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The judicially created doctrine of pedis possessio has long been a tenet of public land law. Curiously, however, the courts have seldom spoken on the application of this doctrine to a group of claims based upon a claimant's work on less than all of the claims in the group. This article considers generally the application of pedis possessio in such a manner and specifically a recent federal district court decision so applying the doctrine.

NEW FRONTIERS IN PEDIS POSSESSIO: MAC GUIRE V. STURGIS†

*Kent R. Olson**

On June 3, 1971, the United States District Court for the District of Wyoming[1] held, in Conclusion of Law No. 8 therein, that the locator of certain uranium claims on the public domain was

> presently[2] entitled to the exclusive possession thereof on a group or area basis where . . . the following

†The author's interest in Mac Guire v. Sturgis, Civil No. 5523 (D. Wyo., June 3, 1971) is partially attributable to his position as co-counsel in the case with Houston G. Williams, Esq. of Casper, Wyoming.

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1. Mac Guire v. Sturgis, Civil No. 5523 (D. Wyo., June 3, 1971). This lawsuit initially was filed by the plaintiff, Mac Guire, in the District Court, Seventh Judicial District, Converse County, Wyoming, pursuant to the Uniform Declaratory Judgment Act of the State of Wyoming, sections 1-1049 to 1-1064, but was removed by the defendant, Sturgis, to said federal court. Mac Guire, before filing this action, had contracted with Continental Oil Company (Conoco) to locate these claims in his name and at a later date assign the same to Conoco for a consideration. No appeal has been taken in this case.
2. The final sentence in Conclusion of Law No. 8 limits Mac Guire's future exclusive possession thereof to "so long as he, or his successors in title, remain in possession thereof, working diligently towards a discovery."

exists or was done for his benefit: (a) the geology of the area claimed is similar[3] and the size of the area claimed is reasonable;[4] (b) the discovery (validation) work referred to in Wyo. Stat. § 30-6 (1957) is completed;[5] (c) an overall work program is in effect for the area claimed;[6] (d) such work program is being diligently pursued, *i.e.*, a significant number of exploratory holes have been systematically drilled;[7] and (e) the nature of the mineral claimed and the cost of development would make it economically impracticable to develop the mineral if the lo-

3. In Finding of Fact No. 5, the court found that
> [t]he geology of the area . . . is low dipping sedimentary strata, cropping out throughout the area, of the Tertiary Wasatch formation. Such strata are fluviatile deposits of lenticular sands, clays and shale, derived from igneous rocks of the mountainous region to the south.

4. Mac Guire claimed and was awarded the present, exclusive possession of 1,785 lode claims within a certain area of Converse County, Wyoming. While a sizeable amount of acreage was thereby awarded, the court apparently felt that Mac Guire's activity (*see* notes 5 and 7 *infra*) on all of these claims, when compared to that of Sturgis', entitled him to the exclusive possessory right of all in view of Parker v. Belle Fourche Bentonite Products Co., 64 Wyo. 269, 278, 189 P.2d 882, 884 (1948), which, in distinguishing quiet title actions from possessory actions, stated that
> '[t]he ordinary rule of law that the plaintiff must recover on the strength of his own title and not on the weakness of that of his adversary does not apply. The rule in possessory actions is that the better title prevails.'

Accord, Ranchers Explor. & Dev. Co. v. Anaconda Co., 248 F. Supp. 708, 722 n.38 (D. Utah 1965).

5. See Finding of Fact No. 8. This statute requires, *inter alia*, the performance of certain discovery work by shaft, tunnel, pit or drill hole. Mac Guire chose to meet this requirement by drilling, on each of these 1,785 claims, one or more holes aggregating at least 50 feet in depth, no such hole being less than 10 feet in depth. In its strict sense, this work anachronism relates solely to rights based on a "discovery," but, confronted with trial practicalities and the fact that such work had been done, this was introduced as further evidence of Mac Guire's compliance with the diligently-working-towards-discovery element of *pedis possessio*. It is not the author's view, and there is nothing suggestive in this court's expressions, verbal or written, that compliance with this statute is necessary to establishing *pedis possessio*. *Cf.* Fiske, *Pedis Possessio—Modern Use of an Old Concept*, 15 ROCKY MT. MIN. L. INST. 181, 213-14 (1969).

6. The specific language in Finding of Fact No. 10 is that "[a]ll of the information obtained therefrom was part of a continuing geological evaluation being conducted relative to all of the Mac Guire claims."

