Denver Law Review

Volume 31 | Issue 8 Article 3

June 2021

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Recommended Citation
E. B. Adams, Some Current Problems in Uranium Mining Law, 31 Dicta 319 (1954).

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in 1924,[74] and subsequently enhanced the power in the Congress.[75] While the power of inquiry may exist in Congress as an aid to legislation, it would seem that no committee thereof possesses this power without its delegation from Congress. Mere "recognition" would seem not enough. It became timely, therefore, in 1941 for *McGrain v. Daugherty* to be abandoned, as was *Toledo*.[76]

It became more timely for Congress to legislate into being fair play for its witnesses. And while Article I, Section 5, Clause 2 implies a limitation on a limitation, even here, judicial inquiry is not foreclosed. For ours is not only a government of laws but also of men, whose motives must be scrutinized. And even our great decisions are also literature, subject to review.

SOME CURRENT PROBLEMS IN URANIUM MINING LAW*

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The problems of uranium mining law undoubtedly began to arise on September 13, 1945 when President Truman responded to the explosions at Hiroshima and Nagasaki by an Executive Order which withdrew from entry all public lands which contained what he termed radio active minerals. This order remained in effect until the enactment of the Atomic Energy Act of August 1, 1946. Uranium claims were located during that period but, so far as I know, the Bureau of Land Management has had no occasion to pass upon their validity.

In this area the lawyers are primarily concerned with the legal steps to be taken in locating and acquiring a valid possessory title to a mining claim containing, or thought to contain, deposits of uranium bearing ores which may be mined and sold at a profit.

While it may be said to be academic at the present time, due to the interpretations placed upon the Atomic Energy Act by the Atomic Energy Commission, I imagine a Court would deliberate for some time if the question were properly raised, in whom the legal title rests to uranium ores mined from claims located upon the Public Domain subsequent to August 1, 1946.

Sub Section 5 (b) (7) Atomic Energy Act reads in part:

> All Uranium, thorium and all other metals determined pursuant to paragraph (1) of this subsection to be peculiarly essential to the production of fissionable material contained in whatever concentration in deposits in the

[74] Frankfurter and Landis, *op. cit.* supra, note 1.

[75] See Landis, *op. cit.* supra, note 53, and Franfurter in United States v. Rumely, 345 U. S. 41, 73 S. Ct. 543, 97 L. Ed. 770 (1953).

[76] Toledo Newspaper Co. v. United States, 247 U. S. 402.

*This is an adaptation of a speech made by Mr. Adams in Grand Junction on June 1, 1954.

> public lands are hereby reserved for use of the United States, subject to valid claims, rights or privileges exist-on the date of the enactment of this Act.

This is immediately followed by the prohibition that no one who had taken any part in the atomic bomb project and had acquired any confidential information as to the location of fissionable materials could benefit, subsequent to its enactment, through any location, entry or settlement.

Attorney Clare M. Senior, Salt Lake City, eminent as a mining lawyer, has publicly stated that:

> The Interior Department appears to have interpreted the Atomic Energy Act of August 1, 1946 (60 Stat. 755; 42 U.S.C. 1801) and particularly Section 5 (b) (7) thereof (42 U.S.C. 1805 (b) (7)) as precluding the location after August 1, 1946 of a mining claim for fissionable source materials (Departmental Decision, Lesse C. Clark, January 14, 1947, Motion for Rehearing denied February 19, 1947; Memorandum of May 13, 1947 from the Chief Counsel of the Bureau of Land Management to the Director of such Bureau; 43 C.F.R. 102.43).
>
> The Atomic Energy Commission, to which is entrusted the administration of said Atomic Energy Act, does not appear, in its administration, to have shared said view of the Bureau of Land Management (Domestic Uranium Program Circular 7—10 C.F.R. 60.7). The Congressional Record and Committee Reports in relation to the consideration of the herein mentioned Public Law No. 250, which was approved August 12, 1953, do not indicate that Congress shared said Bureau of Land Management interpretation. Most operations which are being presently conducted for the mining of uranium are under mining locations located subsequent to August 1, 1946.

