The General Mining Law and the Doctrine of *Pedis Possessio*: The Case for Congressional Action

The General Mining Law of 1872,¹ enacted with the dual purpose of encouraging mineral development² and promoting settlement of the West,³ allows prospecting on unappropriated public lands.⁴ Under the statute, a prospector who discovers a valuable

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¹ 30 U.S.C. §§ 21-54 (1976). The statute opens "all valuable mineral deposits in lands belonging to the United States . . . to exploration and purchase, and the lands in which they are found to occupation and purchase." *Id.* § 22. Subsequent statutes have excluded some important minerals from the General Mining Law's coverage. The Mineral Lands Leasing Act of 1920, *id.* §§ 181-287, created a different statutory scheme for coal, gas, oil shale, phosphate, sulphur (in Louisiana and New Mexico), potassium, sodium, native asphalt, solid and semisolid bitumen, and bituminous rock (such as tar sands). *Id.* § 181. The Common Varieties Act of 1955, *id.* §§ 601-615, excluded common varieties of sand, stone, gravel, and some other construction materials from General Mining Law coverage. *Id.* § 611. The General Mining Law still governs prospecting for gold, silver, lead, tin, copper, nickel, molybdenum, uranium, and other hard rock minerals. *Id.* §§ 23, 35.

² The title of the General Mining Law of 1872 was "An act to promote the Development of the Mining Resources of the United States." Act of May 10, 1872, ch. 152, 17 Stat. 91, 91.

³ McBroom, *Mineral Exploration and Recreation Development on National Resource Lands—Compatible or Incompatible?*, 24 SYRACUSE L. REV. 1057, 1060 (1972).

⁴ Unappropriated public lands are federal lands that have not been withdrawn from mineral exploration. In 1970, the Public Land Law Review Commission estimated total federal land holdings to be 755.4 million acres, or approximately one-third of the nation's lands. Of that, approximately 87%, or 657.3 million acres, was accessible to miners. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 20-22 (1970). Mining laws do not apply to lands used by the Department of Defense, *id.* at 20, or in national parks or monuments, 16 U.S.C. §§ 1901-1912 (1976 & Supp. IV 1980). Mining is permitted in national forests, see *Friends of the Earth v. Butz*, 406 F. Supp. 742 (D. Mont. 1975), and on lands controlled by the Bureau of Land Management, PUBLIC LAND LAW REVIEW COMMISSION, *supra*, at 20-21.

Withdrawal of public lands from mining may be accomplished in any of three ways: by an act of Congress, by an executive officer pursuant to specific congressional delegations, or by an executive officer based on an asserted inherent power. Bennethum & Lee, *Is Our Account Overdrawn?*, 61 MINING CONG. J. 33, 33 (1975). See, e.g., Federal Land Policy and Management Act of 1976, § 204, 43 U.S.C. § 1714 (1976) (authorizing the Secretary of Interior to withdraw certain federal land from settlement, location, or entry).

How much public land has been closed to mining activity is a matter of dispute: representatives of the mining industry estimate about 65% of federal land has been withdrawn from mining; environmentalists estimate only 10-15% has been withdrawn. Lee & Bennethum, *Is Our Account Overdrawn? A Reassessment*, 6 MATERIALS & Soc'y 15, 17 (1982). In recent years, representatives of the mining industry have argued that too high a percentage of the nation's land is now closed to mining. Marsh & Sherwood, *Metamorphosis in Mining*

mineral⁶ may acquire fee simple title to the land within his claim.⁶ The statute, however, does not define a prospector's rights during the exploration period before he actually discovers minerals; pre-discovery rights are governed by the state common law doctrine of *pedis possessio*.⁷

Pedis possessio protects a prospector who is diligently searching for minerals on public land against forcible, fraudulent, surreptitious, or clandestine entries by rival prospectors onto land which

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Law: Federal Legislative and Regulatory Amendment and Supplementation of the General Mining Law Since 1955, 26 ROCKY MTN. MIN. L. INSTR. 209, 306-12 (1980). In response, President Reagan has announced a "new 'national materials and minerals program'" that will "make it easier to withdraw lands from Federal Government protection, making them available for exploration and the mining of minerals." N.Y. Times, Apr. 6, 1982, at A1, col. 1 (quoting Reagan speech of April 5, 1982).

⁶ The General Mining Law provides "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. § 23 (1976). To satisfy § 23's discovery requirement, there must be discovery of a mineral in place. *Pitcher v. Jones*, 71 Utah 453, 456-57, 267 P. 184, 185 (1928). Discovery requires that the mineral be physically exposed. *Thomas v. Morton*, 408 F. Supp. 1361, 1371 (D. Ariz. 1976), *aff'd per curiam sub nom. Thomas v. Andrus*, 552 F.2d 871 (9th Cir. 1977).

What constitutes discovery of a valuable mineral varies with the nature of the dispute and the parties involved. *Knutson & Morris, Locating, Maintaining, and Patenting Groups or Large Blocks of Mining Claims*, 26 ROCKY MTN. MIN. L. INSTR. 517, 549-50 (1980). In a controversy between rival claimants, a prospector need satisfy only the "liberal" or "prudent man rule" of *Walter Castle*, 19 Pub. Lands Dec. 455, 457 (1894) (holding there is discovery of valuable mineral if "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a mine"). *Knutson & Morris, supra*, at 549-50. In a case against the government, a prospector must demonstrate present ability to market at a profit. *United States v. Coleman*, 390 U.S. 599, 600, 602 (1968). *See generally Reeves, The Law of Discovery Since Coleman*, 21 ROCKY MTN. MIN. L. INSTR. 415 (1975).

Although 30 U.S.C. § 23 requires discovery before a claim is marked off, or located, and although most states require discovery before recordation, *see, e.g., Wyo. STAT. ANN. § 30-1-101* (1977 & Supp. 1982), courts have allowed miners to locate and record claims prior to discovery, *see, e.g., Union Oil Co. v. Smith*, 249 U.S. 337, 347-48 (1919); *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 714 (D. Utah 1965); *Weed v. Snook*, 144 Cal. 439, 444-45, 77 P. 1023, 1026 (1904); *Adams v. Benedict*, 64 N.M. 234, 243-45, 327 P.2d 308, 314-15 (1958); *Sparks v. Mount*, 29 Wyo. 1, 6, 207 P. 1099, 1100 (1922). A "location must be distinctly marked on the ground so that its boundaries can be readily traced." 30 U.S.C. § 28 (1976).

⁷ The General Mining Law provides for two types of claims. Lode claims are made of rocks occurring in veins and are accompanied by the right to follow the vein laterally, 30 U.S.C. §§ 23, 27 (1976); placer claims include claims on "all forms of deposit, excepting veins of quartz, or other rock in place," *id.* § 35. A single lode claim may equal, but not exceed, 1500 feet in length and 600 feet in width, or approximately 20 acres. *Id.* § 23. A single placer claim may not exceed twenty acres. *Id.* § 35. The Mining Law does not, however, limit the number of separate claims one person may locate. *See id.* §§ 23, 35.

⁸ *Pedis possessio* is defined as "foothold; an actual possession," BLACK'S LAW DICTIONARY 1019 (rev. 5th ed. 1979), and as "[a] possession of the foot; a bare foothold or momentary personal presence on land in the lawful possession of another," BALLENTINE'S LAW DICTIONARY 917 (3d ed. 1969).

he is occupying.⁸ Originally applicable only to the ground in the immediate area of a prospector's workings,⁹ *pedis possessio* rights are now generally deemed to extend to the boundaries of the claim a prospector is working, so long as the claim is clearly staked.¹⁰ In recent years, mining industry representatives have argued that recognition of *pedis possessio* rights on a claim-by-claim basis no longer provides adequate protection for investment in mineral exploration; the low grade of the minerals sought today makes it necessary to mine many claims together, but because the minerals are buried at great depth, it is too costly to prospect on many claims simultaneously.¹¹ As a remedy, some courts¹² and commentators¹³ have supported a further liberalization of *pedis possessio* to protect neighboring unworked claims.

This comment will review the history of the law related to *pedis possessio*, examine the current failings of the doctrine, and evaluate the likely effects of judicial expansion of the doctrine's

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⁸ See *Union Oil Co. v. Smith*, 249 U.S. 337, 346-48 (1919). See *infra* notes 42-63 and accompanying text.

⁹ *Gemmell v. Swain*, 28 Mont. 331, 335, 72 P. 662, 663 (1903). See also *Zollars v. Evans*, 5 F. 172, 173 (C.C.D. Colo. 1880) (jury instructions); *Armstrong v. Lower*, 6 Colo. 581, 582-83 (1883). See generally 1 C. LINDLEY, *AMERICAN LAW RELATING TO MINES AND MINERAL LANDS* § 218 (3d ed. 1914).

¹⁰ *Adams v. Benedict*, 64 N.M. 234, 250, 327 P.2d 308, 319-20 (1958). See also *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 721 (D. Utah 1965); *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, 124 Ariz. 55, 58, 601 P.2d 1339, 1342 (1979), *cert. dismissed*, 448 U.S. 917 (1980). See generally Ladendorff, *Enlarging Prediscovery Rights of Mineral Locators*, 6 ROCKY MTN. MIN. L. INST. 1, 11-14 (1961) (describing the expansion of *pedis possessio* from a foothold to a full claim); Waldeck, *Discovery Requirements and Rights Prior to Discovery on Uranium Claims on the Colorado Plateau*, 27 ROCKY MOUNTAIN L. REV. 404, 416-18 (1955) (describing two lines of authority on the subject prior to 1955); Speech by Stephen D. Alfors, Denver attorney, Mineral Law Section of the Colorado Bar Association 5 (Apr. 8, 1980) (on file with *The University of Chicago Law Review*). For a brief discussion of the reasons for the expansion of *pedis possessio* to a full claim, see *infra* notes 66-70 and accompanying text.