7. Apart from the location (discovery) formalities of posting, monumenting, validating and recording, the court's Finding of Fact No. 10 discloses that Conoco drilled approximately 150 exploratory holes within a six-mile radius of three groups of these claims, 30 of such holes being drilled on these three groups within a two-month period. Cessation of such work at the end of this period was due to spring thaws and would be recommenced when the ground had dried. The court also found therein that
> [d]uring this period, at which time Conoco had sleeping trailers, cooking facilities and a field laboratory on the Mac Guire claims, well cuttings were taken from these holes and examined in the field, and radiometric logs were run on such holes. Evaluation of these logs was made in the field and in Conoco's Casper, Wyoming, office, and analyses of some of said well cuttings were made in Conoco's laboratories in Ponca City, Oklahoma. . . .

> cator is awarded only those claims on which he is actually present and currently working. . . .[8]

This case represents, to this author's knowledge, the first judicial *holding* relative to the question of whether the *pedis possessio* doctrine must be applied on a claim-by-claim basis or can be applied to a group of claims.[9]

8. Deep exploratory drilling is necessary on these claims before commencing actual mining operations. The cost of such drilling, including the mechanics and logging thereof, is approximately $1.00 per foot, and this per foot cost amounts to approximately $1.60 when employees' salaries and expenses in connection therewith are considered. The number of such holes to adequately "block out" even a portion of the area embraced by these claims would be in the neighborhood of 5,000, of which 200 to 1,000, depending on what was encountered during the course of such drilling, would have to be drilled in the prediscovery stage. Thus, given these more or less fixed costs and the fact that 98% of the uranium ore reserves in the United States are sedimentary, embedded deposits rather than veins or lodes in the traditional sense, costs well in excess of $1,000,000 may be involved in the pre-discovery stage alone.

9. *But cf.* K. C. K. Mining Co. v. Senutovich, Civil No. 9072 (Dist. Ct., McKinley County, New Mexico, March 10, 1956), where the conclusions of law were based on the assumption that this doctrine could be applied to an entire 640-acre section. Also, some would regard Union Oil Co. v. Smith, 249 U.S. 337 (1919); Ranchers Explor. & Dev. Co. v. Anaconda Co., *supra* note 4, at 721; and Adams v. Benedict, 64 N.M. 234, 247, 327 P.2d 308, 317 1958), as suggesting, if not requiring, a claim-by-claim application. *See* Fiske, *supra* note 5, at 190 & n.26, who notes that the Court in *Union Oil* "acknowledged that the doctrine is applicable only on a claim-by-claim basis," and who, citing *Ranchers* and *Adams v. Benedict*, points out that "the aspects and consequences of pedis possessio enunciated in [*Union Oil*] remain valid today"; Foreman, Dwyer & Cox, *Judicial Uncertainties in applying the Mining Doctrine of "Pedis Possessio,"* 3 NATURAL RESOURCES LAW. 467, 471 (1970), who state that *Ranchers* "rejected defendants' contention that the doctrine of 'pedis possessio' could be applied upon a group or area basis rather than a claim-by-claim basis;" Holbrook, *Legal Obstacles to Uranium Development*, 1 ROCKY MT. MIN. L. INST. 325, 346 (1955), who interprets *Union Oil* as, "in effect, refus[ing] to recognize group work for annual labor as possession and diligent prosecution of work essential for pedis possessio and requir[ing] actual possession and performance of work on each claim for protection under the doctrine of pedis possessio"; Ladendorff, *Enlarging Prediscovery Rights of Mineral Locators*, 6 ROCKY MT. MIN. L. INST. 1, 21 (1961), who feels that "[i]n view of the holding in the *Union Oil Co.* case, it can reasonably be concluded that . . . occupancy and exploration must actually extend to each claim [and] [i]t would not be sufficient that he be drilling and actually occupying only one claim of a group"; Sherwood & Greer, *Possessory Interests in Wyoming Mining Claims*, 4 LAND & WATER L. REV. 337, 344 n.24, 346 & n.36 (1969), who regard *Union Oil* as making it "clear that *pedis possessio* requires actual occupancy of each claim," who view *Ranchers* as foreclosing any 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 who cite that portion of *Adams v. Benedict* which states that ". . . possession of *each* claim . . . must be protected by actual occupation of that identical claim and the diligent and persistent exploratory work thereon" (emphasis added); 2 TWITTY & REEVES, LEGAL STUDY OF THE NONFUEL MINERALS RESOURCES 357 (Public Land Law Review Commission Study Report 1969), who cite *Ranchers* for the proposition that "[t]he prediscovery rights of a prospector cannot be extended to more than one claim without an actual occupancy of an [*sic*] diligent serach for mineral on each claim"; Waldeck, *Discovery Requirements and Rights Prior to Discovery on Uranium Claims on the Colorado Plateau*, 27 ROCKY MT. L. REV. 404, 419 (1955), who observes that *Union Oil* "decided that the possession of one of a group of

