

1957

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

No. 8622

UNIVERSITY, UTAH

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

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

Reply Brief of Appellants

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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 COM-
PANY, 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 NIEL-
SON, husband and wife; F. G.
McFARLAND and S. R. HUL-
LINGER,
Respondents (Defendants).

Case
No. 8622

Reply Brief of Appellants

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

INTRODUCTORY

While Respondents (hereinafter referred to as “de-
fendants”) state that in general they agree with the state-
ment of facts made by Appellants (hereinafter referred

to as "plaintiffs") in their Opening Brief, it will be necessary, in view of certain statements made by defendants, to make reference in this reply brief to certain facts and testimony as the same were developed at the trial.

The fundamental issues in this case are clearly drawn. It is the contention of plaintiffs that the trial court erred in failing to recognize and apply well established law as to what constitutes a valid discovery on a lode mining claim. Statements by the trial court (R. 94, 853, 932) demonstrate, as do its findings and judgment in the light of the record, that the trial court felt that the established law of discovery does not apply to uranium deposits where the mineralization is frequently, as in this case, found at depth in unexposed formations and in respect to which there are no mineralized fissures or lodes which offer a lead to be followed.

It is not controverted that discovery under such circumstances presents problems and difficulties. It is controverted that the existence of such difficulties affords any basis for the disregard of the statutory requirement of discovery. This problem is not fundamentally different from that which existed in the making of discovery on placer petroleum claims when, prior to the enactment of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437), the mining laws were applicable to the location of claims for oil and gas. Oil and gas anticlines were drilled where there was surface existence of structure forming a reasonable basis for exploratory drilling but the law.

nonetheless, required discovery and conditions favorable to exploration were no substitute for discovery.

Exploratory drilling has been performed and is presently, throughout the Colorado Plateau area, being performed on uranium claims where reasonable justification for the drilling may be found in geological orientation and in results of exploration outside of and beyond the mining claim. But it does not follow that the necessity of discovery has been dispensed with.

An essential element of discovery is expectation of finding a pay or commercial mineral deposit but to constitute discovery there must be a finding within limits of the claim of mineral or mineral bearing rock, the further exploration of which so found mineral deposit would justify further expenditure of time and money in the reasonable expectation that the pursuit and following of that which was found would lead to pay or commercial ore.

In a determination of whether a particular mining claim or a conflicting mining claim has prior validity, the time and the place of discovery are vital. He who asserts discovery should be able to say what he found, where he found it and when he found it. In the case at bar, defendants say that they observed a sandstone lens in the area — a sandstone lens which evidences no more mineralization than the soil in the yard at the courthouse where this case was tried. Defendants did nothing to explore that “sandstone lens.” No one anywhere in the vicinity

had done so. It had no value. It led to nothing. It meant nothing other than as it may have meant to someone familiar with geology that the ore productive Shinarump formation was some hundreds of feet below.

Defendants were required to show that they made a valid discovery on their respective mining claims prior to July 24, 1953. They failed to do so. The finding by the trial court that plaintiffs' locations were wholly invalid because they bore a date in advance of their actual posting, wholly disregards the facts that:

An Amended Notice of Location, dated October 1, 1953, was, on that date, posted by plaintiffs on their Red Canyon No. 6 claim;

An Amended Notice of Location, dated October 3, 1953, was, on that date, posted by plaintiffs on their Red Canyon No. 9 claim;

Notices of Lease Application, dated May 21, 1954, were on said date posted on plaintiffs' claims pursuant to the provisions of AEC Circular 7 (10 CFR 60.7) with respect to which a timely filing of a Lease Application with AEC was made by plaintiffs on June 25, 1954; and

On September 1, 1954, plaintiffs posted on each of their claims an Amended Notice of Location "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 (68 Stat. 708; 30 USCA 501).

Reply will be made to defendants' points in the order in which they are discussed in Respondents' Brief.

I

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.

This error by the trial court is discussed in part in Appellants' Opening Brief (pp. 33-39). The federal mining law expressly declares:

"* * * no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." (30 USCA 23)

Identical language is found in the Utah statutes (UCA 1953, 40-1-1).

In recognition of these statutes, this Court in *Pitcher v. Jones*, 71 Utah 453, 457; 267 P. 184, said:

"It, of course, is well settled that it is essential to the validity of a mining location, or lode claim, that there be a discovery of mineral in place within the limits of the claim."

To the same effect is *Gibbons v. Frazier*, 68 Utah 182, 184; 249 P. 472.

In *Cole v. Ralph*, 252 U. S. 286; 40 S. Ct. 321, 326, the United States Supreme Court stated:

"In practice discovery usually precedes location, and the statute treats it as the initial act. But in the absence of an intervening right it is no objection that the usual and statutory order is re-

versed. In such a case the location becomes effective from the date of discovery ; but in the presence of an intervening right it must remain of no effect.”

Against the background of the foregoing short statement of the pertinent and applicable statutes and decisions, we shall undertake to analyze the facts which the defendants rely upon as constituting a compliance with the law requiring the discovery of mineral in place within the geographical limits of each of their claims prior to July 24, 1953, the date the oil and gas application was filed. This date is controlling as we have established in our Opening Brief and as we shall further demonstrate in this brief. July 24, 1953, is the date before which any discovery must have been made to be of avail to defendants.

Defendants rely in the main upon the testimony of defendant Milton C. Nielson. At page 7 of Respondents' Brief, they say that this defendant had been familiar with the area and that prior to 1953 he had observed the channelling and mineralization in the area of Red and Fry Canyons. The record (page 522) shows he had prospected the area prior to 1953. His observations at that time must not have impressed him for he did not then stake any claims in the area although he was there for the purpose of prospecting (R 523, line 2). At page 7 of their brief, defendants apparently seek to show that, at the time of staking the claims involved in this action, defendant Nielson was on defendants' claims with a geiger counter. However, a reading of the record at lines 10 to 30, page 524,

shows that defendant Nielson did not know when he was in the conflict area with a geiger counter.

This defendant said he saw “a little bit of mineralization, black copper, I call it.” (R. 524) While not so stated in Respondents’ Brief, the witness was testifying to an observation which he claimed to have made prior to 1953 (see lines 20-30, R. 523). In addition to the foregoing, defendant Nielson testified that he saw a “sandstone lens.” At page 9 of Respondents’ Brief, the statement is made (supposedly supported by a reference to page 535 of the record) that defendant Nielson staked additional claims “based upon the mineralization and the copper showing on the contact of the Moenkopi and Shinarump.” This statement that the claims were located “based upon the mineralization and copper showing” is a conclusion of the writers of Respondents’ Brief and is a statement not found in or in any way supported by the record at page 535 thereof or elsewhere.

