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Globe Mining Co. v. Anderson

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NOTES

GLOBE MINING CO. V. ANDERSON

Today, uranium is continuing in its role as the young giant of the mining industry.[1] Because the basic mining laws of the United States[2] have remained substantially unchanged,[3] courts today are running into difficulty in attempting to adapt the laws to modern mining methods and new minerals.

Of importance to uranium miners in Wyoming is the recent decision by the Supreme Court of Wyoming in the case of *Globe Mining Co. v. Anderson.*[4] For those presently engaged in the rejuvenated mining indus-

1. "It is impossible to measure the dollar value of all the prospecting and exploration activities but when this is added to the expenditures for production and construction, we have in the United States at least a 100 million dollar a year uranium industry. . . . Today probably more people are looking for uranium in the United States than for all other metallic minerals combined. Many discoveries are being made. There are now a dozen or more 100,000 ton ore bodies, as compared with the two or three found in the previous fifty years." Speech by Jesse C. Johnson, A.E.C., before American Mining Congress, San Francisco, Calif., Sept. 22, 1954, "The Outlook for Uranium Mining."
2. Act of May 10, 1872, c. 152, 17 Stat. 91, as amended 30 U.S.C. §§ 21-54 (1952 ed.).
3. Note, 4 Utah L. Rev. 241 (1954).
4. ..... Wyo. ....., 318 P.2d 373 (1957).

try, it presents current interpretations of the foundations of the whole industry and their claims on public lands. The *Globe* case deals with only one element actually peculiar to uranium—that of discovery by Geiger count, but it does interpret statutes as to: (a) definition of shaft or cut with regard to vein, (b) sequence of shaft and filing of location, (c) purpose of filing location and effect thereof, and (d) substantial compliance. It also presents what may be considered as current judicial thinking on the distinction between lode and placer claims.

POSSIBLE CONFLICT WITH FEDERAL LAW

The *Globe* case was a suit to quiet title in which the defendants, by cross-petition, alleged they were the legal owners by virtue of their compliance with the federal and Wyoming minings laws on their claims and that the plaintiff had failed to substantially comply with these laws. One of the objections made was that the discovery shafts were not placed midway between the designated side lines as required by state statutes.[5] The court, basing its holding on an Idaho case,[6] held that this did not invalidate the claim but that the plaintiff must lose that part of his claim that was in excess of that allowed by statute. The court said that deviation from center did not alter the position of the side line closest to it, but automatically delimited the other side line to a point equidistant.[7] Thus, for example, if a person dug a discovery shaft ten feet from a side line, the second side line would be set by law ten feet from the center of the discovery shaft making the claim twenty feet in width. This is in conflict with the federal statute which states: ". . . nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein."[8] Aside from this extreme illustration, the state does possess discretion as to the width of the claim.

Generally the state court will, where possible, construe a state statute so as to avoid conflict with a federal statute, even though the construction is contrary to that which has been universally assumed.[9] Even absent such construction, it has been held that under the federal statute authorizing local rules governing the location of mining claims, the state statutes governing these matters are of no more force than miner's rules.[10] It would seem plausible then, that should a situation arise where the moving of the claim's boundary under the Wyoming statute conflicts with the twenty-five foot limit set by the federal statute, the claim may not be limited to less than the minimum set by the federal law.

The federal law states that no location of a lode claim shall be made until discovery of the vein within the limits of the claim located, and also

5. Wyo. Comp. Stat. § 57-913 (1945).
6. Hawley v. Romney, 42 Idaho 645, 247 Pac. 1069 (1926).
7. Supra note 4.
8. Act of May 10, 1872, c. 152, 17 Stat. 91, as amended 30 U.S.C. § 23 (1952 ed.).
9. Butte Miners' Union v. Anaconda Copper Mining Co., 112 Mont. 418, 118 P.2d 148 (1941).
10. Clark-Montana Realty Co. v. Butte & Superior Copper Co., 233 Fed. 547 (D.Mont. 1916).

contains the further restriction that no claim shall extend more than 300 feet on each side of the *middle of the vein at the surface.*[11] (emphasis added). The Wyoming statute requires that the side lines of the claim be equidistant from the discovery shaft without mention of the middle of the vein. Is the Wyoming statute in conflict with the federal statute on this point and, if so, which statute will control the side lines of the claim?

