



Spring 1970

A Judicial Approach to Updating the Mining Laws of 1872 - *Pedis Possessio*

Malcolm Lloyd Shannon Jr.

Recommended Citation

Malcolm L. Shannon Jr., *A Judicial Approach to Updating the Mining Laws of 1872 - Pedis Possessio*, 10 Nat. Resources J. 385 (1970).

Available at: <https://digitalrepository.unm.edu/nrj/vol10/iss2/9>

This Comment is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact amywinter@unm.edu, lsloane@salud.unm.edu, sahrk@unm.edu.

A JUDICIAL APPROACH TO UPDATING THE MINING LAWS OF 1872¹—PEDIS POSSESSIO

The subject of mining law reform through legislation has been worn threadbare by volumes of detailed articles. In contrast, this Comment presents an analysis which suggests that tolerable reform is possible through judicial decision.

The much discussed comprehensive mineral leasing acts have remained mere predictions. As a result, the rights of a modern deep mineral explorer are still defined by laws nearly a century old. Therefore, the courts have been forced to accommodate the needs of the mineral explorer within the spirit of the mining law. Two judicial approaches have been used to expand an explorer's rights of protection beyond those set out in the Mining Law of 1872. The approaches are the liberalization of the discovery requirement and the creation of pre-discovery doctrine of *pedis possessio*. While it is recognized that neither of these approaches can cure the numerous infirmities of the mining law, the further extension of *pedis possessio* may be preferable to the liberalization of discovery.

The decision of the New Mexico supreme court in *Adams v. Benedict*,² the mining location laws of the State of New Mexico³ and the customs of New Mexico explorers serve as vehicles for general reflections on the interaction of the philosophies of general mining and the problems of deep mineral exploration. Hopefully, this different perspective will suggest a workable solution to traditional problems.⁴

The Mining Laws of 1872 expressly invite qualified persons to go upon the public lands and explore for valuable mineral deposits. However, in order to provide a safeguard against speculative acquisition of public lands, Congress qualified this broad invitation by adopting certain basic location procedures.⁵ Among these pro-

1. 30 U.S.C. §§ 21 to 54 (1964) *as amended* (Supp. 1970). This Comment assumes familiarity with the area, therefore it is suggested that the general reader consult 1 American Law of Mining §§ 4.1-4.70 (1969) for orientation. See generally Martz, *Pick and Shovel Mining Laws In An Atomic Age: A Case For Reform*, 27 Rocky Mt. L. Rev. 375 (1955), the classic article on the subject. See also Fiske, *Pedis Possessio—Modern Use of an Old Concept*, 15 Rocky Mt. Min. L. Inst. 181 (1969), published while this article was in preparation.

2. 64 N.M. 234, 327 P.2d 308 (1958). *Adams v. Benedict* is the only significant New Mexico case construing the New Mexico location statutes.

3. N.M. Stat. Ann. §§ 63-2-1 to -26 (Supp. 1969).

4. For a sampling of conflicts, sometimes violent, precipitated by interactions of static law and changing custom, see generally Albuquerque Tribune July 11, 1956, at 6, col. 2; Albuquerque Journal Feb. 9, 1963, at 1, col. 1; Albuquerque Tribune Dec. 14, 1956, at 27, col. 6.

5. 30 U.S.C. §§ 23 to 54 (1964) *as amended* (Supp. 1970).

cedural safeguards is the requirement that mineral be discovered within the limits of the claim located.⁶ The same law gives authority to the various states to impose additional regulations upon mining location procedures. Additions are valid to the extent that they do not conflict with the federal mining law.⁷

In 1889, pursuant to this authority, the Territory of New Mexico adopted a location statute which included the discovery requirement.⁸ This statute imposed the additional requirement that the discovery must expose mineral in place. However, the statute also granted a definite period within which to satisfy the requirement of exposure. Completing the legal atmosphere is the case law discussing the sufficiency of a lode location discovery⁹ and the doctrine of *pedis possessio*.¹⁰

6. 30 U.S.C. § 23: "[N]o location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." The requirement of a discovery is a practice which predates the federal Mining Law. For a discussion of the history of discovery, see 2 Lindley, *Mines* § 335 (3d ed. 1914).