Pedis possessio is a judicially created doctrine,[10] whose origins are romantically suggested by the following excerpt from *Jennison v. Kirk*:[11]

> The discovery of gold in California was followed, as is well known, by an immense immigration into the State, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open, by law, to occupation and settlement. Little was known of them further than that they were situated in the Sierra

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five claims with diligent exploratory work thereon will not be treated as actual possession of more than the claim actually occupied even though the exploratory work benefited the entire group."

10. The earliest reported mining cases to use the term *"possessio pedis"* are Attwood v. Fricot, 17 Cal. 37, 44 (1860); English v. Johnson, 17 Cal. 107, 116 (1860); and Hess v. Winder, 30 Cal. 349, 355, 358 (1866). The first case, and probably the second, convey an impression that the principal usage of this term was in an agricultural context, and all three appear to equate this term with the foothold. Yet, each recognizes that, local mining rules to the contrary, a mining claimant was *not* limited to the mere *possessio pedis* of the claim when such claimant was in actual possession of a portion of the claim *and* was claiming the entire claim under an instrument (color of title) in which the exterior boundaries of the entire claim were definitely and accurately described. In Crossman v. Pendery, 8 F. 693, 694 (C.C.D. Colo. 1881), the first reported mining case to refer to this doctrine by name and substance, the issue therein was framed and answered in the following language:

> Can prospectors on the public mineral domain acquire any right in which the law will protect them prior to the discovery of mineral in rock in place? And, if so, can plaintiffs, being prior locators, recover against defendants, who first discovered mineral on the ground in controversy?
>
> It is the opinion of the court that inasmuch as the plaintiffs allowed the defendants to enter upon their claim and within their boundaries and there sink a shaft, in which they discovered mineral in rock in place before a discovery by plaintiffs, and make location thereof, without protest, the defendants now have the better right. But the plaintiffs might have protected their actual possession of their entire claim by proper legal proceeding prior to the discovery of mineral by the defendants, or by either party.
>
> A prospector on the public mineral domain may protect himself in the possession of his *pedis possessionis* while he is searching for mineral. His possession so held is good as a possessory title against all the world, except the government of the United States. But if he stands by and allows others to enter upon his claim and first discover mineral in rock in place, the law gives such first discoverer a title to the mineral so first discovered, against which the mere possession of the surface cannot prevail. . . .

See Fiske, *supra* note 5, at 187; Ladendorff, *supra* note 9, at 11; Sherwood & Greer, *supra* note 9, at 347.

11. 98 U.S. 453, 457-58 (1879). *See* Fiske, *supra* note 5, at 186. This article, in the author's opinion, represents the most thorough analysis of *pedis possessio*. An equally well-written, but intentionally more narrow, treatment of this doctrine is to be found in Sherwood & Greer, *supra* note 9, at 339-47. Collectively, these two articles, supplemented perhaps by 2 TWITTY & REEVES, *supra* note 9, at 353-57, present a comprehensive picture of this doctrine, and therefore this article will not treat what already has been well covered.

> Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches and canons, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining such as placer mining, quartz mining, and mining in drifts or tunnels. They all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the lawmakers, as respects mining, upon the public lands in the State. The first appropriator was everywhere held to have, within certain well defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced. . . .

The hallmark of this doctrine is its recognition of the fact that on-the-ground work, to varying extents, necessarily precedes actual discovery.[12] As such, this doctrine sought to establish certain ground rules by which certain inequities in the rights-through-discovery approach of the location laws could be mitigated and breaches of the peace could be

12. *See* Union Oil Co. v. Smith, *supra* note 9, at 346, where the Court observed that,

> [f]or 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.

avoided.[13] These ground rules are succinctly and authoritatively enunciated in *Union Oil Co. v. Smith,* where the United States Supreme Court, citing numerous lower court holdings, affirmed 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 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. . . .[14]

This quoted language still constitutes the crux of *pedis possessio.*[15]

As in other judicially created doctrines, varying and more complicated fact situations have fostered litigation, thereby increasing the body of law on this doctrine. In the process, though, because the courts have seemed inclined to allow each case to be interpreted on its particular facts,[16] uncertainty has arisen. The resulting frustration of the attorney, who must fashion something tangible and practical for his client out of such uncertainty, is exemplified by one writer who bemoans the fact that, although courts frequently repeat language such as this from *Union Oil,* several questions remain unanswered.

