ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672
4258 SRES SB 237 - SB 241

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* DELIVER TO: JPOM

* ORIGINAL
* SENT: 05/02/85 TIME: 15:04
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* PRINT DATE: 05/02/85 TIME: 15:05

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TO: SENATE RESOURCES COMMITTEE:
SENATORS [redacted], FAHRENKAMP, ELIASON, ZHAROFF, HALFORD, COGHILL, AND V. FISCHER

SENATE FINANCE COMMITTEE:
SENATORS FAIKS, SACKETT, KERTTULA, ELIASON, P. FISCHER, HALFORD, AND FERGUSON

FROM: BOB HUNTER
2015 SHEPAGATIA
ANCHORAGE, ALASKA 99508 (H) 276-8134 (W)276-2761

RE: HB 280-ANCHOR RIVER

THE ALASKA SPORT FISHING ASSOCIATION URGES IMMEDIATE PASSAGE OF HB 280 WITHOUT SUNSET CLAUSE. THIS IS AN EXCELLENT BILL AND NEEDS ACTION THIS YEAR. THANK YOU FOR YOUR SUPPORT.

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*MATC5/2**********

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TO: SENATORS KERTTULA, DEVRIES, [redacted] FAHRENKAMP, COGHILL, ELIASON, V FISCHER, HALFORD, ZHAROF

FROM: ART DRABECK 745-4520
SRC BOX 8338
PALMER 99645

RE: SB 279 & SB 280 - RED DOG

FIRST THEY GAVE AWAY OUR RIGHTS, NOW THEY WANT TO SUBSIDIZE A PRIVATE COORPORATION. CREDIT UNIONS GET 18.6%, WHY IS THE STATE EVEN CONSIDERING 2 OR 5%? IN THE FACE OF DECLINING REVENUES, WHY DOES THE STATE INSIST ON COMPLETELY SUBSIDIZING PRIVATE BUSINESSES THROUGHOUT THE STATE. I OPPOSE THESE BILLS.

*MATC5/2**********

Rule 16, subd. 2 (31 C. C. A. clx, 90 Fed. clx), also provides that the respondent may docket the case in the Circuit Court of Appeals, and file a copy of the record there, at any time after the appeal has been perfected in the lower court, and may have the same heard upon its merits. This would have enabled the plaintiff in this cause to have determined the question of the appealable nature of the order complained of upon the failure of the appellants to perfect their appeal within the 30 days. The attorneys who now ask to vacate the order allowing the appeal have been respondent's attorneys since April 16th, and could have advised the correct practice during the open season, but did not so. For the reason that the cause has been regularly appealed to the Circuit Court of Appeals, and for the want of jurisdiction to do so, this court is now compelled to overrule the motion to vacate, and leave the respondent to his remedy in the Circuit Court of Appeals. The motion to vacate is denied.

THE ALASKA GOLD MIN. CO. v. BARBRIDGE et al.

(First Division. Juneau. December Term, 1901.)

No. 49a.

1. TIDE LANDS—MINES AND MINING.

Lands lying below ordinary high tide on the shore of the ocean and arms of the sea in the District of Alaska are not subject to location under the mining laws of the United States.

2. MINES AND MINERALS—EVIDENCE—PATENT.

As a general rule the recitals in a mining patent are conclusive evidence of the extent and boundaries of the claim; other evidence may be admitted to determine the location of the monuments and boundaries called for by the patent.

3. INJUNCTION—TRESPASS.

One who, within the District of Alaska, trespasses upon the tide lands not subject to location under the mineral laws of the United States, may be enjoined from sinking shafts thereon, and

causing an increased flow of water into, and threatening the complete flooding and irreparable injury to, lower levels excavated by an adjoining mine owner underneath the same tide lands in following his vein or lode beyond his boundary line.

Action to Restrain Damage to Mine.

Maloney & Cobb, for plaintiff.
Crews & Hellenthal, for defendants.