If the federal statute controls, another question arises as to what constitutes the middle of the vein in the case of a mineral such as uranium which occurs in mineralized zones of such a width as to include several adjacent claims. It is suggested that the Wyoming statute, which does not require the side lines of claims to be governed by the "middle of the vein," is more acceptable to uranium mining today than the federal law. Suffice it to say that the present law did not envision these problems.

It must also be remembered, in this connection, that when the issue arises between the first locator and another prospector who subsequently attempts to claim the same property, the courts have been quite liberal in sustaining discoveries by the first locator.[12] However, strict compliance with the statutes is demanded by the Department of Interior in considering whether to issue a patent to a mining claim.[13]

DISCOVERY

In determining whether the plaintiff had substantially complied with the federal and Wyoming statutes, the Supreme Court used the four essential steps for establishing a valid lode mining claim listed by the trial court as "discovery," "discovery working," "marking of boundaries," and "filing of certificates of location." As to discovery, the court, on the evidence, held that the readings of electrical instruments such as scintillation and Geiger counters were insufficient to support discovery. The court stated, "such counters, while helpful in prospecting for uranium cannot be relied upon as the *only* test."[14] (emphasis added) It is well settled in the law that the existence of a valuable mineral deposit within the limits of the claim is a prerequisite to a valid location.[15] The question thus becomes: what methods are sufficient to show that existence?

The court found samples were taken from the claims named Phil 5, 6 and 8, and the evidence showed them to be taken from rock in place. These claims were held to be valid. There was no evidence of an assaying or sampling of a vein, lode or rock in place on the other claims, and the

11. Supra note 8.
12. 2 Lindley on Mines § 336 (3d ed. 1914).
13. Id.
14. 318 P.2d at 380.
15. Cole v. Ralph, 252 U.S. 286, 40 S.Ct. 321, 64 L.Ed. 567 (1920); Butte & Superior Copper Co. v. Clark-Montana Realty Co., 249 U.S. 12, 39 S.Ct. 231, 63 L.Ed. 447 (1919); Donnelly v. United States, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 82 (1913); Creed and Cripple Creek Min. Co. v. Unita Tunnel Co., 196 U.S. 337, 25 S.Ct. 266, 49 L.Ed. 501 (1905); Erhardt v. Boaro, 113 U.S. 527, 5 S.Ct. 560, 28 L.Ed. 1113 (1885); Eureka Consol. Min. Co. v. Richmond Min. Co., 4 Sawy. 302, No. 4558 (C.C.Nev. 1871).

court held that therefore there was no discovery. In *King v. Mining Co.*,[16] the Supreme Court of the United States declared, "A location can only rest upon actual discovery of the vein or lode." In *Crisman v. Miller*,[17] the court stated, "there must be such a *discovery of minerals* as gives reasonable evidence of the fact either that there is a vein or lode *carrying the precious mineral*, or if it be claimed as placer ground that it is valuable for such mining." (emphasis added) *Lindley on Mines*[18] approves the definition contained in *Book v. Justice Mining Co.*

> When the locator finds rock in place, *containing mineral*, he has made a discovery within the meaning of the statute, whether it assays high or low. It is the find of the mineral that constitutes the discovery, and warrants the prospector in making a location of a mining claim.[19] (emphasis added)

The Land Department in *Castle v. Womble* states:

> Where *minerals* have been found and the evidence is of such character that a person of prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. (emphasis added)[20]

The expression "discovery of the vein or lode" appears from the authorities to have no fixed meaning,[21] but the above definitions require the *finding of the mineral.* (emphasis added)

It is common knowledge today that readings from Geiger and scintillation counter recordings are among the primary sources of information governing the development of radioactive claims[22] and many of the claims in the West today, especially deep-level ore bodies, were staked without discovery, in sole reliance on geologic studies or radiometric count. In some cases and under certain conditions, radiometric readings are more dependable than chemical assays taken from drill cuttings or cores.[23] To date, in the Wind River Basin, Wyoming, geologists have been unable to find any instance below the water table where the probe[24] data is not positive proof of the existence of uranium. It is obvious that neither the drafters of the statutes, nor the earlier decisions anticipated advances such as these which show the presence of minerals without exposing the mineral in rock in place. Two cases decided since the *Globe* decision have discussed the discovery by radioactive means. In a case before the Colorado

