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Wide Pattern Pedis Possessio: The Expansion of Prediscovery Mineral Claim Protection in New Mexico

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NOTES

WIDE PATTERN *PEDIS POSSESSIO:* THE EXPANSION OF PREDISCOVERY MINERAL CLAIM PROTECTION IN NEW MEXICO

MINING LAW: Historically, pre-mineral discovery possessory rights to mining claims on federal and state land have been protected only on claims actually occupied by a mineral locator. Current mining practices call for expansion of prediscovery possessory protection to constructively occupied block claims to encourage mineral development.

Through the Mining Law of 1872,[1] the federal government created a uniform procedure for acquiring rights to hard minerals on federal public land. Since 1872, Congress has made few amendments to the Mining Law itself, choosing instead to enshroud the Law with environmental legislation aimed at protecting the public interest in federal lands. The procedure adopted under the 1872 Law thus generally remains intact. This procedure is actually a codification of the local rules developed in California during the Gold Rush era. These local rules, in turn, had their roots in various European mining laws and customs.

The federal mining laws are supplemented by state laws and local customs.[2] The local customs achieve standing equal to that of legislation through judicial recognition. An example of a local custom which was recognized and dealt with by the judiciary is prediscovery exploration of potential mining claims. The Mining Law of 1872 does not address prediscovery possessory protection of mining claims. *Pedis possessio*[3] is the judicial remedy adopted to deal with the problems arising from the prediscovery exploration customary among hard rock miners. Since its first application to American mining law, *pedis possessio* has achieved the status of legislation without formal codification. The mining industry has come to rely on the doctrine to protect interests in mining claims before actual discovery of valuable minerals. Hard rock mining practices and techniques have changed since the doctrine's first application in America. Single claim, pick-and-shovel miners have been replaced by multi-claim, multi-state mining companies. Similarly, the minerals gen-

1. Mining Law of 1872, ch. 152, 17 Stat. 91 (1872) (codified as amended at 30 U.S.C. §§ 21-54 (1976)).

2. 30 U.S.C. § 28 (1976).

3. *Pedis Possessio* literally means a foothold. BLACK'S LAW DICTIONARY 1019 (rev. 5th ed. 1979).

erating industry activity include not only gold and silver, but uranium and copper as well.

These changes raise the issue of whether the *pedis possessio* doctrine should be amended to accommodate the current needs of the mining industry. Two recent cases stand in contrast to the majority of cases addressing this issue. *MacGuire v. Sturgis*[4] and *Continental Oil Co. v. Natrona Service, Inc.*[5] both adopt wide pattern *pedis possessio*. This expansion allows mineral locators to maintain exclusive possession of large groups of contiguous claims even though they have not made a mineral discovery and are doing actual discovery work on fewer than all the claims. Under its traditional application, *pedis possessio* does not provide protection for a group of claims when not all of the claims are undergoing discovery operations. *Geomet Exploration v. Lucky Mc Uranium Corp.*[6] is the most recent case that rejects this expansion and maintains the original limits of the doctrine. New Mexico, cited in *Geomet* as following the majority, has never squarely addressed the issue. Proponents on both sides of the question present strong policy arguments supporting their respective positions. Underlying the substantive question of the propriety of amending the doctrine is the fundamental issue of power. Which branch of the government should amend a judicially imposed doctrine, the legislature or the courts?

I. THE DOCTRINE OF *PEDIS POSSESSIO*

Under the Mining Law of 1872, a mineral locator must file a location notice after he has made a discovery of minerals in place on his claim.[7] A mineral discovery is essential to create valid rights to the minerals or initiate title against the United States.[8] The requirements of a valid location are set out in the Mining Law and include placing of monuments at the corners of the claims, distinctly marking the claim's boundaries, and filing a record of the claim with the locator's name, the date of location, and a description of the claim.[9] Once the miner makes a valid location his rights to the claim are protected against entry by subsequent locators. This protection is subject to compliance with post-discovery, annual labor requirements. The locator must file yearly affidavits verifying he has performed $100 worth of labor on the claim during the past year.[10] This

4. 347 F. Supp. 580 (D. Wyo. 1971).

5. 588 F.2d 792 (10th Cir. 1978).

6. 124 Ariz. 55, 601 P.2d 1339 (1979), *cert. granted*, 447 U.S. 920, *cert. dismissed*, 448 U.S. 917 (1980).

