Monopolization of Public Lands or Necessary Liberalization of Exploration Laws

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OR NECESSARY LIBERALIZATION
OF EXPLORATION LAWS?

MINING LAW—PEDIS POSSESSIO

The Tenth Circuit Court of Appeals has recognized circumstances in which pedis possessio may be extended to multiple mining claims. Continental Oil Co. v. Natrona Service, Inc., 588 F.2d 792 (10th Cir. 1978).

Because of the deficiencies in the Mining Act of 1872 and subsequent amendments, the judicial doctrine of pedis possessio developed as a protection for the prospector while he is diligently looking for valuable mineral prior to discovery. The prospector is on the public domain at the invitation of the United States government. He may explore peaceably and be regarded as a licensee of the government. The doctrine applies to only locatable minerals as defined by federal statute. However, pedis possessio does not give any title or

2. Fiske, Pedis Possessio—Modern Use of an Old Concept, 15 ROCKY MOUNTAIN MIN. L. INST. 181, 183 (1969) states:
   The classic discourse on it [pedis possessio] is in the opinion in 1919 of the United States Supreme Court in Union Oil Company of California v. Smith, in which the theory was recognized as providing that if a qualified person peaceably and in good faith enters vacant, unappropriated public domain for the purpose of exploring for and discovering a valuable mineral under the mining laws, while he is so searching he may exclusively hold the place where he is working against those having no better right, and he will be protected against all violent, forceible [sic], fraudulent, clandestine, and surreptitious intrusions so long as he remains in continuous, exclusive occupancy and diligently and in good faith prosecutes work directed toward making a discovery.
   The Lode Law of 1866 and the Mineral Location Law of 1872 opened the public domain to exploration and purchase. They extended an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits, and granted the successful prospector the right to mine the minerals so found, and to obtain a patent. Those who proceeded in good faith to make explorations and to enter peaceably upon vacant lands were no longer regarded as trespassers, but as licensees. Since exploration must precede the discovery of minerals and since occupation of the land is necessary for adequate and systematic exploration, the courts have always recognized the necessity of protecting the prospector's occupancy of the public domain prior to his discovery of mineral.
4. Several federal statutes identify locatable minerals. Two such acts are the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-263 (1976), which withdrew oil and gas, coal, and
permanent rights to the prospector.\(^5\) It merely grants exclusive possession pursuant to federal and state mining laws.\(^6\)

Departing from the traditional application of the doctrine to single mining claims, the Tenth Circuit Court of Appeals, in Continental Oil Co. v. Natrona Service, Inc.,\(^7\) did not rule out extending the doctrine to multiple mining claims. Unfortunately, the court did not give a clear holding that can be uniformly applied. It did not reach the underlying issue of whether or not the extension of the old doctrine is a court-sanctioned monopolization of public lands by large prospectors, or a needed liberalization of exploration laws.

### CONTINENTAL OIL CO. v. NATRONA SERVICE, INC.

**Facts**

Continental Oil Company\(^8\) located lode mining claims in Sweetwater County, Wyoming. It employed contractors to do the actual location work. Conoco instructed these contractors to locate the claims according to federal and state law, and to act in good faith. In May 1975, Natrona Service, Inc., and John W. MacGuire overstaked Conoco on some of its claims in the area.\(^9\) Natrona overstaked claiming that Conoco's contractors located invalid claims.\(^10\) Conoco brought a declaratory judgment action to establish its exclusive right of possession to certain lode-mining claims overstaked by Natrona. Additionally, Conoco sought an injunction preventing Natrona from interfering with its work in the area.

In its complaint, Conoco alleged that it had a systematic pattern of deep exploratory drilling for the entire area of the claims. It further alleged that the area was reasonable in size and that exploration work was diligent.\(^11\) Conoco also claimed that Natrona had acted in bad faith.

Natrona counterclaimed seeking recognition of its superior rights

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\(^5\) Fiske, *supra* note 2, at 184. "Pedis possessio has no independent existence or purpose, and no permanent consequence of its own. It is not a title and does not accomplish the vesting of any title or permanent right." *Id.*

\(^6\) *Id.* at 183. "Pedis possessio is not an elaborate doctrine nor a complex system of rules and concepts." *Id.*

\(^7\) 588 F.2d 792 (10th Cir. 1978).

\(^8\) Continental Oil Company and Natrona Service, Inc., are hereinafter referred to as Conoco and Natrona, respectively.

\(^9\) 588 F.2d at 794.

\(^10\) *Id.*

\(^11\) *Id.*
to 1,200 claims. It also sought to have Conoco's remaining claims, which it had not overstaked, declared open to location.\textsuperscript{12}

**Trial Court's Findings**

The trial court granted Conoco exclusive possession to the claims not overstaked by Natrona. This holding was not a powerful acknowledgement of expanded *pedis possessio* because the trial court did not recognize Natrona's standing to contest claims in which it had no interest.

