 1953, Mr. Hall went out with Mr. Ken R. Bailey, Jr. to the conflict area and there he observed the location monuments and the corner monuments and also the location notices. These were the same notices that he had written and delivered to Mr. Nielson. (R. 539, 540, 541)

Mr. Hall observed mineralization on the claims of Red Fry No. 3 and Maybe Nos. 3 and 4. (R. 445) This was in June of 1953. Mr. Hall testified that he saw the monuments on Maybe Nos. 1, 2, 3, and 4, Red Fry Nos. 2, 3, and 4, but he was not quite certain about seeing those on Red Fry No. 1. (R. 461, 462) Mr. Hall then took a blue crayon and marked on Plaintiffs' Exhibit No. 4 the area in which he had found mineralization on these claims and this covered the Maybe Nos. 2 and 3 claims as shown by two blue lines on this Exhibit. (R. 471) When asked what kind of mineral was found in it he said, "Well, I would say there was uranium in it." (R. 471) This mineralization was observed in June of 1953. The Defendant, K. R. Bailey, as a witness testified that he had been in the White Canyon Mining District and his recollection being once before 1953, and that he observed the geological formation in the White Canyon area. (R. 581)

K. R. Bailey further testified that he had not been in the conflict area prior to June, 1953. That he had gone

into the area, observed the monuments placed by Mr. Nielson, that he and Mr. Bielz then put up the corner monuments, (R. 586-588) and at the same time he made an examination of the sandstone lens which Mr. Nielson had pointed out to him. (R. 587)

Ken Bailey examined this sandstone rim that appeared on the property and that had heretofore been testified to by Mr. Nielson. He says that on that occasion, Mr. Nielson pointed out to him the various places on this sandstone rim and that he checked this sandstone rim with a scintillator and he got a count on the scintillator along this rim. (R. 604, 605) This was checked every 20 to 40 feet at five or six different intervals. He then took a green crayon and marked on Plaintiffs' Exhibit 4 the location of this rim as he found it. This covered the Maybe Nos. 1, and 2, Red Fry 3, and 4, Maybe Nos. 3 and 4, and Red Fry No. 1 claims.

Mr. Bailey, at a subsequent date, showed the discovery monuments and the corner monuments to Mr. David G. Holder, a licensed engineer, who subsequently surveyed in all of the claims and these monuments and corners were in the same position that they were when they had been set up by Mr. Bailey. He said that he did find that a few had been knocked down, he didn't recall how many. (R. 630) It is not incumbent on a claimant to see that the corners and monuments remain standing, once they have been properly posted and erected. (*Miehlich v. Tintic Standard Min. Co.*, 60 U. 569, 211 Pac. 686.) At that time they examined the location papers and they were in

all the monuments. In April, 1956, Mr. Bailey took Mr. Holder again into the area to have him survey in some of the places where the samples were taken from the sandstone rim. (R. 639) Samples were taken from the sandstone lens and Mr. Holder marked the location from which these samples were taken and surveyed in these locations. (R. 640) These locations were the same places that Mr. Bailey had examined in June of 1953 at the time of the staking of the corner monuments on these claims and he covered the same point and took samples of these particular points. (R. 640) In May of 1956, Mr. Bailey again went into the area to the same point on the sandstone rim that had been pointed out by Mr. Nielson and which had been surveyed by Mr. Holder and from which Mr. Bailey had taken samples to be assayed, and this time took Mr. Leland Davis, a geologist, over the same points, same area. He went to the points shown on Exhibit 70. (R. 641; 680; 684) The samples taken by Mr. Bailey from this sandstone lens were assayed by the Smith Laboratories and the assay reports were received in evidence as Defendants' Exh. No. 67. (R. 645) The following percentages of U_3O_8 (uranium ore) were shown: .011; .014; .008; .061; .039; .016; .007; .009; .006; and .011. These samples were taken from the rock in place on the claims. Mr. Bailey testified that he had to use a prospect pick in digging out the rock. (R. 646) The corner monuments as built by Mr. Bailey were three to four feet high. (R. 659)

Mr. Leland Davis, a geologist, was called as a witness for the Defendants and testified that he was completing his doctor's degree in geology and that he had had a lot

of practical experience in mining. His father was a miner and he had grown up with it most of his life. He had mined with his father on the Colorado plateau for uranium. Most of it was in the time back in 1949. (R. 673) He also testified that for the past two years he had been evaluating uranium properties on the Colorado plateau and the San Juan county area as a geologist. Defendants' Exhibit No. 68 shows the channeling formation that occurs in the conflict area by showing the thickening of the various lenses, the Moss Back and the Shinerump in this particular area as drawn and described by Mr. Davis. (R. 77) Mr. Davis went to the same point on this sandstone lens that had been pointed out to him by Mr. Bailey and in turn which had been pointed out by Mr. Nielson. (R. 679) Mr. Davis then took his own samples and made measurements on the lens and at the points indicated. As a result of the assays taken, Mr. Davis says that they definitely show uranium in the assays. Mr. Davis also testified that the sandstone rim constituted rock in place. (R. 682) Defendants' Exhibit No. 70 shows the numerous points from which the assays were taken and the shale facies that were referred to by Mr. Davis. This covers Red Fry Nos. 2, 3, and 4, and Maybe Nos. 1, 2, 3, and 4, and also Red Fry No. 1 with a very slight extension onto the Cedar Mesa No. 5. (R. 684) Mr. Davis testified throughout that this area contained good mineralization but did not contain any ore that he could find in the upper formation. He distinguishes between "ore" as being that rock or material that can be mined profitably at the particular time, whereas mineralization is non-

profitable in mining operations. (R. 688) Mineralization is all that is needed to constitute discovery—not commercial ore. (*Chrisman v. Miller*, 197 U.S. 313, 25 Sup. Ct. 468, 49 L. ed. 770) Mr. Davis finds importance in this channeling and says that the channeling is reflected from the Shinerump formations up into the Wingate bluff. (R. 694) Mr. Davis further testified as to the readings he obtained upon the geiger counter and scintillator in this channel area that has heretofore been referred to and found a high count for uranium (U308) in this area running as high as .23 U₃ O₈. (R. 700) Mr. Davis was asked from his experience as a miner in prospecting areas if he had an opinion as to whether the mineralization that he found in the areas would justify a reasonable prospector in exploring and developing these claims. His answer was:

“The area within the channel reflection, which is an important indication for uranium mineralization in that particular area, is definitely a great key to a miner or prospector to go further developing on this particular property; and I definitely would agree, of course, with the amount of mineralization noted and the channel conditions noted there that further development work would be certainly a feasible thing for a prospector to do.”
(R. 703, 704) (Emphasis added)

The court asked Mr. Davis then to take a red crayon and to draw the lines between which limits he thought a reasonable prospector would spend money in designating further work. The witness, Mr. Davis, then drew on Exhibit No. D. 70, two red lines showing the area and this covered the Red Fry Nos. 1, 2, 3, and 4; Maybe Nos. 1, 2, 3, and 4 claims, and also the Chance claim and Lucky

claim. (R. 704) Although Mr. Davis did not run these red lines up through the Wingate formation upon further inquiry by counsel he was asked whether or not he could indicate the eastern limits and he said in view of the facts here given of the Wingate it may go a considerable distance through there, and definitely reflects that part of this cliff might have been an extension of the channel and upon being asked by the court as to whether he said the mineralization section ran under the Wingate Cliff he answered, "Yes." (R. 705, 706) Upon cross-examination, counsel asked Mr. Davis whether or not he thought a reasonable man would go in and spend money based upon the leads that were shown in the upper Chinle and Mr. Davis said yes, as it is related to the geology in the area. (R. 706) Certainly the leads were sufficient to cause the Atomic Energy Commission (hereinafter referred to as A.E.C) to go in and do further drilling in this area known on what they called the Cub Channel. Mr. Derrell Spencer, one of the engineers called for them as a geologist, said that it was his job to delineate these channels by drilling and that he went in this particular area as part of this project of drilling the area. (R. 708)

Mr. Walter R. Bronson was called as a witness for the Defendants. He had been engaged in the mining business since 1937 and was superintendent of the Four Corners Uranium Corporation at the time of the trial. All of his exploratory mining had been in the field of vanadium and uranium. He was familiar with the White Canyon area. He testified that from his experience as a practical miner the most likely place to find uranium and vanadium

ore in this area was where you could find channels. (R. 773) Milt Nielson testified that he had observed this channeling in 1952 before he located the claims of the Defendants. (R. 546) The fact that the channel was through the Shinarump formation was admitted by all parties in court. Mr. Bronson testified that he had examined these claims and that there is a definite channel there. (R. 775) Furthermore, he made tests with a scintillator and got a reading from the area as low as .04 and as high as .10. (R. 780) He found this to be rock in place on the claims and identifies the claims to which they relate. These definitely covered the Maybe No. 3 and Maybe No. 4 claims. (R. 780 and Exh. D. 70) This witness was asked:

Q. "From your observations there of the channeling, this outcropping, and this sandstone rim that you observed in the Chinle and other formations present there, and from your experience as a miner and prospector, do you have an opinion as to whether there was sufficient ore or mineralization there to justify a prospector in spending money there staking claims and further developing those claims?"

A. "There definitely was. I have did it on lot less." (R. 782)

Dr. W. L. Stokes, who is a Professor of Geology at the University of Utah, was called as a witness for the Plaintiffs. He testified that there were not sufficient surface indications to warrant a practical miner in further exploring this area. (R. 944-945) The interesting fact is that the Defendants, as practical miners, did do further exploratory work and uncovered a million dollar body of

uranium ore. There is obviously a vast difference between the opinion of a "practical miner" and an expert "geologist" like Dr. Stokes. However, Dr. Stokes admitted upon cross-examination that there had been drilling done on properties of less potential than this particular property. (R. 959) Dr. Stokes was asked:

Q. "If I may develop the court's point there, the court's question there, Dr. Stokes, the experience of the drilling that has taken place in areas similar to this and in less potential areas have resulted over the year since 1950 to 1955 of approximately recovery in thirty per cent (30%) of them then?"

A. "I think that is correct." (R. 959-960)

Furthermore, he admitted that he would have advised the A. E. C. to do exploratory work on these claims because they had the money to spend. (R. 959) Dr. Stokes had examined Mr. Charles A. Steen's Mi Vida property before it was staked by Mr. Steen and felt it was not worth locating for mining claims. (R. 961)

Earl Bielz was called as a witness and testified that he and Mr. Ken Bailey went into the conflict area and there set up the corner monuments on the locations on June 1, 2, and 3, 1953. (R. 731, 732 and Exh. D. 59) Mr. Donald Blake went into the area of conflict in the Spring of 1953 and there he observed the rock monuments and the location notice of one particular claim (one of the Maybe claims). Although he does not recall which claim in particular, he did see the claim, and from the base of the Wingate could observe the other monuments. (R.

757, 758) This shows that these claims were definitely monumented in the Spring of 1953. Because this area had been staked, Mr. Blake did not locate any claims here but went upon the Wingate Butte to make his locations. On November 29, 1953, David C. Holder, a licensed engineer, went into the area with Mr. Ken Bailey and there located the monuments and the location notices in all the claim monuments of these claims, and surveyed in the claims of this conflict area. (R. 790-792)

Having recited the fact showing the discovery made by the Defendants in this case, let us examine some of the cases and rules of law applicable thereto.

The general rule as to the amount of ore necessary to constitute a discovery has been laid down by the United States Supreme Court in the case of Chrisman v. Miller, 197 U. S. 313, 322, 25 Sup. Ct. 468, 49, L ed. 770.

“Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.”

With this premise I am sure none of the parties would disagree. The only problem is applying the facts to determine whether or not there is sufficient evidence to warrant a reasonably prudent person to justify further expenditures. We have examined numerous authorities on this question of discovery and are unable to find any decision

relating to the evidence necessary to support discovery as it relates to a uranium claim. Two law review articles have been examined and are very helpful in connection with this particular point. See 9 *Wyoming Law Journal*, page 214: "Valuable Mineral Discovery" by Elmer C. Winters, and 27 *Rocky Mountain Law Review*, page 404: "Discovery Requirements and Rights Prior to Discovery on Uranium Claims on the Colorado Plateau" by William G. Waldeck. The latter law review article at page 408 indicates that there are two main lines of authority as to the amount of mineral necessary to constitute a discovery. The numerical preponderance of the decisions indicate that there must be actual finding of the body of mineralization in order to constitute a discovery. The more liberal decisions, however, accept the fact that indications of mineral are sufficient to constitute a discovery.