7. 30 U.S.C. § 23 (1976).

8. Union Oil Co. of California v. Smith, 249 U.S. 337, 346 (1919).

9. 30 U.S.C. § 28 (1976). This notice is filed in the county clerk's office of the county in which the claim is located. N.M. STAT. ANN. § 69-3-1 (Supp. 1983).

10. 30 U.S.C. § 28 (1976).

affidavit functions as notice to other potential locators that the claim is still being worked.

Underlying these location requirements is the general policy of the Mining Law. The federal government wanted to encourage orderly development of the nation's minerals. A right of entry to public lands is essential to the foundation of this orderly development.[11] A mineral locator may enter and explore for minerals on any federal public land open to mineral location and not previously located or otherwise utilized by the federal government. The procedure for acquiring rights under the Mining Law is relatively simple, but the locator must be diligent in developing the minerals in order to maintain his rights and establish his mineral claim.

The New Mexico Mining Law[12] creates a procedure for acquiring rights on state public lands which basically parallels the federal law. Mineral locators must place monuments at the corners of the claim so that the boundaries may be readily traced, post a written notice on the claim stating intent to locate, and file notice identifying the locators and describing the claim.[13] The important difference between the New Mexico and federal laws is the pre-location discovery requirement. Prior to 1981, New Mexico law required a discovery of valuable minerals within 90 days after the location of the claim.[14] In 1981, the New Mexico legislature repealed the 90 day grace period for discovery. A mineral locator must still make a discovery of valuable minerals under New Mexico law to secure his claim, but the locator may validly file the location notice before he has made an actual discovery. New Mexico law thus acknowledges the customary practice among miners of locating and then securing discovery. *Pedis possessio* applies to protect interests arising from this practice. The federal law contemplates discovery of minerals prior to filing a location notice,[15] but federal courts do apply the doctrine of *pedis possessio*.[16]

Union Oil of California v. Smith[17] is generally cited as the leading case in the application of *pedis possessio* to American mining law. *Union Oil* actually involved a claim to public land bearing oil, but the court's language is broadly interpreted to apply to hard rock minerals as well. The rule articulated by the court is,

11. Ranchers Exploration and Development Co. v. Anaconda Co., 248 F. Supp. 708, 722 (C.D. Utah 1965).
12. N.M. STAT. ANN. §§ 69-3-1 to 69-3-32 (1978).
13. N.M. STAT. ANN. § 69-3-1 (Supp. 1983).
14. N.M. STAT. ANN. § 69-3-4 (1978) (repealed 1981).
15. 30 U.S.C. § 23 (1976).
16. *Union Oil*, 249 U.S. 337.
17. *Id.*

> 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 a discovery, is entitled—at least for a reasonable time—to be protected against forcible, fraudulent and clandestine intrusions upon his possession.[18]

The court goes on to state that, "while discovery is the indispensable fact . . . discovery may follow after location and give validity to the claim as of the time of discovery, provided no rights of third parties have intervened."[19] The reasoning behind the adoption of this rule is that "as a practical matter, exploration must precede the discovery of minerals, and some occupation of the land ordinarily is necessary for adequate and systematic exploration."[20] Legal recognition and protection of the miner's *pedis possessio* rights is therefore necessary.[21]

The *Union Oil* court sought to fill the gap between the actual mining practice of posting notice of a claim before discovery of minerals and the statutory procedure of discovering minerals in place before location notices are posted. Mining practices have since changed, creating an even broader gap between the modern development practices and the *Union Oil* court's solution. Congress has impliedly sanctioned judicial adoption of *pedis possessio* by allowing the doctrine to be shaped and regulated at the local level.[22] Application of *pedis possessio* extends possessory protection to the prediscovery exploration phase of mineral development and thereby lessens the locator's risk of loss. This protection, of course, is contingent upon meeting the requirements of *pedis possessio.*

The requirements announced in *Union Oil* are actual occupation, diligent work towards discovery, and exclusion of others. Actual occupation is the element that most directly bears upon the expansion of the doctrine to wide pattern or group claim exploration. The *Union Oil* court declined to extend the narrow historical meaning of actual occupation.[23] Since *Union Oil,* however, the meaning of actual occupation has been extended from the area literally touched by the locator to the boundaries of the located claim.[24] The rule adopted from *Union Oil* is "continued actual occupancy."[25]

Diligent work towards discovery is required because the purpose behind opening the public lands to mineral exploration is to encourage devel-

