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Last year, in Volume III, Numbers 1 and 2, the authors of this article discussed the influence of modern methods of hard mineral exploration and development upon the mining laws applicable to the appropriation of public mineral lands in Wyoming. The law of mines and mining on the public domain, however, goes beyond the initial appropriation and completion of the acts of location. In this article, therefore, the authors examine the nature of a locator's interest in his mining claim, as illustrated by the principles which determine whether titles to unpatented mining claims are maintained or terminated.

POSSESSORY INTERESTS IN WYOMING MINING CLAIMS†

*Don H. Sherwood**

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INTRODUCTION

THE nature of a locator's interest in his mining claim is essentially possessory¹ and therefore demands regular—

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1. The fact that the paramount title to land in which mines lie is in the United States does not affect the mining title thereto, since "each case shall be adjudged by the law of possession." 30 U.S.C. § 53 (1964). Occupation of such land is authorized by Congress, 30 U.S.C. § 22 (1964), and the possessory nature of the title granted in 30 U.S.C. § 26 (1964) is emphasized in 30 U.S.C. §§ 28, 30 and 38 (1964). *Cf. Wyo. STAT.* § 30-8 (1957). See also Sherwood & Greer, *Mining Law in a Nuclear Age: The Wyoming Example*, 3 *LAND & WATER L. REV.* 1, n. 1, and at 6-12 (1968).

if not constant—attention from him.² So, unlike other kinds of property, with which mining claims are often equated,³ the extent and character of the interest⁴ created by appropriation,⁵ upon completion of the acts of location of public mineral lands,⁶ may vary from time to time thereafter.⁷ Indeed, a great many things may happen to a mining claim between the time of its initiation and its eventual patenting, abandonment or termination. It is therefore appropriate to conclude our review of the law of mines and mining on the public domain in Wyoming with a discussion of the mining claim itself, as defined by the rights and obligations of its owner after he has—at least ostensibly—located it.⁸

We have pointed out elsewhere⁹ that a mining claim may be initiated and recorded, by chance or by design, prior to the discovery of a valuable mineral deposit.¹⁰ One must then consider the interest of the locator of a claim located in advance of discovery as well as the interest of the discoverer who has completed all of the acts of location. The contrast between the two, in fact, almost perfectly describes the nature of the statutory creature we call a mining claim and think of as property.

2. See, e.g., *Birchfield v. Thiercof*, 5 Ariz. App. 484, 428 P.2d 148, *reh'g denied*, 6 Ariz. App. 20, 429 P.2d 512 (1967), where the constant attention required of one without title to a claim occupied by him is distinguished from the regular or minimum annual attention permitted in the case of the owner of a valid claim. In *Birchfield*, the Court held that as against a stranger entering peaceably upon an existing claim for exploration purposes, only actual and continuous possession will protect one without title to the existing claim from relocation, even if annual labor has been performed. There was, in this case, a gap in the chain of title from the original locator of the claim to the one claiming the benefit of the assessment work performed upon the claim, and insufficient evidence to establish title by adverse possession prior to the stranger's relocation.
3. See, e.g., *Ickes v. Virginia-Colorado Dev. Corp.*, 295 U.S. 639, 644-645 (1935), and the cases there cited, especially *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 316-317 (1930). Cf. *United States v. Etcheverry*, 230 F.2d 193, 195 (10th Cir. 1956), and *Davis v. Nelson*, 329 F.2d 840, 844-845 (9th Cir. 1964).
4. The locator's interest may also depend upon the type of mining claim utilized, as discussed in *Sherwood & Greer*, *supra* note 1, at 12-32.
5. Alternative methods of appropriation and forms of location are discussed in *Sherwood & Greer, Mining Law in a Nuclear Age: The Wyoming Example*, 3 LAND & WATER L. REV. 319, 322-328 (1968) (reprinted in 6 ROCKY MT. MINERAL L. REV. 43 (1968)).
6. See *id.* at 330-352.
7. At least until patent issues, if applied for, in which case the appropriation becomes a fee title. 30 U.S.C. §§ 29-38 (1964).
8. See *Sherwood & Greer*, *supra* note 5, at 330-333.
9. *Id.* at 330-352.
10. One may even question whether it can be otherwise since the decision in *United States v. Coleman*, 390 U.S. 599 (1968). But see *Converse v. Udall*, 399 F.2d 616 (9th Cir. 1968).

INTERESTS IN CLAIMS LOCATED
BEFORE DISCOVERY: *Pedis Possessio*

We have already observed that today the search for ore bodies which offer few surface indications of their presence, size, shape and extent is likely to result in the prospector making his discovery sometime later¹¹ than his identification of a particular "target" area.¹² Drilling programs, of course, require considerable time, as well as money, and to complete even one such program the prospector will have to spend several days or even weeks at a particular site or sites, occupying the public lands with personnel and equipment. His presence for such extended periods on public lands without having made a discovery creates several problems. What, for example, is the prospector's legal status while he is attempting to make a discovery of valuable minerals on public lands? Does he have rights and privileges there or is he merely a trespasser? If he has some right to occupy the public lands, how are his rights defined? How can he protect himself and his operation from interference and encroachment by other like-minded prospectors? Since the latter may be attracted primarily by his activity, it is quite necessary that these questions be answered with some certainty if the prospector is to be provided with the minimum assurance of security which he must have in his land position before he commits the large sum required for a modern exploration program.

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11. Sherwood & Greer, *supra* note 5, at 330-333. We have modified the usual order of presentation of the subject matter to take account of this in that we first discussed the performance of the various acts of location and then examined the discovery requirement in some detail. See *id.* at 353-362. We now retrace our steps to reflect upon the legal status of the locator's presence and activities on the public domain before and after he makes his discovery.
 12. See *Adams v. Benedict*, 64 N.M. 234, 327 P.2d 308, 319 (1958), where it is suggested that exploration for oil under the early oil placer claims was similar to that of the modern quest for hard minerals at great depth and that the rules applicable to oil placers ought likewise to apply, for example, to lode claims located for deep deposits. The suggestion should alert Wyoming mining lawyers to the relevance of such cases as *Granlick v. Johnston*, 29 Wyo. 349, 213 P. 98 (1923); *Sparks v. Mount*, 29 Wyo. 1, 207 P. 1099 (1922); *Dean v. Omaha-Wyoming Oil Co.*, 21 Wyo. 133, 128 P. 881, 129 P. 1023 (1913); *Phillips v. Brill*, 17 Wyo. 26, 95 P. 856 (1908), and *Whiting v. Straup*, 17 Wyo. 1, 95 P. 849 (1908), to modern problems.

In our search for the source and nature of pre-discovery rights of occupancy of public lands we may begin with the policy expressed by Congress in the General Mining Law:¹³

... all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase

That Congressional policy, designed to encourage exploration and development of mineral resources, is an invitation to prospectors, and is implemented by an appropriation system which conditions one's right to lay claim to minerals upon the discovery of valuable deposits. This creates obvious "chicken and egg" problems. How is a prospective locator to make his discovery? Certainly not *in absentia*. Since it is necessary for him to be *on* the public domain, looking for minerals, for some time before he actually finds them, the courts quite naturally, and wisely, have construed the law in such a way as not only to permit entry onto the public lands for prospecting, but also to account for and protect that occupancy which necessarily precedes discovery. Thus, while a prospector might not have a true "location" until after he makes his discovery, he might nevertheless enter onto certain ground, and, by virtue of his occupation and possession of it, be protected against forcible or fraudulent entry or intrusion by others until such time as he does make a discovery.¹⁴

13. 30 U.S.C. § 22 (1964). This section is the same as R.S. § 2319, about which the United States Supreme Court said in *Union Oil Co. v. Smith*, 249 U.S. 337, 346 (1919): "Nevertheless, section 2319 extends an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits, and this and the following sections hold out to one who succeeds in making discovery the promise of a full reward." In advance of discovery an explorer is sometimes said to be a licensee or tenant-at-will on the public domain. See *Cole v. Ralph*, 252 U.S. 286 (1920).

14. While the statutory scheme of location suggests that all the acts of location must be predicated on a prior discovery of valuable minerals within the limits of the claim, and the cases often contain language to the effect that there can be no "location" without a discovery, e.g., *Columbia Copper Mining Co. v. Duchess Mining, Milling & Smelting Co.*, 13 Wyo. 244, 79 P. 385 (1905), it has been established beyond doubt that discovery may follow rather than precede such acts. See *Sherwood & Greer*, *supra* note 5, at 330-333. As was said in the leading case of *Union Oil Co. v. Smith*, 249 U.S. 337, 346 (1919):

For since, as a practical matter, exploration must precede the discovery of minerals, and some occupation of the land ordinarily is necessary for adequate and systematic exploration, legal recognition of the *pedis possessio* of a *bona fide* and qualified prospector is universally regarded as a necessity.

The judicially conceived doctrine of *pedis possessio*,¹⁵ as this pre-discovery right is usually called, thus helps fill a conceptual vacuum¹⁶ in the statutory appropriation scheme and provides both a justification for occupancy¹⁷ and a ration-

Compare, e.g., Davis v. Nelson, 329 F.2d 840, 845-846 (9th Cir. 1964):

A common practice in the western states among prospectors who intend more than a casual exploration of an area thought to contain mineral is first to locate, mark and record the boundaries of the claim, and then to expend time, labor, money and energy on the prospect. Such occupation and working of the claim, even before discovery, gives the locator a limited defendable right of possession and a right which is, in some respects, alienable. The right of *pedis possessio* is one which may be transferred by transfer of possession because it rests on actual possession, accompanied by deed, lease or assignment of the color of title represented by the local location and recording of the claim. *Miller v. Chrisman* (1903), 140 Cal. 440, 73 P. 1083, 74 P. 444; *United Western Minerals Company v. Hannsen* (1961), 147 Colo. 272, 363 P.2d 677; *Weed v. Snook* (1904), 144 Cal. 439, 77 P. 1023; *Jose v. Utley* (1921), 185 Cal. 656, 199 P. 1037. . . .

Whatever may be the rights acquired by a prospector, who locates a mining claim prematurely and before actual discovery of valuable mineral, in the defense of his actual possession against third persons, it is clear under both the mining law and the regulations that a discovery of valuable mineral is the *sine qua non* of an entry to initiate vested rights against the United States. The premature location of such a claim and the recordation of certificates or notices of location cast a cloud upon the title of the United States to the lands, as the law contemplates that discovery must coincide with the physical location of the claims. . . .

This is not to say that citizens, and those who have declared their intention to become such, do not also have and enjoy a statutory right to prospect and explore the public domain. Nor do we imply that it is an actionable wrong for a good faith prospector to locate a claim in furtherance and in protection of the rights of *pedis possessio* while pursuing his more thorough exploration. But the validity of his title, claimed and asserted by the location of the claim and the recordation of notices, depends upon the resolution of a question of fact, that is, has there been a discovery of valuable mineral within the limits of the claim?

15. "*Pedis possessio*. Lat. A foothold; an actual possession. To constitute adverse possession there must be *pedis possessio*, or a substantial inclosure. 2 Bouv. Inst. no. 2193; *Baily v. Irby*, 2 Nott & McC. (S.C.) 343, 10 Am. Dec. 609. Black, Law Dictionary (3rd Ed. 1951). The phrase '*pedis possessio*' means actual possession. *Kendrick v. Lathem*, 25 Fla. 819, 6 So. 871, 876; *Goldberg v. Bruschi*, 146 Cal. 708, 81 P. 23, 26. 'Actual possession', as a legal phrase, is put in opposition to the other phrase, 'possession in law', or 'constructive possession'. Actual possession is the same as '*pedis possessio*' or '*pedis positio*', and these mean a foothold on the land and actual entry and possession in fact, a standing upon it, and occupation of it, as a real, demonstrative act done. It is the contrary of a possession in law, which follows in the wake of title, and is called 'constructive possession'. [Citing cases]." *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 724, n. 45 (D. Utah 1965).
16. The statute, 30 U.S.C. § 22 (1964), "does not grant to citizens of the United States the single right to locate, explore and exploit mining claims on the public domain. The statute grants two rights, (1) the right to explore and purchase all valuable mineral deposits in lands belonging to the United States; and (2) the right to occupation and purchase of the lands in which valuable mineral deposits are found. *The right to explore, that is, prospect for valuable minerals on public lands, cannot be telescoped with the right to locate the mining claim and occupy and exploit it for its valuable mineral content after such minerals have been found.*" *Davis v. Nelson*, 329 F.2d 840, 844-845 (9th Cir. 1964) (emphasis added).
17. "It is held that upon the public domain a miner may hold the place in which he may be working against all others having no better right, and

ale for assigning priorities to the rights of competing claimants who hope to find, but have not as yet found, minerals on the public lands.¹⁸

Recognizing at the outset, as we must, that *pedis possessio* is not a doctrine which can be applied against the United States, at least in the absence of statute,¹⁹ the Wyoming cases applicable to disputes between rival locators merit consideration in some detail. If one remembers that those cases involving oil placer locations were governed after February 25, 1920, by a special statute,²⁰ not available today to appropriators of locatable minerals, the principles pertinent to other aspects of these cases are nonetheless still revelant to *pedis possessio* cases.

The doctrine of *pedis possessio* was first elaborated in Wyoming in the case of *Whiting v. Straup*,²¹ where, in apply-

while he remains in possession, diligently working towards discovery, is entitled—at least for a reasonable time—to be protected against forcible, fraudulent and clandestine intrusions upon his possession.” *Union Oil Co. v. Smith*, 249 U.S. 337, 346-347 (1919).

