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**STAKING MINING CLAIMS ON REVOKED PUBLIC LAND WITHDRAWALS: ISSUES AND ALTERNATIVE STRATEGIES**

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**§ 9.01   Introduction**

The acquisition of "hardrock" minerals on public lands of the United States is governed by the General Mining Law of 1872.[[1]](#footnote-2)1 For well over a century, the 1872 statute has been construed and misconstrued in judicial and administrative decisions which collectively comprise a comprehensive and voluminous body of law- Thorough review of existing authority will usually result in the identification of multiple precedents which were decided on the basis of legal and factual circumstances similar and perhaps identical to the circumstances under consideration.

However, federal legislative supplementation of the General Mining Law which took place in 1976 predictably gave birth to what has since become known as the "mining claim staking rush." The existing authorities do not address this phenomenon in its purest and present form. It threatens to generate issues which will tax even the estimable abilities of the bench and bar to stretch analogy to the breaking point, an exercise which the authors will strive to avoid.

At least some of these relatively novel issues are under consideration by the courts and the responsible agency while this article is being prepared.[[2]](#footnote-3)2 Given the structure and concomitant practical limitations of both our judicial and the applicable administrative system, it may be a matter of years before there are any definitive answers to some of the questions raised below- Nevertheless, in view of the pendency of what might ultimately prove to be controlling proceedings, the authors are not only content but also obliged to leave judgments concerning what the law ought to be or eventually will be in the courts, where they properly belong.

Consequently, this discussion will focus on the practical implications of the mining claim staking rush to the individual or entity who might become involved therein. In a practical sense, awareness of potential issues, coupled with diligent planning and preparation, will prove more rewarding than time spent counting the number of angels on the head of the proverbial pin. With that caveat, the reader is invited to join us in a trip through the looking glass of federal legislation, administrative action and inaction, and the boundless ingenuity of the participants in a highly competitive industry.

**§ 9.02   Background**

Property rights are initiated under the General Mining Law through the "staking" or "locating" of a mining claim on "unappropriated" public lands which are "open" for that purpose. Public lands are unappropriated if they have not already been claimed by another individual or entity under either the mining laws or other public land laws which authorize private citizens to claim public lands. In general, public lands are open for mining claim location unless they have been "withdrawn" or "reserved" by Congress or the Executive Branch for some other exclusive use such as construction of a federal reclamation project.[[3]](#footnote-4)3

Over the years, substantial acreages were withdrawn from application of the General Mining Law in order to prevent further private appropriations thereof in the anticipation that they would ultimately be used for a particular governmental or public purpose- In many cases, withdrawn public lands were simply never utilized for the public purpose originally planned, and great concern was eventually expressed concerning the aggregate acreage of public lands which had been declared off-limits to the mining industry.[[4]](#footnote-5)4 Therefore, in section 204 of the Federal Land Policy and Management Act of 1976 ("FLPMA"), [[5]](#footnote-6)5 Congress confirmed the power of the Department of the Interior to revoke many types of existing withdrawals, and directed the Department to review most existing withdrawals with a view toward revoking the same if the subject public lands were either never used for the planned public use or are no longer necessary therefor- When such a revocation takes place, the lands previously withdrawn are often opened or "restored" for location under the General Mining Law.

It was some time after passage of the 1976 legislation before any significant departmental withdrawal review and revocation program was discernible. However, at present such a program is being actively pursued and, in fact, the Department has asked the private sector to propose specific withdrawals for revocation where the public lands in question can be characterized as an "area of critical mineral potential."[[6]](#footnote-7)6 The response by the private sector to this request was immediate, and significant interest now exists in withdrawn public lands with mineral potential- The acreage included within public land withdrawals already revoked or under consideration for revocation is immense.[[7]](#footnote-8)7

When a public land withdrawal is revoked by the Department and the subject acreage is restored for purposes of mining claim location, prior notice thereof is published in the Federal Register.[[8]](#footnote-9)8 The published public land order revoking the withdrawal provides that, at a specified time and on a specified date, the subject public lands "will be opened to location under the United States mining laws-"[[9]](#footnote-10)9 In the words of the Department, where a withdrawal "is to be revoked and the land is known or believed to have mineral potential, particularly for locatable minerals, the competition to gain rights to the minerals may be intense."[[10]](#footnote-11)10

The "intense competition" referred to by the Department is manifested in the form of the mining claim staking rush- This scenario consists of often dozens and sometimes hundreds of rival claimants staking overlapping mining claims on the same area of public land, each making a frantic effort to initiate some sort of first or prior right. The panorama is reminiscent of the famous rush to appropriate the "Cherokee Strip," but the horse and buggy approach has given way to the use of four-wheel drive vehicles, helicopters, two-way radios, portable drilling equipment, digital and other precise timing devices, and additional implements of modern technology. The rush in the field is invariably preceded, accompanied, and followed by a corresponding rush to the office of the local clerk and recorder prompted by the desire to be the first to record the claim location certificate required under state law.

Generally, the initial meeting between multiple rivals who are staking claims or recording location certificates is followed by several subsequent meetings between the same parties. The presiding official has now become the local judge rather than the local clerk and recorder. It is in this context that the courts will eventually provide the answers to certain questions which cannot be definitively answered by reference to existing authority.

**§ 9.03   Historical Approach To Rival Claimant Litigation**

**[1]   The Procedural Context**

Existing case law is, of course, replete with controversies between rival mining claimants of the same public lands. Lawsuits of this sort usually arise in one of two sets of circumstances. The lawsuit may be filed by one claimant against another simply because the former has become aware of the latter's conflicting claims and seeks to confirm or "quiet" what he considers a superior title. On the other hand, the lawsuit may be the result of an application for the issuance of mineral patent.

As a part of the mineral patent application procedure, the applicant is required to post notice of the application on the subject claims and in the appropriate state office of the Bureau of Land Management, and to publish a similar notice in a local newspaper designated for that purpose by the Bureau.[[11]](#footnote-12)11 These notices must be posted and published for a period of 60 days-[[12]](#footnote-13)12 Before expiration of this "publication period," the patent applicant must have completed at least $500 worth of improvements on each claim subject to the application.[[13]](#footnote-14)13

Nearly any party may appear in the Department and object to the issuance of mineral patent as a "protestant-" A protestant need not necessarily hold any mining claim or other property right which conflicts with the applicant's claims, but his appearance in the Department is limited to an appearance for the purpose of demonstrating that the applicant has not complied with applicable law.[[14]](#footnote-15)14 For instance, a protestant might attempt to demonstrate that the land included within the applicant's claims was not open for location at the time when they were staked. If a protestant actually holds and alleges conflicting mining claims which were staked after expiration of the publication period or some other adequate interest in the subject lands, he is viewed as a "protestant with interest" entitled to rights of appeal with regard to dismissal of the protest.[[15]](#footnote-16)15

On the other hand, if a rival seeks to object to the issuance of mineral patent on the basis of and in order to preserve conflicting mining claims, he must file an administrative "adverse" in the Department before expiration of the publication period-[[16]](#footnote-17)16 When a rival claimant fails to file a proper administrative adverse before the publication period expires, he has lost the right to object to the issuance of patent on the basis of his conflicting claims if the patent applicant has properly complied with the notice and other requirements of the General Mining Law.[[17]](#footnote-18)17 If it is found that the required notice has not been properly given, the patent applicant must make a new posting and publication, during which any rival claimant may file an administrative adverse-[[18]](#footnote-19)18

If a proper administrative adverse is filed within the publication period, all further processing of the patent application is normally suspended by the Department.[[19]](#footnote-20)19 The party filing the adverse then has 30 days within which to commence an adverse lawsuit against the patent applicant in a court of competent jurisdiction, and the Department will usually not take any further steps until the adverse suit is resolved-[[20]](#footnote-21)20 If the lawsuit is not commenced within the 30-day period therefor, the adverse filed in the Department will be dismissed with the same result as if the adverse had never been filed, and the Department will resume patent application processing procedures.[[21]](#footnote-22)21

Depending upon the exact issues and parties involved, a lawsuit between rival mining claimants may be heard in either state or federal court, and may or may not involve a demand for a trial by jury-[[22]](#footnote-23)22 The suit may be filed as an action in ejectment or to quiet title or in some other procedural format, depending upon the factual circumstances and local procedure.[[23]](#footnote-24)23 The ultimate question is which rival claimant has the better right to possession of the surface area in dispute-[[24]](#footnote-25)24

In the ordinary case (i.e., litigation not involving a patent application and a related administrative adverse), the plaintiff bears the burden of proof and must recover on the strength of his own title; if he does not prevail, the defendant is entitled to judgment.[[25]](#footnote-26)25 However, in an adverse suit, both parties are, in effect, plaintiffs, and each must recover on the strength of his own title-[[26]](#footnote-27)26 If neither claimant establishes a right of possession, it should be so found and judgment should be entered accordingly.[[27]](#footnote-28)27 A judgment against both parties effectively terminates related administrative patent proceedings, leaving no question to be resolved by the Department-[[28]](#footnote-29)28 If judgment is entered in favor of a patent applicant, after proof thereof is filed in the Department, administrative processing of his patent application will resume.[[29]](#footnote-30)29 Such a judgment does not, however, establish the right to a patent, since it remains for the Department to make its own determination of whether or not the "discovery" and other requirements of the law have been complied with before issuing the patent-[[30]](#footnote-31)30