18. *Id.* at 346.
19. *Id.* at 347.
20. *Id.* at 346.
21. *Id.*
22. 30 U.S.C. § 28 (1976).
23. 249 U.S. at 348.
24. *See* Adams v. Benedict, 64 N.M. 234, 248, 327 P.2d 308, 318 (1958). The size of mining claims is statutorially set. 30 U.S.C. § 23 (1976).
25. 249 U.S. at 348.

opment of the nation's minerals. Through this requirement, courts ensure the sincerity of a locator before extending legal protection to his mineral claim. This requirement, like the actual occupancy requirement, poses a barrier to wide pattern *pedis possessio*. Some courts view wide pattern *pedis possessio* as an invitation to hold large tracts of public land without the requisite diligence necessary to properly develop the minerals.[26]

Finally, the locator must exclude other potential locators from his claim in order to qualify for *pedis possessio* protection. The feasibility of meeting this requirement where a large group of claims is being held creates yet another barrier to expansion of the *pedis possessio* doctrine.

A locator who has met the requirements as set out in *Union Oil* is entitled to exclusive possession of the mineral claim while exploring for minerals. During this exploration period, the locator is in the position of a licensee or tenant at will.[27] The locator's possession is protected against subsequent locators who enter through forceful, fraudulent and clandestine means. If the subsequent locator is allowed to enter peacefully, the prior locator has failed to exclude others from his claim and is therefore not entitled to *pedis possessio* protection.

Adams v. Benedict[28] furnishes examples of both peaceful and forceful entries. Plaintiff Adams was the senior locator of a large group of claims. Defendant Benedict moved drilling equipment onto one of Adams' claims and began drilling. When Adams attempted to reenter the claim staked by Benedict, Benedict "vigorously protested" and resisted entry by Adams' bulldozer.[29] The court ruled that Adams' lack of resistance made Benedict's a peaceful entry, but Benedict's "50 foot ride" on the front of Adams' bulldozer[30] made Adams' reentry forceful, fraudulent and clandestine.[31] Benedict therefore was entitled to exclusive possession of the claim through application of *pedis possessio*.[32]

In *Kanab Uranium Corp. v. Consolidated Uranium Mines*[33] the Tenth Circuit Court of Appeals extended *pedis possessio* to protect against peaceful entry by a subsequent locator. The defendant in *Kanab* admitted that the plaintiff had filed notices of location, but argued that the plaintiff's failure to maintain actual possession of the mining claims made the de-

26. *See Ranchers*, 248 F. Supp. 708; *Geomet*, 601 P.2d 1339.
27. Cole v. Ralph, 252 U.S. 286, 294 (1920), *cited in Adams*, 64 N.M. at 246, 327 P.2d at 317.
28. 64 N.M. 234, 327 P.2d 308 (1958).
29. *Id.* at 240, 327 P.2d at 312.
30. Benedict resisted Adams' reentry by standing in front of Adams' bulldozer. "The bulldozer was started up and carried Mr. Benedict along for some 25 to 50 yards, when it stopped." Benedict was then removed from the bulldozer. *Id.* at 240, 327 P.2d at 312.
31. *Id.* at 247, 327 P.2d at 317.
32. *Id.* at 250, 327 P.2d at 319.
33. 227 F.2d 434 (10th Cir. 1955).

fendant's entry peaceful.[34] The court acknowledged the facts claimed by the defendant, but ruled that the defendant was in "no position to attack the validity of (plaintiff's) title to its mining claims" because the defendant had no valid title to the mining claims.[35] "[I]t is the law without exception that in all actions to recover possession of land or an interest therein one must prevail upon the strength of his own title and not on the weakness of his adversary's title."[36] The senior locator need only "comply" with the law to protect his possession against even a peaceful enterer.[37] By "comply" with the law the court apparently meant statutory mining law because the plaintiff had not actually possessed the claim as required for *pedis possessio* protection.

The *Kanab* decision has been criticized as an unwarranted expansion of *pedis possessio*. In *Ranchers Exploration and Development Co. v. Anaconda Co.*[38] the federal district court in Utah stated the rule of property applied in *Kanab* is not appropriate to mining claims because the right of entry claimed by a subsequent locator is the essential foundation of the "orderly and just development of the mineral resources" on public lands.[39] The *Ranchers* opinion is an example of the reluctance of the courts to extend the *pedis possessio* doctrine beyond the limits established by *Union Oil*. Despite the need for modification created by the changes in mineral location and development techniques, only two cases, *MacGuire v. Strugis*[40] and *Continental Oil v. Natrona*,[41] oppose this strict line interpretation.

