CONTACT INFORMATION
Mining Records Curator
Arizona Geological Survey
1520 West Adams St.
Phoenix, AZ 85007
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05/29/87

ARIZONA DEPARTMENT OF MINES AND MINERAL RESOURCES FILE DATA

PRIMARY NAME: FARRAR GULCH PLACERS

ALTERNATE NAMES:
EMPIRE

LA PAZ COUNTY MILS NUMBER: 113

LOCATION: TOWNSHIP 4 N RANGE 21 W SECTION 36 QUARTER NW
LATITUDE: N 33DEG 38MIN 40SEC LONGITUDE: W 114DEG 23MIN 07SEC
TOPO MAP NAME: LA PAZ MTN - 15 MIN

CURRENT STATUS: PAST PRODUCER

COMMODITY:
GOLD PLACER
SILVER

BIBLIOGRAPHY:
KEITH, S.B., 1978, AZBM BULL. 192, P. 159
ADMMR FARRAR GULCH PLACERS FILE
USGS BULL 620, P. 50-51
AZBM BULL 168, P. 26-28

FARRAR GULCH INC. YUMA COUNTY

MG WR 7/2/82: Jay E. Fuller Construction, 1301 East Ft. Lowell Rd., Tucson, AZ 85719, phone 325±1505, has three association (with Mr. Victor Livingston) placer claim groups: JV, SL, and NF. These groups cover parts of the old Goodman, La Paz, Martinez, Gonzales, and Farrar placers.

John Jett Memo 6/2/83: Aztec Resources has a placer plant in operation. There were two workers on the job site. They were quite new and had little or no information about the company. Probably someone operating Plomosa Placers or Middle Camp. (Aztec Resources Inc., Box 775, Blythe, California 98225, phone (619) 952-2698. Information from Mine Inspector Start-up Sheets).

A large dry washer, similar to the ones at the Jack Pot Placers, was set up and had been operating. It produced a concentrate that was trucked to a wet process mill consisting of two parallel "centrifugal concentrators" and two spiral screw feeders. The concentrators were approximately 18" in diameter by 6 feet long. The concentrate was dropped into a storage where it was panned for gold.

Plans are to eventually recover the gold by chemical. The concentrators ran at a 1600 RPM speed (recommend) then would slow for concentrate to clean out with water flush.

Two water storage ponds were concrete lined. One well was in operation. A small churn drill was on the site. They are going to drill a second well. Numerous pieces of equipment were nearby that had been left by a previous operator.

FARRAR FARAR GULCH PLACER IN LA PAZ

COMPLETE AND MAIL TO:

STATE MINE INSPECTOR
1616 WEST ADAMS, SUITE 411
PHOENIX, ARIZONA 85007-2627

STATE MINE INSPECTOR

DEC 09 1988

FOR OFFICE USE ONLY
START-UP NUMBER 88G1319
STATE NUMBER
DEPUTY NUMBER Joe
NEW X MOVE

NOTICE TO ARIZONA STATE MINE INSPECTOR

In compliance with the Arizona Revised Statute, we are submitting this written notice to the Arizona State Mine Inspector of our intent to start X, stop ____, move ____ an operation.

Please check the appropiate boxes: Contractor ☐, Owner ☒, Operator ☐, Open Pit Mine ☒, Underground Mine ☐, Mill ☐, Quarry ☐, Aggregate Plant ☐, Hot Plant ☐, Batch Plant ☐, Smelter ☐, Leach Plant ☐.

If this is a move, please show last location: ____

If you have not operated a previously in Arizona, please check here: ____ If you want the Education and Training Division to assist with your mine safety training, please check here: X

If this operation will use Cyanide for leaching, please check here: X probably at a later date around February

COMPANY NAME: Johnson Mining of Nevada INC

DIVISION: ARIZONA

MINE OR PLANT NAME: Ferrar Gulch **TELEPHONE:** (602) 923-7892

CHIEF OFFICER: Wade W Pearson

COMPANY ADDRESS: P.O. Box 5002

CITY: Quartzsite **STATE:** ARIZONA **ZIP CODE:** 85359

MINE OR PLANT LOCATION: (Include county and nearest town, as well as directions for locating property by vehicle: mile post 8 3/4 Northside I-10

TYPE OF OPERATION: Placer **PRINCIPAL PRODUCT:** GOLD

STARTING DATE: 12/12/88 **CLOSING DATE:** —

PERSON COMPLETING NOTICE: Wade W Pearson **TITLE:** Vice President

FORM 101-106 REV. 01/88

FARRAR GULCH PLACER (f)

Joe

W&F Properties, Inc.

4776 El Cajon Blvd., #102
San Diego, CA 92115

STATE MINE INSPECTOR

MAY 02 1985

April 29, 1985

Office of the State Mining Inspector
705 West Wing, Capitol Building
Phoenix, AZ 85007

Attention Mr. Joe Ramirez

Gentlemen:

For some time I have been meaning to write to advise you that we have not been operating Ferrar Gulch Mine, near Ehrenberg, since December 25, 1984, and time simply got away from me.

I want to thank Mr. Ramirez for his courtesy to us and when we get going again we will be in touch with him.

Yours very truly,

Philip R. White
W & F PROPERTIES, INC.
1571 Rosecrans Street
San Diego, CA 92106

PRW:ld

FARRAR GULCH PLACER (F)

Joe Ramirez

STATE MINE INSPECTOR

Office of State Mine Inspector

AUG 13 1984

705 West Wing, Capitol Building
Phoenix, Arizona 85007
602-255-5971

NOTICE TO ARIZONA STATE MINE INSPECTOR

In compliance with Arizona Revised Statute Section 27-303*, we are submitting this written notice to the Arizona State Mine Inspector (705 West Wing, Capitol Building, Phoenix, Arizona 85007) of our intent to start/stop (please circle one) a mining operation.

COMPANY NAME W & F PROPERTIES, INC.

CHIEF OFFICER PHILIP R. WHITE

COMPANY ADDRESS 4776 EL CAJON BLVD #102, SAN DIEGO, CA. 92115

COMPANY TELEPHONE NUMBER 619-922-3868

MINE OR PLANT NAME FARRAR GULCH

MINE OR PLANT LOCATION (including county and nearest town, as well as directions for locating by vehicle)

9 MILES EAST OFF I-10, NEAREST TOWN EHRENBERG, AZ. LA PAZ COUNTY AZ.

TYPE OF OPERATION MINING PRINCIPAL PRODUCT GOLD

STARTING DATE 8-6-84 CLOSING DATE

DURATION OF OPERATION

PERSON SENDING THIS NOTICE FRED L. FURRY

TITLE OF PERSON SENDING THIS NOTICE SECT, TREASURER

DATE NOTICE SENT TO STATE MINE INSPECTOR 8-9-84

*A.R.S. Section 27-303 NOTIFICATION TO INSPECTOR OF BEGINNING OR SUSPENDING OPERATIONS: When mining operations are commenced in any mine or when operations therein are permanently suspended, the operator shall give written notice to the inspector at his office prior to commencement or suspension of operations.

DEPARTMENT OF MINERAL RESOURCES
STATE OF ARIZONA
FIELD ENGINEERS REPORT

Mine Farrar Gulch Inc. Sec 25 T 7N R 21W Date November 25, 1974

District La Paz - Yuma County Engineer John H. Jett, Director

Subject: Mine visit

Interview with Jack(Marvin) and Paul Brock and Homer Wenger. Jack Brock owns 10 claims. He was minority owner for many years. Then purchased balance from a Bob Meyer. 9 of the 10 claims are leased to subject company. Lease payments are $200 per month until operations start, then royalty payments.

Farrar Gulch Inc has an office in Las Vegas. Pete Fleming is president. Mr. Fleming's son was on the property the day of my visit. Mr. Fleming is a geological consultant, from California specializing in oil according to Mr. Brock.

At this time they have shipped a ton of black sand concentrate to United Refining Co.
511 W. 500 North
Salt Lake City.

Concentrates reportedly contain Gold, Platinum and Rhodium.

Mine run material dumped on 8" grizzly. -8 inch goes to trommel, approximately 5' dia. by 30 ft. long. Two products plus oversize are produced. One product is -1/8 inch which goes to dry concentrator. The other product is plus 1/8 minus 1/4. It is stockpiled for future use. All oversize is stockpiled for future processing.

The minus 1/8 is fed to three "pulsating" screens - opening size not known. The concentrates from these units are caught in barrels which are taken to a wet classifying or concentrating discs. These discs (3) are a hard rubber material, 3-4 ft. in diameter, concentrically grooved from an approximate 2" hole in the center. The discs are tilted approximately 45°. The outer edge has a rim. The discs are fed with a small continuous drag conveyor. As these discs rotate, the heavy material works its way via the groove, to the center of the disc, then drops into containers. The concentration ratio is about 100 to 1. Water is caught in a settling pond and re-used. Speed of the disc is variable.

It was stated that the plant could handle 100 TPH, all except the discs. A well has been drilled for water. A pan of concentrates was dipped out of the container and many small flakes of gold were visible.

P. W. "Pete" Fleming

MINING CONSULTANT

18588 Linnet Street * Tarzana, California 91356

September 10, 1973

FARRAR GULCH GOLD PLACER

LOCATION: Secs 26 & 26 T 4 N R21W

The Farrar Gulch placer mines are situated in Farrar Gulch, Yuma County, Arizona. All lie north of Highway 60, commencing at a point just north of the highway. The property and mine entrance is located 12 miles east of Blythe, California.

HISTORY:

The history of all past mining on these properties as recorded consists of small dry placer mining operations. Reportedly a fair amount of coarse gold was recovered from these small operations.

Due to the back-breaking pick and shovel methods of operation the men must have tired and left for other means of livelihood. The significant advantage of all that past hard work helped prove a major rich gold placer deposit.

The Farrar Gulch, or similar operations, being of dry placer are now feasible for a very profitable operation, only because of the new dry beneficiation equipment. The writer has checked the operation and efficiency of many dry placer concentrator machines over the past twenty years. The pilot plant operated in the Farrar Gulch consisted of grizzley, screen, bin, elevator, hopper and the CON-SEP DRY CONCENTRATOR. This plant was fed by a one yard frontend loader. Electric power was supp ied by a portable generating plant.

18588 Linnet Street * Tarzana, California 91356

This Con-Sep pilot plant was able to handle 30 tons per hour of bank run placer material. Being able to handle such volume certainly provided fair averages in order to determine: (a) the free gold values in place on a per ton basis, (b) the rate of recovery, and (c) the operating cost on a volume basis.

FARRAR GULCH RESERVES:

A recent field sampling program of this placer property indicated it to be a major deposit. The better part of the placer material runs from 200 feet to 800 feet in width and approximately 10,000 feet in length. The depth will range from 50 feet to 100 feet. The history of these placers is that the values increase with depth. All of the samples run, from hand sampling to concentrate testings from pilot plant, yielded an average minimum value of $5.00 per ton in free gold. Most of the samples that were cleaned up, weighed and assayed figured to carry gold from .05 to 1.5 ounces per bank run ton. These samples contain a very obvious amount of free platinum and silver. I did not find the Pt. and Ag. to be consistent with the gold recovered, but nevertheless, it should add a large bonus to the net income. The gold value was based on $100.00 per ounce.

Taking into consideration the placer material measurements as stated above, I arrive at a minimum reserve of 12,000,000 tons of placer material. The minimum recoverable value in gold at today's price is valued at $60,000,000.00. An equal recoverable value in platinum and silver at today's price should be realized.

H. W. "Pete" Fleming MINING CONSULTANT

18588 Linnet Street * Tarzana, California 91356

OPERATION PROJECTIONS:

It is my recommendation that a minimum placer concentrating program should be pursued immediately. All equipment needed for this operation is now available at reasonable prices. The price of gold is very good and the weather conditions for the next eight months are most favorable.

Your start-up program is based on handling 2,000 tons of bank run material each 16 hour day and running 22 days per month.

In the near future we will be increasing the size of the plant which will give you a much greater production at a lower per ton cost.

The planned plant for the Farrar Gulch placer mining and concentrating program mainly consists of the following:

(1) Excavator - loaders capable of handling over 200 tons per hour, at a cost of $35.00 per hour, including an operator and maintenance.

(2) Screening and trommeling equipment.

(3) Dry beneficiation equipment capable of handling large tonnages.

(4) Stockpile facilities, together with plant feeders.

(5) Conveying systems to facilitate trommel, stockpile and all waste stacking.

In addition to the major items there is the usual shop, fuel storage, field office and items too numerous to mention.

The recommended plant will screen the bank run material to minus 1/4 inch or 30 tons per hour of screened material and concentrate it through three or four beneficiation units. I suggest to run two shifts, with fourteen production hours per day, for 22 days per month, thus allowing 44 hours of down time, plus additional down time and/or maintenance time between shifts.

D. W. "Jeff" Fleming

MINING CONSULTANT

18588 Linnet Street • Tarzana, California 91356

Gross recoveries in gold only should be approximately $10,000.00 per day. Thus, 22 days per month would produce a gross income of $220,000.00.

Monthly cost of operating include:

Contractor, loader-excavator @ $35.00 each hour	$ 6,230.00
Conveying, feeding, equipment and power	3,600.00
Ventilation units (lease, 4 @ $550.00	2,200.00
Superintendent	1,500.00
Engineering	1,500.00
Labor, 2 men each shift (total)	3,600.00
Labor, maintenance	1,000.00
Fuel and supplies @ $200.00 each day	4,400.00
Taxes, insurance, overhead and unanticipated expenses	4,500.00
Total expenses above	$28,530.00

INITIAL OPERATION:

Gross income per year from gold recoveries only		$2,640,000.00
Handling, shipping and smelting charges		264,000.00
Net smelter returns		$2,376,000.00
Property payment (10% Royalty)	$237,600.00	
Depletion allowance (21%)	498,960.00	
Cost of mining and concentrating	342,360.00	1,078,920.00
Subtotal		$1,297,080.00

This subtotal does not include many other right off benefits, such as equipment depreciation, property depreciation or other office, legal, travel,

lodging, medical, telephone expenses incurred by home office or associates participating in this program.

At the end of the first year of operating the larger percentage of the total investment may be tax deductible to the investors as intangible costs.

This general outline of production and cost represents the low cost and feasibility of this program.

To my knowledge, this plant will be highly and readily accepted as being ecologically sound. As a dry process there would be no problem with water pollution. By using electric power and no chemicals or smelting, the air pollution problem should be minimal.

A larger Farrar Gulch operation should be anticipated soon after realizing efficient operations on the initial recommended program. It should be noted that increasing the size of the plant by at least 100% will not only increase by that amount the recoveries to be made, but also will decrease the costs per ton of operating.

PROJECTED BUDGET:

The following budget should be sufficient to place the above recommended program into full operation. Also, within this budget an allowance is made to carry the cost of operations for an extended period in order to continue full operation while the first runs of concentrates are shipped to smelter and the settlement sheets and payment are received.

