

Editor's note: Appealed – aff'd in part, rev'd in part, remanded (for factual determination), Civ.No. 79-0486 (D.Utah June 17, 1981); dismissed, Nos. 81-1801, 81-1968 (10th Cir. Nov. 23, 1981), remand order of D.Ct. modified (Jan. 23, 1983)

UNITED STATES

v.

LEROY S. JOHNSON ET AL.

IBLA 78-507

Decided February 28, 1979

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., declaring the Grey Mound #2 placer mining claim recorded on February 17, 1972, null and void. U 10746.

Affirmed.

1. Mineral Lands: Generally--Mining Claims: Discovery: Generally--Mining Claims: Location

The purpose of 30 U.S.C. § 38 (1976) whereby a person or association may establish a right to patent lands which said person or association has held and worked for a period equal to the statute of limitations is to obviate the necessity of proving formal compliance with requirements for locating a claim, but not to dispense with proof of discovery.

2. Res Judicata--Rules of Practice: Appeals: Generally

Relitigation of the issue of discovery is barred by the principle of res judicata and its corollary, collateral estoppel, insofar as the same lands, parties, and claims are involved, absent compelling legal or equitable reasons for reconsideration.

3. Boundaries--Mining Claims: Location--Surveys: Generally

The primary rule which the courts apply in construing and interpreting a conveyance

where the location of the boundary lines is uncertain by reason of inconsistent or conflicting descriptive calls in the conveyance is that the intention of the parties controls and is to be followed. Where the calls for the location of boundaries to land are inconsistent, calls to monuments, natural or artificial, are of paramount importance and will prevail over all other calls inconsistent therewith. Calls to boundaries are of secondary importance, and courses and distances must be altered if, as given, they will not reach the designated boundary. Calls of course take precedence over distances, so that where it is necessary to either change direction to reach a boundary or else reduce or extend the prescribed distance, the distance must yield to the course. The recital of quantity or area of land conveyed or retained will be least influential.

4. Res Judicata—Rules of Practice: Appeals: Generally

Under principles of res judicata, a judgment is binding upon all parties to the proceedings in which it is rendered and to their privies. Privity denotes a mutual or successive relationship to the same right in property. Privity exists within the meaning of the doctrine of res judicata to bind a subsequent grantee, transferee, or lienor of property.

5. Administrative Procedure: Adjudication—Administrative Procedure: Hearing Examiners

In order to sustain a charge that an administrative law judge should be disqualified or his decision set aside because of bias, a substantial showing of personal bias must be made. An assumption that he might be predisposed in favor of the Government is not sufficient.

APPEARANCES: George Preston, Esq., Thur & Preston, Scottsdale, Arizona, for contestees. Reid W. Nielson, Esq., Office of the Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for contestant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Contestees Leroy S. Johnson *et al.*, appeal from a decision of Administrative Law Judge John R. Rampton, Jr., dated May 26, 1978, declaring null and void contestees' Amended Grey Mound #2 placer mining claim recorded on February 17, 1972.

By order of this Board, dated June 6, 1973, a contest to the validity of this mining claim was ordered to resolve the issues of discovery, title, and the effects of a material site right-of-way granted in September 1961. The case was before this Board as an appeal from the decision of the Utah State Office, Bureau of Land Management (BLM), dated October 25, 1972, rejecting contestees' application for patent of Amended Grey Mound #2 placer mining claim. The order of this Board modified that decision by limiting BLM's finding of invalidity to those lands within the claim which had not previously been located.

Thereafter, on July 1, 1976, BLM issued a contest complaint against the Grey Mound #2 placer mining claim located March 2, 1955, and the Amended Grey Mound #2 placer mining claim recorded February 17, 1972, charging:

1. Minerals have not been found within the limits of the claim so as to constitute a valid discovery within the meaning of the mining laws prior to the Act of July 23, 1955 (30 U.S.C. 611).
2. A valid discovery as required by the mining laws of the United States does not exist within the limits of the claims.
3. The material found within the limits of the claims is not a valuable mineral deposit under the Act of July 23, 1955 (30 U.S.C. 611).
4. The land within the limits of the claims is non-mineral in character within the meaning of the mining laws of the United States.
5. The Amended Notice of Location recorded February 17, 1972, in Book 115, pages 72-73, is void as to all or part of the lands described therein.
6. Lots 2, 3, 4, and 5, Section 6, T. 43 S., R. 11 W., Salt Lake Base and Meridian, were withdrawn from mineral location by the issuance of Utah-060729, a material site right-of-way on September 12, 1961, and all mining claims located thereon subsequent to that date are null and void.

7. The patent application is null and void as to the land included in Grey Mound No. 1 mining claim which has been held null and void by final decision.

8. The patent application fails to comply with 43 CFR 3862.1-3.

Amended Grey Mound #2 is situated in lots 4, 5, 8, and 9, sec. 6, T. 43 S., R. 11 W., and E 1/2 SE 1/4 NE 1/4 and NE 1/4 NE 1/4 SE 1/4 of sec. 1, T. 43 S., R. 12 W., Salt Lake meridian.

BLM expanded the area for the subject contest to include a mining claim denoted Grey Mound #2 recorded in March 1955. This latter claim overlaps Amended Grey Mound #2 in lots 8 and 9 of sec. 6, T. 43 S., R. 11. W., Salt Lake meridian and further includes lots 7, 10, 11, and 12 of that same section.

Contestees frequently refer to their Amended Grey Mound #2 claim as simply Grey Mound #2. Indeed, their amended notice of location (Gov't Exh. 11) uses this abbreviated version. This usage leads only to confusion, however, and will not be adopted herein.

The contestees denied the charges set forth in the complaint. Thereafter, on November 16 and December 15, 16, and 17, 1976, the matter was heard before Administrative Law Judge John R. Rampton, Jr., at Saint George, Utah. A copy of his decision is appended hereto as it contains a rather lengthy summary of the case and of the evidence. Only such facts and circumstances will be stated here as are deemed sufficient to justify the conclusions reached.

Contestees appeal the decision of Judge Rampton and set forth four grounds of appeal:

1. Contestees have established possessory title to Amended Grey-Mound #2 by their possession of the claim for the seven year period prescribed by the Utah statute of limitations for mining claims.

2. Contestees have presented substantial evidence of discovery which the Contestant has failed to refute.

3. Contestees' right to possessory title is not jeopardized by the 1961 decision of Hearing Examiner Black holding Grey Mound #1 placer mining claim to be null and void or by the subsequent grant of a material site right-of-way to the State of Utah.

4. Misrepresentations of fact and law indicate prejudice in favor of the Contestant by Administrative Law Judge Rampton.

[1] The issues presented by the first three grounds for appeal are sufficiently interrelated to permit their discussion together. Contestees have based their right to patent upon 30 U.S.C. § 38 (1976) which reads as follows:

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto * * * in the absence of any adverse claim.

The purpose of 30 U.S.C. § 38 is set forth by the Court of Appeals for the Ninth Circuit in United States v. Haskins, 505 F.2d 246, 250 (9th Cir. 1974):

This savings clause has been part of the general mining law since 1870 (16 Stat. 217). Its purpose is to obviate the necessity of proving formal compliance with requirements for locating a claim but not to dispense with proof of discovery. Cole v. Ralph, 252 U.S. 286, 40 S.Ct. 321, 64 L.Ed. 567 (1920).

Absent proof of discovery on Amended Grey Mound #2, there is no need to inquire into the factual issue of whether the locators of Amended Grey Mound #2 formed an association within the terms of 30 U.S.C. § 38 (1976) and sufficiently held and worked the claim denoted Amended Grey Mound #2.

We hold that the Contestees are unable to prove discovery on Amended Grey Mound #2, because the issue of discovery has been litigated in a prior hearing holding Grey Mound #1 placer mining claim to be null and void, and the contestees have not shown any cognizable discovery since the first hearing.

Although the claim at issue before this Board is Amended Grey Mound #2, it is necessary to relate the history of the locators' claims to the Little Creek Knoll to understand how a prior decision affecting Grey Mound #1 can be res judicata with respect to Amended Grey Mound #2.

On March 30, 1955, four claims known as Grey Mound #1, Grey Mound #2, Grey Mound #3, and Grey Mound #4 were recorded in Washington County, Utah. Richard Jessop was a locator on claims # 1, 2, and 4; Edson Jessop on claims # 1, 2, and 3; Fred Jessop, Dan Jessop, Joseph Barlow, Daniel Barlow, and Floyd Spencer on claims # 1, 2, 3, and 4; Louis Barlow on claims # 1, 3, and 4; and Leroy S. Johnson on claims # 2, 3, and 4. The date of location for each of the above claims was March 2, 1955.

Although the Little Creek Knoll had been used by some of the locators as a source of cinders in the 1930's, it was not until a period shortly prior to the effective date of 30 U.S.C. § 611 (effective July 23, 1955) that the locators filed Notices of Location.

30 U.S.C. § 611 (1976) removed common varieties of cinders from those materials which could be located as a valuable mineral deposit:

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the United States so as to give effective validity to any mining claim hereafter located under such mining laws * * *.