7. 30 U.S.C. §§ 22, 26, 28 (1964).

8. N.M. Stat. Ann. § 63-2-3 (Repl. 1960) provides that:

The locator or locators of any mining claim, located after this act (63-2-1) shall take effect, shall, within ninety (90) days from the date of taking possession of the same, sink a discovery shaft upon such claim, to a depth of at least ten (10) feet from the lowest part of the rim of such shaft at the surface, exposing mineral in place

In 1957, a statute was passed allowing a drill hole as an alternative to a discovery pit or shaft. N.M. Stat. Ann. § 63-2-3.1 (B) (Repl. 1960):

B. The hole shall not be less than ten (10) feet in depth and shall cut or expose, as indicated by the drill hole, a deposit of valuable mineral sufficient in quantity to justify a reasonably prudent man in expending money and effort in further exploration or development

The language of this statute expresses the "prudent man" definition of discovery. See *Cameron v. United States*, 252 U.S. 450 (1919); *Chrisman v. Miller*, 197 U.S. 313 (1905); *Castle v. Womble*, 19 L.D. 455 (1894).

9. The present controversy surrounding the discovery requirement concerns the question of whether evidence of mineral in place, derived from scientific instruments and studies, should suffice as a valid discovery. Authority is now split on this question. The stricter view, as expressed in *Globe Mining Co. v. Anderson*, 78 Wyo. 17, 318 P.2d 373 (1957), holds that only mineral in place will suffice. Conversely, a developing line of decisions hold that strong indications from scientific instruments coupled with additional data will be adequate for valid discovery. See *Dallas v. Fitzsimmons*, 137 Colo. 196, 323 P.2d 274 (1958); *Berto v. Wilson*, 74 Nev. 128, 324 P.2d 843 (1958); *Rummell v. Bailey*, 7 Utah 2d 137, 320 P.2d 653 (1958); *Western Standard Uranium Co. v. Thurston*, 355 P.2d 377 (Wyo. 1960).

10. *Union Oil Co. v. Smith*, 249 U.S. 337, 346 (1919), furnishes the most widely quoted definition of the doctrine of *pedis possessio* and its rationale:

[A]s a practical matter, exploration must precede the discovery of minerals, and some occupation of the land ordinarily is necessary for adequate and systematic exploration, legal recognition of the *pedis possessio* of a *bona fide* and qualified prospector is universally regarded as a necessity. It is held that upon the public domain a miner may hold the place in which he may be working against all others having no better right, and while he remains in possession, diligently working towards discovery, is entitled—at least for a reasonable

The surface of the public domain in New Mexico, as in other mining states, has been thoroughly searched for outcroppings of ore veins. Therefore, exploration on public lands is now focused on ore bodies located well below the surface. Exploration for ore bodies located at such depths requires the use of scientific exploration devices to supplement the physical senses of the explorer. Since it is estimated that less than 10% of the earth's bedrock is exposed,¹¹ the explorer is forced into increasing dependence upon scientific devices.

A new body of mining customs developed simultaneously with the forced changes in methods of exploration.¹² The most significant custom is the practice of staking a whole section of land. The District Court of McKinley County, New Mexico, gives judicial recognition to this custom in *K.C.K. Mining Company v. Senotovitch*.¹³

Uranium occurs in erratic and unpredictable patterns beneath the surface of the earth, rendering subterranean exploration on a single mining claim with the dimensions of 600 feet by 1,500 feet economically infeasible and the practice in the industry has been to acquire control over a large group of claims, usually one section containing 640 acres, before laying out and conducting a drilling program for the discovery of ore beneath the surface. Anyone engaged in the industry would be familiar with this practice, and would know that a group of claims covering the surface of an entire section in a single ownership is intended to be used in a single systematic exploration operation.¹⁴

Under New Mexico mining customs, the number of location acts

time—to be protected against forcible, fraudulent, and clandestine intrusions upon his possession.