The first group of cases are referred to in 2 *Lindley on Mines*, page 777, and cites the case of *Book v. Justice Mining Company* 11 Mont. 309, 28 Pac. 315 as follows:

"Where the locator finds rock in place containing mineral, he has made a discovery within the meaning of the statute, whether the earth or rock is rich or poor, whether assay's high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery and warrants the prospector in making a location of a mining claim."

27 *Rocky Mountain Law Review*, page 408, then goes on to discuss the second group of cases as follows:

"Another series of decisions takes a more liberal view of the requirements of discovery. The

cases seem to have as their touchstone the broad interpretation of the term 'lode,' which has been set forth as follows:

'As used by miners before being defined by any authority, the term 'lode' simply meant that formation by which a miner could be led or guided; it is an alteration of the verb 'lead,' and whatever a miner could follow, expecting to find ore, was his lode.' (Citing: footnote 19, *Eureka Consol. Mining Co. v. Richmond Consol. Mining Co.*, 8 Fed. Case 819, 822, No. 4, 548 (D. Nev. 1877), aff'd, 103 U. S. 839 (1880). See *Harrington v. Chambers*, 3 Utah 94, 1 Pac. 362 (1882).

"This definition of the term 'lode' facilitates the acceptance in evidence of indications of mineral to establish the presence of a valid discovery. It has been held, accordingly, that a valid location may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money following it, with a reasonable expectation of developing ore. Furthermore, such a location may be made on a vein which appears at the surface, not as ore or mineralization, but merely as 'gangue' or vein filling matter. (Citing: footnote 20, *Montana Central Ry. v. Migeon*, 68 Fed. 811 (D. Mont. 1895); *Burke v. McDonald*, 2 Idaho 1022, 29 Pac. 98 (1892); *Harrington v. Chambers*, supra note 19; *Columbia Copper Mining Co. v. Duchess M. M. & S. Co.*, 13 Wyo. 244, 79 Pac. 385 (1905)).

"A similar rule has been utilized in the so-called Alaska 'muck discovery' cases. In these cases the placer deposits containing pay ore are covered with overburden and the only sign of their presence is in the 'colors' that lie at the surface. Courts have shown great leniency and liberality

in applying rules of discovery to these locations. (Citing: footnote 21, 2 Lindley Mines 336 (3d ed. 1914)).

“In another important respect the liberal view differs from the strict interpretation. There are cases in which specific geologic conditions and formations have become recognized in a certain area as characteristic indications which, when followed, will lead to ore. Miners have located claims on property where they detect the same type of conditions and formations which on nearby property, when followed, led to an ore body. The strict interpretation has denied repeatedly that such circumstances can take the place of actual discovery of mineral in satisfying the requirements of discovery under the mining laws. The liberal view, however, does accept such conditions as probative evidence in establishing a discovery. (Citing: footnote 22, Ibid.) In two cases, *Shoshone Mining Co. v. Rutter* (Citing: footnote 23, 87 Fed. 801, 807 (9th Cir. 1898)), and *Ambergris Mining Co. v. Day* (Citing: footnote 24, 12 Idaho 108, 85 Pac. 109, 111 (1906)), such evidence was considered. In the former case the court said:

‘^{the} ~~The discovery of~~ seams containing mineral-bearing earth and rock, which were discovered before the location was made, were similar in their character to the seams or veins of mineral matter that had induced other miners to locate claims in the same district, which, by continued developments thereon, were found to be a part of a well-defined lode or vein containing ore of great value. The discovery made at the time of the Kirby location was therefore such as to justify a belief as to the existence of such lode or vein within the limits of the ground located.’

“In the second case, the Supreme Court of Idaho went even further:

‘If a miner has discovered certain mineral indications which he has followed up with the result that a rich and valuable ore body has been developed therefrom, it seems clear that another miner finding similar indications or conditions on contiguous ground or in the immediate vicinity would be in a measure justified in following up the evidence with reasonable expectation of finding mineral deposits, and this is true even though the indications, rock and deposits, found are such as the expert scientist, geologist and mineralogist in their finest theories tell him are not evidence of mineral deposits or even that they are evidences of the entire absence of mineral.’
(Emphasis added)

“The requirement of discovery by the more liberal view might be summarized as follows: Discovery is satisfied when it is shown that there are such indications or showings of mineral upon a claim as would justify a reasonably prudent person in the further expenditure of his time and money with a reasonable expectation of developing pay or commercial ore.

“In two recent decisions it appears that the Department of Interior may have adopted the more liberal view regarding discovery requirements. (Citing: footnote 25, *United States v. Merger Mines Corp.*, Coer d’Alene 013942, Contest No. 977 (S. F. 48915) (1954)). In each of these cases the sufficiency of the contestee’s discovery was challenged. In the first case, *United States v. Merger Mines Corp.*, (Citing: footnote 26, Contest No. 978—M. S. No. 3373 (1954)), the valuation engineer for the Bureau of Land Management testified

for the contestant that after several examinations of the claims he had found: 'There was no evidence of valuable minerals prospective or otherwise on the claims that would justify the development of a valuable mine.'

"The mining and geological witnesses for the contestee were of the opinion, based on their broad knowledge of the area, that the showings, while not disclosing any pronounced vein and but meager mineral content, were worthy of further prospecting and development. Considering such showings and the proximity of the claims to known mineral deposits, the witnesses believed the expending of time, money and labor for development was justified with a reasonable prospect of developing a valuable mine at depth.

"The manager of the Land and Survey Office, Boise, Idaho, on October 7, 1952, rendered a decision holding the mineral entry for cancellation on the basis that the mining claims had not been validated by discovery. Upon appeal to the Director of the Bureau of Land Management, the Director overruled the decision and stated:

'All of the above indicia, if entirely unrelated to known valuable deposits would mean little to a prudent person desirous of expending his labor and means on a suitable prospect. But the evidence shows that these claims are within a mining district in which similar surface showings are relied on to such extent that many thousands of dollars have been expended not by one but by several prospectors in the area near these claims and several valuable mines have resulted from these expenditures. One company is now extending a tunnel into the same area in which these claims are located at very considerable expense.