¹¹ Brief of the Arizona Mining Association as Amicus Curiae in support of Petition for Writ of Certiorari at 11-12, *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, 124 Ariz. 55, 601 P.2d 1339 (1979), *cert. dismissed*, 448 U.S. 917 (1980) (on file with *The University of Chicago Law Review*) [hereinafter cited as Arizona Mining Ass'n Brief]; Petition for a Writ of Certiorari at 14-17, *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, 124 Ariz. 55, 601 P.2d 1339 (1979), *cert. dismissed*, 448 U.S. 917 (1980) (on file with *The University of Chicago Law Review*) [hereinafter cited as Petition].

¹² See *MacGuire v. Sturgis*, 347 F. Supp. 580, 584-85 (D. Wyo. 1971); see also *Continental Oil Co. v. Natrona Serv., Inc.*, 588 F.2d 792, 798 (10th Cir. 1978) (approving *MacGuire* in dictum).

¹³ See Forman, Dwyer & Cox, *Judicial Uncertainties in Applying the Mining Doctrine of "Pedis Possessio"*, 3 NAT. RESOURCES LAW. 467, 474 (1970); Knutson & Morris, *supra* note 5, at 566 (by implication); Olson, *New Frontiers in Pedis Possessio: MacGuire v. Sturgis*, 7 LAND & WATER L. REV. 367, 380-81 (1972); Comment, *A Judicial Approach to Updating the Mining Laws of 1872—Pedis Possessio*, 10 NAT. RESOURCES J. 385, 393-95 (1970).

coverage to neighboring, unworked claims. Finding that judicial action would not significantly increase mineral development but would encourage land speculation and depletion of public lands available for nonmining uses, the comment concludes that comprehensive congressional action is needed instead. Congress should create a system of permits that grant exclusive exploration rights to particular land parcels for limited time periods. By so doing, Congress would give miners the protection they need, encourage mineral development, and foster a rational land-use program for national lands.

I. HISTORY

Congress enacted the first federal mining law in 1866,¹⁴ when natural resources seemed unlimited. The law invited citizens to prospect on public lands and enabled them to acquire legal title to both the minerals and land within a claim on which they discovered a valuable mineral.¹⁵ In 1870, Congress enacted legislation supplementing the first mining law;¹⁶ two years later, Congress amended and consolidated those early laws in the more comprehensive General Mining Law of 1872.¹⁷ That statute, with minor changes, is the mining law in force today.¹⁸

Although the Constitution gives Congress power to regulate the use and disposition of federal land,¹⁹ the General Mining Law broadly delegated the regulation of mining on public lands to local authorities.²⁰ The few specific requirements of the federal law are as follows: a prospector must discover a valuable mineral before he enjoys rights against the United States;²¹ title passes from the United States to a prospector only after mineral discovery and

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¹⁴ Act of July 26, 1866, ch. 262, 14 Stat. 251 (codified as amended at 30 U.S.C. §§ 43, 46, 51, 53 (1976)) (recognizing only lode claims, *see supra* note 6).

¹⁵ *Id.* § 1, 14 Stat. at 251 (codified at 30 U.S.C. § 22 (1976)).

¹⁶ Act of July 9, 1870, ch. 235, 16 Stat. 217 (codified as amended at 30 U.S.C. §§ 35-36, 38, 47, 52 (1976)) (adding §§12-17 to Act of July 26, 1866, ch. 262, 14 Stat. 251 (codified as amended at 30 U.S.C. §§ 43, 46, 51, 53 (1976))). That act gave locators of placer claims, *see supra* note 6, the same rights of location and patent as the earlier act gave to locators of lode claims. Act of July 9, 1870, ch. 235, § 12, 16 Stat. 217 (codified as amended at 30 U.S.C. § 35 (1976)).

¹⁷ Act of May 10, 1872, ch. 152, 17 Stat. 91, *amended by* Act of Feb. 25, 1920, ch. 85, 41 Stat. 437 (codified as amended at 30 U.S.C. §§ 21-54 (1976)).

¹⁸ McBroom, *supra* note 3, at 1060. Subsequent statutes have excluded some important minerals from prospecting under the General Mining Law. *See supra* note 1.

¹⁹ U.S. CONST. art. IV, § 3, cl. 2.

²⁰ *See* 30 U.S.C. §§ 22, 28, 53 (1976); *infra* notes 25-27 and accompanying text.

²¹ *See* 30 U.S.C. § 23 (1976); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963); *Union Oil Co. v. Smith*, 249 U.S. 337, 347 (1919). *See also* PUBLIC LAND LAW REVIEW

upon purchase of a federal deed known as a patent;²² one hundred dollars' "worth of labor shall be performed or improvements made during each year" after discovery and before the purchase of a patent;²³ and all local regulations must be consistent with the laws of the United States.²⁴ Other than these requirements, exploration on federal lands is to occur "under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts."²⁵ The "miners of each mining district" are also authorized to make regulations governing location and recordation,²⁶ provided the regulations comply with the federal requirements and are "not in conflict with . . . the laws of the State or Territory in which the district is situated."²⁷

The General Mining Law's reliance on administration by mining districts is perhaps best understood in historical context. In 1872, both federal and state governments in the West were virtually nonexistent;²⁸ western miners had been governing themselves since the California gold rush²⁹ and had already established a system of customs and rules designed to maintain order in the mining camps.³⁰ In the century since the passage of the General Mining

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COMMISSION, *supra* note 4, at 126. For a discussion of the discovery requirement, see *supra* note 5.

²² 30 U.S.C. §§ 29, 37 (1976). The patent price is \$2.50/acre for placer claims and \$5.00/acre for lode claims. *Id.* § 37. After acquiring a patent, a locator owns his claim in fee. *Forbes v. Gracey*, 94 U.S. 762 (1877). Except for the transfer of legal title, however, post-discovery, prepatent rights are identical to patent rights. *Id.* at 763, 767 (indicating that after discovery, a claim can be transferred by conveyance, inheritance, or devise); see *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963) (holding that even though mining claims are unpatented and title to lands is still in the United States, the claims are valid against the United States if there has been discovery of mineral within the limits of the claim and other statutory requirements have been met).

²³ 30 U.S.C. § 28 (1976). The work required each year to protect postdiscovery rights is known as "assessment work." *Union Oil Co. v. Smith*, 249 U.S. 337, 350-51 (1919).

²⁴ 30 U.S.C. §§ 22, 28 (1976).

²⁵ *Id.* § 22.

²⁶ *Id.*; see *supra* note 5 (discussing location and recordation and their relation to discovery).

²⁷ 30 U.S.C. § 28 (1976).

²⁸ See R. BILLINGTON, *WESTWARD EXPANSION* 615-32 (1949); C. SHINN, *MINING CAMPS: A STUDY IN AMERICAN FRONTIER GOVERNMENT*, 236-40 (1884), reprinted in *AMERICA'S FRONTIER STORY* 546-48 (M. Ridge & R. Billington eds. 1969). See generally C. BEARD, *CONTEMPORARY AMERICAN HISTORY 1877-1913*, at 41-46 (1914); H. BRADLEY, *THE UNITED STATES FROM 1865*, at 44-53 (1973); A. NEVINS, *THE EMERGENCE OF MODERN AMERICA 1865-1878*, at 101-53 (1935); F. PAXSON, *THE NEW NATION* 20-37, 142-61 (1915).

²⁹ See *Jennison v. Kirk*, 98 U.S. 453, 457 (1878) (dictum); R. BILLINGTON, *supra* note 28, at 615-32; C. SHINN, *supra* note 28, at 236-40, reprinted in *AMERICA'S FRONTIER STORY* at 546-48.

³⁰ Strauss, *Mining Claims on Public Lands: A Study of Interior Department Procedures*, 1974 UTAH L. REV. 185, 186. See *Jennison v. Kirk*, 98 U.S. 453, 457-58 (1878) (dic-

Law, however, state governments have grown and preempted "mining-districts"³¹ in the administration of federal mining law.³² State statutes now govern virtually all aspects of claim location and recordation.³³

Representatives of the mining industry contend that possessory disputes prior to discovery should be resolved according to the contemporary customs of miners³⁴ because the statutory section mentioning such disputes,³⁵ unlike the section governing location and recordation,³⁶ does not mention consistency with state law but

tum) (suggesting that the California gold miners treated discovery as requisite to title and adhered to a system of pre-discovery rights because of their concern for order and fairness). Customary rules providing possessory rights allowed unimpeded exploration and minimized breaches of the peace. See Fiske, *Pedis Possessio—Modern Use of an Old Concept*, 15 ROCKY MTN. MIN. L. INST. 181, 186 (1969) (citing *Jennison*); Olson, *supra* note 13, at 370-71 (same); Arizona Mining Ass'n Brief, *supra* note 11, at 19 (same). But see Draft of a Brief of the Colorado Mining Association that Certiorari Should be Dismissed at 3, Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp., 124 Ariz. 55, 601 P.2d 1339 (1979), cert. dismissed, 448 U.S. 917 (1980) (arguing that miners' codes generally did not regulate possessory rights prior to discovery) (on file with *The University of Chicago Law Review*) [hereinafter cited as Colorado Mining Ass'n Brief Draft].

³¹ The term "mining district" is used in 30 U.S.C. §§ 22, 28 (1976). See *supra* notes 25-27 and accompanying text. In *United States v. Smith*, 11 F. 487, 490-91 (C.C.D. Ohio 1882), the court defined the term as meaning that "section of country usually designated by name and described or understood as being confined within certain natural boundaries in which gold or silver or both are found in paying quantities, and which is worked therefor, under rules and regulations prescribed by the miners therein."