BROWN, District Judge. This action was brought to restrain and enjoin the defendants from sinking a certain shaft situated at a point where the surface of the earth is below mean high tide on Gastineau channel, and immediately above the workings of the plaintiff corporation on a vein or lode, the apex of which is within the surface boundaries of the mining claim of the corporation. It is alleged that, by following the vein or lode on the dip thereof, the plaintiff has passed beyond the side line of its lode mining claim and beyond the shore line of Gastineau channel, which said channel is an arm of the sea, and is now working under said arm of the sea, the greatest working depth attained being about 900 feet; that the defendants, in sinking their shaft and discharging blasts in that behalf, cause the ground beneath to vibrate and the waters of the sea to flow through fissures in the rock that forms the roof above the workings of the plaintiff, thereby causing large quantities of the water of the sea to flow in upon the plaintiff, to its great and irreparable injury; and that, unless the defendants are restrained from further pursuing the work of sinking their said shaft, the plaintiff's mine will become flooded and made valueless. The defendants deny these matters generally, but admit they are engaged in sinking a shaft, etc.; allege it to be on a lode mining claim properly located by them, and that their work in no wise damages plaintiff. This is practically the case before the court.

The evidence shows that plaintiff has a patent to its certain mining claim, and the patents offered in evidence show by reference to points, distances, courses, etc., that the line of said claim, at some points, is some little distance from the shore line of mean high tide of said channel. It further appears that the defendants have sunk shafts a few feet in depth, the surface at the point of sinking being above mean high tide, and have exposed rock in place of some value, the quartz taken therefrom showing good value; that shafts have been sunk at one or more places, the defendants claiming a lawful location of a lode mining claim, and that they are entitled to work the same even though some injury should result therefrom to the plaintiff. It is admitted that the particular shaft complained of is on what defendants claim to be the strike of their vein, and that the surface where said shaft was begun is below mean high tide. It further appears from the evidence, the admitted facts, and the personal observation of the court when present upon the ground, on invitation of the parties to this action, that only a few feet of the vein claimed by defendants extends, at either end thereof, above mean high tide, and that, following the strike of the vein or lode a few feet from the point of discovery, the vein passed below the tide line, and that the apex of the vein, except at low tide, other than these few feet, is beneath the sea, and a considerable portion is below even low tide.

It is contended by the defendants that, under the mining laws of the United States, all of the public mineral lands of the United States are subject to exploration and location; that mineral lands below high tide are a part of the public mineral lands of the United States, and therefore subject to exploration and location the same as the like character of land above high tide; that, beginning at or near the shore line, the defendants have a right to follow a vein upon the

strike thereof beyond the shore line beneath tide waters for the entire length of a claim. As before stated, except for a few feet, the apex of the entire vein claimed by the defendants is below the tide line. The above proposition is denied and contested by plaintiff. It is further claimed by plaintiff that plaintiff's land runs to the shore line of Gastineau channel and to mean high tide thereof; that the points designated by stakes constitute the meander line, and, though these are a few feet back from the point of mean high tide, their patented land in fact runs to mean high tide; and that therefore there is no land above shore line on which defendants could sink a shaft, make explorations, or locate a lode mining claim or any part thereof.

Thus are outlined the main points contested in this case. To what extent it is necessary for the court to follow these in order to determine the rights of the parties under the pleadings, the court does not at this time determine. It is sufficient to say that some of them will be examined. The arguments of counsel have been long, learned, and highly interesting, but, if counsel will excuse the court for so saying, unnecessary to follow at length in order to determine this case.

It seems to be expedient to determine, first, whether a mining claim can be located on lodes situated on the shore of the sea below mean high tide, or whether, where the vein or lode extends on its strike beyond the shore line under the sea, the discoverer can lawfully locate the part of the lode above mean high tide, and include in such location the larger part thereof that lies below the waters. Stating the proposition in another way, can the locator of a mining claim lawfully include in his claim any mineral lands of the United States that may extend into and under the sea below mean high tide, or must his claim end at the shore line?

Section 2319 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1424] provides that:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States," etc.