It is interesting to note that defendant Nielson asserts that he staked part of the claims on one day and that, on the next day, he returned and staked more claims. This defendant signed a payroll record certifying that he had worked full time for a construction company (R. 551-553) on each of said two days.

We submit that the foregoing is the only testimony relating to discovery given by defendant Nielson who located defendants’ claims. He did not say and could not say where on any or even on what claims he saw the asserted mineralization or a sandstone lens. At the tak-

ing of the deposition of this defendant, he freely and unequivocally stated under oath that he had made no discovery of ore on any of the claims of defendants involved in this litigation (Nielson deposition, p. 15, lines 6-8).

At pages 10 and 11 of their brief, defendants state that defendant Nielson in fact made a discovery on Maybe No. 2 and on Maybe No. 3. For this conclusion defendants cite pages 560 and 561 of the record. An impartial reading of the record discloses that, when asked at his deposition if he made any discovery of ore on any of these claims, defendant Nielson answered in the negative. By trial time, however, he had been educated to the necessity of having made a discovery. Then for the first time and after having to admit that he had stated that he had made no discovery on any of defendants' claims, Nielson came up with the convenient excuse that what he had meant was that he had made a discovery at some indeterminate but earlier date. That, we submit, is an escape effort which is either, on the one hand, unworthy of belief or is, on the other, so vague that it is of no probative value. Had this man honestly considered that he had made a discovery at any time he would have so stated in his deposition.

Defendant E. J. Hall is referred to on page 12 of Respondents' Brief as having observed mineralization on Red Fry No. 3 and Maybe Nos. 3 and 4. The record must again be read for a correct and factual understanding (R. 445). What defendant Hall testified as having seen was "stains and what it looked like to me as mineralized

sandstone.” These were not leads to anything and defendants did not follow them. Hall did not say on what part of any particular claim or even on what claim or claims he made any such observation.

Defendant Bailey is also quoted in the brief as stating that he examined the sandstone rim with a scintillator and got a count (R. 604-605). He did not say what the count was. He did not say on what part of any particular claim he got a count or even what claim or claims he was on. His testimony also must be read in the light of his deposition, at the time of the taking of which he could not even state at what time in 1953 he had been in the area.

The foregoing is all the evidence as to defendants’ alleged discovery prior to July 24, 1953. The balance of defendants’ testimony on discovery is that of parties who were employed by them to examine the property in connection with defendants’ preparation for the trial of this suit and, of course, has no bearing on the factual situation as the same existed prior to July 24, 1953.

Defendants urge upon this Court the adoption of what defendants refer to as a “liberal” interpretation of the law, i. e., a liberal interpretation of the mining statutes of the United States and of the State of Utah cited above. Plaintiffs submit that defendants are in fact urging disregard of the requirement of discovery which is the very foundation of the mining laws. Defendants did nothing but observe a sandstone lens in the general vicinity of the claims and saw (where is not shown)

what they considered to be mineralization and black copper.

It must be borne in mind that the surfaces of the area looked at by defendants Bailey, Hall and Nielson were not in the ore horizons of the Shinarump whence all of the ore production in the area has come. Such surfaces were on top of the barren Mossback (a member of the upper Chinle formation) whence no production has ever come.

The basis of defendants' argument for a "liberal" theory of the law is that a locator may, by the observation of geology and by geological orientation (as distinguished from the finding of ore in place) be led to locate a claim and, therefore, that he has made a discovery before he actually finds mineral in place. The observation of these defendants was of surface geology many hundreds of feet above the ore horizon. No fissures exist in the area where the alleged observations were made which argumentatively could have permitted an interchange of mineralization and a deposition of ore or the following of a mineralized fissure to ore. Defendants found nothing and followed nothing which induced them to spend either subsequent time or money in pursuit of any alleged lead. Rather, they followed the course of the drilling instituted by the AEC and no drill holes which showed ore were completed on any of the claims in question until after August 17, 1953. (Testimony of Hyrum B. Woods, AEC geologist in charge of drilling, as set forth on pages 169 to 214 of the record.)

The testimony shows that nowhere in the vicinity of the claims in question had ore, commercial or non-commercial, been found in the Mossback or in the so-called "sandstone lens" and that prospecting in those horizons offered no prospect of success. Of course, defendants did not start or pursue any work on these horizons — no reasonable person would have.

The fact that these defendants did not see nor find anything which they could have followed or did follow to a finding of ore destroys their argument, for even as to the minority "liberal viewpoint" the "touchstone" of the "broad interpretation" is that the claimant has found what "*he could follow, expecting to find ore*" (Resp. Br. 22). A valid discovery cannot be based upon geological inference as to possible existence at depth of a potential ore horizon which has no connection whatever with what was found other than that in nature's masonry it was laid down geologic ages before the surface, and barren, Mossback.

W. D. McDougald, an independent geologist, of Moab, Utah, a graduate of the University of Utah with Bachelor of Science and Master of Science degrees in geology, testified he examined the area in question on three occasions — once with Ken Millard and H. G. Brown, once with Frank H. MacPherson and once with Dr. Leland W. Stokes. Samples were taken from the exposed material at the same points from which defendants caused samples to be taken (R. 890). We must assume that defendants selected for sampling the points

they considered most likely to show mineralization. These samples were subjected to chemical assay and no copper was found. There being no copper there for defendant Nielson to have observed, he could not possibly have seen any copper, either black or any other color, at these points which defendants, not plaintiffs, selected for sampling. Moreover, the chemical assays of the eleven samples so taken range between 0.002 and 0.013 of one percent U_3O_8 , less than the geiger counter indicated in the court house lawn.

Frank H. MacPherson, a graduate and experienced engineer (R. 921-3), testified (R. 932-5) that a prudent miner would not spend money doing exploration work with the hope of developing an ore body on the basis of what was shown in the formation from which these samples were taken.

Dr. Leland W. Stokes, head of the Department of Geology of the University of Utah and an outstanding expert, particularly in the field of uranium, testified that in his examination of the conflict area he found no visible uranium or signs of uranium mineralization and that no reasonable miner or prudent man would have spent any time or money in pursuing any showing in the sandstone lens above the Mossback (R. 943, 945). His statement is completely consistent with what defendants' actually did, for they did nothing in respect to pursuing anything they found in the Mossback. He stated that there was no mineralization relationship between the Mossback and the Shinarump formation. He further testified that there is

about 300 feet of very dense rock of varying kinds between the Mossback surface and the Shinarump in which the ore body was found by the AEC in its drilling (R. 946). Dr. Stokes testified that there was no possibility of the lower ore body influencing or being responsible for a higher ore body — that the Mossback is part of the Chinle formation and that he knew of no production from the Chinle formation in the White Canyon area. In reference to the channelling of which defendants speak, Dr. Stokes described the nature of channels or ancient stream beds and stated that the channel in the Mossback traversed the area in a later geologic age, ran at a different angle and had no relationship to and was uninfluenced by the ore productive channel in the deep-lying and earlier Shinarump formation.