> To what extent must a person occupy a claim in order to be entitled to such protection? To what size area does such right extend? What amounts to a forcible entry or one made in bad faith as distinguished from a permissible peaceful entry upon the possession of another? . . .[17]

13. *See* Whiting v. Straup, 17 Wyo. 1, 23, 95 P. 849, 855 (1908). Stated in a contemporaneous context, where large amounts of time and money are demanded, Sherwood & Greer, *supra* note 9, at 345, would characterize the purpose of this doctrine as being "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."

14. Union Oil Co. v. Smith, *supra* note 9, at 346-47.

15. *See* Ranchers Explor. & Dev. Co. v. Anaconda Co., *supra* note 4, at 721.

16. *See* 1 LINDLEY, MINES § 217 (3rd ed. 1914); 2 TWITTY & REEVES, *supra* note 9, at 363; Waldeck, *supra* note 9, at 419.

17. Waldeck, *supra* note 9, at 419; *See also* Fiske, *supra* note 5, at 187, 209; Forman, Dwyer & Cox, *supra* note 9, at 472; Holbrook, *supra* note 9, at 349; 2 TWITTY & REEVES, *supra* note 9, at 362-63.

These first two questions touch upon the one presented and answered affirmatively in *Mac Guire v. Sturgis*—can one acquire, under certain circumstances and conditions, the exclusive possessory right to numerous claims even though the claimant is currently performing physical work towards discovery on less than all of such claims? Prior to this case, greater uncertainty existed, although some undoubtedly would contend that judicial precedent at least suggested, if not required, a negative answer.[18]

Ironically, *Union Oil* itself has occasioned some uncertainty in this regard,[19] despite there being no basis in the Court's holding therefor.[20] In that case, the plaintiff had located a 160-acre oil placer claim (A). At that time, the defendant was not in actual possession of A but was in actual possession of a contiguous 160-acre oil placer claim (B), upon which the defendant had drilled a well to discovery. The defendant claimed he had acquired the possessory rights to A (as well as to four other such claims contiguous to B) by virtue of his annual assessment work on B, which tended to determine the oil-bearing character of A and the other four claims. The Court, however, expressly framed the issue before it as presenting for the first time the question of the meaning and effect of a 1903 Act entitled "An Act Defining What Shall Constitute and Providing for Assessments on Oil Mining Claims."[21] So as to leave no doubt, except collectively among future legal writers, the Court unequivocally stated that

> [t]o what extent the possessory right of an explorer before discovery is to be deduced from the invitation extended in § 2319 [30 U.S.C. § 22], to what extent it is to be regarded as a local regulation of the kind recognized by that section and the following ones, and to what extent it derives force from the authority of the mining states to regulate the posses-

18. These writers and the judicial precedent they cite are discussed in note 9, *supra*.

19. Compare the interpretations of this case by the writers quoted in note 9, *supra*. 2 TWITTY & REEVES, *supra* note 9, at 357, correctly state the holding in *Union Oil*.

20. *See* Comment, *A Judicial Approach to Updating the Mining Laws of 1872—Pedis Possessio*, 10 NATURAL RESOURCES J. 385, 393 (1970).

21. Union Oil Co. v. Smith, *supra* note 9, at 342, 348.

> sion of the public lands in the interest of peace and good order, are questions with which we are not now concerned. Nor need we stop to inquire whether the right is limited to the ground actually occupied in the process of exploration, or extends to the limits of the claim. These questions and others that suggest themselves are not raised by the present record, which concerns itself solely with the rights asserted by the defendant under the Act of 1903. . . .[22]

Further, the Court observed that assessment work has "nothing to do with locating or holding a claim before discovery."[23] Consistent with these statements, the Court held that the work on B did not confer on the defendant by said Act inchoate rights in A, of which it was not in possession or upon which it had made no discovery.[24]

Despite the clarity of this holding and the narrow issue before the Court, *Ranchers Exploration & Development Co. v. Anaconda Co.* cites *Union Oil* as rejecting the contention that *pedis possessio* can be applied on a group or area basis rather than on a claim-by-claim basis.[25] This citation undoubtedly reinforced the view of those who believed *Union Oil* suggested or required such a result. Moreover, in addition to misciting *Union Oil,* the court compounded this error of substance by committing a procedural error—devoting a substantial portion of its opinion to dicta. Reduced to its essence, the facts in *Ranchers* reveal that the defendants therein were the claimants of numerous lode claims on some of which the plaintiff attempted to locate lode claims of its own. The defendants forcibly prevented the plaintiff from doing so, and the plaintiff sought, *inter alia,* injunctive relief, which was opposed by the defendants on the theory, *inter alia,* that *pedis possessio* gave them exclusive possession of

22. *Id.* at 348. The Court then immediately and gratuitously notes that "[w]hatever the nature and extent of a possessory right before discovery, all authorities agree [citing no authority] that such possession may be maintained *only* by continued *actual* occupancy . . ." (emphasis added). What the Court meant by "actual" is not entirely free from doubt, but in any event the statement is dictum.