Within these procedural settings, the task of the analyst of a rival mining claimant dispute is to determine which of the rivals has the better right to possession of the area included within conflicting claims. The basic components of the analytical framework consist of the judicial doctrine of *pedis possessio*, the mineral discovery requirement of the General Mining Law, and the actions performed in connection with staking and making a record of a mining claim which are established by federal as supplemented by local law.[[31]](#footnote-32)31 Before proceeding to describe the analytical framework, its three basic components will be summarized-

**[2]   *Pedis Possessio***

Under the doctrine of *pedis possessio*, a locator who is actually occupying his claim while diligently working toward a discovery is protected for a reasonable period from forceable, fraudulent, and clandestine intrusions by rival claimants.[[32]](#footnote-33)32 Some affirmative effort to exclude others must be made, since the doctrine is no protection against peaceable entries by rivals-[[33]](#footnote-34)33

The relationships between the doctrine of *pedis possessio* and the other two basic components of the rival mining claimant dispute analytical framework are relatively simple. In and of themselves, occupation and diligent exploration do not create any significant rights. There can be no *pedis possessio* in the absence of (and the doctrine assumes the initiation) of a claim.[[34]](#footnote-35)34 Furthermore, the doctrine is by definition an exploration phase and pre-discovery concept-[[35]](#footnote-36)35 Hence, as against a particular rival claimant and at a specific moment in time, a locator may have a quantum of rights which flow from *pedis possessio*, or he may have a different quantum of rights which flow from discovery, but he does not have a greater quantum of rights which flow from a combination of *pedis possessio* and discovery.

**[3]   The Acts of Location**

Since the steps taken in connection with staking and making a record of a mining claim are based on federal law but supplemented by state law, there is a high degree of variability in applicable requirements, depending upon the jurisdiction in question and whether the claim under consideration is a lode claim or a placer claim.[[36]](#footnote-37)36 Ideally, lode claims are staked along the strike of mineralized formations and described by metes and bounds, while placer claims are staked and described by reference to the rectangular public land survey-[[37]](#footnote-38)37 In general, at least since the enactment of FLPMA and the repeal or substitution of statutory alternatives for outmoded "discovery work" requirements, the "acts of location" consist of the posting of some form of location notice on the claim, the marking of the boundaries of the claim on the ground, and the recordation of a claim location certificate in both the local jurisdiction and the appropriate office of the Bureau of Land Management.[[38]](#footnote-39)38 In many cases, only "substantial compliance" with applicable claim location procedures has been required by the courts-[[39]](#footnote-40)39

With respect to the other two basic components of the rival mining claimant dispute analytical framework, location will not, in and of itself, create any rights in the absence of either *pedis possessio* or discovery.[[40]](#footnote-41)40 Location plus *pedis possessio* will establish rights which are defensible under specified circumstances, as will location plus discovery-

**[4]   Discovery**

The most basic requirement of federal law insofar as claim validity is concerned is that the locator must make a "discovery" of valuable minerals.[[41]](#footnote-42)41 Only one discovery is required with respect to any mining claim, regardless of whether it is a lode or placer claim and regardless of the acreage included within a placer claim-[[42]](#footnote-43)42 However, each ten-acre tract within a placer claim must be "mineral in character," and a discovery on one ten-acre tract of a placer claim does not operate to establish the mineral character of the entire claim.[[43]](#footnote-44)43 The determination of whether a particular tract is mineral in character is within the exclusive jurisdiction of the Department of the Interior-[[44]](#footnote-45)44 The test used for making the latter determination and the rule used for determining whether a mining claim contains a sufficient discovery are similar, and the Department sometimes erroneously applies the discovery rule to each ten-acre tract of a placer claim.[[45]](#footnote-46)45

Unless and until the requisite discovery has been made, the locator has not established any defensible property rights as against the United States- As noted above, at this pre-discovery stage, the locator's rights as against rival claimants depend upon actual occupation of the claim while diligently working towards a discovery under the doctrine of *pedis possessio*.[[46]](#footnote-47)46

As between rival claimants, the sufficiency of a particular-discovery is measured by the "prudent man rule."[[47]](#footnote-48)47 The prudent man rule has two basic requirements- First, it must be demonstrated that valuable minerals have actually been found or exposed within the limits of the claim. Secondly, the evidence must be such that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.[[48]](#footnote-49)48

The question of the existence of a discovery is a question of fact which is determined by the trier of fact. Each case is determined with reference to applicable factual circumstances.[[49]](#footnote-50)49 Relevant evidence includes a nearly limitless spectrum of factors, such as the nature and extent of the mineral disclosed, the geology of the area, the existence of other known mines or mineral deposits in the area, the history of the development of other mines in the area, and the opinion of miners, geologists, and other experts-[[50]](#footnote-51)50

When the discovery required by the General Mining Law has actually been made and can be proven, property rights are enhanced considerably. It is no longer necessary for the locator to continually occupy his claim in order to prevent loss of property rights to a rival claimant. After a discovery is made, the locator has established the right to "exclusive possession" of his claim as against subsequent rival claimants, but only for so long as the claim is "maintained" in compliance with applicable law.[[51]](#footnote-52)51 The chief claim maintenance requirements involve performance of "annual assessment work" and, since 1976, annual recordation of claim "maintenance evidence-"[[52]](#footnote-53)52

The relationship of the discovery requirement to the other two basic components of the rival mining claimant dispute analytical framework is that discovery confers no rights in and of itself.[[53]](#footnote-54)53 As previously discussed, the doctrine of *pedis possessio* is by definition a pre-discovery concept, and discovery plus location will result in defensible rights-

**[5]   The Analytical Framework**

Thus, it can be seen that at least in theory if not in practice, no single component of the rival mining claimant analyticalframework will give rise to defensible rights in and of itself. There are only two *combinations* of these three basic components which will create rights which are defensible under specified circumstances. The first combination is location plus *pedis possessio*, and the second combination is location plus discovery. As discussed below, the validity of a particular mining claim as against a rival claimant is dependent upon ascertainment of the point in time when such a combination of components exists. It is the moment of joinder of two of the necessary components which marks the birth of a defensible right.

Bearing these precepts in mind, rival mining claimant disputes can be divided for purposes of analysis into three categories. The first category involves one claimant who has defensible rights and one claimant who does not. The second category involves two claimants who both have defensible rights. The third category involves two claimants neither of whom have defensible rights.

The first category of dispute is the easiest to resolve. If one claimant has defensible rights (either location plus *pedis possessio* or location plus discovery) and the other does not, the former claimant should always prevail. In this situation, it is not necessary to deal with the establishment of rights in a temporal sense so as to allocate any priority as between the two rival claimants.

The second category of dispute, where both claimants have defensible rights, does require the establishment of some priority between them. The exercise is simplified by noting that, at any particular point in time, it is theoretically impossible for two rivals to be both in *pedis possessio* as against each other.[[54]](#footnote-55)54 Thus simplified, the basic rules appear to be that:

1-   The combination of location plus *pedis possessio* will prevail over the combination of location plus discovery if the former combination existed before and at the time of the latter.[[55]](#footnote-56)55

2.   The combination of location plus discovery will prevail over the combination of location plus *pedis possessio* if the former combination existed before and was being properly maintained at the time of the latter.[[56]](#footnote-57)56

3-   The first combination of location plus discovery will prevail over any subsequent combination of location plus discovery if the former combination was being properly maintained at the time of the latter.[[57]](#footnote-58)57

4.   In states where the posting of a notice is required and a specified period of time is established for completing the location by marking claim boundaries and recording a certificate, a claimant is completely protected from rivals during the period from the date when he has both a posted notice and a discovery until expiration of the prescribed time for completing the location.[[58]](#footnote-59)58

Turning to the third category of dispute referred to above, the authors are unaware of any case where a tribunal has declared that neither rival claimant truly has any defensible rights, although that result is not inconceivable in view of the practice of making "paperlocations-" It is suggested that when this category of dispute includes one or more bona fide prospectors, it is normally resolved through relaxation in the application of the essential elements of the three basic components of the rival claimant dispute analytical framework. This practice has been described as follows:

In a controversy between rival locators, the issue is *not* the nature of the discovery or the extent of the mineral value which it has demonstrated, but rather the *priority* as between the two claimants, each of which is claiming the same ground, *whatever might be the value of the mineral*. In such a case "it was never intended that the courts should weigh scales to determine the value of the mineral found as between a *prior and subsequent locator* of a mining claim on the same lode," and the courts have been quite liberal in sustaining discoveries made by the *first locator* of mining ground. Where both locators claim the same vein or deposit, no more than a slight showing by the prior locator is needed to satisfy the "discovery" requirement of the statute. For example, the finding of a few "colors" of gold, taken together with other circumstances, has been held sufficient. This is not to say, however, that one who claims ground under the mining laws is relieved from *substantial compliance* with the law regarding mineral discovery. There "must be such a discovery of mineral as gives reasonable evidence of the fact, either that there is a vein or lode carrying the precious mineral, or, if it be claimed as placer ground, that it is valuable for such mining." In other words, the *liberality* of the courts is a liberal consideration and application of the evidence, rather than a liberal construction of the statute.[[59]](#footnote-60)59

A liberal consideration of the prior locator's evidence of discovery translates, of course, directly into a relatively low burden of proof to establish discovery for the first or "senior" locator- Furthermore, this "priority" line of decisions followingthe rationale that "in a controversy between rival locators, the issue is not the nature of the discovery...but rather the priority as between the two claimants," amount in effect if not in literal wording to rulings that the first to complete the acts of location will prevail. That line of reasoning is not without persuasive impact in cases involving a bona fide and reasonably diligent senior locator, since both rivals are alleging and therefore conceding that the land in dispute actually contains a valuable mineral deposit.