The conclusion of the writers of defendants' brief (Resp. Br. 19) that Dr. Stokes testified or expressed the opinion that the Mi Vida property was not worth locating finds no support in the record.

That the possibility of making a discovery may justify exploration in search of a discovery is no more a substitute for discovery on a uranium claim than is the existence of a favorable anticline, which warrants drilling, equivalent to an oil discovery.

Lindley, in his work *On Mines*, 3rd Ed., Volume 2, section 437, p. 1026, makes the following statement:

“Of course, exploitation on adjacent lands might raise a strong presumption that a given tract contained petroleum. An oil-producing well

within each of four sections of land surrounding a fifth would produce a conviction that the oil deposit was underneath the fifth section. This fact might justify the land department in classifying the section in the category of mineral lands, or the government surveyor in returning it as such, but it would not dispense with the necessity of making a discovery." (Citing cases.)

In *Waskey v. Hammer*, 223 U. S. 85; 32 S. Ct. 187, 188 (1912), the court said:

"Discovery without the limits of the claim, no matter what its proximity, does not suffice."

Six pages of Respondents' Brief (pp. 21-26) represent a quotation from an article appearing in 27 *Rocky Mountain Law Review* 404. Such quotation constitutes that author's discussion of what he refers to as the "liberal view." In introducing his discussion, the author states (p. 408):

"Two main lines of authority stand out in the body of decisions relating to determination of discovery. They diverge with regard to whether *indications* of mineral can suffice for a discovery in lieu of the actual presence of mineral."

In the paragraph which follows the foregoing quotation and precedes that with which defendants' quotation commences (p. 408), the author with complete frankness states:

"The preponderance of decisions hold that mere indications of mineral, however strong, cannot take the place of discovery of mineral itself." (Citing 16 cases of which 4 are decisions of the United States Supreme Court.)

Following the discussion quoted by defendants, the author of the article again frankly states:

“As stated before, however, numerical weight of authority seems to hold that actual mineral in place must be revealed, and whether such revelation may be by means other than the sense of sight is not clear.” (p. 413)

Reference to the authorities cited for the so-called “liberal view” will indicate that such weight of authority does not depend upon numbers alone. Not a single decision by the United States Supreme Court is cited for the “liberal view.” Two pages of the quotation (Resp. Br. 24-26) represent discussions of or quotations from two decisions by the Director of the Bureau of Land Management.

Let us refer to two decisions by the Secretary of the Interior Department, who, on appeal, reviews decisions by the Director of the Bureau of Land Management.

In the case of *Oregon Basin Oil and Gas Co.*, 50 L.D. 253 (1924), it is stated:

“The Department is aware of no decision wherein, citing the rule announced in *Castle v. Womble*, it has ever taken into consideration the proven presence within the limits of a mining claim of deposits not actually and physically exposed therein as a ground for sustaining the sufficiency of an asserted discovery based upon the exposure within the limits of the claim of a deposit that did not warrant or justify the expenditure of time and money with a reasonable prospect of

success in the development of a valuable mine on the particular deposit so exposed. * * * (255)

“If any doubt ever existed as to the meaning of the *Castle v. Womble* rule, that doubt was removed by the decision in *Jefferson-Montana Copper Mines Company* which specifically points out that the particular deposit actually discovered within the limits of a mining claim is the one for the reasonable prospect of the development of which into a valuable mine the further expenditure of time and money must be shown to have been warranted by the evidence.” (256)

In *United States v. Arizona Manganese Corp.*, 57 I.D. 558 (1942), it is stated:

“The geologists who have been in charge of the development work and the mineral expert for the Government agree in the belief that the maniferous beds underlie all of the claims in question. The reason for this belief, as expressed by the defendants’ witnesses, appears to be that the various drill holes and outcrops in which manganese is found, considering their position with relation to each other and the claims in question, the similarity in the formation in which the manganese is found, the occurrence of the mineral in the same geologic horizons and other geologic evidence, strongly indicate the continuity and lateral extent of the deposit and the probability, as to most of the claims and the possibility as to a few, that all the claims in question are underlain by the beds of maniferous deposits that have actually been discovered. * * *

“It was contended in the appeal to the Commissioner, and is contended here, in effect, that the geological proof is so strong as to the existence of maniferous beds under the claims in ques-

tion that it would be a waste of money to require discovery by drilling on each contested claim; that manganese is a strategic mineral and the Bureau of Mines and the Geological Survey are interested in developing a large and adequate domestic reserve of such mineral to provide for national defense needs in the present emergency; that large expenditures necessary to establish a plant to develop the property are not justified unless title is obtained to the entire compact and contiguous area and therefore the technical rule of actual discovery on the claim should be waived by the Department as it did in the *Rough Rider* case (42 L.D. 584) when there was no national emergency or other compelling reason.

“The Commissioner held that:

A discovery of mineral is an essential of the first importance; regardless of any emergency that may exist it is a requirement that this office has no authority to waive. Section 2320 R. S. (30 U. S. C. 23), provides that ‘no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claims located.’

“The rule that no lode mining claim can be located and no patent issued until the actual discovery of a vein or lode within the limits of the claim as located and that mere indications or belief in the existence of mineral on the claim do not amount to a discovery, is well settled. See 30 U.S.C.A. sec. 23, note 124, and cases cited in *Rough Rider and Other Lode Claims*, 41 L.D. 242, 253, 254; *East Tintic Consolidated Mining Co.*, 41 L.D. 255; *Oregon Basin Oil and Gas Company*, 50 L.D. 244; *id.* 258; *Lindley on Mines*, (3d ed.) sec. 437. Also a discovery outside the location no matter what its proximity to the lines of the claim is not

a discovery thereon. *Waskey v. Hammer*, 223 U.S. 85, 91. The case of *Rough Rider and Other Lode Claims* (42 L.D. 584), has plainly no application to the facts of this case. Furthermore, the case is no longer followed. *Gonzales v. Stewart*, 46 L.D. 85. If it can be shown that the prompt acquisition of title to these claims by the claimants, without compliance with the law as to discovery, would expedite the accumulation of manganese resources for the purpose of national defense, that showing might constitute an appropriate basis for congressional legislation. The Department is without authority to disregard the law for such reasons. The Commissioner was right in holding invalid the claims upon which no actual and physical exposure of manganese has been made." (559-560)