16. 152 U.S. 222, 227, 14 S.Ct. 510, 38 L.Ed. 419 (1894).
17. 197 U.S. 313, 323, 25 S.Ct. 468, 49 L.Ed. 770 (1905).
18. 2 Lindley on Mines § 336 (3d ed. 1914).
19. 58 Fed. 106, 120 (C.C.D. Nev. 1893).
20. 19 L. D. 455, 457 (1894).
21. United States v. Sage Investment Gold Mining Co., 258 Fed. 872 (8th Cir. 1919).
22. See Smaller v. Leach, ... Colo. ....., 316 P.2d 1030 (1957).
23. In the Wind River Formation, Wind River Basin, Wyoming, chemical assays are taken only for the purpose of establishing the chemicalradiometric balance of the particular occurrence for use in predicting grades and tonnages of ore encountered.
24. A slender instrument for examining a cavity, usually the extension containing the Geiger counter and first amplifier tube which is connected to the remainder of the instrument. For a complete discussion of probes and how they work, see Heiland, Geophysical Exploration, 619-715 (1940).

Supreme Court[25] three claims were staked side by side and discovery notices posted. A sample from one of the claims was assayed. There was no showing of a mineral in place on the other two claims. The court held all the claims valid, stating:

> Where . . . the assay samples came from at least one of the claims, and all the claims are contiguous, and where the trial court could and did conclude from the evidence that the non-assayed claims lie in similar ground, it is not unrealistic to hold that competent radiometric reactions supported by a chemical assay as to a part of the claims, clearly show the presence of uranium on the adjacent claimed locations showing the same or similar radiometric readings. The latter are then valid "discoveries" under our statute as much so as are outcrops visibile to the naked eye.

The Supreme Court of Utah has recognized discovery without the actual finding of ore.[26] The court, in determining if there had been valid discovery, stated:

> Notwithstanding the fact that we recognize that the statute requires some discovery of mineralization in place on the claim, as distinguished from float or imported material, it need only be such as would lead a miner to pursue such indications with a reasonable expectation of *finding ore.* (emphasis added)

The defendant in this case had found indications of mineralization, including copper in dome-like formations. He had a significant Geiger count, took into consideration the geology of the area, the presence of channeling and the thickness of the sandstone lenses. The court said this was a sufficient discovery of mineral to meet the statutory requirements.

These recent decisions show a definite attempt by the courts to cope with this problem and to construe the law so as to encourage, foster, and develop the mineral resources of the nation. This may be the beginning of a modern trend which could ultimately establish the certainty which the uranium industry needs. On the other hand, these could remain minority holdings and the uranium industry could remain in the "dark ages."

The Wyoming Supreme Court, in ruling that counters cannot be relied upon as the only test, gave no indication of how many, or which of these modern methods could be joined to prove sufficient discovery. This leaves the door open for a construction in Wyoming along the lines of those in Utah and Colorado, but it is suggested that the answer still lies in legislative action.

Should certain radiometric readings, under given facts, be recognized as sufficient for discovery, one obstacle in Wyoming may be the requirement of a discovery shaft.[27] The wording of the statute seems to indicate an intention to require an actual, visible exposure of the mineral in place

25. Dallas v. Fitzsimmons, ... Colo. ....., 323 P.2d 274, 279 (1958).
26. Rummell v. Bailey, ... Utah ....., 320 P.2d 653-656 (1958).
27. Wyo. Comp. Stat. § 57-916 (1945).

in the shaft. The Wyoming statute,[28] which provides for fifty feet of core drilling in lieu of the discovery shaft, merely states that the shaft or hole must expose deposits of valuable minerals sufficient in quality to justify a reasonably prudent man to expend time and money in further exploration. Thus it appears that unless this requirement is also modified in some way, the prospector still must produce a sample containing the mineral.

One attempt to modify the discovery requirements was a bill introduced by United States Senator Murray (Montana) to provide for the location of mining claims by geological, geochemical and geophysical means.[29] Under this bill, the claims would be square, embracing not more than forty acres and requiring one hundred dollars annual expenditure for each twenty acres. The work necessary for proper exploration would have to begin within one year and thirty days from the date of location. Another suggestion would recognize the validity of a location without actual discovery for a period of time sufficient to permit adequate exploration for concealed deposits.[30]

It may be suggested that the law of pedis possessio,[31] as established by our Wyoming cases,[32] is sufficient and accomplishes everything contemplated by this last proposal. This right is predicated on actual possession, which necessarily is determined as a matter of fact on the basis of the bona fide development of the premises for the discovery of the minerals. This is desirable in that a large number of claimants do not have the intent to develop, but only intend to speculate with the market. However, how satisfactory is this to the bona fide prospector? It is generally agreed that his possession is secure against "forceable, fraudulent, and clandestine intrusions."[33] This, according to the general rule, will not protect him against a peaceable entry[34] nor will it protect him if a valid location is made adjacent to his workings and his workings are included in the valid location.[35]