18. See note 24 *infra*.

19. In *Davis v. Nelson*, 329 F.2d 840 (9th Cir. 1964), involving a dispute between locators and the United States, the locators argued that mining claims located for the purpose of prospecting the land before the discovery of valuable mineral thereon insure a valid possessory title to the land embraced within the claim enforceable against the United States. The Court rejected this contention, saying: “From earliest times in the history of mining, the courts have uniformly held that a discovery of valuable mineral must coincide with compliance with the legal requirements for locating a claim before valid ownership of the property has been established. Whenever such coincidence does occur, the locator has acquired a vested property right enforceable and defendable against the United States as well as third persons.” *Id.* at 845. *Cf.* note 14 *supra*. The *Davis* case involved public domain and the powers of the Bureau of Land Management. It is not clear that the result should be the same in the case of contests initiated by action of the Forest Service, since there are statutes expressly prohibiting interference by the Forest Service with prospecting and prospectors. 16 U.S.C. §§ 471, 472, 475, 478 and 482 (1964).

20. Act of Feb. 25, 1920, ch. 85, § 37, 41 Stat. 451, as amended, now 30 U.S.C. § 193 (1964). This section, making oil and gas, theretofore locatable under the Act of Feb. 11, 1897, ch. 216, 29 Stat. 526, formerly 30 U.S.C. § 101, subject to disposition by lease, saved “valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.” 30 U.S.C. § 193 (1964) (emphasis added).

21. 17 Wyo. 1, 95 P. 849 (1908). In this case, Straup and three others located an eighty-acre association placer which was conveyed, prior to a discovery, first to a corporation, and then to Straup, who later conveyed the south half (40 acres) of the claim to Phillips, who then conveyed a one-half undivided interest therein to Whiting. Thereafter, Straup was employed by one Bijur, who represented an association, to drill a well on the north half of the claim; after discovery, a second well was drilled on the south half, and a new claim was located in behalf of Straup's employer-association, which included the south half of the old claim. The association then conveyed the new claim to a corporation. Straup's deed to Phillips was held not to estop his subsequent employer from questioning the validity of Straup's original location and the possession of Phillips and Whiting. Since Straup's quit-claim deed conveyed only his *pedis possessio* to Phillips,

ing the traditional rule, the Court pointed out that if there is no discovery to support a location, the land is "vacant and unappropriated, except so far as it might be in the actual possession of some one." The Court went on to say:²²

Though such a location must rest upon discovery, and will not be complete until the discovery is made, it is not required, in the absence of intervening rights, that discovery shall precede the other acts of location. If made prior to any intervening rights, though subsequent to marking the boundaries and recording the claim, the location, if otherwise good, will be validated at least from the date of discovery.

Applying these rules, the Court in *Whiting* found on the evidence that a prior claim had been successfully "jumped" because the prior claimants did not maintain actual possession for the purpose of prosecuting work looking to a discovery and therefore could not exclude others who entered peaceably.

A more typical and orthodox example of the kind of dispute that might arise and of the technique for resolving it can be found in the case of *Sparks v. Mount*.²³ There, the defendants' predecessors in interest were the first to lay claim to the ground in dispute, filing an oil placer location in February of 1918. But having taken this step, no further efforts to make a discovery were attempted on the claim. Nearly eighteen months later, on August 29, 1919, the plaintiffs' predecessors in interest came onto the then unoccupied ground and located another oil placer. In November, 1919, the plaintiffs, having acquired the interest of their predecessors, entered and began drilling. They erected a small building on the land and continued to drill for oil, until one night in December when someone sabotaged their well. Two days later the defendants moved drilling equipment onto the ground and in another two days were drilling their own well. Plaintiffs protested and notified defendants to vacate the ground within their claim. Plaintiffs also started drilling another

and Phillips and Whiting were found not to be in actual possession of the south half of the claim at the time Straup re-entered in behalf of his subsequent employer, the decision is clearly correct. See *Birchfield v. Thiercof*, 5 Ariz. App. 484, 428 P.2d 148, *reh'g denied*, 6 Ariz. App. 20, 429 P.2d 512 (1967).

22. *Whiting v. Straup*, 17 Wyo. 1, 95 P. 849, 854 (1908).

23. 29 Wyo. 1, 207 P. 1099 (1922).

well. Five days after they had started, the defendants, who had ignored the demand that they vacate the ground, made the first discovery. Plaintiffs brought an injunction suit to enjoin further trespass by the defendants. The defendants won a dismissal in the trial court, but on appeal the Supreme Court reversed, reasoning that at the time the plaintiffs made their entry on August 29, 1919, the ground was open to entry because the defendants' predecessors had made no attempt to take or maintain possession under the original 1918 location. Conversely, at all times after the August 29th entry, the plaintiffs or their predecessors had continued in possession, diligently pursuing their efforts to make a discovery. The plaintiffs thus were to be protected against hostile or clandestine entry by others, including defendants, by the right of pre-discovery *pedis possessio*, and it did not matter that the defendants, having intruded and trespassed against the plaintiffs, won the drilling "race" to discovery.²⁴

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24. It is occasionally suggested that where two competing claimants are searching for minerals in the same ground, a "race" situation is created and the first to make a discovery is the winner. Such "races" of course can be conducive to hostilities, sabotage, and breaches of the peace. One of the functions of the *pedis possessio* rule is to establish priority in one of the competing prospectors on the basis of prior legal right, thereby avoiding any need for warfare between drilling crews. Whenever it can be established that one party is entitled to protection by virtue of *pedis possessio*, then it makes no difference that the other party wins the discovery "race." *Adams v. Benedict*, 64 N.M. 234, 327 P.2d 308 (1958). Cf. *Granlick v. Johnston*, 29 Wyo. 349, 213 P. 98 (1923), in which case the first locator or claimant of certain oil placer ground failed to establish a *pedis possessio* right in himself to exclude the second locator because the evidence showed a "relaxation" by him of his possession or the right thereto. Subsequently, the second locator entered peaceably. The Wyoming Court correctly found that because of a failure of "continued actual occupancy" on the part of the first locator, his claim was subject to entry by others, if that entry was not forcible, clandestine or fraudulent. Unfortunately, however, the court suggested that the first locator's dilatoriness, coupled with the second locator's entry, set up a race in which the right of possession ultimately would fall to the first to prosecute diligently to discovery. A better statement of the rule appears in *Adams v. Benedict*, *supra*, 327 P.2d at 316-317, where the New Mexico Court first quotes from *Union Oil Co. v. Smith*, 249 U.S. 337, 348 (1919), as follows:

Whatever the nature and extent of a possessory right before discovery, all authorities agree that such possession may be maintained only by continued actual occupancy by a qualified locator or his representatives engaged in persistent and diligent prosecution of work looking to the discovery of mineral.

and then goes on to say:

... possession of each claim, where no valid location has been perfected ... must be protected by actual occupation of that identical claim and the diligent and persistent exploratory work thereon. If the occupation is relaxed under those circumstances, another may take possession of the claim if he can do so peaceably. The occupation of the second occupant, in that event, will be protected so long as he abides by this same rule.

The *Sparks* case illustrates both the principal policy and the limitation²⁵ on the *pedis possessio* rule. The purpose of the rule is to guarantee to one in possession of mineral ground an assured land position as against intruders and to encourage him to feel secure in committing his time and resources to mineral development. Someone in the position of the plaintiffs in *Sparks* should be able, upon observing vacant, or apparently vacant, ground, to enter upon it and search for minerals, assured that he may protect his right to do so by remaining in possession, in good faith, diligently exploring or working toward a discovery. Conversely, it is no more than fair to require of one relying on *pedis possessio* that he manifest his possession by continued actual occupancy and bona fide, diligent effort to make a discovery within a reasonable time.²⁶ The requirement is necessary to prevent monopolization of desirable public lands by those who, not having made discoveries, merely hope to stockpile lands for speculative purposes. In *Sparks*, a failure in this regard was held to mean that the interest of the defendants' predecessors was not such at the time of plaintiffs' entry as to be entitled to protection, defendants' predecessors not having maintained their rights.

Numerous difficulties attend the doctrine of *pedis possessio* and its application. For example, in attempting to guarantee the right of one in possession to remain in exclusive possession of public lands, the courts have, with a certain logic, developed a corollary to the rule, the requirement that the possessor's possession must have been exclusive. That is, he must have excluded others from his location. Any relaxation of the claim to exclusive possession may result in loss

25. The doctrine must be viewed both as conferring rights on those in possession under the prescribed circumstances and as depriving them of rights whenever the principal conditions, *i.e.*, good faith, due diligence, continued actual possession, and prosecution of work towards discovery, are no longer met. See *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 722, n. 36 (D. Utah 1965).

26. *Hodgson v. Midwest Oil Co.*, 17 F.2d 71 (8th Cir. 1927). What constitutes sufficient occupancy, and what is a reasonable time, depend, of course, on the circumstances of the case and, particularly, on the presence or absence of a competing claimant asserting an intervening, better right. See *Phillips v. Brill*, 17 Wyo. 26, 95 P. 856 (1908), a case which was found to depend on the issue of whether *pedis possessio* was established ahead of a competing location and in which it was made clear that *pedis possessio* will protect a locator even though he delays taking possession for several months after completing the other acts of location, provided there are no intervening rights.

of the right to continue in exclusive possession.²⁷ The inevitable result is that the possessor must walk a legal tightrope. If he has misjudged his right, he risks unlawfully excluding others from the public domain.²⁸ On the other hand, he risks loss of his own possessory right if he fails to exclude others and suffers peaceable entry.²⁹ Inevitably, difficult questions about what constitutes possession,³⁰ or good faith,³¹ or diligence,³² are involved. Occasionally, the spectacle of a head-on confrontation between parties who may have miscalculated their *pedis possessio* rights occurs.³³

Often the modern miner searching for deeply situated, widely disseminated deposits will find an area of interest considerably larger than the size of one claim and too large for actual occupancy of all of the land on any practical basis.³⁴ Nevertheless, it is clear that *pedis possessio* requires actual occupancy of each claim,³⁵ there being no basis on which to hold a block of several claims by possession of one of them even though operations conducted on one claim may ultimately lead to a discovery of mineral on more than one, and even though there is no practical necessity for occupancy of more than a small surface area in order to develop an extensive underground ore body.³⁶ These and other diffi-

27. *Granlick v. Johnston*, 29 Wyo. 349, 213 P. 98 (1923).

28. *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708 (D. Utah 1965).

29. *Granlick v. Johnston*, 29 Wyo. 349, 213 P. 98 (1923).

30. *E.g.*, *Sparks v. Mount*, 29 Wyo. 1, 207 P. 1099 (1922). See note 36 *infra*.

31. The right to make a location cannot be exercised in trespass, or fraudulently. See *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708 (D. Utah 1965), where a defendant whose rights fell short of *pedis possessio* nevertheless prevailed over its opponent, whose agent had at an earlier time been employed by defendant's predecessor in interest and was thereby disabled from acquiring an intervening right. But cf. *Whiting v. Straup*, 17 Wyo. 1, 95 P. 849 (1908).

32. *E.g.*, *Phillips v. Brill*, 17 Wyo. 26, 95 P. 856 (1908).

33. The most picturesque modern example is found in *Adams v. Benedict*, 64 N.M. 234, 327 P.2d 308 (1958), where it is reported that appellant attempted physically to block the passage of appellee's bulldozer onto his claim and was carried along on or by the bulldozer for some 25 to 50 yards before he was removed from the front of it.

34. See, *e.g.*, *Titanium Actynite Indus. Inc. v. McLennan*, 272 F.2d 667 (10th Cir. 1959); *Globe Mining Co. v. Anderson*, 78 Wyo. 17, 318 P.2d 373 (1957), noted in 13 Wyo. L.J. 43 (1958).

35. *Union Oil Co. v. Smith*, 249 U.S. 337 (1919).

36. "[A] distinction is clearly drawn between rights of locators after a discovery, where constructive possession is sufficient as against other claimants, and rights of locators prior to discovery, where there is protection afforded a claimant only if he is in 'actual occupancy'." *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 723 (D. Utah 1965). A somewhat perplexing question may also exist concerning the extent to which *pedis possessio* protects a claimant even on one claim. Conceivably, he might be protected (and entitled to exclude others) only as to that

culties seriously detract from the usefulness of the *pedis possessio* doctrine in a modern context. But while the prospector might feel more secure, and his attorney more comfortable, if the courts—which, after all, created the doctrine of *pedis possessio*—extended the doctrine to protect the locator's interest in a not unreasonably large group of claims, appropriate inquiries into the extent that the locator's activities do tend reasonably and promptly to prospect an entire group of claims systematically, would necessarily substitute the subsequent judgment of the judiciary for the initial judgment of the prospector and his geologist. Since there is a tendency to leave the determination of what is reasonable to the initial judgment of the miner,³⁷ even a rule of reasonableness can become arbitrary, and an arbitrary rule is certain to promote speculation and restrict competition as surely as it would provide pre-discovery protection. If the amount of litigation is any gauge, application of the doctrine in its present form, coupled with the liberal test of discovery as between rival locators, seems to create few problems. Most alternatives would, in effect, substitute some form of lottery system for the basic rule of appropriation which protects the first discoverer rather than the first bettor.