³² 30 U.S.C. § 28 (1976), see *supra* notes 26-27 and accompanying text, has been interpreted as giving states broad regulatory authority. See, e.g., *Butte City Water Co. v. Baker*, 196 U.S. 119, 126-28 (1905) (§ 28 permits state legislatures to enact regulations supplementing provisions of federal statutes if not inconsistent with them); *Lockhart v. Johnson*, 181 U.S. 516, 526-28 (1901) (regulations promulgated by the Territory of New Mexico, supplemental to and not inconsistent with federal mining laws, were valid and enforceable); *Erhardt v. Boaro*, 113 U.S. 527, 535 (1885) (federal requirements listed in § 28 were not intended to interfere with the rights of states).

All major mining states have statutes supplementing the General Mining Law. See ALASKA STAT. §§ 27.05.010-.25.010 (1962 & Supp. 1981); ARIZ. REV. STAT. ANN. §§ 27-201 to -275 (1976 & Supp. 1981-1982); CAL. PUB. RES. CODE §§ 2001-2708 (West 1972 & Supp. 1981-1982); COLO. REV. STAT. §§ 34-1-101 to -54-107 (1973 & Supp. 1981); IDAHO CODE §§ 47-201 to -1611 (1977 & Supp. 1982); MONT. CODE ANN. §§ 82-1-101 to -4-441 (1981); NEV. REV. STAT. §§ 513.011-520.270 (1981); N.M. STAT. ANN. §§ 69-1-1 to -10-4 (1978 & Supp. 1981); OR. REV. STAT. §§ 516.010-517.990 (1981); UTAH CODE ANN. §§ 40-1-1 to -1-13 (1981); WYO. STAT. ANN. §§ 30-1-101 to -4-305 (1977 & Supp. 1982).

³³ See, e.g., ARIZ. REV. STAT. ANN. §§ 27-201 to -222 (1976 & Supp. 1981-1982); COLO. REV. STAT. §§ 34-43-101 to -116 (1973 & Supp. 1981); WYO. STAT. ANN. §§ 30-1-101 to -110 (1977 & Supp. 1982).

³⁴ See Arizona Mining Ass'n Brief, *supra* note 11, at 22; Petition, *supra* note 11, at 13 n.17 (urging the Court to clarify "the weight that should be accorded the customs of modern prospectors under this statute [30 U.S.C. § 53] and the flexibility that the various state legislatures might have to address the issue").

³⁵ 30 U.S.C. § 53 (1976).

³⁶ *Id.* § 28; see *supra* notes 26-27 and accompanying text.

provides that "each case shall be adjudged by the law of possession."³⁷ Historically, there has been a close relationship between miners' customs and judicial resolution of possessory disputes; the early court cases resolving possessory mining disputes before the enactment of the General Mining Law essentially adopted the miners' customs,³⁸ forming them into the doctrine of *pedis possessio*.³⁹ Later courts continued to apply those possessory rules when implementing the Mining Law because judicial protection of *pedis possessio* rights, facilitating peace and order and providing miners with prediscovery security, was compatible with the statute.⁴⁰ Despite its historical origins, however, the doctrine of *pedis possessio* is not bound to the current customs of miners; it is a state common law doctrine that is capable of developing independently of miners' customs.⁴¹

II. THE DOCTRINE OF *Pedis Possessio*

A. The Doctrine in its Traditional Form

The classic enunciation of the doctrine of *pedis possessio* appears in dicta in the United States Supreme Court's 1919 opinion in *Union Oil Co. v. Smith*.⁴² The Court stated that a prospector actively searching for minerals in the public domain is entitled to protection of the land he occupies against forcible, fraudulent,

³⁷ 30 U.S.C. § 53 (1976). The phrase "law of possession" was interpreted to mean "local rules and customs of miners" in *Rico-Aspen Consol. Mining Co. v. Enterprise Mining Co.*, 53 F. 321, 324 (C.C.D. Colo. 1892), *rev'd on other grounds*, 66 F. 200 (8th Cir. 1895), *aff'd*, 167 U.S. 108 (1897). The court, however, went on to recognize the authority of states to regulate possessory disputes, stating that "the general policy of congress . . . [has been] to recognize and establish the usages and customs of miners in mining districts, and the laws of the several states relating to such matters." *Id.* (emphasis added). See also Colorado Mining Ass'n Brief Draft, *supra* note 30, at 6 (arguing "law of possession" means state common law).

³⁸ *Jennison v. Kirk*, 98 U.S. 453, 457-58 (1879) (dictum); 1 C. LINDLEY, *supra* note 9, §§ 44-46. But see Swenson, *Sources and Evolution of American Mining Law*, in 1 AMERICAN LAW OF MINING § 1.9 (Rocky Mountain Mineral Law Foundation ed. 1981) ("[a] review of . . . California cases between 1848 and 1866 does not reveal that the customs of miners played a very significant role in the judicial law making process"); Colorado Mining Ass'n Brief Draft, *supra* note 30, at 3-4 (indicating that state courts recognized possessory rights despite the failure of miners' rules to do so).

³⁹ The earliest reported mining cases to use the term *pedis possessio* were *Attwood v. Fricot*, 17 Cal. 37, 43 (1860); *English v. Johnson*, 17 Cal. 107, 116 (1860); *Hess v. Winder*, 30 Cal. 349, 355, 358 (1866).

⁴⁰ Fiske, *supra* note 30, at 186.

⁴¹ See *Union Oil Co. v. Smith*, 249 U.S. 337, 348 (1919) (dictum) (stating that possessory rights may derive from "the authority of the mining states to regulate the possession of the public lands in the interest of peace and good order").

⁴² 249 U.S. 337 (1919).

clandestine, or surreptitious intrusions.⁴³ The Court identified the essential requirements for *pedis possessio* protection as continued actual occupancy of a claim, diligent work directed toward making a discovery, and exclusion of others.⁴⁴ If any of these elements is missing, no protection is provided by the doctrine, and the initial prospector is left without special rights against his competitors.⁴⁵

1. *Persistent and Diligent Work Toward Discovery.* Persistent and diligent work toward mineral discovery traditionally has been required on *each* claim for which protection is sought.⁴⁶ Satisfaction of the work requirement has almost invariably consisted of actual digging or drilling on the specific claim sought to be protected.⁴⁷ Acts of location such as posting, marking, monumenting, staking, and recording are not considered work leading toward discovery.⁴⁸ Similarly, patrolling a claim, watching over it, or placing signs, fences, or caretakers on it does not satisfy the work requirement,⁴⁹ although such activity might help meet the occupancy and exclusion requirements.⁵⁰

2. *Actual Occupancy.* Closely related to the work requirement is the requirement described in *Union Oil* as "continued actual occupancy."⁵¹ Subsequent court decisions have reiterated that

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⁴³ *Id.* at 346-48. Although the Court asserted that *pedis possessio* protection exists "at least for a reasonable time," *id.* at 347, no reported cases discuss what amount of time would be reasonable, see Fiske, *supra* note 30, at 191.

⁴⁴ *Union Oil*, 249 U.S. at 346-48.

⁴⁵ Fiske, *supra* note 30, at 191, 197.

⁴⁶ See, e.g., *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 721-23 (D. Utah 1965); *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, 124 Ariz. 55, 58, 601 P.2d 1339, 1342 (1979), *cert. dismissed*, 448 U.S. 917 (1980); *Adams v. Benedict*, 64 N.M. 234, 238, 327 P.2d 308, 311 (1958). See also Fiske, *supra* note 30, at 195; Knutson & Morris, *supra* note 5, at 551; Sherwood & Greer, *Possessory Interests in Wyoming Mining Claims*, 4 LAND & WATER L. REV. 337, 346 (1969); Speech by Stephen D. Alfors, *supra* note 10, at 4. But see Olson, *supra* note 13, at 374-75 (claiming the restrictive statements in *Adams* and *Ranchers Exploration* are dicta).

⁴⁷ Fiske, *supra* note 30, at 195.

⁴⁸ *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 718 (D. Utah 1965); *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, 124 Ariz. 55, 56, 601 P.2d 1339, 1340 (1979), *cert. dismissed*, 448 U.S. 917 (1980); *Borgwardt v. McKittrick Oil Co.*, 164 Cal. 650, 660-61, 130 P. 417, 420-21 (1913); *New England & Coalinga Oil Co. v. Congdon*, 152 Cal. 211, 215, 92 P. 180, 181 (1907); *Adams v. Benedict*, 64 N.M. 234, 248-50, 327 P.2d 308, 318-19 (1958); *Whiting v. Straup*, 17 Wyo. 1, 24-25, 95 P. 849, 855-56 (1908).

⁴⁹ *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 718 (D. Utah 1965); *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, 124 Ariz. 55, 56, 601 P.2d 1339, 1340 (1979), *cert. dismissed*, 448 U.S. 917 (1980); *New England & Coalinga Oil Co. v. Congdon*, 152 Cal. 211, 214-15, 92 P. 180, 181 (1907); *Whiting v. Straup*, 17 Wyo. 1, 24-25, 95 P. 849, 855-56 (1908).

⁵⁰ Fiske, *supra* note 30, at 194.