The court presented the other claims to the jury, which returned a verdict generally in favor of Natrona. The trial judge granted a motion for judgment notwithstanding the verdict with respect to some nineteen of Conoco's claims which had deep drilling operations on them.

**Appeal to the Tenth Circuit**

The main challenge on appeal was to the trial judge's instructions to the jury regarding *pedis possessio*. The Court of Appeals examined in detail the trial judge's instructions to the jury concerning how *pedis possessio* is applied. In its review, the Tenth Circuit recognized that the trial court had departed from the strict requirements of actual physical possession of each claim. It also noted that the trial court had accepted Conoco's theory that substantial compliance with federal and state laws allowed extension of the doctrine to groups of claims.\textsuperscript{13} The appellate court took no issue with the trial court's acceptance of these interpretations.

Most importantly, the Court of Appeals appears to have accepted the trial judge's determination of the elements that must be present for extending *pedis possessio*: (1) substantial compliance with state laws, (2) similarity within the area claimed and reasonable size of the area, (3) an overall area work program, (4) diligent pursuit of work program, and (5) nature and cost of mineral development making non-exclusive group possession economically impractical.\textsuperscript{14}

Conoco specifically requested that the Court of Appeals "write definitions and guidelines to the application of the doctrine of *pedis possessio*."\textsuperscript{15} After accepting the possibility of expanding the doctrine, the court avoided ruling on the issue and decided the case on other grounds.\textsuperscript{16} The court never reached Conoco's central issue of

\begin{itemize}
  \item \textsuperscript{12} Id. at 795.
  \item \textsuperscript{13} Id. at 796.
  \item \textsuperscript{14} Id. at 798.
  \item \textsuperscript{15} Id. at 797.
  \item \textsuperscript{16} Id. at 798.
\end{itemize}
expanded *pedis possessio* because there were two defects in Conoco's claims. The jury in the lower court found that Conoco did not have substantial and good faith compliance with the state statutes. The Court of Appeals seemed to say that the issue of expanding the doctrine of *pedis possessio* will never be considered without retaining the requirements of substantial and good faith compliance because without these two requirements *pedis possessio* does not exist: "At the same time we are powerless to change the fundamental requirements of the law and the response has to be that the prospectors must substantially and in good faith comply with the statutes, and this is the approach of the trial court."18

**PRESENT DAY APPLICATION AND CONTROVERSY WITHIN THE OLD DOCTRINE**

The law on extended *pedis possessio* remains unclear after *Continental Oil Co. v. Natrona Service, Inc.*, because the Court of Appeals said that such an extension could exist, but the case was decided on the issue of good faith. The appellate court accepted additions to the traditional elements of the doctrine which have been: (1) actual, physical occupancy of the ground, (2) diligent, bona fide work directed toward making a discovery, and (3) exclusion of others. The additional requirements of similarity within the area claimed and reasonable size of the area tend to show that the nature and cost of the mineral development require exclusive group possession for economic practicality. Equally related to these three elements is the overall area work program. The requirement is already present in the three traditional elements. In addition to compliance with the federal mining laws, substantial compliance with state laws was included by the Tenth Circuit as a requirement. The purpose appears to be to force the claimant of extended *pedis possessio* to show good faith. This is the exact issue upon which the court decided against Conoco.19

Beyond the good faith requirements are the requirements of actual physical occupancy and diligence. These are designed to prevent monopolization of the public domain.20 Because few small indepen-

17. *Id.*
18. *Id.*
19. *Id.*
20. Sherwood & Greer, *Possessory Interests in Wyoming Mining Claims*, 4 LAND & WATER L.R. 337, 345 (1969). Conversely, it is no more than fair to require of one relying on *pedis possessio* that he manifest his possession by continued actual occupancy and bona fide, diligent effort to make a discovery within a reasonable time. The requirement is necessary to prevent monopolization of desirable public lands by those who, not having made discoveries, merely hope to stockpile lands for speculative purposes.

*Id.*
dent miners have the resources to develop the public domain extensively, the large prospectors become the major developers of mineral resources. These large prospectors require groups of claims in order to make a profit. Consequently, encouragement of the mineral resources development on federal lands\textsuperscript{21} may conflict with prevention of monopolization.

The proponents of expanding the doctrine base their arguments upon the changed circumstances of mineral exploration. They believe that the nature of mineral deposits such as uranium\textsuperscript{22} and the pre-discovery exploratory costs demand exclusive possession of multiple claims.\textsuperscript{23} The argument points out that under federal and state mining laws, the prospector on a large block of claims has limited protection without expanded *pedis possessio*.\textsuperscript{24} They argue that he cannot be physically present at the same time on all of his claims, and he can explore profitably and geologically only on multiple claims.

The proponents of expanding *pedis possessio* also argue that the historic purpose of the doctrine is to give miners pre-discovery protection so that they can develop mineral resources on the public domain.\textsuperscript{25} Accordingly, this argument views an extension of the old doctrine as a logical adaptation to modern mining conditions.