INTEREST OF LOCATOR AFTER DISCOVERY

Both discovery³⁸ and performance of all of the acts of location³⁹ are essential to a completed appropriation of public mineral lands. Just as it sometimes happens that a prospector may lay out his claim in advance of discovery,⁴⁰ he may also make his discovery in advance of performing all of the acts of location. It is therefore appropriate to define the nature

certain ground in which he actually is in possession or to that portion of the claim vertically in which he is exploring. *Adams v. Benedict*, 64 N.M. 234, 327 P.2d 308 (1958), sensibly, we think, suggests that a prospector is entitled to possession of the full claim he intends to locate during the time he is diligently engaged in an effort to make a discovery, at least where he has given notice of the extent of that claim by defining the boundaries of the claim he proposes to perfect.

37. See AMERICAN LAW OF MINING § 7.6, n. 4 (1960).

38. See Sherwood & Greer, *supra* note 5, at 353-362.

39. *Id.* at 330-333.

40. See discussion and text at notes 11-37 *supra* on the rights of one in possession prior to discovery.

of the rights and interest of a *discoverer* both before⁴¹ and after completion of all the acts of location prescribed by law.⁴²

Until he has done some act demonstrating his intent to appropriate the discovered minerals, the discoverer remains merely a prospector, who has advantageous knowledge but no appropriation. But when he begins his appropriation by doing the acts of location his status changes to that of "locator" in the fullest sense. Upon posting the required location notice, the locator is entitled to exclusive possession of his claim during the period prescribed by statute for completing the acts of location.⁴³ Thus a conflicting junior location attempted during this period is void.⁴⁴ Further, upon completion of all of the acts of location, the discoverer has a valid, perfected mining location, secure from divestiture so long as the claim is maintained as provided by law.⁴⁵ The combination of discovery and the appropriative acts thus operate to segregate mineral land from the public domain. This land, and the minerals thus segregated, are said to constitute private property in the fullest sense of that term.⁴⁶ While the

41. While it is sometimes emphasized that the right of *pedis possessio* is strictly a pre-discovery right having nothing whatever to do with the post-discovery status of a prospective locator, it should be readily apparent that the status is in no way diminished by the fact of discovery, but rather, is enhanced thereby. See *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 723 (D. Utah 1965). A discoverer of mineral is, in the strictest sense, the only person entitled by law to make a valid location. See Wyo. STAT. §§ 30-1 and 30-3 (1957); *Columbia Copper Mining Co. v. Duchess Mining, Milling & Smelting Co.*, 13 Wyo. 244, 79 P. 385 (1905). Yet, one who merely knows of the existence of minerals on the public domain and has not yet acted to appropriate them has no rights which are substantially superior to one whose only right is pre-discovery *pedis possessio*.

42. Posting of notice, recording of claim, marking of boundaries, and, where required, discovery work. See *Sherwood & Greer*, *supra* note 5, at 333-352.

43. *Bergquist v. West Virginia-Wyoming Copper Co.*, 18 Wyo. 234, 106 P. 673 (1910). Read literally, Wyo. STAT. § 30-1 (1957) imposes on discoverers a sixty-day time limit within which they must act to record their claims. The type of information prescribed for the recorded certificate practically requires performance of the acts of location during the sixty-day period, at least as against a potential relocater. *Sherwood & Greer*, *supra* note 5, at 341, n. 120. It is clear that protection at this stage does not depend on actual possession, *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708 (D. Utah 1965).

44. *Bergquist v. West Virginia-Wyoming Copper Co.*, 18 Wyo. 234, 106 P. 673 (1910). The segregation of the lands from location by others is temporary in that expiration of the statutory time for performance of the acts of location makes the ground once again open to entry by one who is able to establish an "intervening right." Cf. *Columbia Copper Mining Co. v. Duchess Mining, Milling & Smelting Co.*, 13 Wyo. 244, 79 P. 385 (1905). Questions of the relative rights of a delinquent locator attempting to resume work as against a relocater are discussed below.

45. Claim maintenance requirements are discussed below.

46. See note 3 *supra*. The Act of July 23, 1955, Pub. L. No. 84-167, ch. 375, §§ 3-7, 69 Stat. 368, as amended, 30 U.S.C. §§ 611-615 (1964), no doubt qualifies the scope of the owner's property interest in an unpatented mining

exact nature of the estate acquired by a locator may be somewhat difficult to define,⁴⁷ the significant variances between an unpatented mining title and the title to other real property are the facts that: (1) the paramount title remains, until and unless patented, in the government,⁴⁸ and (2) the miner's interest is merely possessory,⁴⁹ and, as such, is subject to defeasance by either abandonment⁵⁰ or forfeiture.⁵¹

CLAIM MAINTENANCE AND THE ANNUAL WORK REQUIREMENT

Congress embodied its policy of encouraging diligent, bona fide mineral development of the public domain in section

claim, although *United States v. Etcheverry*, 230 F.2d 193 (10th Cir. 1956), *United States v. Rizzinelli*, 182 F. 675 (D. Idaho 1910), and *Teller v. United States*, 113 F. 273 (8th Cir. 1901), would seem to make the necessity for legislation limiting the possession to that required for mining purposes questionable, but for cases like *Ward v. Chevallier Ranch Co.*, 138 Mont. 144, 354 P.2d 1031 (1960), in which the owner of an unpatented mining claim successfully collected damages from a rancher whose sheep "trespassed" upon the claim, notwithstanding the fact that there was no apparent damage to the mining operations, if, indeed, there were any being conducted upon the claim. The 1955 Act restricts the use of claims located after July 23, 1955, to "prospecting, mining or processing operations and uses reasonably incident thereto." 30 U.S.C. § 612(a) (1964). In *Burke v. Horth*, 12 F.2d 58 (8th Cir. 1926), the court said in dictum that a mining claim is "property" and, as such, may be the subject of bargain and sale, mortgaging and disposition by will; however, the locator was said not to acquire such an estate as to which dower might attach. The interest of the locator was further characterized as the right to exclusive possession subject to certain conditions subsequent upon failure of which forfeiture occurs. This view of a mining claim, as will be seen later, somewhat over-simplifies the mechanics of relocation and forfeiture. See also *Boatman v. Andre*, 44 Wyo. 352, 12 P.2d 370 (1932); *Mecum v. Metz*, 30 Wyo. 495, 222 P. 574 (1924); *Friend v. Oggshaw*, 3 Wyo. 59, 31 P. 1047 (1883). Compare *United Western Minerals Co. v. Hannsen*, 147 Colo. 272, 363 P.2d 677 (1961), holding even the right of *pedis possessio* leaseable like other property.

47. Lindley suggests that the early recognition of mining rights in the public domain was merely an application of the common law rule that the possessor of property is regarded as having the best right thereto as against all but the true or paramount title holder, i.e., the United States of America, and that while he cannot be said to have the fee title, the locator has all the attributes of fee ownership so long as continued-development requirements are satisfied. Various theories of tenure are suggested as analogous, such as beneficial ownership in which the government is trustee, and common law copyholds. See 2 C. LINDLEY, MINES §§ 535-542 (3d ed. 1914).
48. *Forbes v. Gracey*, 94 U.S. 762 (1877).
49. *E.g.*, *Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U.S. 220, 226 (1904); *Bergquist v. West Virginia-Wyoming Copper Co.*, 18 Wyo. 234, 106 P. 673, 682 (1910).
50. *Simmons v. Muir*, 75 Wyo. 44, 291 P.2d 810 (1955); *Bergquist v. West Virginia-Wyoming Copper Co.*, 18 Wyo. 234, 106 P. 673 (1910); *Whiting v. Straup*, 17 Wyo. 1, 95 P. 849 (1908).
51. *E.g.*, *Hodgson v. Midwest Oil Co.*, 17 F.2d 71 (8th Cir. 1927); *Parker v. Belle Fourche Bentonite Prod. Co.*, 64 Wyo. 269, 189 P.2d 882 (1948).

5 of the Act of May 10, 1872.⁵² This section complemented the legislative purpose of opening public mineral lands to exploration and purchase by providing for forfeiture of claims upon (1) failure of the original claimants to perform a statutory annual minimum of work and development and (2) proper entry by subsequent locators who comply with the mining laws and "relocate" or locate new claims on the same ground.⁵³ Section 5 is now codified in 30 U.S.C. § 28 (1964)⁵⁴ which, in pertinent part, reads:

On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than \$100 worth of labor shall be performed or improvements made during each year. . . . [A]nd upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or

52. Ch. 152, § 5, 17 Stat. 91. Cf. 2 AMERICAN LAW OF MINING §§ 7.1 and 7.2 (1960). The policy, however, merely adopted the pre-existing custom of the miners. *Id.* § 7.2 at nn. 2-4. Cf. Sherwood & Greer, *supra* note 1, at 6, n. 28.

53. In accordance with 30 U.S.C. § 28 (1964), the traditional penalty for failure to do the required annual assessment work is that a mining claim which is delinquent in annual work becomes subject to relocation by another locator; the relocation works a forfeiture of the earlier claim. *Swanson v. Sears*, 224 U.S. 180 (1912); *Belk v. Meagher*, 104 U.S. 279 (1881); *Parker v. Belle Fourche Bentonite Prod. Co.*, 64 Wyo. 269, 189 P.2d 882 (1948). It should be emphasized, however, that a claim does not lose its validity merely because it has fallen into default through failure to perform the required annual assessment work. As against the government, as paramount title holder, the claim remains valid and may not be invalidated except for some other good cause such as abandonment, lack of discovery of valuable minerals, fraud or some like defect. *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306 (1930); *Ickes v. Virginia-Colorado Dev. Corp.*, 295 U.S. 639 (1935); *Oil Shale Corp. v. Udall*, 261 F. Supp. 954 (D. Colo. 1966), *aff'd*, ___ F.2d ___ (10th Cir. 1969).

54. Congress has from time to time suspended the annual assessment work requirement of 30 U.S.C. § 28 (1964) for certain years. See 30 U.S.C. § 28a (1964). In some instances the requirement was suspended for all claimants. In others only certain classes of claimants, such as servicemen on active duty with the armed forces, were excused. Usually, but not always, Congress provided a procedure for claimants to use in taking advantage of the suspension. Typically, claimants were permitted to file "lieu statements" or affidavits of intent to hold their claims in lieu of performing annual labor. Often the "lieu" procedure was authorized only for a limited number of claims. For example, a claimant owning thirty or forty claims might be authorized in a given suspension year to hold not more than six of his claims by complying with the "lieu" procedure; but his remaining claims would be subject to the assessment work requirement the same as in an ordinary or non-suspension year. If for a given year the Congressional suspension resolution provides a "lieu" procedure, failure of the claimant to utilize the procedure results in the claim or claims affected becoming subject to forfeiture, but compliance with the "lieu" procedure is effective to hold the claim for the entire year. See *Scoggin v. Miller*, 64 Wyo. 206, 189 P.2d 677 (1948); *Field v. Tanner*, 32 Colo. 278, 75 P. 916 (1904).

legal representatives, have not resumed work upon the claim after failure and before such location.

Compliance with the Federal statutory requirement on assessment work is effected by performing the required amount of work or by making the required improvements at some time between the beginning and the end of the fiscal year for which the claim is to be "represented."⁵⁵ But assessment work, like location procedure, is particularly vulnerable to the vagaries of local legislation,⁵⁶ and in Wyoming, the present requirements⁵⁷ can be traced back to the First Territorial Legislative Assembly, which seems to have been concerned as much with the danger of Indian attack as anything else.⁵⁸

55. The Federal law at various times in the past prescribed the periods July 1 to July 1, January 1 to December 31, or the year between anniversary dates of the original location of the subject claims as "assessment years." 2 AMERICAN LAW OF MINING § 7.3, n. 1 (1960). Under present law, the assessment year or period within which the work is permitted and required to be done commences at 12 o'clock noon on the first day of September succeeding the date of location of the claims and ends at 12 o'clock noon the following September 1. 30 U.S.C. § 28 (1944), *as amended* August 23, 1958, Pub. L. No. 85-736, 72 Stat. 829. Thus for any given assessment year the claimant has from noon of September 1 until noon of the following September 1 in which to do his annual work. If his assessment work for the preceding year was performed, or if the claim was located in the preceding year, he is fully protected for the entire assessment year even though he does not perform his work until the last morning of the assessment year. If, however, he fails to do any assessment work, his claim is open to location by others from and after 12 o'clock noon on that September 1st. *Griffith v. Noonan*, 58 Wyo. 395, 133 P.2d 375 (1943). WYO. STAT. §§ 30-12 and 30-14 (1957) provide that one hundred dollars worth of assessment work shall be performed during each year from the first day of July after the date of location and that delinquent claims shall accordingly be open to relocation on or after the first day of July of any year after such labor or improvements should have been done. The dates must be regarded as changed by the overriding Federal law. *Parker v. Belle Fourche Bentonite Prod. Co.*, 64 Wyo. 269, 189 P.2d 832 (1948); *Norris v. United Mineral Products Co.*, 61 Wyo. 386, 158 P.2d 679 (1945). The 1967 amendment substituted "September" for "July" in WYO. STAT. §§ 30-11 and 30-16 (1957). Law of Feb. 1, 1967, ch. 20, §§ 1-2, [1967] Wyo. Laws 14. Why the Legislature should change the month in but half of the sections referring thereto is uncertain, but of little significance. As to the "representation" aspects of assessment work, *see* Law of Dec. 16, 1871, § 1, [1871] Wyo. Laws 114, which relates the term to assessment work. *See also* Comment, *Annual Assessment Work as Notice to Prospector*, 6 UTAH L. REV. 391 (1959), and Note, *The Assessment Work Requirements*, 9 WYO. L.J. 231 (1955).