It is claimed that the language of the section is broad enough to include land below, as well as above, high tide. Considering the language of the section, it might possibly include any of the mineral lands of the United States; but, under the policy of our government, the tide lands have never been sold by the general government. The original states, upon the formation of the Union, held the tide lands subject to their several control. In order that new states, carved out of the various portions of the public domain, should, when admitted as states of the Union, be admitted on an equality with all the other states, it has been deemed wise —and perhaps obligatory upon the general government—to so hold these tide lands that, when the new states should be formed, they should be transferred to the sole control of such states, to be disposed of as might seem wise to them. Considering this policy of the government in dealing with this class of lands, it would seem that the legislation by Congress relative to the disposition of its agricultural and mineral lands should be treated as subject in this respect to this general policy. It has been frequently said by our courts of last resort that these tide lands do not really belong to the United States, and are not subject to disposition, but are simply by the United States held in trust for the new states that shall be carved out of the public domain. Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428. See, also. Shively v. Bowlby, 152 U. S. 47, 14 Sup. Ct. 548, 38 L. Ed. 331; Knight v. The U. S. Land Ass'n, 142 U. S. 163,

12 Sup. Ct. 258, 35 L. Ed. 974; Weber v. Commissioners, 18 Wall. 65, 21 L. Ed. 798.

While this doctrine is supported by high authority, it seems to me that it is true only in the sense that the general government has established this policy in dealing with its lands. That the general government is the owner, and might, if it chose, dispose of them as it pleased, I have no doubt. But it is not difficult to perceive that the disposition of the tide lands in the outlying district of the United States might, when new states should be carved out of the public domain, create difficulties in the admission of the same as states of the Union; hence the policy of the government. It is fair to conclude, in construing the act of Congress providing for the disposition of the public lands of the United States, that the Congress only intended to provide for the disposition of such lands as have been held for disposition under the general policy of the government. In Weber v. Harbor Commissioners, 18 Wall. 57, 21 L. Ed. 798, Mr. Justice Field, delivering the opinion in the case, said:

"Although the title to the soil under the tide waters of the bay was acquired by the United States by cession from Mexico equally with the title to the upland, they held it only in trust for the future state. Upon the admission of California into the Union on an equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits, passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters."

In Knight v. U. S. Land Association, Mr. Justice Lamar said:

"It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original states, were reserved to the several states, and that the new states since admitted have the same rights, sover-

eignty, and jurisdiction in that behalf as the original states possessed within their respective borders."

In the case of Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428, Mr. Justice Bradley, speaking for a majority of the court, said:

"With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the state in which they are situated, if a state has been organized and established there."

In many other cases in the Supreme Court, the dictum is frequently found that the lands belonging to the United States, in territories, below high-water mark, are held in trust for the future state, and title therein is not vested in the United States, to the extent that the same might be sold. If this should be deemed to be true as a legal proposition, then, of course, as before stated, the laws of Congress providing for the disposition of the public mineral lands could by no possibility include the lands below ordinary high tide.

But another result might follow if this were true. If the general government has no title in these lands, and holds them simply in trust, the title being in the future state, then a person having a lode location near the shore of the sea might not be permitted to follow his ledge on the dip beyond the shore line, because it is very apparent that, if the United States cannot dispose of this land, any grant it may convey in the sale of a mining claim must stop at the line of the grant, and cannot extend into lands that the United States does not own. It is well settled that, where agricultural lands have been conveyed by patent, a party obtaining title to a contiguous mining claim cannot follow the dip of his vein beyond a point where a line let fall perpendicularly from the boundaries of the agricultural land would strike the dip of the vein. This is true because, where agricultural

land is conveyed by the United States, it carries everything with it, not only within its boundaries upon the surface, but to any depth which the party may seek to go to explore it. But, as before stated, it is not believed that these dicta—by our very learned Supreme Court in many cases—can be the true theory of the law in these matters.

Mr. Justice Gray, in Shively v. Bowlby, 152 U. S. 47, 14 Sup. Ct. 565, 38 L. Ed. 331, after quoting many of the decisions on this question, says:

"Notwithstanding the dicta contained in some of the opinions of this court already quoted to the effect that Congress has no power to grant any land below high-water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true."