Defendants use two pages of their brief (Resp. Br. 26-28) to quote from a law student Note appearing in 9 *Wyoming Law Journal* 214. In the quotation used by defendants, the author refers to geological information and to radio-activity readings. It may be pointed out that in the article the author also said:

"An informed guess based on geological evidence indicating the likelihood of discovery is not sufficient in the absence of an actual discovery of minerals within the confines of the claim." (p. 215)

In respect to radiometric readings, the author says:

"However, consideration must be given to the fact that elements other than uranium are radioactive. In addition, these instruments are subject to failure due to defective batteries, malfunction of the mechanism due to rough or improper handling in the field and subjection of the instrument to extreme humidity or cold. * * * However, in view of the uncertainties described above it is be-

lieved that additional evidence would be required to establish a valid discovery.” (p. 218)

It may also be pointed out that in the same paragraph and in the sentence which precedes the quotation used by defendants commencing on the last paragraph of page 27 of defendants’ brief, the author whom they quote stated:

“Information which is of a general nature is not sufficient to support a claim of discovery. Thus, the testimony of four witnesses that a discovery complied with the meaning of the standard was ineffective and failed to establish that a valid discovery had been made.” (p. 216)

Defendants (Resp. Br. 33-38), with no supporting authorities whatsoever, dispute the proposition that prior to enactment on August 13, 1954, of Public Law 585 (68 Stat. 708; 30 USCA 521), a valid mining claim could not be located on land embraced within an issued oil and gas lease or embraced within a pending application for an oil and gas lease under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 USCA 181 ff.).

We quote from the decision of the Solicitor of the Department of the Interior in *Jebson et al. v. Spencer et al.*, 61 I. D. 161, 163-164).

“*The first question for consideration is whether the land was subject to mining location on February 2, 1940, when the discovery of minerals is claimed to have been made by the contestants.* (Emphasis supplied)

“Prior to the passage of the leasing acts, including the Mineral Leasing Act of February 25,

1920, all valuable mineral deposits in lands belonging to the United States were open to exploration and purchase, and the lands in which they were found were open to occupation and purchase under the provisions of the mining laws (30 U.S.C., 1946 ed., sec. 21 et seq.). The leasing acts inaugurated an entirely new system with respect to the disposition of lands containing the deposits dealt with in those acts. The Mineral Leasing Act provided that, with the exception of valid claims existing on February 25, 1920, deposits of oil and gas and lands containing such deposits should be subject to disposition only in the form and manner provided therein (30 U. S. C., 1946 ed., secs. 181 and 193).

“Shortly after the passage of the Mineral Leasing Act, the Department held that there could be no room for the contemporaneous operation of the mining laws and the Mineral Leasing Act with respect to the same lands; and that if an attempt were made, after the enactment of the Mineral Leasing Act, to locate a mining claim on land covered by an outstanding permit or lease issued under the act or known at the time of the attempted location to be valuable for any of the minerals mentioned in the Mineral Leasing Act, the Department would not recognize the attempted location. See *Joseph E. McClory et al.*, 50 L. D. 623 (1924); letter dated October 9, 1924, from Secretary Work to Congressman Richards, 50 L. D. 650 (1924). The Department has maintained its position in this respect over the years. See *United States v. United States Borax Company*, 58 I.D. 426, 432 (1943). The Department has also held that the filing of an allowable application for an oil and gas prospecting permit or for a noncompetitive oil and gas lease has a segregative effect on the land applied for and confers upon the applicant a priority of right over any adverse interest

thereafter sought to be initiated. *Filtrol Company v. Brittan and Echert*, 51 L.D. 649 (1926); *Mono-lith Portland Cement Company et al.*, 61 I.D. 43 (1952).

The Interior Department decisions in *R. L. Greene et al.*, A-27181 (1955), *Clear Gravel Enterprises, Inc.*, A-27287 (1956) and *Clear Gravel Enterprises, Inc.*, 64 I. D. 210 (1957), are to the same effect.

The *R. L. Greene et al.* case involved two mining claims, one of which covered lands which at the time of the location were included within a pending application for an oil and gas lease which was subsequently issued. The other mining claim covered lands which at the time of location were included in an outstanding oil and gas lease. After stating the rule of *Jebson et al. v. Spencer et al.*, above referred to, the Solicitor, in his decision of May 11, 1955, stated:

“Thus, in the present case, the two claims were located at a time when the land embraced in the claims was not open to mineral location. The claims therefore have no validity.

“While these holdings of the Department have apparently never been considered by the courts, the position taken by the Department has, in effect, been affirmed by two recent acts of Congress.

“By the act of August 12, 1953 [Public Law 250] (30 U. S. C., 1952 ed., Supp. I, secs. 501-505), Congress provided, among other things, that any mining claim located under the mining laws of the United States subsequent to July 31, 1939, and prior to January 1, 1953, on lands of the United

States which were at the time of such location included in a lease issued under the Mineral Leasing Act or covered by an application for such a lease should be effective to the same extent as if such mining claim had been located on lands which were at the time of such location subject to location under the mining laws of the United States. The act required, however, that in order to obtain the benefits of the act the owner of any such mining claim must, not later than 120 days after August 12, 1953, post on such claim and file for record in the office where the notice of location of such claim was of record an amended notice of location of such claim, stating that such notice was filed pursuant to the provisions of the act and for the purpose of obtaining the benefits thereof. The act provided further that any mining claim given force and effect under the act shall be subject to the reservation to the United States of all minerals subject to disposition under the Mineral Leasing Act.

“A year later, on August 13, 1954, Congress passed another act [Public Law 585] (68 Stat. 708) under the terms of which mining claims may, thereafter, be located on lands of the United States which are at the time of location included in leases issued under the Mineral Leasing Act or covered by applications for leases under that act. The act of August 13, 1954, further repeated the substance of the act of August 12, 1953, and provided that in order to be entitled to the benefits thereof the owners of mining claims located on such lands subsequent to July 31, 1939, and prior to January 1, 1953, must have posted on the claims and filed for record within the time allowed by the act of August 12, 1953, amended notices of location, stating that such notices were filed pursuant to the provisions of the 1953 act

and for the purpose of obtaining the benefits thereof.”