II. EXPANSION OF *PEDIS POSSESSIO* PROTECTION TO GROUP CLAIMS

The *pedis possessio* rule currently applied by the majority of courts prohibits a mineral locator in the prediscovery stage from using his actual occupancy on one claim in the group to maintain exclusive possession over the entire group.[42] These courts rely on the statement of the *pedis possessio* doctrine in *Union Oil*. The *Ranchers* case is typical of the majority position.

In *Ranchers*, the court discusses the doctrine of *pedis possessio* at great length, but the language concerning wide pattern *pedis possessio* is dicta. The defendant senior locator in *Ranchers* argued for application of wide

34. *Id.* at 436.
35. *Id.*
36. *Id.*
37. *Id.* at 437.
38. 248 F. Supp. 708.
39. *Id.* at 722.
40. 347 F. Supp. 580.
41. 588 F.2d 792.
42. *See, Ranchers*, 248 F. Supp. at 721; *Geomet*, 601 P.2d at 1341.

pattern *pedis possessio,* but failed to prove even the elements necessary to protect one claim under the established doctrine. Defendants were not in actual possession nor were they diligently working any of the claims examined by the court.[43] Since the defendants could not prove that the *pedis possessio* requirements were met, the court's discussion of wide pattern *pedis possessio* is unnecessary to its holding. The *Ranchers* court cites *Union Oil* as supporting their refusal to expand *pedis possessio. Union Oil* made a clear distinction between rights before and after discovery. After discovery, constructive possession is sufficient, but prediscovery exploration requires actual possession of the claim.[44] The *Ranchers* court noted that, while "modern conditions may make [it] desirable" to allow locators to hold substantial areas, a change is not within the court's province.[45]

The New Mexico case on point, *Adams v. Benedict,*[46] similarly deals with wide pattern *pedis possessio* in dicta. Both parties asserted rights to several contiguous claims, but the possession of only one claim was actually litigated. The court found defendant Benedict's entry onto the claim to be peaceful and plaintiff Adams' reentry to be forcible. As a result, the court held for Benedict under the doctrine of *pedis possessio.* Prediscovery possession is protected only against forcible entry by subsequent locators.

Adams also argued that his possession was protected by his actual occupation of and work on other claims. In rejecting this argument, the court stated that actual possession of each claim was required prior to a mineral discovery in order to create possessory rights on an individual claim.[47] Since, however, Benedict's entry was peaceful, the court's rejection of Adams' wide pattern argument is unnecessary to the holding and thus should be regarded only as dicta. *Adams* has been cited as requiring actual possession and rejecting wide pattern *pedis possessio.*[48] Considering the nature of the *Adams* holding and the fact that there have been no New Mexico cases interpreting or applying *Adams,* the accuracy of this citation is questionable. The correct statement of the *Adams* holding is that prediscovery rights to a single claim are protected only against forcible entry. Any expansion of the holding beyond this limit misrepresents the issue which was actually before the court.

The most recent rejection of wide pattern *pedis possessio* is in *Geomet*

43. 248 F. Supp. at 724.
44. *Id.* at 723.
45. *Id.* at 724.
46. 64 N.M. 234, 327 P.2d 308 (1958).
47. *Id.* at 247, 327 P.2d at 317.
48. 601 P.2d at 1342.

Exploration v. Lucky Mc Uranium Corp.[49] This 1979 Arizona Supreme Court decision squarely addresses the issue of expanding *pedis possessio*. In *Geomet*, the court held that the doctrine requires actual possession of each claim to protect prediscovery possession of a block of claims. Defendant Geomet entered one of several claims held, but not actually occupied by, plaintiff, Lucky Mc. The court rejected Lucky Mc's argument that actual possession of only some individual claims was enough to gain exclusive possessory rights to a large block of claims. The court instead preferred to keep the *pedis possessio* doctrine "intact." The court reasoned that requiring actual possession of all claims encourages those locators who are "prepared to demonstrate their sincerity and tenacity in the pursuit of valuable minerals."[50] Encouraging sincere locators is the policy behind opening the public domain to mineral exploration and location.[51]

The United States Supreme Court granted certiorari in the *Geomet* case,[52] but the parties settled before arguments were heard. The Court's decision to hear the case indicates the Court did not view the issue as being foreclosed by *Union Oil*. Possibly the Court viewed *Geomet* as the vehicle by which *pedis possessio* could be broadened to deal with the current needs of the mining industry. By granting certiorari, the Court raised doubts about the continued viability of the *pedis possessio* doctrine as developed from *Union Oil*. These doubts have been articulated in the arguments made in favor of wide pattern *pedis possessio*.