Judge Gray in this case, referring to the opinion of Chief Justice Taney, says:

"One delivering an opinion already cited, after the subject has been much considered, in cases from Alabama, said, 'Undoubtedly Congress might have granted this land to a patentee, or confirmed his Spanish grant, before Alabama became a state.'"

Again, Judge Gray says:

"By the Constitution, as is now well settled, the United States, having rightfully acquired the territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, federal and state, over all the territories so long as they remain in a territorial condition"—citing many cases. "We cannot doubt, therefore," continues Judge Gray, "that Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territories. But Congress has never undertaken by general laws to dispose of such lands. And the reasons are not far to seek."

Speaking of the policy of the general government in reference to these particular lands, Judge Gray says:

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country, but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways, and, being chiefly valuable for the purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government, but, unless in case of some international dut, or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states."

Concluding this opinion, which is very learned and reviews all the cases upon this subject, Judge Gray says:

"The United States, while they hold the country as a territory, having all the powers both of national and municipal government, may grant, for appropriate purposes, titles or rights in the soil below high-water mark of tide waters. But they have never done so by general laws, and, unless in some cases of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters and the soil under them to the control of the states, respectively, when organized and admitted into the Union."

From the discussion of this question by the learned Mr. Justice Gray, we think it is evident, considering the general policy of the government, that Congress never intended, by its act giving to citizens the right to go upon the public lands and explore the same for mineral, and obtain title thereto on proper discovery and location, that such right should ever extend to the lands lying below ordinary high

tide on the shore of the ocean and the arms of the sea. The conclusion of the court, therefore, in this case, is that, if the defendants have acquired any right in the lands upon the shore of Gastineau channel, so soon as their vein on the strike thereof goes beyond the shore line and below mean high tide, they can make no claim whatever thereto; and in going upon a ledge or lode at any such place, and undertaking to occupy the same and acquire title, they place themselves in the position of trespassers having no rights whatever in the land or the lode, and no right to occupy or possess the same.

Second. It is claimed on the part of the plaintiff that the patented lands constituting their several lode mining claims run to the shore of Gastineau channel, and that there is no land between their lode claim and the said channel upon which the defendants could lawfully enter to make exploration or discovery; that the apices of any veins that can be found above mean high tide along the shore of said channel, opposite their several patented claims, are all within the boundary lines of their several patented claims; that the meander line fixing the boundaries of their several claims, while indicated in the patent and survey by several stakes and monuments, is in fact the meander line of Gastineau channel, notwithstanding such fixed boundary points as are described in the patent. In aid of the description of the land covered by their several patents, they offer the field notes of the survey made by the United States mineral surveyor Garside, and also the oral testimony of Garside, to show the intent and purpose of said survey in fixing said boundary line along Gastineau channel. When this evidence was offered, objection was made by the defendants, on the ground that the same was incompetent, and that the patent is the only competent evidence that can be offered in this case to show the lands embraced by the same. It is believed that

the legal effect of a conveyance must be determined by the terms employed therein, and that nothing can be added to or taken from the same by parol testimony. This is undoubtedly the general rule controlling the question of testimony. Fletcher v. Phelps, 28 Vt. 262; Platt v. Jones, 43 Cal. 219; Bartlett v. Corliss, 63 Me. 287. But if there is a latent ambiguity in the description itself as furnished by the deed or patent, then the true intent and meaning may be added by parol. White v. Lunning, 93 U. S. 515, 23 L. Ed. 938; Pride v. Lunt, 19 Me. 115.