There is a split of authority regarding the physical limits of the precovery protection granted by the doctrine. The more restrictive view would extend protection only to the immediate surrounding area where the prospector is working. *Gremmel v. Swain*, 28 Mont. 331, 72 P. 662 (1903). The more liberal view extends the protection to the entire surface of the one claim located. *Field v. Grey*, 1 Ariz. 404, 25 P. 793 (1881).

11. Pemberton, *World Geographical Discoveries Bolster Future Mineral Needs*, 167 Engr. & Min. J. 85 (1966).

12. Customs are practical reflections of the methods utilized to expose and mine for minerals in particular situations. The Mining Laws of 1872 are essentially codification of the customs developed and used by the 1872 miners. The adoption of these local customs and district ordinances was forced upon Congress by strong western pressures. See 1 Lindley, *Mines* ch. IV, V (3d ed. 1914).

13. Civil No. 9072, District Court, McKinley County, New Mexico (1956).

14. Court's Finding of Fact, Civil No. 9072, at 5, District Court of McKinley County, New Mexico (1956). Compare *Smaller v. Leach*, 136 Colo. 297, 316 P.2d 1030, 1036 (1957), *cert. denied*, 356 U.S. 936 (1958):

The rule of *pedis possessio*, without sanction of the Congress or our legislature or judicial approval, has been enlarged by uranium prospectors to cover all the reasonable area on the public domain that one can stake

performed determines the degree of respect subsequent explorers will grant to the primary locator's claims. A set of claims is viewed as "valid" when all federal and state location requirements,¹⁵ with the exception of discovery, have been completed. Once located, other explorers continue to respect the primary locator's claim so long as he performs annual assessment work and files affidavits as proof of this labor.¹⁶

The recognition of possessory rights of a previous locator of legally invalid claims is based upon the concept of reciprocity. The subsequent explorer respects the previous locator's claim because the subsequent explorer recognizes all explorers must use the same methods of exploration and that at some future date he will want others to respect similarly the claims he now holds or will eventually hold.

The nuisance locator and the claim jumper are persons who will not respect legally invalid claims. Normally, the nuisance locator is not engaged in the mining business and owns no other claims. His operating procedure is to top-file or over-stake the far corner of a section of claims with no intention of exploring. At times, the nuisance locator is ignored by the primary locator, but many times the primary locator must purchase a quit-claim deed from the nuisance locator in order to insure against future title problems.

The claim jumper, like the nuisance locator, is not sensitive to reciprocity, as he seldom owns others claims within the state. However, when a claim jumper over-stakes a portion of a primary locator's claim, he generally plans to explore and develop the land. Although the nuisance locator and the claim jumper are within their rights to over-stake legally invalid claims, men in the mining industry, resenting such interferences with systematic exploration plans, consider them reprobates.

This, briefly, was the situation in 1957, when Russell Benedict moved his drill onto Harry Adams' Bulldog No. 5 claim.¹⁷

15. 30 U.S.C. §§ 21 to 54 (1964) *as amended* (Supp. 1970); N.M. Stat. Ann. §§ 63-2-1 to -26 (Supp. 1969). Regarding the location acts as an expression of willingness to explore and develop the claimed area, a distinction is offered between "being willing" and "being justified" in 2 Lindley, Mines § 336 (3d ed. 1914). The New Mexico explorers, in effect, equate the two terms.

16. 30 U.S.C. § 28 (1964); N.M. Stat. Ann. § 63-2-9 (Repl. 1960) requires the performance of \$100 worth of labor or improvements a year per claim. If the work is not performed, the claim is open to relocation. Work done on one legally valid mining claim is apportionable to others contiguous, subject to certain qualifications. *Duncan v. Eagle Rock Gold Mining & Reduction Co.*, 48 Colo. 569, 111 P. 588 (1910).