Legal writers in favor of broadening the doctrine argue that current mining procedures and minerals of interest require the staking of large areas of land in order to make development economical.[53] Uranium is a prime example of a mineral which can be produced economically only through the development of a large tract of claims. Usually, uranium is beneath thick layers of overburden.[54] Surface "hotspots" lead locators to stake large areas because the real "bonanza" may lie some distance from the hotspot.[55] As soon as a discovery is made public, other locators, hoping to capitalize on the original locator's find, rush in to stake surrounding land.[56] Wide pattern *pedis possessio* would protect the predis-

49. *Id.* at 1339.
50. *Id.* at 1342.
51. *Id.*
52. Lucky Mc Uranium Corp. v. Geomet Exploration Ltd., 447 U.S. 920 (1980).
53. *See* Fiske, *Pedis Possessio: Modern Use of an Old Concept*, 15 ROCKY MTN. MIN. L. INST. 181 (1969); Forman, Dwyer, and Cox, *Judicial Uncertainties in Applying Mining Doctrine of "Pedis Possessio,"* 3 NAT. RES. LAW. 467 (1970).
54. Smaller v. Leach, 136 Colo. 297, 316 P.2d 1030, 1036 (1957), *cert. denied*, 356 U.S. 936 (1958).
55. *Id.*
56. *Id.*

covery rights of modern group claim locators and would thus encourage the mineral exploration that can be done economically only through block claims.[57]

An additional argument for wide pattern *pedis possessio* focuses on the fact that the current doctrine is already expanded beyond *pedis possessio*'s historical limits. Originally, *pedis possessio* protected only that land on which the claimant had an actual "foothold." Since *Union Oil,* this protection had been expanded to the legally authorized boundaries of the mineral claim.[58] The next step logically following from this expansion is the extension of protection to a legally located block of claims. Again, this extension would encourage exploration by increasing the locator's possessory rights and thus reducing his risks. The inadequate protection afforded locators under the current doctrine serves to discourage mineral development.[59] Arguably then, the current doctrine frustrates the policy behind the Mining Law of 1872.

The primary argument voiced by those courts rejecting wide pattern *pedis possessio* is that the expansion would encourage locators to hold large tracts without requiring diligent exploration. The two courts that adopted wide pattern *pedis possessio* dealt with this argument by limiting the protection afforded group claim locators. These limitations are intended to ensure the sincerity of those staking large groups of claims.

In *MacGuire v. Strugis*[60] a federal district court in Wyoming held that MacGuire was entitled to exclusive possession of all claims within a contiguous group even though he did not actually occupy all the claims. While the court states that MacGuire completed "discovery" work on all of his claims,[61] the court apparently was referring to the statutory location requirements. If MacGuire had completed discoveries on every claim, *pedis possessio* would not have been applicable.

The court in *MacGuire* set out guidelines for the application of wide pattern *pedis possessio*. These guidelines require that, (1) the geology of the area claimed is similar and the size of the area is reasonable; (2) the statutory location requirements are met; (3) an overall work program is in effect for the area; (4) the work program is being diligently pursued, i.e., "a significant number of exploratory holes have been systematically drilled"; and (5) the nature of the mineral claim and the cost of development make it economically impractical to develop the mineral if the locator is awarded only those claims which he is actually occupying and

57. *See* Olson, *New Frontiers in Pedis Possessio: MacGuire v. Sturgis,* 7 LAND & WATER L. REV. 367 (1972).

58. *See, e.g., Adams,* 64 N.M. 234, 327 P.2d 308 and *Kanab,* 227 F.2d 434.

59. Fiske, *supra* note 53, at 211.

60. 347 F. Supp. 580 (D. Wyo. 1971).