Property advance, lease and purchase payment	$ 5,000.00
Excavation of overburden, contract	15,000.00
Excavation of plant siet, contract	1,000.00

P. H. "Pete" Fleming MINING CONSULTANT

18588 Linnet Street * Tarzana, California 91356

Build roadways, contract	$ 1,500.00
Build storage bins	3,500.00
Build concentrator plant building	4,500.00
Install 4 CON-SEP units	3,280.00
4 Citron Feeders	2,000.00
Concentrate hoppers	400.00
Concentrate conveyor	800.00
Concentrate bin	500.00
Facilities to package concentrate	1,200.00
Waste material conveyor	1,000.00
Fine ore conveyor	2,500.00
Trommel (like new)	18,000.00
Trommel hopper and lawnders	600.00
Conveyor to trommel	3,500.00
Hopper, grizzley and feeder	4,200.00
Oversize stacker	3,500.00
Equipment moving expense	5,500.00
Assembling, welding and labor	20,000.00
Construction material	5,000.00
Electric generating plant	6,500.00
Water tanks and lines	1,500.00
Fuel tanks and lines	1,500.00
Camp sanitation and shower	500.00
Field office trailer	2,500.00
Shop and supply building	1,500.00

18588 Linnet Street * Tarzana, California 91356

Welding equipment	$ 1,600.00
General mechanics tools	1,200.00
Insurance fees	1,800.00
Legal fees	2,000.00
Engineering and office overhead	4,000.00
Plant construction labor	8,400.00
Transportation, lease and travel	3,000.00
Total cost to point of operating	$142,480.00
30 days of full production costs	28,530.00
TOTAL BUDGET	$171,010.00

The listed itemized costs are up-to-date in this area. However, I do believe that upon purchasing, many items may be bought at discount.

ADDITIONAL INFORMATION:

The existence and location of many dry placers are common knowledge. An exerpt from a heavy metals program report states, "this would provide target zones for exploitation containing 600 to 800 million cubic yards of material with gold value of three dollars per yard," at today's market.

In 1962 a bulletin from the San Francisco Mining Bureau (WBC 11-20-62) stated that, "all large-scale attempts to recover gold by dry washing methods in California thus far have been unsuccessful."

In 1966 a new DRY PROCESS was patented. This process and equipment has been adequately tested and proven by operation of a pilot plant at various locations in California, Nevada, and Arizona.

The excerpts and additional information as expressed above are attached hereto.

P. W. "Pete" Fleming

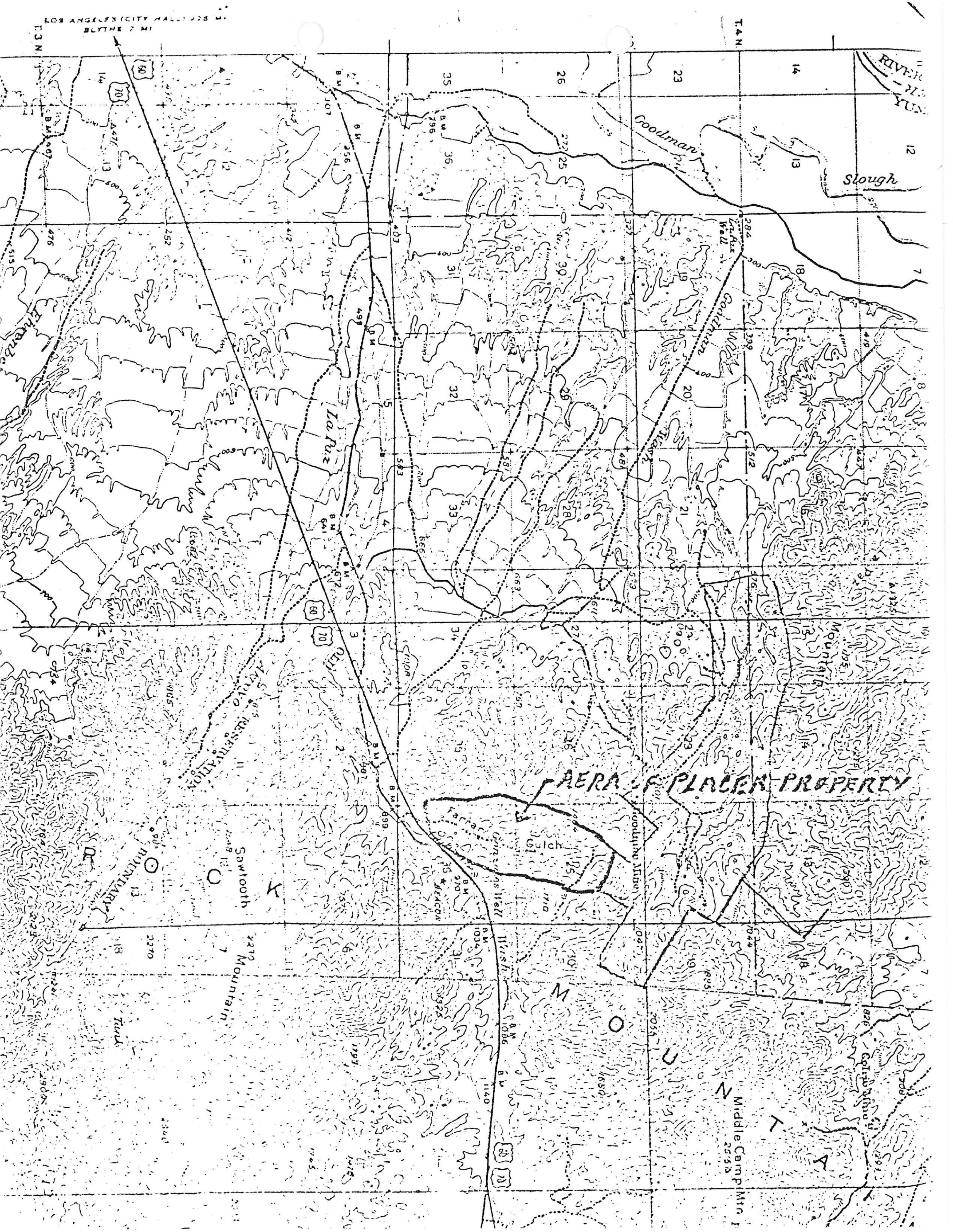
MINING CONSULTANT

18588 Linnet Street * Tarzana, California 91356

It is my sincere recommendation that the recommended programs be exercised and commence as soon as possible. Taking into consideration the high market value of gold, platinum and silver, with the market continually on the rise, and that the plant set-up, facilities and operation are purely mechanical, one can only expect to enjoy an immediate and greater profitable program than that expressed herein.

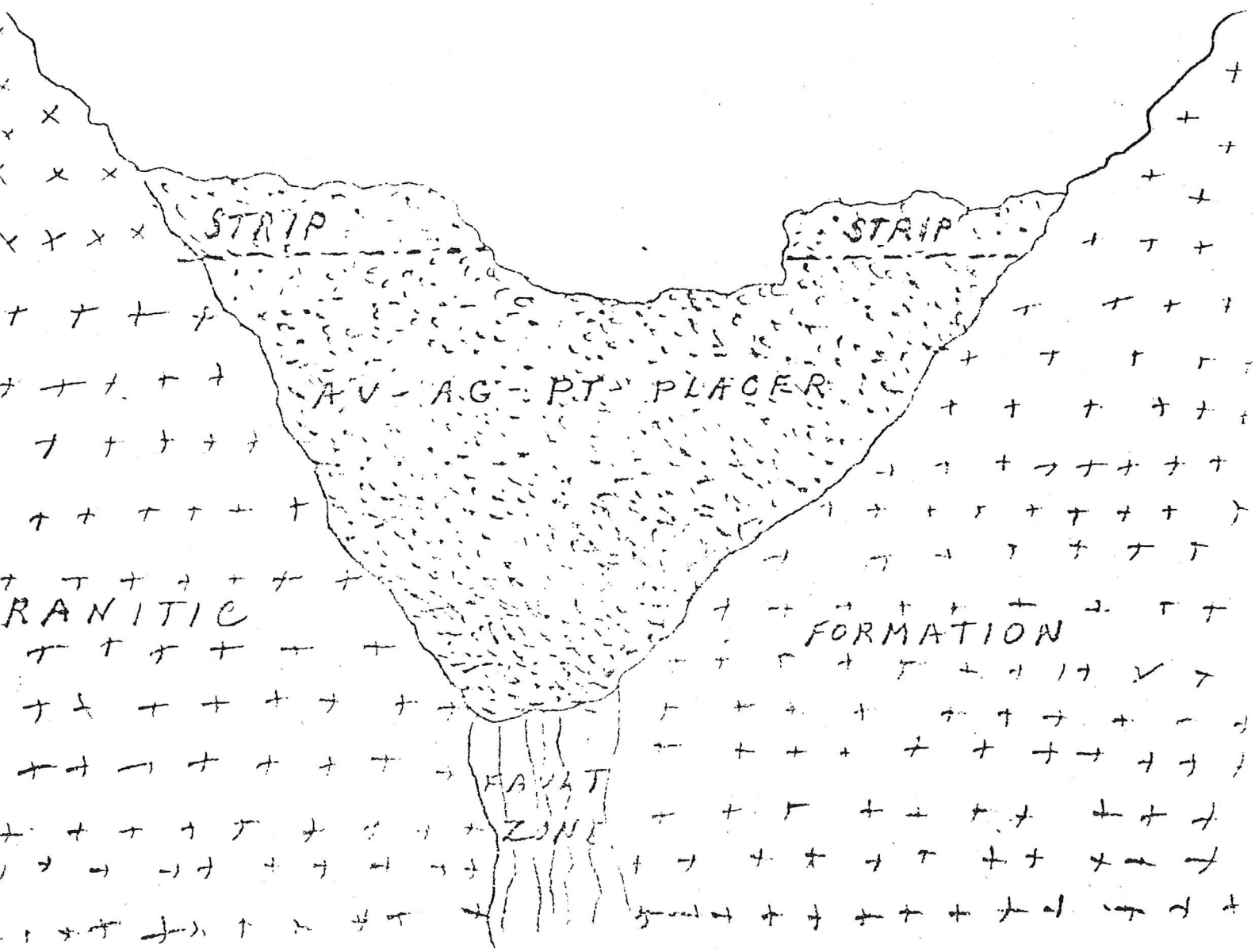
Respectfully submitted,

P. W. Fleming



BLYTHE 7 MI
T4N
T3N
Goodman
Slough
La Paz
AERA OF PLACER PROPERTY
Farrar
Gulch
Sawtooth
Mountain
Middle Camp Mtn
R O C K
M O U N T A

FARRAR GULCH



DEPARTMENT OF MINERAL RESOURCES
STATE OF ARIZONA
FIELD ENGINEERS REPORT

Mine Farrar Gulch Inc.

Date November 25, 1974

District La Paz - Yuma County

Engineer John H. Jett, Director

Subject: Mine visit

Interview with Jack(Marvin) and Paul Brock and Homer Wenger. Jack Brock owns 10 claims. He was minority owner for many years. Then purchased balance from a Bob Meyer. 9 of the 10 claims are leased to subject company. Lease payments are $200 per month until operations start, then royalty payments.

Farrar Gulch Inc has an office in Las Vegas. Pete Fleming is president. Mr. Fleming's son was on the property the day of my visit. Mr. Fleming is a geological consultant, from California specializing in oil according to Mr. Brock.

At this time they have shipped a ton of black sand concentrate to United Refining Co.
511 W. 500 North
Salt Lake City.

Concentrates reportedly contain Gold, Platinum and Rhodium.

Mine run material dumped on 3" grizzly. -3 inch goes to trommel, approximately 5' dia. by 30 ft. long. Two products plus oversize are produced. One product is -1/8 inch which goes to dry concentrator. The other product is plus 1/3 minus 1/4. It is stockpiled for future use. All oversize is stockpiled for future processing.

The minus 1/8 is fed to three "pulsating" screens - opening size not known. The concentrates from these units are caught in barrels which are taken to a wet classifying or concentrating discs. These discs (3) are a hard rubber material, 3-4 ft. in diameter, concentrically grooved from an approximate 2" hole in the center. The discs are tilted approximately 45°. The outer edge has a rim. The discs are fed with a small continuous drag conveyor. As these discs rotate, the heavy material works its way via the groove, to the center of the disc, then drops into containers. The concentration ratio is about 100 to 1. Water is caught in a settling pond and re-used. Speed of the disc is variable.

It was stated that the plant could handle 100 TPH, all except the discs. A well has been drilled for water. A pan of concentrates was dipped out of the container and many small flakes of gold were visible.

3/88

Jan. 31, 1951.

R. G. Langmade,
State Highway Dept.,
Phoenix, Arizona.

Dear Mr. Langmade:-

For your assistance in the matter of the trespass suit against the State by McIntyre, Tracy, et al, involving right-of-way over certain mining locations in sections 1 & 2, T. 5 N. R. 21 W, and sections 35 & 36, T. 4 N. R. 21 W., I am submitting memorandums as follows:

Area involved: is shown on your excellent road maps. The general region is mountainous land in the Dome Mts., untimbered, of bare and rocky surface, untillable, 4th rate grazing, without surface water, and does not possess any industrial value or townsite possibilities.

Geology & Mineralization: A description of the underlying rock structure is found in Arizona Bureau of Mines bulletion #142, pages 24-28. This bulletin likewise describes the placer deposits and cites some of the early day history of the region.

I did not undertake sampling of the claims involved. If that be necessary for the suit it will be a 2-3 day job, and should be done by two men, both for nature of work and for possible corroboration in event of hard-fought suit.

Off-handedly, as based on the one day's field work with Mr. Clare, and partly with Mr. Layton, I would say the claims are of doubtful validity as to (a) discovery, (b) annual-work, and, (c) whether original location was made upon " vacant, unappropriated, unreserved, public land.". And I failed to see wherein the new highway has injured the claimants, although the new right-of-way would take about 2/3rds (400 ft) of some of the lode claims. The new road does not cover any mine shafts, or other mine workings, or obstruct access to the claims -- excepting the portion of the road that lies almost wholly within Gonzales Wash. There may have been some old prospect holes in that wash that are now covered; and the gravels in said wash are more or less covered by rockfills. However, these areas lie within the lode claims in large part. It is difficult to see wherein the new road has injured the placer claims any more than had been done by the old road; and the old road was built and used without any protest on part of the mineral claimants for some year

R.G.L. # 2; 1/31/51

Claim status: As shown by your map the EMPIRE, NUGGET #2, SURE THING #2, and YELLOW METAL lode claims overlap, ie, are in conflict with each other. My data indicates the Sure Thing No 2 is prior to the Empire on the Nugett No 2. (haven't any data on Yellow Metal).

Now this fact could invalidate either the Nugett #2 or the Empire.

That is to say: if the location notice of either of the lode claims last above cited was WITHIN the limits of the prior Sure Thing #2, such claim would be invalid - void to begin with.

I suggest a scrutiny of the copies of location notices. Thus, if the Empire, for example, is 400 ft N-easterly by 1100 ft S-westerly, per recorded notice, such point would be within the prior Sure Thing No 2. Similiarly, with the Nugget #2; if the notice is 600 ft -or less - from the N-easterly endline, such notice would also fall within the Sure Thing No 2.