As to patent for mining claims, as a general rule, a patent is conclusive as to the limits of a location, and it cannot be assailed by showing that its actual boundaries are different from those described in the patent. In Waterloo Min. Co. v. Doe, 27 C. C. A. 50, 82 Fed. 45, it was claimed that a certain portion of the ground had been omitted from the patent through the fraudulent acts of one Bohton. The acts of Bohton, the court thought, did not amount to fraud, and, in the absence of fraud, it was held that the patent was conclusive evidence as to the limits of the claim patented. In 27 C. C. A. 50, 82 Fed. 45–50, the question arose as to whether the party in possession under the patent could follow the dip of their vein beyond the side lines extended down vertically. The defendant in that case contended that the plaintiff had no extralateral rights, as his end lines were not parallel. The plaintiff's patent, however, described the end lines as being parallel. The court held that, since the patent described the end lines as parallel, the court was bound by the terms thereof, and no evidence could be received that tended to show that the end lines were not parallel. The court said:

"The presumptions are in favor of the correctness of the land department in issuing these patents. Its action was within its jurisdiction, and we cannot go behind the same in a collateral action."

Again, in Golden Reward Min. Co. v. Buxton Min. Co., 38 C. C. A. 228, 97 Fed. 413, the contest was between two patented claims—the Bonanza and the Silver Case. Fraud was alleged, but not proven. The court held that, in the absence of fraud or mistake, the boundaries as described in the patent were conclusive.

It is said in the case at bar that the field notes that have been offered in evidence make reference to the meander line of Gastineau channel, but the patent offered in evidence makes no reference to Gastineau channel whatever, and determines the lines by the monuments and courses and distances run. The contention of the defendants is that the field notes of the survey cannot be introduced to help out the lines established by the patent, or to explain the same; that there is no latent or patent ambiguity in the conveyance issued by the government, and that there is therefore nothing to explain. It is not claimed by the plaintiff that there is any mistake in the patent. And not only are the field notes of the surveyor that were offered in evidence objected to by the defendants, but also the oral testimony of Surveyor C. W. Garside as to what his intentions were in fixing the line of the claim owned by plaintiff bordering on Gastineau channel. My recollection is that the field notes referred but once to the tide water of the channel. Nothing in the field notes and nothing in the patent is found fixing the boundaries of the claim on that side by the line of the sea or the shore line of Gastineau channel. The court is unable to see in what particular the field notes of the surveyor aid or explain the directions and distances given in the patent itself. The field notes are therefore rejected as evidence in this case, as also are the statements of the witness Garside as to his intentions in making the survey of said claim. It is evident that the surveyor's intentions did not enter into the consideration of the land department when title was con-

veyed to the land in question. They cannot, therefore, be considered in determining what land the government intended to convey by its patent. Garside's testimony, however, that he placed the different stakes that bounded the claim on the side next to Gastineau channel, upon the line of ordinary tide is, perhaps, testimony of importance in the case.

Third. Another fact that may be considered of some importance in determining the rights of the parties to this action is the width of the claim that was patented, and that is now owned by the plaintiff. An examination of the maps offered in evidence, and the patent itself, as to the distances, shows that the claim is not 600 feet wide, and that the claimants did not take 300 feet on each side of their vein, as was their right under the law. Having taken less than the full width on the side bordering on Gastineau channel, the only possible reason that could exist to indicate why the claim was not taken of its usual width must have been the limit that was fixed by natural conditions, viz., the shore line of Gastineau channel.

The defendant Barbridge, in testifying in this case, says that a certain stake, that was pointed out to the judge of this court when examining the ground in person and while the attorneys and officers and parties were present, is now where it has stood for many years and where it was originally placed. This stake was placed upon the bank, as close to the edge of the same as it could be planted, and where the bank from the beach rises abruptly some six feet or more, and as close to the tide line as it could well be placed without danger of being washed away by the waves that would roll up at times from the sea, the waves having evidently at times washed away the ground up the edge of the embankment on which the post was placed. MacDonald, the manager of the plaintiff corporation, stated in the presence of the court that this stake, so far as he knew, was one of the posts

marking the boundary of plaintiff's claim. Another point marked and designated on this line as at the corner of the mill was evidently below mean high tide before the beach at the shore of the sea had been filled in by débris and waste from the mill. But at the point where the stake is there was a controversy between MacDonald, on behalf of the corporation, and Barbridge, one of the defendants, as to whether the shaft of the defendants, a hole about six or eight feet deep that had been sunk near the post referred to, was in part within the boundaries of the patented claim, or whether the same was all outside. The court is of the opinion that it is not important whether said shaft is in part within, or in part or wholly without, the lines of the patented claim. In Railroad Co. v. Schurmeier, 7 Wall. 272, 19 L. Ed. 74, it is said:

"Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser."