By locating the four claims prior to July 23, 1955, the locators sought to protect their use of the Little Creek cinder knoll (Tr. 293, 1976). It was the intention of the locators that the four claims would cover the knoll which they had been using for development of the Colorado City-Hildale area (Tr. 269, 1976).

The contestees relied upon a crew of young men to monument the center of sec. 6, T. 43 S., R. 11 W., Salt Lake meridian, as a common corner of the four claims (Tr. 439, 1976). Contestees were apparently unaware, however, that section 6 contains in excess of the standard 640 acres. Contestees were apparently further unaware that the center of section 6 was substantially to the east of the Little Creek Knoll and hence was a poor selection as a common corner for the four claims which were to cover the Little Creek Knoll.

The legal description for each of the four claims used the center of section 6 as a starting point. The legal descriptions for Grey Mound claims #1 and 2, however, contained contradictory descriptions as a result of the unusual width of the section. Grey Mound claims # 1 and 2, for example, were to extend 2,640 feet to the west of the center point of section 6; these same claims, however, were also to be bounded by legal subdivision boundaries which were well in excess of 2,640 feet from the center of section 6.

Thus on February 17, 1972, the locators sought to correct the various discrepancies in Grey Mound claims # 1, 2, 3, and 4 by filing an Amended Notice of Location of a claim denominated Grey Mound #2. This latter Grey Mound #2 claim, referred to as Amended Grey Mound #2 for clarity, is the focus of the present contest. This claim was centered about the Little Creek Knoll and included each of the three cinder pits which the locators had worked. Amended Grey Mound #2 contained 157.48 acres and included lots, 4, 5, 8, and 9 of sec. 6, T. 43 S., R. 11 W., Salt Lake meridian and the E 1/2 SE 1/4 NE 1/4 and NE 1/4 NE 1/4 SE 1/4 of sec. 1, T. 43 S., R. 12 W., Salt Lake meridian, Washington County, Utah.

The locators of Amended Grey Mound #2 were LeRoy S. Johnson, Joseph I. Barlow, Daniel Barlow, Samuel S. Barlow, Richard S. Jessop, Edson P. Jessop, Fred M. Jessop, and Dan C. Jessop.

Thereafter on May 16, 1972, the above locators filed an application for patent of Amended Grey Mound #2.

Amended Grey Mound #2 covers the Little Creek Knoll in a manner consistent with the intentions of the locators. It clearly covers pits # 1, 2, and 3 which the locators had extensively worked.

The defect in the locators' application for patent of Amended Grey Mound #2 is their inability to show proof of discovery prior to the effective date of 30 U.S.C. § 611, July 23, 1955. This inability is the result of a 1961 contest of Grey Mound #1 which held that Grey Mound #1 was null and void for failure to evidence a discovery.

On June 6, 1961, the United States filed a contest designated Utah 9278 involving Grey Mound #1; Sam Barlow, the grantee of Grey Mound #1 by quitclaim deeds from the original locators, was named contestee.

A full hearing was held before Hearing Examiner Howard B. Black on September 13, 1961, and the parties were each represented by counsel. Eugene W. Pearson, a valuation engineer for the Utah State Office of BLM, testified therein that he had examined pit #1 on the northwest side of the knoll and pit #2 on the east side of the knoll (Tr. 18, 28, 19, 1961). Based on this examination and his knowledge of the market and production costs for cinders, Pearson testified that valuable minerals were not present on Grey Mound #1 so as to warrant a prudent man in expending his labor and means in developing a profitable claim (Tr. 22, 1961).

Jarvis Klem, a valuation engineer for the Utah State Office, testified to his examination of pit #2 and concluded as did Pearson that Grey Mound #1 did not contain valuable minerals so as to warrant a prudent man in expending his labor and means in developing a profitable mine (Tr. 41, 1961).

For the contestee, Sam Barlow, Edson Jessop, and Lewis Barlow testified to the various uses of cinder and to the importance of cinders in the development of the Colorado City-Hildale area. Mr. Barlow further testified to receiving \$110 from a sale of cinders to the Haumont Construction Co. on June 29, 1961, the only sale of cinders to date involving a cash receipt by Barlow (Tr. 61, 1961).

No evidence was presented of the development of pit #3 on the south side of Little Creek Knoll, because this pit was not opened until some 10 years later.

Based upon the evidence presented, Hearing Examiner Black concluded that Grey Mound #1 lacked a discovery of valuable minerals within the meaning of the mining laws and hence declared the claim null and void.

The contestee failed to comply with the provisions for appealing this decision, and thus the matter stood until February of 1972 when the application for patent of Amended Grey Mound #2 was prepared. Amended Grey Mound #2 overlaps a significant portion of Grey Mound #1, and hence the issue of discovery is raised once again with respect to much of the same area surrounding Little Creek Knoll.

[2] Relitigation of the discovery issue is barred by the principle of res judicata and its corollary, collateral estoppel, insofar as the same lands, parties, and claims are involved, absent compelling legal or equitable reasons for reconsideration. Eldon L. Smith, 6 IBLA 310 (1972). The principle rests upon the ground that a party has litigated, or has had the opportunity to litigate the same issue in a former action in a court of competent jurisdiction and should not be permitted to litigate it again. Commissioner v. Sunnen, 333 U.S. 591 (1948).

[3] In order to determine whether the Grey Mound #1 holding is res judicata with respect to the issue of discovery on Amended Grey Mound #2, it is crucial to examine the decision and determine what lands were held to be without discovery. This task is complicated by the contradictory legal descriptions appearing for Grey Mound claim #1.

As set forth in its location notice, Grey Mound #1 was to extend westward 2,640 feet from the center of section 6. A conflicting description in the location notice, however, extends the western boundary of this claim to legal subdivision boundaries which are located well in excess of 2,640 feet from the center of section 6 and which if included in the claim would make its area much greater than the statutory maximum of 160 acres.

The primary rule which the courts apply in construing and interpreting a conveyance where the location of the boundary line is uncertain by reason of inconsistent or conflicting descriptive calls in the conveyance is that the intention of the parties controls and is to be followed. The Coast Indian Community, 3 IBLA 285 (1971).

Where the calls for the location of boundaries to land are inconsistent, calls to monuments, natural or artificial, are of paramount importance and will prevail over all other calls inconsistent therewith. Calls to boundaries are of secondary importance, and course and distances must be altered if, as given, they will not reach the designated boundary. Calls of courses take precedence over distances, so that where it is necessary to either change direction to reach a boundary or else reduce or extend the prescribed distance, the distance

must yield to the course. The recital of quantity or area of land conveyed or retained will be least influential. United States v. State Investment Company, 264 U.S. 206 (1924); Galt v. Willingham, 11 F.2d 757 (5th Cir. 1926); Phillips Petroleum Company v. Threlkeld, 123 F.2d 434 (10th Cir. 1942); U.S. v. Big Bend Transit Company, 42 F.Supp. 459 (D. D.C. 1942); The Coast Indian Community, *supra*.

Given the priority of artificial monuments and boundaries over a call to distances, it is clear that Grey Mound #1 extended westward beyond the area located within 2,640 feet of the center of section 6. To conclude otherwise would be to ignore the intentions of the locators that Grey Mound claims #1-4 were to cover the cinder knoll. Hence the western boundaries of Grey Mound #1 extend at least as far as the artificial monuments marking the legal subdivision boundaries.

Evidence presented at the hearing before Judge Rampton is sufficient to establish that pits #1 and 2 are located within the boundaries of Grey Mound #1 (Tr. 35, 36, 37, 1976).

The 1961 decision holding Grey Mound #1 null and void thus is a finding of a lack of discovery on those lands composed of lots 1, 2, 3, 4, 5, and 6 of sec. 6, T. 43 S., R. 11 W., Salt Lake meridian, i.e., those lands in the NW 1/4 of section 6. Pits #1 and 2 are located therein. These lands exceed 160 acres, the maximum acreage allowable to an association placer mining claim. 30 U.S.C. § 36 (1976). No attempt appears to have been made in 1961 to require the contestee to limit his claim to 160 acres.

[4] As set forth above, Sam Barlow was the contestee in the 1961 contest declaring Grey Mound #1 null and void. On March 27, 1972, Sam Barlow conveyed a seven-eighths interest in Amended Grey Mound #2 to seven of the original nine locators of Grey Mound claims #1-4. This transfer included lands subject to the 1961 judgment and also lands in sec. 1, T. 43 S. R. 12 W., Salt Lake meridian, which Barlow had never claimed. Counsel for appellants argues that the 1961 judgment against Sam Barlow cannot be res judicata against these seven grantees, Leroy S. Johnson, Richard S. Jessop, Edson P. Jessop, Dan C. Jessop, Joseph I. Barlow, Daniel Barlow, and Fred M. Jessop.

This contention is incorrect, for it is well settled that a judgment is binding upon all parties to the proceeding in which it is rendered and to their privies. Commissioner v. Sunnen, *supra*; Re West Jordan, Inc., 7 Utah 2d 391, 326 P.2d 105 (1958). As used in this context, privity denotes a mutual or successive relationship to the same right in property. Privity exists within the meaning of the doctrine of res judicata to bind a subsequent grantee, transferee, or lienor of property. Louis v. Brown Twp., 109 U.S. 162, 27 L.Ed. 892, 3 S.Ct. 92 (1883).