17. Transcript of record, Court's Findings of Fact and Conclusions of Law at 32, adopting Plaintiff's Finding of Fact and Conclusions of Law at 21-27, *Adams v. Benedict*, Civil No. 9537, District Court McKinley County, New Mexico (1957).

Adams' predecessor in interest properly located Bulldog No. 5 along with other claims during the Summer of 1956. From November, 1955, to January, 1956, the predecessors built roads, drilled nine holes and spent a total of \$12,000 developing the set of claims. The required proofs of labor were filed for the year 1956. On April 1, 1957, Adams purchased the claims and subsequently entered into agreements for a half-million dollar exploration and development program. Later that month, Benedict placed a drilling rig on Bulldog No. 5 despite a warning by a geologist employed by Adams that the land was under claim. When Adams attempted to place his drill on Bulldog No. 5, Benedict protested by blocking his path. Benedict finally yielded after he was pushed along for approximately 25 feet by a bulldozer. A race to discover minerals began, the drills working side by side. Adams was the first to discover mineralization.

Suit was brought by Adams in the District Court of McKinley County to quiet title to the claim in question.¹⁸ The court held for plaintiff. On appeal to the Supreme Court of New Mexico, *held*, reversed, on the ground that there was not sufficient evidence upon which the lower court could have found a discovery of mineral in place upon each claim.¹⁹ The court then went on to state that since the ninety days of statutory protection had expired and Adams was not in continuous possession of Bulldog No. 5, diligently working towards a discovery, he did not have legally recognized rights. The defendants were within their rights to relocate the invalid claims and were entitled to protection for the period set by law.²⁰

The court did not pass on the sufficiency of a discovery of mineral in place under New Mexico Stat. Ann. § 36-2-3. That statute requires that a ten-foot shaft or pit be dug. Because no ten-foot pit was dug, the court reasoned that the issue of whether readings from scientific instruments can substitute for mineral in place did not need to be decided.²¹

The court took cognizance of the language of New Mexico Stat. Ann. § 63-2-3.1,²² which contains a different test for discovery if a drill hole is used. The court avoided elaboration upon this statute by pointing out that Adams did not take advantage of its provisions that require filing of a drill hole affidavit. Even if the court had discussed the discovery requirement, there would still be a question

18. Adams v. Benedict, Civil No. 9537, District Court McKinley County, New Mexico (1957).

19. 64 N.M. 234, 327 P.2d 308 (1958).

20. *Id.* at 243, 327 P.2d at 314. See also N.M. Stat. Ann. § 36-2-3 (Repl. 1964).

21. *Id.* at 249, 327 P.2d at 318.

22. *Supra* note 8, for language.

whether, in view of New Mexico mining customs and the philosophy of the mining laws, the best method for expanding a locator's legal protection is the liberalization of the discovery requirement.

The court provides an explicit definition of the doctrine of *pedis possessio*:

. . . [T]he possession of each claim, where no valid location has been perfected within the statutory time, must be protected by actual occupation of that identical claim and the diligent and persistent exploratory work thereon. If the occupation is relaxed under those circumstances, another may take possession of the claim if he can do so peaceably. The occupation of the second occupant, in that event, will be protected so long as he abides by the same rule.²³

The court then proceeded to construe the definition liberally, extending protection to the boundaries of one claim:

. . . [W]hen a person is prospecting for uranium ore which lies at a great depth below the surface of the earth and where he has peacefully taken possession of the premises and is in actual possession, diligently and persistently drilling a hole in an attempt to disclose uranium in place, he should be protected in his possession to the full extent of his proposed claim as against someone with no better right.²⁴