23. *Id.* at 350.

24. *Id.* at 353.

25. Ranchers Explor. & Dev. Co. v. Anaconda Co., *supra* note 4, at 721 n.35. Although *Union Oil* is miscited and the court's discussion of *pedis possessio* is dictum, this opinion nevertheless represents, in this author's view, the most scholarly and exhaustive judicial treatment of this doctrine.

these claims. The court found that the defendants were neither in actual occupancy of nor diligently working towards discovery on any of these claims; that they did not attempt to drill a single hole or do any work whatsoever in the general area, but merely had plans and used guns to keep others off.[26] Given these circumstances, the court quite correctly concluded that the defendants had no *pedis possessio* rights, but it failed to recognize that the defendants' contention relative to a group or area application of this doctrine at that point became moot. If no *pedis possessio* obtains, a fortiori no group or area application thereof could obtain.

Similarly, some may regard *Adams v. Benedict*[27] as precedent for not permitting *pedis possessio* to be applied on a group or area basis.[28] It is true that this case does contain the following language which could foster such a conclusion:

> The work done on other claims does not supply the requirement [of being in actual and continuous possession, working diligently towards discovery]. . . . Likewise, the possession of each claim . . . must be protected by actual occupation of that identical claim and the diligent and persistent exploratory work thereon. . . .
>
> . . . Any knowledge [defendants] had of an overall plan for the development of the area is immaterial. . . . To hold otherwise would allow a person to hold vast amounts of land by merely claiming it without doing the work required by the rules laid down above. It would encourage speculation and would not allow the orderly filing of mining claims anticipated by the law.[29]

Yet, even if one assumes that the area or group application of *pedis possessio* was before this court as an issue, which is very doubtful, such language nevertheless is dictum. The court found that the plaintiffs had allowed the defendants to enter upon the contested claim peaceably, and that thereafter the defendants were in actual possession of such claim, working diligently towards discovery thereon, and did not

26. *Id.* at 724 and 726.
27. *Supra* note 9.
28. *See* Sherwood & Greer, *supra* note 9, at 344 n.24.
29. Adams v. Benedict, *supra* note 9, at 247, 327 P.2d at 317.

permit the plaintiffs to peaceably re-enter this claim.[30] As such, the defendants would have been entitled to the exclusive possession thereof, and, a fortiori, the plaintiffs could not have acquired any possessory right thereto either directly or by any acts done on any of the other 25 lode claims.[31]

During the time-span covered by these three cases, the need for a solution to the problem of how to secure pre-discovery possessory rights so as to encourage uranium exploration and development, and correspondingly discourage claim jumpers and nuisance locators, but without opening the door to speculation and monopoly, has become more acute due to the increasing depth at which uranium is found and the consequent rise in pre-discovery exploratory costs. What was applicable in 1957, as illustrated by the following excerpt from *Smaller v. Leach,* has even greater applicability today:

> Uranium itself, particularly the secondary minerals such as carnotite . . . are often subject to thick layers of overburden. A radiometric anomaly may be found on the surface and yet no single piece of rock subjected to the scintillator may react or give a 'count'. This fact has resulted in the custom among those seeking uranium of staking all of an area that may be 'hot'; i.e., an area that gives a radioactive count above the normal background reading caused by the normal radiations from the earth's crust and from cosmic rays. Once staking and recording of location notices have been done, then the expensive drilling and other searching are begun in earnest. As a practical matter the prospectors know that the real bonanza may lie some distance from the 'hot spot'. They also know that the moment a discovery is known to the public that others rush in and stake the surrounding lands, thus many times preventing the original discoverer from capitalizing on his efforts. . . .[32]

30. Adams v. Benedict, supra note 9, at 240, 247, 327 P.2d at 312, 317.

31. The trial court had found in favor of the plaintiffs as to all 26 claims in McKinley County, New Mexico, but the defendants challenged the correctness of the trial court's judgment and decree only as to one of these claims.