‘It is my belief that the major intent of the mining law is to encourage the development of minerals, not to hinder that development. In an area where pay ore is ordinarily found only at great depths, it is obvious that even the most enterprising miner must have more than ordinary faith and courage since he must stake his time and money on following evidence of possible mineral which to many would seem no more than mere will o’ the wisp. Unless the enterprise of such as these is recognized many valuable deposits are doomed to remain dormant in the depths of the earth of no value to anyone. This is not consistent with the great present-day need for the development of minerals in the interest of national defense and the public welfare. Nor is it, I am persuaded, consistent with the intent of the law.

‘Considering the large expenditures of money and evidencing faith of the contestee, the similarity of the showings here to those which have led to the development of valuable mines and the departmental decisions, supra, holding, in effect, that in that locality, a meager showing of mineral has often led to commercial ore attempts, the showing as to discovery in this case is accepted.’

“The second case, *United States v. A. A. M. Arnold* (Citing: footnote 27, Contest No. 978—M. S. No. 3373 (1954)), is practically parallel to the one discussed above and the reasoning is identical.”

The following extract is from 9 *Wyoming Law Journal* 214 (1955) “Valuable Mineral Discovery” by Elmer C. Winters:

“There are no Appellate Court decisions or Department of the Interior decisions as yet relating to a valuable uranium discovery. However, in light of existing precedent, the facts peculiar to the nature and occurrence of uranium-bearing ores and methods of discovery, the factors discussed below undoubtedly will be regarded as significant establishment of a sufficient discovery may require only one such factor although all may be required in situations where evidence based on one type and source is only indicative of the presence of a valuable mineral deposit.

“1. Geological information derived from the knowledge and opinions of experienced miners and experts in the field of mining and geology as heretofore discussed.

“2. Radioactivity readings obtained by the use of (a) Geiger-Muller counters, (b) Scintillation counter on the surface, (c) Core drilling operation supplemented by (a) radioactivity readings obtained by the use of probe-type radiometric instruments, or (b) assay of samples taken from cores. Information may thus be obtained on formations as to depth, thickness of veins and deposits, the type of mineralization and estimates of the value of ore bodies.” Page 217-218.

“The opinions of experienced miners and experts in mining and geology are acceptable in establishing the occurrence, quantity and quality of a mineral deposit. (Citing: *Wilson v. Harnette* 32 Colo. 172 Pac. 395 (1904)). The locator has a wide range of elements from which to select acceptable evidence to support his claim of a valuable discovery. (Citing: *United States v. W. L. Ross*, I. D. Case No. A 26941 (1954)). Evidence of mineral character of the land, development work, testing of samples, that the samples were representa-

tive of the mineral found on the claim, assays and extent of values, and the time expended in examination were the principal factors considered in determining the validity of a claim. (Citing: *United States v. J. C. Ternahan* I. D. Case No. A 26359 (1952); *Monolith Portland Cement Co. et al*, I. D. Case No. A 26281 (1952), *United States v. Claude Allen et al*, I. D. Case No. A 26587 (1953)). The Secretary of the Department of the Interior in discussing the factors which a prudent man would consider in determining whether he had made a discovery has stated: 'The size of the vein, as far as disclosed, the quality and quantity of mineral it contains, its proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts, would be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not.' (Citing: *Jefferson-Montana Copper Mines Co.* 41 L.D. 320 (1912); *United States v. M. W. Monat et al*, I. D. Case No. A 26181 reconsideration (1954)). The uranium prospector thus should utilize information as to the presence of a like geological formations and authentic reports of uranium finds made in those formations. Likewise, the frequency and occurrence of uranium deposits and the possibility that the mineralized area which he proposes to develop may be expected to yield similar results should he consider.'" (Citing: *Burke v. McDonald* 2 Idaho 646, 33 Pac., 49, 50 (1890); *Shoshone M. Co. v. Rutter* 87 Fed. 801, 807, 31 CCA 223 (1898); 2 Lindley on Mines 774)

This court in the case of *Harrington v. Chambers* 3 Utah 94, 1 Pac. 362 (1882), (aff'd 111 U. S. 350) is a case in which the court accepted the testimony of miners that

they had observed iron stain and other indications of ore and in commenting on this testimony and affirming the decision that these were sufficient to constitute discovery the court said:

“The ore, or the indications which determine the prospector to make the locations are seldom confined to one spot. Neither is there any requirement of the law, which compels him to name as the discovery point the precise spot where he first finds ore, or the indications, which to his mind form the lead or lode. In fact, before the location is made, an examination or tracing is often required to determine its course, and in doing this the cropping may be found in numerous places. Which will finally be marked a discovery may depend upon considerations of convenience for work, description, monuments, etc. It was competent for the Plaintiffs to show that ore or mineralized rock or whatever the ‘miner could follow and find ore’ was not only marked discovery, but cropped out at other points within the ‘limits of the claim located,’ and thus strengthen the testimony already in, in reference to the indications at the point called discovery.”

Volume 2 *Lindley on Mines*, pages 774-776 has the following to say about discovery:

“In cases of surface placer deposits and veins or lodes with a visible outcrop, the embarrassments surrounding a locator in establishing a sufficient discovery are not as serious as they are in cases of deposits covered with overburden, or where, by reason of their nature and origin, surface indications or exposures are infrequent, if not entirely wanting. Actually discovery at the surface is impracticable in many cases. In some

localities experience has taught the miner that certain surface conditions, such as what the miners term 'blossom' — a local discoloration of the rocks resulting from oxidation, or seams to some extent mineralized — will, if followed, lead the prospector to merchantable ore and justify location. In such a district where it has been demonstrated that there is a connection between these surface exposures and ore beneath, the courts have held that a location on such an exposure in the district is sufficient to authorize a location.

"In *Shoshone M. Co. v. Rutter*, 87 F. 801, (See also *Hayes v. Lavagnino*, 17 Utah 185, 53 Pac. 1029), the circuit of appeals for the ninth circuit said:

'The discovery of seams containing mineral bearing earth and rock, which were discovered before the location was made, were similar in their character to the seams or veins of mineral matter that had induced other miners to locate claims in the same district, which, by continued developments thereon, were found to be a part of a well-defined lode or vein containing ore of great value. The discovery made at the time of the Kirby location was, therefore, such as to justify a belief as to the existence of such a lode or vein within the limits of the ground located.'