In *Kanab Uranium Corporation v. Consolidated Uranium Mines, Inc.*,[36] it was held that even peaceable entry may be prevented. This would seem to give as much protection from intrusion to one who enters and marks his claim as to one who has a valid discovery under the prescribed mining statutes. As one author suggests,[37] this could lead to abuse by persons or associations, who could tie up unlimited amounts of land in

28. Wyo. Comp. Stat. § 57-917 (Supp. 1957).
29. S.B. 2875, 83d Cong., 2d Sess. (1954).
30. Note, 4 Utah L. Rev. 241 (1954).
31. Lat. A foothold; an actual possession. Black's Law Dictionary, 4th Ed. (1951).
32. Granlick v. Johnson, 29 Wyo. 349, 213 Pac. 98 (1923); Sparks v. Mount, 29 Wyo. 1, 207 Pac. 1099 (1922); Phillips v. Brill, 17 Wyo. 26, 95 Pac. 856 (1908).
33. Cole v. Ralph, 252 U.S. 286, 40 S.Ct. 321, 64 L.Ed. 567 (1920).
34. Ibid., Belk v. Meagher, 104 U.S. 279, 26 L.Ed. 735 (1881); Hanson v. Craig, 170 Fed. 62 (9th Cir. 1909); Ritler v. Lynch, 123 Fed. 930 (C.C.D. Nev. 1903); Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673 (C.C.S.D. Cal. 1899).
35. Note, 30 Rocky Mt. L. Rev. 224 (1958); Martz, Pick and Shovel Mining Laws in an Atomic Age, 27 Rocky Mt. L. Rev. 375 (1955).
36. 227 F.2d 434 (10th Cir. 1955).
37. Note, 30 Rocky Mt. L. Rev. 172 (1958).

possessory claims, since the doctrine of pedis possessio is not limited by the area restriction of the mining statutes. This results in the very thing some members of the mining industry, who are opposed to legislation, fear; namely, that any legislation would have the resultant effect of giving the independent prospector little chance of making his stake. The ultimate effect of this, it is claimed, is to encourage the "promoter" to the discouragement of the true "miner" or prospector. What is lacking is the recognition that radiometric data, under certain conditions, is as reliable as actual exposure of a vein and should be recognized as sufficient for discovery. This would give the uranium prospector the protection he is seeking while he verifies his claim.

NOTICE

Evidence in the *Globe* case disclosed the "location notice" filed in the office of the county clerk referred to a "discovery monument" which was at a point other than the discovery shaft. To this extent it was defective.

The court, relying on the previous decisions in Wyoming cases, *Scoggin v. Miller*[38] and *Hagerman v. Thompson*,[39] held that the function of such records is the constructive notice they impart and that since the defendants had actual notice, they could not take advantage of the defect in recordation. A similar result was reached by the United States Supreme Court in *Yosemite Mining Co. v. Emerson*,[40] which held that one who had actual knowledge of the existence of a mining location could not take advantage of the locator's failure to post two notices required by local rule, since he had all the information that the notice was designed to give. In the case of a bona fide purchaser without actual notice of the mining location, correct recording is essential.

Globe is the first case in which the Wyoming Supreme Court has expressly taken the view that the function of recording is constructive notice, that one having actual notice will not be heard, and that failure to record does not invalidate the claim.

SHAFT OR "CUT"

In this connection the Supreme Court held that the words "ten feet," in the Wyoming statute[41] requiring the sinking of a shaft upon the discovery lode or fissure to the depth of ten feet, referred to the depth of the cut, and not to the height of the vein. The court also held that if the evidence classified the pit as a shaft rather than an open cut, the ten-foot length[42] requirement was inapplicable.

In *Globe* the plaintiff posted and recorded the location notices before sinking a shaft or making a cut to make the discovery and in this respect failed to strictly comply with the statute. The court held that if discovery

38. 64 Wyo. 206, 189 P.2d 677 (1948).
39. 68 Wyo. 515, 235 P.2d 750 (1951).
40. 208 U.S. 25, 28 S.Ct. 196, 52 L.Ed. 374 (1908).
41. Wyo. Comp. Stat. §§ 57-916 and 57-917 (1945).
42. Wyo. Comp. Stat. § 57-917 (Supp. 1955).

occurs before the intervening rights, it will be immaterial in what order the necessary acts take place.