61. *Id.* at 582.

currently working.[62] A locator meeting these requirements is entitled to exclusive possession of the area covered by the block of claims as long as he or his successor "remain in possession thereof, working diligently towards a discovery."[63]

The court found MacGuire had met the requirements. His overall exploration program[64] substituted for the traditional actual occupancy requirement, he excluded other locators from his claims, and he was working diligently towards discovery. The facts surrounding MacGuire's claim present the strongest argument to be made for wide pattern *pedis possessio*. There was no evidence MacGuire was monopolizing a large tract for speculative purposes; rather, the evidence indicated MacGuire's locations and exploration were carried out with diligence and in good faith.

In *Continental Oil v. Natrona*,[65] the Tenth Circuit Court of Appeals approved and applied the guidelines set out by the *MacGuire* court. The Court of Appeals stated that *Union Oil* should not be read to require continuing occupation of each claim. Instead, a locator must only comply substantially with the "element of possession and working."[66] This ruling clears the way for the court's application of wide pattern *pedis possessio*. The plaintiff-locator, however, failed to prove substantial compliance with the possession and work requirements. The locator did not diligently carry out the location and validation work. The court found that evidence introduced at trial showing that the locator's discovery holes and monuments did not comply with statutory requirements was adequate to support the jury's verdict against the locator.[67] In addition, the court was not convinced that the locator had an overall work program for the area. The evidence indicated to the court that the locator was not making a good faith effort to pursue the exploration and satisfy the statutory requirements.[68]

The *Continental Oil* decision demonstrates that wide pattern *pedis possessio* can be limited to prevent the monopolistic practices that the majority of courts fear will be encouraged by expanding the doctrine. Under *MacGuire* and *Continental Oil* the locator must prove he is diligently

62. *Id.* at 584.
63. *Id.* at 585.
64. MacGuire's exploration program included exploratory drilling of 150 holes on claims adjacent to and within the blocks of claims in question, an on-the-ground systematic pattern of deep exploratory drilling, and on-site and laboratory examintion and evaluation of well cuttings. In addition, MacGuire and his successor in interest maintained trailers, cooking facilities, and a field laboratory on the claims during exploration. Work ceased only when the ground conditions made it too difficult to continue. *Id.* at 583.
65. 588 F.2d 792 (10th Cir. 1978).
66. *Id.* at 797.
67. *Id.* at 799.
68. *Id.* at 798–99.

exploring the entire block claim before his rights to the area will be protected. The locator's development program must be sufficient to demonstrate his interest and sincerity in developing the claims. The facts of each case will determine whether wide pattern *pedis possessio* protection is appropriate.

The obvious barrier to New Mexico's adoption of wide pattern *pedis possessio* is the *Adams* case. As discussed above, however, the *Adams* court's rejection of the constructive possession argument is unnecessary to its final holding. The controlling issue was whether Benedict's entry was forcible, fraudulent and clandestine. Thus, the weight to be accorded the language rejecting wide pattern *pedis possessio* is still unclear. If a case with facts like those in *MacGuire* were presented to the New Mexico court, there would be a strong argument for distinguishing *Adams*. There are no facts reported in *Adams* which indicate diligence on the senior locator's part in developing the entire block he claimed. Similarly, there is no evidence suggesting Adams was pursuing an overall development program. These two elements—diligence and overall development plan—are essential requirements for protecting block claims under the wide pattern *pedis possessio* theory adopted in *MacGuire*.

Geomet likewise could be distinguished on factual grounds from a case with facts similar to those in *MacGuire*. There is no indication from the *Geomet* opinion that the senior locator had an overall development plan or that he was diligent in exploring the entire area he claimed. Again, the facts in *MacGuire* represent the strongest argument to be made for expanding the *pedis possessio* doctrine.

New Mexico's statutory law does not prohibit application of wide pattern *pedis possessio* or require actual possession of each mining claim. Limitations of this type have never been a part of New Mexico or federal mining law. Therefore, the question is not whether the current mining statutes permit wide pattern *pedis possessio*, but whether this expansion of the doctrine should be legislatively or judicially made.