Thus, it might be possible to prove illegal location of both the Empire and the Nugget #2 lode claims. And the Empire is the claim whereon the plaintiff's shack is situated. (see map).

Further: Beggs, one of the co-locators of some of these claims, is dead, per statement of C.C.Thompson, of Bouse.

Question: how did plaintaiffs acquire his interest? Heirs? Deed?

If they base their damages on a 1911 or a 1916 location, will they be able to show such title as would warrant the suit --- if Beggs left any heirs? Same applies to Haggerty - colocator on the Empire, though I do not know if Haggerty be alive or dead.

These remarks might likewise apply to the High Bar Nos 1, 2 & 3 placer claims. I haven't any memo as to locators names.

Reservations: If the High Bar locations are on Section 2, and the plat-ofsurvey was approved prior to their location, per my present data, what then? The utmost the locators could obtain in way of a title would be a LEASE. They could never acquire full title under our State law.

I think this applies, also, if the claims were located while the land was within the old boundary of the Indian Reservation.

Doubtless they never applied for a lease - (check this) If not, and the State still retains title, aren't THEY THE TRESPASSERS ?

Then, too,in the matter of the State selections that cover part of the land in controversy: the mineral claimants (or maybe the Interior Dept field division, if examined by them) would have

to prove the mineral character prior to the date of selection -- not date of approval. See
Payne vs C.P.R.Co., 255 U.S.,228
Payne vs New Mexico, 255 U.S., 367,
Santa Fe Co., vs Fall, 259 U.S.,197,

General considerations: One of the gas transmission pipe lines of the El Paso Natural Gas Co likewise crosses these claims, and, in putting same in, considerable surface rock was moved, and a parallel road made that can be traveled by jeep, tractor, etc.

Question: Why no damage suit against that Co. ?

Similiarly, the Bell Telephone has a buried line of some kind, almost parallely to the gas line: why no damages from that Co.?

Conclusion: These memos, as stated, are for whatever help they may be worth in preparing your defense.

If sampling is to be done, I suggest a conference with Mr. Dunning with a view of having either Manning or Flagg assigned the job. Possibly Mr. Dunning would himself undertake the work. In any case, I will help. I'm afraid to tackle the work alone, and, for same reason, (heart trouble) would prefer not to be called as a witness.

Very truly yours,

J.E.Busch.

In The

Supreme Court

of the

State of Arizona

STATE OF ARIZONA, ex rel
FRED O. WILSON,
Attorney General,
Appellant,

vs.

SAM P. TRACY and
P. D. McINTYRE,
Appellees.

No. 5584

APPELLANT'S OPENING BRIEF

FRED O. WILSON,
Attorney General,

R. G. LANGMADE,
Assistant Attorney General,
Attorneys for Appellant.

Filed in the office of the Clerk of the Supreme Court of the State of Arizona, this

.....day of....., 1951.

.....
Clerk

18 SIMS PRINTING CO.

INDEX

INDEX—*(Continued)*

TABLE OF CASES CITED

TABLE OF CASES CITED—*(Continued)*

REFERENCES

A.C.A. 1939:

Sec. 10-1001
Sec. 11-314
Sec. 21-101, 21-1028
Sec. 27-101 to 27-106, Inc.
Sec. 27-1401
Sec. 59-206
Sec. 65-110

Arizona Code 1913:

Secs. 4038, 4039 and 4040

State Constitution:

Sec. 18, pt. 2, art. 4
Sec. 32, art. 2

Arizona Session Laws:

Chap. 5, 2nd SS, Arizona Laws 1915
Section 2, Act 42, Laws of 1895

U.S. Revised Statutes:

Sec. 28, Title 30 USCA—Fed. Stat.
Sec. 2247, U.S.R.S. (43 USCA 932)
Sec. 2320, U.S.R.S.

Lindley on Mines, 3d Ed:

Vol. 1. Secs. 127, 167, 182, 183, 184
Vol. 2. Sec. 447, and pages 739 and 919

In The

Supreme Court

of the

State of Arizona

STATE OF ARIZONA, ex rel
FRED O. WILSON,
Attorney General,
Appellant,

vs.

SAM P. TRACY and
P. D. McINTYRE,
Appellees.

No. 5584

APPELLANT'S OPENING BRIEF

This is an action in Trespass, charging State officers, with having entered upon and occupied a group of unpatented mining claims without either obtaining the consent of the plaintiffs, or filing a proceeding in Condemnation.

The original Complaint was filed in Yuma County, naming the five members of the State Highway Commission and the State Engineer as defendants. The case was transferred

to Maricopa County, under provisions of Section 21-101, A.C.A., 1939. The Yount Constructors, Inc. was thereafter substituted for John Doe.

After removal to Maricopa County Superior Court, plaintiffs petitioned for, and this Court granted, an Order making the State of Arizona a defendants as liable for Trespass.

A Motion to Dismiss on behalf of the State and its officials, interposed the defense of Sovereign Immunity, lack of jurisdiction, and failure to state a cause of action, and upon the Court's denial of the Motion, an Answer filed. Title to the Easement having been acquired more than two years before filing the action, the Statute of Limitations, among other defenses, was pleaded as a defense in the Answer. (Sec. 59-206, A.C.A., 1939; A.R. 33).

Gravamen of Complaint

The gravamen of the Complaint is that the State committed an act of Trespass in *acquiring* from the United States and the State of Arizona an Easement.

Plaintiffs make no claim that they still own or claim title to the land within the right

of way. There is no contention made by plaintiffs that the State did not acquire an Easement in 1947, more than two years previous to the filing of the action.

The acts of Trespass complained of are not that the road was being constructed or now being used upon land belonging to the plaintiffs, but rather that the act in "taking" by virtue of the Highway Resolution and filing of maps in accordance with the laws and regulations of the State and United States, constituted Trespass. The State, it is alleged, took the land without condemning.

During the trial, and while defendants were establishing the procedure by which the title was acquired, plaintiffs' counsel, in waiving any objection to the exhibit being offered as evidence, stated: (T.R. 318)

Witness

"A. It is prepared in our office, yes, sir.

"Mr. Shute: I have no objection. *We a long time ago admitted there was a right of way across there.*"

The ownership of the right of way being conceded, there could, therefore, be no Trespass by the defendants in constructing upon

land and ground owned by the State, and the Court dismissed the action as against the contractor, as well as the officers of the State, for Trespass.

This concession of ownership makes it unnecessary to include in the Statement of Facts a summary or review of the testimony and exhibits introduced at the trial, establishing the procedure taken to acquire title to the right of way.

The ownership of the right of way being conceded, there could be no Trespass by reason of the construction and occupation of the land after the State had acquired title.

This is not an action to quiet title or determine ownership, but is a collateral attack upon the grant of an Easement to the State. The paramount title was in the State to that part of Section 2 and 36 that was not Federal land, and the paramount title to Federal land in the Government until patent issues or an Easement granted. When the State or Government grants or patents land in error, or by mistake, an action lies for a resulting trust, an action in equity, or by a direct proceeding for cancellation of patent or grant.

Statement of Facts

The Easement traversing State land was acquired and perfected under Section 10-1001 et seq., A.C.A., 1939, and across Federal land under Section 2247 U.S.R.S. (43 U.S.C.A. 932) in March and April, 1947, 400 feet in width. Contract for construction was awarded in June, 1949, and actual construction work commenced June 16, 1949. Complaint was filed October 20, 1949.

On or about July 15, 1949, an employee of the State Highway Department, Mr. Kelly Moore, received a letter from one of the plaintiffs, (Tr. 318), relative to some mining claims in the vicinity of the right of way, this being the first notice of any kind received by the Department of any adverse claim. An investigation disclosed that there was a small shack within the right of way occupied by a man named Silver. Arrangements were made to have the shack moved. Mr. Tracy, one of the plaintiffs, at a later date made a personal call at the office of Mr. Moore and requested the Right of Way Department to confer with his attorney, Mr. Westover, of Yuma, Arizona, to discuss with him a claim which the plaintiffs asserted to the ground claimed under mining locations. A request was made (A.R. 131), August 6, 1949, to Mr. Westover, to furnish the claims across

which the right of way traversed, and a response was made, naming some twenty-eight mining claims (A.R. 133).

The Right of Way Division of the Highway Department delegated the responsibility to a Mr. Clare, an employee of the State, to first examine the ground across which the highway traversed, for the purpose of locating any monuments or location notices, or other evidences of mining claims upon, across or in the vicinity of claims alleged to be owned. Mr. Clare, together with Mr. Mills, a mining engineer, and a Mr. Layton, the project engineer, both in the employment of the Department, went over the ground for the purpose of finding monuments or location notices, or other evidence of mining claims. (Tr. 339). A single mining claim monument was found—with two copies of location notices — which were introduced in evidence, describing two mining claim location notices in the same tobacco can, "Empire Fraction" and "Nugget No. 4," (Defendants' Exhibit 27, A.R. 134). It later developed that neither of these location notices described any land claimed by the plaintiffs. These were the only evidences on the ground found by the defendants as evidencing any mining claims or locations either monuments, location notices or otherwise within the right of way

across Sections 2 and 36, and the land involved herein.

Finding no evidence on the ground, Mr. Clare then went to Yuma, the County Seat, and contacted a title company, (Tr. 347), requesting an examination of the records and title search, (Tr. 348), and upon the title company's refusal, because of irregularities, to furnish a report, Mr. Clare made an attempt himself to examine Recorder's records and was unsuccessful in establishing any title in plaintiffs.

A letter was then addressed to Mr. Westover, dated October 14, 1949, (Def. Ex. 5, A.R. 105), making a report of the findings and requesting he furnish evidence of title or abstract.

The only reply to this letter was the Complaint filed October 20, 1949, naming the twenty-eight claims that the State (A.R. 1) was alleged to have acquired as and for a right of way.

We have set forth the facts leading up to the Complaint rather fully, although immaterial here, because of the charge in the Complaint against the Commissioners, and the State Engineer, had notice of plaintiffs' claims and they wantonly disregarded and

acted maliciously, when, in fact, as the evidence disclosed, their first notice of any claim was the filing of the Complaint. The Right of Way Division made every effort to investigate and justify payment of public funds if a valid claim could be found.

It is not the business of the Commissioners or the State Highway Engineer, as such officers, to negotiate for rights of way, prepare maps or plats for filing. Mail addressed to the State Highway Department is handled by subordinates. Upon recommendation of the State Engineer regarding realignments, a Resolution is presented to and acted upon by the Highway Commission, as in the present instance. (Defendants' Exhibit No. 18, A.R. 124). Because of the many and multitudinous matters involved in acquiring the rights of way, this particular function is handled by a Right of Way Division, with many employees qualified to examine records, titles, and appraise values. The officers that were made defendants in this case appeared and testified that the first information they had of any adverse claim was the filing of the Complaint.

After the venue of the action was moved to the Superior Court of Maricopa County and the Court had directed that the State of Arizona be made a party defendant, the

plaintiffs filed an Amended Complaint specifying more definitely the claims involved. In the new Amended Complaint, plaintiffs abandoned damages for traversing all twenty-eight claims, but did not reduce the damages claimed as against the State, although they reduced the number of claims damaged, from twenty-eight to eight, and at the trial, (Tr. 25), the plaintiffs abandoned any claim for damages to "Nuggets No. 3" and "Nuggets." Damages were, therefore, confined to a right-of-way that it was alleged traversed the following claims only:

Nuggets No. 2.
Sure Thing No. 2.
Empire.
High Bar No. 1.
High Bar No. 2.
High Bar No. 3.

The Answer of the Defendants put in issue the validity of the claims alleged to have been damaged, and denied that they were valid and existing mining claims, and denied that the plaintiffs were the owners of the claims described in Paragraph 2 of plaintiffs' Complaint.

After introducing location notices recorded in the County Recorder's Office at Yuma,

Arizona, the plaintiffs, in order to show that they had succeeded to any title owned or claimed by Edward Beggs and M. Y. Haggerty, the locators of the claim, offered in evidence Exhibits "D" and "E" as constituting the chain of title. (Tr. 11, 12, 13 and 14).

Objection having been made to the introduction, the Court responded, by saying:

> "I don't care what it represents—I will find out what it represents when I read it,"

and received the Exhibits in evidence.

From an examination of these Exhibits (A.R. 64 to 80, inclusive), it will be noted that the following Exhibits constitute the chain of title under which the plaintiffs claim to be entitled to damages. They are as follows:

> June 17, 1933, R. H. Benton transferred to P. D. McIntyre a one-third interest in some twenty-eight mining claims in Yuma County, described in the instrument. (A. R. 72).

It will be noted that there is no previous conveyance from either Beggs or Haggerty to Benton. Nevertheless, Benton conveys a

one-third interest in some twenty-eight mining claims as though he were the owner.

The next conveyance is dated February 23, 1937, (Exhibit "E", A.R. 78), wherein P. D. McIntyre and R. H. Benton convey a one-third interest to Samuel P. Tracy.

We wish to emphasize that the title of McIntyre and Tracy, the plaintiffs herein, stem from the Quit-claim Deed to a third interest. The Complaint sought a Judgment in the sum of $15,000.00, $10,000.00 general damages, and $5,000.00 exemplary. It is assumed that the Court, in allowing a $5,000.00 Judgment in favor of McIntyre and Tracy, has awarded them a one-third of the value, and that in due time, unless the Statute of Limitations prevails, Benton will have an action for the balance of the $15,000.00. There being no conveyance from Haggerty and Beggs, and they not having been made parties to this action, if the Statute of Limitations does not prevail, they would still have a right to come in and claim the total damages of $15,000.00 again.

As further evidence of the chain of title, the plaintiffs exhibited Affidavits of Annual Labor or Exemptions from Annual Labor. This, we submit, does not constitute a conveyance.

As part of Exhibit "D", plaintiffs offered in evidence, as part of their chain of title, a Notice by McIntyre, dated July 20, 1936, addressed to P. E. Woodson, Administration of the Estate of Edward Beggs, giving Notice of his intention to forfeit the interest of the deceased unless payment was made to cover the assessment work. The Notice given Woodson was that Beggs was owner of only a third interest. The record does not show that P. D. McIntyre was a co-owner. Section 65-110 A.C.A. 1939 limits the right to advertise out a delinquent co-owner to one who is a co-owner by giving the statutory notice. No provision is made for giving notices to administrators of deceased persons, and the law requires that the Notice given be recorded. The Notice offered in evidence does not comply with any of these provisions.

As further evidence of ownership, plaintiffs introduced the Deed executed January 27, 1933, by some six different parties, to a 160 acre placer claim. This placer claim bears the same name as the 40 acre placer claim, High Bar No. 1, located by Beggs and Haggerty. The 160 acre High Bar located by eight claimants many years afterwards was never identified in the testimony as to what land was covered by the 160 acre placer claim, and is in no way connected with the property identified by the plaintiffs as High Bar No.