LODE CLAIM

One of the most notable features of the case is the indication by the Wyoming Supreme Court of what constitutes a lode. In footnote 4, the court states:

> Various portions of a mineral-bearing area coming from the same general source and found to have been created by the same processes of deposit from solution constitute a lode (rock in place) for the purpose of locating mining claims even though they may be formless and are not enclosed by definite boundaries.[43]

Previously the court had stated that boundaries need not be fixed by a change to rock so different from the host rock that it does not contain in some way the same degree of mineralization. The boundary may be fixed by the improverishment of the mass beyond the limits of profitable extraction. This seems to be the only limitation. However, the court does indicate that while this would constitute a "lode" for the purpose of locating a mining claim, the court would apply the doctrine of extralateral rights in the location of uranium only if there exists a well-defined, continuous vein, lode or ledge extending down vertically and being clearly traceable.[44] Thus the Wyoming Supreme Court has designated one criteria of "lode" for purpose of location, and another in the application of the doctrine of extralateral rights.

SUBSTANTIAL COMPLIANCE

The court, in determining if there had been substantial compliance with the federal and Wyoming mining statutes, took each requirement individually and determined if each act required had been substantially complied with rather than looking at the requirements as a whole and determining if there had been substantial compliance.

CONCLUSION

Although, in the present case, the radiometric data was insufficient to show a "lode" (rock in place), the door remains open to a future decision which may hold scientific data, under certain conditions, sufficient to establish discovery.

Seemingly, the requirement of a discovery shaft or core which shall expose valuable minerals, is justified under past mining practice, but it may prevent a court from relying on scientific data alone, no matter how accurate. If construed as a requisite of discovery, such a result would be inevitable. However, the language of the statute indicates that the shaft is drilled, or cut, after discovery. Thus it is possible to say that the shaft is only one of the requisites to the filing of a valid location certificate, and that discovery itself can be based upon scientific information clearly demonstrating the presence of mineral-bearing rock in place.

43. 318 P.2d at 373.
44. Id. at 379.

The court, by its definition of a "lode" for mining purposes, indicates it is aware of the changes that must occur when dealing with a substance like uranium rather than the metallic minerals common at the time our present mining laws were enacted. Except when mineralized rock in place is physically produced, the requirements of what constitutes discovery of a vein or lode in Wyoming will remain in doubt, particularly as to new radioactive minerals, until there is a recognition, either by amendatory legislation or judicial decision, of what scientific information may be sufficient.

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EASEMENTS OF NECESSITY TO REACH PUBLIC LANDS

The United States Government in order to encourage settlement of the territories which have now become the western states made various grants to individuals[1] and to railroads.[2] By virtue of these grants, an uncontemplated problem arose. When the Government made these grants, it failed to expressly reserve to itself, its assigns, licensees, or other grantees, a right of way over the land granted. Thus, situations have arisen where there is public land that cannot be reached without crossing private lands. The problem is whether there is a way of necessity common to the United States Government, its assigns, licensees, or other grantees, across private lands to reach public land so situated. If such a way exists, there is no need for condemnation to establish a right that is already in existence.

Under the common law, the doctrine of easements of necessity (hereafter, easement of necessity and way of necessity may be used interchangeably) can be traced at least to the time of Edward I, for it was said, "Note that the law is that anyone who grants a thing to someone is understood to grant that without which the thing cannot be or exist."[3] This maxim had application in a case in which a grantor conveyed land to his grantee which was entirely surrounded by land retained by the grantor. No provision was made in the grant for the grantee to have a way of ingress and of egress to his land. The court found that the grantee could have a way of necessity over other lands of the grantor, "for otherwise he could not have any profit of his land."[4] Soon, a consideration of the converse situation arose—the grantor conveyed the surrounding lands and retained the surrounded land reserving to himself no way of ingress or of egress across the land conveyed. It was held that the way should be allowed.[5] The doctrine of easements of necessity is based on the public policy that the general social interest favors the occupancy and utilization of land rather than that it should lie idle.

1. Act of December 29, 1916, c. 9, 39 Stat. 862, 43 U.S.C. § 291.
2. Act of July 1, 1862, c. CXX § 2, 12 Stat. 489.
3. Darcy (Lord) v. Askwith, Hobart 234 (1618).
4. Clark v. Cogge, Cro. Jac. 170 (1607).
5. Packer v. Welsted, 2 Sid. 39 (1658).