It is to be noted that on page 47 of the booklet published in 1949 by the Atomic Energy Commission and the United States Geological Survey that:

> It is the view of the Atomic Energy Commission and the Department of the Interior, however, that this provision does not prevent the staking of a valid claim as a result of the discovery of uranium or thorium, and generally not prevent the locator from mining or selling the ore.

The word "generally" is an adjective of degree, and the exceptions which might prevent a miner from mining or selling the ore must remain in the mind of the official who wrote the words.

It is said, on pages 48 and 49 of the booklet, under the title of "Government Rights and Powers" that:

> Because of the provisions of the Atomic Energy Act, the Government keeps certain rights in uranium or thor-

ium ores located on public lands after August 1, 1946. The most important of these is the right of the Atomic Energy Commission to enter on the land subject to the location and remove the uranium or thorium ore. If this right of entry is used, the Commission is required by law to compensate the locator for the damage or injury caused by its action, although not for the uranium or thorium which is removed. For example, in the case of a carnotite deposit, the Commission would be required to pay the claim holder for the vanadium which would be removed along with the uranium, but not for the uranium content of the ore. This right of the Commission to enter and remove ores which contain uranium or thorium protects the Government from, among other things, a claimholder's refusal to work a deposit.

Under the provisions of the Atomic Energy Act, the Atomic Energy Commission may also, if it considers it necessary, require the delivery to the Commission of uranium or thorium, located on public lands after August 1, 1946, after the metal has been mined and separated. If the Commission exercises this power, it must pay the reasonable value of their services, including a profit, to those persons found by the Commission to have performed services in the discovery, mining and extraction of the metal. It does not have to pay for the uranium or thorium.

Up to the present time, the Commission has not thought it desirable or necessary to exercise either of these rights, and it will not be the policy of the Commission to exercise them except in case of emergency where no other course of action is practicable. It is not expected that such an occasion is likely to arise.

In Utah the State Land Board has issued a large number of uranium-vanadium leases upon its school lands. The State Land Board of Colorado is just beginning to do so. What title does the State possess in the uranium?

It is said in C.J.S. under Public Lands that:

> As a rule, a grant to a state of certain designated sections for school purposes, does not include mineral rights known to be such at the time the survey is approved; . . . but if the mineral character of the land is not known at the time of the survey, tile passes to the State.

We also have the problem of the locator desiring to locate a uranium claim on patented lands where coal and all other minerals are reserved to the United States under the Act of December 29, 1916.

The right of the prospector to initiate a mining location is clarified in the Colorado case of *McMullin v. Magnuson*, 102 Colo.

230, such interpretation being followed in the Wyoming case reported in 189 P. 2d 692.

One of our members is shortly to commence a Quiet Title action in Grand County, Utah, to quiet title to uranium ores in patented lands with no mineral reservations to the United States but where the fee owner has given oil and gas leases covering all of the oil and gas and *other minerals.*

There may be some head scratching and pensive looks if he should join the Atomic Energy Commission as a defendant or if defense attorney without joinder pleads Section 5 (b) (7) of the Atomic Energy Act and demands a determination of the ownership of the ores.

In cases of larceny or replevin of carnotite ores the court will probably hold that the miner, by reason of the presence of vanadium in the ore, has a sufficient title whereby to be declared the owner. The title to pitch blende might not be so readily determined.

Since it has been officially conceded, but as yet not legally determined that locations for uranium ore may be made upon the public domain in the same manner as other hard minerals, subject however to the provisions of the Atomic Energy Act, we must look to the Federal Mining Law of 1872, and the supplemental state legislation of the several states in which uranium has been found.