1, High Bar No. 2 and High Bar No. 3, in the testimony. Exhibit "A" introduced in evidence by the plaintiffs refers to High Bar No. 1 as a 40 acre claim. The purpose of introducing High Bar No. 1, the 160 acre placer claim, and this particular Deed, on page 72 of the Abstract of Record has never been explained by the plaintiffs.

This completes the chain of title upon which the plaintiffs rely as the basis of their ownership. It will be observed that no where has there been a conveyance from Haggerty and Beggs, the original locators of the six mining claims above referred to, conveying the same to the plaintiffs, or any other person.

Indian Reservations

Indian Reservations and their boundaries are fixed and determined by Executive Orders, and lands within Indian Reservations are not open to settlement or purchase or mineral entry under the public laws. (See Sections 182 and 183, Vol. 1, Lindley on Mines, 3rd Edition).

The Colorado Indian Reservation as established by Executive Order, dated May 15, 1876, (Defendants' Exhibit 9, A.R. 115), fixed the southern boundary between the

Colorado River and the crest of the La Paz Mountains as being the La Paz Arroyo. This remained the southern boundary of the Colorado Indian Reservation until November 22, 1915, when Executive Order 2273, (Defendants' Exhibit 10), amended the southern boundary to read along the northern boundary of Sections 19 to 24, inclusive, in Township 4 North, Range 21 West, and as shown on the plat in evidence, of this township. (Exhibit 4).

The location of the La Paz Arroya is evidenced by:

(a) Surveyor-General's field notes Township 3 North, Range 21 West, (Defendants' Exhibit 12, A.R. 121).

(b) Township plat approved December 6, 1915, (Defendants' Exhibit 8, A. R. 111).

(c) Official Government map 1883, (Defendants' Exhibit 11, A.R. 121).

(d) Official map of Yuma County, by James M. Barney, (Defendants' Exhibit 7, A.R. 111).

Two of the alleged mining claims were located by Haggerty and Beggs within the boundaries of the Colorado Indian Reservation.

Sure Thing No. 2 was located one mile west of Gonzales Well, May 13, 1910. (A.R. 90).

Nugget No. 2 was located eleven miles west of Quartzsite, June 1, 1911. (A.R. 91).

Exhibit No. 9, pertaining to the Colorado Indian Reservation, beginning on page 111 of the Abstract of Record, is a certified copy of the various Executive Orders establishing the boundaries of the Colorado Indian Reservation. The pertinent and material Executive Order establishing the La Paz Arroyo as the southern boundary is dated May 15, 1876. It begins at page 114 of the Abstract of Record and concludes at page 115 thereof, and reads as follows:

"EXECUTIVE MANSION, May 15, 1876.

"Whereas an Executive Order was issued November 16, 1874, defining the limits of the Colorado Indian Reservation, which purported to cover, but did not, all the lands theretofore set apart by act of Congress approved March 3, 1865, and Executive order dated November 22, 1873; and whereas, the order of November 16, 1874, did not revoke the order of November 22, 1873, it is hereby ordered that all lands withdrawn from sale by either of these orders are still set apart for Indian purposes; and the following are hereby

declared to be the boundaries of the Colorado Indian Reservation in Arizona and California, viz:

"Beginning at a point where La Paz Arroyo enters the Colorado River and 4 miles above Ehrenberg; thence easterly with said Arroyo to a point south of the crest of La Paz Mountain; thence with said mountain crest in a northerly direction to the top of Black Mountain; thence in a northwesterly direction over the Colorado River to the top of Monument Peak, in the State of California; thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; thence to the place of beginning.

U. S. GRANT."

State Land

Section 2, in Township 3 North, Range 21 West, became State land upon approval of the plat of survey, December 6, 1915, as evidenced by Defendants' Exhibit 8, a map not incorporated in the Abstract of Record.

Section 36, in Township 4 North, Range 21 West, became State land upon the approval of the plat of survey, December 6,

1915, as evidenced by Defendants' Exhibit 4, a map not incorporated in the Abstract of Record.

These dates are further confirmed by certified copies of the State Land Office records, (Defendants' Exhibit 14, not incorporated in the Abstract of Record), and certified copy of the State Land Office records, (Defendants' Exhibit 33, not incorporated in the Abstract of Record).

From a reference to defendants' Exhibit 14, the State Land Office records, it will be observed that all of Section 2 remained State land from the date of the approval of the plat, December 6, 1915, until June 23, 1938. On June 23, 1938, the State selected, in lieu of the N½NW¼ and Lot 1 of Section 2, other land, for the reason that in March of 1934, the Federal Government had made a Colorado River withdrawal.

It, therefore, became necessary, in filing a right of way map for the State Highway Department in 1947, to apply for a right of way across the N½NW¼ and Lot 1 of Section 2 as being Federal lands in 1947, and a right of way was applied for as against the remaining part of Section 2 that remained State land in 1947.

From a reference to Defendants' Exhibit 14, the State Land Office records in reference to Section 36, a similar situation existed. All of Section 36 remained State land until November 5, 1938, when the State released the W½ of Section 36, and selected in lieu thereof, other land, because the W½ of Section 36, Township 4 North, Range 21 West was within the Colorado River Withdrawal. Therefore, in 1947, it became necessary, in obtaining a right of way across Section 36, to apply to the Federal Government for the part that became Federal land in 1938, and to apply to the State for a right of way across the E½ of Section 36, which had remained State land from the date of the filing of the plat, in 1916.

It will be noted that the southern boundary of the Colorado Indian Reservation was the La Paz Arroyo, which was south of both Sections 2 and 36 involved herein, and existed from May 15, 1876 to November 22, 1915. By virtue of the amendment of November 22, 1915, the land was open and subject to entry as public land and public domain of the United States, until the approval of the official survey map, December 6, 1915, at which time, under the law, both Sections 2 and 36 became State land. In other words, there was a period of approximately two weeks only that the land was public domain subject to location

as mining claims. Prior to November 22, 1915, both Sections 2 and 36 were within the boundaries of the Colorado Indian Reservation. After December 6, 1915, after the public surveys had identified the public land as school land, such land was no longer subject to mineral location under the Federal Mining Laws, but was subject to lease under Section 11-314, A.C.A., 1939, which provides:

> "Any citizen of the United States finding valuable minerals upon any unsold lands of the State may apply to the Department for a lease of an amount of land not exceeding the amount allowed by the Mining Laws of the State and United States." (Laws of 1915, Ch. 5, 2nd S.S.).

"Sure Thing No. 2" and "Nugget No. 2" were both located during the period of time that the land was within the Colorado Indian Reservation. The "Empire," "High Bar No. 1," "High Bar No. 2" and "High Bar No. 3" were all located after January 1, 1916, and after the school sections had been identified.

All of the claims involved herein were located by Beggs and Haggerty. No evidence was introduced in the record to show that Beggs and Haggerty erected monuments, posted a location notice upon the claims, or made a discovery. The only act of location which was introduced in evidence was the act

of recording with the county recorder. The location notices as recorded, of "High Bar No. 1," "High Bar No. 2" and "High Bar No. 3" made no reference to a natural object or permanent monument and was void under Section 4040 of the 1913 Arizona Code, the applicable statute in the instant case.

"Empire Lode"

The Complaint and the Deeds of Conveyance under which the plaintiffs claim title refer to "Empire Lode," recorded in Book 11, at page 192.

The plaintiffs did not offer or introduce in evidence "Empire Lode," recorded in Book 11, page 192. The plaintiffs did offer in evidence a location notice of "Empire Mining Claim," recorded in Book 14, at page 134. This claim was also located by Beggs and Haggerty October 2, 1916, long after the land had become State land. In the caption of the location notice there appears a notation, "Amended location lode claim." There is nothing in the body of the location notice itself as to whether it was an amendment of "High Bar," "Sure Thing" or "Empire Lode." There were no monuments upon the ground or location notices indicating its location.

Whether the "Empire Lode" or "Empire Mining Claim," there was no evidence of a lode or vein or discovery of mineral in place such as to validate a lode claim. The plaintiffs made no effort whatsoever to establish a discovery or a lode or vein bearing gold or any other mineral.

The location notices of "Sure Thing No. 2," and "Nugget No. 2," located while the land was within the Indian Reservation, contained a statement indicating their location. "Sure Thing No. 2" was described as being one mile west of Gonzales Well, in Frea Gulch, and "Nugget No. 2" was eleven miles westerly from the town of Quartzsite.

Defendants' Exhibit 22 is a map indicating the location of "Nugget No. 2" and "Sure Thing No. 2," as described in location notices, and placed them about one mile north of the State highway.

In order to identify the ground that the plaintiffs occupied, the plaintiffs did not rely upon the location notices themselves, or monuments, as describing the property. Plaintiff testified that he was in possession of the ground indicated on a map prepared by Frank Salisbury in 1934, introduced as Exhibit "A". Salisbury did not testify and did not identify the map as having been made

from the records or location notices or monuments upon the ground. Salisbury evidently "floated" the claims to suit his purpose.

In 1934 Salisbury and Tracy located the N½ of Section 2 as "New Gold No. 1" and "New Gold No. 2." (Defendants' Exhibits 2 and 3, A.R. 100 to 103, inc.)

On April 23, 1934, Salisbury and Tracy wrote a letter to the United States Land Office, stating they claimed the N½ of Section 2, Township 3 North, Range 21 West, as placer mining claims. In testifying, (Tr. 61 to 63, inc.), Tracy testified that in 1934, when he located the "New Gold" claims on the N½ of Section 2, he could not find any location notices or monuments that you could check out. He, therefore, located the ground and built his own monuments and located the N½ of Section 2 as "New Gold No. 1" and "New Gold No. 2."

On Exhibit "A", the map prepared by Salisbury in 1934, he does not show the location of "New Gold No. 1' 'and "New Gold No. 2" as being on the N½ of Section 2, but he "floats" "New Gold No. 1" and "New Gold No. 2" to the SE¼ of the "High Bar" claims, and shows "High Bar No. 1," "High Bar No. 2," and "High Bar No. 3" as being on the N½ of Section 2. There being no

permanent or fixed monument to which the claims could be identified, it was possible for a map maker to "float" the claims to such a location as suited their purpose.

ASSIGNMENTS OF ERROR

Assignment of Error No. 1

The Court erred in not making the Findings of Fact and Conclusions of Law, stated separately, the case being tried upon the facts without a jury, request having been for findings before the introduction of evidence, as well as after.

Legal Propositions

Section 21-1028, Rules of Civil Procedure, provides:

> "Section 21-1028. Findings by the Court—Effect.—In all actions tried upon the facts without a jury, the court, if requested, shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the Court shall similarly set forth the Findings of Fact and Conclusions of Law which constitute the grounds of its action. Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be

given to the opportunity of the Trial Court to judge the credibility of the witnesses. The findings of a master, to the extent that the Court adopts them, shall be considered as the findings of the Court."

Assignment of Error No. 2

The Court erred in ordering plaintiffs to amend complaint, naming the State of Arizona a defendant, and rendering judgment against the State, in an action of Trespass alleged to have been committed by officers of the State, the plaintiffs not having posted bond required by statute or otherwise complied with statute in actions brought against the State.

Legal Propositions

Section 18, Part 2, Article 4 of the State Constitution provides the Legislature, not the Courts, shall direct in what manner suits may be brought against the State, and in Section 32, Article 2, declares the provisions of the Constitution to be mandatory.

Sections 27-101 to 27-106, inclusive, A.C.A. 1939, provide in what manner actions may be brought, provide for cost bond of $500.00, service not only upon Attorney General, but

upon Governor, and shall be filed within two years.

Section 27-1401, A.C.A., 1939, also provides in an action to quiet title, the State may be made a party defendant.

Damages cannot be recovered from the State for the negligence or tortious acts of its officers or agents. *(State v. Dart,* 23 Ariz. 145).

Assignment of Error No. 3

Title to right of way having passed to the State more than two years prior to filing of complaint, Court erred in directing judgment against the State on an action barred by the Statute of Limitations as set up in the answer.

Legal Propositions

Section 59-206, A.C.A., 1939, expressly pleaded in defendants' answer, like Section 27-102, A.C.A., 1939, is a limitation of time within which an action against the State must be brought.

Section 59-206 does not alter or modify the constitutional provision providing the manner in which actions against the State

may be brought, and the legislative mandate, enacted pursuant thereto, that before initiating an action against the State, a plaintiff is required to post a $500.00 cost bond and serve the Governor as well as the Attorney General, as a condition precedent to acquiring jurisdiction.

Assignment of Error No. 4

The Court erred in holding the evidence of ownership offered by plaintiffs, supported a Judgment of $5,000.00, or any other amount, based upon a Quit-claim Deed executed in 1933, from one R. H. Benton to P. D. McIntyre, to a one-third interest in unpatented mining claims alleged to have been located upon public land in 1910, 1911 and 1916, by Edward Beggs and M. Y. Haggerty.

Legal Propositions

1. While a claim of title to unpatented mining claims may be transferred by the original locators, or one holding under them, a stranger to the title, attempting to transfer a one-third interest therein, having no power of attorney from claimant, conveys no title as against the Government or the locator by a Quit-claim containing the words, "remise, release, and forever quit-claim," or any other words of conveyance, so as to vest a valid

title in the transferee to the whole of said claims, or any part thereof.

2. A Quit-claim Deed from one who has initiated no rights to public land conveys no rights to the title, as occupancy of State or public land, without first initiating a right under some law of the State or United States Government, vests no rights in the transferee.

Assignment of Error No. 5

Until plaintiffs established as valid, the original mining claims located in 1910, 1911 and 1916, by Beggs and Haggerty, a direct transfer or quit-claim by the locators themselves, or their transferees, conveyed no title or right of possession to the plaintiffs, and the Court erred in awarding $5,000.00, or any other sum, to plantiffs.

Legal Propositions

1. The filing of location notices with County Recorder, without proof of other acts of location required by statute does not segregate the land from the Public Domain, and no presumption is implied from recordation alone that locator posted, monumented or made a discovery.

2. Recording of location notices of min-

ing claims does not establish that land was public land open to a valid entry, or that it was not upon an Indian Reservation or State land at the time it was located.

Assignment of Error No. 6

The Court erred in awarding plaintiffs damages for an Easement acquired by the State, traversing land alleged to be owned by plaintiffs by virtue of two placer claims located by Edward Beggs and M. Y. Haggerty on the Colorado Indian Reservation, described as "Sure Thing No. 2", located May 13, 1910, (A.R. 90), and "Nuggets No. 2", located June 1, 1911, (A.R. 91), no evidence being introduced that locators made a discovery, erected monuments, or posted location notices upon the ground located. The only act performed by locators being the act of recording with the County Recorder a copy of location notices describing land entirely outside the right of way acquired by the State.

Legal Propositions

Lands within an Indian Reservation are not public domain subject to entry under the Mining Laws. (Lindley on Mines, 3rd Ed., Secs. 182, 183, 184.)

Validity of a mining claim is not established by proof of recording alone a location notice, all statutory requirements, including proof of discovery, monumenting and posting, when contested, must be established by evidence.