⁵¹ 249 U.S. at 348.

pedis possessio occupancy must be "actual,"⁵² not constructive.⁵³ Because the United States retains title until after discovery,⁵⁴ the common law principle of priority based upon "color of title"⁵⁵ is not relevant in possessory actions under the General Mining Law.⁵⁶ *Pedis possessio* doctrine does allow constructive possession in the limited sense that a prospector may assert *pedis possessio* rights over the full area of a claim even though he is only working on a portion of the claim.⁵⁷ Until recently,⁵⁸ however, it has been assumed that *pedis possessio* rights cannot extend beyond the boundaries of a claim.⁵⁹

3. *The Exclusion Requirement.* *Pedis possessio* protects a prospector against only forcible, fraudulent, clandestine, or surrep-

⁵² *Cole v. Ralph*, 252 U.S. 286, 294-95 (1919) (dictum); *Hanson v. Craig*, 170 F. 62, 65 (9th Cir. 1909); *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 724 (D. Utah 1965); *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, 124 Ariz. 55, 58-59, 601 P.2d 1339, 1342-43 (1979), *cert. dismissed*, 448 U.S. 917 (1980); *Adams v. Benedict*, 64 N.M. 234, 246-47, 327 P.2d 308, 317 (1958); *Granlick v. Johnston*, 29 Wyo. 349, 360-61, 213 P. 98, 101 (1923). Cases decided prior to *Union Oil* also implied such a requirement. *See, e.g.*, *Belk v. Meagher*, 104 U.S. 279, 285-87 (1881) (dictum); *McLemore v. Express Oil Co.*, 158 Cal. 559, 561, 112 P. 59, 60 (1910). Some commentators have concluded from these cases that *pedis possessio* occupancy must be "continuous," Speech by Stephen D. Alfors, *supra* note 10, at 4, and "physical," Fiske, *supra* note 30, at 191-92; Speech by Stephen D. Alfors, *supra* note 10, at 4 & Annotated Outline at 3.

⁵³ *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 724-25 (D. Utah 1965); *Mountain States Dev. Co.*, 50 Pub. Lands Dec. 348, 351 (1924); *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, 124 Ariz. 55, 57-58, 601 P.2d 1339, 1341-42 (1979), *cert. dismissed*, 448 U.S. 917 (1980); Fiske, *supra* note 30, at 192; Ladendorff, *Proposed Legislation to Enlarge Prediscovery Rights of Mineral Locators*, 1 NAT. RESOURCES J. 76, 80 (1961). *Contra Kanab Uranium Corp. v. Consolidated Uranium Mines, Inc.*, 227 F.2d 434 (10th Cir. 1955). *Kanab* has been widely criticized by courts and commentators. *See, e.g.*, *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 721-23 (D. Utah 1965); Fiske, *supra* note 30, at 208; Knutson & Morris, *supra* note 5, at 553 n.102; Ladendorff, *supra* note 10, at 17, 21; Olson, *supra* note 13, at 379. For a comparison of *Kanab* and *Ranchers Exploration*, see Forman, Dwyer & Cox, *supra* note 13, at 469-72.

⁵⁴ *See supra* note 21 and accompanying text.

⁵⁵ Under the doctrine of "color of title," an adverse possessor claiming valid title to a large tract is deemed to be in possession of the whole tract, although he actually occupies only a small part of the area in question. To invoke the doctrine, however, the adverse possessor must be able to claim "what purports to be valid muniment of title." 4 H. TIFANY, *THE LAW OF REAL PROPERTY* § 1155, at 815-16 (3d ed. 1975).

⁵⁶ *See Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 721-23 (D. Utah 1965); *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.* 124 Ariz. 55, 56-57, 601 P.2d 1339, 1340-41 (1979), *cert. dismissed*, 448 U.S. 917 (1980).

⁵⁷ *See supra* note 10 and accompanying text.

⁵⁸ *See infra* notes 81-91 and accompanying text.

⁵⁹ *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 721 (D. Utah 1965); *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, 123 Ariz. 55, 57-58, 601 P.2d 1339, 1341-42 (1979), *cert. dismissed*, 448 U.S. 917 (1980); *Adams v. Benedict*, 64 N.M. 234, 247, 327 P.2d 308, 317 (1958); Fiske, *supra* note 30, at 195; Sherwood & Greer, *supra* note 46, at 346; Speech by Stephen D. Alfors, *supra* note 10, at 5.

titious entries;⁶⁰ if a claimant allows a rival to enter peaceably, without deceit or secrecy, the claimant loses his superior status.⁶¹ Accordingly, a prospector seeking *pedis possessio* protection must actively deny entry to rivals.⁶² Whether this requirement is met does not depend upon whether a prospector has or has not granted permission to rivals to enter; because federal lands are open to all citizens for prospecting, no permission is necessary.⁶³

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⁶⁰ *Union Oil Co. v. Smith*, 249 U.S. 337, 346-47 (1919) (dictum); Fiske, *supra* note 30, at 196. An entry is clandestine when made at night or in the temporary absence of the prior occupant. See *Nevada Sierra Oil Co. v. Hane Oil Co.*, 98 F. 673, 680-81 (C.C.S.D. Cal. 1899); *Springer v. Southern Pac. Co.*, 67 Utah 590, 601, 248 P. 819, 824 (1926); *Davis v. Dennis*, 43 Wash. 54, 59, 85 P. 1079, 1080 (1906); Speech by Stephen D. Alfors, *supra* note 10, Annotated Outline at 8. An entry is forcible when made against vigorous physical resistance. *Adams v. Benedict*, 64 N.M. 234, 247, 327 P.2d 308, 317 (1958). An entry is fraudulent if it is made under the guise of a non-adverse motive. Fiske, *supra* note 30, at 198.

After mineral discovery, a prospector is protected against entries made in bad faith, i.e., made by one who has notice of the prior locator's claim. Prior to discovery, it traditionally has not been considered bad faith to go upon a tract knowing that it is claimed by someone else. *Id.* at 202-03. Prior locators have encouraged the courts to expand the "bad faith defense" to conflicts involving *pedis possessio* rights because tainting an intruder's motives is easier than complying with the requirements of *pedis possessio*. *Knutson & Morris*, *supra* note 5, at 555-56. In fact, some recent cases have applied the bad faith defense quite liberally to predisccovery situations. See *Columbia Standard Corp. v. Ranchers Exploration & Dev., Inc.*, 468 F.2d 547, 550 (10th Cir. 1972) (knowledge of the existence of a claim imposes a duty on the subsequent occupant "to make inquiry to determine the extent of the adverse party's work"), *cert. denied*, 410 U.S. 991 (1973); *Bagg v. New Jersey Loan Co.*, 88 Ariz. 182, 189-90, 354 P.2d 40, 45 (1960). But see *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 731 (D. Utah 1965) ("knowledge of an adverse claim does not of itself indicate bad faith and may not even be evidence of it unless accompanied by some improper means to defeat such claim"); *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, 124 Ariz. 55, 59, 601 P.2d 1339, 1343 (1979), *cert. dismissed*, 448 U.S. 917 (1980); *Adams v. Benedict*, 64 N.M. 234, 246, 327 P.2d 308, 316 (1958).

The argument against liberal application of the bad faith defense in predisccovery situations has been stated as follows:

Since *pedis possessio* protects against not only forcible and fraudulent but also clandestine entries (such as those by night and those made in the temporary absence of the prior locator), there is little need or justification for case law which prohibits rival locations on the ground that the subsequent locator knew of the existence of a prior location. The legal incentive for the senior locator to make a prompt discovery is vitiated, since he may hide behind a paper location—and the remaining economic incentive is insufficient, since all too often claims are held for profit by sale rather than development. There is no reason or justification for protecting the "possession" of those whose indolence or absence has led others to believe that their claims have been abandoned.

Knutson & Morris, *supra* note 5, at 556.

⁶¹ *Cole v. Ralph*, 252 U.S. 286, 294-95 (1920).

⁶² *Id.* The manner in which the occupant must resist a rival is not clear. Fiske, *supra* note 30, at 202, claims "[t]he law does not require violent self-help, so any reasonable visible or verbal protestation should suffice." Another commentator has noted, however, that "the cases are replete where telephone calls and threats of trespass actions were insufficient." Speech by Stephen D. Alfors, *supra* note 10, at 4.

⁶³ See *supra* notes 1-4 and accompanying text.

B. Contemporary Problems with the Doctrine

Representatives of the mining industry⁶⁴ and some legal commentators⁶⁵ contend that traditional *pedis possessio* rules no longer adequately protect prospectors' investment in exploration because the mining techniques employed today are of necessity far different from the methods for which the doctrine was designed. When *pedis possessio* was judicially adopted in the 1860's it was fairly easy to discover gold and silver, the principal objects of prospecting, close to the surface.⁶⁶ Limited *pedis possessio* protection, securing only the area immediately adjacent to a prospector's workings, presented no hardship because discovery was quick, easy, and highly remunerative.⁶⁷ When miners began searching for deposits hidden further below the surface, however, they sought additional protection to offset the risks and expenses involved in deep drilling.⁶⁸ Judicial expansion of *pedis possessio* protection to the boundaries of a claim around the turn of the century⁶⁹ satisfied the miners' needs; prospectors could afford to limit their searches to one claim at a time because the deposits they sought, once uncovered, occurred in rich veins and dense pools, providing high returns for investments.⁷⁰

The mineral deposits sought today, however, are neither easily discoverable nor rich in nature. They are covered by layers of overburden and, when discovered, tend to be of low grade.⁷¹ Because processing low grade ore requires immense plants and investments, it is most economical for miners to locate claims in large groups or blocks encompassing hundreds of claims.⁷² Because deep drilling is

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⁶⁴ Arizona Mining Ass'n Brief, *supra* note 11, at 11-13; Petition, *supra* note 11, at 14-17; Public Lands Committee of the American Mining Congress, *The Mining Industry and The Public Lands* 17 (Jan. 11, 1968) (unpublished statement on behalf of the American Mining Congress before the Public Land Law Review Commission) (on file with *The University of Chicago Law Review*) [hereinafter cited as American Mining Congress].

⁶⁵ Forman, Dwyer & Cox, *supra* note 13, at 474; Knutson & Morris, *supra* note 5, at 566 (by implication); Olson, *supra* note 13, at 380-81; Comment, *supra* note 13, at 393-95.