It is very earnestly contended by counsel for the plaintiff that this case is an authority in support of his claim that the line as indicated by the patent, and the survey as shown by the field notes, were simply the establishment of a meander line on the shores of Gastineau channel for the convenience of the government in determining the acreage of land within the proposed claim, and not with a view of excluding from the patent any portion of the land which might rightfully come within said claim that was above the tide waters of Gastineau channel. Many cases of this character are presented, but they all refer to surveys of the public agricultural lands of the United States and certain rules of the department that require the United States surveyors, in subdividing

sections where a portion thereof would border upon the sea or upon lakes or river or tide waters, not with a view of excluding any of the land from the fractional portion of the section, but to determine the price to be paid, etc.; and that, notwithstanding such meander line so established on the shore of a lake or sea, the land should run to the sea. But I fail to see the force of the principles and theories announced by the court in Railroad v. Schurmeier, and many other cases to the same effect, when applied to the case at bar. No authority has been shown vesting in the United States mineral surveyor any right or authority to establish a meander line, and the department very evidently refrains from any mention of such a line in the patent. No authority is shown under the rules of the Department of the Interior, having the sale of the public lands in charge, for arranging or establishing any such meander lines upon the mineral lands. It would, therefore, seem that in this case the court is bound by the usual rule that the language of the patent governs, and I am therefore compelled to hold practically that the lines of the claim in controversy are established according to the points, lines, courses, and distances mentioned in the patent.

In White v. Luning, 93 U. S. 524, 23 L. Ed. 938, the court says:

"It is true that, as a general rule, monuments, natural or artificial, referred to in a deed, control, on its construction, rather than courses and distances; but this rule is not inflexible. It yields wherever, taking all the particulars of the deed together, it will be absurd to apply it."

At common law the ordinary high-water mark is the boundary of the adjoining lands. Commonwealth v. Alger, 7 Cush. 53; Rogers v. Jones, 1 Wend. 237, 19 Am. Dec. 493. Had the land in question been bounded by the sea, the tide water, or by the harbor, bay, cove, creek, or any such words, or had the patent described a corner set upon the tide line at the

sea, and thence running with the sinuosities of the shore to another point, there would have been no question as to what land would have been included within the grant in this case. Whatever may be the rule for determining grants where they run to the sea—and unquestionably under all such descriptions they run to ordinary high tide and are bounded thereby—we have no such description in this patent, and we are bound to determine the boundaries of the land by the patent itself. But it is not always easy to determine to just what point the land embraced in the patent extends, because of the monuments being destroyed and thrown down or removed, as it is claimed in some instances they were in this case. We may be compelled to resort to parol evidence, surveys, and measurements, to determine the point at which monuments were placed and should be found. Such evidence has been offered and received in this case. The testimony of Carside, the original surveyor of these claims, is to the effect that the posts and monuments, as originally set, were placed upon the tide line, and that the line indicated between the monuments was as near on the tide line as it could be placed. Considering this testimony, and considering further the width of this claim, its relation to the tide line, the quantity of land conveyed being less than is usually covered in a full-sized mining claim, 600 by 1,500 feet; the fact that the full 300 feet is not taken on the side line next to Gastineau channel—all these matters may be reasonably considered in determining where the line of this claim really was and is, and what and where the lands are as described in the terms of the patent. While this question is not one necessary for the court to decide in this case, I am inclined to the opinion that the patented claim owned by the plaintiff company ran to ordinary high tide and included all the land above high tide within its limits, and that there was, in fact, no land above high tide upon which a location could be properly

made by the defendants. But, as stated, this is not a matter of any special interest to the court, and one that the court does not now definitely pass upon.