The court disregards evidence of systematic exploration plans covering a number of claims as immaterial²⁵ and rejects any further extension of the doctrine to encompass all claims located pursuant to such a plan. As the rationale for denial of any extension, the court repeats that the law requires a discovery on *each* claim in order for a locator to obtain legally recognized rights beyond those granted by statutes.²⁶

23. Adams v. Benedict, 64 N.M. at 247, 327 P.2d at 317.

24. *Id.* at 250, 327 P.2d at 319-20. Perhaps the court is attempting to distinguish between the criteria necessary for protection and those necessary for extension of protection by replacing the term "occupation" with the term "possession". However, such a distinction seems nonexistent. Black's Law Dictionary 1230 (4th ed. 1951): "*Occupation*: possession. . . . [W]here a person exercises physical control over the land." "*Actual possession*: Exists where a thing is in the immediate occupancy of a party." *Id.* at 1325.

As stated, the doctrine does not protect an explorer from *peaceable* entries of another locator. However, in Kanab Uranium Corp. v. Consolidated Uranium Mines, 227 F.2d 434 (10th Cir. 1955), the ruling protects the explorer from *any* entry, no matter how peaceable. Such an extension is desirable. The existing rule encourages a locator to provoke shows of force to insure that another's entry is not peaceable, but rather forcible. The extension would eliminate the armed guards and roving patrols sometimes evident upon the public domain in New Mexico.

25. Adams v. Benedict, 64 N.M. at 238-39, 247, 327 P.2d at 311, 317.

26. *Id.* at 238, 327 P.2d at 311; N. M. Stat. Ann. § 63-2-3 (Repl. 1960).

New Mexico mining customs and the mining laws conflict in basically one respect. The source of this conflict lies only in the *implementation* of the fundamentally sound policy of encouraging exploration while preventing fraudulent acquisition of public land. The material composition of the earth has forced changes in exploration methods, which now conflict with the unchanged implementation fossilized in the mining laws. Since the composition of the earth cannot be altered by legislative enactment or judicial decision, solutions must be sought by modification of the implementation.

Should the ideal solution be to harmonize the law to the customs, such harmonization would grant the explorer legal protection upon a reasonable number of claims necessary to pursue a systematic plan of exploration. Either of two modifications may achieve harmonization:

- (1) Liberalization of the discovery requirement, or
- (2) Expansion of the doctrine of *pedis possessio*.

The requirement of discovery is basically designed to protect the government from wholesale acquisition of its land by speculators.²⁷ Discovery is the source of title.²⁸ If a valid discovery has been made and location acts have been properly performed, the claim is removed from the unappropriated public domain. Such appropriation prevents numerous types of nonmineral entries under the public land laws. Although paramount title remains in the United States, the appropriated claim may then be conveyed, inherited or devised. Any liberalization of the rules of discovery in favor of protection of a prospector will correspondingly decrease the amount of protection afforded the government.

There is now a developed line of case authority holding that it is no longer essential to have an actual discovery of mineral in order to validate a claim.²⁹ The Wyoming court in *Western Standard Uranium Co. v. Thurston*³⁰ found a valid discovery based upon geiger counter readings, geological deductions, assays from neigh-

27. Compare *Chrisman v. Miller*, 197 U.S. 313 (1905); *Northern Pac. Ry. v. Solderberg*, 188 U.S. 526 (1903); *Clipper Mining Co. v. Eli Min. & Land Co.*, 33 L.D. 660 (1905); *Hagan v. Dutton*, 20 Ariz. 476, 181 P. 578 (1919). Courts will apply a stricter definition of discovery when the controversy is between a mineral claimant and the United States or a claimant under another federal act. When the controversy is between two mineral claimants, the rule relating to sufficiency of discovery is more liberal.

28. 1 American Law of Mining § 4.14 (1969).

29. See note 9, *supra* for case citations. For a discussion of the chronological development of these cases, see Sandstrom, *The Discovery Requirement in Mining Law, Can It Be Satisfied By Geophysical Data?* 40 Denver L. Center J. 228 (1963).