In suggesting the abbreviated analytical framework summarized above, the authors would be terribly remiss if they did not also warn the casual reader that the interstices of the framework are filled with a plethora of principles, rules, and exceptions which apply under specific factual circumstances.[[60]](#footnote-61)60 A full discussion thereof would form the subject matter of a treatise, and is farbeyond the scope of this article-[[61]](#footnote-62)61 Like the prudent miner, the prudent member of the bench or bar will follow preliminary conclusions with diligent verification efforts.

**§ 9.04   Some Alternative Strategies**

In expectation of the intense competition during a mining claim staking rush, the participants have devised all sorts of alternative strategies which are intended to establish some sort of first or prior right. These strategies display a wide variation in terms of relative sophistication, ranging all the way from the filing of mere paper locations with the county clerk and recorder (unaccompanied by any activities in the field) to the "cafeteria-style" claim location procedure described below. Based on their experience with mining claim staking rushes, the authors have selected a sampling of strategies which can be anticipated, with the observation that the number of alternatives is limited only by the imagination of the participants. These tactical devices fall into two basic classifications: those related to the staking program and those related to a dispute resolution plan.

**[1]   "Instantaneous" Staking**

Not surprisingly, strategies related to a staking program are nearly all designed to accomplish staking mining claims and making a record thereof within the shortest possible time. It is at least theoretically possible to complete the staking and recording of one or more mining claims at a precise moment in time, and the simplest step in pursuit of this "instantaneous staking" objective is the use of "common corners" with respect to contiguous claims.

Most state laws require the emplacement of substantial posts or monuments at each corner of a mining claim, and sometimes the emplacement of equivalent "side-center" monuments along the long dimension of a lode claim.[[62]](#footnote-63)62 Assuming that side-center or end-center monuments are not required, a single mining claim can be staked with a total of four corner monuments, plus a "discovery monument" if the latter monument is necessary under applicable law- The claim location notice is posted on a corner monument or the discovery monument, as local law may require.

If a single mining claim has been so cornered, a second and contiguous claim can be cornered with only two additional monuments, since the two existing corners of the first claim which delineate the boundary line between the two contiguous claims can be used as "common corners." In the same way, the fourth such claim in a group of four contiguous claims arranged in two tiers can be cornered by emplacing a single additional monument. The use of such common corners is accepted practice in the mining industry[[63]](#footnote-64)63 and will certainly minimize cornering time in a staking rush- On the other hand, accurate claim size control is necessary in order to avoid leaving gaps in the staking pattern created by oversize mining claims, inaccurate legal descriptions of "short-staked" claims,[[64]](#footnote-65)64 and location notices which are not actually "on the claim" if posted on a corner monument because a discovery monument is not required.[[65]](#footnote-66)65

The second level of the instantaneous staking approach is the use of "parallel" stakers, discoverers, and certificate filers- This involves stationing the required number of personnel in the field, at the office of the county clerk and recorder, and in the appropriate office of the Bureau of Land Management.

The number of personnel necessary in the field will be dependent upon the claim monumentation required under state law, the claim staking pattern, and the geologic circumstances. At least one claim staker is required at each point on and perhaps within the boundaries of each claim where applicable law requires erection of a corner or discovery monument. The location notice is affixed to the appropriate monument. The use of sharpened steel posts (if adequate under applicable state law) or rebar imbedded in the ends of wooden posts permits instantaneous emplacement thereof in all but the hardest surfaces.

If the geology of the subject area is such that minerals do not outcrop and must be sought at depth within a particular claim, the first or "physical exposure" requirement of the prudent man rule of discovery will not be satisfied until minerals have actually been exposed through trenching or drilling of some sort. In an effort to overcome this problem, some claimants have stationed portable drilling equipment on the claim with a view toward exposing or beginning to expose mineralization precisely at the moment of the revocation.

The last feature of the parallel staking system is the stationing of personnel at the local clerk and recorder's office and the appropriate office of the Bureau of Land Management (which may be hundreds of miles away) with filing fees and completed location certificates ready to be stamped as recorded at the precise moment of the revocation. Ordinarily, it makes no difference in what order the requisite acts of location are actually accomplished, but state law must be carefully reviewed in this respect.[[66]](#footnote-67)66

**[2]   The Use of Placer Claims**

Where geologic and legal circumstances permit,[[67]](#footnote-68)67 the use of placer claims has several advantages- Since placer claims are ordinarily located by reference to the rectangular public land survey rather than by metes and bounds, the possibility of gaps in a staking pattern and the need for close claim dimension control through surveying or similar procedures is minimized. In recognition that the boundaries of placer claims are relatively easy to establish when they are located by reference to the rectangular public land survey system, state claim location laws often require less monumentation for placer claims than lode claims.[[68]](#footnote-69)68

In addition, an association of eight or more qualified locators may include up to a maximum of 160 acres within a single "association" placer claim, so a given acreage of public lands can be located much more quickly with an association placer than is the case if lode claims are utilized or 20-acre placer claims are located by an individual claimant.[[69]](#footnote-70)69 There is, of course, a corresponding reduction in the number of field personnel which are necessary in order to accomplish instantaneous location-

Placer claims also have distinct advantages in geologic terrain where outcrops of mineralization occur but are sparse. Careful design of an association placer claim staking pattern which corresponds to a sparse outcrop pattern can result in including at least one outcrop within each claim in a contiguous group and resultant satisfaction of the first requirement of the prudent man rule of discovery, an advantage which may not be possible if lode claims or less than maximum size placer claims are employed.

Finally, as discussed above, only a single discovery is required within any placer claim, regardless of its size. Thus, eight different discoveries are required if eight lode or 20-acre placer claims are used to stake a given area of 160 acres, while only one discovery is required if the same area is staked with the maximum size association placer claim. It is true that each 10-acre parcel of a placer mining claim must be mineral in character, but the mineral in character determination is within the exclusive jurisdiction of the Department of the Interior and ordinarily does not arise in the context of rival claimant litigation,[[70]](#footnote-71)70 simply because all rivals are alleging and therefore conceding that the acreage in question is "mineral in character-"

**[3]   The Technique of Adoption**

The techniques described above relate to mining claims which are staked at or after the precise time and date of a revocation. An alternative strategy is the performance of all or some portion of the acts of location before the revocation. This procedure is known as the technique of "adoption."

It is an axiom of the mining law that a claim located on land which is not subject to mineral entry at the time of location is null and void from its inception.[[71]](#footnote-72)71 Revocation of a withdrawal, without more, will not breathe life into claims located while the withdrawal was in effect-[[72]](#footnote-73)72 A claim "cannot be located by mere mental operation...."[[73]](#footnote-74)73

The related concept of adoption springs from the 1882 *Noonan* decision by the Supreme Court for the Territory of Dakota-[[74]](#footnote-75)74 In that case, both the plaintiffs and the defendant attempted to locate mining claims on and prior to relinquishment to the United States of land within the Sioux Reservation. After the land was restored to location, the plaintiffs made an additional and supplementary location of their claim and caused certificates of the original claim and location, as well as of the additional and supplementary claim and location, to be recorded in the mining district records. Because these acts were completed before the defendant took any action to validate or perfect his void location, and because no other intervening party had made a valid location before the plaintiffs completed their additional location, the plaintiffs' possessory rights were given protection as of the date that the land was restored to location. The territorial decision held that:

The right of possession to a quartz mining claim depends, after discovery of the vein within the limits of the claim, upon the performance of certain acts of location, and a continuing compliance with the laws of congress, and with the local laws, rules, and regulations not inconsistent with such laws of congress. Such acts, performed while the inhibition of the treaty with the Indians remained in force, were of no avail; but a party *in possession* on the [date of restoration] with the requisite discovery, with the surface boundaries sufficiently marked, with the notice of location posted, and with a disclosed vein of ore could be [sic] *manifesting his adoption of these facts, and subsequently causing a proper record to be made* and performing the amount of labor and making the improvements necessary to hold the claim, date his rights *from that date* and such location and subsequent labor and improvements would give him the right to the possession from the date thereafter.[[75]](#footnote-76)75

In the subsequent case of *Kendall v- San Juan Silver Mining Co*.,[[76]](#footnote-77)76 reliance upon *Noonan* to protect a claim which had been located while the land contained therein was not open to entry proved unjustified. In *Kendall* the plaintiffs opposing a patent application in an adverse lawsuit monumented their boundaries and performed the other acts of location required by statute while the subject lands were within the Ute Indian Reservation. The land in question did not become open for location until April 29, 1874. Thereafter, the defendant's predecessors in interest established a conflicting claim by performing all of the acts of location as of October 29, 1874. On October 14, 1876, the plaintiffs filed an additional certificate of location for their claim.