56. *See* 2 AMERICAN LAW OF MINING § 7.4 (1960); *cf. id.* § 7.5, and Sherwood & Greer, *supra* note 1, at 3-4.

57. WYO. STAT. §§ 30-11, 30-12, 30-13, 30-14, 30-15, and 30-16 (1957).

58. Act of Dec. 2, 1869, ch. 22, § 25, [1869] Wyo. Laws 312: "Hindrance of work by Indians shall not cause forfeiture of claims, when it is clearly proven that work could not have been prosecuted with safety to life or person." The Indian danger was recognized in the statutes until 1886. The Act of 1869 was repealed by the Act of Dec. 13, 1873, ch. 17, § 1, [1873] Wyo. Laws 176, but the Act of Dec. 16, 1871, § 1, [1871] Wyo. Laws 114, had been theretofore enacted, excepting from assessment-work requirements those who had been "driven from . . . [the district in which their claims were situated] by Indians." This latter provision, which

With the exception of the statute providing for the recording of labor affidavits,⁵⁹ which seems to require that affidavits be recorded for both lode and placer claims,⁶⁰ all of the present Wyoming statutes concern placer claims rather than lode claims.⁶¹ They no doubt stem from the early uncertainty as to whether the Act of May 10, 1872,⁶² required representation of placer claims as well as lodes.⁶³ State legislation in 1886⁶⁴ set forth annual labor requirements for association placers and fractional placers,⁶⁵ and rules for contiguous placer claims held under common ownership.⁶⁶ Two years later the Wyoming assessment-work statutes were enacted more or less in their present form.⁶⁷ The contiguity

appeared in WYO. COMP. LAWS ch. 85, § 1, at 488 (1876), was repealed by the Act of Mar. 12, 1886, ch. 115, § 22, [1886] Wyo. Laws 447.

59. WYO. STAT. § 30-15 (1957). See notes 60 and 79 *infra*.

60. "Upon completion of the required *assessment work* for any mining claim, the owner . . . shall cause to be made . . . an affidavit . . . which . . . shall within sixty days of the completion of the work, be filed for record, and . . . thereafter be recorded in the . . . county in which the said claim is located." WYO. STAT. § 30-15 (1957) (emphasis added). Since the semi-annual six months' diligent prosecution requirement of 30 U.S.C. § 27 (1964) governing tunnel sites is not the "assessment work" required by 30 U.S.C. § 28 (1964) to which the Wyoming statute refers, and a tunnel site located under 30 U.S.C. § 27 (1964) is a mining-purpose claim rather than a mining claim, Sherwood & Greer, *supra* note 5, at 323-324, nn. 21, 22 and 23, the benefit of recording would appear to be limited to lode and placer mining claims, even to the extent that *assessment work* is permitted, under the Act of Feb. 11, 1875, ch. 41, 18 Stat. 315, *now* the first sentence of the last paragraph of 30 U.S.C. § 28 (1964), to be done in a tunnel (located under 30 U.S.C. § 27 (1964)), for the benefit of a lode claim or claims. Cf. note 79 *infra*, as to the mandatory language of WYO. STAT. § 30-15 (1957).

61. Provision was made for lode claims in the assessment-work provisions of the Territorial Act for Mining Resources Development of Dec. 2, 1869, ch. 22 §§ 3, 4, and 5, [1869] Wyo. Laws 308, under the Federal Act of July 26, 1866, ch. 262, 14 Stat. 251, but the Wyoming statutes were geared to the lode-length footage provisions of the 1866 Act of Congress, and were all repealed by the Law of Dec. 13, 1873, ch. 17, § 1, [1873] Wyo. Laws 176.

62. Ch. 152, § 5, 17 Stat. 91, *now* 30 U.S.C. § 28 (1964). The statute then and now refers to "each claim located after the 10th day of May 1872," but it also refers to "all claims located prior to the 10th day of May 1872" as to "each one hundred feet in length along the vein," notwithstanding the Act of July 9, 1870, ch. 225, 16 Stat. 217, recognizing placer claims. *But see* note 80 *infra*.

63. See note 62 *supra* and 2 AMERICAN LAW OF MINING § 7.11 (1960).

64. Law of Mar. 12, 1886, ch. 115, § 10, [1886] Wyo. Laws 442-443. This statute provided that expenditures "made in buildings, ditches to conduct water upon or from . . . [placer] claims, or in making other mining improvements thereon necessary for the working of such mining claim or claims" would qualify.

65. The \$100 in annual labor or improvements required by the Law of Mar. 12, 1886, ch. 115, § 10, [1886] Wyo. Laws 442, for 160-acre association placer claims was no doubt proper, 2 AMERICAN LAW OF MINING § 7.12 at n. 2 (1960), but the \$15 minimum for placer claims of less than twenty acres was hardly appropriate under the rule that the minimum for a twenty-acre claim is \$100. *Id.* § 7.11 at n. 5.

66. See notes 68 and 71 *infra*.

67. The Law of Mar. 12, 1886, ch. 115, § 10, [1886] Wyo. Laws 442-443, WYO. REV. STAT. § 1628 (1887), was repealed by the Law of Mar. 6, 1888, ch. 40, § 26, [1888] Wyo. Laws 91, five of the six numbered subsections of Section 23 of which, at 90-91, and Section 24 of which, at 91, are the forerunners of

statute,⁶⁸ which dates from the 1888 Law⁶⁹ without change, is in fact copied from the earlier law,⁷⁰ and is of doubtful validity, unless construed in conformity with the rule which requires that labor performed outside the boundaries of a claim must benefit that claim to qualify as assessment work for it.⁷¹

The 1967 Legislature amended and re-enacted two of the placer-claim assessment work statutes,⁷² making them consistent with the Federal statute as amended nine years earlier,⁷³ but might just as well have repealed them, since one is at most declaratory of the Federal law⁷⁴ and the other, which implies that placer locators can hold their claims without performing further assessment work after having per-

the present WYO. STAT. §§ 30-11 through 30-16 (1957). Section 23(4) of the 1888 law, permitting regulation by mining districts of the amount and manner of accomplishment of assessment work on placer claims, WYO. REV. STAT. § 2557 (1899), was repealed by the Law of Feb. 14, 1901, ch. 41, § 1, [1901] Wyo. Laws 39, which was just as well, since the 1888 law attempted to permit the district laws to require annual labor in an amount "greater or less than the amount" set forth elsewhere in Section 23 of that law for placer claims not in organized districts. This was clearly repugnant to R.S. § 2324, now 30 U.S.C. § 28 (1964), if the Federal law required assessment work on placer claims. Cf. note 80 *infra*.

68. WYO. STAT. § 30-13 (1957).

69. Law of Mar. 6, 1888, ch. 40, § 23(3), [1888] Wyo. Laws 90.

70. Law of Mar. 12, 1886, ch. 115, § 10, [1886] Wyo. Laws 442.

71. "Because of the nature of placer deposits, it is difficult to establish that work on one placer claim benefits adjoining claims." 2 AMERICAN LAW OF MINING § 7.16 at n. 5 (1960), citing *Parker v. Belle Fourche Bentonite Prod. Co.*, 64 Wyo. 269, 189 P.2d 882 (1948). Even if claims are contiguous, the work performed for a claim must benefit it, 2 AMERICAN LAW OF MINING § 7.16 at n. 9 and 7.19 at n. 4 (1960), and WYO. STAT. § 30-13 (1957) can hardly be construed to provide otherwise. See *infra* at notes 89-92.

72. WYO. STAT. §§ 30-11 and 30-16 (1957), amended by Law of Feb. 1, 1967, ch. 20, §§ 1-2, [1967] Wyo. Laws 14. Cf. note 55 *supra*, pointing out that the Legislature overlooked two other sections in need of the 1967 amendment: WYO. STAT. §§ 30-12 and 30-14 (1957). The latter were, however, amended by the Law of Feb. 1, 1951, ch. 18, §§ 2-3, [1951] Wyo. Laws 25-26. See note 73 *infra*.

73. 30 U.S.C. § 28 (1964) was amended by the Act of Aug. 23, 1958, Pub. L. No. 85-736, § 1, 72 Stat. 829, to set the deadline for performance of annual labor at noon on September 1st of each year. The 1967 amendment of WYO. STAT. §§ 30-11 and 30-16 (1957), mentioned in note 72 *supra*, brought these two statutes into conformity with 30 U.S.C. § 28 (1964). As originally enacted, Law of Mar. 6, 1888, ch. 40, §§ 23(1) and 24, [1888] Wyo. Laws 90 and 91, the Wyoming statutes specified the calendar assessment year then in force under R.S. § 2324, and the Law of Feb. 1, 1951, ch. 18, §§ 1 and 4, [1951] Wyo. Laws 25 and 26, changed the assessment year to a fiscal year ending July 1st each year, bringing the statutes into conformity with R.S. § 2324, which had been amended thirty years before by the Act of Aug. 24, 1921, ch. 84, 42 Stat. 186, to provide for a fiscal assessment year ending at noon each July 1st.

74. See note 81 *infra*. If the statute makes it possible for a placer locator to hold his claim merely by showing good faith and intention on his part and his intention to hold possession of the claim, without improvement or benefit of the claim in the required amount, it is no doubt repugnant to the Federal law, 30 U.S.C. § 28 (1964). See 2 AMERICAN LAW OF MINING § 7.5 at n. 3 (1960).

formed such work for five successive years,⁷⁵ is dangerously misleading, since a placer locator might not understand that the statute is merely declaratory of the Federal law requiring \$500 in improvements *upon* a claim to qualify it for patent.⁷⁶ The obligation to perform assessment work does not, however, stop with the completion of \$500 in improvements or with the filing of the application for patent.⁷⁷

Proof of annual labor may be made the same ways as proof of any other overt act.⁷⁸ This is true even in jurisdictions such as Wyoming which, by statute,⁷⁹ provide for recording of affidavits of annual labor performed.

75. WYO. STAT. § 30-16 (1957) (emphasis added) provides: "When any . . . persons . . . have held and worked their placer claims in conformance with the laws of this state . . . for five (5) successive years after the first day of September succeeding the date of location, then such . . . persons . . . shall be entitled to proceed to obtain a patent for their claims from the United States *without performing further work*; but where such . . . persons . . . desire to obtain a United States patent before the expiration of five (5) years from the date hereinabove mentioned, they shall be required to expend at least five hundred dollars' (\$500.00) worth of work upon a placer claim." Without the last provision, it might be argued that the statute is intended to require a placer locator to wait at least five years to obtain a patent; with the provision, its purpose is not clear unless it is intended either to make assessment work equivalent to the improvements required for patent or to permit the locator to apply ("proceed to obtain") for patent and thereafter avoid assessment work. But assessment work is required until the patent certificate issues, 43 C.F.R. § 3420.5 (1968), and 30 U.S.C. §§ 29 and 35 (1964) require that \$500 worth of labor be expended or improvements made upon a claim for which patent is sought. It is by no means clear that labor and improvements which will satisfy the assessment work provisions of 30 U.S.C. § 28 (1964) will also satisfy the patent improvements provision of 30 U.S.C. § 29 (1964). See 43 C.F.R. §§ 3441.3 and 3470.2 (1968). *But see* Note, *The Assessment Work Requirements*, 9 Wyo. L.J. 231, 237-238 (1955), which reaches the contrary conclusion.

76. 30 U.S.C. §§ 29 and 35 (1964).

77. The statute, 30 U.S.C. § 28 (1964), requires performance of assessment work "until a patent has been issued" for a claim. *Cf.* 43 C.F.R. § 3420.5 (1968). In *Gillis v. Downey*, 85 F. 483 (8th Cir. 1898), it was held that "the filing of the application for patent does not suspend the obligation to keep up the required work where, without paying the purchase money, the claimant permits his application to sleep for years . . ." Morrison says that "the fact that sufficient improvements (\$500 worth) has been done to authorize issuance of patent does not dispense with the necessity for the annual expenditure, which is required . . ." E. DE SOTO & A. MORRISON, *MORRISON'S MINING RIGHTS* 111 (16th ed. 1936).

78. "The doing of annual labor may be proved the same way as other overt acts; but in some jurisdictions by statute the filing of an affidavit of annual labor within a given time after the labor is done makes out a prima facie case of its performance." G. COSTIGAN, *MINING LAW* § 84 at 284 (1908). *See also* 2 C. LINDLEY, *MINES* § 636 (3d ed. 1914) and 2 *AMERICAN LAW OF MINING* § 7.25 (1960). The performance or non-performance of the work is a question of fact to be resolved by the trial court, and its decision, if supported by substantial evidence, will not be disturbed on appeal. *Chittim v. Belle Fourche Bentonite Prod. Co.*, 60 Wyo. 235, 149 P.2d 142 (1944). The burden of proof of showing non-performance of annual labor is on the one alleging forfeiture. *Simmons v. Muir*, 75 Wyo. 44, 291 P.2d 810 (1955).