30. 355 P.2d 377 (Wyo. 1960).

boring claims and customs of miners in the area. This decision should be particularly significant to the New Mexico situation, because the language of the Wyoming statute defining discovery³¹ is almost identical to the language used in the New Mexico drill hole statute.³²

Another argument for liberalization can be found in 30 U.S.C. § 641,³³ in which Congress authorizes loans to finance deep mineral exploration. One need only show probability of discovery in order to qualify for assistance.³⁴

It is interesting that Congress, by granting exploration aid, is willing to wager the country's money upon favorable evidence obtained from instruments and geological predictions while some courts have held that this evidence would not ". . . justify a reasonably prudent man in expending money and effort in further exploration or development."³⁵

The doctrine of *pedis possessio* was developed by the courts to protect the explorer prior to his discovery of a mineral. Operation of the doctrine does not provide the explorer with title. He is merely protected from another mineral claimant's forcible, secret or fraudulent entry while he is working toward a discovery.³⁶ An expansion of the protection granted by this doctrine will expand an explorer's right of protection only at the "expense" of other explorers.

31. Wyo. Stat. Ann. § 30-6 (1957) "[S]hall cut or expose deposits of valuable minerals sufficient in quantity to justify a reasonably prudent man in expending money and effort in further exploration and development."

32. *Supra* note 8 for statutory language. The contest being between rival locators, the Wyoming court ignored the word "valuable," thereby avoiding discussions of the relative market value of the lode mineral. *But see* *Converse v. Udall*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969), a contest between the government and a mining claimant, in which the court extended the marketability concept, formerly applicable to only nonmetallic minerals, to include metallic minerals. Discussed in *Forman & Dwyer, The Prudent Man's Changing View of Discovery Under The U.S. Mining Laws*, 2 *Natural Resources Lawyer* 109 (1969). *See generally* Gray, *New Concept of Discovery and Title to Unpatented Mining Claims*, 10 *Rocky Mt. Min. L. Inst.* 491 (1965).

33. 30 U.S.C. § 641 (Supp. 1970). Establishment and maintenance of program for exploration; financial assistance.

34. 30 C.F.R. § 229.7 (Supp. 1969) Criteria.

The following factors will be considered and weighed in passing upon applications:

- (a) The geologic probability of a significant discovery being made.
- (b) The estimated cost of exploration in relation to the size and grade of the potential deposit.
- (c) The plan and method of conducting exploration.
- (d) The accessibility of the project area.
- (e) The background and operating experience of the applicant.
- (f) The applicant's title or right to possession of the property.

35. *Adams v. Benedict*, 64 N.M. at 241, 327 P.2d at 313.

36. *Union Oil Co. v. Smith*, 249 U.S. 337 (1918); *see* 1 *American Law of Mining* §§ 4.7-4.12 (1969).

The definition and extension of the doctrine as adopted by the New Mexico court in *Adams v. Benedict* is satisfactory as far as it goes. However, any argument to extend the doctrine further to protect a reasonable number of claims must avoid the mixing of discovery and pre-discovery concepts. In *Union Oil Co. v. Smith*, the argument was made that concept of allocation of annual assessment work should be applied to extended discovery and *pedis possessio* to cover contiguous claims.³⁷ The Court properly dismissed the argument by stating that allocability is a post discovery concept and not applicable to discovery and pre-discovery questions.³⁸ However, it seems the argument for the extension of *pedis possessio* to include a reasonable number of claims could best be made using the rationale of practicality which initially gave birth to the doctrine:

[A]s a *practical* matter, exploration must precede discovery of mineral, and some occupation of the land ordinarily is necessary for adequate and systematic exploration, legal recognition of the *pedis possessio* of a bona fide and qualified prospector is universally regarded as a necessity (emphasis added).³⁹

This language seems sufficiently broad to include the desired extension.