To the extent that in March 1972, Sam Barlow conveyed real property in sec. 6, T. 43 S., R. 11 W., Salt Lake meridian, adjudged to be lacking in discovery, the seven grantees of this property are barred from relitigating the issue of discovery on this property. The Dredge Corporation, 3 IBLA 99 (1972).

Amended Grey Mound #2 also contains certain areas not affected by the 1961 contest hearing. Specifically, these lands are: lots 8 and 9, sec. 6, T. 43 S., R. 11 W., Salt Lake meridian, and E 1/2 SE 1/4 NE 1/4 and NE 1/4 NE 1/4 SE 1/4 of sec. 1, T. 43 S., R. 12 W., Salt Lake meridian. These lands include the present site of pit #3 and the western slope of Little Creek Knoll.

As of July 23, 1955, there were no pits on any of these lands from which cinders could be obtained (Tr. 181, 212, 1976). July 23, 1955, is the critical date for contestees, for it is the effective date of 30 U.S.C. § 611 which removed common varieties of cinders from those materials which are locatable under the mining laws. This same date was used in the 1961 contest of Grey Mound #1.

A prima facie case establishing the lack of discovery on these lands was presented by the Government. Judge Rampton refrained from passing on the issue of discovery on these lands. We see no reason to avoid this finding. The contestees have presented no evidence of any development of lots 8 and 9, sec. 6, T. 43 S., R. 11 W., Salt Lake meridian and E 1/2 SE 1/4 NE 1/4 and NE 1/4 NE 1/4 SE 1/4 of sec. 1, T. 43 S., R. 12 W., Salt Lake meridian as of July 23, 1955. No pits were open at that time to extract cinders. Nor was any evidence adduced to demonstrate marketability as of the crucial date. We, therefore, reaffirm our holding of June 6, 1973, that the remaining portion of Amended Grey Mound #2 is null and void for failure to evidence discovery.

This holding in conjunction with the 1961 holding regarding Grey Mound #1 results in the overall conclusion that Amended Grey Mound #2 is null and void for failure to evidence a discovery as of July 23, 1955. Having made this holding, it is unnecessary for us to consider whether contestees have established possessory title to Amended Grey Mound #2 by possession pursuant to 30 U.S.C. § 38 (1976), since discovery prior to July 23, 1955, is an essential element in establishing their ultimate goal, the right to patent.

We note that Judge Rampton found the cinders on the Little Creek Knoll to be a common variety of cinders which have not been locatable since July 23, 1955, pursuant to 30 U.S.C. § 611 (1976). Nothing has been shown to refute that finding, and it is upheld.

The evidence indicating no development of lots 8 and 9 of sec. 6, T. 43 S., R. 11 W., Salt Lake meridian prior to July 23, 1955, is fatal to contestees' Grey Mound #2 claim which BLM has also contested

herein. A prima facie case establishing the lack of discovery on these lands was presented by the Government. No evidence has ever been offered by contestees regarding the existence of a discovery on lots 7, 10, 11, and 12 in section 6 as these lots are considerably removed from the cinder knoll itself. There being no development on the entire claim site denoted Grey Mound #2 prior to July 23, 1955, contestees have shown no discovery on this claim as of the critical date. We therefore declare this claim, Grey Mound #2, recorded March 30, 1955, to be null and void.

[5] As their final ground for appeal, contestees allege that Administrative Law Judge Rampton exhibited a lack of impartiality and a decided prejudice in favor of the contestant.

To support these allegations, contestees point to the Judge's incorporation of large sections of text from contestant's brief, alleged misrepresentations of fact, typographical errors, and misspellings. Even if proven to be accurate, a charge that Judge Rampton incorporated textual material from contestant's brief and published a decision containing typographical errors and misspellings hardly amounts to a charge of prejudice or lack of impartiality.

The typographical errors and misspellings referred to by contestees in their statement of reasons have been corrected in the decision of Judge Rampton attached.

In the absence of proof that alleged misrepresentations of fact were in fact intentionally made, it is more likely that the alleged misrepresentations are simply innocent mistakes of fact. These instances of misrepresentations cited by contestees are of insignificant facts at best. In citing these insignificant instances, contestees should consider that the record alone in this case is 1,118 pages long and of frequently contradictory testimony.

In order to sustain a charge that an administrative law judge should be disqualified or his decision set aside because of bias, a substantial showing of personal bias must be made. An assumption that he might be predisposed in favor of the Government is not sufficient. Converse v. Udall, 262 F.Supp. 583 (D. Ore. 1966), aff'd on other grounds, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); United States ex rel. De Luca v. O'Rourke, 213 F.2d 759, 763 (8th Cir. 1954); United States v. Stevens, 14 IBLA 380, 81 I.D. 83 (1974).

Contestees have presented no arguments or facts which show any personal bias either in favor of the Government or as against the contestees. Contestees have simply failed to preponderate with credible evidence over that presented by the Government.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed. In addition, this Board declares Grey Mound #2 placer mining claim recorded March 30, 1955, to be null and void.

Douglas E. Henriques
Administrative Judge

We concur:

Joan B. Thompson
Administrative Judge

Frederick Fishman
Administrative Judge

May 26, 1978

UNITED STATES OF AMERICA,	:	UTAH 10746
	:	
Contestant	:	Involving the Grey Mound
	:	#2 (Amended Grey Mound #2)
v.	:	placer mining claim situated
	:	within Section 6, T. 43 S.,
LEROY S. JOHNSON,	:	R. 11 W., and Section 1, T.
JOSEPH I. BARLOW,	:	43 S., R. 12 W., Washington
DANIEL BARLOW,	:	County, Utah.
RICHARD S. JESSOP,	:	
EDSON P. JESSOP,	:	
FRED M. JESSOP, :	:	
DAN C. JESSOP, and	:	
SAMUEL S. BARLOW,	:	
	:	
Contestees	:	

DECISION

Appearances: Reid W. Nielson, Esq., Office of the Solicitor,
U.S. Department of the Interior, Salt Lake City,
Utah, for Contestant;

George Preston, Esq., Thur, Preston & Hungerford,
Scottsdale, Arizona, for Contestees.

Before: Administrative Law Judge Rampton.

Summary

The claim in issue is located for cinders extruded from an extinct volcanic cone, known as Little Creek Knoll. Geographically, the cone is located approximately 15 miles southeast

of Hurricane, Utah, and approximately 15 miles northwest of Hilldale, Utah, and Colorado City, Arizona. These communities lie immediately adjacent to each other and were formerly known as Short Creek. Short Creek was founded in the early 1930' by Fred and Richard Jessop, John Y. Barlow, and Leroy Johnson, ranchers and farmers who banded together for mutual benefit economic gain and adopted the brand representing the names, Barlow, Johnson and Jessop.

Surface production of cinders from the Little Creek Knoll began some time between 1933 and 1936. The cinders were used for surfacing and stabilization, concrete aggregate, cinder block insulation, and drain fields within the Short Creek community. In 1943 and 1944, cinders removed from the pits were used in a small, hand-mold, cinder block manufacturing operation conducted by two residents of Short Creek, John Butcheriet and John Bistine. The cinder blocks were utilized in the construction of two three small homes in the community. Since 1945, no cinders been used for the construction of cinder blocks, and in 1954 negotiations by residents of the community to buy second-hand machinery for a cinder block plant proved fruitless. Although most of the buildings in Colorado City-Hilldale are constructed with cinder blocks, with the exception of the small houses constructed with hand-manufactured blocks, the cinder blocks were purchased from sources outside the area.

Over the years, a substantial amount of material has been removed from the Little Creek Knoll. During 1940-1946, an average of 350 cubic yards of cinders was utilized in the community for road stabilization, cinder block insulation, concrete aggregate, and drain fields; the same usages for which the pits were first developed and which continue to date. The quantities of material removed from the pits yearly roughly parallel the growth of the community. In the years 1947 through 1950, an average of 825 cubic yards of cinders per year was removed. From 1950 to 1955, an average of 1,850 cubic yards per year was mined. In the period 1955 to 1960, the communities suffered a growth setback and the average yearly removal dropped to 750 cubic yards of cinders. During the next five years, the community again prospered and the average removal per year by its residents increased to 12,050 cubic yards. The average yearly removal from 1965 through 1970 was 3,050 cubic yards and from 1970 through 1975, 2,900 cubic yards. All of the material removed was applied in the Colorado City-Hilldale community, except for 3,000 cubic yards of cinders used to improve the road from Short Creek to Hurricane in 1951 and 18,470 cubic yards in 1960-61, when the same road was paved. These removals were by the Utah Division of the Bureau of Public Roads.

With the exception of material utilized for state highway construction, the pits developed on the Little Creek Knoll could be regarded as community pits for the residents of Colorado City-Hilldale. Permission to remove material, however, had to be obtained from the developers of the pits, i.e., the original settlers and the Elders of the community. No specific testimony was offered or could be elicited as to how permission was given and what consideration was received by the controlling group. The testimony indicates that since members of the community all belonged to the same religious group and because the members cooperate with one another in the building of their homes and in making their livelihood, what benefited one benefited all. Commonly, the members of the community assist one another in construction of homes, roadways and community buildings. No business records were kept and any consideration for removal of cinders was limited to exchange of goods or services.