"The Supreme Court of Idaho, in a case involving an ore occurrence similar to that considered in *Shoshone M. Co. v. Rutter*, expressed the following views:

'If a miner has discovered certain mineral indications which he has followed up with the result that a rich and valuable ore body has been developed therefrom, it seems clear that

*another miner finding similar indications and conditions on contiguous ground or in the immediate vicinity would be in a measure justified in following up these evidences with reasonable expectation of finding mineral deposits, and this is true even though the indications, rock and deposits found are such as the expert scientist, geologist and mineralogist in their finest theories tell him are not enough evidence of mineral deposits or even that they are evidences of the entire absence of mineral.’ (See *Ambergris Mining Co. v. Day*, 12 Idaho 108, 85 Pac. 109). (Emphasis added)*

“The rule announced in these cases has been applied by analogy to what is known as ‘muck discoveries’ in the Alaska placer regions. The ‘pay-streak’ in many cases is covered with detrital material, and the only indication of the existence of the placer deposits below which are found in ancient stream channels are the ‘colors’ obtained from the surface overburden.”

2 *Lindley*, *supra*, has this statement as to the amount of discovery necessary between adverse mining claimants on the same property: (See section 336, page 765).

“The tendency of the court is toward marked liberality of construction where a question arises between two miners who have located claims upon the same lode, or within the same surfaced boundaries, and toward strict rules of interpretation where the miner asserts rights in property which neither *prima facie* belong to someone else or is claimed under the laws other than those provided for the distribution of mineral land, in which latter case the relative value of the tract is a matter directly in issue.”

Although the Plaintiffs take the position that the only discovery claimed by the Defendants herein is that of indicated geological formation or structure, the Defendants claim that they both have the discovery of such mineral as well as these other factors and either of which would lead a reasonable person to expend further money and labor in the exploration of said claims. The testimony about the sandstone lens here which was observed by Mr. Nielson and was assayed by Mr. Davis to show the existence of minerals and the testimony of Mr. Davis showing the amount of minerals in this body is good evidence of actual mineral discovery on these claims. The argument of the Plaintiffs herein that the Defendants failed to have discovery is nothing more than a cloud or a smoke screen because in reality the Plaintiffs never had any discovery on their claims, and they are only trying to argue what they call a weakness of Defendants' case in attempt to bolster their own. This weakness certainly does not exist because the Defendants had *discovery* on their claims as found by the court. The Plaintiffs never spent one dime on exploratory work on any of these claims. On the other hand the Defendants negotiated with the A. E. C. to drill and explore these claims. The A. E. C. obtained the verbal consent of the Defendants to drill and subsequently reduced this to writing. (Exhibit D. 23) The A. E. C. further dealt with the Defendants in giving them the information relating to the drilling. (Exhibit D. 24) The Defendants, McFarland and Hullinger, through a lease with the Defendants, Bailey and Hall, commenced mining operations on the properties and spent thousands of dol-

lars before encountering commercial ore. Even then, it was only after these Defendants had taken out hundreds of thousands of dollars worth of ore that Plaintiffs commenced this action. To date no money has been spent by the Plaintiffs on actual exploration and development of any claim in the conflict area.

An interesting argument raised by the Plaintiffs in this case is the argument that the Defendants did not have any discovery on their claims prior to July 24, 1953, at which time an application for oil and gas lease was filed with the Department of the Interior and covering these particular lands. They argued further that since the application for the oil and gas lease was filed this withdrew the land for mining purposes because no valid mining claim had been established at that time. This, of course, indicates that they would concede that if there had been any discovery on the claim prior to the date of July 24, 1953, there would be no doubt but that the Defendants' claims are valid and subsisting mining claims. The Plaintiffs then go on to argue that the discovery made by the A. E. C. on these mining claims in the conflict area inure to Plaintiffs' benefit since they follow the procedure of Public Law 585. They, therefore, by their own argument recognize that if there was any discovery made by the A. E. C. or otherwise, this discovery existed prior to the middle of September, 1953, the day on which they located their mining claims. During the drilling by the A. E. C. and as they drilled hole No. 70 on August 18, 1953, they encountered uranium ore. (R. 199) As stated in the brief of the Plaintiffs on page 23:

“The discovery had been made—everyone then knew it—the cores along side the holes demonstrated it.”

For the purpose of this argument, and without conceding that there was no discovery by the Defendants prior to July 24, we may admit that on August the 18th, 1953, there was definitely discovery of ore. Although the application for the Federal oil and gas lease has been made, the lease itself was not effective until September 1, 1953. (Exh. No. P 26) This then raises the interesting point as to whether or not a lease application for an oil and gas lease precludes any individual from making locations upon the public domain or whether it is the actual issuance of the oil and gas lease which precludes the further location of mining claims upon the public domain. We have been unable to find any court cases discussing this particular point. An interesting law review article found on this point is in 28 *So. California Law Review*, 147, “The New Forty-Niners: Uranium v. Oil and Gas on the Public Domain,” by Norman Elliott. In this article several cases are sighted involving decisions of the Land Department wherein they have held that a mining claim was invalid where an application for an oil and gas permit had been filed. (See *Filtro Company v. Brittan and Echert*, (1926) 51 L. D. 649). None of these cases involve a situation such as we have here. The article then concludes:

“However, although many of the foremost mining law authorities criticized the Department’s decision, all agreed that the point should be settled in the courts. Unfortunately, no such case was ever litigated, and the Administrative repeal of the

mining laws by the Department was never reviewed by the courts."

Certainly in this case the mere filing of an application should give no right to the applicant other than the priority between oil and gas lease claimants. As between the applicant and the Defendants herein, even assuming there was no discovery by the Defendants herein prior to the day of August 18, 1953; both are in a position where they are seeking to perfect some rights, and certainly by the day of August 18, 1953, it is well conceded by the Plaintiffs herein that there was discovery on the claims. The rights of the oil and gas lease applicant should be established as of September 1, 1953, when the lease became effective.