Both the Colorado Supreme Court and the United States Supreme Court concluded in *Kendall* that the location of the plaintiffs' claim, made when the subject land was not open for location, was null and inoperative to confer any rights upon the plaintiffs. The United States Supreme Court held that not only did the null location establish no rights when made, but also that no such rights could have arisen, even after the land became open for location, until two years later when an additional location certificate was filed. But by that time, the defendant's claim had already been located in full compliance with the law and after restoration of the area. Accordingly, the defendant's claim prevailed.[[77]](#footnote-78)77

Close scrutiny of the *Noonan* and *Kendall* cases makes it clear that they both deal with a relocation or supplementary location of a previously void claim which was made prior to the intervention of any third party rights-[[78]](#footnote-79)78 Apparently on the basis of these holdings, some feel that the technique of adoption can be employed in a mining claim staking rush. Rather than a curative or amendatory technique, here adoption would be used as a device to initiate a claim by erecting monuments and perhaps posting a notice prior to restoration and then adopting these acts effective as of the time and date of revocation. As discussed below, the implications of this strategy must be analyzed in light of the specific attendant legal and factual circumstances.[[79]](#footnote-80)79

**[4]   Cafeteria Style Location**

At least one claimant in an observed but not formally reported mining claim staking rush attempted to combine the two techniques of instantaneous location and adoption. In this particular instance, the effort began with complete corner monumentation on the ground of a group of contiguous mining claims. At the time of revocation, the area in question was entirely re-monumented at the corners (the first set of corner monuments was left in place) and a location notice was posted as quickly as possible. This procedure resulted in the existence of two corner monuments at each position on an interior claim where state law required corner monumentation.

It has been suggested that this and other variations of the same technique will permit the claimant to argue in the alternative. If it appears that the speed of his staking efforts on the day of the revocation were exceeded by the speed of staking efforts by his rivals, he can argue that he adopted pre-existing corner and/or discovery monuments at the precise instant of the revocation. If the speed of his efforts on the date of the revocation appears to have exceeded the speed of his rivals, he can argue that he was the first to erect monumentation at or after the revocation. The final twist of the cafeteria style approach is that a claimant may argue that the monumentation of alternate "columns" of contiguous mining claims within his staking pattern was adopted, while the monumentation on the intervening columns was erected on the date of the revocation. These arguments reflect some doubt about the efficacy of the adoption technique, and appear to be designed to convince rivals that the cafeteria style locator can, regardless of a court's view of the adoption technique, tie up enough of the mineral prospect so that he should be considered seriously in settlement negotiations.

**[5]   Forcing the Issue**

Perhaps the only certain result of a mining claim staking rush is that nothing is certain, particularly the status of title to the lands involved. Significant development expenditures in the face of such yawning title uncertainty exceed even the expectations of an industry so familiar with the concept of risk capital. Various dispute resolution plans have been developed with the design of resolving this uncertainty as quickly and favorably as possible.

One way to force the issue is for a claimant to apply for issuance of mineral patent. A major perceived advantage is the high probability that one or more rivals will overlook the published notice of intention to apply for patent which will appear in the legal notices section of a small circulation local newspaper and thereby lose the right to file an administrative adverse to the patent application in the Department of the Interior. Depending upon the number of rival claimants involved who might subscribe to and carefully read the local newspaper, the publication procedure can reduce the number of participants in settlement negotiations to a manageable level.

As previously discussed, before the publication period expires, at least $500 worth of improvements must be made on each claim subject to an application for patent. This investment might provide the necessary proof of discovery, as against less diligent rivals if not the United States. The cost of the required improvements should be balanced against the relative ease and low expense of the publication procedure as opposed to the time and cost involved in service of a complaint and process on multiple rival claimants in an ordinary lawsuit. It should also be borne in mind that, as opposed to the ordinary case, in an adverse lawsuit no single litigant will bear the burden of proof.

In addition, there is authority to the effect that evidence of discovery will be "frozen" as of the date that an adverse claim is filed in the Department.[[80]](#footnote-81)80 Under these circumstances, a claimant who follows the revocation with rapid completion of the necessary patent improvements and an application for patent may be in a very advantageous position with respect to proof of discovery as opposed to a less diligent rival who waits for the dust to settle in some fashion- The patent applicant may be able to thus minimize a disadvantage in terms of over-all personnel and resources. The probability of accomplishing the same objective through injunctive relief would seem low, since at the inception of a lawsuit of this sort it will normally be difficult to establish either the probability of success on the merits or the possibility of irreperable injury which is not compensable in damages.[[81]](#footnote-82)81

Conversely, the patent application strategy is certainly not without danger. A patent application must be prosecuted with reasonable diligence, or it may be dismissed by the Department.[[82]](#footnote-83)82 In that event, the benefit of the publication procedure is lost-[[83]](#footnote-84)83 This exposure should be evaluated in light of the rapidity with which the Department processes patent applications; in some cases, related administrative proceedings may proceed at a truly glacial pace and, assuming that all rival claims have been resolved, the applicant may make a discovery on lands which remain open that will be sufficient as against the United States at any time prior to the time of the hearing in a governmental contest.[[84]](#footnote-85)84

It should be remembered that the sufficiency of a patent applicant's discovery will be scrutinized by the Department after resolution of any adverse suits, and the related determination by the court in an adverse suit will not be binding upon the Department-[[85]](#footnote-86)85 Different and more stringent rules will be applied.[[86]](#footnote-87)86 If the claims subject to the application are placer claims, the 10-acre mineral in character rule must be satisfied-[[87]](#footnote-88)87

Even if a patent applicant prevails in adverse litigation, he must be prepared to face all of these eventualities. The application can ordinarily be withdrawn before a governmental contest is initiated but, if it is withdrawn, the benefit of the publication procedure will be lost.[[88]](#footnote-89)88 This may not be of controlling importance if all adverse claims have been settled or if parties previously advertised out have abandoned their claims through failure to file the requisite annual claim maintenance evidence-[[89]](#footnote-90)89

In any event, a patent application and the following adverse procedures will at least provide a framework for settlement negotiations which might otherwise be difficult to arrange, due to the multiplicity of rivals or to other factors. Many of the same benefits will flow from an ordinary action to quiet title or seeking ejectment. The chief differences between the two procedural formats seem to be in the difficulty and expense of service of process, the differing burdens of proof, the likelihood of generating formal responses from rivals, and possibly the issues involved.[[90]](#footnote-91)90

**[6]   Selecting and Implementing a Strategy**

A primary step associated with selecting and implementing a particular strategy should be a comprehensive review and analysis of the file on the subject withdrawal which is maintained by the Department of the Interior. In addition to possibly providing guidance with respect to the issue of adoption,[[91]](#footnote-92)91 this file may contain departmental reports and materials which confirm the existence of valuable mineralization in the area in question and knowledge of the same could help a claimant to demonstrate the required discovery-

Another necessary step will be an exhaustive review of location procedures under applicable state law. Any participant in a mining claim staking rush can be virtually assured that his staking procedure will be scrutinized by rivals in the most minute detail. For instance, it has been argued in the context that a claimant's location notice was "off the claim" because it was included in a can on a side of a post which was facing to the exterior rather than the interior of the claim.

The need to acquire administrative permits in connection with the staking program should be considered, in order to avoid either the implication or a finding of trespass against the United States. Regulations applicable to lands managed by the Bureau of Land Management[[92]](#footnote-93)92 do not contain an exception to notice and permitting requirements which is specifically applicable to claim staking programs, but similar regulations which apply to lands managed by the Forest Service do not contain such an exception-[[93]](#footnote-94)93

Geological factors can, of course, have the most significant impact on selection of a staking strategy. All available geologic data should be analyzed carefully. Can control of the withdrawal areas be gained through the doctrine of extralateral rights? Is lode or placer the appropriate form for the claims to be staked?[[94]](#footnote-95)94 Is it possible that lode and placer deposits are mixed?[[95]](#footnote-96)95 Can a staking pattern be developed which will assure an outcrop within each claim? Can the heart of a particular deposit be appropriated with a few mining claims so that marginal areas cannot be economically operated? All these and a host of other geologic implications should be taken into consideration-

Another concern in the planning procedure involves planning for either settlement or litigation. This and other features of the strategy selected may be controlled by a claimant's available technical, legal, and financial resources. Some judgment must be made concerning the amount which will be hazarded in the form of operational and legal expenses in the face of such remarkable title uncertainties. Is settlement a preferable course? If so, how should a framework for settlement be established and what staking strategy will facilitate the claimant's position in settlement? In view of the usual factors considered in selection of a forum, is state or federal court preferable, and is a jury to be preferred over a trial to the court? Can the claimant carry the necessary burden of proof? Is he in a position to respond to all of the potential issues? Last, but not least, in view of the circumstances, what are the equities of the situation?

When implementing the strategy ultimately selected, the most vital factor may be accumulation and preservation of the evidence. Radio pulses are receivable in many areas of the country on short wave radios which signal elapsing seconds toward each hour of the day. When combined with digital timepieces and photographs, the result is strong evidence of performing a particular act at a specific time. The use of claim staker affidavits executed on the date of the revocation in a sort of debriefing procedure can preserve valuable evidence not only of one's own compliance with the law, but the failure of others to comply. The prevailing party may be the party that "shows more substantial compliance with the law and produces the strongest evidence of satisfying all [of] the requirements as to locations."[[96]](#footnote-97)96

**§ 9.05   Selected Issues**

In the vast majority of the reported decisions involving rival mining claimant disputes, one or another rival was clearly senior in terms of either making a location or perfecting a location through discovery. The concept that first in time is first in right is, of course, the lynchpin of an appropriation system. This concept is thoroughly reflected in the structure of the rival mining claimant dispute analytical framework suggested above.