⁶⁶ See Arizona Mining Ass'n Brief, *supra* note 11, at 7-8; Forman, Dwyer & Cox, *supra* note 13, at 468-69; Ladendorff, *supra* note 10, at 3.

⁶⁷ Arizona Mining Ass'n Brief, *supra* note 11, at 7-8.

⁶⁸ See Fiske, *supra* note 30, at 188; Ladendorff, *supra* note 10, at 3, 12-15.

⁶⁹ *Field v. Grey*, 1 Ariz. 404, 408-09, 25 P. 793, 794 (1881); *Miller v. Chrisman*, 140 Cal. 440, 450-51, 73 P. 1083, 1086 (1903), *aff'd*, 197 U.S. 313 (1905). See *supra* notes 9-10 and accompanying text.

⁷⁰ See Arizona Mining Ass'n Brief, *supra* note 11, at 8; Forman, Dwyer & Cox, *supra* note 13, at 469.

⁷¹ Arizona Mining Ass'n Brief, *supra* note 11, at 8-13; Forman, Dwyer & Cox, *supra* note 13, at 469.

⁷² Arizona Mining Ass'n Brief, *supra* note 11, at 7-9; Knutson & Morris, *supra* note 5,

time consuming and extremely costly, however, "[i]t is simply impossible . . . to instantaneously and simultaneously possess and explore hundreds of separate claims by occupancy."⁷³ Unable to meet the traditional *pedis possessio* requirements by occupying and exploring each claim, the modern miner is left without *pedis possessio* protection for most of the claims in his block.⁷⁴ Consequently, once there is any hint of mineral discovery, a miner's competitors may reap the benefits of his exploration work by quickly grabbing the neighboring unprotected claims. This problem is particularly acute when the largest seam is found some distance from what appeared at first to be the most promising location.⁷⁵

In recognition of this problem, miners customarily adhere to "gentlemen's agreements" which respect the land positions staked out by others regardless of whether the land is actually being worked or occupied.⁷⁶ Although such agreements give protection over and above that of *pedis possessio*, they are not legally binding, and some recent cases indicate the risk of reliance on this custom.⁷⁷ Many of the critics of traditional *pedis possessio* doctrine⁷⁸ argue that if mineral development is to remain the purpose of the General Mining Law,⁷⁹ to which *pedis possessio* is an adjunct, courts must once again adopt the customs of miners as law⁸⁰ and recognize *pedis possessio* rights on a group, or block, basis.

III. JUDICIAL MODIFICATION OF *Pedis Possessio*

In *MacGuire v. Sturgis*,⁸¹ the United States District Court for

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at 519-24.

⁷³ Fiske, *supra* note 30, at 209-10.

⁷⁴ Knutson & Morris, *supra* note 5, at 521 (citing "'Nonfuel Mineral Resources and the Public Lands,' IV *Mineral Land Systems* 813-14 (Univ. of Ariz. 1969)").

⁷⁵ This often is the case in uranium mining, for example. See, e.g., *Smaller v. Leach*, 136 Colo. 297, 306, 316 P.2d 1030, 1036 (1957).

⁷⁶ Speech by Stephen D. Alfors, *supra* note 10, at 8.

⁷⁷ E.g., *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, 124 Ariz. 55, 56, 601 P.2d 1339, 1340 (1979), *cert. dismissed*, 448 U.S. 917 (1980). Geomet Exploration did not respect Lucky Mc Uranium's land positions, but instead located seven claims on a portion of the two hundred Lucky claims. This forced Lucky Mc Uranium to demonstrate in court that it deserved exclusive mining rights to the land because it had either made a discovery, see *supra* note 5, or satisfied the elements of *pedis possessio*, see *supra* notes 46-63 and accompanying text.

⁷⁸ See sources cited *supra* notes 64-65.

⁷⁹ See *supra* note 2 and accompanying text. See also 30 U.S.C. § 21a (1976) (added to the mining law in 1970 to reaffirm the federal government's encouragement of mineral development).

⁸⁰ Cf. *supra* notes 34-41 and accompanying text.

⁸¹ 347 F. Supp. 580 (D. Wyo. 1971). The case arose under diversity jurisdiction. Disputes over location and *pedis possessio* rights do not give rise to federal question jurisdiction.

the District of Wyoming provided a miner with extraordinary pre-discovery protection by extending *pedis possessio* coverage to unworked claims proximate to worked claims. Alluding to economic justifications, the court substantially liberalized traditional *pedis possessio* requirements.⁸² The Supreme Court of Arizona has rejected *MacGuire* outright in *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*,⁸³ but the Tenth Circuit has spoken approvingly of *MacGuire*⁸⁴ and has expressed dissatisfaction with the limited protection afforded miners by current mining laws.⁸⁵ Hence, although *MacGuire* does not necessarily represent a trend in the law, it is clear that courts are looking critically at the law concerning the pre-discovery period, and *MacGuire* represents the view that judicial modification of *pedis possessio* is necessary.

A. *MacGuire v. Sturgis*

The district court in *MacGuire* applied greatly liberalized standards for the *pedis possessio* requirements of actual work and occupancy, but apparently applied the traditional exclusion requirement. The court awarded plaintiff *MacGuire* exclusive possession of a group of 1785 uranium lode claims⁸⁶ even though he was engaged in work toward discovery on only some of those claims.⁸⁷

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tion unless they involve the federal requirements discussed *supra* notes 21-24 and accompanying text. See *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 508 (1900) (although what is currently 30 U.S.C. § 22 (1976) gives states the ability to supplement the General Mining Law, that section does not incorporate state regulations into federal law). For a discussion of *Shoshone* and the federal jurisdiction questions it raises, see D. CURRIE, *FEDERAL COURTS: CASES AND MATERIALS* 370-73 (2d ed. 1975).

⁸² *MacGuire*, 347 F. Supp. at 584-85.

⁸³ 124 Ariz. 55, 57-58, 601 P.2d 1339, 1341-42 (1979), *cert. dismissed*, 448 U.S. 917 (1980). It also appears that the expansive view of *pedis possessio* taken by *MacGuire* is inconsistent with the three previous decisions of the Wyoming Supreme Court on the subject. See *Sparks v. Mount*, 29 Wyo. 1, 207 P. 1099 (1922); *Phillips v. Brill*, 17 Wyo. 26, 95 P. 856 (1908); *Whiting v. Straup*, 17 Wyo. 1, 95 P. 849 (1908); *Knutson & Morris*, *supra* note 5, at 573. See also *Sherwood & Greer*, *supra* note 46, at 346 (discussing Wyoming law prior to *MacGuire*). Defenders of the *MacGuire* decision argue that the restrictive cases of the Wyoming Supreme Court should not be binding because they were all decided prior to 1925, before modern exploration techniques were developed. *Petition*, *supra* note 11, at 8 n.6.

⁸⁴ *Continental Oil Co. v. Natrona Serv., Inc.*, 588 F.2d 792, 798 (10th Cir. 1978).

⁸⁵ See *Columbia Standard Corp. v. Ranchers Exploration & Dev., Inc.*, 468 F.2d 547 (10th Cir. 1972) (applying a liberal version of the bad-faith defense in pre-discovery situations, discussed *supra* note 60); *Kanab Uranium Corp. v. Consolidated Uranium Mines, Inc.*, 227 F.2d 434 (10th Cir. 1955) (indicating prior locators should be able to rely on the principle of "color of title," discussed *supra* note 55).

⁸⁶ See *MacGuire v. Sturgis*, 347 F. Supp. 580, 581-82 (D. Wyo. 1971); *Olson*, *supra* note 13, at 368 n.4.

⁸⁷ *MacGuire*, 347 F. Supp. at 584-85.

As a general proposition, the decision suggests that the work requirement for a group of claims will be satisfied if a work program is in effect for the area claimed and if a significant number of exploratory holes are systematically drilled.⁸⁸

By modifying the work required for *pedis possessio* protection, *MacGuire* also relaxed the traditional occupancy requirement. The decision would allow a prospector who actually occupies some claims to enjoy *pedis possessio* rights on unoccupied neighboring claims as well, so long as the area claimed is reasonable in size and all the claims share a similar geologic structure.⁸⁹

The court's disposition of the exclusion requirement is less clear. When evaluating the relative merits of the *MacGuire* and *Sturgis* positions, the court relied on *MacGuire*'s efforts to exclude *Sturgis* from the contested area.⁹⁰ This suggests that a prospector relying on *MacGuire* would still have to exclude others from all the claims he seeks to protect even though he is not occupying or working most of them. Although it may seem incongruous to preserve the duty to exclude while relaxing the occupancy and work requirements, it is quite possible that eliminating the exclusion requirement would have made the decision inconsistent with the General Mining Law.⁹¹

B. Limitations of the *MacGuire* Approach

Because *MacGuire*'s approach is responsive to current western mining economics, one would expect it to encourage mineral development. In practice, however, few benefits and substantial harm can be anticipated if the rule is applied in other cases. The *Mac-*

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⁸⁸ *Id.*

⁸⁹ *See id.*

⁹⁰ *Id.* at 583-84.

⁹¹ *MacGuire*'s grant of possessory rights to land on which no minerals were discovered has been criticized as inconsistent with the requirement in 30 U.S.C. § 23 that discovery precede legal title. *See supra* note 5 and accompanying text (discussing the discovery requirement); Brief for the United States as Amicus Curiae at 4, *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, 124 Ariz. 55, 601 P.2d 1339 (1979), *cert. dismissed*, 448 U.S. 917 (1980) (on file with *The University of Chicago Law Review*) (concluding that "[r]ecognition of such broad possessory rights is foreclosed by the governing federal mining law"). *See also* *Union Oil Co. v. Smith*, 249 U.S. 337, 351-52 (1919) (dictum) (interpreting an assessment work statute to allow possessory control over contiguous unworked claims would be a "radical departure from the previous policy of the mining laws," *id.* at 352); Fiske, *supra* note 30, at 183-84 ("*Pedis possessio* has no independent existence or purpose, and no permanent consequence of its own . . . It is no more than a device to implement the General Mining Law . . . [T]he scope and operation of *pedis possessio* must be consistent with the existing principles of the General Mining Law." *Id.* at 184).