Although production from the Little Creek Knoll began as early as 1933, the developers of the claims did not file mining claims on the property until March 2, 1955, when Leroy Johnson, Richard Jessop, Fred Jessop, Edson Jessop, Dan Jessop, Lewis Barlow, Joseph Barlow, Daniel Barlow and Floyd Spencer placed location notices on the ground for the Gray Mound #s 1 through 4 placer claims. Their stated intention was to protect their possessory rights to the deposit of cinders prior to the passage of Public Law 167 (30 U.S.C. § 611) on July 23, 1955, which removed common varieties of cinders from location under the mining laws.

The Utah Division of Public Roads applied to the Bureau of Land Management on January 12, 1961, for material site right-of-way to lots 2, 3, 4 and 5 of section 6, Township 43 South, Range 11 West, Salt Lake Meridian. On March 10, 1961, the association locators, with the exception of Floyd Spencer, quitclaimed their shares or interests in the four placer mining claims to Samuel S. Barlow. Mr. Barlow was to act in their behalf in negotiations with the Road Commission. On April 12, 1961, Samuel S. Barlow acquired a share of the claims by buying out Floyd Spencer. Then, on May 15, 1961, the Utah Road Commission signed an option with Mr. Barlow to purchase the material.

On June 6, 1961, the Bureau of Land Management filed a complain against the validity of the Grey Mound #1 placer mining claim, which covered the area applied for under the material site right-of-way, and the Utah Road Commission then stopped payment under its option-purchase agreement until the resolution of the validity proceedings brought by the BLM. On June 29, 1961, the Haumont Construction Company purchased 1,100 tons of cinders at 10 a ton for use in construction of the highway. On September 21, 1961, a material site right-of-way was granted by the BLM to the Utah Road Commission.

On September 13, 1961, a hearing on the validity of the Grey Mound #1 was held before a Hearing Examiner of the Department of the Interior, and by decision dated January 15, 1962, that claim was held to be invalid. No appeal was filed from this decision.

On February 17, 1972, a document entitled "Certificate of Location, Amended Notice of Location, Placer Mining Claim" was recorded in the County Recorder's Office. (BLM Ex. 11). This document, signed by the present contestees, purported to amend the location of the Grey Mound #2 mining claim to correct error in the description in said location, which was placed on the ground on March 2, 1955, and which it is claimed should have been dated approximately April 19, 1945.

The contestees then filed on March 14, 1972, a patent application, U-18932, for the amended Grey Mound #2 association placer mining claim and supplementary affidavits in support of their claim to possessory title pursuant to the provisions of 30 U.S.C. § 38.

By decision dated October 25, 1972, the Utah State Office, Bureau of Land Management, issued a decision holding the application null and void. The decision was appealed and by decision dated June 6, 1973, the Interior Board of Land Appeals (IBLA 73-237) remanded the matter and ordered the BLM to initiate contest proceedings against the Amended Grey Mound #2 claim.

The complaint, issued July 1, 1976, lists eight specific charges in support of its requests to have the claim declared void. Based on these charges and the evidence presented at the hearing, the following issues are presented:

- [1] Whether the material found within the limits of the claim is "special and distinct" as defined by the Act of July 23, 1955 (30 U.S.C. § 611) and still subject to location under the mining laws.
- [2] Whether contestees have acquired possessory title to the claim by virtue of occupancy and use pursuant to the provisions of 30 U.S.C. § 38.
- [3] If compliance with provisions of 30 U.S.C. § 38 had been made, did the location of Grey Mound #s 1, 2, 3 and 4 constitute an abandonment of the Grey Mound #2 placer

claim, Amended Grey Mound placer claim asserted to have been located in 1945.

- [4] Can the boundaries of the Grey Mound #1 placer claim be determined, and, if so, is the patent application void as to the land within the Grey Mound #1 placer claim which was held to be null and void by final decision.
- [5] Was the issuance of material site right-of-way on September 12, 1961, proper, and if so, did this preclude any subsequent location of a mining claim on land included within the material site right-of-way.
- [6] Was the Certificate of Location, Amended Notice of Location, filed February 17, 1972, an amendment of a previous location or a relocation of a mining claim.
- [7] Was a discovery within the meaning of the mining laws made prior to July 23, 1955.

[1] Common Variety.

The Act of July 23, 1955 (30 U.S.C. § 611) defines cinders as a common variety material and therefore not locatable under the mining laws of the United States. The material located in Pits Nos. 1, 2 and 3 are cinders used in the communities of Colorado City and Hilldale for a variety of purposes, including sand stabilization, fill, cinder blocks, concrete reservoir construction and drain fields. Contestees make no claim that the Little Creek Knoll contains a valuable mineral other than the cinders.

The Government called three witnesses, mining engineers and geologists, who testified that they had made an examination of the cinders from the pits on the Little Creek Knoll and had compared them with cinders from other cones and pits found in southwest Utah. They uniformly testified that the cinders from the Little Creek Knoll were used for the same purposes as materials taken from other volcanic cones in the area. Ferdie Peterson stated that, in his opinion, the material was a common variety of material within the meaning of the mining laws (Tr. 51), as did Lanny Ream (Tr. 126) and Jarvis Klem (Tr. 173).

For the contestees, Donald F. Reed, a consulting mining engineer, testified that he had examined cinders and the use of

cinders all over the state of Arizona and those from Little Creek Knoll. He found the Little Creek Knoll cinders were pretty much the same as cinders found in Arizona. (Tr. 1085) He also testified that cinders near Flagstaff and Winslow, Arizona, are used to make concrete. (Tr. 190-191).

Fred M. Jessop, one of the contestees, had made a comparison of the Little Creek Knoll cinders with cinders from volcanic mounds closer to Hurricane and stated that they could be used for the same purposes as from the Little Creek Knoll. He made a comparison with other cinder cones in Washington County and was of the opinion they are better than the cinders on the Little Creek Knoll. (Tr. 391-392). He had examined most of the pits in the area and thought that the cinders from the other pits could be used substantially for the same purposes as the cinders from the Little Creek Knoll, except that the cinders from the pits around St. George, Utah, were better quality for cinder blocks than for concrete aggregate. (Tr. 470-473).

L. Leon Jennings, a witness for the contestant, has been in the business of constructing and selling cinder blocks for in excess of 30 years. He had examined most of the cinder sources in the area and said there was nothing to distinguish or make the cinders on the Little Creek Knoll any better or worse than any other, and they were all pretty much the same. (Tr. 145).

There is no testimony in the record that the cinders on the Little Creek Knoll in Pits Nos. 1, 2 or 3 possess characteristics giving them distinct and special value and by virtue of that distinction would command a higher price in the market place. The only exception is the opinion by Hale C. Tognoni, a consulting mining engineer, who theorized that, since the cinders could compete with sand and gravel for use as a concrete aggregate, which is scarce in the area, the cinders must be regarded as uncommon. Mr. Tognoni stated he was astonished to find that the concrete structures he examined in Colorado City-Hilldale containing cinders as aggregate, were without crack normal to age. He was, however, unable to conduct adequate tests or, within his limited time, draw conclusions as to the reason for this phenomena. He speculated that there may be quality in the Little Creek Knoll cinders different from ordinary cinders.

In any event, there is no testimony that this material commands a higher price in the market place because of its possible uniqueness, and the tests established by the Department in *United States v. U.S. Minerals Development Corp.*, 75 I.D. 127 (1927), and subsequent cases have not been met. The only

conclusion which can be reached from the evidence presented is that the cinders on the Little Creek Knoll are a common variety of mineral as defined by the Act of July 23, 1955.

[2] Possessory title.

The contestees claimed to have established the possessory title to Amended Grey Mound #2 by virtue of occupancy and use pursuant to the provisions of 30 U.S.C. § 38, which reads in pertinent part:

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter . . . in the absence of any adverse claim; . . .

Contestees assert that Barlow's, Johnson's and Jessops' occupation and use on the claim began in 1945 when Pit No. 1 was open, the road to it improved, and a chute built for loading. They assert that seven years after 1945 their title was established and therefore existed under Section 38 well before the enactment of Public Law 167 on July 23, 1955, and would be unaffected by that Act. The contestees concede there was no written instrument or location notice filed, but argue that the only qualification under the Utah statute of limitation is that improvements must have been made on the claim.

The right to a mining claim rests not only upon compliance with the laws of the United States, but upon full compliance with the laws of the state in which the claim is located. Belk v. Meagher, 104 U.S. 279 (1881). Thus, a mining claimant must not only comply with Federal law but also with such state location requirements as are not inconsistent with Federal mining provisions. United States v. Zweifel, 508 F.2 1150 (10th Cir. 1975).

The requirements for locating and maintaining possessory rights are set forth in 30 U.S.C. § 28 (1970) and the regulation implementing the statute, 43 CFR 3831.1, which states in pertinent part:

Rights to mineral lands, owned by the United States, are initiated by prospecting for minerals thereon, and, upon the discovery of minerals, by locating the lands upon which such discovery has been made. A location is made by (a) staking the corners of the claim, except placer claims described by legal subdivision where State law permits locations without marking the boundaries of the claims on the ground, (b) posting notice of location thereon, and (c) complying with the State laws, regarding the recording of the location in the county recorder's office, discovery work, etc. As supplemental to the United States mining laws there are State statutes relative to location, manner of recording of mining claims, etc., in the State, which should also be observed in the location of mining claims.