Pedis possessio is a judicial addition to the federal mining laws. The courts adopted this doctrine in recognition of the customary practice among hard rock miners of locating claims before actual mineral discoveries are made.[69] The Mining Law of 1872 does not address prediscovery possessory rights on located claims. To date, Congress has rejected bills presented with specific proposals for prediscovery protection. The mining industry does not favor a legislative solution to the prediscovery possession problem because the industry does not want Congress to impose

69. *See Union Oil*, 249 U.S. at 346.

another set of rules on the already complex statutory mining law structure.[70]

MacGuire provides a meaningful set of judicial guidelines for wide pattern *pedis possessio*.[71] The court conditioned the extension of protection on the continued satisfaction of these guidelines. This judicial solution allows for a claim-by-claim resolution and thereby enables the court to prevent monopolistic and speculative mineral claim location practices. Aside from *MacGuire*, however, the courts have been reluctant to take on the task of revising *pedis possessio*. The *Ranchers* decision is an example of this reluctance. The Utah federal district court was unwilling to liberalize the *pedis possessio* doctrine in the absence of Congressional action.[72] The *Kanab* decision, on the other hand, demonstrates the problems that arise when the courts attempt to apply property rules that are contrary to the purposes behind the federal and state mining laws.

A solution to the question of whether wide pattern *pedis possessio* should be judicially or legislatively adopted may lie in determining the propriety of having a uniform rule. Obviously, a uniform legislative rule would make the development process easier for large, multi-state develoeprs. A case-by-case determination, however, allows the courts to evaluate the merits of each claim and thereby prevent monopolistic mineral claim locations. Regardless of which branch ultimately expands the doctrine, there must be practical limits on prediscovery protection of block claims.

Apart from the question of which branch should expand the doctrine is the issue of whether the change should be made at the state or federal level. Under the Mining Law of 1872, states are empowered to enact mining laws which are not contrary to the federal laws.[73] Since the federal law does not deal with prediscovery possessory rights, state laws protecting these rights cannot be contrary. Expansion of the *pedis possessio* doctrine would simply acknowledge a practice that is already customary among mineral developers, especially uranium developers.[74] Again, the need for a nationally uniform rule may be the deciding factor in choosing between state and federal law.

In New Mexico, legislative adoption of wide pattern *pedis possessio* would be comparable to abolishing the discovery hole requirement[75] in

70. Ladendorff, *Enlarging Prediscovery Rights of Mineral Locators*, 6 ROCKY MTN. MIN. L. INST. 1, 22 (1961).

71. Olson, *supra* note 57, at 380. *But see*, Comments, *The General Mining Law and the Doctrine of Pedis Possessio: The Case for Congressional Action*, 49 U. CHI. L. REV. 1026 (1982) for a discussion of the problems with the *MacGuire* decision and a proposed legislative solution.

72. *See Ranchers*, 248 F. Supp. at 724.

73. 30 U.S.C. § 28 (1976).

74. *See generally, Smaller*, 316 P.2d at 1036.

75. N.M. STAT. ANN. § 69-3-4 (1978) (repealed 1981).

that wide pattern *pedis possessio* is in keeping with current technology and mineral exploration practices. Adoption at the local level may be the only alternative if Congress does not act to expand the doctrine.

CONCLUSION

The current technology and exploration practices of mineral developers require expansion of the prediscovery protection afforded through the *pedis possessio* doctrine. Two federal courts have expanded the doctrine and provided the criteria necessary for extending possessory protection beyond those claims actually occupied by the mineral locator. Historically, however, the majority of courts have rejected arguments for wide pattern *pedis possessio*. This rejection results from a strict interpretation and application of the rules articulated in the *Union Oil* case and from the courts' reluctance to act without prior legislation on the issue. Considering that *pedis possessio* was first applied to American mining law by the courts, this reluctance is not justified. The courts are capable of determining the customary practices of mineral locators and the protection that these practices require. The guidelines ennunciated in *MacGuire* and *Continental Oil* provide practical limits on wide pattern *pedis possessio*. While a uniform statutory rule has advantages for the multi-state developers, a judicially adopted rule would allow for case-by-case resolution based on the facts of each claim. Regardless of which branch makes the amendment, the courts ultimately will be responsible for its interpretation and enforcement.

Current mining practices demand that prediscovery possessory protection be extended to group claims. Without this protection, mineral developers will not be encouraged to explore and develop those minerals which require the holding of large areas of land for economical mineral development. The United States Supreme Court has indicated it is willing to review the issue of wide pattern *pedis possessio*. The lower federal and state courts should act upon this indication and follow the lead taken by *MacGuire* and *Continental Oil*. New Mexico courts are not bound by either case law precedent or statutory limits on the issue of wide pattern *pedis possessio* and thus are free to liberalize the doctrine to accommodate the needs of the modern mining industry.

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