Discovery is the source of a miner's title and is an essential requisit to a valid location, and must precede the location.

Where the description and reference to a natural monument is of such a character that it may be floated anywhere to suit the ground, it cannot furnish a foundation for a valid claim, and oral testimony may not be introduced to vary the written description.

Assignment of Error No. 7

The Court erred in awarding plaintiffs damages for an Easement acquired by the State, traversing land alleged to be owned by the plaintiffs by virtue of three placer claims located by Edward Beggs and M. Y. Haggerty on State land described as "High Bar No. 1", "High Bar No. 2", and "High Bar No. 3", located January 1, 1916, the location notices containing no permanent monument or natural object identifying the land claimed, and no evidence being introduced that the locators made a discovery, erected

monuments or posted notices upon the ground located. The only act performed by the locators in evidence being the act of recording with the County Recorder a copy of the location notices.

Legal Propositions

After public surveys have identified public land as school sections such lands are no longer subject to mineral location under Federal Mining Laws, but are subject to lease only, under Section 11-314, A.C.A., 1939.

A discovery after patent, school or other grant, would not defeat the patent or enable the Government, or anyone else, to abridge the right of the patentee or sanction an intrusion upon his possessions.

Sections 4038, 4039 and 4040, Arizona Code of 1913 declares that a placer mining claim which makes no reference to a natural object or permanent monument in the location notice, is void.

Discovery is the source of a miner's title and is an essential requisite to a valid location and must precede the location, and this rule applies alike to lode and placer locations, and, as far as the character of the deposits will admit, the principles governing

lodes apply to placers, but when contested, proof of discovery, monumenting and posting must be established.

Assignment of Error No. 8

The Court erred in awarding plaintiffs damages for an Easement acquired by the State, traversing land alleged to be owned by the plaintiffs by virtue of "Empire Mining Claim," a lode claim alleged to have been located by Edward Beggs and M. Y. Haggerty, October 2, 1916, no evidence having been introduced of a vein or lode, or discovery of mineral in place, the sinking of a discovery shaft, the erection of monuments or the posting of location notice, and because the "Empire Mining Claim," recorded in Book 14, at page 134 was not part of the land alleged in the complaint to have been trespressed upon.

Legal Propositions

Gold occurs in veins or rock in place and when so found, the land containing it must be appropriated under the laws applicable to lodes. (Lindley on Mines, 3rd ed. vol. 2, pg. 739.)

Where the right of possession is founded upon an alleged compliance with the law re-

lating to a valid location, all necessary steps, aside from the making and filing of the location certificate, must, when contested, be established by proof outside of such certificate.

Section 2320, U. S. Revised Statutes, provides no location of a mining claim shall be made until discovery of the veins or lode within the limits of the claim located.

Assignment of Error No. 9

The Court erred in awarding damages to the plaintiffs for an Easement acquired by the State, traversing land alleged to be owned by the plaintiffs by virtue of plaintiffs' Exhibit "B", (A.R. 62) a placer mining claim, recorded in Book 24 of Mines, at page 1, located on Section 2, September 10, 1924, described as "High Bar No. 1", no permanent monument or natural object identified the land claimed and embraced 160 acres, without designating whether it was the South half, the East half or the West half of Section 2, and no evidence was introduced that the locators had made a discovery, erected monuments or posted notices upon the ground.

Legal Propositions

The legal propositions in support of this

Assignment are identical with the legal propositions in support of Assignment of Error No. 7, pertaining to "High Bar" claims 1, 2 and 3.

Assignment of Error No. 10

The Court erred in rendering judgment for plaintiffs in the sum of $5,000.00 as against the State of Arizona, by reason of insufficiency of evidence to support the Judgment, the plaintiffs not having established the validity of the mining claims or a chain of title in themselves.

Legal Propositions

It is elementary that damages may not be claimed as for Trespass, or otherwise, without the plaintiffs establishing by compentent evidence, proof of ownership and a valid title.

ARGUMENT

The answer to the legal questions relating to the validity of unpatented mining claims raised in this Appeal, are more important to the Arizona Highway Department than the $5,000.00 Judgment. The Highway Department is continuously faced with claims arising out of rights of way across public land, and especially unpatented mining claims. It

has never been the practice to negotiate with, and pay claims for questionable and defective titles.

Private property may not be taken for public use without payment, but the officers of the State are not given a blank check to reimburse claimants who are not vested with a title that a title company will not insure, or that may not be verified from the public records.

Public moneys are trust funds, to be expended and paid out only to persons having titles that can be verified, and the decision made in this case relating to valid mining claims will be a precedent and act as a guide and govern Highway Department officials in the future in the expenditure of public funds for occupants of public land under a claim of ownership.

Assignment of Error No. 1

Request was made for Findings of Fact and Conclusions of Law before the calling of the first witness. (Tr. 3). The Court directed entry of Judgment June 4, 1951. (A.R. 59). On the same day, because the Court informally advised a member of the staff of the Attorney General's office that the Court would not make findings, a formal written

request was thereupon filed June 9, 1951. (A.R. 35), which the Court ordered stricken June 19, 1951. (A.R. 60).

While Section 21-1028, A.C.A., 1939, is mandatory, the Court shall, if requested, find the facts specially and state separately its conclusions of law, we find no Arizona precedent reversing a Judgment solely because the Court failed or refused to make finding, when requested.

The many interlocking legal questions involved in this action, because of the Court's failure to state its conclusions of law separately, cast an unusual and additional burden upon the Appellate Court to re-examine all of the evidence and issues raised. Findings of Fact and Conclusions of Law stated separately would have simplified the issues in this case tremendously and it was with this in mind that a request was made for findings.

The defendants' evidence consists chiefly of official records and documents which are not controverted. It is not a case of weight of evidence or the word of one witness over the testimony of another, but the chief issue is the application of the law to the documentary facts.

We submit, when a timely request is made

that the Court make findings, and if the Court fails so to do, there should be no presumption indulged in that there are facts in the record to support the Judgment.

Assignment of Error No. 2

Immunity from suit is an attribute of every sovereign, and it is well settled that neither the United States nor a state can be sued without its consent.

Section 18, Part 2, Article 4 of the State Constitution provides that the Legislature shall direct in what manner suits may be brought against the State. Section 32, Article 2, declares the provisions of the Constitution to be mandatory. We submit, the Court erred in directing the State be made a party, and in rendering a Judgment against the State in an action sounding in Tort against officers of the State Highway Department.

As part of the Order, the plaintiffs were directed to file an Amended Complaint and served upon the State. In amending the Complaint, the plaintiffs restated Paragraph 1 of the original Complaint and substituted only the Young Constructors, Inc. in lieu of the fictitious John Doe, and not the State of Arizona as a party to the proceeding, and no

where in the Complaint has any cause of action been stated as against the State.

The Legislature, pursuant to the constitutional mandate, has provided in two different sections the manner, or procedure, and what actions may be brought against the State. Section 27-1401, A.C.A., 1939, provides that the State may be made a party defendant in an action to quiet title, and in Section 27-101 to 27-106, inclusive, A.C.A., 1939, provides the manner in which actions may be brought, first, by filing a Cost Bond in the sum of $500.00, by serving the Governor of the State, as well as the Attorney General, and that the action must be brought within two years. By statutory requirement, suits to quiet title must be under oath. The Amended Complaint was not verified.

Service was not made upon the Governor; the action was not filed within two years, as will hereinafter be pointed out, and the Bond required was not posted. Previous to the Order making the State a party defendant, the plaintiffs had furnished a Cost Bond of $200.00 upon a Motion based upon the non-residence of the plaintiffs. The $200.00 Bond is not the statutory Bond required by Section 27-103, A.C.A., 1939.

We submit that the Court did not acquire

jurisdiction over the State of Arizona until the statutory requirement had been complied with.

Furthermore, damages may not be recovered from the State for the negligent or tortious acts of its officers or agents.

In the case of the *State of Arizona v. Dart,* 23 Ariz. 145, the Court had under consideration the liability of the State for the negligent acts of its officers in the construction of a bridge near Florence, Arizona, in which plaintiff's land was inundated. The Court said:

> "*It is not, of course, contended that negligence can be directly imputed to a soverign state.* If a recovery is to be had in this case, it must therefore be based on the negligence of the officers, agents, or servants of the state for which the state is responsible under the substantive law, on the principle of RESPONDEAT SUPERIOR.
>
> "It was held by this court, in the case of *State v. Sharp,* 21 Ariz. 424, 189 Pac. 631, that the State is not liable to respond in damages for the negligent acts of its agents, servants or employees, and that in consequence of its sovereignty, it is immune from prosecution in the courts, and from liability to respond in damages for negligence, except in those cases where it

has expressly waived immunity or assumed liability by constitutional or legislative enactment."

In the case of *Hill v. United States,* 13 Sup. Ct. Rep. 1011, (Syllabus), it is stated:

"1. The United States have never, either by the act of March 3, 1887, (24 Stat. 506, c. 359,) or by any other law, permitted themselves to be sued for torts committed by their officers, as, for instance, a trespass on private lands; and the settled distinction in this respect cannot be evaded by framing the claim so as to count upon an implied contract to compensate for use and occupation.

"2. The United States, while they may be sued, as upon an implied contract, for the value of land actually appropriated to public use, *when the title of the plaintiff is admitted,* are yet not subject to such suit when plaintiff's title has never been acknowledged, but, on the contrary, the government pleads that it has a paramount right to use the lands; for, in the latter case, the injury, if any, constitutes a tort by the government agents, for which the United States is not suable. Mr. Justice Shiras, dissenting."

The Hill case was very similar in many respects to the case at bar. The Government had occupied land fronting upon Chesepeake

Bay, in the State of Maryland, and erected thereon a lighthouse, claiming the ownership to the land as being a part of the bottom of Chesepeake Bay, one of the navigable waters of the United States, and that the Government had a paramount right to its use.

The plaintiff alleged that he had been seized and possessed in fee simple, with all the aquarian rights of the land in question, and that the Government had seized it without any compensation, and without the consent of the plaintiff; that the title or right so acquired by him was his private property, which, by the Fifth Amendment of the Constitution, could not be taken by the United States for the erection and maintenance of a lighthouse, without just compensation.

In the Hill case, like the case at bar, the Government defended upon the proposition that the Government owned the land. In the case at bar the State contends that it acquired title to an Easement and is the owner of a right of way across the land. This contention was admitted by plaintiff, and that the State is the owner of an easement over and across the land, but alleges a Trespass was committed by the officers of the State in acquiring the easement. The Supreme Court, in the Hill case, concluded:

"The United States cannot be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction in this respect between contract and tort be evaded by framing the claim as upon an implied contract. *Gibbons v. United States,* 8 Wall 269; *Langford v. United States,* 101 U.S. 341; *United States v. Jones,* above cited.

"An action in the nature of Assumpsit for the use and occupation of real estate will never lie where there has been no relation of contract between the parties and where the possession has been acquired and maintained under a different or adverse title, or where it is tortious and and makes the defendant a trespasser. *Lloyd v. Hough,* 1 How. 153; *Carpenter v. United States,* 17 Wall, 489."

The State of Wyoming has a constitutional provision similar to that of Arizona. It provides:

"Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct."

The Wyoming Supreme Court then observed:

"The general rule appears to be that such provisions are not self executing and

> no suit can be maintained against the State until the Legislature has made provision therefor, (36 Cyc. 913), and no consent having been given by the State, it is evident that this suit could not be maintained against the State."

This quotation is from the case of *Hjorth Royalty Company v. Trustees of the University,* 222 Pac. 9. The plaintiffs in that action claimed a legal estate in the lands as an oil placer mining claim, subject to the paramount title of the United States. The land was in fact a school section belonging to the State and the Court dismissed the action for want of jurisdiction, for the reason that the State had not provided for the action filed by the plaintiffs.

In the case of *Taylor v. Roosevelt Irrigation District,* 226 Pac. 2d, 154,—this was an action sounding in tort brought against the irrigation district. In this case the Court pointed out, as it did in the case of *Maricopa County v. Warford,* 69 Ariz. 1, that an action sounding in tort could be brought against an irrigation district, although it was a political subdivision. It distinguished between a political subdivision not exercising governmental or political prerogatives and the State itself when exercising governmental powers. It was stated:

"We hold, therefore, that an irrigation district, such as the appellee herein, may be held liable for its torts as in the case of a municipal corporation when it is engaged in a function which is of a proprietary nature."

See also, *Larson v. Yuma County,* 26 Ariz. 367; *Ballaine v. Alaska Ry.,* 8 A.L.R. 990.

Section 27-103 A.C.A., 1939, provides:

"BONDS FOR COSTS: At the time of filing the complaint, the plaintiff shall file therewith a bond in a sum not less than Five Hundred ($500.00) Dollars, as the court may fix, to be approved by a judge of the court, and conditioned that in case the plaintiff fails to recover judgment, he will pay all costs incurred by the state in such suit."

The original Complaint did not state a cause of action against the State, and the State was not made a party. The plaintiffs sought Judgment only against the officers of the State Highway Department on the theory that the defendant-officers, knowing full well the plaintiffs' ownership of the land, wrongfully and surreptitiously acted together to obtain a title for the State of Arizona directly from the United States Government and the State of Arizona, and that such acts were unlawful and intended to deprive the

plaintiffs of their right of ownership, with the intention of appropriating the property to their own use.

No change was made in the original Complaint, or the plaintiffs' theory of recovery, in the Amended Complaint, filed after the State was ordered to be made a party, except the Amended Complaint added the name of Yount Constructors, Inc. in Paragraph I thereof, and alleged that the claims directly affected were not twenty-eight, but only eight in number, which were afterwards reduced to six. The Amended Complaint did not state a cause of action as against the State of Arizona.

The Lower Court having concluded that there was no cause of action against the State officers on the plaintiffs' theory and evidence introduced, erred in holding that the State became liable upon the same state of facts, because damages may not be recovered against the State for the negligence or tortious acts of its officers or agents. Furthermore, in bringing in another party defendant, the State, unlike individuals, may be sued only in the manner provided by statute in accordance with the constitutional mandate.

The Legislature, not the Court, fixes the terms under the Constitution, by which the State may be sued.

Assignment of Error No. 3

Paragraph XI of the defendants' Answer, (A.R. 32), pleaded in defense of the plaintiffs' action, Section 59-206, A.C.A. 1939, the Statute of Limitations, in bar of plaintiffs' action.

Section 59-206, A.C.A., 1939, is a repetition of Section 27-102, A.C.A., 1939, relating specifically to property claimed by the State, taken for public highways, relating to the time within which an action may be filed.

The right of way maps, (Defendants' Exhibit 16), filed by the Highway Department, with the United States Land Office, were approved as of March 6, 1947, and as filed with the State Land Office, were approved April 16, 1947.

After the State acquired, and title perfected, for a period of two years, the time fixed by statute for bringing an action for the taking is limited to two years. Whether the State acquires the land from a private individual or by a grant from the Federal Government or State, there is nothing that requires the State to immediately begin the construction of the highway. As a matter of fact, many of the rights of way whether from private owners, or Government are obtained

at least two years before construction work begins. The statute begins to run from the date the land was acquired.