The opponents of the expanded doctrine concentrate their arguments on the need to substitute the judgment of the judiciary for

\begin{footnotes}
\item[21] See note 3 supra.
\item[22] Uranium deposits generally occur in deep subterranean patterns. The mineral is characterized by diffusion throughout the ore body.
\item[23] Crouch, *Title to the Unpatented Mining Claims*, 23 ROCKY MOUNTAIN MIN. L. INST. 879, 916 (1977).

The primary problem with relying on *pedis possessio* in a mining claim acquisition program is that the protection of the doctrine is usually limited to individual claims. Consequently, the elements of *pedis possessio* must be independently established for each claim sought to be protected by the doctrine. Therefore, the doctrine is generally inadequate to protect a locator's pre-discovery rights to an entire block of claims. While the locator's *pedis possessio* rights may be transferred and assigned, the doctrine of *pedis possessio* and the protection afforded thereby is of limited use to a company contemplating the acquisition of a large block of claims which have not been validly located by discovery and the accomplishment of the mechanical acts of location.

\textit{Id.} (footnotes omitted).

[T]he need for a solution to the problem of how to secure pre-discovery possessory rights so as to encourage uranium exploration and development, and correspondingly discourage claim jumpers and nuisance locators, but without opening the door to speculation and monopoly has become more acute due to the increasing depth at which uranium is found and the consequent rise in pre-discovery exploratory costs.

\textit{Id.}
\item[25] See note 3 supra.
\end{footnotes}
that of the prospector and his geologist. They argue that an arbitrary rule which allows the miner to determine the reasonableness of the size of his claim promotes speculation and restricts competition.26

CONCLUSION

Because the Tenth Circuit Court of Appeals avoided ruling on the availability of expanded *pedis possessio*, there is reason to believe that the Tenth Circuit or another circuit court would not reach the issue without being presented with a proper case. The following hypothetical case illustrates possible circumstances under which expanded *pedis possessio* could apply: Locator A enters the public domain peaceably,27 without fraud, openly and carefully adhering to all federal and state statutory requirements. He locates multiple claims in the same area. Locator A physically occupies part of the claims at all times while he is diligently and in good faith looking for uranium. He shows his good faith by complying with the statutory requirements for locating claims28 and by performing bona fide work.29 Locator A peaceably excludes any person who tries to enter on his claims.

Locator A selects an area which is geologically similar and which is reasonable in size.30 He develops and documents his overall plan or work program for the entire area claimed. In his documentation, he includes evidence that uranium deposits are widely scattered throughout the multiple claims in patterns far beneath the earth's surface.31 This evidence is supported by an economic analysis showing the impracticality of developing uranium on only one claim.

Locator B attempts to overstake one or more of Locator A's claims lying within the total area claimed by Locator A. At the time of the overstaking, Locator A is diligently and in good faith looking

27. See *note 3 supra*. The government invitation to miners to explore and develop the public domain requires that these activities be conducted peaceably.
28. Wyoming law requires that validation work be completed within 60 days from the time that a lode is discovered or a claim is staked. Other states have similar requirements.
29. Conoco failed to show bona fide work. It performed the work over a long period of time (1971-1975). It also discovered that its contractor was locating the claims unsatisfactorily and did not recheck its locator. 588 F.2d at 798.
30. The Tenth Circuit Court of Appeals accepted the trial court's determination that exclusive possession for expanded *pedis possessio* must include claiming an area that is similar and has a reasonable size. Because the issue of expanded *pedis possessio* was never reached by the court, the court gave no guidelines for determining what is reasonable size. *Id.*
31. The first locator must show that the nature of the mineral claimed and the cost of development of that mineral would make it economically impracticable to develop the mineral if the locator is not awarded exclusive possession of all of his claims. *Id.*
for uranium on his other claims. He tries to exclude Locator B peace-ably by asserting his rights. Locator B shows pronounced good faith by overstaking Locator A with the honest belief that these claims are open to location (thus, the court could not decide the case on bad faith grounds).

Because both parties have acted in good faith and individual equi-ties are equally balanced, the court will have to decide a case such as the above hypothetical based on policies reflective on the needs of the entire mining community. Should the court hold in favor of expanded pedis possessio, would this discourage future exploration by the small mining interests? Should the court not expand the doctrine, will the lack of pre-discovery protection impede develop-ment on the public domain by the large mining concerns who have the capital for such development? When the proper case arises the courts will have to choose.

A miner exploring for valuable mineral on multiple claims would be unwise to rely upon Continental Oil Co. v. Natrona Service, Inc., to give him the protection of pedis possessio. This is true even if the facts are similar to those presented in the hypothetical case. In the past, the courts have decided the cases on good faith grounds and even a case such as the above hypothetical could turn on that issue again.

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32. One of the three primary elements of pedis possessio is the exclusion of others from the locator's claims. Fiske, supra note 2, at 191.