The Utah Statute, U.C.A. 1953, Section 40-1-2, requires the locator of a mining claim to erect a monument at his place of discovery and post his notice of location, which shall contain:

- (1) The name of the claim.
- (2) The name of the locator or locators.
- (3) The date of the location.

* * *

- (5) If a placer or mill site claim, the number of acres . . . and such a description of the claim or mill site, located by reference to some natural object or permanent monument, as will identify the claim or mill site.

Section 40-1-4 requires recordation of the location notice within 30 days after the date of posting, but the Utah Supreme Court in Atherley v. Bullion Monarch Uranium Company, 8 Utah 2d 362, 335 P.2d 71, has held that recordation of the location notice is not a requisite to the initiation of title under the mining laws and failure to record does not forfeit the title properly initiated. The court reasoned that if the statute provides no forfeiture for failure to record, by failure nothing is divested.

While Utah law provides no penalty for failure to record a location notice, a locator to initiate a right to a mining claim

must still, by some form of notice and posting, proclaim to everyone that he has a claim and give notice to its location. In the Atherly case, the court stated:

The locator's title to a mining claim is initiated by the discovery of mineral coupled with the segregation of the claim from the public domain by the marking of the boundaries thereof.

What we are concerned with is the right of the contestees to assert a right granted by adverse possession. If the claim boundaries are not marked on the ground or if a placer claim boundaries are not described in a location notice filed for record in the County Recorder's office or are not described in a notice placed upon the ground, there can be no open and notorious possession which advertises to all or anyone that a claim exists.

The right to adverse possession of a mining claim under 30 U.S.C. § 38 is governed by the state statutes for a claim, not founded on written instruments. Section 78-12-10 provides:

Where it appears that there has been an actual continued occupation of land under claim of title, exclusive of any other right, but not founded upon a written instrument, judgment or decree, the land so actually occupied, and no other, is deemed to have been held adversely.

Section 78-12-11 provides:

For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment or decree land is deemed to have been possessed and occupied in the following cases only:

- (1) Where it has been protected by a substantial inclosure.
- (2) Where it has been usually cultivated or improved.
- (3) Where labor or money has been expended upon dams, canals, embankments, aqueducts or otherwise for

the purpose of irrigating such lands amounting to the sum of \$5 per acre.

Section 78-12-12, in part, provides:

In no case shall adverse possession be considered established under the provisions of any section of this Code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid all taxes which have been levied and assessed upon such land according to law.

The leading case in Utah is Springer v. Southern Pac. Co., 67 Utah 590, 248 P. 819 (Utah 1926). In that case, the lower court concluded as a matter of law that respondent was entitled to possession of mining claims in dispute. In support of this conclusion, the court made the following findings:

[The claimants entered] and filed upon and located mining claims thereof; . . . the boundaries of said claims were marked on the ground and so indicated as to afford actual notice of the extent, boundaries, and possession thereof, and notices of such locations were posted thereon and at said time were duly filed and recorded in the office of the county recorder. . . .

* * *

That each year . . . the defendant and said Central Pacific Railway Company have expended and caused to be actually expended upon said ground and for the benefit of each of said claims in the way of labor and improvements far in excess of \$100 or a total sum far in excess of \$600 for the entire group. . . .

* * *

[T]he defendant and said Central Pacific Railway Company have continuously possessed and uninterruptedly worked said claims and each of them for the sole purpose and object of mining, quarrying, and removing

said building stone, and have so removed during said period of time upwards, if not in excess of, 500,00 cubic yards thereof, . . .

* * *

This defendant and said Central Pacific Railway Company . . . were erroneously designated and described in the location notices posted on each, which were thereafter recorded as stated in finding 1 hereof, as lode mining claims, but that each of said locators intended to locate and claim said ground for the sole mineral deposit of value found in each, to wit, limestone valuable for building stone, . . .

The Utah Supreme Court, in upholding the lower court, said on page 823:

The first contention we have already disposed of contrary to counsel's contention. As to whether respondent may avail itself of the provisions of section 2332, supra, however, where as here, the attempted lode location failed because no discovery of valuable mineral was made by discovering rock in place, as that term has always been construed and applied by the courts, is, perhaps, not without some difficulty. The record in this case leaves no room for doubt that every other legal requirement except the discovery of valuable mineral in rock in place has been met by the respondent. Neither is there any doubt that an honest attempt was made by respondent to make a lode location, and that in view that no proper discovery was made no valid or legal lode location was made. Notwithstanding that fact, however, respondent has fulfilled every other legal requirement.

And on page 824:

In view of all the facts and circumstances in this case, we are of the opinion, therefore, that the provisions of section 2332 should be held to apply.

The Utah Supreme Court quoted from Newport Mining Company v. Bean Lake G.C.M. Co., 110 Wash. 120, 188 p. 27 (1920), where the Washington Court held:

The trial court found that each year since the location, under which the respondent claims, the laws of the United States and the state of Washington have been complied with, by "performing all the assessment work and labor on said mining claims required by said laws."

In the case of Lind v. Baker, 31 Cal. Appel. 2d 631, 88 F.2d 777 (1939), the court, on page 779 said:

This section has been frequently construed by the courts of the country. Without deviation, it has been interpreted as giving the claimant who, either through his predecessors in interest or personally, entered upon land that was open to location, built his monuments, made discovery of valuable minerals, completed his annual assessments and continued such possession for a period equal to the statute of limitations (five years here) the right to a patent from the United States regardless of defects in his location notices. Cole v. Ralph, 252 U.S. 286, 40 S.Ct. 321, 64 L.Ed. 567; Springer v. Southern Pac. Co., 67 Utah 590, 248 P. 819; Newport Mining Co. v. Bean Lake G.C.M. Co., 110 Wash. 120, 188 P. 27; Law v. Fowler, 45 Idaho 1, 261 P. 667; Oliver v. Burg, 154 Or. 1, 58 P.2d 245.

The Interior Board of Land Appeals, In United States v. Mike Guzman et al., 18 IBLA 109 (December 5, 1974), considered the applicability of 30 U.S.C. § 38 and discussed the cases construing the Act and the legislative history of that section. On page 138, it stated:

However, the record made at the hearing of this contest falls far short of establishing that the Guzmans have indeed qualified under section 38. They have adduced evidence tending to show that they have produced sand and gravel from the vicinity of these claims since the 1940's, presumably at a profit, but it is not settled when

they entered the small tract of land in question, when they effected a discovery on that tract, when they commenced to work it, and for how long such work continued. As indicated above, the claimants must show that they had perfected their right to receive a patent pursuant to section 38 prior to July 23, 1955, because no claim for a deposit of common sand and gravel can be perfected by any means after that date.

The tests, then, to be applied to the facts here to determine whether there is sufficient evidence to sustain the allegation that a placer mining claim was located on April 19, 1945, are:

1. There must be an entry upon the land by identified owners.
2. There must be a marking of the boundaries of the land within the claim.
3. There must be exclusive possession of the land by the owners for the statutory period and payment of all taxes assessed.
4. There must be full compliance with all of the requirements of the mining laws, including completion of assessment work.
5. There must be a chain of title from each owner leading to the present claimants.

The most recent case involving the applicability of 30 U.S.C. § 38 and the one which contestees cite as controlling is United States v. Haskins, 505 F.2d 246 (1974), which involved an action of ejectment brought by the Government to enforce its right to possession of an area encompassed by four lode mining claims which had been held to be invalid by final decision of the Interior Board of Land Appeals.

In holding that the mining claimants had a valid right to patent the same property as a placer claim by virtue of adverse possession, the Ninth Circuit Court states:

This savings clause [30 U.S.C. § 38] has been part of the general mining law since 1870 (16 Stat. 217). Its purpose is to obviate the necessity of proving formal compliance with requirements for locating

a claim but not to dispense with proof of discovery. *Cole v. Ralph*, 252 U.S. 286 (1920).

We agree with the district court that the section is applicable to this case. The evidence unequivocally shows that Haskins and predecessors have been in possession of the ground and have worked the claims for over a half a century and for much longer than five years prior to the enactment of the Watershed Withdrawal Act of May 29, 1928. Section 38 permits them to assert valid placer locations for the ground in question without proof of posting, recording notices of location and the like. *Springer v. Southern Pac. Co.*, 67 Utah 590, 248 P. 819 (Utah 1926); *Newport Mining Co. v. Bead Lake G.C.M. Co.*, 110 Wash. 120, 188 P. 27 (Wash. 1920); *Humphreys v. Idaho Gold Mines, etc. Co.*, 21 Idaho 126, 120 P. 823 (Ida. 1912).

In answer to the Government's argument that the cited authorities involved contests between adverse claimants and do not apply against the United States, the Court stated:

We think, however, that the Supreme Court, in *Cole v. Ralph*, supra, has made it plain that the statute was intended to apply in claims for patent against the United States.