The right of way acquired from the Federal Government, under Section 2477, Revised Statutes, vested in the State the title to the land as to the date of the filing of the right of way map, and the same is true of the right of way acquired from the State of Arizona.

The Statute of Limitations, therefore, within which an action could be brought, expired in April of 1949, and this action was not filed until October of 1949.

The cases are uniform in holding that Section 2477 is a standing offer of a free right of way, and as soon as accepted in an appropriate manner by the agents of the State, the highway is established and the grant is one in praesenti.

In the case of *Wallowa County v. Wade,* 43 Ore. 253, 72 Pac. 793, it was stated:

> "The Act of Congress is more than a mere general offer to the public, being in effect a dedication of the land, which becomes operative and relates back to the date of the Act whenever the public either by user or by some appropriate act of the

highway authorities, affirmatively manifests an intention to use a certain definite portion of the public land as a highway * * * When the public authorities lay out and locate a road over public lands of the United States by surveying and marking it on the ground, or by some legislative Act, or when it is shown by user, the right becomes complete."

Estes Park v. Edwards (Colo.) 32 Pac. 549.

"The language used in regard to the right of way for highways is, 'It is hereby granted.' The word 'granted' in such connection is very significant, in fact, seems to be a key for the solution of the question involved." * * *. This grant and the acceptance were all that was necessary to pass the Government title to the right of way and vest it in the grantee permanently, subject to disfeasance in case of abandonment."

The State having acquired the land within the right of way, as shown on the maps recorded for that purpose, in March and April of 1947, an action brought in October of 1949, not having been commenced within two years, is barred by Section 59-206.

The Trespass of which the plaintiffs complain is the "taking" of the land without first condemning it. In other words, the

Trespass complained of, by plaintiffs' admission that the land belongs to the State, was committeed when the maps of location were filed, and thus, the statute begins to run at that time.

If it is to be conceded, on the plaintiffs' theory, that the land taken belongs to the State, it has belonged to the State for more than two years, and the State could not commit a Trespass by going upon its own land and building a highway.

If the title to the land has not vested in the State, then the Trespass is a continuing one, not being committed by the Highway Department, but by the public in traversing the land. The State Highway Department does not occupy the land, but the land is occupied and is traversed by the public. An action in Trespass settles nothing if the State did not acquire the land, and if the State did acquire the land, it has enjoyed the ownership for more than two years previous to the filing of this action.

In the case of *Wells v. Pennington County,* 2 S. Dak. 1, the Court stated:

> "Mere settlement on the public lands confers no rights on the settler as against the Government or its grantees. The set-

tler acquires no vested interest in the land until he has entered the same at the proper land office and obtained his certificate of entry. Until then, the land continues subject to the absolute disposing power of Congress."

Section 2477, enacted in 1866, provided:

"That the right of way for the construction of highways over public lands not reserved for public use, is hereby granted."

Justice Field, in the case of *Railroad v. Baldwin,* 103 U.S. 428, stated:

"The language of the Act here, and nearly all congressional Acts granting lands, in terms of a grant in praesenti, the Act is a present grant. 'There is hereby granted' are the words used and they must import an immediate transfer of interest, so, when a route is definitely fixed, the title attached from the date of the Act."

The Court held that the Act of the South Dakota Legislature, designating the section lines as highways was an acceptance of the grant of Congress, although the road was not dedicated until after the settlement right had attached. The Court said:

"The title to the land is not taken

away. It is merely the right to pass over and use it for roads and highways when found practicable."

Assignment of Error No. 4

This Assignment of Error goes to the right of the plaintiffs in this case to recover damages based upon an alleged possession by them of ground that was located as mining claims by persons from whom no conveyance has been made to the plaintiffs.

The chain of title upon which plaintiffs allege ownership, (Plaintiffs' Exhibit "D" and "E", A.R. 64 to 80, inc.) consists of four Quitclaim Deeds and a Notice by an alleged co-owner to contribute to assessment work.

Plaintiffs' Exhibit "D", dated 1936, was a Notice by P. D. McIntyre as co-owner, addressed to an Administrator of Edward Beggs, to contribute towards the annual labor. This Notice was defective, as we have pointed out in the Statement of Facts, chiefly because McIntyre had not shown himself to be a co-owner.

The first conveyance (A.R. 67, 68) in which McIntyre appears to have been conveyed any part of the property was dated January 27, 1930, purporting to be an assign-

ment of any interest in 160 acres in Section 2, described as "High Bar No. 1", located by some eight different parties on September 10, 1924. The co-owner's notice to contribute, dated 1936, no where contains any reference to "High Bar No. 1" containing 160 acres.

After introducing in evidence location of a 160 acre claim Exhibit "B" (A.R. 62), no further effort was made in any of the evidence to identify the ground covered and located by the 160 acre claim recorded in Book 24 of Mines, at Page 1. The Amendment of the First Amended Complaint, (A.R. 25), to which was attached a map showing the property claimed by the plaintiffs, made no reference to "High Bar No. 1", (Plaintiffs' Exhibit "B"). Plaintiffs' Exhibit "K" likewise shows no location of a 160 acre "High Bar No. 1" claimed to have been located September 10, 1924.

At the time that Exhibit "B" was offered in evidence, (A.R. 18) timely objection was made because it was no part of the Complaint, and the Court, (A.R. 19), admitted the same for the purpose of examination only, saying:

> "I have got to look at all these instruments to see what they mean, so why not let them in, and if they don't mean anything legally, that is that."

After their introduction, the plaintiffs no where in any of their testimony identified "High Bar No. 1", "Exhibit B", located September 10, 1924 as being in conflict with any of the land occupied by the State.

The other three Quit Claim Deeds constitute the chain of title involving the mining claims which the plaintiffs alleged to have been trespassed upon. The mining claims which the plaintiffs allege to have been trespassed upon were all located by M. Y. Haggerty and Edward Beggs. There is no Deed conveying any of the claims located by Haggerty and Beggs transferring their interest to the plaintiffs herein.

The first Deed introduced as part of the chain of title was dated June 17, 1933, (A.R. 72), from one R. H. Benton to P. D. McIntyre.

The next Deed is dated June 23, 1950, and is a Trust Deed from P. D. McIntyre to Sam P. Tracy. Plaintiffs' Exhibit "E", (A.R. 78), dated February 23, 1937, was a Deed from McIntyre and Benton to Sam P. Tracy, for a one-third interest. Plaintiff testified this deed, Feb. 23, 1937, was his claim of ownership. (Tr. 11)

It will be noted that there was no convey-

ance from Haggerty and Beggs, conveying any of the claims alleged to have been trespassed upon, to the plaintiffs herein.

We submit, therefore, as a legal proposition, that the plaintiffs are not entitled to a Judgment based upon any rights initiated by the plaintiffs themselves, or to any rights of Haggerty and Beggs because the plaintiffs have received no conveyance or legal transfer of title from the original locators.

Assignment of Error No. 5

Possession alone, and of itself, on public or State land creates and establishes no rights that prevents the Government, or State, from granting or conveying title to a qualified applicant. The fact that a person was occupying land thus patented or granted does not invalidate the title granted.

The defendants' Answer and proof puts in issue the validity of the mining claims themselves, not alone that officers of the State had no notice of plaintiffs' claim, actual or constructive. Plaintiffs might have claimed actual possession of the very land they identified, believing themselves to be holding rightfully, without actually enjoying any legal right to that possession.

Plaintiffs' proof of location and validity consisted of introducing in evidence location notices of record in Yuma County Recorder's office, and a map prepared by a stranger some twenty years later.

The location notices of four claims do not identify, and contain no natural object or monument by which the area located may be identified. The two claims that referred to Gonzales Well, or the Town of Quartzsite, identify those claims as outside the right of way. (Defendants' Exhibit 22, A.R. 129.)

In short, relying upon the recorded notices themselves, which constitute constructive notice alone, would not lead an engineer to the property. The location notices introduced, referred to by the Courts as "floating claims" had to be anchored by the plaintiffs to the land they occupied. This they did by offering in evidence the map prepared some twenty years after the date of recorded notices, (Plaintiffs' Exhibit "A", prepared by Frank Salisbury, Tr. 7, and Exhibit "K" prepared during the trial by Harry Jones from another map prepared in Bouse in 1916, Tr. 23 and 24.)

We wish to emphasize again at this point, the issue is not whether the plaintiffs actually occupied and claimed the land identified upon

Exhibit "A" and Exhibit "K", but rather did Haggerty and Beggs locate the ground as depicted on the map, and did Haggerty and Beggs otherwise comply with the law in accordance with the Statutes, State and Federal, to initiate a valid location.

Valid mining claims are not initiated by recording a notice in the Recorder's office, and their location is not identified by a map prepared by a witness not present and sworn.

The first question that arises is—Was the land public domain subject to entry under under the mining laws of the United States, at the time the locations were made?

Plaintiffs' proof was entirely silent as to the status of the land at the time the locations purport to have been made. The defendants introduced the official records of the United States Land Office, and the State of Arizona Land Office records, establishing the land claimed by plaintiffs to be either within an Indian Reservation or State land at the time the locations are alleged to have been made.

In the case of *McKenzie v. Moore,* 20 Ariz. 1, the Court stated:

> "Without any doubt, the law is that a mineral location to be valid for any pur-

pose must be made upon unappropriated government land open to location, in which mineral has actually been discovered in place. Until the actual discovery of mineral in place, all acts tending to consumamte a valid mineral location give the locator no right other than the right to continue a reasonable search for mineral. The time given by the local statute of this state within which the location is required to be completed is limited to ninety days after the discovery of mineral on the ground (paragraph 4030 Rev. Stats. Ariz. 1913), in any event, and such additional time until conflicting rights intervene. The unquestionable right of the locator to the possession of the area within the boundaries of the claim marked on the ground by the requisite monuments as described in the location notice posted at the location monument carries the right to possession * * * whenever the locator's exclusive right to possession of the premises with its appurtenances ceases, either by reason of his failure to perform all of the acts requisite to a complete mineral location, for instance, his failure to discover mineral in place in the ground being located within ninety days after his location was initiated, thereafter his exclusive right to possession based upon a mineral location is at an end, and he is thereafter holding possession of the public lands by the sufferance of the sovereign power. The possession so held is subject to be terminated by the government, or by any citizen of the United States qualified to

> acquire title to public lands, without notice, simply by initiating a claim to the same premises under some law of Congress authorizing the disposition of public lands. But until the government intervenes, or some qualified citizen of the United States initiates a better claim to the possession of the premises located, the locator cannot be disturbed in his actual possession. Of course, boundary lines of a mining claim, as marked on the ground after the locator's failure to complete his location for any cause, are no evidence of a right to possession nor of the extent of the locator's possession." * * *

The next question is whether the record discloses any evidence of a discovery by Haggerty and Beggs. No evidence was offered or introduced by plaintiffs of any discovery made by the locators. Tracy's first visit to the land was as a prospector in 1917. A discovery in 1917, if made, was after the Government surveys had identified the lands as Sections 2 and 36, as of December 6, 1915, at which time any discovery made on State land did not validate a previous entry made under the mineral laws of the United States. Tracy prospected up and down the La Paz diggins and Farrar Gulch, and in that immediate vicinity only, and did not locate any claims at that time. Some seventeen years later, in 1934, Tracy returned to the vicinity and located "New Gold" placer mining claim. (De-

fendants' Exhibit 2, A.R. 100) and "New Gold No. 1" on the south (Defendants' Exhibit 3, A.R. 103).

These two claims covered 320 acres of ground. In a letter to the United States Land Office, dated April 24, 1934, Tracy and Salisbury, (the map maker) applied to validate these two claims, identifying the land located as being the North half of Section 2, Township 3 North, Range 21, West, the identical land he now claims under locations made in 1916 by Haggerty and Beggs as "High Bar No. 1", "High Bar No. 2" and "High Bar No. 3".

A reference to the United States Land Office records, (Defendants' Exhibit 33, A.R. 140), shows the rejection of this application.

On cross examination as to why he located the North half of Section 2 as "New Gold" placer, and "New Gold No. 1", now claimed as "High Bar" claims, he testified he could find at that time no location notices or monuments "that you could check out." (Tr. 61). Tracy further testified (Tr. 62) he monumented and posted notices locating the North half of Section 2 as "New Gold" placer and "New Gold No. 1". These notices were dated February 7, 1934, and were recorded February 28, 1934 with the County Recorder of

Yuma. The letter to the Land Office was dated April 24, 1934, claiming title.

Our question, therefore, if the ground was not monumented and there were no location notices upon the ground in 1934, are we to assume there were monuments or notices posted, and on this particular ground, in 1916, without some testimony or evidence. The only evidence in the record is there were no monuments and no notices, either when Tracy was prospecting up and down the diggins, either in 1917 or in 1934 when he located the ground. The Land Office having rejected his application he resorted to the fiction that Haggerty and Beggs must have had in mind this same tract of land, although he found no evidence on the ground.

The first evidence of any discovery of gold upon any of these claims was Mr. Baverbrook, a witness for plaintiffs, who first visited the ground in 1934, (Tr. 121). This does not establish a discovery in 1910 or 1916.

The deed by which Tracy acquired a one-third interest was dated February, 1937. (Tr. 11), Tracy testifying:

"A. That is a quit claim deed from P. D. McIntyre and R. H. Benton. * * *

Court: No, is that the deed under which you claim ownership of this property?

A. Yes."

(Tr. 84), Tracy still testifying:

"Q. Since 1937, have you ever performed any work on any of the three or four claims involved in this lawsuit?

A. Yes, here the other day.

Q. Well, what work was that?

A. Sampling.

Q. That was just recently?

A. Just recently.

Q. Up to 1949, had you ever performed any work on these claims of any kind?

A. No, sir."

Tracy further testified (Tr. 51) that during his ownership he had taken eight samples from the several mining claims in the group, but he could not remember when. On Page 50, Mr. Tracy testified as to when he sampled it, as,

"Since I have owned the property—different times."

This testimony, we submit does not establish a discovery made by Haggerty and Beggs and validate claims initiated by them in 1910, 1911 and 1916.

Garibaldi, et al v. Grillo, et al.

(Syllabus), 120 Pac. 425.

"MINES AND MINERAL (Sec. 17) MINING CLAIMS-DISCOVERY.

"Discovery is the source of a miner's title, and is an essential requisite to a valid location, and must precede the location, and this rule applies alike to lode and placer locations, and, as far as the character of the deposits will admit, the principles governing lodes apply to placers."

It was stated in *Lindley on Mines,* Vol. 1, pg. 485, as follows:

"The right of possession comes only from a valid location.

"Parties may not go on the public domain and acquire the right of possession by the mere performance of the acts prescribed for location (that is, where there is no discovery.)

"Mere 'paper locations' do not prevent appropriation of land under agricultural laws.