The Law Review article (28 *So. Calif. Law Review* 147) referred to by defendants (Resp. Br. 34) not only does not dispute this proposition, it supports it. The author states (p. 148):

“Since rights under a valid mining location were rights of present and exclusive possession which could ripen into full title and since the General Mining Laws did not contemplate anything less, a valid mining claim and a valid prospecting permit or lease could not exist at the same time on the same land.”

The statement quoted from this article by defendants (Resp. Br. 34-35) had absolutely no reference to the effect of an application for an oil and gas lease or an issued oil and gas lease as precluding a mining location. It had reference only to the completely independent question of whether or not a mining location could be made on lands “known to be valuable for leasing act minerals” in respect to which lands there was no pending application or outstanding permit or lease.

Defendants’ assertion that a pending application or issued oil and gas lease did not preclude the making of a valid mining location, prior to the enactment of Public Law 585, is not only unsubstantiated but cannot be substantiated by any citation of authority.

Clearly unsubstantiated and contrary to authority is defendants’ correlative assertion (Resp. Br. 35) that:

“* * * the mere filing of an application should give no right to the applicant other than priority between oil and gas lease claimants.”

This assertion like its companion argument above discussed is contrary to consistent rulings of the Interior Department.

In the case of *Monolith Portland Cement Company et al. v. J. R. Gillbergh et al.*, 61 I. D. 43, 48-49 (1952), it is stated:

“Moreover, it is clear that rights under the mining laws cannot be acquired in a tract of public land after the filing and during the pendency of a proper application for a noncompetitive oil and gas lease on such land. Although the mere filing of a proper application for a noncompetitive oil and gas lease on a tract of public land does not obtain for the applicant a vested right to a lease, the person first submitting a proper application does acquire an inceptive or inchoate right to be offered a lease on the land before a lease is offered to a subsequent applicant, if it is decided by the Secretary of the Interior (or his delegate), in the exercise of his discretion, that the land will be made available for oil and gas development, if it is decided that the land is not within any known geological structure of a producing oil or gas field, and if it is decided that the applicant is qualified to obtain and hold a lease on the land. (See *Warwick M. Downing*, A-25798, August 16, 1950, 60 I.D. 433; *Bettie H. Reid et ano.*, A-26330, February 4, 1952, 61 I.D. 1.) The inceptive rights of the senior applicant for a noncompetitive oil and gas lease on a particular tract of public land must be protected pending a determination as to whether the land will be made available for oil and gas develop-

ment, as to whether the land applied for is within the known geological structure of a producing oil or gas field, and as to whether the applicant is qualified to hold the lease for which he has applied. For this reason, rights cannot be acquired under the mining laws in land that is covered by a pending proper application for a noncompetitive oil and gas lease, since such rights would be incompatible with the rights of an oil and gas lessee if the applicant's inchoate or inceptive right should ripen into an oil and gas lease."

As to Interior Department decisions the Supreme Court of the United States in *Hastings & Co. v. Whitney*, 132 U. S. 357, 366; 10 S. Ct. 112 (1889), said:

"It is true that the decisions of the Land Department on matters of law are not binding upon this court, in any sense. But on questions similar to the one involved in this case they are entitled to great respect at the hands of any court. In *United States v. Moore*, 95 U. S. 760, 763, this court said: 'The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons.'"

The Supreme Court of Utah likewise so held in *Lavagino v. Uhlig*, 26 Utah 1, 71 P. 1046, 1049 (1903).

Defendants' argument demonstrates that they wholly fail to realize that it was not any misconception that an oil and gas lease included rights as to minerals other than oil and gas which rendered wholly incompatible the coexistence of rights under the Mineral Leasing Act and rights under the General Mining Laws; it was,

rather, the fact that a valid mining claim carried rights as to all minerals including oil and gas which precluded such coexistence. Public Law 585, enacted August 13, 1954, met this situation by prescribing that mining locations did not carry rights as to leasing act minerals. It also provided a method by which mining claims, which lacked validity because they embraced lands within an application for or issued permit or lease under the Mineral Leasing Act, could be validated. Plaintiffs did what was necessary to obtain this validating benefit. Defendants did not.

Defendants state (Resp. Br. 36-37) that a discovery after location relates back to the date of the location and validates the claim "if there have been no intervening rights."

The United States Supreme Court does not agree with that assertion.

"In practice, discovery usually precedes location, and the statute treats it as the initial act but in the absence of an intervening right it is no objection that the usual and statutory order is reversed. In such a case the location becomes effective from the date of discovery; but in the presence of an intervening right it must remain of no effect. (Citing authorities)" *Cole v. Ralph*, 252 U. S. 286, 296; 40 S. Ct. 321, 326 (1920).

Defendants blandly state that the rights of an applicant for an oil and gas lease and a lessee under an oil and gas lease do not constitute intervening rights. How complete is the error of this unfounded and unsupported assertion

appears not only from the above referred to Interior Department decisions but also from the following court cases.

In *Griffith et al. v. Noonan et al.*, 133 P. 2d 375, 376 (1943), the Supreme Court of Wyoming said:

“Counsel for appellants have cited us to various decisions of the United States Land Department, for instance, *Joseph E. McClory*, 50 L.D. 623, where it was held that the granting of an oil and gas prospecting permit precludes, as long as the permit is in force, the appropriation of the land for metalliferous minerals under the United States mining laws. That, too, was held in *Filtrol Company v. Brittan & Echart*, 51 L. D. 649. The correctness of these decisions may be conceded, but the question herein is as to whether or not the oil and gas prospecting permit above mentioned was in force on May 17, 1939.”

The court held, as had the Commissioner of the General Land Office, that the permit in question had “expired by operation of law on December 31, 1938.”

In affirming the decision of the trial court, the Wyoming court said in *Norris et al. v. United Mineral Products Co. et al.*, 158 P. 2d 679, 683 (1945):

“Trial of the cause was to the Court without a jury and a judgment was entered which may be briefly summarized as follows: The Court found that due to the fact that the Blakeman Oil and Gas Permit, mentioned above as applied for August 31, 1934, allowed April 9, 1936, and cancelled September 9, 1939, was outstanding upon the lands in controversy during that period and conse-

quently these lands 'were not subject to location or entry under the mining laws of the United States'; * * *"

In *Hagerman et al. v. Thompson et al.*, 235 P. 2d 750, 753 (Wyo. 1951), it is stated:

"At that time, however, these lands were included in an oil and gas prospector's permit held by one Walter F. Tracy, so it is admitted herein that the location made at that time was void. *Griffith v. Noonan*, 58 Wyo. 395, 133 P. 2d 375."