Guire rule probably will not increase mineral development and will divert public lands from the uses intended by Congress.

1. *MacGuire's Effect on Mineral Development.* A judicial expansion of *pedis possessio* doctrine patterned after *MacGuire* will not likely lead to additional mineral development for two reasons. First, it will encourage land speculation and withholding land from production. Second, it would leave unchanged some aspects of current law that discourage investment in mining.

Under traditional *pedis possessio* requirements, a miner can control a claim only if he is actively working toward discovery of minerals.⁹² *MacGuire* would allow a miner to control large numbers of claims without work or cost, so long as the claims are near a few worked claims.⁹³ Such cost-free control would give miners the opportunity to claim far more land than they can work, thereby reducing the amount of land producing minerals.⁹⁴ The hoarding of public lands for speculative purposes is already a significant national problem.⁹⁵ Widespread judicial acceptance of *MacGuire's* liberalization of *pedis possessio* rules would exacerbate that problem, thus frustrating both the General Mining Law's overall purpose of increasing mineral development and the discovery requirement's specific purpose of preventing speculation.⁹⁶

Advocates of an expansion of *pedis possessio* protection recognize the possibility of increased speculation and decreased mineral production⁹⁷ but maintain that judicial limits on *pedis possessio* expansion, such as those set forth in *MacGuire*, can minimize that risk.⁹⁸ *MacGuire's* guidelines, however, are vague and very difficult

⁹² See *supra* notes 46-50 and accompanying text.

⁹³ See *supra* notes 86-89 and accompanying text.

⁹⁴ See *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, 124 Ariz. 55, 58, 601 P.2d 1339, 1342 (1979), *cert. dismissed*, 448 U.S. 917 (1980); *Adams v. Benedict*, 64 N.M. 234, 247, 327 P.2d 308, 317 (1958); *Ladendorff*, *supra* note 10, at 21-22.

⁹⁵ See *Uranium Lode Mining Claims on Federal Lands: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 19 (1977) (testimony of John W. MacGuire) (almost 25% of United States land likely to contain uranium may now be tied up by speculators) [hereinafter cited as *Hearings*]; *Knutson & Morris*, *supra* note 5, at 556 ("all too often claims are held for profit by sale rather than development").

⁹⁶ The general purpose of the Mining Law is to increase mineral development, see *supra* notes 2, 79 and accompanying text; the specific purpose of the discovery requirement of 30 U.S.C. § 23 (1976), see *supra* note 5 and accompanying text, appears to have been to prevent speculation, see 43 C.F.R. § 3841.3-1 ("[t]he object of [30 U.S.C. § 23] is evidently to prevent the appropriation of presumed mineral ground for speculative purposes").

⁹⁷ *Arizona Mining Ass'n Brief*, *supra* note 11, at 13; *Olson*, *supra* note 13, at 380.

⁹⁸ *Arizona Mining Ass'n Brief*, *supra* note 11, at 29-38; *Olson*, *supra* note 13, at 380-81. The *MacGuire* court indicated that a prospector will be entitled to exclusive possession over a group of claims only if the geology is fairly uniform throughout the area claimed, the size

to enforce.⁹⁹ The court discussed a "reasonable" area,¹⁰⁰ but it did not say what an unreasonable number of acres would be. *MacGuire* itself involved 1785 claims,¹⁰¹ an extremely large area. Although the *MacGuire* rule requires a miner to devise a work program for the entire area he claims, it does not detail the contents of such a plan.¹⁰² Moreover, *MacGuire* does not specify whether there must be a real intent to follow the work plan,¹⁰³ or, if such an intent is required, how a court could tell whether it existed. Finally, *MacGuire* stresses the economic impracticability of developing minerals only on actively worked claims, but it does not distinguish impracticability from mere inconvenience to the miner.¹⁰⁴ In sum, the judicial limits set in *MacGuire* are too vague and powerless to be a meaningful check on speculation and the withdrawal of land from mineral production.¹⁰⁵

MacGuire also leaves intact two aspects of current law that inhibit mineral development. First, a prospector acquires no rights against the United States under the General Mining Law until he discovers a mineral.¹⁰⁶ As a result, the government can dispose of

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of the area claimed is reasonable, an overall work program is in effect for the area claimed, a significant number of exploratory holes have been drilled systematically, and the nature of the mineral claimed makes it economically impracticable to develop the mineral only on those claims where the prospector is actually present and working. *MacGuire*, 347 F. Supp. at 584-85. The court also relied on the fact that "the discovery (validation) work referred to in Wyo. Stat. § 30-6 (1957) is completed." *Id.* at 584. This is irrelevant for purposes of establishing *pedis possessio*. See Olson, *supra* note 13, at 368 n.5.

⁹⁹ *Contra* Olson, *supra* note 13, at 380.

¹⁰⁰ *MacGuire*, 347 F. Supp. at 584.

¹⁰¹ See *id.* at 581-82; Olson, *supra* note 13, at 368 n.4. Cf. *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, 124 Ariz. 55, 56, 601 P.2d 1339, 1340 (1979), *cert. dismissed*, 448 U.S. 917 (1980), which involved 200 claims and 4000 acres. One commentator has suggested that the immodest size of the claim block in *Geomet*, though smaller than in *MacGuire*, was one reason why the court did not grant *pedis possessio* protection to the plaintiff. Speech by Stephen D. Alfors, *supra* note 10, at 16.

¹⁰² See *MacGuire*, 347 F. Supp. at 584-85. The decision neither sets quality standards for work plans nor insists that the scheme be economically or technically feasible. *MacGuire* also does not indicate whether the plan must be in writing. See *id.*

¹⁰³ See *id.* Although *MacGuire* stipulates that a work program must be diligently pursued, the facts of the case show that work on only 150 claims was sufficient for possessory control of over 1785 claims. See *id.* at 583.

¹⁰⁴ *Id.* at 584-85.

¹⁰⁵ See *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, 124 Ariz. 55, 58, 601 P.2d 1339, 1342 (1979) (criticizing *MacGuire* as "laden with extreme difficulties of determining over how large an area and for how long one might be permitted to exclude others"), *cert. dismissed*, 448 U.S. 917 (1980). See also Ladendorff, *supra* note 10, at 21-22 ("[T]here must be some limitations as to time, area, and diligence. Without such limitations, the doctrine of *pedis possessio* becomes a tool for speculators, permitting the preemption of large areas of public domain and the frustration of the policy of the general mining law.").

¹⁰⁶ See *supra* note 21 and accompanying text.

the land on which he is working in any manner it chooses throughout the predisccovery period.¹⁰⁷ The possibility of adverse government action adds to the inherent risk of loss during mineral exploration. This is especially true today when mineral discovery is a long, hard, costly process.¹⁰⁸

Second, because *MacGuire* did not eliminate the *pedis possessio* exclusion requirement,¹⁰⁹ a prospector proceeding under its holding still must prevent rivals from entering any of the claims he seeks to protect. Guarding against peaceable entries over a large block of claims involves considerable expenditures. Rather than increasing mineral discoveries and production, however, such expenditures would only preserve possessory rights. This undercuts the production goals of *MacGuire* and the General Mining Law. In sum, *MacGuire*'s failure to provide adequate protection and its encouragement of speculation ill serve the goal of increasing mineral development.

2. *Withdrawal of Public Land from Legitimate Mining and Nonmining Uses.* A *MacGuire*-like expansion of *pedis possessio* would foster abuse of the mining laws, thus reducing the number of acres available for legitimate mining and nonmining uses. Under the General Mining Law, a miner can prospect for minerals on any unappropriated public land without regard to other land uses.¹¹⁰ During the predisccovery period, *pedis possessio* rights allow a miner to exclude other land uses to the extent that they interfere with his exploration.¹¹¹ Once mining begins, it tends to displace other uses because mining is largely incompatible with land uses such as recreation, watershed protection, and conservation.¹¹² More formally, once a prospector discovers a valuable mineral, he obtains property rights good against the United States¹¹³ that allow him to exclude all other uses of his claim regardless of whether they interfere with mining.¹¹⁴

Miners often acquire postdiscovery rights illegitimately by

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¹⁰⁷ PUBLIC LAND LAW REVIEW COMMISSION, *supra* note 4, at 126.

¹⁰⁸ See *supra* notes 71-73 and accompanying text.

¹⁰⁹ See *supra* notes 90-91 and accompanying text.

¹¹⁰ See STANFORD ENVIRONMENTAL LAW SOCIETY, PUBLIC LAND MANAGEMENT—A TIME FOR CHANGE? 8 (1971).

¹¹¹ Fiske, *supra* note 30, at 198.

¹¹² See STANFORD ENVIRONMENTAL LAW SOCIETY, *supra* note 110, at 8, 18; McBroom, *supra* note 3, at 1066 ("it would be facetious to say that there is no conflict between mining and recreation or that mining is compatible with recreation").

¹¹³ See *supra* notes 21-22 and accompanying text.