The formal public notice given in connection with a public land withdrawal revocation and the attendant informal radio and newspaper "advertising procedures" which the Bureau of Land Management has sometimes followed result in mining claim staking rush participants ranging all the way from individuals who have never before staked a mining claim to established mining companies with fleets of mining lawyers. Because of the wide disparity in sophistication, planning efforts, and available resources and because the best laid plans of mice and men so often go astray, the analytical framework discussed above might well prove just as useful in the staking rush context as it has been historically. In other words, even in a mining claim staking rush, it might be eventually possible to establish definite and controlling priorities.

On the other hand, a staking rush might include multiple participants with significant experience, resources, and access to legal advice. In an area of high mineral potential, it is quite possible that a court will be faced with a situation where it is unable to definitely allocate certain priorities among competing individuals or entities. If and when such a dilemma occurs, the suggested analytical framework may be expanded to some greater or lesser degree. The following discussion of selected issues is illustrative, not exhaustive.

**[1]   Does the Doctrine of*Pedis Possessio* Have Any Application?**

Widely publicized mining claim staking rushes in areas of high mineral potential are usually closely monitored by local law enforcement agencies. Law enforcement personnel will prevent (and rightfully so) any affirmative efforts to exclude rival claimants except perhaps verbal and written admonitions to "stay off my claim." Experience has shown that such admonitions are totally ignored. Even in the absence of law enforcement agencies, an aura of conviviality rather than hostility seems to develop. Physical violence between rival claimants is eschewed, and would certainly be viewed with a jaundiced eye in the courts.

It is not only possible but almost universally the case that multiple rivals are "occupying" the same parcel of land while diligently (feverishly might be a more accurate description) seeking a discovery. Under these circumstances, it would seem that no such diligent occupant is entitled to any rights under the doctrine of *pedis possessio* as against another such diligent occupant, recognizing that both of them might gain *pedis possessio* rights as against a less enthusiastic participant.[[97]](#footnote-98)97

As between two or more such diligent occupants, utilizing the traditional analytical framework, correlative rights should be determined on the basis of the first rival to couple the notice posting and discovery requirements in states where applicable law permits the locator a specified period within which to mark the boundaries of his claim and record a certificate of location-

**[2]   The Possibility of "Ties"**

Taking the possibilities one step further, we find that the case law is bereft of direct authority in the situation where two diligent rivals, neither of whom was in *pedis possessio*, have been able to establish simultaneous posting at a precise moment. This sort of occurrence is entirely possible in the context of a mining claim staking rush, but the traditional analytical approach still provides an answer. Posting, in and of itself, does not create any rights. Regardless of simultaneous posting, the first locator to make a discovery is protected for the statutory period of time to complete his location.[[98]](#footnote-99)98

A more difficult dispute to resolve would be the situation where two claimants, neither of whom is in *pedis possessio*, posted simultaneously and made a simultaneous discovery in a jurisdiction with an established period of time after posting for completing the other acts of location- Full and appropriate use of the strategies discussed above and the implements of modern technology bring this hypothetical within the realm of possibility. At the risk of sounding repetitive, the observation must again be made that there is no authority which is directly applicable.

Where two claimants simultaneously post and make discoveries, there is no reason to afford either of them any period of protection as against the other for completing the acts of location. Indeed, to do so might result in an impasse. Under these circumstances, it would appear that there is only one additional distinction which can be made. If one of these claimants completes the acts of location within the statutory period and before his rival, the rationale of the "priority" line of decisions could apply. Under this rationale, the first to complete the acts of location would prevail. This would be a departure from the existing "priority" line of authority only to the extent that the holding would be phrased directly, rather than in terms of "liberal construction of the evidence" or a "low burden of proof" applied in favor of a senior locator.

In and of itself, the question of who is or was the first locator to complete the acts of location generates additional new issues, and the answers are elusive. Are the necessary acts of location completed when a location certificate is recorded locally, or only when the location certificate is recorded both locally and in the appropriate office of the Bureau of Land Management? Without resorting to characterizing either or both local and federal recordation as "essential" acts of location,[[99]](#footnote-100)99 it is observed that a claim is conclusively presumed to have been abandoned if it is not recorded with the Bureau of Land Management within 90 days after the date of location-[[100]](#footnote-101)100 In this sense, a location is certainly not "complete" until the required certificate is recorded both locally and with the BLM.

A related issue is the question of "constructive" times of recordation. It can and has been argued that, where several rivals are waiting at either the door of the county clerk and recorder or of the appropriate office of the BLM when the door is opened for business, each claimant's certificate should be endorsed with an identical "constructive" time of recordation. While this proposition has a certain equitable ring, it is just as easily argued that diligence in arriving at a recording office is no different than diligence in making a discovery, and the mining laws reward the diligent.

**[3]   What is Necessary to Establish a Discovery?**

The first requirement of the prudent man rule is actual physical exposure of minerals. There can be no discovery without this element. If mineralization must be sought at depth because it does not outcrop, under the traditional analytical framework, a claimant who has drilled and thereby exposed mineralization is at least in a position to allege a discovery. If no other rival has exposed mineralization, the one who has would necessarily prevail by a preponderance of the evidence.

On the other hand, if the claims of two or more rivals include exposed mineralization, the second element of the prudent man rule must be considered. The question becomes which one will preponderate with respect to assays, cross-sections, or other evidence demonstrating a reasonable prospect of success in developing a valuable mine. In close cases, how far will the court go in evaluating a mass of technical data? Is the "priority" line of cases applicable here?

**[4]   The Question of Adoption**

Depending upon the circumstances, the adoption strategy may raise more questions than it answers. At a primary level, query whether the old cases which bless some form of adoption as a curative or amendatory device in the absence of intervening rights are also authority for the use of adoption as a claim initiation technique in the context of a modern mining claim staking rush. In addition, there is some uncertainty concerning exactly what acts of location can be adopted under any set of circumstances. There is some authority for the adoption of corner monuments[[101]](#footnote-102)101 and a discovery,[[102]](#footnote-103)102 but not a notice of location[[103]](#footnote-104)103 or a location certificate-[[104]](#footnote-105)104 Thus, if adoption is permissible in a mining claim staking rush as a claim initiation technique, the danger may lie in extending its application too far.

With respect to the making of a discovery prior to a revocation followed by adoption thereof, the exploration methods actually utilized may be important. It is well settled that no rights to a mining claim can be initiated in trespass.[[105]](#footnote-106)105 Are surface disturbing activities prior to revocation trespass against the United States?[[106]](#footnote-107)106 Does it make any difference if public notice of a planned revocation has been given?[[107]](#footnote-108)107

It may be possible to shed light on some of these troublesome questions through careful analysis of the statutory authority for a withdrawal- Some delegations of withdrawal authority and other statutes provide a basis for arguing that Congress actually contemplated some sort of mineral activity on withdrawn lands.[[108]](#footnote-109)108 Others do not.[[109]](#footnote-110)109 Many of these withdrawal statutes were repealed in FLPMA and the corresponding regulations were thereafter deleted from the *Code of Federal Regulations*,[[110]](#footnote-111)110 but FLPMA also provides that all "withdrawals, reservations, classifications, and designations in effect as of the date of the approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law-"[[111]](#footnote-112)111

In view of the uncertainties involved, it is suggested that a mining claimant approach the strategy of adoption with caution. Considering the other alternative strategies available, will adoption actually strengthen his position or will it simply provide a convenient point of attack for rivals? In any event, it is fruitless to look to the Department of the Interior for guidance. When these issues were posed to the Department, it responded by observing that: "Appropriation of lands under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation...shall vest no rights against the United States."[[112]](#footnote-113)112

As usual, the Department can be relied upon to reiterate the obvious while avoiding the issue- This is the sort of administrative "guidance" which has been accurately characterized as "so poorly expressed and obfuscatory as to defy assured comprehension even by competent lawyers...."[[113]](#footnote-114)113

**[5]   The Ultimate Dilemma**

The ultimate dilemma would be posed where two claimants, neither of whom are in *pedis possessio*, post simultaneously, make a simultaneous discovery, and complete the acts of location simultaneously. In this situation, again quite possible if rivals employ the advantages of both the law and technology to the full extent, the only apparent solution is a finding of equal rights to the subject lands which might be described as co-tenancy. If it is possible for a jury to rightfully conclude that no rival claimant is entitled to exclusive possession,[[114]](#footnote-115)114 it is no great jump to conclude that two or more claimants are rightfully entitled to possession, even if not exclusive-

**[6]   Issues Related to Placer Claims**

**[a]   Acreage Limitations**

There are particular issues which can arise in connection with the utilization of placer as opposed to lode claims. These issues are related to the placer claim "acreage limitations" established by federal law.[[115]](#footnote-116)115 A discussion of the potential questions here requires summarization of the nature and purpose of the acreage limitations-

An individual locator may stake a placer claim up to but not exceeding 20 acres in size, and a group of locators may "associate" and stake an association placer claim equal in size to 20 acres times the number of locators, provided that the total acreage included within the claim does not exceed 160 acres.[[116]](#footnote-117)116 In addition, the product of the ownership interest (expressed as a fraction) of any co-locator multiplied times the total acreage included within the claim cannot exceed 20 acres- For example, eight co-locators may stake the maximum size 160-acre association placer claim if each co-locator has an equal (1/8th) interest therein.[[117]](#footnote-118)117 For purposes of these acreage limitations, a corporation is treated as an individual.[[118]](#footnote-119)118