The procedure for obtaining an oil and gas lease on the public domain is set forth in 43 C. F. R. 192.40 et seq. The applicant files an *offer* to lease on a specified form (Form 4-1158). These regulations clearly show that this establishes the priority between applicants for oil and gas leases. Until the lease is accepted and becomes effective the applicant has no right. He has simply made an offer. The regulations (43 C. F. R. 192.40a) provide that the lease becomes effective on the first of the month after it is signed, except that the applicant by special petition can have the lease effective on the first of the month in which it is signed. No such special petition was shown in this case. The lease had no effect until September 1, 1953. Even after the lease became effective, it leased *only* the oil and gas rights on the property and this should not preclude the lessor (U. S. Government) from disposing of the

other mineral rights as provided for by law, eg, location of mining claims.

On the Cedar Mesa Nos. 4 and 5, Hope and Wingate claims located by Defendants after September 1, 1953, when the oil and gas lease was issued on this area, Defendants filed lease applications with the A.E.C. and also filed amended notices of location under Public Law 585 (30 USCA 521 et seq.) to claim, hold and establish valid mining claims on these particular areas. (See Exhs. D 40 and D 49) They did not file lease application on the claims located prior to the oil and gas lease because they considered them as good and valid claims located on open ground and so established before the issuance of the oil and gas lease. Had there been any question in their minds about the sufficiency or validity of the claims or any question raised at that time about discovery they could have easily filed lease applications with the A. E. C. and amended notices of location under Public Law 585 on these other areas previously located and preserved their priority of location.

Assuming for the purpose of argument, Plaintiffs' contention that Defendants did not have discovery on their claims when the oil and gas lease was issued and that the issuance of the oil and gas lease prevented the establishing of valid mining claims before the effective date of Public Law 585. The general law on discovery is that if a locator did not have a discovery of ore when he posted his notice of location, but afterwards made a discovery, the later discovery relates back to the date of the

original location and validates the claim, if there have been no intervening rights.

In the instant case the offer to lease the oil and gas rights filed July 24, 1953, and the oil and gas lease issued September 1, 1953, were not intervening rights as to the minerals. As stated elsewhere in this Brief, the lease covered only the oil and gas rights and did not relate to the minerals. Any lack of discovery on any of the claims previously located by Defendants could be corrected and discovery made until there were valid mining claims located on this area. Defendants could, therefore, claim all of the A. E. C. drilling and their own drilling, exploration and mining as relating back to the dates of their first locations. There were no possible intervening rights as against Defendants until Plaintiffs attempted to locate and their locations are void because of back-dating.

As further evidence that Defendants had discovery on their Maybe Group of mining claims, the Plaintiffs and their agents, Pasco and Andrews, never questioned the sufficiency of the Defendants' mining claims on the grounds of lack of discovery until the actual trial of the lawsuit. When Andrews talked to Ed Hall at the Western Mine Supply Co., at Monticello, before the Red Canyon claims were located, his only question was where the Maybe and Red Fry claims were located and where the location and corner monuments were. Nothing was said about any claimed lack of discovery. On the contrary, the Plaintiffs knew there had been a prior discovery of ore on these mining claims, otherwise they would not have

come in and located themselves. When Mr. Rummel, one of the Plaintiffs, talked to Ed Hall he only questioned where the claims had been located and monuments had been set up, he said nothing about any lack of discovery. At the time Andrew's and Rumel's Depositions were taken, they were asked wherein they claimed the Defendants' mining claims were not valid. They answered that they were not properly located on the ground and monuments were not erected. No question was raised about discovery.

After the Plaintiffs had filed the lawsuit and were attempting to figure out some theory on which they could possibly prevail, they then raised the question of the sufficiency of the Defendants' discovery in an effort to assert a technical defense to the Defendants' prior locations by claiming that the oil and gas lease application of July 24, 1953, in effect cut off the locations made by the Defendants.

If the Plaintiffs can prevail on their theory a locator of mining claims would have to make frequent current checks in the District Land Office of the Bureau of Land Management to determine whether there was an oil and gas lease application covering this particular land. If an application had been filed on the land, they would then have to make a daily check to determine whether the oil-gas application had been accepted and then attempt to determine what else need be done to hold his claim. We submit that the law does not require such exactness and such responsibility in checking records by a locator of a mining claim on public domain.

POINT II

PLAINTIFFS FAILED TO PROVE THAT THEY HAD ANY VALID MINING CLAIMS IN THE RED CANYON NO. 6 and NO 9, BECAUSE THEY FAILED TO SHOW ANY DISCOVERY OF ORE BY THEMSELVES AND FAILED TO PROPERLY LOCATE THE CLAIM KNOWN AS RED CANYON NO. 9.

In this case, the Plaintiffs have abandoned all claims to any mining claims except Red Canyon No. 6 and Red Canyon No. 9. The Plaintiffs have also argued throughout their brief that the Defendants failed to establish any title to the claims in themselves and use this as a basis upon which they claim title should be given to them. The principal has been well established by this court that an individual seeking to quiet title to property in himself must show that he has good title and cannot rely upon any so-called weakness of the Defendants' title (*Babcock v. Dangerfield* 98 U. 10, 94 P. 2d 862; *Mercur Coalition Min. Co. v. Cannon* 112 U. 13, 184 P. 2d 341.) We, of course, do not admit any weakness in our title but rather strenuously assert that we have good title to the mining claims claimed by Defendants.

As heretofore pointed out the Plaintiffs *never* spent any time or money in exploration or development of their mining claims. They have relied exclusively upon the drilling by the A. E. C. and the actual mining by the Defendants. Mr. Pasco, a witness for the Plaintiffs, testified that he examined the cores from the holes drilled by the A. E. C. He said he found mineralization in some of

them. He referred to Plaintiffs' Exhibit P. 3 and said he could not tell which hole he examined the cores from. (R. 103) He testified that he examined the cuttings from the drilling but could not identify them with any particular claim. (R. 108) An examination of Exhibit P. 3 shows that most of the drilling was on Red Canyon No. 7 with only three holes shown on Red Canyon No. 6. In fact, Mr. Pasco said he could not say which of the two claims (Red Canyon No. 6 or Red Canyon No. 7) he had found the mineralization on (R. 109-111). It was Mr. Pasco who staked these claims for the Plaintiffs and he cannot say he had any discovery on Red Canyon No. 6 at the time of its location.