There can be no valid mining claim without the discovery of mineral. The Act of 1872, among other things, says: ". . . but no location of a mining claim can be made until the discovery of the vein or lode within the limits of the claim located."

The courts have said generally that to constitute discovery, it is necessary that minerals be found under such circumstances and of such character that a reasonably prudent man, not necessarily a skilled miner, would be justified in expending time and money developing the claim with the reasonable expectation of finding ore in paying quantities. It has also been held that a belief in the existence of mineral not based on any discovery or tracing does not meet this requirement. However, it is not essential that discovery precede the location of the claim if it is made prior to an adverse location or prior to the land being withdrawn from entry.

Since it is generally believed that all of the surface deposits of uranium ores in Colorado and Utah have been located by discovery on the canyon and valley rims, and since those deposits seem to occur in horizontal beds of varying size and thickness, it has become the practice for locators to locate claims back of the rim by performing all of the required steps of location except the discovery of mineral which, if it exists, can only be determined by drilling to a depth dependent upon the surface topography but in many instances several hundred feet. If ore is found in a drill hole, other drilling must be done to determine so far as possible, the extent of the ore body and its value, and thereafter to sink a shaft or drive an incline to it, so that it may be mined. Obviously this re-

quires amounts of money not possessed by the average prospector or miner.

It has also become the custom in many instances under Colorado law, which requires that the discoverer shall sink a shaft, open cut, cross-cut or tunnel which shall cut the lode at the depth of 10 feet below the surface, for the locator to bulldoze at the point of his discovery notice, a ten-foot excavation. Such discovery work is not required in Utah.

Many thousands of such locations without mineral discovery have been made in Colorado and Utah. Such locations through this country have been and are being in the main, respected, because an adverse locator would be required to stake out a claim, move in a drilling rig, and proceed with expensive drilling in order to find out whether or not a mineral deposit existed within his claim beneath the surface of the earth. This seems to be the same situation and the same problem which confronted oil and gas prospectors prior to the Leasing Act of 1920.

The Supreme Court in *Cole v. Ralph*,[1] stated:

> Location is the act or series of acts whereby the boundaries of the claim are marked, etc., but it confers no right in the absence of discovery, both being essential to a valid claim. . . . In practice discovery usually precedes location, and the statute treats it as the initial act. But, in the absence of an intervening right, it is no objection that the usual and statutory order is reversed. In such a case the location becomes effective from the date of discovery; but in the presence of an intervening right it must remain of no effect.

And, in advance of discovery, the Court said at page 576:

> . . . an explorer in actual occupation and diligently searching for mineral is treated as a licensee or tenant at will, and no right can be initiated or acquired through a forcible, fraudulent or clandestine intrusion upon his possession. But if his occupancy be relaxed, or be merely incidental to something other than a diligent search for mineral and another enters peaceably and not fraudulently or clandestinely and makes a mineral discovery and location, the location so made is valid and must be respected accordingly.

It is the custom of locators without discovery to perform what they call assessment work and file affidavits so stating. If the work and expenditure is directed to the search for minerals and is carried on with reasonable diligence undoubtedly the locator's possessory right for a reasonable period should be upheld but, of course, this does not answer the lack of mineral discovery.

[1] 252 U. S. 286.

The question of extralateral rights on carnotite claims has not arisen, and probably will not by reason of the horizontal nature of the deposits. I recall, however, that I patented some carnotite claims in Montrose County about forty years ago wherein extralateral rights were granted in the patent.

Public Law 250, passed by the recent Congress, was primarily intended to validate mining claims located subsequent to July 31, 1939 and prior to January 1, 1953 where such locations had been made within the area of an oil and gas lease from the United States.

At least two questions respecting such locations may be presented. First, would this Act, upon compliance therewith, validate any such locations without a valid discovery therein made prior to January 1, 1953? Second, if there were a valid discovery upon such claim, would the failure of the locator to perform the annual labor thereon, lay such claim open to relocation by a third party?