79. WYO. STAT. § 30-15 (1957) provides as follows:
Upon completion of the required assessment work for any mining claim, the owner . . . shall cause to be made by some person cognizant of the facts, an affidavit setting forth that the required

Frequently recurring questions concerning assessment work involve the character and amount of work which will satisfy the statutory⁸⁰ requirement,⁸¹ that is, what will be considered as such "labor" or "improvements" as are contemplated by law. In *Simmons v. Muir*,⁸² the senior locators had entered into contracts with the United States Geological Survey and the Atomic Energy Commission whereby these government agencies were to develop certain uranium claims. The government was given the right to enter, prospect, drill,

amount of work was done, which affidavit shall within sixty days of the completion of the work, be filed for record

A state law which provided that the annual labor could be proven *only* through the use of filed affidavits would probably be pre-empted by Federal law. See, e.g., *Sweet v. Webber*, 7 Colo. 443, 4 P. 752 (1884); *Norris v. United Mineral Prod. Co.*, 61 Wyo. 386, 158 P.2d 679 (1945). Though it is normally the province of a state to determine what types of evidence may be used in the proof of ultimate facts, such a statute would be repugnant to the express terms of 30 U.S.C. § 28 (1964). In *Parker v. Belle Fourche Bentonite Prod. Co.*, 64 Wyo. 269, 189 P.2d 882 (1948), proof of non-performance was made on the basis of oral testimony. See also *Simmons v. Muir*, 75 Wyo. 44, 291 P.2d 810 (1955), in which no affidavit was filed but performance was allowed to be proved by other evidence. The Wyoming statute, WYO. STAT. § 30-15 (1957), was adopted in its present form in the Law of Feb. 19, 1901, ch. 100, § 3, [1901] Wyo. Laws 105, repealing the prior provision of the Law of Mar. 6, 1888, ch. 40, § 23(6), [1888] Wyo. Laws 91, which required an affidavit to be recorded with the mining district recorder within thirty days if the claim was situated in an organized district, and also required the affidavit "to be made by some person engaged in performing the work."

80. Title 30 U.S.C. § 28 (1964) does not distinguish between lode claims and placer claims in requiring annual labor and improvements. Although Morrison insisted to the contrary, *R. MORRISON & E. DE SOTO, MINING RIGHTS* 134 (14th ed. 1910), carried forward into *E. DE SOTO & A. MORRISON, supra* note 77 at 135, the requirement, we think, clearly applies to both kinds of claim. Compare note 62 *supra* with *Jackson v. Roby*, 109 U.S. 440 (1883); *St. Louis Smelting Co. v. Kemp*, 104 U.S. 636 (1882); *Sweet v. Webber*, 7 Colo. 443, 4 P. 752 (1884). Cf. *Simmons v. Muir*, 75 Wyo. 44, 291 P.2d 810, 817 (1955).
81. Federal law specifies for every claim "not less than \$100 worth of labor . . . performed or improvements made during each year." 30 U.S.C. § 28 (1964). Wyoming law specifies, for every placer claim, "not less than one hundred dollars (\$100.00) worth of assessment work . . . performed during each year," WYO. STAT. § 30-12 (1957), which "shall consist in manual labor, permanent improvements made on the claim in buildings, roads or ditches made for the benefit of working such claims, or after any manner, so long as the work done accrues to the improvement of the claim, or shows good faith and intention on the part of the owner or owners and their intention to hold possession of said claim." WYO. STAT. § 30-11 (1957). Cf. notes 64 and 74 *supra*. The definitions of what may be counted as assessment work are in addition to the usual state statutes on methods of proof of performance. See 2 AMERICAN LAW OF MINING § 7.4 (1960). Of course, state legislation may supplement, but not conflict with Federal law on the subject, *Norris v. United Mineral Prod. Co.*, 61 Wyo. 386, 158 P.2d 679 (1945), and the \$100 value is stated in the Federal statute. The Wyoming statute did not always conform with the Federal statute. The Law of Mar. 6, 1888, ch. 40, § 23(2), [1888] Wyo. Laws 90, specified assessment work at the rate of 62½ cents per acre or fraction thereof for placer claims of less than 160 acres, but not less than \$15.00, and \$100.00 for a 160-acre placer. Compare note 65 *supra*. The change to \$100 for each placer claim came in the Law of Feb. 19, 1901, ch. 100, § 2, [1901] Wyo. Laws 105.
82. 75 Wyo. 44, 291 P.2d 810 (1955).

explore, and to exclude third parties. There was evidence that the government agencies performed work in the value of \$100 per claim⁸³ for each of the years in question, but objections to counting this work as assessment work were raised by the plaintiffs who, as junior locators, sought to assert forfeiture for the years in question. The Court carefully considered the question as one of first impression. Noting that work done by third parties generally may inure to the benefit of a claimholder⁸⁴ as assessment work, the Court found no reason to distinguish work done⁸⁵ by the government *under contract*. The decision was rested on the following factors: (1) there was clear authority in the government to enter into such a contract; (2) there was public importance in the development of uranium, and particularly, there was a relationship to national security; (3) the government was in privity of title with the claimant as legal title-holder of unpatented ground;⁸⁶ (4) there is no prohibition in the mining law against crediting work performed by government agencies as assessment work; (5) the government (as a purchaser of ore) was an "agent or representative" of a claimant; (6) the fact that the government could have developed the property alone if

83. In *Norris v. United Mineral Prod. Co.*, 61 Wyo. 386, 158 P.2d 679 (1945), the claimant testified that he actually paid \$100 per claim for annual labor for the year there in question. The Wyoming court reaffirmed its previous holding in *Chittim v. Belle Fourche Bentonite Prod. Co.*, 60 Wyo. 235, 149 P.2d 142 (1944), in declaring that the value of assessment work is not determined by the amount actually paid out but rather by the amount that the work done is actually worth.

84. Compare *E. DE SOTO & A. MORRISON*, *supra* note 77, at 114, with *Simmons v. Muir*, 75 Wyo. 44, 291 P.2d 810, 819 (1955). Nevertheless, with certain specified exceptions, the responsibility for doing assessment work generally falls on the locator. Where a claim is held by two or more co-locators, the co-locators are co-tenants, and each has the right to forfeit out the interest of the others for failure to contribute to the assessment work, upon compliance with statutory procedure. 30 U.S.C. § 28 (1964). *Mecum v. Metz*, 32 Wyo. 79, 229 P. 1105 (1924). *Cf. Hartney v. Gosling*, 10 Wyo. 346, 68 P. 1118 (1902). Wyoming once had a statutory procedure governing such forfeitures. Law of Dec. 16, 1871, §§ 3-5, [1871] Wyo. Laws 115, amended by Law of Mar. 10, 1882, ch. 70, § 2, [1882] Wyo. Laws 156, repealed and replaced by Law of Mar. 12, 1886, ch. 115, §§ 10 and 22 [1886] Wyo. Laws 442-443, and 447, repealed by Law of Mar. 6, 1888, ch. 40, § 26, [1888] Wyo. Laws 91.

85. The type of work actually done in the *Simmons* case, both by the government and by other parties under contract, consisted of a systematic plan of drilling holes and testing the holes drilled for fluorescence and with geiger counters. Upon testimony of performance of work of this type and expenditures in excess of \$100 per claim it was held that sufficient assessment work was done for the purpose of holding the claims for the years in which the work was done. *Simmons v. Muir*, 75 Wyo. 44, 291 P.2d 810, 817-818 (1955).

86. So, of course, is a co-tenant of the claim, who bears his share of the responsibility for doing assessment work on penalty of forfeiture. See note 84 *supra*.

it had so chosen suggested that there was no reason why it must not do so jointly with the locator; and (7) there existed a contract with the locator under which the government for the time in question had the right of exclusive possession.

Sometimes the question does not involve the type of work performed, but rather *where* the work must be performed. In *United States v. Ohio Oil Co.*,⁸⁷ Judge Riner noted that assessment work performed outside the boundaries of the claim may qualify as assessment work for the claim. As a general rule, such work is permitted to be counted as assessment work for as many benefited, contiguous claims as the reasonable value of the work will support.⁸⁸ As mentioned earlier,⁸⁹ Wyoming applies that rule by statute to contiguous placer claims. The statute provides:⁹⁰

When two or more placer mining claims lie contiguous and are owned by the same person, persons, company or corporation, the yearly expenditure of labor and improvements required on each of the claims may be made upon any one of such contiguous claims if the owner or owners shall thus prefer.

The statute was construed in *Simmons v. Muir*⁹¹ to provide a presumption that the work done on one of the contiguous claims benefits all the others. That is, when evidence is adduced that work was done on one of a group of contiguous placer claims, it devolves upon the party asserting forfeiture to show that the work did not benefit the other claims in the group. That the presumption is and should be readily rebuttable clearly appears from the decision in *Parker v.*

87. 240 F. 996 (D. Wyo. 1916).

88. 30 U.S.C. § 28 (1964). *But see* 2 AMERICAN LAW OF MINING §§ 7.16-7.18 (1960).

89. *See* note 71 *supra*.

90. WYO. STAT. § 30-13 (1957).

91. 75 Wyo. 44, 291 P.2d 810 (1955). Without the benefit of the statute, as, for example, where the claims are not contiguous or are not owned by the same party or are lode claims or where work is done outside all the claims, the burden of proof rests with the proponent of the work to show that the work does in fact benefit all the claims. *Id.*, 291 P.2d at 817 (1955). The Federal requirement that the work actually benefit each claim worried Mr. Chief Justice Blume in *Simmons*, but it did not, unfortunately, move him to apply that standard to the Wyoming statute, except to note that the party asserting forfeiture can overcome the statute by showing that work done on one claim did not in fact benefit other claims. We have already suggested that WYO. STAT. § 30-13 (1957) should not be construed to supply benefit where benefit does not exist, *see* note 71 *supra*, and this should be so even in the absence of a preponderance of contrary evidence.

Belle Fourche Bentonite Products Co.,⁹² in which the opponent of the assessment work was able to demonstrate that "stripping pits" sunk on one bentonite placer claim to determine the depth, character, and extent of the bentonite beds in no way bore any relationship to or contributed any benefit to adjoining claims.

Under certain circumstances the assessment work requirement may be excused. One of these is the enactment by Congress of a suspension of the requirement.⁹³ Another such circumstance may occur when a claimant is wrongfully⁹⁴ prevented from performing the required work by some third party. *Scoggin v. Miller*⁹⁵ was an action by the plaintiff Scoggin in support of his claim adverse to defendant Miller's patent application. The evidence showed that in October of 1944 one Brimmer, an employee of the defendant Miller group of claimants, went onto their claims to do some drilling work as assessment work. Scoggin entered the claims for the purpose of locating his own claims and after a short consultation with Brimmer, Brimmer abandoned his employment and left the ground. Scoggin proceeded to locate his claims and later brought the adverse suit relying on his locations as having forfeited the senior Miller interests. One of the defenses was that the Miller group had been prevented from performing assessment work. It appeared that Scoggin, hav-

92. 64 Wyo. 269, 189 P.2d 882 (1948).

93. See note 54 *supra*. See also WYO. STAT. § 30-12 (1957), which provides for suspension of the state statutory requirement contained therein whenever the Federal law requirement may be suspended. The provision originated in the Law of Feb. 1, 1951, ch. 18, § 2, [1951] Wyo. Laws 25. There is considerable variance among the numerous Federal suspension statutes enacted for various years and attention to the exact language of the suspension statute with which one is dealing in determining its effect on any particular question is crucial. For example, some statutes require the filing of "lieu statements," while others do not. In certain instances the locator is limited in the number of claims for which he can claim the benefit of the suspension statute. For some years the suspension does not benefit all locators. See generally 2 AMERICAN LAW OF MINING, §§ 7.34-7.36 (1960).

94. In *Hodgson v. Midwest Oil Co.*, 17 F.2d 71 (8th Cir. 1927), the Eighth Circuit Court of Appeals held that where the plaintiff failed to allege that there had been a threat by the defendant of violence or physical opposition, and the plaintiff had offered or attempted to do the work but could not because it was unsafe to do so, there was a failure to plead the requisite title in himself to maintain the ejectment action which was brought in the case. The plaintiff did plead that "The defendants entered upon the landousting the plaintiffs' predecessors . . . and have ever since such time wrongfully and unlawfully withheld from the plaintiff . . . the possession of the premises." This allegation was held not to be a sufficient statement of such facts as to excuse the assessment work requirement. Cf. *Swansea Properties, Inc. v. Hedrick*, 3 Ariz. App. 594, 416 P.2d 1015 (1966).

95. 64 Wyo. 206, 189 P.2d 677 (1948).

ing once taken possession of the claims, refused to allow Miller to come onto the land for the purpose of doing assessment work and, indeed, when Miller's employees attempted to do so, Scoggin met them at the boundary with a rifle, indicating that he would use it if necessary. The Court held for the Miller group on the adverse claim and, in a companion case,⁹⁶ enjoined Scoggin from further interference with performance of work by the Miller group.

Although it has been often said that a locator cannot be divested of title to his claim if, without his fault, the boundaries which he has properly marked are subsequently destroyed, obliterated, or removed,⁹⁷ the United States District Court for the District of Oregon has recently sustained a Federal government contention that a locator must maintain his claim boundaries as well as his claim, so that government officials may find and evaluate both the claim and its discovery point.⁹⁸ It is for this reason that we have elsewhere suggested that locators should replace lost boundary markings, at least as often as annual labor is performed.⁹⁹

EFFECT OF NON-PERFORMANCE

The Wyoming assessment-work statutes include a section on the effect of failure to perform such work, apparently on placer claims.¹⁰⁰ This section provides:¹⁰¹

Upon failure of the owners to do or have done the assessment work required within the time above stated, such claim or claims upon which such work has not been completed, shall thereafter be open to re-location on or after the first day of July of any year after such labor or improvements should have been done, in the same manner and on the same terms as if no location thereof had ever been made; provided, that the original locators, their heirs,

96. *Miller v. Scoggin*, 64 Wyo. 248, 189 P.2d 693 (1948).