Fourth. The proposition before the court is in reality a simple one. The defendants were about to sink a shaft at a point close to the shore of Gastineau channel, over which the tide ebbed and flowed every day, and which was immediately above some of the workings of plaintiff in this case. These people were here upon this land below mean high tide, where they could acquire no right whatsoever, and where they were trespassers upon the lands and rights of the United States. The plaintiff is the owner of several patented claims; has expended many hundreds of thousands of dollars in developing the same and in extracting minerals from the ores therein; has, it is said, distributed among its stockholders from $4,000,000 to $5,000,000; is employing about a thousand men; and has followed down on the dip of its vein until it is now beneath the waters of an arm of the sea called "Gastineau Channel," and immediately beneath this particular shaft of the defendants. It further appears that any work on the shaft of defendants in question, and the blasts being exploded there, so increase the flow of water through the roof above where the plaintiff is taking out ore that, if continued, it will drive plaintiff from its mine and prevent the further working of the same; and because of this result plaintiff asks that the defendants be restrained from such work.

If these defendants had an unquestioned right to occupy the ground where they now are, and to develop a lode which they may have undertaken to locate and that is situated below tide water, they could hardly use their own in such a way as to bring inevitable calamity on their neighbor. One may not sink on the line of his own ground and excavate it in such a way as to allow his neighbor's land to fall into

the excavation so made. Matters of this character have been so frequently determined that they now need no discussion and no citation of authorities; the proposition is settled beyond controversy. Car it be said, then, that these defendants, having no rights whatever below tide water in the location and development of a mine so situated, may be permitted to enter upon and so work the same as to destroy the property of the plaintiff, which is engaged in a like business, but has reached the point beneath the tide waters by following the dip of a vein the apex of which is within its patented land? While it is true that, under the general policy of the government, lands below tide water are not for sale and disposition, and have never been held for sale and disposition by the United States, these tide lands having been reserved to the states that might be organized out of the territories of the United States, the purposes for which these lands are held in trust for the future state are trade, commerce, navigation, and the convenience of the public, and for such purposes only. If the plaintiff is usurping any of the rights of the government in the land it now possesses, by the working of its mining claim beneath the water of the sea, no one, save the United States, through its proper channels, can complain. They are in possession, and by their efforts are adding millions to the wealth of the country. The defendants, though trespassers upon the rights of the United States in going upon and locating land below ordinary high tide, were they in nowise damaging any one else, could not be stopped, perhaps, except upon complaint by the government. But, as before stated, even if they were rightfully in possession of the ground where their shaft is being sunk, and were operating in a way to injure and destroy property owned by the plaintiff, the court is of the opinion that the defendants should be restrained and enjoined from further work. Under the facts and circumstances of this

case, the court is compelled to the conclusion that the defendants should be restrained and enjoined from further continuing the sinking of their shaft, or further interfering in this behalf with the rights of the plaintiff.

It may be said in this connection that the situation of the parties plaintiff and defendant are not the same. The plaintiff has a lawful location, and, under the mining laws of the United States, a lawful right to pursue its vein on its dips beyond the side lines of its claim and wherever it may run; and while, as before observed, the lands below mean high tide are reserved from sale, it is believed that the law giving a party the right to follow all veins, the apices of which are within the limits of his claim, even outside of the side lines thereof, would permit him to go below the waters of the sea in following such vein, without trespassing any law of property existing in the United States.

The temporary injunction heretofore issued under the order of this court will therefore be made perpetual, and the plaintiffs are awarded their costs and disbursements.

FOX, Administrator, et al. v. MACKAY et al.

(First Division. Juneau. December Term, 1901.)

No. 483.

1. PARTIES—ABATEMENT—ADMINISTRATOR—SURVIVORSHIP.

While, under section 956, Rev. St. [U. S. Comp. St. 1901, p. 697], an action may be continued by one surviving plaintiff against a surviving defendant without abatement, an administrator can neither continue nor defend an action of this character.