Mr. Traylor was confronted with this problem in a case in Grand County, Utah. However, the case was settled without a ruling on this point.

Section (b) of this Act reads:

> Labor performed or improvements made upon or for the benefit of such mining claims after the original location thereof, shall be recognized as applicable thereto for all purposes to the same effect as labor performed and improvements made upon or for the benefit of mining claims which are not affected by this Act.

Uranium mining leases have of course been issued by the Commission, and applications for leases under Circular 7 have been filed in the Grand Junction office. I do not know whether any lease as yet has been granted.

The Multiple Use Bill of Congressmen Aspinall and Dawson now pending, as I read it, is, among other things, intended to cover lease applications and leases issued under Circular 7. We are hopeful that it will be speedily passed in some form to eliminate the leasing system provided in Circular 7, and otherwise clarify miners' rights in making locations of uranium claims.

As an aside it is to be noted that the form of lease to be issued under Circular 7 among other things provides, "Assignment of this lease may be made only upon approval of the Commission." There is no provision against subletting. It is further stated that no assignment will be approved which provides for a royalty in excess of 15% of gross ore receipts less haulage and development allowances.

We have expressed the opinion that this provision does not prevent subleasing for a greater royalty, and that such sublease does not require the approval of the Commission. If the Commission disagrees with this construction, it could solve it by instructing its ore buyers not to pay the sublessor more than 15% of the proceeds; and then he would have to sue which, in the ordinary case, would be prohibitive.

The problem of taxation of the production of uranium is present. Unpatented mining claims in Colorado are subject to acreage taxation. It has been held by the Supreme Court of the United States as well as the State of Colorado that the estate in an unpatented mining claim is property, subject to taxation. Notwithstanding this judicial declaration of taxable status, the possessory title up to this time has not been assessed. The 1953 Utah Assessment of Mines statute provides for the assessment of all metaliferous mines and mining claims to be assessed at $5.00 per acre, together with two times the average net annual proceeds for the three calendar years next preceding, or for as many years next preceding as the mine has been operating, whichever is less.

It might prove embarrassing to the locators if the Utah Tax Commission should decide to impose the $5.00 per acre tax upon the several thousand locations in the counties of eastern Utah which have been made and claimed without discovery of minerals. Embattled farmers are quite likely to insist that taxing authorities of both states impose the tax if a few more uranium millionaires lift up their modest heads above the orchids.

On August 13, 1953, Congress amended the Atomic Energy Act by striking out the last sentence of Section 9 (b) reading:

> The Commission and the property, activities and income of the Commission are hereby expressly exempt from taxation in any manner or form in any state, county, municipality or any subdivision thereof.

The Act is effective as to tax liabilities which accrued on or after October 1, 1953. This leaves the Commission on a par with other property owning Federal agencies, and it remains to be seen what the taxing authorities may be able to do.

As to taxes on the production of uranium ores from premises leased by the Commission, it would seem difficult for the lessee to escape that tax. While the United States is the owner of the leased premises and the Commission the sole purchaser of the ores, it would appear that at least for tax purposes, legal title to such ores is in the lessee, and no tax is attempted to be placed upon the government by levying such production tax.

In 1950 I had an article in the Rocky Mountain Law Review entitled *Proposals to Amend the Mining Laws Relating to Hard Minerals*. The only change suggested was to ask the Colorado Legislature to repeal the requirement of the ten-foot discovery cut in order that Colorado uranium miners might be placed on an equal footing with Utah uranium miners. At that time I had no idea of the millions of acres under oil and gas leases on the Colorado Plateau, or that the Bureau of Land Management had ruled that no valid mineral location could be made within the area covered by such leases.

Paraphrasing Mark Anthony—I did not come to bury the Atomic Energy Act, nor yet to praise it. The excerpts from the laws and the administrative declarations which I have cited, I submit as sufficient justification for my own uncertainties.

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