¹¹⁴ See McBroom, *supra* note 3, at 1064-66.

filing false affidavits of discovery¹¹⁵ and of assessment work.¹¹⁶ These rights allow them to exclude legitimate uses of public lands, even though they have not met the General Mining Law's discovery requirement.¹¹⁷ Only the United States or a subsequent locator can challenge the validity of a miner's claim,¹¹⁸ but the government rarely challenges claims unless it needs the land for other purposes.¹¹⁹ Under traditional *pedis possessio* rules, a subsequent lo-

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¹¹⁵ See *supra* note 5 (noting, in paragraph three, that courts have long allowed miners who have not discovered minerals to locate and record claims despite federal and state statutes that require discovery to precede both location and recordation).

¹¹⁶ *Hearings, supra* note 95, *passim*; Marsh & Sherwood, *supra* note 4, at 285 (noting that "perjury convictions for filing such fraudulent statements are hardly common"). See *supra* note 23 and accompanying text (discussing assessment work requirement).

¹¹⁷ See M. CLAWSON & B. HELD, *THE FEDERAL LANDS* 57 (1957) ("Mining claims cover a much larger area of federal land than does actual mineral development; and these claims often limit, if not exclude, other uses of the land."). See also *id.* at 80:

[T]he mining laws have been subject to many abuses and have frequently been used as a subterfuge for obtaining control of land that would not be available under laws or regulations for the purposes sought. The Forest Service has estimated that only 15 percent of all mining claims that went to patent, and only a very small fraction of those not patented, have been used for commercial mining operations. The others have been used for grazing, timber harvest (permitted after patent), summer homes, or for many other purposes.

¹¹⁸ See Comment, *Preservation and Strategic Mineral Development in Alaska: Congress Writes a New Equation*, 12 ENVTL. L. 137, 149 (1981). The United States can always contest the validity of a claim on the ground that no valuable mineral has been discovered. *Cameron v. United States*, 252 U.S. 450, 459-60 (1920); STANFORD ENVIRONMENTAL LAW SOCIETY, *supra* note 110, at 6. Traditionally, failure to do the assessment work required by 30 U.S.C. § 28 (1976), *supra* note 23, entitled other prospectors to relocate the claim but did not allow the Department of the Interior to cancel the claims. *Ickes v. Virginia-Colorado Dev. Corp.*, 295 U.S. 639 (1935); *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306 (1930). More recently, the Supreme Court has held that in some circumstances the federal government can contest the validity of a claim for failure to do proper assessment work. *Hickel v. Oil Shale Corp.*, 400 U.S. 48 (1970).

The Federal Land Policy Management Act of 1976, 43 U.S.C. §§ 1701-1783 (1976 & Supp. IV 1980), appears to give the Interior Department more power. The law requires claimants to file, both locally and with the Bureau of Land Management, either a "notice of intention to hold" or an affidavit of assessment work. *Id.* § 1744(a). Failure to file such instruments "shall be deemed conclusively to constitute an abandonment of the mining claim." *Id.* § 1744(c). Filing such an instrument "by itself shall not render valid any claim which would not be otherwise valid under applicable law. Nothing in this section shall be construed as a waiver of the assessment and other requirements of such law." *Id.* § 1744(d).

¹¹⁹ Strauss, *supra* note 30, at 192; Comment, *supra* note 118, at 149; see also STANFORD ENVIRONMENTAL LAW SOCIETY, *supra* note 110, at 6. In general, the federal government has been hesitant to challenge false affidavits, preferring to encourage prospectors to come onto public lands not needed for another public use. Comment, *supra* note 118, at 149.

If it should become apparent that massive new speculation is taking place, the government might take action. Because a miner can go back and stake another claim if his initial claim is declared invalid, however, it might not be worthwhile for the Interior Department to change its current practice, even in the face of massive speculation. If the Department does not change its current practice, 43 U.S.C. § 1744 (1976 & Supp. IV 1980), see *supra*

cator has an incentive to show that a prior locator has failed to comply with the discovery or assessment work requirements, because the subsequent locator can obtain rights to valuable minerals by demonstrating that his claim is superior.¹²⁰ Under the *MacGuire* standard, however, it is virtually impossible for a subsequent locator to establish a superior claim: because *MacGuire* liberally grants *pedis possessio* protection to vast areas, the prior locator will almost always be able to demonstrate the subsequent locator's entry violated his *pedis possessio* rights.¹²¹

Without incentives to bring suit, subsequent locators will bring fewer challenges. Without such challenges, the number of fraudulent claims will increase unchecked. Congress intended that miners have easy access to public land for the purpose of mining.¹²² In the absence of mining, Congress has provided for other uses of the public's land.¹²³ By making it easier for individuals who have not actually made a discovery to assert postdiscovery rights, which include the right to exclude nonmining uses, the *MacGuire* decision will divert public land from the uses intended by Congress.

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note 118, will not ensure the performance of assessment work because miners will simply file a "notice of intention to hold" as allowed by § 1744(a).

It would seem that the 1976 Act must be coupled with a more aggressive policeman-role for the Department, in the form of contests under the post-*Hickel v. Oil Shale Corp.* regulation [43 C.F.R. § 3851.3(a) (1979)], or it must be conceded that the 1976 Act constitutes a mere notice-to-the-government exercise which will have substance only where the land located has been withdrawn or if failure to comply with the 1976 Act . . . can be relied upon by a third party relocater to defeat the prior locator in possession.

Marsh & Sherwood, *supra* note 4, at 286.

¹²⁰ In possessory disputes between prospectors, the prospector who meets the three requirements of *pedis possessio* obtains possession, regardless of who entered the land first. See *supra* note 45 and accompanying text.

¹²¹ Under the *MacGuire* rule, it is not necessary for the prior locator to work and occupy each claim to obtain *pedis possessio* rights, so long as he fulfills his duty to exclude. See *supra* notes 86-91 and accompanying text. That another prospector meets the traditional *pedis possessio* requirements, therefore, will be to no avail. Entry on the claim against the prior locator's active resistance is an infringement of his possessory rights under *MacGuire*; it defeats the subsequent locator's claim.

¹²² See *supra* note 2 and accompanying text.

¹²³ See, e.g., 16 U.S.C. §§ 528-531 (1976) (providing that national forests "shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes" so long as such administration does not "affect the use or administration of mineral resources," *id.* § 528). Cf. 30 U.S.C. § 612(a) (providing mining claims shall not be used for nonmining uses); Marsh & Sherwood, *supra* note 4, at 218 ("The purpose of [§ 612(a)] is to permit multiple use of the surface resources of our public lands . . . ." (quoting S. REP. No. 554, 84th Cong., 1st Sess. 1-2 (1955))).

C. The Propriety of Judicial Action

Judicial action providing miners with additional prediscovery protection would be advantageous and compatible with the purposes of the General Mining Law¹²⁴ if court action would not lead to land speculation and depletion of public land available for legitimate uses. The *MacGuire* decision is deficient because it neither provides miners with adequate protection nor places sufficient limits on speculation and private domination of public lands.¹²⁵

These problems, however, cannot be attributed solely to the failings of that court's opinion. Courts cannot protect miners against peaceable entries¹²⁶ or adverse federal government allocations¹²⁷ prior to discovery; providing such protection would entail amending the General Mining Law, which only Congress can do.

More fundamentally, courts are not designed to effect the kinds of broad policy reforms that are required once *pedis possessio* protection is extended to land beyond the clear line marked by the boundary of a claim being worked.¹²⁸ Industrywide acreage and time limits are the best way to ensure against land speculation and the restriction of nonmining uses.¹²⁹ Such limits would also permit the mining industry to engage in long-term planning; miners could rely on an objective standard and not be concerned with subjective definitions of "reasonable" in determining which claims are protected.¹³⁰ Industrywide regulation, however, should be based on an extensive inquiry into the nature of the industry. Legislatures are

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¹²⁴ See *supra* notes 2, 79, and accompanying text; Fiske, *supra* note 30, at 184 (quoted *supra* note 91).

¹²⁵ See *supra* notes 92-123 and accompanying text.

¹²⁶ See *supra* note 91 and accompanying text.

¹²⁷ See *supra* notes 106-08 and accompanying text.

¹²⁸ The traditional *pedis possessio* approach of requiring actual occupancy and work on each claim, see *supra* notes 46-59 and accompanying text, makes it easy to identify the limits of *pedis possessio* rights. Once *pedis possessio* is expanded beyond the boundaries of a claim, courts are faced with the tough questions of how large an area and for how long a period one ought to be permitted to exclude others without actual work or occupancy. See *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, 124 Ariz. 55, 58, 601 P.2d 1339, 1342 (1979), *cert. dismissed*, 448 U.S. 917 (1980).

¹²⁹ See *supra* note 105. Speculation is more difficult if the amount of land a miner is allowed to control without work roughly equals the amount of land he can mine economically. Similarly, limiting the length of time the miner can control the land without work would be an inducement to develop the mineral content. See *infra* notes 143-50 and accompanying text.

¹³⁰ Cf. *supra* notes 99-105 and accompanying text (discussing the vague and subjective standards in *MacGuire*); *infra* notes 137-38 and accompanying text (discussing planning problems caused by the multitude of state laws).

better able to perform this sort of inquiry than are courts;¹³¹ courts are constrained to consider only the facts of the particular controversy before them.¹³²

Case-by-case determinations ill serve miners and the public. Miners need uniform rules for planning purposes¹³³ and the public has an interest in coherent national land use policies. Although prediscovery protection should be increased, courts are not the appropriate institution to do so.

IV. A CONGRESSIONAL SOLUTION

It is often stated that mining law needs to be reformed.¹³⁴ This comment has demonstrated that courts are ill suited to undertake that task. The alternatives to judicial tinkering are either state or federal legislation. This part discusses why federal action is preferable and outlines a proposal for a permit system to replace *pedis possessio* law.