Under federal law, an assessment work year begins at noon on September 1, and ends on the same date and at the same time during the following calendar year-[[119]](#footnote-120)119 During each full assessment work year following claim location, the locator must perform at least $100 worth of assessment work "on or for the benefit of" his claim.[[120]](#footnote-121)120 The required amount of assessment work is the same with respect to any placer claim, regardless of its size-[[121]](#footnote-122)121 The reason for the assessment work requirement is to prevent the holding of mining claims without development for purposes of speculation, and to promote diligent development of mineral resources on public lands.[[122]](#footnote-123)122 As stated by the Supreme Court in *Chambers v- Harrington*, the purpose of the assessment work requirement is: "[T]o require every person who asserted an exclusive right to his discovery or claim, to expend something of labor or value on it as evidence of his good faith, and to show that he was not acting on the principle of the dog in the manger."[[123]](#footnote-124)123

The following observation concerning the placer claim acreage limitations appears at page 563 of the first edition (1897) of *Lindley on Mines*:

It is a matter of frequent occurrence, that an individual locator, desiring to obtain more ground than he is permitted under the law to appropriate in his individual capacity by a single location, resorts to the use of "dummies," and perfects locations in their names, *subsequently obtaining conveyances* therefor. The courts have held that this is a fraud upon the government. The same object can be accomplished without violating the law. There is nothing to prevent a miner from locating, by separate location, as many twenty-acre tracts as he pleases, either contiguous or non-contiguous. The right to locate and develop mining ground is not exhausted by a single location, as in the case of pre-emption and homestead entries. *If he...is willing to annually perform labor to the extent required by law upon, or for the benefit of, each*, he is clearly entitled to do so. [Emphasis supplied; footnote deleted.]

Since there is no limitation on the total number of 20-acre placer claims which an individual or a corporation can stake, the purpose of the placer claim acreage limitations cannot be strictly to prevent "monopoly" of the public lands.[[124]](#footnote-125)124 In *St- Louis Smelting and Refining Co. v. Kemp*, the Supreme Court described the derivation and purpose of the acreage limitations as follows:

Previously to the Act of July 9, 1870, 16 Stat. 217, Congress imposed no limitation to the area which might be included in the location of a placer claim. This, as well as every other thing relating to the acquisition and continued possession of a mining claim, was determined by rules and regulations established by miners themselves. Soon after the discovery of gold in California, as is well known, there was an immense immigration of gold seekers into that territory. They spread over the mineral regions and probed the earth in all directions in pursuit of the precious metals. Wherever they went they framed rules prescribing the conditions upon which mining ground might be taken up; in other words, mining claims be located and their continued possession secured. Those rules were so framed as to give all immigrants absolute equality of right and privilege. The extent of ground which each might locate, that is, appropriate to himself, was limited, so that all might, in the homely and expressive language of the day, have an equal chance in the struggle for the wealth there buried in the earth.[[125]](#footnote-126)125

Thus, the chief purpose of the acreage limitations, which are the provisions related to the use of association placer claims, is to give a competitive advantage to associations of individuals with limited resources as opposed to individuals or corporations with greater assets- One way that the advantage is realized is through the minimization of expense associated purely with staking (as opposed to developing) a parcel of land of a given size, but that one-time advantage is minimal, since placer mining claims are taken by legal subdivision of the public land survey system, and federal law and the laws of some states do not even require the corners of a placer claim to be staked.[[126]](#footnote-127)126 Similarly, it has been observed that some advantage is gained through the use of association placer claims because only a single discovery must be made on any claim, regardless of its size.[[127]](#footnote-128)127 However, that advantage is qualified because the "10-acre" or "mineral in character" rule discussed above requires the claimant of an association placer claim to demonstrate not only the single required discovery but also that each 10-acre parcel of the claim is mineral in character-

**[b]   "Dummy" or Accommodation Locators**

Thus, the chief means of realizing the competitive advantage intended by the placer claim acreage limitations is clear. The competitive advantage is that an association of individuals can locate an association placer claim and share the continuing expenses of claim development, including annual assessment work. This competitive advantage is properly described as "qualified" because it is limited by the dummy or accommodation locator doctrine referred to in the quotation above from *Lindley on Mines*. The limitation imposed by the accommodation locator doctrine is that each member of the association must truly share in the ownership of the claim. Otherwise, through the use of accommodation locators, individuals or corporations with unlimited assets could gain the minimization of development expense advantage which Congress intended only for associations of individuals with limited resources. The latter result would frustrate both the purpose of the acreage limitations to give associations of individuals with limited resources a chance to compete in the minerals industry, and the purpose of the assessment work requirement to promote diligent development of the mineral resources on public lands.

The accommodation locator doctrine was and is designed to prevent individuals from decreasing the total amount of required assessment work for a given 160-acre parcel of public land from $800 to $100 by using dummy locators and staking a single 160-acre placer claim rather than eight 20-acre placer claims. Any such device is viewed by the courts as "endeavoring to hold land temporarily for speculation" and acting on the principle of the "dog in the manger."[[128]](#footnote-129)128

The dummy or accommodation locator issue cannot be raised in an ordinary lawsuit between two private parties, since any fraud involved is against the United States and only the United States should be allowed to complain thereof- However, since the United States is a "silent party" and at least tangentially involved in an adverse lawsuit between rival claimants which is generated by a patent application, a party to the adverse lawsuit may raise the issue against the patent applicant "on behalf of" the United States.[[129]](#footnote-130)129 The relationships between the co-locators of an association placer claim will certainly then be the subject of inquiry, and this is particularly true where a corporation is also involved, either as a co-locator or as the holder of development rights to the claim under a lease or some other form of contractual right.

The courts have *never* found an intent to avoid the assessment work requirement or to commit any other sort of fraud against the United States through transfer of an interest in an association placer claim to an individual unless the evidence established three circumstances: (1) the transferor did not retain or reserve any interest in the claim, (2) the transferor was given "nominal" or no consideration for the transfer, and (3) the transfer was made with the intent to vest the transferee with a beneficial interest in the mining claim in excess of the 20 acres permitted by law. All of the accommodation locator cases are consistent in this respect.[[130]](#footnote-131)130 The following finding is illustrative:

The authorities cited by respondents in this regard, have no application to such a situation, but refer to cases where a location is made by so-called "dummy locators," persons who simply loan their names as locators and act simply as the agents or employees of some person or corporation to whom they are to transfer their interest- Our own case of Mitchell v. Cline, 84 Cal. 409, 24 Pac. 164, cited by respondents, is one of such cases. There as said by the court, three of the locators of one claim and five of another were "sham locators," not pretending to have any interest in the claim. "They merely permitted their names to be used as locators to enable their friends to obtain possession of and patent for more mineral land than they were entitled to by law; *and they executed conveyances to such friends without any valuable or lawful consideration therefor*." This was held to be contrary to the policy and object of the United States law limiting the quantity of placer mineral land, which may be located by one person.[[131]](#footnote-132)131

The allegation that a "dummy" or "accommodation locator scheme" exists is an allegation that a fraud has been committed against the United States of America.[[132]](#footnote-133)132 The existence of an accommodation locator fraud is never to be presumed, and whenever it constitutes an element of a cause of action or of a defense which is of an affirmative nature, and invoked as conferring a right against the opposite party, it must be alleged in the pleadings-[[133]](#footnote-134)133 As stated by the court in *Muldoon v. Brown*:

Fraud, when relied upon as a defense, must be specifically pleaded in an answer as well as in a complaint; and the facts and circumstances relied upon should be set out, in order that the court may know whether there was such fraud as will be of avail to the pleader, and also that the party charged with fraud may know the nature of the charge, and be prepared to meet it.[[134]](#footnote-135)134

In the mining claim staking rush, as in other situations, it may be to the advantage of an association of individual claimants who are entitled to the benefits of the mining law with regard to claim size to combine efforts with a corporation having the technical and financial resources necessary to initiate and prosecute mineral development- If and when this combination of forces is accomplished through a mining lease or some other form of contractual vehicle, the principles discussed above should be equally applicable with respect to the contract as they would be with respect to an actual conveyance. Assuming that fair market value is received by the association in the form of lease bonuses, rentals, and royalties, there is certainly no fraud against the United States, and this is true regardless of whether or not the lease or other contract is entered into prior to, at the time of, or after location of the leased claims.

**§ 9.06   Conclusions**

Perhaps it is inappropriate to even include a section called "Conclusions" in the face of so many unresolved legal issues. A distinction can be made, however, between legal conclusions and the practical conclusions which are the objective of the authors.

The authors participated in a lawsuit generated by a mining claim staking rush. The lawsuit was eventually settled, but not before several depositions were taken and the following exchange occurred between opposing counsel and a deponent:

Q:   Did your lawyers ever tell you that you should be the first to do something?

A:   People have been telling me that all of my life.

Perhaps the simple exchange above is the best and most succinct advice that can be given. In view of the potential mineral value involved and your own particular available resources, plan as carefully and be as diligent as possible. Diligence can be more than its own reward.