Numerous types of withdrawals and reservations preclude mining locations. Numerous types of entries under public land laws preclude mining locations. Prior to Public Law 585, an application for or issuance of a permit or lease under the Mineral Leasing Act precluded mining locations. Defendants complain (Resp. Br. 38):

"If the Plaintiffs can prevail on their theory" (that a valid mining claim cannot be located on land closed to location by reason of the filing of an application for or issuance of a permit or lease under the Mineral Leasing Act) "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."

The same could be said with respect to withdrawals or reservations or revocations or modifications of with-

drawal or reservation orders or of other entries. There is nothing new in the proposition that a valid mining claim may not be made on public lands which are not open to location. The fact is and has always been that the status of the body of public lands in this respect varies from time to time and from day to day. The United States District Land Offices have always been the source of information as to what lands are and what lands are not subject to location. Any mining locator who does not care to gamble on the question of whether his mining location is or is not valid must determine that the status of the lands upon which his claim is situated was not such as to defeat his location.

II

PLAINTIFFS PROVED THE VALIDITY OF THEIR RED CANYON NO. 6 AND NO. 9 CLAIMS

Not once but three times (Resp. Br. pp. 3, 39, 50) defendants state that plaintiffs have "abandoned" all of their claims except the Red Canyon Nos. 6 and 9. The multiplication of this misstatement does not change its character. Plaintiffs have "abandoned" no claim. They have simply and candidly stated (Appts. Br. p. 2) to the Court that they proved discovery on only two of their claims: Red Canyon Nos. 6 and 9. Plaintiffs assert that defendants have not proved validity of *any* of defendants' claims. There is no foundation in the record in this case for holding valid any of the claims involved (either plaintiffs' or defendants') except plaintiffs' Red Canyon Nos.

6 and 9. The remainder of the area, so far as the record is concerned, is still subject to the acquisition of rights under the Mining Laws but no location heretofore or hereafter made thereon can be valid and effective unless and until it is supported by discovery.

Defendants assert (Resp. Br. p. 39) that plaintiffs "failed to show any discovery of ore by themselves." This contention has unequivocally been answered in *Pitcher et al. v. Jones et al.*, 71 Utah 453, 267 P. 184, 186, where this Court held:

"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."

Plaintiffs rely upon the discoveries made by the AEC in its drilling program and upon plaintiffs' acquisition of knowledge of these discoveries through observation of the cores brought to the surface and left beside the drill holes and through recognition of the ore contained in these cores.

Hyrum B. Wood, an AEC geologist, testified that drill hole No. 78, which is on the Red Canyon No. 6 (Exh. P-97), was bottomed September 2, 1953. The chemical analysis of this core showed ore ranging from .06 percent to .10 percent U_3O_8 (R. 209-210). The AEC drilling pro-

gram was in progress when plaintiffs' agents Andrews and Pasco first went upon the property (R. 247). The cuttings and cores from the drill holes were examined. Pasco, who holds a degree in geology from the University of Utah (R. 85), testified that he examined cuttings and cores from drill holes on Red Canyon No. 6 and that such cuttings and cores showed mineralizaion (R. 110). Andrews also so testified (R. 253). The AEC had drilled a total of nine holes on Red Canyon No. 6 (Exh. P-97). Pasco was not only on plaintiffs' claims at the time the original locations were made but he was also there in November of 1953 (R. 117) and subsequently in May, 1954, for the purpose of posting plaintiffs' Circular 7 Notices of Lease Application.

Drill hole No. 109 on the Red Canyon No. 9 was completed December 31, 1953. Pasco examined the core from that drill hole in May of 1954. This was an "ore hole" — that is, one in which ore with a minimum content of .10 percent U_3O_8 was found. The observed evidences of mineralization of ore in these drill holes from the Shinarump formation were subsequently verified by the chemical analyses of the AEC. Discoveries on both plaintiffs' Red Canyon No. 6 and Red Canyon No. 9 claims are clearly established. That these discoveries were made by the AEC in the course of its drilling in no way precludes adoption of these discoveries by plaintiffs and, as set forth hereinabove, this Court in the *Pitcher* case in terms so held.

Defendants assert that plaintiffs had not spent any money exploring the claims located by them. This liti-

gation was commenced May 22, 1955. Plaintiffs performed over \$1,100.00 worth of core drilling and bulldozer work as assessment work during the assessment year ended July 1, 1955 (Exh. P-36, pp. 43-44, R. 354-7).

Under a stipulation (R. 43-53) approved by the trial court May 11, 1956, it was agreed that defendants' operators, McFarland and Hullinger, might proceed in accordance with the lease of February 19, 1954; that the lessors' royalty would be impounded pending outcome of this litigation; that work done by McFarland and Hullinger on the property should satisfy the applicable assessment work requirements as to plaintiffs' claims and as to defendants' claims; and that any development or discovery work thenceforth done by them would accrue to the benefit of the party prevailing in this litigation.

Incidentally, the only monies the defendant locators ever spent in exploration upon their claims, either above or below the ground, were the fees they paid to Davis and others in seeking, shortly before the trial, to establish that the "sandstone lens" was a "discovery." After the AEC had made discoveries on the Red Canyon Nos. 6 and 9 (discoveries which cannot give validity to defendants' claims — this not because the AEC made them but for reasons elsewhere in this and in Appellants' Opening Brief set out), the defendant operators, McFarland and Hullinger, drifted into the channel which the AEC drilling had disclosed. This they did with knowledge of plaintiffs' claims, and prior to the above-mentioned stipulation, in gambling disregard of plaintiffs' claims.

Neither the defendant locators nor the defendant operators ever evidenced the slightest interest in the "sandstone lens" other than as they sought to claim it as a blanket discovery in an attempt to breathe life into defendants' invalid locations.

Defendants attempt to make much of an unsupported assertion (Resp. Br. 40-41) that plaintiffs moved or "floated" the plaintiffs' Red Canyon No. 9 claim. Plaintiffs did no such thing. There was an error in the description in the recorded original Notice of Location of this claim. The law is clearly established to the effect that where there is a discrepancy between the description written into the Notice and the actual monuments on the ground, the latter prevail. Moreover, an amended Notice of Location was posted on said claim on October 3, 1953, sixteen days after the recording of the original Notice on September 17, 1953. In this Amended Notice, which was recorded October 26, 1953, the description of the original Notice was corrected and made more certain. This is one of the clearly recognized purposes of amendment. Even had the position of the claim lines been altered (and this was not the case although the law likewise clearly recognizes this as permissible and proper through amendment) the only effect would have been that as to any newly included area, the rights would date from the amendment.