"The Circuit Court of Appeals for the Eighth Circuit said:

"Every competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceable adverse entry upon it while it is in the possession of those who have no superior right to acquire the title or to hold the possession * * * . Any other rule would make the wrongful occupation of the public land by a trespasser superior in right to a lawful entry of it under the acts of Congress by a competent locator."

And, it is further stated in Vol. 1, *Lindley on Mines,* at page 167:

"Mere indications of mineral do not prove that the lands contain permanent valuable deposits. Nor does the fact that a mining location has been made, indicate that the land is valuable for mineral. As between rival applicants for Government title, a tract cannot be assumed to be mineral because it is situated in a mineral belt and is adjacent to numerous mining claims."

In the case of *Hunt v. Steese,* 17 Pac. pg. 920, there was involved a contest between a

title issued to the Central Pacific Railroad Company, under a grant, which excluded a right to known minerals, and one claiming the land under a placer location.

At the time of the grant to the Railroad, there was no water available for recovering the placer gold, but after the grant became effective, water became available. The Court stated:

> "If, on account of the absence of water, and sources of water, the lands in controversy were not more valuable for mining purposes than for agricultural purposes at the time of the sale, we think that the same principle should be applied, and the fact that other sources of water supply have been discovered or become accessible and can now be used in the profitable working of the mines, should not operate to the prejudice of the plaintiff, whose rights to the land were determined upon the conditions existing at the time of the sale. If it were otherwise, 'the proprietor would never be secure in his possessions, and without security there would be little development, for the incentive to improvement would be wanting. What value would there be to a title in one man with the right of invasion in the whole world,' upon a subsequent change in the conditions, contingencies or probabilities? *Boggs Mining Co.,* 14 Cal. 380."

Dower v. Richards, (151 U.S. 658, 14 Sup. Ct. Rep. 452).

SYLLABUS:

"In order to except mineral lands from the operation of a townsite patent, they must be known to be valuable for mining purposes at the date when the patent takes effect; and it is not sufficient that they have once been valuable for mining purposes, or are afterwards discovered to be still valuable therefor."

The decisions and opinions of the Courts are unanimous in holding that the life of a mining claim begins with "discovery." Its very validity dates from "discovery." The first evidence of "discovery" offered by the plaintiffs with respect to any particular claim, in the entire group of twenty-eight mining claims, were the samples taken by Tracy and Ralph S. Baverstock.

After thirteen years of prospecting and searching, the plaintiffs should know exactly where to find the very best samples. The plaintiffs furnished six samples and directed the defendants where to take three of the six samples taken and assayed by the defendants. There is a variance in the value between the samples taken by the plaintiffs and the defendants, although three samples were taken

from the same identifical shaft or location. Mr. Deal, the defendants' assayer, testified that the samples were taken in accordance with the practices of sampling placer claims; Mr. Deal is a licensed assayer in Arizona. Mr. Baverstock, on the other hand, has never been licensed, either in California or Arizona, to make assays.

Mr. Deal testified that a few samples taken from placer ground could not, and do not, establish the value of the ground for mining purposes. Further sampling would certainly be necessary before any evaluation could be made of the property, to justify anybody in expending any money.

In the case of *Dobler v. Northern Pacific Railroad,* 17 L. D. 103, the Department of the Interior had under consideration a similar situation. It was stated in that case that it is a matter of common knowledge that an ordinary assayer's certificate does not establish the value of a vein of mineral. This case involved a controversy between a grant to the railroad and a mineral claimant. The mineral claimant, like the plaintiffs, was claiming improvements and possession and values by reason of assays. In denying that the mineral claimant had failed to carry the burden of proof in establishing the mineral character of the land, it was stated:

"There is practically no dispute as to the improvements. They consist of three shafts, and a cabin in which the claimant and his family reside. Shaft No. 1, the discovery shaft, is five by five ft. thirty-three ft. deep, timbered; shaft No. 2 is twenty-three ft. deep, four by four timbered, and No. 3 is thirty five ft. deep, four by four timbered, which, however, contains water and is used as a well. These improvements are variously estimated at from $750 to $1,300. Dobler claims that he made a discovery of mineral before he made his location; that shafts 1 and 2 are sunk on a vein bearing gold, silver and copper. He says the land has no value for agricultural purposes, it being broken and rolling, and part of it in the foothills. On cross-examination he says that the vein dips south and its trend is east and west; that he had assays made showing from $1, to $4.38 cents per ton. When asked if he had not stated within the last three days that the best assays he could get were about one dollar, he refused to answer the question. He has never shipped any ore; has two or three tons on the dump; that he has one solid wall of granite and a line hanging wall, but it is soft. He does not think miners' wages can be earned by removing the ore; that it will not pay expenses for working; has been engaged in developing it for three years.

"The five witnesses for the mineral claimant substantially corroborate his testimony. I do not consider it necessary to

quote them at any length. Suffice it to say that they all agree that in its present condition it will not pay to work; that they consider it a good prospect and on further development will be of value for its mineral. During the progress of the trial Dobler had an assay made which shows gold and silver of the value of $13.92 per ton.

"It seems to me that the testimony on behalf of the mineral claimant is insufficient to establish the mineral character of the land. He has shown that for several years the land had been worked with the view of developing mineral, yet as a matter of fact, there has been no production whatever, and the only indication of mineral is the result of two assays. *I take it that it is a matter of common knowledge that an ordinary assay certificate does not establish the value of a vein of mineral.* The most that can be said for it is that it indicates the presence of mineral in the particular piece of matter under treatment, and it is not any evidence of the value of the vein as an entirety."

The first evidence of discovery having been made long after location, and the values being insufficient to justify an ordinarily prudent man in the expense necessary to recover the values, the plaintiffs have failed to establish a valid mining claim.

We submit there is no evidence in this record to support a finding of fact for plaintiffs that there was a discovery of gold on the placer claims described as "Nugget No. 2", "Sure Thing No. 2", or the "High Bar" claims, until the samples had been taken and assayed; and, furthermore, there is absolutely no evidence of a vein or lode bearing gold, or a discovery of gold or other mineral in a vein or lode to support the location of "Empire" lode.

Another statutory requirement which the plaintiffs failed to offer proof or introduce any evidence was the failure of Haggerty and Beggs, the locators, to erect monuments, sink a discovery shaft, erect a discovery monument or to post a notice therein. The record is absolutely silent as to any necessary acts required by the locators to be performed to establish a valid mining location.

The mere allegation of ownership and only proof of the recording of the notice, without proof of discovery or monumenting of the ground, or the existence of a lode or ledge in place, does not not establish the validity of a lode mining claim.

In *Lindley on Mines,* Vol. 2, at page 919, it is stated:

"A record of a certificate of a location which recites the citizenship of locators, the fact of discovery and the fact that the location had been marked upon the ground so that the boundaries could be readily traced, is not evidence of any of these facts in any of the states, for the simple reason that no such facts are required to be stated in any of the statutory notices.

"Where the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate. The record of the certificate is proof itself of its own performance as one of such steps, and in regular order, generally speaking, the last step in perfecting the location.

"While many of the states require the date of the discovery to be stated in the recorded certificate, this would not be evidence of the FACT of discovery. A discovery once proved, such a record would, PRIMA FACIE, fix the date. Discovery is the most important of all acts required in the proceedings culminating in a perfected location. But it is not a matter of record, but IN PAIS, and if controverted must be proved independently of the recital in the certificate. It is the foundation of the right without which all other acts are idle and superfluous. With the exception of three states, (Idaho, Mon-

tana and Oregon), the certificate is executed with no solemnity. It is neither acknowledged nor sworn to. It is a mere EX PARTE, self-serving declaration on his own behalf of the party most interested. The same may be said of marking the boundaries.

"It is quite true that when a certificate contains a description of the claim with reference to a natural object or permanent monument, the recorded notice to this extent may be PRIMA FACIE evidence of its own sufficiency, for the reason that the statute requires such description to be inserted in the certificate.

"The real purpose of the record is to operate as constructive notice of the fact of an asserted CLAIM and its extent. When the locator's right is challenged, he should be compelled to establish proof outside of the certificate of all the essential facts, without the existence of which the certificate possesses no potential validity."

Assignment of Error No. 6

Referring to "Sure Thing No. 2", (A.R. 89), and "Nugget No. 2", (A.R. 91) plaintiffs' Exhibit "J" and "L", located May 13, 1910, and June 19, 1911, respectively, the land at this time was unsurveyed and was within the boundaries of the Colorado Indian Reservation. (Def. Ex. 33, A.R. 140)

The Indian Reservations are established by Executive Order and the lands within such Reservations are not open to settlement or purchase or mineral entry under the Public Land Laws. (Sections 182 and 183, Volume 1, Lindley on Mines, 3rd Edition.) We have pointed out in our Statement of Facts the evidence establishing the Southern boundary of the Indian Reservation as being the La Paz Arroyo, which is clearly defined on Plaintiffs' Exhibit 4 as Township 3 North, Range 21 West, being the township plat of survey dated December 6, 1915, not incorporated in the Abstract of Record. A reading of the Surveyor-General's field notes of Township 3 North, Range 21 West, Defendants' Exhibit 12, not incorporated in the Abstract of Record, also shows the Southern boundary of the Indian Reservation as well as the official Government map of 1883, Defendants' Exhibit 11, and the official map of Yuma County, prepared by James M. Barney, Defendants' Exhibit 7.

The amendment of the Colorado Indian Reservation of November 22, 1915, excludes this land from the Indian Reservation and did not have the effect of validating these entries. A mining claim to be valid must be filed upon land open and subject to entry at the time the location is made. The leading case involving this principle, *Belk v. Mea-*

gher, 104 U.S. 279; 26 L. Ed. 735, it was held that the Belk claim, not having been located at a time when the land was subject to location, did not ripen into a valid claim. The Court stated:

> "The next inquiry is, whether the attempted location in December became operative on the first of January, so as to give Belk the exclusive right to the possession and enjoyment of the claim after that. We think it did not. The right to the possession comes only from a valid location. Consequently, if there is no location there can be no possession under it. Location does not, necessarily, follow from possession, but possession from location. A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the Acts of Congress and the local laws and regulations. As in this case, all these things were done when the law did not allow it; they are as if they had never done. On the 19th of December the right to the possession of this property was just as much withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law, or the possession by a valid and subsisting homestead or preemption entry. As the United States could not at the time give Belk the right to take possession af the property for the purpose of making his location, because there was an existing outstanding

grant of the exclusive right of possession and enjoyment, it would seem necessarily to follow that any tortious entry he might make must be unavailing for the purposes of valid location of a claim under the Act of Congress. A location, to be effectual, must be good at the time it is made."

The boundary of the Colorado Indian Reservation was amended November 22, 1915, and the approval of the map of survey was December 6, 1915. There was a period of time between November 22 and December 6, of approximately only two weeks, when the land was unsurveyed public land subject to location. None of the mining claims involved herein were located during this period of time.

Section 184, *Lindley on Mines,* 3rd Edition, states:

"Section 184. STATUS OF MINING CLAIMS LOCATED WITHIN LIMITS OF AN INDIAN RESERVATION PRIOR TO THE EXTINGUISHMENT OF THE INDIAN TITLE.—It logically follows from the nature and object of a reservation of land for the use and occupancy of the Indians that no rights can be lawfully initiated to mineral lands within the limits of such reservation. It would be a violation of public faith to permit these lands, so long as the Indian title remains unextinguished, to be invaded with a view to their exploration and appropriation for

mining purposes. Such invasion, although peaceful in its inception, would invariably end in conflicts. The government could not lend its sanction to such intrusion without being charged with a violation of its solemn obligations. * * *

"The general rule with reference to mining claims within Indian reservations was first announced by the supreme court of Dakota in the case of *French v. Lancaster;* but no written opinion was filed. In this case it seems that both parties litigant, being rival mineral claimants IN PARI DELICTO, stipulated to waive all objections that might have been raised to evidence of acts of location and appropriation performed prior to the extinguishment of the Indian title. The trial court acted upon the stipulation, and determined the case regardless of the existence of the reservation.

"The appellate court, however, held that public policy required that notice should be taken of the facts, and held the attempted locations invalid.

"The general doctrine announced in this case was followed by the same court in a later case.

"The land department has uniformly adhered to the doctrine that the occupancy and location of a mining claim within an Indian reservation prior to the extinguishment of the Indian title is an open viola-

tion of solemn treaty obligations, and without even a shadow of right."

The claims are invalid because located within an Indian reservation. The locators in both instances were Haggerty and Beggs, who made no conveyance to the plaintiffs, but the location notices themselves naming a natural object or permanent monument indicated that the mines were not in conflict with the highway constructed, and were too vague and indefinite to assist a mining engineer in locating the property.

There was no proof offered by the plaintiffs that the claims were ever monumented or notices posted, or a discovery made. "Sure Thing No. 2" was located one mile westerly from Gonzales Well. Gonzales Well is shown on the township plat of Township 4 North, Range 21 West, (Defendants' Exhibit 4). A reference to this exhibit will show that Gonzales Well is located as the highway enters Section 36, on the section line of Section 36. One mile westerly from that location would place the location of "Sure Thing No. 2" on the section line between Section 35 and Section 36, in the NE¼ of Section 35, and not on the SE¼ traversed by the highway, and approximately one mile north of where the highway crosses the section line between Sections 35 and 36.

Defendants' Exhibit No. 22, (A.R. 129), not incorporated in the record, is a map prepared by the Highway Department projecting "Sure Thing No. 2" upon a map or plat, showing the location of "Sure Thing No. 2 as the description in the recorded notice, which only constitutes constructive notice of the location of the mine.

In the case of *Chandler v. Huff,* 79 S.W. 1010, 105 Mo. App. 354, the word "westerly" was defined as follows:

> "The word 'westerly' as used in an order of the county court incorporating a village which describes the Commons as 'on the west side of said limits' one-quarter of a mile in a *Westerly* direction, should be construed to mean *due west,* rendering the description definite and certain."

An engineer attempting to locate "Sure Thing No. 2" with only the recorded notice as his direction would be compelled to show the location as shown on the map, (Defendants' Exhibit 22), and would not conflict with the location of the highway as constructed.

Nugget No. 2: The natural object or permanent monument from which "Nugget No. 2" was located was "about eleven miles in a westerly direction from the Town of Quartz-

site." The defendants likewise have shown the location of "Nugget No. 2" as projected upon Defendants' Exhibit 22, and does not conflict with the location of the highway as constructed.

In the case of *Faxon v. Bernard,* 4 Fed. 702 (Colo.), the locator of a mining claim had described the natural monument in the following language:

> "Situated on the north side of Iowa Gulch, about timber line, on the West side of Bald Mountain. Said claim is staked and marked as the law directs."

The Court stated that it is utterly impossible to find, in this language, any reference to a natural object or permanent monument defining the location.

In the case of *Darger v. LeSieur,* 8 Utah, 160, the description in the mining location reads:

> "This ledge is situated up near the head of the right hand fork of what is known as Tie Canyon, about five miles from the Denver and Rio Grande Railway, in Utah County."