32. 136 Colo. 297, 306, 316 P.2d 1030, 1036 (1957), *cert. denied,* 356 U.S. 936. *See also* Waldeck, *supra* note 9, at 404-05.

Many recognize this problem.[33] Of these, some feel the problem should be solved legislatively;[34] some see an opportunity for judicial resolution,[35] even though the judiciary heretofore may have shown little inclination in this respect;[36] some apparently offer no solution or feel the present situation is a lesser evil than other proposed solutions.[37]

As a practical matter, it seems unlikely that Congress, in view of its past legislative record in this respect[38] and the numerous bills currently before it stemming from the Public Land Law Review Commission's Report, will be inclined to deal with this problem exclusively in a manner unrelated to a broad consideration of the 1872 Mining Law. While a solution may result from any sweeping revision of the 1872 Act, uranium claimants' pre-discovery possessory rights in the interim, and probably for a time thereafter relative to claims located prior to the effective date of any such revision, will remain essentially insecure unless the courts are prepared to afford relief, as in *Mac Guire v. Sturgis,* by adapting *pedis possessio* to current uranium mining realities. To withhold such relief would be tantamount to ignoring the existence of the problem heretofore described; the express statutory invitation to explore on the public domain;[39] the underlying policy of Congress to encourage the maximum utilization of the mineral resources thereon;[40] the absence of any stare

33. *See* Fiske, *supra* note 5, at 210-11, 214 n.90, and 216; Forman, Dwyer & Cox, *supra* note 9, at 469; Holbrook, *supra* note 9 at 349, 350; Ladendorff, *supra* note 9, at 4-6, 20-21; Martz, *Pick and Shovel Mining Laws in an Atomic Age: A Case for Reform,* 27 ROCKY MT. L. REV. 375, 380 (1955); Sherwood & Greer, *supra* note 9, at 339, 346-47; 2 TWITTY & REEVES, *supra* note 9, at 362-63; Waldeck, *supra* note 9, at 405; 1 AMERICAN LAW OF MINING § 4.9 (1971); Comment, *supra* note 20, at 393-94; PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS 124-25 (1970).
34. *See* Forman, Dwyer & Cox, *supra* note 9, at 472-74; Ladendorff, *supra* note 9, at 21, 25-33; Martz, *supra* note 33, at 383; 2 TWITTY & REEVES, *supra* note 9, at 362-63.
35. *See* 1 AMERICAN LAW OF MINING, *supra* note 33; Comment, *supra* note 20, at 394-95.
36. *See* Fiske, *supra* note 5, at 211-12, 216.
37. *See* Holbrook, *supra* note 9, at 356; Sherwood & Greer, *supra* note 9, at 347, 371-73; Waldeck, *supra* note 9, at 423.
38. *See* Ladendorff, *supra* note 9, at 22-23; Sales, *Geophysical Mining Claims,* 3 ROCKY MT. MIN. L. INST. 395 (1957).
39. 30 U.S.C. § 22 (1970). *See* Union Oil Co. v. Smith, *supra* note 9, at 346.
40. *See* Fiske, *supra* note 5, at 185 n.10, 211, 216; Sherwood & Greer, *supra* note 9, at 340, 371-72. In this context, it is noteworthy that Congress in enacting 30 U.S.C. §§ 641-46 (1970), relative to low interest loans to be made available to private enterprise for mineral exploration, declared it to be the policy of Congress, in the recital clause thereof (Pub. L. No. 85-

decisis to the contrary,[41] and, indeed, the fact that the judiciary has created this doctrine,[42] based on earlier Western mining district customs,[43] and has not regarded it as a fossilized curiosity.[44]

Zollars v. Evans, while recognizing that "[o]n the public domain of the United States a miner may hold the place in which he may be working against all others having no better right," nevertheless required a miner, "when he assert[ed] title to a full claim of 1,500 feet in length and 300 feet in width, [to] prove a lode extending throughout the claim."[45] Yet, this strict "foothold" application of *pedis possessio* was rejected by *Field v. Gray*[46] in favor of awarding possession to the entire claim. In *United States v. Grass Creek Oil & Gas Co.*,[47] the placing of a caretaker upon the contested lands and the making of a verbal contract for drilling wells thereon constituted the only work relative to such lands before the critical date of May 6, 1914,[48] and yet this was deemed to be

701, Aug. 21, 1958), "to stimulate exploration for minerals within the United States, its Territories and possessions." Outside of a purely *pedis possessio* context, this Congressional policy relative to the supply of energy from public domain lands might have to be balanced against the national environmental policy found in the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970). Consideration of these different policies, though, is beyond the scope of this article.