A close examination of Plaintiffs' claim Red Canyon No. 9 reveals a very interesting situation. Plaintiffs' Exhibit No. 5 contains the original Notices of Location for Red Canyon No. 9 together with the amended Notices of Location. The original Notice of Location on Red Canyon No. 9 shows the "south end center monument of Red Canyon No. 9 is corner No. 4 of Red Canyon No. 5." Defendants' Exhibit No. 87 is a map showing the location of Red Canyon No. 9 claim as described in the original Notice of Location. This places the Red Canyon No. 9 claim at almost a right angle with Red Canyon No. 6 and covers part of Red Canyon Nos. 6 and 7. This Notice of Location is dated the 18th day of August, 1953, although actually it was not prepared until sometime in September, 1953, and had been fraudulently antedated. On September 25, 1954, one year later, an amended Notice of Location was filed by the Plaintiffs herein on Red Canyon No.

9. In the amended Notice of Location as shown in Plaintiffs' Exhibit No. 5 they state:

“The SW end line of this claim is partly contiguous with the NE end line of the Red Canyon No. 6.”

They also filed a third amended Notice of Location, this one dated October 3, 1953, and shows the same wording as the SW end line of the claim being contiguous with the NE end line of Red Canyon No. 6. There is no testimony in the record, however, that they ever went out and restaked or relocated this claim. Thus if the original claim of Red Canyon Nos. 6 and 9 as shown on the original Notice of Location is correct, then the location is shown as found on Defendants' Exhibit No. 87. An examination of Defendants' Exhibit Nos. 88 and 89 shows the relative change in the moving of these claims. This is what is known as a “floating claim,” that is one that can be moved to suit the convenience of the locator. Such claims can have no basis in law. It is essential that a mining claim have a fixed location (36 *Am. Jur.* “Mines and Minerals” Sec. 89, page 341).

If we accept the final location of Plaintiffs' Red Canyon No. 9 claim as shown on Exhibit D. 88, it shows the discovery monument to be located in Defendants' Red Fry No. 1 claim. If the discovery is located outside of the mining claim or upon another valid mining claim then the location is void and of no effect.

“While it appears to be a recognized rule that the point of discovery must fall within the limits

of the claim as theretofore or thereafter laid out, and that a find made on another claim is a nullity and of no avail to the discovered . . .” 36 *Am Jur.* 336 “Mines and Minerals.” P. 339

POINT III

THE PLAINTIFFS, BY BACK-DATING THEIR CLAIMS, PERPETRATED A FRAUD AND THE CLAIMS ARE VOID.

Plaintiffs in their brief on this point state that the Plaintiffs were not seeking to “jump” or predate anyone’s claims because they did not believe any claims existed; that the predating injured no one; that fraud was not pleaded by Defendants as a defense and if the original notices were void because of fraud, amended notices were filed at a later date. Plaintiffs had knowledge that Defendants had mining claims in this area as evidenced by their checking and talking to the Defendants and asking about their mining claims before Plaintiffs staked their Red Canyon claims.

Plaintiffs’ witnesses, Andrews and Pasco, were staying at the A. E. C. Camp and told Ross Seaton, who was an A. E. C. geologist, that the Defendants, Hall and Bailey, claimed 12 claims in the area, but all they could find were 4 claims and they were going to stake everything and make Hall and Bailey prove where their claims were at, that they were not going to jump the claims but just pick up the fractions. See testimony of Ross Seaton. (R. 722)

Andrews told Darrell Spencer, who was the A. E. C. project geologist, that LaSalle was not interested in beat-

ing anyone out of anything, but he was going to overstate for fractions. (R. 712) This is another statement by Andrews that he knew Hall and Bailey had staked their claims in the area. Spencer also testified that it was common knowledge that Hall and Bailey were the owners of the claims when the A. E. C. started exploration which was prior to July 1, 1953. (R. 715)

It is significant that Defendants' claims are irregular in shape and size, the way that a prospector would lay out on the ground. If the claims had been "floated" in by Defendants as claimed by the Plaintiffs, they would be shown on the maps and surveys as 600 feet wide and 1500 feet long and forming an even geometric pattern such as the Plaintiffs' plat of the Red Canyon claims (Exh. P. 3)

Definite proof that the Plaintiffs had perpetrated a fraud in back-dating their claims and definite knowledge by the Defendants that such was the case was not obtained until the time of the trial and the testimony of Richard Pasco. Depositions had been previously taken of Mr. Rummel, a party Plaintiff, and Mr. Andrews and the question was asked them when the claims were located and both said the claims were located on August 18, 1953, the date that was on the notices of location. Defendants, therefore, had no prior knowledge of the fraud nor any opportunity to set it up as an affirmative defense in the pleadings. It was proper at the trial to present any evidence (and for the court to consider all facts and circumstances) that affected the validity of the claims since

there was a general denial of the validity of Plaintiffs' claims in the Defendants' answer. In their pleading Plaintiffs alleged that the claims were located on August 18, 1953, and the testimony of their own witnesses at the time of taking depositions reaffirmed this date of location. Defendants certainly could not anticipate that the same witnesses who had previously sworn under oath that the claims were located on August 18, 1953, would later come into court and again under oath state that they were actually located in September, 1953, and that they had been back-dated. There having been no objection to the proof, the court was required to consider the evidence and render judgment accordingly — notwithstanding the lack or absence of pleadings specifically raising the issue. (URCP 54 (c) (1); *Morris v. Russell*, 120 Utah 545, 236 P. 2d 451)

Plaintiffs in attempting to answer the question of fraud perpetrated by back-dating the notices of location state that no one was injured and infer that the fraud was not perpetrated against anyone and there was no intention to defraud. They justify the Plaintiffs' conduct by the statement that they were apprehensive of what the Defendants might do with their claims. The back-dating of the claims was intentional by the Plaintiffs and for the purpose of gaining an advantage against anyone that had located in the area and against the government itself.

It is significant that the Plaintiffs selected August 18, 1953, to place on their notices of location in back-dating them because it was on this date that a very valuable

drill hole was bottomed which gave further evidence of the discovery and enlarged upon the ore body in the cub channel. Andrews and Pasco had this information from the A. E. C. drilling crew and it was first recorded by the A. E. C. that this valuable drill hole bottomed on August 18, 1953, was on the Maybe group of claims. It later developed after Plaintiffs had used this date that this valuable drill hole was drilled on the east side of the Windgate on the Gizmo claims but still on this cub channel. By selecting this date Plaintiffs were attempting fraudulently to use a good ore discovery made by the A. E. C.