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1. 1Act of May 10, 1872, ch. 152, 17 Stat. 91, current version at 30 U.S.C. §§ 22-54 (1982). [↑](#footnote-ref-2)
2. 2*E.g*., Tornabene v. Agard, Civ. Action No. 53767, Sup. Ct., Imperial County, California; U.S. Dept. of the Interior, Bureau of Land Management, Wyo. State Office, M. A. 80886. [↑](#footnote-ref-3)
3. 3For a comprehensive treatment of the prior appropriation, reservation, and withdrawal limitations on the right to acquire property rights under the General Mining Law, see L. Mall, *Public Land and Mining Law* Ch. 5, at 107-43 (3d ed. 1981). [↑](#footnote-ref-4)
4. 4The public land withdrawal problem is discussed in Marsh & Sherwood, "Metamorphosis in Mining Law: Federal Legislative and Regulatory Amendment and Supplementation of the General Mining Law Since 1955," 26 *Rocky Mt. Min. L. Inst*. 209, 306-09 (1980). [↑](#footnote-ref-5)
5. 5Pub. L. No. 94-579, 90 Stat. 2743, 2751, 43 U.S.C. § 1714 (1982). [↑](#footnote-ref-6)
6. 647 Fed. Reg. 54557 (1982). *See also* 43 C.F.R. §§ 2370.0-1 through 2374.2 (1983). [↑](#footnote-ref-7)
7. 7*See e.g., Public Lands*, Vol. 7, No. 24, at 7 (Resource Publishing Co., Jan. 20, 1983), which reports that 4.5 million acres were opened for claim location for all minerals during Bureau of Land Management fiscal year 1982 and that 7 million acres were then under consideration for additional openings. [↑](#footnote-ref-8)
8. 8U.S. Dept. of Interior, Bureau of Land Management Instruction Memorandum No. 83-241 (January 11, 1983). [↑](#footnote-ref-9)
9. 9*Id*. [↑](#footnote-ref-10)
10. 10*Id*. [↑](#footnote-ref-11)
11. 1130 U.S.C. § 29 (1982); 43 C.F.R. §§ 3861.7-1, 3862.4 (1983). [↑](#footnote-ref-12)
12. 12*Id*. [↑](#footnote-ref-13)
13. 1330 U.S.C. § 29 (1982); 43 C.F.R. § 3861.2-4 (1983). [↑](#footnote-ref-14)
14. 142 *American Law of Mining* § 9.20 (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-15)
15. 15*Id*. at §§ 9.22-9.27. [↑](#footnote-ref-16)
16. 16*Id*. at §§ 9.13-9.15D. [↑](#footnote-ref-17)
17. 17*Id*. at §§ 9.15A, 9.15D, 9.23. [↑](#footnote-ref-18)
18. 18*Id*. It should be noted that the failure to file a proper adverse in the Department benefits only the patent applicant's claims. For instance, if locators 1, 2, and 3 all claim the same ground, locator 1 files a patent application, and locators 2 and 3 fail to properly adverse, then locators 2 and 3 have lost the right to object to issuance of patent to locator 1 on the basis of their conflicting claims, but locator 2 has not lost the right to object to issuance of patent to locator 3 on the same basis (and vice versa). [↑](#footnote-ref-19)
19. 19*Id*. at § 9.15B. [↑](#footnote-ref-20)
20. 20*Id*. [↑](#footnote-ref-21)
21. 21*Id*. [↑](#footnote-ref-22)
22. 22*Id*. at § 9.16, 9.17. [↑](#footnote-ref-23)
23. 23*Id*. at § 9.16. [↑](#footnote-ref-24)
24. 24*Id*. at § 9.17. [↑](#footnote-ref-25)
25. 25*Id*. [↑](#footnote-ref-26)
26. 26*Id*. [↑](#footnote-ref-27)
27. 27*Id*. at § 9.17; 30 U.S.C. § 32 (1982). [↑](#footnote-ref-28)
28. 28*American Law of Mining* at § 9.16. [↑](#footnote-ref-29)
29. 29*Id*. at § 9.18. [↑](#footnote-ref-30)
30. 30*Id*. In other words, while the court may consider certain evidence of mineral discovery in determining which rival is entitled to possession of the surface area in conflict, it remains for the Department to determine whether the prevailing litigant also has the right to possession of the subsurface or mineral estate as against the United States. If so, patent will issue and the patentee has confirmed his right to "exclusive" possession of the mining claim. See 30 U.S.C. § 26 (1982). [↑](#footnote-ref-31)
31. 31For an explanation of the relationship between federal, state, and local mining district laws and regulations related to the acts of location, see 1 *American Law of Mining* § 5.46 (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-32)
32. 32The doctrine and its vagaries are analyzed in Fiske, "*Pedis Possessio*-Modern Use of an Old Concept," 15 *Rocky Mt. Min. L. Inst*. 181 (1969), and Knutson & Morris, "Locating, Maintaining, and Patenting Groups or Large Blocks of Mining Claims," 26 *Rocky Mt. Min. L. Inst*. 517 (1980). [↑](#footnote-ref-33)
33. 331 *American Law of Mining* § 4.11 (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-34)
34. 34*See, e.g., id*. at § 4.10. [↑](#footnote-ref-35)
35. 35See Knutson & Morris, *supra* note 32, at 550-75. [↑](#footnote-ref-36)
36. 36See Pruitt, *Digest of Mining Claim Laws* (Rocky Mt. Min. L. Fdn., 2d ed. 1981); 1 *American Law of Mining* Tables V-1 through V-17 (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-37)
37. 3730 U.S.C. §§ 26, 35 (1982). [↑](#footnote-ref-38)
38. 381 *American Law of Mining* § 5.48 (Rocky Mt. L. Fdn., 1983). [↑](#footnote-ref-39)
39. 39*See, e.g., id*. at § 5.53. [↑](#footnote-ref-40)
40. 40*Id*. at §§ 5.50A, 5.51A. [↑](#footnote-ref-41)
41. 4130 U.S.C. §§ 23, 35 (1982). [↑](#footnote-ref-42)
42. 42*Id*. at § 23; 1 *American Law of Mining* § 4.91 (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-43)
43. 43*See, e.g*., Laden v. Andrus, 595 F.2d 482 (9th Cir. 1979). [↑](#footnote-ref-44)
44. 442 *American Law of Mining* § 9.14 (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-45)
45. 45*See, e.g*., McCall v. Andrus, 628 F.2d 1185 (9th Cir. 1980), *cert. denied*, 450 U.S. 996 (1981). [↑](#footnote-ref-46)
46. 46MacGuire v. Sturgis, 347 F. Supp. 580 (D. Wyo. 1971). [↑](#footnote-ref-47)
47. 471 *American Law of Mining* §§ 4.45, 4.57-4.66 (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-48)
48. 48*Id*. at § 4.63. [↑](#footnote-ref-49)
49. 49*Id*. at § 4.93. [↑](#footnote-ref-50)
50. 50*Id*. at § 4.65. [↑](#footnote-ref-51)
51. 5130 U.S.C. §§ 26, 28 (1982). [↑](#footnote-ref-52)
52. 52*Id*. § 28; 43 U.S.C. § 1744 (1982). [↑](#footnote-ref-53)
53. 531 *American Law of Mining* §§ 4.19, 4.21, 5.51A (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-54)
54. 54*See* Knutson and Morris, *supra* note 32, at 554. [↑](#footnote-ref-55)
55. 551 *American Law of Mining* §§ 4.7-4.11, 4.36 (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-56)
56. 56*Id*. at §§ 4.22, 7.26-7.33. [↑](#footnote-ref-57)
57. 57*Id*. [↑](#footnote-ref-58)
58. 58*Id*. at § 4.21. [↑](#footnote-ref-59)
59. 59*Id*. at § 4.46 (footnotes deleted; emphasis supplied). [↑](#footnote-ref-60)
60. 60For example, the simplified analytical framework assumes that both rival claimants have properly completed the acts of location within the applicable period of time. Failure to do so significantly alters the outcome. *See, e.g., 1 American Law of Mining* § 4.21 (Rocky Mt. Min. L. Fdn., 1983). In addition, analysis in depth must include consideration of the possibility of "swinging" a mining claim around a posted point of discovery, the doctrines of "relation back" and "intervening rights," the effect of local laws and regulations which do not require posting of a discovery, the rules for "lodes in placers," and other principles which might be applicable in specific circumstances. [↑](#footnote-ref-61)
61. 61For a taste of the complexity of the subject, reference should be made to 1 *American Law of Mining* §§ 4.7-5.97 (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-62)
62. 62See Pruitt, *supra* note 36. [↑](#footnote-ref-63)
63. 631 *American Law of Mining* § 5.65 (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-64)
64. 64Knutson & Morris, *supra* note 32, at 535-42. [↑](#footnote-ref-65)