In constructing an argument for extension of the doctrine, it is essential that the concept of *pedis possessio* be clearly separated from all discovery and post discovery concepts. The tempting analogy of allocability of assessment work⁴⁰ should be avoided.

Assuming that either argument would convince the New Mexico supreme court, which alternative, while granting a greater amount of protection to an explorer, would produce effects in conformity with the twofold policy of the mining laws? The expansion of the doctrine of *pedis possessio* to a reasonable number of claims appears the better alternative.⁴¹ The New Mexico mining industry is already acclimated to the concept of possession and acts as manifestations

37. *Id.* at 343. Miners are allowed to allocate assessment work over a series of contiguous claims under 30 U.S.C. § 28 (1964) *as amended* (Supp. 1970).

38. *Id.* at 352.

39. *Id.* at 346.

40. 43 C.F.R. § 3420.1 (1969).

41. What will constitute a "reasonable" number of claims must be established by trade usage relating to the particular mineral in question. Time and diligence considerations are also inherent issues. *But see* Ladendorff, *Enlarging Pre-discovery Rights of Mineral Locators*, 6 Rocky Mt. Min. L. Inst. 1 (1961), where the author argues that the doctrine of *pedis possessio* should not be enlarged without corresponding legislative enactments. *See also* Sherwood & Greer, *Possessory Interests in Wyoming Mining Claims*, 4 Land & Water L. Rev. 337 (1969).

of another's rights. The expansion of the doctrine would not alter the existing practices of New Mexico miners.⁴² The single claim protection functions more to discourage rather than encourage exploration. Explorers who must use systematic exploration plans are at the legal mercy of the nuisance locator and claim jumper.

An extension of the doctrine would reverse this situation. Claim jumpers and nuisance locators would then be forced to show greater respect for systematic plans of exploration. Under the extension, the requirement of discovery could remain unaltered. The government would not be denied necessary protection because exploration rights can be granted without title consequences.

As discussed above, many courts have attempted to aid the deep mineral explorer by liberalizing the discovery requirement. However, by so doing, the inherent arbitrariness of the standard will be greatly magnified. Also, the cases evidence a trend⁴³ that could result in the marketability concept being applied to contests between rival locators. Chaos would result when a determination of marketability was attempted without a physical finding of the mineral. The courts would be referees in conjectural battles between geological experts.

In order to acquire protection under the expanded doctrine of *pedis possessio*, all locators must fulfill the basic elements of *pedis possessio*: physical possession, diligence in working toward a discovery and exclusion of rival claimants. In addition, a requirement of good faith, as discussed in *Ranchers Exploration and Development Co. v. Anaconda Co.*,⁴⁴ must be met. As systematic plans of exploration will be protected under the expanded doctrine, a great amount of the traditional top-filing and over-staking would be considered bad faith locations, hence the locators would obtain no legal rights.

The decision of the New Mexico supreme court in *Adams v. Benedict* has provided a foundation for building an argument in support of the expansion of the doctrine of *pedis possessio*. With increasing exploration activity, it is most likely that present mining

42. Granting the extension of the doctrine, the economic question would still remain whether the resources used to perform possessory acts should not be directed toward exploration. This question takes the discussion out of the scope of this Comment and into the area of total reform of the implementation of the mining laws. For some discussion as to possible leasing acts, see Hansen, *Why a Location System For Hard Mineral?* 13 Rocky Mt. Min. L. Inst. 1 (1967); Forman & Dwyer, *supra* note 22; see generally *Adams v. Benedict* 64 N.M. 234, 327 P.2d 308 (1958).

43. *Supra* note 32, for citations.

44. 248 F. Supp. 708 (D. Utah 1965).

customs and the Mining Law of 1872 will again meet head-on upon the public domain and eventually in a New Mexico courtroom. Hopefully, the court will modify the implementation of the philosophy behind the Mining Law of 1872 by expanding possessory rights.

MALCOLM LLOYD SHANNON, JR.