A. The Importance of National Policies

Each mining state has laws that regulate mining and supplement federal law.¹³⁵ Conceivably, state legislatures could expand prediscovery rights to suit contemporary needs. Unlike state courts, state legislatures have the capacity to gather the information necessary for expanding prediscovery rights while imposing limits that can control speculation and illicit domination of public land.¹³⁶ State legislatures can also detail stringent work plan requirements more easily than can state courts. Like state courts, however, state legislatures cannot amend the General Mining Law to protect miners against peaceable entries and adverse federal government allocations prior to discovery. Equally important, if

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¹³¹ See generally D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 353-81 (1978); Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1269-70, 1273-74 (1982).

¹³² D. HOROWITZ, *supra* note 131, at 17-21.

¹³³ See *infra* notes 137-38 and accompanying text.

¹³⁴ See PUBLIC LAND LAW REVIEW COMMISSION, *supra* note 4, at 124; Forman, Dwyer & Cox, *supra* note 13, at 473-74; Hagenstein, *Changing an Anachronism: Congress and The General Mining Law of 1872*, 13 NAT. RESOURCES J. 480, 488-93 (1973); Ladendorff, *supra* note 10, at 25-33; Martz, *Pick and Shovel Mining Law in an Atomic Age: A Case for Reform*, 27 ROCKY MOUNTAIN L. REV. 375, 380-92 (1955); Olson, *supra* note 13, at 381; Comment, *supra* note 13, at 393-95. See also McBroom, *supra* note 3, at 1066; Strauss, *supra* note 30, at 219-36; Article, *Environmental Regulation of Hardrock Mining on Public Lands: Bringing the 1872 Law Up to Date*, 4 HARV. ENVTL. L. REV. 145, 163 (1980).

¹³⁵ See *supra* note 32 and accompanying text.

¹³⁶ See *supra* note 131 and accompanying text.

not more so, dispersion of mining regulation detracts from the coherence of the nation's mining laws¹³⁷ and makes it difficult for companies operating in several states to engage in long-term planning or to affect the policies of the agencies regulating mining.¹³⁸ Further, because abuse of the mining laws affects land-use policy generally,¹³⁹ dispersion of mining regulation prevents the nation from having a uniform national land-use policy.

In 1872, when the extent of federal and state governments in the West was minimal, it was reasonable to rely on miners for local administration of the General Mining Law. It was also reasonable for state governments later to supplant mining districts.¹⁴⁰ Today, decisions concerning mineral development, conservation, and recreation affect not only miners, but millions of citizens throughout the country.¹⁴¹ It is only fair that the representatives of all the people, not just miners or even mining states, allocate the uses to which publicly owned lands will be put.¹⁴²

B. Exploration Permits as a Replacement for *Pedis Possessio*

Congress should enact a system of exploratory mining permits to replace *pedis possessio* and state laws governing the exploration period.¹⁴³ The permits should grant miners complete prediscovery protection for a limited time period on a limited amount of land.¹⁴⁴

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¹³⁷ State laws on this subject vary widely and many are obsolete or archaic in light of modern technology. The discovery [validation] work required by state law often serves no useful purpose and frequently conflicts with sound land use practices and causes needless harm to the environment. . . . [W]e believe that the development of mineral resources is so important the Federal statutes should fully prescribe uniform methods by which rights in these resources may be acquired.

PUBLIC LAND LAW REVIEW COMMISSION, *supra* note 4, at 130. The American Mining Congress has recommended replacing the varying state requirements with uniform federal location requirements. American Mining Congress, *supra* note 64, at 2.

¹³⁸ See generally Petition, *supra* note 11, at 9-10 ("lack of uniform policies and direction has created domestic shortages of minerals"); U.S. COMPTROLLER GENERAL, GAO REP. NO. B-125067, U.S. MINING AND MINERAL PROCESSING INDUSTRY: AN ANALYSIS OF TRENDS AND IMPLICATIONS 5-9 (1979) (stressing need for better coordination of the nation's mineral policies); U.S. COMPTROLLER GENERAL, GAO REP. NO. B-118678, LEARNING TO LOOK AHEAD: THE NEED FOR A NATIONAL MINERALS POLICY AND PLANNING PROCESS 7-8 (1979) (same).

¹³⁹ See *supra* notes 110-23 and accompanying text.

¹⁴⁰ See *supra* notes 28-33 and accompanying text.

¹⁴¹ PUBLIC LAND LAW REVIEW COMMISSION, *supra* note 4, at 33-65.

¹⁴² *Id.* at 6 ("[T]he ultimate responsibility of the Federal Government is to provide for the common defense and promote the general welfare and, in so doing, it should make use of every tool at its command, including its control of the public land.").

¹⁴³ See, e.g., *id.* at 126-28; Ladendorff, *supra* note 10, at 22-33.

¹⁴⁴ This type of permit would also prevent the government from disposing of the land while the permit is in effect.

Such a permit system would eliminate *pedis possessio* rights and the doctrine's requirements of actual occupancy, work toward mineral discovery, and physical exclusion of rivals.¹⁴⁵

Elimination of the *pedis possessio* duty to exclude would save miners the time and money they must spend under current law to keep competing prospectors from their claims.¹⁴⁶ The proposed system of mining permits would also alleviate the risk of lost investments due to displacement by the federal government.¹⁴⁷ These reductions in the costs and risks of exploration should encourage capital investment in mineral development.

Exploration permits limited to specified acreage and time periods will give miners the flexibility they need to explore claims in groups without having to risk losing claims due to lack of occupancy or exploration. The time and acreage limits, if properly calibrated, should also prevent large-scale land speculation and the withdrawal of land from productive use.¹⁴⁸ Accordingly, the acreage limit should be high enough to allow economic development but low enough to prevent hoarding.¹⁴⁹ Similarly, the time allowed should be sufficient to complete exploration or secure evidence of valuable deposits, but not so long as to encourage speculation.¹⁵⁰

Disagreement among various interest groups has stalled congressional action on mining law reform.¹⁵¹ The mining industry, jealous of its unrestricted access to large portions of public lands,¹⁵² resists the imposition of royalty charges or administrative regulations.¹⁵³ Environmentalists tend to favor a leasing system for

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¹⁴⁵ See sources cited *supra* note 143.

¹⁴⁶ Cf. *supra* text following note 109.

¹⁴⁷ Cf. *supra* notes 106-08 and accompanying text.

¹⁴⁸ See *supra* note 105; *supra* note 129 and accompanying text.

¹⁴⁹ See Ladendorff, *supra* note 10, at 29 (recommending that permits be issued for a minimum of 640 acres and a maximum of 3200 acres per miner per state).

¹⁵⁰ A one-year claim with a yearly option to renew upon showing of diligent work toward discovery might be appropriate. This is the time period adopted by Utah for prospecting permits on state-owned land. UTAH CODE ANN. § 40-1-13 (1981).

¹⁵¹ Bills proposing permit systems have been introduced in Congress but have not been passed. See, e.g., H.R. 7211, 92d Cong., 1st Sess., 117 CONG. REC. 9828 (1971); H.R. 7354, 91st Cong., 1st Sess., 115 CONG. REC. 4097 (1969). The major points of controversy are discussed in STANFORD ENVIRONMENTAL LAW SOCIETY, *supra* note 110, at 45-50; Hagenstein, *supra* note 134, at 484-85, 489-91.

¹⁵² Miners characterize this privilege of free access to public lands as an historic right. See Forman, Dwyer & Cox, *Basic Mining Law Provides Maximum Benefit for the General Public*, 3 NAT. RESOURCES LAW. 327, 327-28 (1970).

¹⁵³ They claim royalties would bankrupt small prospecting firms. See STANFORD ENVIRONMENTAL LAW SOCIETY, *supra* note 110, at 30-31, 38-39, and sources cited therein. This criticism is disingenuous because the expansion of *pedis possessio* protection to large blocks of claims, which industry representatives support, would hurt small firms, too; only large

federal lands with extensive supervision by federal authorities.¹⁵⁴ Regardless of the resolution of these controversies, however, the enactment of an exclusive permit system would improve current law. It will provide coherent national regulation, protect miners' investments in exploration work, and encourage mineral development while also avoiding the displacement of legitimate uses of federal lands.

CONCLUSION

The common law doctrine of *pedis possessio* was developed to protect the rights of miners prospecting on federal lands prior to the discovery of valuable minerals. *Pedis possessio* traditionally has protected miners from forcible, fraudulent, and surreptitious entries on each claim they actually occupy and work. In the past decade, some courts have approved the expansion of *pedis possessio* protection to neighboring unworked claims. Concerned with geologic and economic constraints on modern mining, those courts relaxed the traditional occupancy and work requirements, hoping to encourage mineral development.

This comment has found that judicial expansion of *pedis possessio* will not significantly increase mineral development because it will not give miners sufficient prediscovery protection and because it will encourage land speculation. Moreover, judicial expansion of the doctrine is inappropriate because it would allow unchecked mining industry domination of public lands.

Although regulation of the prediscovery period traditionally has been a local function, political developments, changes in the mining industry, and the need for national coordination of mineral and public land-use policy make it appropriate for the federal government to act. Congressional legislation creating exclusive mining exploration permits, limited in time and land area, is the best means of giving miners additional protection without creating problems of speculation or illegitimate monopolization of public lands.

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firms could afford the costs imposed by the *pedis possessio* duty to exclude rivals from the large tracts.

¹⁵⁴ *Id.* at 32-50. The environmentalists favor royalty payments and competitive bidding for leases. They claim that bidding will result in more efficient resource allocation, *id.* at 33-34, and that the current absence of royalties amounts to an inefficient subsidy to miners, *id.* at 19-23. See generally Udall, *The Mining Law of 1872 Must be Scrapped*, 8 NAT'L WILDLIFE 9-11 (1970) (written by former Secretary of Interior Stewart Udall).