In condemning this location as properly describing or locating a mining claim, the Court stated:

> "About five miles from a railroad is very indefinite as a distance. It might be four, or four and one-half, or it might be five and one-half. Up under the head of the right hand fork of Tie Canyon is a very indefinite and uncertain locality."

Tracy testified that he was not present when any of the claims were located, did not know whether a discovery had been made, and did not know whether the claims had been actually monumented. At the time the State of Arizona secured its Easement for a right of way there were no monuments or location notices upon the ground.

We submit that the constructive notice contained in the recorded notice was insufficient and too indefinite to identify the claims as being in conflict with the right of way.

Assignment of Error No. 7

This Assignment, and the three assignments that follow, refer particularly to the six mining claims which the plaintiffs alleged the State, by taking a right of way, committed Trespass.

Three claims, to-wit, "High Bar No. 1," "High Bar No. 2," and "High Bar No. 3"

were all located January 1, 1916. They appear as Plaintiffs' Exhibit "G", "H" and "I". They were all recorded on the 17th day of February, 1916, in Book 11 of Mines, at pages 193, 194 and 194, respectively. (A.R. 83 to 89, inc.)

On the face of the claims, they purport to have been located by two entrymen as placer claims, embracing 40 acres each, and to be located on Section 2, Township 3 North, Range 21 West, and Section 35, Township 4 North, Range 21 West. Although located as placers upon surveyed land, the locators ignored two statutory requirements—the location notice does not describe the legal subdivisions entered upon. The Placer Law of 1870 required that where locations were made on surveyed land, the entry in its exterior limits was required to conform to the legal subdivisions of the public land. *(Lindley on Mines,* Section 447, Vol. 2, 3rd Ed.), and in marking and describing boundaries, a location notice must contain a reference to a "natural object" or a "permanent monument." This is a requirement of both the Federal and State law.

The Federal Statute, (Section 28, Title 30 U.S.C.A.) among other things, provides as follows:

> "All records of mining claims made after May 10, 1872 shall contain the name or names of the locator, the date of the location and such a description of the claim or claims located by reference to *some natural object or permanent monument as will identify the claim.*"

The Federal Statute, in turn, was supplemented by Section 2 of Act 42 of the Laws of 1895, and carried forward into Sections 4038, 4039 and 4040 of the Arizona Code of 1913, and provided, in addition to other things:

> "A description of the claim with reference to some natural object or permanent monument that will identify the claim, and by marking the boundaries of this claim with a post or monument of stones, * * * and specifically provided:
>
> "Any record of the location of the placer mining claim which shall not contain all the requirements of the two next preceding sections, shall be void."

Neither "High Bar No. 1", "High Bar No. 2" or "High Bar No. 3" contained any reference whatsoever to a natural object or permanent monument, and under the Arizona Statute were void.

The location notice was on a form in which it was stated:

> "Were located in the County of Yuma, about ..... distance in the ..... direction from ..... direction."

Each location notice, "High Bar No. 1", "High Bar No. 2" and "High Bar No. 3" contained the identical description. So far as the recorded notices were concerned, one claim was located exactly over the other. There was nothing on the ground to indicate the location of the different claims and there were no location notices posted in any monument, and the plaintiffs offered no testimony that the locators themselves had ever erected monuments or posted notices upon the claim. In fact, as we have heretofore pointed out, Mr. Tracy testified that in 1934 he located the N½ of the Section 2 as "New Gold" and "New Gold No. 1" and at the time he located these "New Gold" claims there was no monument or other evidence of locations upon the ground.

In the case of *Mitchmore v. McCarthy,* 149 Cal. 603, the Court stated:

> "The notice is invalid under Revised Statutes 2324 for the reason that it contained no description of the claim by reference to any natural object or permanent monument by which it might be identified, and besides, if it had contained every essential requirement of a location notice,

a copy of the record would have proved nothing except the bare fact that it had been recorded—it would not prove posting, marking, etc."

In the case of *Brown v. Levan,* (Idaho) 46 Pac. 661, the Court stated:

> "Where the description and reference to a natural object or permanent monument is of such a character that a mining engineer could not find the claim from the location notice, and where it is such that the claim may be *floated* anywhere to suit the ground or to cover ore that may have since been discovered, it is clearly such a notice as cannot furnish a foundation for a valid location."

If the Court will examine the Exhibit on which the plaintiffs indicated to the Court the area from which the ore he claimed existed, it will be observed that all of the locations on which plaintiffs claimed ore existed were on the school sections and none whatsoever on Section 35.

In the case of *Brown v. Levan* (Supra), the Court announced the general rule that where a claim may be "floated" to cover the ore that may have since been discovered, it is not a valid location. We submit that all of "High Bars 1, 2 and 3" contain no reference to a natural object or permanent monu-

ment, and not showing upon what legal subdivisions they are located, could be floated in any direction to suit the purpose of the locator. In fact, an examination of plaintiffs' Exhibit "A", the map on which plaintiffs relied to show the ground they were occupying, floated "High Bars 1, 2 and 3" to cover the exact ground that Salisbury had located as "New Gold" and "New Gold No. 1", in 1934, and on the map he floats "New Gold" and "New Gold No. 1" to a position entirely off from Section 2 and to the Southeast thereof.

Exhibit "A" does not establish that the claim shown thereon had ever been monumented or posted or that a discovery had been made, or that the ground was not school land at the time the location was made.

After the survey of December 6, 1915, all land in Section 2 became vested in the State of Arizona, and thereafter, under Chapter 5, 2nd SS, Laws of 1915, could be taken up only under the State law, which provided for the leasing of mineral lands, in the following language:

> "Any citizen of the United States, finding valuable minerals upon any unsold lands of the State, may apply to the Department for a lease of an amount of land not exceeding the amount allowed by

the Mining Laws of the State and the United States."

In the case of *Virginia Lode,* reported in 7 L.D. 459, the authority for the proposition that the title to school land, 16 and 36, vests in the state upon its identification by the approval of the survey and that a discovery of minerals upon said land thereafter does not impair the state's title, the Court stated:

> "Until the survey of the township and the designation of the specific section, the right of the State rests in compact-binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object upon which it can attach, and, if there is no legal impediment the title of the State becomes a legal title.
>
> "(*Cooper v. Roberts* (18 How., 173); the State of Colorado, Supra).
>
> The State's title to the lands having vested on the approval of the survey, the lands not being then known to contain minerals, cannot be divested by the subsequent discovery of mineral thereon. To hold the contrary would tend greatly to disparage and unsettle the title to such lands, and

thus lessen their value to the State, and might be productive of great hardship and injustice to purchasers from the State." Volume 1, *Lindley on Mines,* 3rd edition,

Section 127, reads as follows:

"A discovery after patent, *school or other grant,* would not defeat the patent or enable the Government, or any one else, to abridge the right of the patentee or sanction an intrusion upon his possessions."

A discovery of mineral upon a school section, after the survey has been approved, does not defeat the State's right to the land.

Traphaagen v. Kirk, 77 Pac. 58.

McCormick v. Sutton, 32 Pac. 444.

Richards v. Dower, 22 Pac. 304.

Saunders v. LaPurisima Gold Mining Company, 57 Pac. 656.

We submit, therefore, there being no evidence of a discovery made by the locators, the land in Section 2 having passed to the State of Arizona, and there being no "natural object" or "permanent monument" indicating the position of the mine, and not having been taken up under the legal subdivisions in ac-

cordance with the Federal Statute, "High Bar No. 1", "High Bar No. 2", and "High Bar No. 3" are void.

Assignment of Error No. 8

The plaintiffs' Complaint, and the various transfers, relied upon by the plaintiffs as vesting title to the mining claims involved, at all times refers to *"Empire Lode"*, recorded in *Book 11, at page 191.* "Empire Lode" was not introduced in evidence. Plaintiffs introduced in evidence *"Empire Mining Claim"*, recorded in *Book 14 of Mines, at page 134,* located as of October 2, 1916, after the approval of the official survey of Section 36, Township 4 North, Range 21 West.

This claim is described as being about one mile in a westerly direction from Gonzales Well. One mile West of Gonzales Well does not conflict with the highway herein.

The location notice, introduced as Plaintiffs' Exhibit "F", appears on Page 81 of the Abstract of Record, and is described as a *lode* claim, but there is no evidence in the record that there is any vein or lode carrying minerals.

The location notice describes the general course of the vein and lode deposit as being

from the easterly to the westerly. Possibly one mile west of Gonzales Well there is a vein or lode carrying minerals, but the plaintiffs made no attempt in any of their proof, to establish a vein or lode.

Lindley on Mines, Vol. 2, page 739, 3rd Edition states:

> "Gold occurs in veins or rock in place, and when so found, the land containing it must be appropriated under the laws applicable to lodes. It is also found in placers, and when so found, the land containing it must be appropriated under the laws applicable to placers."

In the case of *Chrisman v. Miller,* 197 U. S. 313, reported in 25 Sup. Ct. Rep. at page 468, the Court stated:

> "By Sec. 2320, Rev. Stat. U. S. Comp. Stat. 1901, p. 1424, no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.
>
> "What is necessary to constitute a discovery of mineral is not prescribed by statute, but there have been frequent judicial declarations in respect thereto. In *United States v. Iron Silver Min. Co.,* 128 U.S. 673, 32 L. Ed. 571, 9 Sup. Ct. Rep. 195, a suit brought by the United States to set aside placer patents on the charge

that the patented tracts were not placer mining ground, but land containing mineral veins or lodes of great value, as was well known to the patentee on his application for patents, we said, (p. 683, L. ed. p. 575, Sup. Ct. Rep. p. 199):

> " 'It appears very clearly from the evidence that no lodes or veins were discovered by the excavations of Sawyer in his prospecting work, and that his lode locations were made upon an erroneous opinion, and not upon knowledge, that lodes bearing metal were disclosed by them. It was not enough that there may have been some indications, by outcropping on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained and be of such extent as to render the land more valuable on that account and justify the exploitation. *Although pits and shafts had been sunk in various places, and what are termed in mining cross-cuts had been run, only loose gold and small nuggets had been found, mingled with earth, sand and gravel. Lodes and veins in quartz or other rock in place bearing gold or silver or other metal were not disclosed when the application for the patents were made.*' "

In the case of *King v. Amy & Silversmith*

Consolidated Min. Co., 152 U.S. 222, reported in 14 Sup. Ct. Rep. pg. 510, the Court stated:

> "The preceding section (2320), prescribes the extent to which mining claims upon veins or lodes of quartz or other rock in place, bearing gold, silver, or other valuable deposits, on lands of the United States, may be taken up after May 10, 1872. It allows a claim to be located to the extent of 1,500 feet along the vein or lode, but provides that no location shall be made until the discovery of the vein or lode within the limits of the claim located, which is, in effect, *a declaration that locations resting simply upon a conjectural or imaginary existence of a vein or lode within their limits shall not be permitted. A location can only rest upon an actual discovery of the vein or lode.*"

In the case of *Silver Jennie Lode,* L.D. 7, pg. 6, cancelling a lode claim for lack of proof of discovery and the necessity of discovery in order to initiate a valid claim, it was held (Syllabus):

> "Evidence as to the discovery of the alleged vein or lode should be furnished showing the place where, and when such discovery was made, the general direction of the lode or vein, and all the material facts in relation thereto; and such evidence should be clear and positive, and based on actual knowledge and the wit-

nesses' means of information be clearly set forth."

Assignment of Error No. 9

The plaintiffs' original Complaint having alleged that the State Highway traversed some twenty-eight claims, a Petition was filed before Answer, asking that the Complaint be made more definite and certain. Having been unable to find any monuments or location notices upon the ground, and the recorded notices of the twenty-eight claims referred to not containing any natural object or permanent monument by which they could be located, the Court granted the defendants' Petition that the Complaint be made more definite and certain.

Upon filing the First Amendment to the Amended Complaint the plaintiffs described as the claims that the highway traversed, "High Bar No. 1", "High Bar No. ", and "High Bar No. 3", being 40 acre claims. The Amendment to the First Amended Complaint no where described a "High Bar No. 1" containing 160 acres.

The first location notice offered by plaintiffs at the beginning of the trial, (Exhibit "B"), (Tr. 18), the plaintiffs offered in evidence the location notice of "High Bar No.

1", containing 160 acres of land located in 1924. Objection was timely made to the offering in evidence for the first time of a mining claim that the Complaint did not list as one of the claims that had been traversed.

"High Bar No. 1", (Plaintiffs' Exhibit "B"), appears in the Abstract of Record, on page 62. It will be noted that there is no natural object or permanent monument given in the recorded notice. It contains a statement that it is about ..... miles in a ..... direction from ....., located on Section 2, Township 3 North, and Section 35, in Township 4 North, Range 21 West; Section 2, in 1924, had already vested in the State.

After introducing this location notice in evidence, the plaintiffs abandoned any further reference to this location. No attempt was made to identify what land was embraced within the boundaries of this 160 acre claim. There being nothing on the face of the claim to identify what land was embraced within its boundaries, and nothing upon the ground to identify its location, and the plaintiffs having offered no evidence as to where it was located, the Court erred in finding that there was any mineral upon this ground to which the plaintiffs were entitled to a Judgment. No attempt was made to establish that a discovery had been made upon the ground

embraced within the 160 acre claim, and no evidence was submitted that any monuments had ever been built or erected to identify the land.

Assignment of Error No. 10

That the evidence is insufficient to support the Judgment herein, we invite the Court's attention, first, to the status of the land as shown by the official records at the time the entries were made. Valid mining claims may be initiated only upon the public domain open to entry. Two of the mining claims, "Sure Thing No. 2" and "Nugget No. 2" were initiated upon land within the boundaries of the Colorado Indian Reservation. Four of the claims, "High Bars 1, 2, 3" and "Empire Lode", were initiated and located after the Government survey December 6, 1915, and title had passed to the State of Arizona.

Notices purporting to locate lode claims are not sufficient to enter ground identified only as placer. There was no evidence identifying any of the ground as containing a vein or lode carrying minerals.

The evidence discloses no legal transfer from the original locators to the plaintiffs.

The recording with the County Recorder alone, of a copy of a mining location, in and of itself, does not establish the validity of a mining claim. There being no evidence in this record that the locators erected monuments, or posted notices, or made discovery of minerals, plaintiffs fail to establish a valid mining claim.

Location notices containing no natural object or permanent monument do not comply with either the requirements of the Federal or State law, and are insufficient evidence to support a Judgment as to their validity. Notices containing natural objects or permanent monuments must so identify the ground that an engineer may locate the ground from the description contained in the location notice, and provided further that monuments and notices have been posted when the ground is found, that the claim may be identified from the description, monuments and posted notices. The location notices that do contain natural objects and permanent monuments relied upon in the instant case are not sufficient evidence to lead an engineer to the land plaintiffs claim to be in possession of, and there is no evidence of monuments or location notices upon the ground.

The evidence submitted by plaintiffs in this action is insufficient and entirely fails

to establish the validity of a single mining claim or a claim of title from the locators to the plaintiffs, to support a Judgment against the State of Arizona for $5,000.00, or any other sum.

Respectfully submitted,

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