Denver Law Review

Volume 32 | Issue 2 Article 4

January 1955

The Requirements for a Discovery Excavation in Colorado

Philip C. Klingsmith

Irving M. Mehler

THE REQUIREMENTS FOR A DISCOVERY EXCAVATION IN COLORADO

By PHILIP C. KLINGSMITH *of the Gunnison Bar*

The sudden and tremendous increase in the number of mining claims discovered, staked and filed which has resulted from the requirement of the government for a large and stable source of domestic fissionable ore has raised to vital practical importance the question of what is a legal discovery excavation in Colorado. In the absence of legislative pronouncement clarifying these requirements, many miners and prospectors, large and small, are confused as to the requirements.

The requirements of a legal discovery excavation to hold a lode claim upon the public domain in Colorado are laid down by the Colorado legislature. The United States Statutes require that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located, 30 U.S.C.A. Sec. 23. But the exploration of mineral deposits on the public domain is regulated by state law and according to local custom in the several mining districts, not inconsistent with the laws of the United States, Sec. 22. Therefore, there being no U. S. statute laying down the requirement of a discovery excavation, we must look to the laws of the State of Colorado to determine what these requirements are.

An owner of an unpatented lode claim can be sure that his discovery excavation meets the statutory requirements if, within sixty days from the date of discovery, (1) he sinks a shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of said shaft at the surface, or deeper, if necessary, to show a well defined crevice, (Chapter 92, Art. 22, Sec. 6, CRS 1953), or (2) if he excavates an open cut, cross cut or tunnel which cuts the lode at a depth of ten feet below the surface. Sec. 8, *supra.* However, for the majority of the amateur weekend prospectors, upon whom the government is to a large extent relying to discover the large amounts of fissionable materials necessary to meet the present requirement for the cold war, and the vast quantities necessary to meet future peacetime needs, the above provisions are prohibitively difficult and expensive. In order to sink a shaft described above in the geological formations in which fissionable ores have most commonly been found in Colorado, heavy and expensive equipment, requiring high cost labor to operate, must be used to drill to the necessary depth. Consequently, a large percentage of the claims which have been located in Colorado do not meet the requirements of Sec. 6. Prospectors have instead made a scoop-out either by hand labor or with a bulldozer uncovering ore for a horizontal distance of ten feet or more and to a depth of from six inches to three or more feet. The saving in cost of such

a discovery adit is, of course, enormous. The vital question is, will such a discovery adit hold the lode?

The writer is of the opinion that the scoop-out discovery adit is and should be held to be in compliance with the statutory requirements and that the holding of such a discovery adit to be sufficient to meet the legal requirements is in harmony with the intent of Congress to encourage people who have primary occupations in the cities and on the farms and ranches to prospect for and mine fissionable ores in their leisure time.

Chapter 92, Art. 22, Sec. 8, CRS 1953 provides that in addition to a shaft ten feet deep, as described in Sec. 6, "Any open cut, cross-cut or tunnel which shall cut a lode at the depth of ten feet below the surface, shall hold such lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft".

It is clear that any open cut to be sufficient under the statute must be ten feet deep, but it is equally clear that an adit need not be. An adit is sufficient if it is ten feet in along the lode. The question for determination then is, what is an adit? An adit in Colorado is what the Supreme Court has held it to be in cases which have come before it and properly raised the question. The Supreme Court has spoken upon three such occasions. In the case entitled *Gray v. Truby*,[1] the Court adopted Webster's definition of an adit as being "an entrance or a passage, a term used in mining to denote the opening by which a mine is entered, or by which water and ores are carried away; called also the drift". It is helpful to look at the facts of that case to determine exactly what kind of an excavation was deemed an adit and given the Court's stamp of approval. Gray, the plaintiff, testified that we "did our work by running in along a vein of mineral about 3 inches deep for 20 or 25 feet, the cut being 8 or 9 feet deep at the lowest and deepest end". He further testified that "we took this cut for our discovery." The plaintiff's testimony precluded the Court from considering a shaft subsequently sunk on the claim as the discovery. Other witnesses for plaintiff testified the excavation was less than ten feet deep and that the "cut" ran along the vein of mineral.

In *Electro-Magnetic Mining and Development Co. v. Van Aken*,[2] the Court expressly rejected the concept that to be an adit, the excavation had to be under cover, i.e., run beneath the surface, or that it had to be of any maximum depth. The Court stated that the legislature meant by the term "adit", an excavation in and along the lode, for a distance of ten feet to be measured from a point where the lode may be in any manner discovered.

The Supreme Court specifically affirmed its former holdings in *Craig v. Thompson*,[3] in which case it said, "The distance re-

[1] 6 Colo. 278 (1882).
[2] 9 Colo. 204, 11 P. 80 (1886).
[3] 10 Colo. 517, 16 P. 24 (1887).

quired for an adit to be run, in, upon or along a lode is ten feet, without regard to depth". The Court rejected the argument advanced by the defendant that in order to make a valid discovery, plaintiffs must have cut, by their work in such discovery, ten feet below the surface.

In none of the three cases in which the Court discussed the sufficiency of an adit to hold the lode, was the question of uncovering a vein of mineral raised, that is to say, in each case, the adit did follow and uncover a vein of mineral. Just as it is necessary for a discovery shaft to show a well defined crevice, it is necessary for an adit to follow in along the lode. An adit which did not follow the lode would be no more effective in holding the claim than would be a ten foot shaft which did not disclose a crevice.

A mine is described as a pit or excavation from which ores, etc., are taken by digging. A scoop-out along the lode which uncovers ore would therefore be classified both as a mine and the entrance to the mine from which ores are removed, or an adit. We therefore believe the Colorado Supreme Court, following its former decisions, would hold that a scoop-out which uncovered fissionable ores for a horizontal distance of at least ten feet would constitute an adit and therefore be legally sufficient under the statute to hold the lode.

NOTES AND COMMENTS

IMPUTED NEGLIGENCE—HUSBAND AND WIFE, AGENCY, FAMILY CAR DOCTRINE.—*Moore v. Skiles,* 1954-55 C.B.A. Adv. Sheet No. 1.

The facts of the case are these: the plaintiff and her husband were riding in a pick-up truck owned jointly by them both; the husband was driving and the wife was occupying the seat next to him. During the course of the trip, a collision with a vehicle driven by the defendant occurred. The wife brought suit to recover damages to herself and the truck predicated on the negligence of the defendant.

After trial was had, the jury returned a verdict complying with instruction No. 4, in which it found for the defendant. Instruction No. 4 was, in substance, that if the jury found that the accident was caused by the negligence of both drivers, then the plaintiff, (who was neither of the drivers) could not recover. The plaintiff assigned error to the fact that the trial court allowed the negligence of the driver-husband to be imputed to the passenger-wife. The Supreme Court stated the problem thusly:

> When a husband and wife are journeying together in a vehicle jointly owned by both and engaged in a mission with a purpose common to both, can the negligence of the husband in operating the vehicle be imputed to the wife?