65. 65*Cf*. Wyo. Stat. § 30-1-103 (1977) *with* Wyo. Stat. § 30-1-110 (1977). [↑](#footnote-ref-66)
66. 661 *American Law of Mining* § 5.49 (Rocky Mt. Min. L. Fdn., 1983); *cf*. Wyo. Stat. § 30-1-103 (1977). [↑](#footnote-ref-67)
67. 67See Knutson & Morris, "Coping with the General Mining Law of 1872 in the 1980's." 16 *Land and Water L. Rev*. 411, 412-19 (1981). [↑](#footnote-ref-68)
68. 68*See, e.g*., ***Kern*** ***Oil*** Co. v. Crawford, 143 Cal. 298, 76 P. 1111 (1903). [↑](#footnote-ref-69)
69. 6930 U.S.C. §§ 35, 36 (1982). [↑](#footnote-ref-70)
70. 70*See, e.g*., Chrisman v. Miller, 197 U.S. 313 (1905); 2 *American Law of Mining* § 9.14 (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-71)
71. 71*See, e.g*., Brown v. Gurney, 201 U.S. 184 (1906), *aff'g* 32 Colo. 472, 77 P. 357 (1904); Belk v. Meagher, 104 U.S. 279 (1881); cf. Amoco Minerals Co., 81 IBLA 23, GFS (MIN) 84 (1984). [↑](#footnote-ref-72)
72. 72*See, e.g*., Kendall v. San Juan Silver Mining Co., 144 U.S. 658 (1892), *aff'd* 9 Colo. 349, 12 P. 198 (1896). [↑](#footnote-ref-73)
73. 73Hagerman v. Thompson, 68 Wyo. 515, 235 P.2d 750, 755 (1951). [↑](#footnote-ref-74)
74. 74Noonan v. Caledonia Gold Mining Co., 3 Dak. 189, 14 N.W. 426 (S. Ct. Dakota Territory 1882), *aff'd* 121 U.S. 393 (1887). [↑](#footnote-ref-75)
75. 75Noonan v. Caledonia Gold Mining Co., 3 Dak. 189, 14 N.W. 426, 430 (1882). [↑](#footnote-ref-76)
76. 76144 U.S. 658 (1892). [↑](#footnote-ref-77)
77. 77*See also* State v. Tracy, 76 Ariz. 7, 257 P.2d 860 (1953). [↑](#footnote-ref-78)
78. 78*See also* Mandel v. Great Lakes ***Oil*** & Chemical Co., 150 Cal. App. 2d 621, 310 P.2d 498 (1957). [↑](#footnote-ref-79)
79. 79*See* 1 *American Law of Mining* §§ 5.49, 5.51A (Rocky Mt. Min. L. Fdn. 1983). [↑](#footnote-ref-80)
80. 80*Id*. at § 4.30. [↑](#footnote-ref-81)
81. 81*See, e.g*., Christensen v. Chromalloy American Corp., 656 P.2d 844 (Nev. 1983). [↑](#footnote-ref-82)
82. 8243 C.F.R. § 3862.6-1 (1983). [↑](#footnote-ref-83)
83. 83*Id*. [↑](#footnote-ref-84)
84. 841 *American Law of Mining* § 4.30 (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-85)
85. 852 *American Law of Mining* § 9.18 (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-86)
86. 86*See* Reeves, "The Origin and Development of the Rules of Discovery," 8 *Land and Water L. Rev*. 1 (1973). [↑](#footnote-ref-87)
87. 871 *American Law of Mining* §§ 4.91-.92 (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-88)
88. 8843 C.F.R. § 3862.6-1 (1983). [↑](#footnote-ref-89)
89. 89*See* 43 U.S.C. § 1744 (1982). [↑](#footnote-ref-90)
90. 90See the discussion of the accommodation locator problem at text accompanying notes 127-34 *infra*. [↑](#footnote-ref-91)
91. 91See the discussion of issues related to adoption at text accompanying notes 101-13 *infra*. [↑](#footnote-ref-92)
92. 9243 C.F.R. §§ 3809.0-1 through 3809.6 (1983). [↑](#footnote-ref-93)
93. 9336 C.F.R. § 228.4(a)(1)(1983). [↑](#footnote-ref-94)
94. 94*See* 30 U.S.C. § 26 (1982). [↑](#footnote-ref-95)
95. 95*See id*. at § 37. [↑](#footnote-ref-96)
96. 96Houck v. Jose, 72 F. Supp. 6, 8 (S.D. Cal. 1947), *aff'd* Jose v. Houck, 171 F.2d 211 (9th Cir. 1948). [↑](#footnote-ref-97)
97. 97*See* Knutson & Morris, *supra* note 32, at 554 ("possession must be exclusive"). [↑](#footnote-ref-98)
98. 981 *American Law of Mining* § 5.50A (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-99)
99. 99*See id*. at §§ 5.72-5.78. [↑](#footnote-ref-100)
100. 10043 U.S.C. § 1744 (1982). [↑](#footnote-ref-101)
101. 101Noonan v. Caledonia Gold Mining Co., 121 U.S. 393 (1887). [↑](#footnote-ref-102)
102. 102*Id.; cf*. 1 *American Law of Mining* §§ 4.14, 4.19, 4.33, 4.35, 5.65 (Rocky Mtn. Min. L. Fdn., 1983). [↑](#footnote-ref-103)
103. 103Kendall v. San Juan Silver Mining Co., 144 U.S. 658 (1892); 1 *American Law of Mining* § 5.15A (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-104)
104. 104Noonan v. Caledonia Gold Mining Co., 121 U.S. 393 (1887). [↑](#footnote-ref-105)
105. 105*See, e.g*., Belk v. Meagher, 104 U.S. 279 (1881); Cowell v. Lammers, 21 F. 200 (C.C.D. Cal. 1884); Phillips v. Brill, 17 Wyo. 26, 95 P. 856 (1908); Dripps v. Allison's Mines Co., 45 Cal. App. 95, 187 P. 448 (1919). [↑](#footnote-ref-106)
106. 106*See, e.g*., 43 C.F.R. § 9239.0-7 (1983). [↑](#footnote-ref-107)
107. 107*See* Samuel Speerstra, 78 IBLA 343, GFS(MIN) 42(1984). [↑](#footnote-ref-108)
108. 108*See, e.g*., 30 U.S.C. §§ 521, 621-625 (1982); 43 U.S.C. § 142 (1982); 30 U.S.C. § 193 (1982). [↑](#footnote-ref-109)
109. 109*See, e.g*., 43 U.S.C. § 416 (1982); 43 C.F.R. § 2322.1-1 (1980). [↑](#footnote-ref-110)
110. 11043 U.S.C. § 1701 (1982). [↑](#footnote-ref-111)
111. 111*Id*. [↑](#footnote-ref-112)
112. 112U.S. Dep't of the Interior, Bureau of Land Management Instruction Memorandum No. 83-241 (January 11, 1983). [↑](#footnote-ref-113)
113. 113Alaskamin Co., 49 IBLA 49A, at 2 (1981), GFS(MIN) 174(1980); *cf*. 30 U.S.C. § 53(1982); 2 *American Law of Mining* § 9.13 (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-114)
114. 114See 2 *American Law of Mining* § 9.17 (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-115)
115. 115*See* 1 *American Law of Mining* §§ 4.91-.92 (Rocky Mt. Min. L. Fdn., 1983). [↑](#footnote-ref-116)
116. 11630 U.S.C. §§ 35, 36 (1982). [↑](#footnote-ref-117)
117. 117*Id*.; 43 C.F.R. § 3842.1 (1983). [↑](#footnote-ref-118)
118. 118*See, e.g*., United States v. Toole, 224 F. Supp. 440 (D. Mont. 1963). [↑](#footnote-ref-119)
119. 11930 U.S.C. § 28 (1982). [↑](#footnote-ref-120)
120. 120*Id*. at §§ 28, 35. [↑](#footnote-ref-121)
121. 121*Id*.; Union ***Oil*** Co. of California v. Smith, 249 U.S. 337, 350 (1919). [↑](#footnote-ref-122)
122. 122Fiske, "Character of the Labor or Improvements," *Annual Assessment Work* (Rocky Mt. Min. L. Fdn., 2-1, 2-11 through 2-15 (1972). [↑](#footnote-ref-123)
123. 123111 U.S. 350, 353 (1919). [↑](#footnote-ref-124)
124. 124*See, e.g*., St. Louis Smelting and Refining Co. v. Kemp, 104 U.S. 636 (1882). [↑](#footnote-ref-125)
125. 125*Id*. at 649-50. [↑](#footnote-ref-126)
126. 126*See, e.g*., 30 U.S.C. § 35 (1982); ***Kern*** ***Oil*** Co. v. Crawford, 143 Cal. 298, 76 P. 1111 (1903). [↑](#footnote-ref-127)
127. 127*See, e.g*., United States v. Thirty-Two ***Oil*** Co., 242 F. 730, 736 (S.D. Cal. 1917). [↑](#footnote-ref-128)
128. 128*Id*. at 736. [↑](#footnote-ref-129)
129. 129*See, e.g*., Riverside Sand & Cement Co. v. Hardwick, 16 N.M. 479, 120 P. 323 (1911). [↑](#footnote-ref-130)
130. 130*See, e.g*., Chanslor-Canfield Midway ***Oil*** Co. v. United States, 266 F. 145 (9th Cir. 1920); United States v. Toole, 224 F. Supp. 440 (D. Mont. 1963); United States v. Brookshire ***Oil*** Co., 242 F. 718 (S.D. Cal. 1917); Borgwardt v. McKittrick ***Oil*** Co., 164 Cal. 650, 130 P. 417 (1913); Durant v. Corbin, 94 F. 382 (D. Wash. 1899); Mitchell v. Cline, 84 Cal. 409, 24 P. 164 (1890). [↑](#footnote-ref-131)
131. 131Borgwardt v. McKittrick ***Oil*** Co., 164 Cal. 650, 180 P.417, 419 (1913). [↑](#footnote-ref-132)
132. 132Hall v. McKinnon, 193 F. 572, 581 (9th Cir. 1911); Parker v. Belle Fourche Bentonite Products Co., 64 Wyo. 269, 291, 189 P.2d 882, 890 (1948); Chittim v. Belle Fourche Bentonite Products Co., 60 Wyo. 235, 256-57, 149 P.2d 142, 148 (1944). [↑](#footnote-ref-133)
133. 133Hall v. McKinnon, 193 F. 572, 581 (9th Cir. 1911), quoting with approval from Wetherly v. Straus, 93 Cal. 283, 286, 28 P. 1045, 1046 (1892); Fed. R. Civ. P. 9(b). [↑](#footnote-ref-134)
134. 13421 Utah 121, 59 P. 720 (1899). [↑](#footnote-ref-135)