97. *E.g.*, 2 AMERICAN LAW OF MINING § 7.37 at n. 1 (1960); *E. De Soto & A. Morrison*, *supra* note 77, at 60.

98. *Converse v. Udall*, 262 F. Supp. 583 (D. Ore. 1966), *aff'd* *United States v. Independent Quick Silver Co.*, 72 Interior Dec. 367 (1965).

99. *Sherwood & Greer*, *supra* note 5, at 344-345, nn. 137-140.

100. WYO. STAT. § 30-14 (1957). The words "within the time above stated" must refer to the period "after the date of location" specified in WYO. STAT. § 30-12 (1957), for the reasons given in note 104 *infra*, and since Section 30-12 concerns placer claims only, it is most likely that Section 30-14 relates also to placer claims.

101. WYO. STAT. § 30-14 (1957).

assigns, or legal representatives have not resumed work upon such claim or claims after failure, and before any subsequent location has been made.

The language is so similar to that of the Federal statute¹⁰² that the section must have been enacted in response to the concern that the Act of Congress did not command the performance of annual labor on placers.¹⁰³ The legislative history supports this conclusion,¹⁰⁴ and in view of the modern unanimity with respect to the applicability of the assessment work requirement to placer claims,¹⁰⁵ there is little, if any, reason

102. 30 U.S.C. § 28 (1964): "[U]pon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

103. See notes 60-63 *supra*.

104. WYO. STAT. § 30-14 (1957) is readily traced back to Section 10 of the Law of Mar. 12, 1886, ch. 115, [1886] Wyo. Laws 442, which was, insofar as the following language thereof is concerned, plainly devoted to placer claims:

[U]pon a failure to comply with these conditions within the time above required such claim or claims shall thereafter be open to relocation on and after the first day of January of any year after such labor or improvements were due, in the same manner and on the same terms as if no location thereof had ever been made; *Provided*, That the original locators, their heirs, assigns or legal representatives have not resumed work upon such claim or claims after failure, and before any subsequent location has been made....

That provision was repealed by the Law of Mar. 6, 1888, ch. 40, § 26, [1888] Wyo. Laws 91, and replaced by the substantially similar Section 23(5) of the Law of Mar. 6, 1888, at 90-91, which follows four subsections dealing with placer claims and is, with the exception of the specified month ["January" was changed to "July" by the Law of Feb. 1, 1951, ch. 18, § 3, [1951] Wyo. Laws 25-26], in the exact language appearing today in WYO. STAT. § 30-14 (1957). Prior to the Law of Mar. 12, 1886, the Wyoming statutes regarding relocation were quite different. The Law of Dec. 2, 1869, ch. 22, § 26 [1869] Wyo. Laws 312-313, simply granted "any and all claims held in compliance with" the 1869 Law immunity from relocation, and provided for relocation of those claims or fractions thereof not so held. This provision was repealed by the Law of Dec. 13, 1873, ch. 17, § 1, [1873] Wyo. Laws 176, two years after the Law of Dec. 16, 1871, § 1, [1871] Wyo. Laws 114, was adopted, providing as follows:

Any person or persons who shall have performed work or made improvements or expenditures to the amount of one thousand dollars on any lead, lode or ledge, the same shall not be subject to re-location under the laws of this territory; *Provided*, That such quartz claim or claims shall not be abandoned, but shall be represented by the person or persons owning such claim or claims, or by his or their agent or attorney, who shall reside within the district in which such claim or claims may be situated, unless driven from said district by Indians.

The section just quoted was amended by the Law of Mar. 10, 1882, ch. 70, § 1, [1882] Wyo. Laws 156, to include placer claims, and, as amended, was finally repealed by Law of Mar. 12, 1886, ch. 115, § 22, [1886] Wyo. Laws 447. If it be true that the Territorial Assembly could fix the annual labor requirement at a dollar amount higher than that set by Congress, 2 AMERICAN LAW OF MINING § 7.5 at n. 3 (1960), this \$1000 provision might have had that effect unless the obvious relationship of the provision to the Act of July 26, 1866, ch. 262, § 4, 14 Stat. 251, repealed by the Act of May 10, 1872, ch. 152, §§ 1-15, 17 Stat. 91, could be established to have worked a repeal of the Territorial law by implication.

105. See notes 60-63 *supra*.

for the continued existence of this statute, which is, in any event, now more than ten years behind the current Federal statute,¹⁰⁶ and imprecise besides.¹⁰⁷

While performance of assessment work on or before the end of an assessment year holds a claim for the next succeeding assessment year, the locator must again perform \$100 worth of work per claim on or before the end of the next assessment year. Thus, assessment work performed on September 2, 1967, would have held the claims so represented until noon, September 1, 1968.¹⁰⁸ On the other hand, although the effect of non-performance has been misstated,¹⁰⁹ it is clear that failure to do the work required by law does not mean that the claimant automatically loses his possessory interest in his claim. The rule, of course, is that failure to do assessment work merely subjects the ground to relocation by others, but in the absence of an attempt by others to claim the ground, no forfeiture occurs.¹¹⁰ Hence, a locator may hold an unpatented mining claim indefinitely without the performance of assessment work, and the claim, though open to relocation, is not forfeited until and unless relocation takes place.¹¹¹ Moreover, a failure to do the work cannot be raised or asserted by anyone who cannot, himself, demonstrate that his own conflicting claim or title was initiated at a time when the allegedly forfeited claim was delinquent in assessment work. For example, in

106. See notes 55 and 73 *supra*.

107. The 1951 amendment which changed the word "January" to "July," Law of Feb. 1, 1951, ch. 18, § 3, [1951] Wyo. Laws 25-26, *amending* Law of Mar. 6, 1888, ch. 40, § 23(5), [1888], Wyo. Laws 90-91, overlooked the fact that the Act of Aug. 24, 1921, ch. 84, 42 Stat. 186, changed the assessment year from a calendar year ending at midnight December 31st to a fiscal year ending at noon on July 1st, beginning July 1, 1922. Even those Wyoming statutes which have been changed to reflect the more recent change of the assessment year to a fiscal year ending September 1st, see note 55 *supra*, overlook the change from midnight to noon.

108. See *Griffith v. Noonan*, 58 Wyo. 395, 133 P.2d 375 (1943).

109. *E.g.*, *Hodgson v. Midwest Oil Co.*, 17 F.2d 71 (8th Cir. 1927), where although the Court correctly understood the rule, it said that failure to do annual work results in forfeiture in which all possessory rights are terminated. To be compared is *Burke v. Horth*, 12 F.2d 58 (8th Cir. 1926), where the same Court suggested that a mining claim carries the exclusive right of possession subject to conditions subsequent, failure of which produces forfeiture. These statements erroneously focus attention on non-performance of the work, which in itself, absent a third party's claim, is innocuous.

110. See 30 U.S.C. § 28 (1964) and note 53 *supra*; 2 AMERICAN LAW OF MINING § 7.26 (1960).

111. *Gillis v. Downey*, 85 F. 483 (8th Cir. 1898); *Simmons v. Muir*, 75 Wyo. 44, 291 P.2d 810 (1955); *Scoggin v. Miller*, 64 Wyo. 206, 189 P.2d 677 (1948); *Griffith v. Noonan*, 58 Wyo. 395, 133 P.2d 375 (1943).

Griffith v. Noonan,¹¹² the evidence showed that the plaintiff Griffith had located a claim on May 17th, 1939; he therefore had until July 1, 1940, to do his first year's assessment work. The defendant Noonan located a conflicting junior mining claim on May 14, 1940, or a month and a half before the end of Griffith's assessment year. The court held that the defendant Noonan had no such interest in the property through his premature relocation¹¹³ as to be entitled to question the sufficiency of the plaintiff's assessment work. Similarly, in *Scoggin v. Miller*,¹¹⁴ it appeared that the original locators were two days late in filing a lieu statement for the year ending July 1, 1944. The lieu statement actually was filed on July 3, 1944. Later, the plaintiff Scoggin located conflicting junior claims in October or November of 1944. Scoggin, in his quiet title action against the defendant senior locators, attempted to assert a delinquency of the original locators to comply timely with the statute permitting the lieu statement to be filed. The court said that late filing of the lieu statement could be of no advantage to the plaintiff Scoggin, whose rights did not intervene between July 1, 1944, when the statement should have been filed, and July 3, 1944, when it actually was filed. Hence, said the Court, Scoggin had no such interest as would permit him to raise the question.

TERMINATION OF INTEREST:

FORFEITURE BY RELOCATION

The term "relocation"¹¹⁵ as we use it here is taken from Section 30-9 of the 1957 Wyoming Statutes, which, pursuant

112. 58 Wyo. 395, 133 P.2d 375 (1943).

113. Premature relocations are discussed below under the heading "Termination of Interest: Forfeiture by Relocation."

114. 64 Wyo. 206, 189 P.2d 677 (1948).

115. The processes utilized in amendment of an original location certificate to correct defects, amendment of an original location certificate to take in abandoned ground, relocating of a claim by its original owner in such a way as to relinquish some ground or take in new ground, and relocation by a third party or stranger to the claim are sometimes confused and misunderstood. This is probably because several separate matters are grouped together into two classes and referred to as "Amendment and Relocation." They have been similarly grouped into two statutory sections, WYO. STAT. §§ 30-4 and 30-9 (1957). Section 30-4 dates from the Law of Mar. 12, 1886, ch. 115, § 14, [1886] Wyo. Laws 444, which was repealed and re-enacted by the Law of Mar. 6, 1888, ch. 40, §§ 7 and 26, [1888] Wyo. Laws 85 and 91. Both the 1886 and 1888 versions were adopted in substantially the form in which Section 30-4 appears today, except for the additional permitted cause for such filing: "or in case the original certificate was made prior to the approval of this act, and he or they shall

to the authority and invitation contained in the General Mining Law,¹¹⁶ provides:

be desirous of securing the benefit of this law," which appeared in both versions and was deleted in WYO. REV. STAT. § 70-106 (1931). Section 30-9, similarly, dates from the Law of Mar. 12, 1886, ch. 115, § 15, [1886] Wyo. Laws 444-445, which was repealed by the law of Mar. 6, 1888, ch. 40, § 26, [1888] Wyo. Laws 91. The present section was enacted in Section 21 of the 1888 Law, at 89, and is substantially the same as the 1886 Law, except for the addition in 1888 of the words "or monuments of stone." "Amendment and relocation" may be thought of as including three, four, or even five separate functions or processes. See, e.g., *Reeves, Amendment v. Relocation*, 14 ROCKY MT. MINERAL L. INST. 207 (1969), where the author proposes clarifying the nomenclature by using the terms "Amendment of Record," "Relocation by Amendment," "Relocation by Forfeiture," and "Relocation on Abandonment." Reeves' first two categories include those things authorized in WYO. STAT. § 30-4 (1957) to be done by the original locator of a claim (or his successors):

Whenever it shall be apprehended by the locator, or his assigns, or [of?] any mining claims or property heretofore or hereafter located, that his or their original location certificate was defective, erroneous, or that the requirements of the law had not been complied with before the filing thereof, or shall be desirous of changing the surface boundaries of his or their original claim or location, or of taking in any part of an overlapping claim or location which has been abandoned, such locator or locators, or his or their assigns, may file an additional location certificate in compliance with and subject to the provisions of this act (§§ 30-1 to 30-26); provided, however, that such relocation shall not infringe upon the rights of others existing at the time of such relocation, and that no such relocation, or other record thereof, shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under any previous location.

It seems reasonably clear that the source of authority to do any of these things is co-extensive with and included in the general authority in the mining law to locate claims in the first instance. Although the section unfortunately uses the word "relocation," it apparently contemplates performing no act other than the filing of paper in the appropriate office. The statute seems to be directed primarily at the location *certificate*, as can be seen by the reference to defects and errors in the certificate which may be cured. Only incidentally and indirectly does the section provide for correcting or curing defective acts of location, such as the posting of notice or the marking of boundaries. What apparently contributes most of all to confusion of "amendments" under Section 30-4 and "relocations" under Section 30-9, is the inclusion in § 30-4, in addition to language authorizing purely curative filings of certificates, of other language contemplating amendments of the identification of ground claimed. These "amendments" by a claim owner can be divided into two categories: (1) amendment to change the boundaries of one's own claim from one position to another by "swinging" the claim and thus taking in new ground and vacating some ground previously claimed, and (2) a different kind of amendment which, although it may claim new ground, does not involve changing the original exterior boundaries of one's claim, as, for example, the amendment of a junior claim (which has been located with its lines laid over part of a senior claim) to take in the conflict with the senior claim after abandonment of the latter by its owner. See generally *Bergquist v. West Virginia-Wyoming Copper Co.*, 18 Wyo. 234, 106 P. 673 (1910); *Slothower v. Hunter*, 15 Wyo. 189, 88 P. 36 (1906). Both categories involve claiming ground not previously claimed under the original location, and, for this reason, are, in a sense, relocations of the original claim.