...

Haskins having occupied and worked the ground for more than five years may assert placer locations without proof of recording and posting. He must, nevertheless, prove discovery of a valuable mineral because the statute has no application to a trespasser on public lands, title to which cannot be acquired by entry under the mining laws of the United States. *Cole v. Ralph*, supra, *Chanslor-Canfield Midway Oil Co. v. United States*, 266 F. 145 (9th Cir. 1920).

In Haskins, the Ninth Circuit Court answered to controlling questions of law certified by the District Court as follows:

The notice of intention to hold the placer claims recorded in 1968 does not preclude

Haskins from asserting the validity of the claims based on actual possession and working of the claims for their more than five years prior to the Watershed Withdrawal Act of 1928, proof of posting and recording notices of placer locations at or about the date of occupancy being obviated by 30 U.S.C. § 38.

The Haskins case, in effect, held that a claimant under 30 U.S.C. § 38 need not furnish proof of posting, recordation or proving formal compliance with the requirements of location during the date of adverse possession, but that he must still comply with the requirements of discovery. The court did not address itself to other requirements to prove adverse possession as discussed by the courts in the prior decision cited. The questions of identity of the locators, marking of claim boundaries, and proof of assessment work were not in issue.

In the present case, the 1945 locators acknowledged that no prior claim by one or more persons existed. The pits were opened and used as community sources of supply for a commodity needed by anyone and everyone that joined the community.

Dan Calvin Jessop testified, for example, that he was out on the mountain in April of 1945, and the men there were Fred Jessop, Virgil Jessop, Melvin Johnson, Leroy Johnson, Richard S. Jessop, Joseph S. Jessop, Sr., and himself (Tr. 201); that they were working on the west side of the mountain at what we refer to as Pit No. 1, and as near as he can remember, it was the 19th day of April, 1945. (Tr. 202). He also stated, "When I say we I refer to the people of our community, Colorado City, Short Creek it was called at that time." (Tr. 207). He stated that nearly everyone used the products from the cinder cone, and everybody and anybody did the hauling of those materials. (Tr. 211).

On cross-examination, Mr. Jessop testified that the names of the people who were at Pit No. 1 in 1945 were Virgil Jessop, Melvin Johnson, Leroy Johnson, Joseph Jessop, Sr., Richard Jessop, and himself. He testified:

- A Explain what you mean by location on that date?
- Q Well, is that the date that you are claiming the location of this mining claim was made?

A It wasn't the location of the mining claim that was filed at that time or was made at that time.

Q And at that time was every one or any one in the area using this whole set up there?

A Yes.

Q Anyone that came along from the community or any where else and use the pit?

A As far as I know.

Q It was a common use area for everybody to use?

A Yes.

(Tr. 221).

Louis Jessop Barlow said that the community or friends or relatives used cinders, but there might be a group within the community who could not get to the cinders any time. (Tr. 322-323). Fred M. Jessop testified that he assisted in constructing the chute on Pit No. 1 in 1945. (Tr. 373). Joseph I. Barlow, Sr. removed cinders in 1945 (Tr. 404), and between 1951 and 1955, a group would get together and haul cinders. (Tr. 426). Samuel Barlow testified that the association got out in the are and started to remove cinders in 1948. (Tr. 514). The original members were John Y. Barlow, Leroy S. Johnson, Richard S. Jessop and Fred M. Jessop. (Tr. 504-505). John Y. Barlow is deceased and has eight living sons who are all involved in the association (Tr. 509). His daughters, however, are not probably could not become members of the association. (Tr. 549). He describe the association (Tr. 528-535, 547-551), who are members (Tr. 553, 557, 561), and stated that not all residents of the community were members of the association in 1950. (Tr. 598). The affidavits of Possession in the patent applications file refer to "fellows." Mr. Tognoni, who prepared the application, testified that this was as close as they could indentify the people (Tr. 1005), and there is no description of the land, just the knoll. (Tr. 1006).

From the evidence presented, it is apparent the cinders from the Little Creek Knoll were used by almost all members of the community of Short Creek continuous from 1945 to date. However, no mining claim was filed in 1945 and it cannot be determined which members of the community asserted control over the cinder. If there were delineated owners, no one could or would state who they were or just how permission to obtain cinders was given.

The contestees assert that their right of possession to the claims was recognized by the State Highway Department long before 1955 when, in exchange for cinders, the Highway Department's power shovel was used to load trucks owned by Short Creek residents and again in 1961 when the Highway Department signed an option to purchase road materials with Samuel Barlow. But this recognition, if it was a recognition, was repudiated by the Utah Division of Public Roads when, after investigation showed that no mining claim had been filed for the cinders, it applied to the Bureau of Land Management in 1961 for material site right-of-way covering Pit No. 2 on Little Creek Knoll.

Short Creek was, and remains today, a rather isolated community, accessible by one road east and west. The nearest town is Hurricane, Utah, which lies approximately 32 miles northwest. Approximately 50-60 miles to the east is Fredonia, Arizona. (Tr. 48). The residents of Short Creek had exclusive use of the claims because there were no competitors or few other possible users in the area. But irrespective of whether the use and removal of the cinders by the residents of the community might be construed as adverse possession, there was never any description or delineation of claim boundaries and no specific evidence as to who the asserted locators were. As a consequence, there can be no chain of title from anyone to the present claimants. See Estate of Thomas S. Williams, 10 IBLA 138 (March 19, 1973).

The claimants cannot therefore assert title under 30 U.S.C. § 38 because there were no identified owners of the claim, no marking of boundaries, no proven adverse possession and no chain of title to the present contestees.

[3] Abandonment.

But even assuming compliance had been made with the provisions of 30 U.S.C. § 38 and that a mining claim was acquired by right of adverse possession by someone or some group in the Short Creek Community, on March 2, 1955, Richard Jessop, Edson Jessop, Fred Jessop, Dan Jessop, Louis Barlow, Joseph Barlow, Daniel Barlow, and Floyd Spencer filed a new notice of location for Grey Mound #1. (Ex. 1). On the same day, Grey Mound #2 was located by the same locators, except Louis Barlow who was replaced by Leroy Johnson. (Ex. 2). The locators of Grey Mound #2, except Richard Jessop who was replaced by Louis Barlow, located Grey Mound #3 on the same day and these locators, with the exception of Edson Jessop and with the addition of Richard Jessop, located Grey Mound #4.

The contestees' stated intention for locating Grey Mound #s through 4 was for the purpose of attempting to protect their title prior to the enactment of Public Law 167. (30 U.S.C. § 611). Louis Jessop Barlow, who prepared the notices of location for the Grey Mound #s 1 through 4, testified:

Q How did that group, how did the locators get together in the first place?

A Well, some of them are my brothers and others are very close friends of mine who had been working together and we had determined after having used the cinder knoll for some time that we should go through what ever legal process or whatever needed to be done to make sure that there would be no loss to the use of that cinder knoll and so as far as getting together this same group of locators had located other claims, not in this particular area but uranium claims prior to this. (Tr. 293).

He later stated:

A Yes. I didn't read the law thoroughly or any thing like that. I just was informed that building materials which we had used in our own area for many years would not be locatable after the middle of 1955 and this became an urgency in my mind and so the young people who were working with me inspecting the claims and the people who were associated with me in the other claims we decided to go ahead and frame up the cinder knoll which we had been using without an actual claim on it and filing a claim. (Tr. 297).

Louis Jessop Barlow directed Mel Jessop and Truman Barlow to mark the locations on the ground, who the locators were, and the intention of the locators in making the locations on March 2, 1955. (Tr. 298-307).

Some of the locators of Grey Mound #s 1 through 4 are people who went upon Pit No. 1 on April 19, 1945. (Tr. 201). Floyd Spencer, the Barlows, and some Jessops are new. Obviously, Louis Barlow and the new group recognized that there was in fact no mining claim then existing upon Little Creek Knoll,

and it was necessary for them to make the locations in order to hold and control the cinders on Little Creek Knoll.

The record is devoid of any evidence that the locators of Grey Mound #s 1, 2, 3 and 4 are the grantors or successors of any claim which was claimed to have been located earlier and proven under 30 U.S.C. § 38. There is no record of assessment work having been performed for any year between 1945 and 1955 and therefore the ground was open for location. Thus, by locating the claims on March 2, 1955, the locators acknowledged and, in effect, asserted that there was no existing mining claim on the Little Creek Knoll and that the land was open for location.

Further, if the claimants or the present contestees are claiming a mining claim in 1945 and perfected prior to 1955, then, by their locating Grey Mound #s 1 through 4, they, in effect, abandoned, by this express act, the prior location.

[4] Final decision - Utah No. 9278.

The contestees' position is that the boundaries of the Grey Mound #1 are so vague and uncertain that the decision declaring this claim to be void is meaningless and cannot be the basis for res judicata. Cases are cited supportive of the proposition that the Grey Mound #1 as described in the decision could only relate to a general area, the center of which was the Little Creek Knoll cinder cone, and, therefore, a judgment affecting the title must be described specifically and with certainty and a wrong or uncertain description renders the judgment erroneous or void.