41. See earlier discussion herein relative to *Union Oil, Ranchers* and *Adams v. Benedict, supra* note 9.
42. See note 10, *supra,* in this connection.
43. *See* Fiske, *supra* note 5, at 186.
44. *See* Fiske, *supra* note 5, at 188; Ladendorff, *supra* note 9, at 2; Waldeck; *supra* note 9, at 406; Comment, *supra* note 20, at 385.
45. 5 F. 172, 173 (C.C.D. Colo. 1880). This restrictive view of *pedis possessio* was supported in the later case of Gemmel v. Swain, 28 Mont. 331, 335, 72 P. 662, 663 (1903).
46. 1 Ariz. 404, 408-09, 25 P. 793, 794 (1881). *Cf.* Crossman v. Pendery, *supra* note 10. This liberal view was widely followed in the oil placer cases arising in California and Wyoming, the rationale for which is described in Fiske, *supra* note 5, at 188.

> Deep deposits were sought, and the search required more sophisticated technology utilized over a wider area to narrow the exploration program to the places where drilling seemed most promising. Consequently, the prospecting parties needed protection while they worked upon larger tracts in different ways than had been customary for shallow deposits, and those tracts or claims had to be defined specifically before discovery of minerals took place.

It is submitted that similar rationale exists today relative to uranium. Ladendorff, *supra* note 9, at 13, recognizes this rationale, but would favor a legislative solution. *See* 1 LINDLEY, *supra* note 16, at § 218, who refers to and agrees with this rationale; Sherwood & Greer, *supra* note 9, at 339 n.12, where cases germane to the oil placer analogy are cited.

47. 236 F. 481 (8th Cir. 1916).
48. On this date, the President of the United States, under the authority vested in him by the Pickett Act (enacted June 25, 1910), withdrew these lands from mineral exploration and from all form of location and entry.

"diligent prosecution of work leading to the discovery of oil or gas."[49] Although the issue in this case was whether or not such work brought these lands within the first proviso of the Pickett Act,[50] the court's citation of *Borgwardt v. McKittrick Oil Co.*[51] strongly suggests that the *Grass Creek* court would have construed such work as coming within the standard of "diligent prosecution of work leading to discovery" even if the contest had been between two mineral claimants. More recently, the "actual possession" and "working diligently towards discovery" elements of *pedis possessio* were modified by *Kanab Uranium Corp. v. Consolidated Uranium Mines,*[52] involving a contest between two mineral claimants. The holding therein was that, because the one claimant was in possession under color of title, which flowed from location notices having been filed and some purported discovery monuments having been erected, the other claimant could not assert any right "as [a citizen] of the United States to enter upon [these] public domain [lands] for the purpose of prospecting for, discovering, and developing valuable ores and minerals."[53] While this case is an unfortunate aberration,[54] for surely some form of "actual possession" and "diligent work towards discovery" is essential, it does reveal that *pedis possessio* is far from being a static doctrine. The year following *Kanab,* a New Mexico state court awarded *pedis possessio* rights to an entire 640-acre section, thereby dealing the claim-by-claim application of this doctrine a direct blow.[55]

49. United States v. Grass Creek Oil & Gas Co., supra note 47, at 485, 487.
50. This proviso may be found in 43 U.S.C. § 142 (1970) and reads as follows:
> *Provided,* That the rights of any person who, at the date of any order of withdrawal, is a bona fide occupant or claimant of oil- or gas-bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work. . . .
51. 164 Cal. 650, 130 P. 417 (1913). This case contains the statement that "[w]e do not mean to hold that such diligent prosecution of the work may not include such actual preparation for the same as the bringing to the claim of the materials necessary therefor." *Id.* at 661, 130 P. at 421. This statement was quoted by the court in United States v. Grass Creek Oil & Gas Co., *supra* note 47, at 487.
52. 227 F.2d 434 (10th Cir. 1955).
53. *Id.* at 436-37.
54. Ranchers Explor. & Dev. Co. v. Anaconda Co., *supra* note 4, at 721-23, 729, tactfully rejects *Kanab,* but the "Freudian slip" in *Ranchers* in referring to *Kanab* as a Ninth Circuit, rather than a Tenth Circuit, decision may be more suggestive of an outright disownment. *Id.* at 721.
55. *See* K.C.K. Mining Co. v. Senutovich, *supra* note 9; Comment, *supra* note 20, at 387.

In that case the plaintiffs' work on 36 claims in one section in McKinley County, New Mexico, consisted of merely having staked; having dozed 18 cuts or scoops approximately eight feet in depth, each on a boundary line between two claims; having made an accurate survey, and having been in the process of preparing a plat of the surface for drilling purposes. The court found that industry custom warranted such an award.