116. 30 U.S.C. § 28 (1964) provides that upon the failure of a locator to do annual assessment work on his claims, the claims are opened to relocation by others in the same manner as if no previous location existed, provided the original locator, his heirs, assigns, or legal representatives, have not resumed work upon the claims after such failure and before such relocation. This portion of the statute is quoted in note 102 *supra*.

Any abandoned lode, vein or strata claim may be relocated and such relocation shall be perfected by sinking a new discovery shaft and by fixing new boundaries in the same manner as provided for the location of a new claim;¹¹⁷ or the relocater may sink the original discovery shaft ten feet deeper than it was at the time of its abandonment, and erect new, or adopt the old boundaries, renewing the posts or monuments of stone if removed or destroyed. In either event, a new location stake shall be fixed. The location certificate of an abandoned claim may state that the whole or any part of the new location is located as an abandoned claim.

The statute says that "abandoned" claims may be relocated. While abandonment has a specific and narrow meaning,¹¹⁸

117. A relocation is distinguishable from an ordinary location of a new claim which may happen to have been made in such a way as to overlap part of a prior, valid claim. A junior, partially overlapping claim cannot appropriate ground where it is in conflict with an underlying claim, so long as the underlying claim is valid and subsisting. *E.g.*, Phillips v. Brill, 17 Wyo. 26, 95 P. 856 (1908); Columbia Copper Mining Co. v. Duchess Mining, Milling & Smelting Co., 13 Wyo. 244, 79 P. 385 (1905). Even where the underlying claim later is abandoned or becomes delinquent, there is no automatic appropriation of the ground by the junior claim without the filing of an additional certificate. Belk v. Meagher, 104 U.S. 279 (1881); Griffith v. Noonan, 58 Wyo. 395, 133 P.2d 375 (1943); Bergquist v. West Virginia-Wyoming Copper Co., 18 Wyo. 234, 106 P. 673 (1910). In contrast, a relocater intends, even though he may adopt some features of a prior location, to appropriate and occupy the ground adversely to any underlying claim from the time of his relocation. Slothower v. Hunter, 15 Wyo. 189, 88 P. 36 (1906). See generally Reeves, *supra* note 115, at 213-218. Of course, an ordinary new location appropriates all locatable ground within its exterior boundaries, including ground formerly held by valid claims which were abandoned or became delinquent for failure to do assessment work prior to the new location, and the statutes do not require that the new location be designated a "relocation" in order to appropriate such ground. Any new location which happens to cover ground which was once claimed but is now open is in this limited sense a "relocation." But, strictly speaking, the term "relocation" is properly reserved for those locations in which the relocater establishes a link between an earlier location and his own by adopting something, such as the earlier discovery, or the earlier boundaries, as his own, as is permitted by the statute. The last sentence of WYO. STAT. § 30-9 (1957) is, fortunately, permissive rather than mandatory. Had the Legislature substituted the word "shall" for the word "may" as the Arizona Legislature did, the result could well have been a disaster. See Morrison's discussion of the "mischievous" Arizona law, ARIZ. REV. STAT. § 3241 (1901), and the cases involving it, prior to its repeal, in E. DE SOTO & A. MORRISON, *supra* note 77, at 147. Mr. Morrison there concluded that "all such statutes are useless and produce only embarrassment," and it is noteworthy that the comparable last sentence of the Colorado statute, Law of Feb. 13, 1874, § 16, [1874] Colo. Laws 189-190, which was most likely the model for the Wyoming statute, was repealed by the Law of June 5, 1911, ch. 172, § 2, [1911] Colo. Laws 515. Cf. COLO. REV. STAT. § 92-22-16 (1963).
118. Abandonment has been defined as the relinquishment or surrender of rights including "both the intention to abandon and the external act by which the intention is carried into effect." Phillips v. Hamilton, 17 Wyo. 41, 95 P. 846, 848 (1908). See also Boatman v. Andre, 44 Wyo. 352, 12 P.2d 370 (1932). The element of intent is usually emphasized. See Simmons v. Muir, 75 Wyo. 44, 291 P.2d 810 (1955), and Bergquist v. West Virginia-Wyoming Copper Co., 18 Wyo. 234, 106 P. 673 (1910), both of which reject the notion that abandonment can come about merely through inadvertence or by the

the courts have interpreted the statute to include two other situations in which relocation is clearly proper: (1) where an original location was void because of some fatal defect,¹¹⁹ and (2) where an original location was valid, but the locator has become delinquent in the performance either of the acts of location¹²⁰ or annual assessment work.¹²¹ In every case the relocation is made by a stranger¹²² and it covers ground once held or located by someone else.¹²³

The mechanics of the forfeiture are illustrated in *Parker v. Belle Fourche Bentonite Products Co.*¹²⁴ There, the defendant company had locations dating back to the years 1935 to 1937. Parker's conflicting claims were located in April of 1942. The question was whether the ground included in defendant's claims and overlapped by plaintiff Parker's

doing of an act inconsistent with one's existing title, such as the filing of an amended location certificate.

119. The classic examples are found in *San Francisco Chem. Co. v. Duffield*, 201 F. 830 (8th Cir. 1912), in which it was held that senior placer locations for lode deposits were void and gave way to lode locations made thereafter by a junior locator making a peaceable entry, and in *Slothower v. Hunter*, 15 Wyo. 189, 88 P. 36 (1906), in which the Court held that a location certificate which did not contain a statement prescribed by statute vested no title in its claimant. To be compared with *Slothower* on the point of sufficiency of location certificates is *Hagerman v. Thompson*, 68 Wyo. 515, 235 P.2d 750 (1951), in which the Court took a tolerant and permissive view of the statutory requirements where there was evidence of actual notice to the party raising the point that information was defectively omitted from the certificate.
120. *E.g.*, *Norris v. United Mineral Prod. Co.*, 61 Wyo. 386, 158 P.2d 679 (1945); *Bergquist v. West Virginia-Wyoming Copper Co.*, 18 Wyo. 234, 106 P. 673 (1910); *Slothower v. Hunter*, 15 Wyo. 189, 88 P. 36 (1906); *Columbia Copper Mining Co. v. Duchess Mining, Milling & Smelting Co.*, 13 Wyo. 244, 79 P. 385 (1905).
121. *E.g.*, *Simmons v. Muir*, 75 Wyo. 44, 291 P.2d 810 (1955); *Seoggin v. Miller*, 64 Wyo. 206, 189 P.2d 677 (1948); *Parker v. Belle Fourche Bentonite Prod. Co.*, 64 Wyo. 269, 189 P.2d 882 (1948); *Griffith v. Noonan*, 58 Wyo. 395, 133 P.2d 375 (1943).
122. That is, by someone who is a stranger to or insulated from the original possessory title. Relocation should be viewed both as terminating an existing title and as initiating a new title. *Slothower v. Hunter*, 15 Wyo. 189, 88 P. 36 (1906), is interesting in this regard. The original locator of the Great Divide claim, having suffered relocation by a third party, purchased the title of that third party and applied for patent on the *relocated* claim. It was held in an adverse suit that the applicant's title and priority dated only from the time of the third-party relocation which was the inception of his title, he having elected to insulate himself from his original title.
123. The ground must have become open to location by the time of the attempted relocation and, not surprisingly, the burden is on the relocater to show that fact. *Western Standard Uranium Co. v. Thurston*, 355 P.2d 377 (Wyo. 1960).
124. 64 Wyo. 269, 189 P.2d 882 (1948). The case involves relocation of placer claims. The legislature, of course, made no provision for placers in WYO. STAT. § 30-9 (1957), but their omission from a statutory section prescribing rules for the adoption of discovery shafts by sinking them deeper should not be thought significant in view of the facts that Federal statutes do not even require discovery work and discovery shafts are neither required nor are they customarily sunk on placer claims. See *Sherwood & Greer, supra* note 5, at 331, nn. 67-68.

claims was validly maintained so as to have been in good standing at the time of Parker's locations. If so, Parker's claims were void. If not, Parker's claims were valid and forfeited the defendant's claims. The evidence showed that for the assessment year ending July 1, 1941, no assessment work had been done on some of defendant's claims. Consequently, those claims were subject to relocation as of July 1, 1941, and were forfeited upon the relocation by Parker of his overlapping claims in April of the following year.¹²⁵

The statute specifically authorizes either relocating by the same method used in the location of a new claim or by sinking the existing discovery shaft ten feet deeper; in either case, the existing boundaries may be adopted.¹²⁶ The Wyoming Supreme Court has confirmed adoption of old boundary markers,¹²⁷ and in the intriguing case of *Norris v. United Mineral Products Co.*,¹²⁸ approved adoption of an earlier discovery,¹²⁹ which in fact had been made by the same party doing the relocating but at a much earlier date. In *Norris* the evidence was that the defendants had originally attempted to locate certain placer claims for bentonite deposits in 1936, at a time when the ground had been made subject to an oil and gas prospecting permit.

On September 9, 1939, the prospecting permit was cancelled. Thereafter, on September 26, 1939, the plaintiff located conflicting claims over the defendants' 1936 placer claims. On November 2, 1940, and again on May 31, 1941, the defendants filed amended locations of their 1936 claims.¹³⁰ In June

125. Of course, had assessment work been done for the year ending July 1, 1941, the defendant would have had until the end of the *next* succeeding assessment year in which to do the assessment work and the defendant's claims would have been in good standing in April, 1942. Cf. *Griffith v. Noonan*, 58 Wyo. 395, 133 P.2d 375 (1943).

126. WYO. STAT. § 30-9 (1957).

127. Recognizing that the somewhat restrictive language of the statute, referring as it does only to relocation of "abandoned" claims, probably was intended to apply in any case of relocation, the court in *Bergquist v. West Virginia-Wyoming Copper Co.*, 18 Wyo. 234, 106 P. 673 (1910), approved adoption of boundary markers by the relocater whenever they are at his disposal and for whatever reason the ground may have become open to location.

128. 61 Wyo. 386, 158 P.2d 679 (1945).

129. Colorado has done likewise under a then similar statute, requiring only that the relocater have actual knowledge of the prior discovery and that he elect to rely on it. See *McMillen v. Ferrum Mining Co.*, 32 Colo. 38, 74 P. 461 (1903).

130. Since the defendants' 1936 claims were void as originally located, this filing of amended certificates could not have served to breathe life into them even if done after July 1, 1941, when the ground ultimately became open to

of 1941, the plaintiff did some assessment work, but not of sufficient value to hold the claims. In August of 1941, the plaintiff brought a quiet title action to protect his claims from the defendants, and to enjoin the defendants from interference. After suit had been commenced, the defendants made new locations on September 5, 1941, and on October 8, 1941, relying in part on their original 1936 discoveries. On appeal of a judgment for defendants, the court noted that the defendants' initial locations were void because of the existing oil and gas permit application. The plaintiff's 1939 locations held the ground for a time, but the plaintiff's failure, as of July 1, 1941, to have done sufficient assessment work to hold the claims meant that the claims were delinquent as of July 1, 1941. The defendants' September and October locations were therefore made at a time when the plaintiff's claims were subject to relocation. The defendant was allowed to rely on and adopt the 1936 discovery as of September and October, 1941.¹³¹

The most difficult problems of relocation are those concerning the timing of the various acts performed by the relocater and the responses, if any, of the original locator. While the facts of each case can be complex, the solutions to the puzzle-like problems are not too difficult if one merely remembers the fundamental rule that a valid location or relocation may be made only on the ground that is at the time open to location,¹³² and its corollary, that the delinquencies of the

location. *Simmons v. Muir*, 75 Wyo. 44, 291 P.2d 810 (1955). See also *Hagerman v. Thompson*, 68 Wyo. 515, 235 P.2d 750 (1951), distinguishing between cases where a defective certificate is amended and where a claim boundary is changed so as to take in territory not before included. An attempt to amend a void claim as opposed to a void certificate more nearly resembles the boundary change amendment, and cannot be done merely by filing an amended certificate, at least in the face of a competing, intervening right. See *Sullivan v. Sharp*, 33 Colo. 346, 80 P. 1054 (1905); 2 C. LINDLEY, MINES, § 398 (3d ed. 1914). Appropriately, the amendments were not relied on by the Court in reaching its decision in *Norris*.

131. It is the September and October locations on which the defendants relied as "relocations" of ground once held by the plaintiff. Defendants apparently made full, new locations and even asserted new discoveries in 1941. Thus, it was not actually necessary for the Court to permit reliance on the 1936 discoveries as perfected by 1941 relocations. The defendants in *Norris* were not regarded by the Court and should not be elsewhere considered to have "relocated" their own 1936 claims. What they relocated was ground forfeited by the plaintiff and, had they so elected, they could have relied on their own prior discovery, their recent discovery, or even the plaintiff's discovery, to support their relocations. See WYO. STAT. § 30-9 (1957) which permits sinking the existing discovery shaft ten feet deeper if the relocater chooses, and note 129 *supra*.