Conversely, contestant argues that the decision of January 15, 1962, is res judicata, at least as to the issue of discovery prior to the Act of July 23, 1955, and common variety under that Act. It further contends that the decision voids that portion of the land included in the patent application to the Grey Mound #2 placer claim, Grey Mound #2 Amended.

In the spring of 1955, Hale C. Tognoni instructed Louis Jessop Barlow that, in the light of pending Federal legislation, he had better place on record as soon as possible his group's intention to hold the cinders he and persons associated with him had been mining on Little Creek Knoll. The instructions were to select the legal subdivision survey marker, either a quarter corner or section corner, or to select the center of the section which is nearest the geological center of the cinder deposit and make it the common corner of his claim.

Acting on this advice, Louis Jessop Barlow and others laid out the association mining claims on a legal subdivision basis, use as a corner common to all of the claims the center of section Township 43 South, Range 11 West. Their intention in locating Grey Mound #1 was to encompass the northwest quarter section on section 6, for as described in the notice, corner No. 1 was located at the center of section 6 running thence west 2,640 feet thence north 2,640 feet, thence east 2,640 feet, thence south 2,640 feet. The sentence at the bottom of the description further expresses their intent, for it reads, "The other three corners are at Government survey markers."

It is not difficult to locate the center of a section even though that center is not monumented, and those who located corner No. 1 of the four claims had no difficulty in locating the center of section 6. Frederick Merrill Jessop testified they found the section corner between sections 1, 6 and 7, went east along the south line until they came to the quarter corner, which would be the south quarter corner of section 6, then went due north half a mile by pacing and put up a common monument for all four claims. (Tr. 459-463). The description in the notice places lots 1, 2, 3, 4, 5 and 6 of section 6 in the boundaries of Grey Mound #1. The fact that the area enclosed within the description of the notice of location is excess to the number of acreage permitted by an association of eight locators does not void the claim. The locators have the option of relinquishing a portion of the claim in excess of the permitted acreage.

All of the testimony indicates that the intent of the locators of Grey Mound #1 was to locate the cinders on the Little Creek Knoll and all of the testimony is that Pits Nos. 1 and 2 are in that part of section 6, containing lots 2, 3, 4 and 5. Any logical exclusion would be in the east portion of Grey Mound #1 off and outside of the area covered by cinders and lots 1 and 6. Any other interpretation would cause the description of Grey Mound #1 to include only lots 1, 2, 5 and 6 in the southwest quarter of section 6 and exclude lots 3 and 4 in which are located Pits Nos. 1 and 2. This would obviously defeat the intention of the parties locating the Grey Mound #1 to cover the cinders.

The same rationale applies to Grey Mound #2. The concluding sentence of the description of that claim is, "This claim encloses the southwest quarter, section 6, with claim boundaries coinciding with the legal subdivision boundaries."

At the time of filing of the notices of location on March 2, 1955, the only pits open were Pits Nos. 1 and 2. No other conclusion can be reached than that the locations made in 1955

did cover the deposits on the Little Creek Knoll and the pits that were opened.

On July 6, 1961, the Bureau of Land Management filed a complaint contesting Grey Mound #1 placer mining claim situated in section 6, Township 43 South, Range 11 West, SLM, Washington County, Utah. The contestee, Samuel Barlow, filed an answer alleging that the claim was located on March 2, 1955, and recorded March 30, 1955, in Book X-33, page 230, in the Washington County records. A hearing was held on September 13, 1961. The file, including the decision of the Hearing Examiner dated January 15, 1962, the maps and the transcript, were admitted as an exhibit at the hearing.

In the present case, Jarvis Klem testified that he was present and testified at the hearing in 1961. (Tr. 166-168, 1095). James Allen Humphrey testified in the 1961 hearing and again in the present contest. (Tr. 110-111). Samuel Barlow stated:

Q Now, that pit number two, is that the same pit that was described and you testified to in the hearing held in 1961 that the cinders were taken from?

A Yes.

Q And pit number one is that the same pit which you described as cinders having been taken from in the hearing in 1961?

A Yes.
(Tr. 570-571).

Mr. Barlow also stated that in the hearing in 1961, Pit No. 2 designated in the exhibits introduced was the same Pit No. 2 as shown on BLM Exhibit No. 5 in the present hearing. (Tr. 574). He had purchased the four Grey Mound mining claims and paid \$10.00 and other good and valuable consideration. (Tr. 576). He entered into the agreement to sell material from Pit No. 2 located on Grey Mound #1 to the State. (Tr. 596).

At the time of the contest of Grey Mound #1 in 1961, Samuel Barlow was the sole owner of Grey Mound #s 1, 2, 3 and 4. Mr. Barlow testified that he was transferred title to the claims in 1960 or 1961, and he did not have a power of attorney from anyone at that time. (Tr. 596).

A review of the transcript of the 1961 hearing and the decision dated January 15, 1962, discloses that the mining claim under

contest was Grey Mound #1, which included Pits Nos. 1 and 2, on the cinder knoll in question. The testimony of the Government witnesses and of the witnesses for the contestees was to the issue of discovery prior to the effective date of the Act of July 23, 1955, and common variety. The decision held that Grey Mound #1 lacked a valid discovery of valuable minerals within the meaning of the mining law prior to July 23, 1955; that the cinders were a common variety, and therefore the claim was determined to be null and void.

The decision dated January 15, 1962, is not based upon the question of the description of the land included within the notice of location of Grey Mound #1 of March 2, 1955, but decided on the cinder material from the Little Creek Knoll. The testimony in that hearing referred to the same cinder material removed from the two pits. The testimony in this case places the pits in the identical place, and the evidence on discovery is to the same material from the same pits. The decision in 1962 and the present contest involve the same material from the same deposit and used for identical purposes.

Although the contestees point out that the claims described in any of the locations filed in 1955 did not cover the cinder deposit, even though it was the intention of the locators to do so, the simple answer is that the intention of the parties is the controlling consideration. See Losee v. Jones, 235 P.2d 132.

I find no uncertainty as claimed by the contestees in the position of the Grey Mound #1. The contest was based upon the location notice as filed and recorded March 30, 1955. (Ex. 1). A reading of that description contained in the location notice makes it obvious that the intention of the locators was to encompass the northwest quarter of section 6. The testimony shows that it was the locators' intention to encompass Pits Nos. 1 and 2 on the Little Creek Knoll and the question of the exact boundaries is therefore irrelevant.

In United States v. Haskins, supra, the court held on page 251:

On the contrary, the Department accepted the lode locations and proceeded to investigate the quality of the deposit, ultimately holding the claim invalid for lack of discovery of a valuable mineral.

Haskins now attempts to claim at least some of the same mineral on the same ground as a placer deposit. It may be that some of the dolomite is not in lode formation. To the

extent that it is deposited as a zone or belt of mineralized rock lying within boundaries separating it from neighboring rock, Haskins cannot twice litigate the issue of the existence of this valuable mineral in the ground. He is precluded by the doctrine of res judicata. Consequently, whatever the merits of Haskins' claimed placer locations, their validity cannot be supported by proof of the presence of dolomite or dolomite limestone in lode formation. Haskins cannot use the same material that he relied on as discovery of valuable mineral under his lode locations to support his present placer applications.

and later on page 253:

Haskins may pursue his application for patent of the Haskins' Placer Mining Claim pursuant to 30 U.S.C. § 38, but may not base his claim of discovery of a valuable mineral upon the presence of dolomite or dolomite limestone in lode formation.

Since we are dealing in the present contest with the same area, the same pits, and the same material, the final decision of January 15, 1962, is therefore res judicata, at least as to the issue of discovery prior to the Act of July 23, 1955, and common variety under that Act.

Highway Material Site.

At the time of the hearing of mineral contest Utah 9278 in 1961 and 1962, Grey Mound #1 mining claim was in conflict with the material site application made by the State of Utah. (Tr. 165). The material site application is given File No. Utah 060729. The file was introduced as Exhibit 16 (Tr. 40-43) and the Serial Page for Application No. 060729 was introduced as Exhibit 17. The initial decision granting the right-of-way was issued on September 12, 1961, and made subject to all valid rights existing on that date. The right-of-way was granted covering lots 2, 3, 4 and 5 in section 6, Township 43 South, Range 11 West, SLM, Utah, as plotted on Exhibit 6 which shows that conflict between the various documents involved.

Mining Contest Utah 9278 involving Grey Mound #1 was initiated in 1961 at the time of the pending application for material site right-of-way by the State of Utah. That decision, which became final, eliminated the prior existing rights upon lots 2, 3, 4 and 5 of section 6, Township 43 South, Range 11 West. The land was withdrawn from mineral entry upon the allowance of the right-of-way and any conflicting mining claims were eliminated by the 1962 decision. The granting of a material site right-of-way under the Highway Act withdraws that land from subsequent mineral location. See Carl M. Shearer (A-3083 December 21, 1967), where it was held:

It is well established that a material site is an appropriation of the land it covers under the laws of the United States which, while it is outstanding, bars the location of a valid mining claim. J. M. Keeney et al., A-28856 (August 6, 1962); Sam D. Rawson, 61 I.D. 255 (1953); see United States v. Schaub, 103 F. Supp. 873 (D. Alaska 1952).