It matters not in the determination of this case whether plaintiffs' rights date from the original Notice of Location; or from the October 3, 1953 amendment; or from

the Circular 7 Notice posted May 21, 1954; or from the amendment of September 25, 1954, made pursuant to Public Law 585 since there were no intervening rights. Defendants cannot prevail as to any location of theirs unless they can establish the validity of that location prior to July 24, 1953, by proof that they had a discovery on that location prior to July 24, 1953.

The survey and other evidence shows conclusively that plaintiffs' Nos. 6 and 9 claims (and other claims) were monumented and marked on the ground in substantial accordance with the October, 1953, amendments, the May 21, 1953, Circular 7 Notices and the September 7 Notices and the September 25, 1954, amendments. The situs of plaintiffs' claims is and has been fixed. Reference by defendants to plaintiffs' No. 6 and 9 claims as "floating" claims and as lacking fixed location is wholly unwarranted and absurd.

The present situs of defendants' claims, however, does appear to be different than where originally staked. Shortly after plaintiffs' claims were staked, defendant Hall told plaintiff Rummel that the reason plaintiffs did not find the monuments of defendants' claims was that "they were down under the rim" (R. 407). Although defendant Hall testified (R. 458) that "I don't think I made quite that statement," it is significant that in November, 1955, Erle F. Bielz gave a signed statement (Exh. P-78) that when he was in the general area with Bailey and Hall on June 2 and 3, 1953, the claims which they staked were "on the Shinarump rim under the heavy white

rim," which would place defendants' claims outside the conflict area and would explain why the other witnesses did not find them where they now appear. Later, and after defendant Hall flew to Colorado to see him, Bielz wrote a letter (Exh. D-79) to repudiate the statement he had first made. The fact remains that neither the witness Pasco (R. 114-115) nor the witness Andrews (R. 237) nor the witness W. G. Mathews, a surveyor working for the AEC (R. 358-361) nor the witness J. W. Smith, an AEC geologist (R. 872-875) found monuments of defendants' claims in the conflict area although they did find the monuments of plaintiffs' claims.

Hardly worthy of passing mention is defendants' suggestion (Resp. Br. 41-42) that plaintiffs' Red Canyon No. 9 claim is invalid because its discovery monument is located on defendants' Red Fry No. 1 claim. This suggestion of invalidity is based upon defendants' convenient assumption that this Court will decide in their favor an ultimate issue, i. e. the validity of the Red Fry No. 1 claim. Moreover, it will be noted how defendants' slide from mention of the discovery monument in one sentence to a legal assertion in the next sentence and a following citation both having reference to *actual* discovery. Perhaps they merely failed to recognize the distinction.

III

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

The error of the trial court in holding that plaintiffs could acquire no rights because their originally posted Notices of Location were dated prior to the posting is discussed in Appellants' Opening Brief, pages 16 through 21.

Defendants' argument in this respect is replete with misstatements apparently intended to obscure the issues with prejudice. The dating of plaintiffs' original Notices of Location ahead of their posting was intended by plaintiffs' agents to protect the claims against the misconduct of others and not to defraud or injure anyone. Admittedly, this was bad judgment but no fraudulent motive was involved and the trial court so stated at the trial (lines 5-10, R. 427).

In *Stock v. Plunkett*, 183 P. 657 (Cal., 1919), the court held that the claim of the first locator was valid against the subsequent locator with notice where the first locator's notice was *undated* though the statute required that it be dated. That holding is referred to with approval in *MacDonald v. Midland Mining Co.*, 293 P. 2d 911 (Cal., 1956). Inherent in an undated notice is a greater fraud potential than in a misdated notice, yet in *Stock v. Plunkett* the amendment was held to relate back to the posting of the undated notice as against an intervening location. In the case at bar, there was no intervening

location between the misdated notices and the amendments. The holding in *Stock v. Plunkett* is completely consistent with the statement of this Court in *Muldoon et al. v. Brown et al.*, 21 Utah 121, 59 P. 720-721, quoted at page 19 of Appellants' Opening Brief.

It is clear that the defendants were not defrauded nor in the slightest degree affected. Defendants repeatedly assert that plaintiffs when they located their claims knew about defendants' Red Fry Nos. 1, 2, 3, 4 claims and Maybe Nos. 1, 2, 3, 4 claims. The Notices of Location of defendants' said claims all bore date of April 2, 1953, and were all recorded April 17, 1953. Why, if plaintiffs were trying to predate defendants' claims, would they have selected a date more than four months subsequent to the recording of defendants' claims?

Further illustrative of the misstatements made by defendants is the following: (Resp. Br. p. 45)

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

There is not a word in the record to indicate that plaintiffs then had the slightest knowledge as to the oil and gas lease and, furthermore, the oil and gas lease had been applied for July 24, 1953, and was actually issued August 7, 1953. The suggestion that an August 18, 1953 date was intended to predate the effect of that application or lease issuance is nonsense.

The Utah statutes contemplate that the corners of a mining claim will be monumented within the time allowed for recording of the Notice of Location. Defendants concede that they did not mark the corners of their claims until June, 1953, a month and a half after defendants had recorded their Notices of Location. Were defendants seeking some improper advantage by recording the Notices of Location before the corners of their claims had been monumented?

An Amended Notice of Location of plaintiffs' Red Canyon No. 6 mining claim dated October 1, 1953, was posted that day. An Amended Notice of Location of plaintiffs' Red Canyon No. 9 mining claim dated October 3, 1953, was posted that day. Timely recording was had as to each of these Amended Notices of Location and each of these Amended Notices of Location was sufficient standing on its own to constitute an original location.

These amended relocations were, as were plaintiffs' original locations, then invalid because they covered land embraced within an oil and gas lease. Section 1 of Public Law 585 (30 USCA 521), enacted August 13, 1954, provided the means by which such invalid locations could be validated through the filing of amended notices of location within the period allowed by the statute. This plaintiffs did on September 1, 1954. No such Amended Notices were filed by defendants as to their claims which were invalid for lack of discovery prior to the filing of the application pursuant to which said oil and gas lease was issued.

On February 10, 1954, AEC Circular 7 (10 CFR 60.7) was promulgated through publication in the Federal Register. That Circular was designed to permit acquisition of uranium lease rights on lands whereon location of valid mining claims was precluded because of there being an outstanding lease or permit under the Mineral Leasing Act or a pending application therefor. On May 21, 1954, plaintiffs, in accordance with this Circular, posted Notices of Lease Application on their respective claim tracts. This was followed by a timely filing with AEC of plaintiffs' Lease Application No. O.G. 1021. Under the provisions of Section 3 of Public Law 585 (30 USCA 523) the owner of any pending uranium lease application was granted a preference right for a period of 120 days after the date of the enactment for the location of mining claims covering tracts as to which notices of lease application and a lease application had been filed. The amended relocations made by plaintiffs September 1, 1954, complied in every respect with the requirements necessary to entitle plaintiffs to the benefits of that Section 3.