Another advantage that the Plaintiffs attempted to gain by using this date was the predating of the issuance of the oil and gas lease which was dated September 1, 1953.

Under public law 585 (30 USCA 521 et seq.) the prior filing of a notice of location on an area previously leased for oil and gas gives a preference right to establish a first and prior mining claim when the amended notice of location is filed under this act. The back-dating accordingly gave them this added preference in time when they filed their amended notices of location under the act on September 25, 1954, and recorded September 29, 1954. These amended notices of location on Red Canyon Nos. 6 and 9 recite that they are the same lodes originally located on August 18, 1953. (Exh. P. 36) Here again the Plaintiffs attempt to take advantage of their fraudulent act of back-dating the original notices of location and rely on the original notices.

Others that were injured and defrauded by Plaintiffs predating the notices of location, besides the Defendants, were other locators in the area who had located claims in the area contiguous to the Maybe group of mines. Donald V. Blake located the Gizmo claims and Curtis Jones located the Windgate claims on August 25, 1953, which claims cover part of the area attempted to be located by Plaintiffs. These mining claims located by Blake and Jones are shown by Exhibits D 91 and D 92 and shown on the map, Exhibit D 89. The testimony of Donald V. Blake (who is the same person as Chap Blake) as to these locations and that he observed the locations of the Maybe group and Red Fry group of claims by the Defendants before July 1, 1953, is set forth in the record at pages R. 755 to 757. The Windgate and Gizmo claims located by Blake and Jones and their relation to the area in conflict is set forth in Exhibit D 89. It is significant that Blake saw the Defendants' locations before July 1, 1953, and he was in there for the specific purpose of locating some claims for himself, and that upon seeing Defendants' locations he then went on to the east and located in an area contiguous on the east.

The Utah case of *Mouldoon, et al v. Brown, et al*, 21 Utah 121, 59 Pac. 720, was cited by Plaintiffs in their brief as the leading case on the subject of a mining claim being void where it is fraudulently predated. The court states:

“The dating back of location notice, for the purpose of defeating other claimants to the land covered by the notice, was a fraud upon the parties

sought to be defeated, and it may also be fraud upon the government.”

This Utah case is quoted as an authority in a number of texts and cited in 58 C. J. S., Page 97, Sec. 45, Note 52, which states:

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

The back-dating by the Plaintiffs was an intentional act designed to give them an advantage over the Defendants in their location of the Maybe and Red Fry group of claims and an advantage over any other locators, such as, Chap Blake, and an advantage against the government, which was therefore with the intent to defraud these respective parties.

Plaintiffs state that even if the first locations were fraudulent amended notices were filed and are unassailable insofar as their regularity is concerned. Plaintiffs in their pleading rely on the original notices of location which are dated August 18, 1953, and recorded September 17, 1953. They do not rely upon claims and rights initiated the latter part of September, 1953, when the amended notices were filed. Plaintiffs at the trial did not abandon the original notices of location and rely solely upon the amended notices but asserted the validity of the original notices at all times.

The Trial Court found and held that the original Red Canyon notices of location were fraudulent and therefore void. It is an accepted rule of law that a void thing cannot be amended.

This rule was announced early in the mining law, *McEvoy vs. Hyman*, 25 Fed. 596.

“A void thing is null, and not subject to amendment. A thing in esse is a condition precedent to the exercise of the power of amendment, for a living graft cannot be put on a dead stock.”

Other cases holding that a void notice of location cannot be amended are: *Frisholm, et al vs. Fitzgerald*, 25 Colo. 290, 53 Pac. 1109; *Sullivan, et al vs. Sharp, et al*, 33 Colo. 346, 80 Pac. R. 1054. (See also: *American Mining Law* Volume 1, 19 and 3 — Sec. 693, Note 24; and Sec. 699, Note 41.)

Amended notices of location are designed and made for the purpose of correcting errors and irregularities in their first location notice which is otherwise valid, but there must be a prior instrument which has some validity on which the amendment can operate and refer to. Mining claims which are void, as held by the court in this case, contain nothing that can be amended. The area attempted to be located under a void mining claim is the same as if no location had been made, and insofar as a void location affects the area, it continues to be open for location.

To permit the Plaintiffs to now stand on their amended notices of location after they have fraudulently predated their original notices, places a premium on such falsification and gives a locator that will predate his claims a decided advantage. It is true that a locator in a new area who places the correct date that the claims

were located on the notice of location runs the chance of some unscrupulous person coming into the area and noticing his notices of location and then predating notices and locating the same area, and that the unscrupulous locator will then claim that his notices of location were posted on the ground first. This possibility of being imposed upon and defrauded by an unscrupulous prospector is certainly no justification for the prospector that was there first following a general practice of predating his claims in order to defeat the claims of a later party, who may also fraudulently predate them. The possibility that anyone may commit a fraud does not justify another one in committing it. Such would place a premium on dishonesty. If the Plaintiffs' contention that the original notices of location are not fraudulent because no one was defrauded, and that if they were fraudulent the amended notices of location are good and valid, the prospectors should then change their method of prospecting and in each instance predate the claims about 28 days and rush to the recorder's office so that they are recorded within 30 days from the date they bear. Shortly after the predated notices are located a prospector should then file an amended notice so that if he gets caught in the fraudulent act of predating the original notices, he can then come in and stand on the amended notices. This is exactly what the Plaintiffs are attempting to do in the instant case by the policy and rule of law they are asking the court to announce in this appeal.

A locator who intentionally back-dates his claim should not be allowed any advantage, and the notices of

location attempted to be located by this fraudulent act should be held to be void and not subject to amendment.

Plaintiffs in their Brief state they have abandoned all of their claims except Red Canyon Nos. 6 and 9. The other Red Canyon claims Nos. 1 to 5, 7, 8, and 10 were located in the same area and under the same circumstances as Nos. 6 and 9 they now claim. Nos. 6 and 9 are subject to the same objections and have no more validity than the others abandoned by Plaintiffs.

SUMMARY

The decision of the Trial Court should be affirmed in finding that the Defendants had good valid mining claims and Plaintiffs did not have good and valid mining claims.

Respectfully submitted

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