[6] Certificate of Location,
Amended Notice of Location 1972.

The Certificate of Location, Amended Notice of Location, Place Mining Claim, dated February 16, 1972, recorded February 17, 1972, in Book 115, pages 72-23, was introduced as Exhibit 11. As discussed above, Samuel Barlow became the owner in 1961 of Grey Mound #'s 1 through 4 by quitclaim deeds identified as Exhibits 7, 8 and 9. In 1972, he consulted Hale Tognoni concerning a patent application, and it was concluded by Mr. Tognoni to file the above notice in 1972. (Tr. 587, 593). Mr. Tognoni testified:

- A Well, in my determination of where this association placer was occupied under section thirty-eight was, my limitation again was that it would be a hundred and sixty acres, therefore, I had to have acreages that totaled up to less than a hundred and sixty acres. It has each of those, it doesn't have the acreages for the two legal subdivisions in section one, but it has the legal subdivision totals of acreage on lots four, nine, and lot five, and it doesn't have it for this lower one

down here, which is lot ten, but that is a ten acre piece. (Tr. 696).

* * *

A Well, this is the result, this exhibit eleven is the result of my decision to select Grey Mound number two as the name for this association placer, but I think the location notice that I was speaking of is the old location is different than this, but this exhibit eleven is the amended location notice that I then amended and put onto it this legal description that appears on exhibit I as the area occupied under section thirty-eight.

Q Why did you prepare the amended location notice, exhibit eleven, if you will?

A As stated then on page two of the location notice this amended location notice is made and posted to correct errors in description in said location notice which should have been dated April 19, 1945, and was posted on the ground on the 2nd day of March, 1955, and to reflect the purchase of Floyd Spencer's interest by Samuel S. Barlow. (Tr. 697).

Mr. Tognoni did a title search and found the locators of the Grey Mound placer mining claim had quitclaimed them to Samuel Barlow. He then prepared a quitclaim deed from Samuel Barlow to the locators so that Barlow could act for himself and the remaining locators in preparing the patent application. (Ex. 12). The amended location notice is by all of the other seven locators, and Samuel Barlow as the grantee of Spencer. (Tr. 698). He stated that the descriptions in the notice of location for Grey Mound #s 1 and 2 were void and were impossible descriptions; that he knew that Grey Mound #1 was held to be null and void by an administrative decision, and that was the reason they did not amend Grey Mound #1, but, rather, amended Grey Mound #2 and moved the description of the north and west to encompass part of the land covered in Grey Mound #1. He was the one who prepared the description, and as Grey Mound #2 was the convenient claim in the area, he was merely attempting to cover Pits Nos. 1 and 2, the ground occupied and used by the locators. (Tr. 998-1006).

The document (Ex. 11) was posted on the ground on February 16, 1972. (Tr. 1002). The description is for lots 4, 5, 8 and 9

of section 6, Township 43 South, Range 11 East, the E1/2SE1/4, NE1/4, and the NE1/4NE1/4SE1/4 of section 1, Township 43 South, Range 11 East. The document recites that it is an amendment of Grey Mound #2, which was located on March 22, 1955. The final decision in Mining Contest 9278 held Grey Mound #1, which includes Pits Nos. 1 and 2, located on lots 4 and 5 of section 6, null and void. The highway material site right-of-way granted to the State of Utah covers and withdraws lots 2, 3, 4 and 5 of section 6 from mineral entry. In 1972, lots 4 and 5 of section 6 were not open to mineral entry, and any subsequent claim located thereon is void. See Dennis G. Quinn, 29 IBLA 307 (March 30, 1977).

The decision of the Interior Board of Land Appeals, on June 6, 1973, in U-18932, IBLA 73-234, in paragraph 2, provides:

The decision below should have been limited to a declaration of invalidity (if appropriate) only to the extent that the amendment (if indeed it was an amendment) embraced new lands not previously covered by location. The decision appealed from is modified to that extent.

Apparently, the Interior Board of Land Appeals was confused as to the nature of Exhibit 11. The last two paragraphs of the document state it is an amended location notice amending the description of Grey Mound #2 and that it is to reflect the purchase of the interest of Floyd Spencer by Samuel S. Barlow. Grey Mound #2 (Ex. 2) describes land in the SW1/4 of section 6, and as discussed hereinabove, the obvious intention of the locators was to include lots 8, 9, 10 and 11, and perhaps part of the other two lots of section 6, as the land located. The purported amended location defines lots 8 and 9 in the SW1/4 of section 6, but then attempts to move the description north to include lots 4 and 5 in the NW1/4 of section 6 which was covered by Grey Mound #1, located on the same day. The amended location does not change lots 8 and 9 of section 6 other than a language change. The land included within section 1 was never at any time included within the location of Grey Mound #s 1 through 4, located on March 2, 1955.

An amendment to a mining claim has been defined as, "The purpose of an amended location notice is to cure imperfections and correct errors." Fred B. Ortman, 52 L.D. 467, 471 (1928). The document (Ex. 11) cannot be an amendment because there were no errors in the description of Grey Mound #2, located on March 2, 1955. As I have held, the locators of that claim intended and did place their location entirely within the

boundaries of the southwest part of section 6. The obvious intent of the locators is expressed in the notice of location, and there is no error in that description which needed to be corrected by amendment other than deletion of land and acreage in excess of the 160-acre limitation in the southwest area of section 6. The document here would impinge upon the area located by Grey Mound #1 and locate land in section 1, which has not been subject to a location notice.

The document (Ex. 11) must therefore be interpreted to be a relocation of an abandoned or forfeited mining claim. As a relocation of an abandoned or forfeited mining claim, it can be effective only as of the date of its location and cannot relate back, for it is adverse to the prior mining claim. A relocation has been defined as "the appropriation of mining ground by location where a former claim has been lost by abandonment or forfeiture." 58 C.J.S., Mines and Minerals § 84. A relocation can include additional vacant ground unclaimed by other parties, but its location dates from the date thereof and does not relate back. See Shoshone Mining Company v. Rutter, 87 Fed. 801 (9th Cir. 1898).

One other facet of the series of events relating to the claim in issue deserves comment. Contestees' basic argument is premised on the assumption that the Certification of Location, Amended Notice of Location (Ex. 11), is a legal document which effectively asserts rights to a mining claim obtained by them in 1945 and that those rights have not since been affected by their subsequent actions, actions by others, statutes, decisions or withdrawals. The evidence shows, however, this document is itself defective.

Exhibit 11 was posted upon the ground on February 16, 1972, and a copy recorded on February 17, 1972. It was signed by eight individuals, either in person or by SSB, presumably Samuel S. Barlow. Samuel S. Barlow obtained the title to Grey Mound #2 by quitclaim deeds (Exs. 8, 9 and 10) in 1961, and he was the registered recorded owner of those mining claims on February 16, 1972. Samuel Barlow did not transfer or convey title to the other people who signed Exhibit 11 until March 27, 1972. (Ex. 12). On the date that Exhibit 11 was executed, which had to be prior to February 17, 1972, Samuel Barlow was the sole owner of Grey Mound #2. The other signatories were therefore claiming rights not vested in them and to which they had no rights to assert.

[7] Discovery

The one remaining principal issue is whether a discovery was perfected on the claim prior to July 23, 1955. This issue involves the test of marketability as defined by the Supreme Court in United States v. Coleman, 390 U.S. 599, 602 (1968), and much of the testimony was offered as to the use of the cinders, their value to the community, consideration received and the possibility of a profitable market for their use in southeastern Utah.

My previous findings and conclusions, however, make a resolution of this issue unnecessary. Except for the issue of "common variety," my conclusions have been based upon my second conclusion that the contestees cannot avail themselves on the provisions of 30 U.S.C. § 38. Only if that conclusion is incorrect and the contestees have acquired, by right of adverse possession, a mining claim perfected in 1945, does the issue of whether a discovery was perfected prior to July 23, 1955, still remain to be determined. See United States v. Haskins, *supra*.

Summary of Conclusions and Order

The Grey Mound #2 mining claim, Amended Grey Mound #2 mining claim recorded February 17, 1972, is not an amended location of a mining claim acquired in 1945, but is a new location of a claim for a common variety of mineral which since July 23, 1955, is no longer subject to location under the mining laws. The description in the notice of location is for land embraced within a previous claim located by the same parties and for the same material, which by final decision was declared invalid for lack of discovery in 1962, and those parties are precluded from again adjudicating the same issues raised in the previous proceeding in the present contest. Further, the area from which material has been removed within the present claim relied upon to support a discovery was withdrawn from mineral entry through a material site right-of-way withdrawal in 1961. And finally, the notice of location is itself defective.

For these reasons, the patent application must be rejected and the claim is declared null and void.

John R. Rampton, Jr.
Administrative Law Judge

APPEAL INFORMATION

The contestees, as the parties adversely affected by this decision, have the right of appeal to the Interior Board of Land Appeals. The appeal must be in strict compliance with the regulations in Title 43 CFR Part 4. (See enclosed information pertaining to appeals procedures.)

If an appeal is taken, the adverse party, the contestant, can be served by service upon the Office of the Regional Solicitor at the address listed below.

Enclosure: Information Pertaining to Appeals Procedures

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