132. *E.g.*, *Griffith v. Noonan*, 58 Wyo. 395, 133 P.2d 375 (1943).

first locator will be treated with indulgence so long as no intervening right is affected.¹³³

We have seen that the original locator is allowed until the end of the assessment year to do his annual labor or make his improvements.¹³⁴ Hence, a claim is not delinquent for failure to do work until the expiration of an entire assessment year from and after the end of the last year in which work has been done.¹³⁵ Nevertheless, it happens that relocations are attempted during the assessment year in which the original locator still has time to complete his assessment work. In these "premature relocation" cases, it is usually held that the relocation is too early and void, even if it turns out that the senior claim goes unmaintained for the entire year.¹³⁶

Just as a relocation may be premature because made at a time when the senior claim has not yet become delinquent, a relocation may also be too late because made at a time when

133. *E.g.*, *Scoggin v. Miller*, 64 Wyo. 206, 189 P.2d 677 (1948). The same rule applies whether the delinquency be in maintenance as in *Scoggin* or in performance of the acts of location. For example, it has occasionally happened that a locator has failed to file his location certificate within the statutory sixty day period prescribed by WYO. STAT. § 30-1 (1957). It is clear that the certificate may be filed, albeit late on, say, the 80th day after discovery, so long as the ground is not properly claimed by a third-party in the meantime. *Slothower v. Hunter*, 15 Wyo. 189, 88 P. 36 (1906); *Columbia Copper Mining Co. v. Duchess Mining, Milling & Smelting Co.*, 13 Wyo. 244, 79 P. 385 (1905).

134. Notes 112, 125 *supra*.

135. *Simmons v. Muir*, 75 Wyo. 44, 291 P.2d 810 (1955); *Scoggin v. Miller*, 64 Wyo. 206, 189 P.2d 677 (1948); *Griffith v. Noonan*, 58 Wyo. 395, 133 P.2d 375 (1943). For example, if work in the requisite amount to hold a claim was done for the assessment year ending 12 o'clock noon, September 1, 1966, the claim would be validly maintained (even without further assessment work) until noon, the following September 1, and would become subject to relocation only after noon on September 1, 1967.

136. *Simmons v. Muir*, 75 Wyo. 44, 291 P.2d 810 (1955); *Griffith v. Noonan*, 58 Wyo. 395, 133 P.2d 375 (1943). The reason for such holdings is to prevent entries and locations on valid claims in anticipation of a delinquency that may or may not occur. In *Simmons*, the plaintiffs, having made invalid, premature relocations in June of 1952, prior to the expiration of the then current assessment year on July 1st, attempted to salvage their claims by filing amended location certificates on July 2, 1952. The court did not apparently consider the amendments to have any efficacy as it did not discuss their effect. In any event, no harm is done by the filing of amended certificates. *See* WYO. STAT. § 30-4 (1957). In the same case, by coincidence, the defendants, who had valid claims, nevertheless saw fit to file new claims covering the same ground, but under different names. The court considered these amendments, which were defective because the certificates contained more than one claim and the claims themselves were for excessive amounts of ground, mere nullities, which, though void, did not adversely affect the defendants' earlier, valid claims. The court recognized that in the absence of an intent to abandon or to evade the assessment work requirement, the defendants' regrouping of their claims by amendment, even if erroneously executed, should not jeopardize their vested possessory title to the ground which they assuredly intended to continue to hold.

the original locator, having been delinquent, has resumed his assessment work and is once again in good standing.¹³⁷ In such case the belated relocation is invalid for the reason that the owner of the delinquent claim is entitled to resume work at any time prior to a valid relocation.¹³⁸

Without relocation, of course, there is—absent *pedis possessio* in a subsequent prospector¹³⁹—no one to assert forfeiture, and the lack of an adverse party willing to relocate an abandoned claim reflects primarily upon the apparent value of the ground. It should be nonetheless clear that a mining claim can be abandoned by its owner,¹⁴⁰ and for the same reason that he gives up on it—lack of apparent value—it may be many years until the ground is again located. If relocation does occur, it may be entirely without reference to the abandoned and perhaps forgotten claim,¹⁴¹ and the later appropriation is a relocation only in the broadest sense. But if abandonment were not possible, any doctrine of forfeiture

137. 30 U.S.C. § 28 (1964).

138. *See Scoggin v. Miller*, 64 Wyo. 206, 189 P.2d 677 (1948). In that case it appeared that the filing of a lieu statement due on or before July 1, 1944, was not actually done until July 3, 1944. Technically, the claims for which the lieu statement was filed were delinquent between July 1 and July 3. The filing of the statement on July 3, however, was held to be a resumption of assessment work by the original locator and a subsequent attempted relocation in November of 1944 was held to be untimely. In the "puzzler" category is the question which arises when locator A, who is delinquent in doing assessment work, comes on his claim and finds B's posted notice of relocation. What if A hurriedly resumes his maintenance work and does the required amount of work before B can finish? Compare 2 C. LINDLEY, MINES, § 408 (3d ed. 1914) with G. COSTIGAN, MINING LAW, 318 (1908 ed.). Other similar questions are considered in 2 C. LINDLEY, MINES, § 652 (3d ed. 1914).

139. Even the acquisition of title by adverse possession requires "claim and color of title." *See E. DE SOTO & A. MORRISON, supra* note 77, at 489. *But compare id.* at 486-489 with 30 U.S.C. § 38 (1964) and *see also* the interesting recent case of *Nugget Properties, Inc. v. County of Kittitas*, 71 Wash. 2d 760, 431 P.2d 580 (1967), resolving a dispute between a placer locator and residential "squatters" on the basis of laches and equitable estoppel, rather than adverse possession, against the mining claimant. The Washington Court concluded that the squatters could not establish adverse possession without occupying and working the ground as a mine, or at least relocating the claim.

140. *See* note 118, *supra*, and 2 AMERICAN LAW OF MINING §§ 8.1 through 8.7 (1960). Morrison concluded that "although a technical abandonment may at this day be proved as to any sort of possessory title, the subject has lost much of its importance except in connection with the annual labor acts." E. DE SOTO & A. MORRISON, *supra* note 77, at 103.

141. WYO. STAT. § 30-9 (1957). Reference to a prior abandoned claim in the certificate recorded for a new location will prevent the relocater from arguing that the old claim was invalidly located. *See* 2 AMERICAN LAW OF MINING § 8.37 (1960), *citing* *Slothower v. Hunter*, 15 Wyo. 189, 88 P. 36 (1906). For this reason, it is seldom wise to refer to abandoned, prior claims in a location certificate, and the adoption of stakes and discovery workings is similarly dangerous, although how the latter admits the validity of the prior claim is not clear. 2 AMERICAN LAW OF MINING § 8.39 at 262, n. 4 (1960).

for failure to maintain a claim would be irrational. Therefore, since abandonment is not only possible, but common,¹⁴² forfeiture through relocation is a necessary adjunct to the mining law. It is and was intended to be a convenience for all beneficiaries of the mining law; without it, the entire hard-mineral appropriation system would have ground to a halt years ago.¹⁴³ One can therefore view the rather complex rules governing terminations of interest by forfeiture in the light of the conditions under which they developed. In distinguishing abandoned from merely inactive mining claims, the courts had to sort out claim jumpers from prospectors, appropriators from speculators, and miners from promoters. In the final analysis, we can only conclude that the rules have not only protected well the rights of *bona fide* prior appropriators from forfeiture (which, after all, is still viewed as a penalty and only reluctantly enforced¹⁴⁴), but have also served the full development of natural resources by reopening truly stale claims to location and development by those ready to do so.

TERMINATION OF THE APPROPRIATION

The General Mining Law contemplates, but does not require, application for patent to "land claimed and located for valuable deposits" of minerals,¹⁴⁵ and generally, when patent issues, the work of the mining lawyer terminates,¹⁴⁶ together with the possessory interest characterized as an

142. "Bureau of Land Management officials estimate that over 6 million mining claims have been filed on public lands since 1872. Out of this number only 500,000 are estimated to be even semi-active." U.S. DEP'T. OF THE INTERIOR REPORT TO PUBLIC LAND LAW REVIEW COMM'N, PUBLIC LAND MANAGEMENT: IDENTIFICATION OF PROBLEMS—ANALYSIS OF CAUSES, 42 (Mar. 29, 1968). The report does not say how many of the six million have been patented, but it is obvious, even excluding the number of claims patented, that the number of abandoned claims is enormous.

143. Compare note 142 *supra* with E. DE SOTO & A. MORRISON, *supra* note 77, at 147.

144. Throughout any consideration of forfeiture proceedings under the General Mining Law, which includes, incidentally, provision for forfeiture of one co-owner's interest in a mining claim to another, 30 U.S.C. § 28 (1964), one is impressed by the emphasis which Congress has placed upon development and the ease with which that obligation has been tempered, both by time (the \$100 annual labor provision dates from 1872) and by judicial decision. See 2 C. LINDLEY, MINES, §§ 624, 645 (3d ed. 1914).

145. 30 U.S.C. § 29 (1964).

146. Although he will often be called upon to examine title to patented mining claims. See Mai, *Examination of Title to Mining Claims*, 14 WYO. L.J. 139 (1959). See also notes 150-151 *infra*.

"appropriation." In sum, the perfection of fee title¹⁴⁷ to the land,¹⁴⁸ and the mineral deposit therein contained,¹⁴⁹ together with some additional rights peculiar to mining titles¹⁵⁰ and qualified by some limitations inherent in the mining law,¹⁵¹ completes the appropriation process.¹⁵² But the process is no less complete when the mineral deposit has been mined out, or exhausted, whether patented or not. The appropriation then terminates,¹⁵³ and the right to obtain a patent expires with it.¹⁵⁴

CONCLUSION

Our focus in this article, as the title suggests, has been on the right of possession of mining claims before, during and after their discovery and location. While one might define the nature of a mining claim in terms of the intralateral and extralateral rights which go with it and also serve as limitations upon its enjoyment,¹⁵⁵ we believe that the possessory title is best described by reference to its creation upon the location of the claim, then to its maintenance and, ultimately, to its termination. Thus viewed, the mining claim, the very viability of which depends upon the continued interest and effort of its creator-owner, can be seen to be at once a form of property and at the same time an instrumentality of Congressional policy to encourage the maximum utiliza-

147. Recent Acts of Congress provide for less-than-fee patents in certain circumstances, e.g., Act of Sept. 3, 1964, Pub. L. No. 88-577, § 4(d) (3), 78 Stat. 893, 16 U.S.C. § 1133(d) (3) (1964) (restricting the scope of patents issued in wilderness areas on claims located between September 3, 1964, and December 31, 1983), and Act of Aug. 13, 1954, ch. 730, §§ 4-5, 68 Stat. 710, 30 U.S.C. §§ 524-525 (1964) (restricting the scope of patents issued where on the date of the Act or at a subsequent time of location, leasable minerals are known to exist, or such minerals are leased or applied for under the leasing laws). Cf. 30 U.S.C. § 502 (1964).

148. With a few exceptions, fee title to the land included in a mining claim can be acquired only by patent. See 30 U.S.C. §§ 611-615 (1964).

149. See also note 150 *infra*.

150. See 30 U.S.C. §§ 26 (granting extralateral rights) and 43 (provision for easements and other necessary means for complete development of mines) (1964).

151. The grant of extralateral rights, for example, 30 U.S.C. § 26 (1964), operates as a sub-surface limitation upon the claims of others. We do not consider the extralateral right here simply because the concept has yet to be explored by the Wyoming Supreme Court. There are, of course, other limitations, such as those relating to lodes in placers, see 30 U.S.C. § 37 (1964), and "tunnel-rights," see 30 U.S.C. § 27 (1964).

152. See G. COSTIGAN, *supra* note 78, at 395-398.

153. Although there is no reason that possession cannot be maintained under the doctrine of *pedis possessio*. See notes 15-18 *supra*.

154. See *Adams v. United States*, 318 F.2d 861 (9th Cir. 1963). Cf. *Mulkern v. Hammit*, 326 F.2d 896 (9th Cir. 1964).

155. See notes 150-151 *supra*.

tion of the mineral resources of the public domain. In essence, the doctrine of *pedis possessio*, the annual maintenance requirements, and the statutory forfeiture to co-locator provisions all serve to determine but two things: At what *time* does the economic pressure for development of a mineral deposit become sufficient to require the locator to represent his continued interest to the world and to what *extent* must he do so? The *pedis possessio* doctrine requires the prospector to maintain exploration activities and possession continuously simply because there will be no pressure to develop until a discovery has been made. Once made, economics will determine whether development begins immediately, and if development is not yet indicated, representation of continued interest—that is, negatived abandonment—is and should be sufficient to hold the property until changes in economics dictate that development should commence.

Perhaps all understand that there is a fundamental but seldom-mentioned rationale behind the favor extended to the first to establish possession. Development of a mineral deposit will be delayed only by adverse economic pressures. Until these are clearly reversed, the development policy of Congress is not truly served by relaxation of the first-in-time, first-in-right rule of appropriation. If development of the mineral deposit remains uneconomic, there will be little competitive pressure from others for the claim. But with enhanced economic conditions, the likelihood of relocation increases, and failure to maintain gives way progressively to performance of minimum maintenance efforts and eventually, perhaps, to full-scale development efforts. If it does not, it will become increasingly difficult to persuade jury and judge that the claim has in fact been represented. And so it should be, because the representation requirement is the opposite of the forfeiture provision designed to enforce it; just as the remedy of forfeiture is stringently applied, so representation efforts are liberally construed. In either case, the law adjusts tests and remedies alike as objective economic evidence demands. The possessory mining claim, even with its title uncertainties, has proved to be an approach to nature and to economic

geology which has appealed to generations of prospectors, if not to those less accustomed to the uncertainties of a high risk industry.