> Uranium occurs in erratic and unpredictable patterns beneath the surface of the earth, rendering subterranean exploration on a single mining claim with dimensions of 600 feet by 1,500 feet economically infeasible and the practice in the industry has been to require control over a large group of claims, usually one section, containing 640 acres, before laying out and conducting a drilling program for the discovery of ore beneath the surface. Anyone engaged in the industry would be familiar with this practice, and would know that a group of claims covering the surface of an entire section in a single ownership is intended to be used in a single systematic discovery operation.[56]

Those who oppose further evolution of this doctrine to embrace a group or area application raise the spectre of monopolization,[57] speculation,[58] and a substitution of the judiciary's judgment for that of the prospector and his geologist.[59] Unquestionably, some would seek to exploit such an evolution for monopolistic and speculative ends, and the judiciary must be alert to this. However, if a court, as in *Mac Guire v. Sturgis,* establishes clear and meaningful guidelines by which it will so apply *pedis possessio,* finds that the evidence satisfies these guidelines, and conditions its judgment and decree upon the continued satisfaction of such guidelines, these fears can be minimized, if not eliminated. In this regard, it is important to remember that any judicial expansion of this doctrine will affect only claimant-to-claimant relation-

56. K.C.K. Mining Co. v. Senutovich, *supra* note 9, Court's Finding of Fact No. 7, page 3.

57. *See* Sherwood & Greer, *supra* note 9, at 345. This article best marshalls the arguments against such an evolution.

58. *Id.* at 347.

59. *Id.* at 347, 372.

ships; the federal government would not be hindered[60] from challenging any claim based on the absence of discovery of a valuable mineral[61] or a failure to perform the required assessment work.[62] Apart from these deterrents to monopoly and speculaton, monopolistic practices would be subject to civil and criminal sanctions available under the antitrust laws. Also, any lack of diligent work towards discovery resulting from any speculation would expose one relying on *pedis possesio* to peaceable entry by another and consequent litigation. Nor, by accepting this task, would the judiciary in our adversary system be substituting its judgment for that of the prospector and his geologist. Rather, if it be the trier of fact, it would be weighing evidence introduced by contesting parties. As such, the court would be performing a traditional role, one analogous to its role in a discovery contest between two rival locators. In applying *pedis possessio* to current uranium mining realities, the court likewise would be engaging in a traditional role of fashioning orders and granting relief to fit a need long neglected by Congress.

60. Sherwood & Greer, *supra* note 9, at 342 n.19, suggest that the Forest Service might be hindered in this respect. Yet, the Forest Service can make its impact felt in challenging a patent application. *See* United States v. Baranof Explor. & Dev. Co., 72 Interior Dec. 212 (1965); United States v. Carlile, 67 Interior Dec. 417 (1960).

61. *See* Davis v. Nelson, 329 F.2d 840, 845-46 (9th Cir. 1964); United States v. Baranof Explor. & Dev. Co., *supra* note 60; United States v. Carlile, *supra* note 60; Fiske, *supra* note 10, at 197-98. Withstanding such a challenge has been made even more difficult by United States v. Coleman, 390 U.S. 599 (1968), and Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969).

62. Disregarding Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639, 646-47 (1935), Hickel v. Oil Shale Corp., 400 U.S. 48 (1970), at the very least, gave the federal government authority to challenge any claim for failure to properly perform past assessment work relative to leasing act minerals located before the effective date of the Mineral Leasing Act of 1920, where the locator thereof receives notice of such challenge prior to his resuming assessment work thereon. The Department of Interior's proposed regulation section 3851.3(a) reveals that the Department interprets this case as embracing also locatable minerals and as permitting any claim to be so challenged even when such work is resumed thereon before receipt of the notice of challenge. 36 Fed. Reg. 13153 (July 15, 1971). Some might question the relevance of assessment work, a post-discovery requirement, to *pedis possessio*, a pre-discovery right. Legally, they would be correct. However, as a practical matter, mineral claimants customarily locate, perform assessment work and file annual affidavits thereof prior to discovery with the hope of protecting their claims in the pre-discovery stage. Such location and assessment work and filing serve notice to others that a prior claimant has intended to appropriate the claims covered thereby. This notice is customarily respected, since others desire similar respect to be reciprocated to their claims. Of course, those who seek easy financial gain from practices more akin to extortion than mineral exploration and development unscrupulously exploit the bona fide mineral claimant's pre-discovery insecurity. *See* Comment, *supra* note 20, at 388.