Even apart, however, from the question of whether plaintiffs' claims were validated under Section 1 of Public Law 585 or whether they are preference right locations under Section 3 of Public Law 585, the provisions of Section 5 of Public Law 585 (30 USCA 525) opened to mining location as of August 13, 1954, those lands as to which mining location had theretofore been precluded because the lands were either :

1. included in a permit or a lease issued under the mineral leasing laws ; or

2. covered by an application or offer for a permit or lease which had been filed under the mineral leasing laws; or
3. known to be valuable for minerals subject to disposition under the mineral leasing laws.

The amended relocations made by plaintiffs September 1, 1954, complied in all respects with the requirements necessary for the location of a valid mining claim and, if treated as effective only as of that date, stand as the first valid mining locations made as to the area in conflict.

Since there were no intervening rights, it matters not whether by virtue of compliance with Section 1 of Public Law 585 plaintiffs' rights date from the posting of their original locations in September, 1953, or from the posting of their amended relocations in October, 1953, or whether by virtue of compliance with Section 3 of Public Law 585 plaintiffs' rights date from their posting of Circular 7 Notices of Lease Application on May 21, 1954, or whether plaintiffs' amended relocations of September 1, 1954, be treated as the first effective date of plaintiffs' rights.

The gist of defendants' argument is that because plaintiffs made the mistake of predating their original Notices of Location there was nothing which they could do whereby the mistake could be corrected and rights could be acquired.

Any careful analysis of the cases relating to amendment will show that as between (1) a situation where the

original but subsequently amended location was wholly invalid and (2) a situation where the original but subsequently amended location involved a merely technical irregularity or deficiency, there is this and only this distinction: Where the original location was wholly invalid, an amended relocation which meets the requirements of law operates from the date of the amended relocation and does not relate the thus established rights back to the date of the original location. On the other hand, where there was but a technical irregularity or deficiency, the amendment is related back to the original location as establishing rights as of the date of the original location.

Defendants boldly assert (Resp. Br. 47-48) that a mining location which is void cannot be amended. Each of the three cases cited by defendants for this contention was a Colorado case involving two particular and apparently conflicting Colorado statutory provisions, one of which declared a defective certificate to be void and the other of which authorized amendment.

In *Morrison's Mining Rights*, 16th Edition, page 633, the author states in criticism of *Sullivan et al. v. Sharp et al.*, 80 P. 1054 (Colo.), one of the three cases cited by defendants:

“The opinion everywhere has always been that a relocation perfected the original location if in any respect defective, or, if void, the incident which rendered it void being at the time of relocation gone, it operated as an original location. The case of *Strepy v. Stark*, 7 Colo. 614, 620, 5 P. 111,

17 M. R. 28, so decides in terms. The doctrine that a relocation could not cure a location originally void is absolutely novel and contrary to all the cases which have approached the point. — *Beals v. Cone*, 27 Colo. 473, 62 P. 948, 83 Am. St. Rep. 473, 20 M.R. 591; *Tonopah & S. L. M. Co. v. Tonopah M. Co.*, 125 F. 389, 390.”

The foregoing statement from Morrison was quoted with approval in *Norris v. United Mineral Products Co.*, 158 P. 2d 679, 687-8 (Wyo., 1945).

In *McEvoy v. Hyman*, 25 F. 596 (1885) another of the three cases cited by defendants, the federal court for Colorado in effect attempted to read the word “void” out of one section of the Colorado statutes in reference to amendments where another section of the Colorado statutes indicated that application of the doctrine of relation to the original notice was intended. The quotation from that case set out in Respondents’ Brief (p. 48) must be read in connection with the omitted balance of the second quoted sentence, the sentence which follows and the full decision. So read, it is clear that the court held only that the use of the word “void” in one section of the Colorado statutes did not defeat the operation of the doctrine of relation and, therefore, that the amended location involved in that case did relate back to the original defective location and did defeat any rights under the location which had intervened. There is nothing in the case which warrants any inference that an amended relocation may not be effective as of the date of its making, even though it will not relate back.

In *Morrison's Mining Rights*, 16th Ed. page 160, it is stated:

“In *Moyle v. Bullene*, 7 Colo. App. 308, 44 P. 69, the very tenable distinction is made that where the original location certificate was so ‘defective as to absolutely fail to comply with the statutory requirements’ it was void and the amended record would not relate back; but if the original paper was only lacking in technical detail the two should be construed as of the date of the first, and both construed together according to the doctrine of relation. But in *Frisholm v. Fitzgerald*, 25 Colo. 290, 53 P. 1109, where a record contained no reference at all to a natural object or permanent monument, and was not only constructively void for noncompliance with the Congressional Act, but was declared void in terms by the Colorado Statute, the relocation was held to relate back to the original record and to cut out an intervening title.”

Frisholm v. Fitzgerald, referred to in the above quotation, is the third case relied upon by defendants.

It may be mentioned that *Morrison's Mining Rights*, 16th Ed. (1936) above referred to, was the work of Emilio D. DeSoto and Arthur R. Morrison, members of the Colorado Bar.

In *Bergquist v. West Virginia-Wyoming Copper Co.*, 106 P. 673 (Wyo., 1910), the court discussed the *McEvoy* and *Frisholm* cases above referred to and clearly recognized that the principle that an amendment of an invalid location is effective from the making of the amendment whereas an amendment of a merely imperfect location

relates back to the original location and cuts off intervening rights. This court stated (p. 679):

“Therefore, if a proper construction of the statute, a question which we do not decide, would require the location notice to be posted at the discovery shaft as distinguished from the point where the lode was first discovered upon the claim, there would be the same irregularity in both the Little Joe and Merry Christmas location, which, if sufficient to invalidate either claim, would invalidate both, whereupon it would follow that the amended certificate of location of the original Little Joe would take effect as recorded before the existence of the intervening rights, thereby curing the only defect suggested by this record as to that location.”

There was no fraud or fraudulent intent which would render plaintiffs' original locations invalid. But even were the original Notices held invalid, there is no basis for the disregard of plaintiffs' October, 1953, Amended Notices of Location; or plaintiffs' May, 1954, Notices of Lease Application; or plaintiffs' September, 1954, Amended Notices of Location.

CONCLUSION

The judgment of the trial court should be reversed and this Court should enter a decree as requested in Appellants' Opening Brief.

Respectfully submitted,

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