2. MINES AND MINERALS—ADVERSE SUIT—PUBLIC LANDS.

When an application is made to the United States Land Department for a patent to a mining claim, and an adverse claim

Summary Explanation of Proposed Extralateral Rights Legislation

The doctrine of extralateral rights originated under the Federal Mining Law of 1872 and provides that the owner of a federal lode mining claim is entitled to follow a vein downward outside the vertical boundaries of his claim if the top or apex of the vein is within his claim. The doctrine only relates to the title to the minerals contained in the specific vein. It does not entitle the owner to any surface use outside his claim, does not relieve the owner from obtaining all the necessary permits required by law before conducting operations, and does not apply to placer claims. The doctrine of extralateral rights has been around for over 100 years and is clearly applicable to all uplands in the United States, including Alaska. The law is not clear, however, on whether the doctrine applies to lands underneath navigable waters, such as tidelands and submerged lands.

The purpose of the proposed legislation is to clarify the law in Alaska and confirm that owners of federal lode mining claims located prior to statehood are entitled to extralateral rights under shorelands, tidelands, and submerged lands. This will ensure that the owners of such claims have secure title to these deposits so that they may obtain the necessary development financing.

The principal areas in the state which will be affected by this legislation are Southeast and Prince William Sound, although the legislation will also have some impact on the Interior and other regions where veins may trend under bodies of navigable water.

JPT:029

AMERICAN LAW OF MINING

Second Edition

By

THE ROCKY MOUNTAIN
MINERAL LAW FOUNDATION

Boulder, Colorado

Cheryl Outerbridge
Editor-in-Chief

VOLUME 2

(Dates originally published: First Edition 1960, Second Edition 1984)

MATTHEW BENDER
235 E. 45TH STREET, NEW YORK, N.Y. 10017
450 SANSOME STREET, SAN FRANCISCO, CALIF. 94111

CHAPTER 37

EXTRALATERAL RIGHTS

SYNOPSIS

CHAPTER 37

EXTRALATERAL RIGHTS

§ 37.01 Nature of Extralateral Rights

[1] Definition and Nature of Extralateral Rights

Extralateral rights are rights to the dip of a vein based on ownership of its apex by means of a valid location. The term "extralateral rights"[1] refers to rights to a vein outside the side line limits of a lode location. The term is used in contradistinction to "intraliminal rights" which refers to rights to ore within the limits of a location.[2]

There is no common law to support the principle of extralateral rights which are purely statutory in origin.[3] The statutory authority appears in the Mining Law of 1872 which provides that lode locators:

> shall have the exclusive right of possession and enjoyment. . .of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges.[4]

Extralateral rights are property rights and other rights in the nature of easements[5]

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[1] Lindley attributed the coining of "extralateral" to Dr. Rossiter W. Raymond, formerly United States Commissioner of Mining Statistics, who introduced it in his paper, "The Law of the Apex," XII *Transactions of the American Inst. of Mining Engineers* 387 (1884). 2 *Lindley on Mines* § 565 at 1251 (3d ed. 1914). The term has been adopted almost universally by the courts, although other terms are sometimes used, such as "extralimital," "extraliminal," "the right of lateral pursuit," and "apex rights."

[2] See § 36.01, *supra*, discussing intraliminal rights.

[3] Arizona Commercial Mining Co. v. Iron Cap Copper Co., 27 Ariz. 202, 232 P. 545, *aff'd as modified on rehearing*, 29 Ariz. 23, 239 P. 290 (1925), *cert. denied*, 270 U.S. 642 (1926). *See also* § 37.01[2], *infra*.

[4] 30 U.S.C. § 26 (1982).

[5] *See* § 37.01[3], *infra*.

which are granted by the statute in "veins, lodes, and ledges,"[6] and which attach to lode locations containing the apex[7] of a vein which extends[8] outside the side lines of a location with parallel end lines,[9] and which may be exercised (under specified conditions) by following the vein downward[10] beneath the surface of certain categories of adjacent lands.[11]

Extralateral rights are granted by the statute only to lode deposits properly located as lode mining claims.[12] Thus, extralateral rights do not apply to placer locations made on placer deposits[13] or placer locations improperly made on lode deposits.[14] Because of the statutory limitation, extralateral rights do not apply to mill sites,[15] tunnel sites,[16] or nonmineral land patented under agricultural, townsite, or other nonmining laws,[17] nor to lode locations based upon blanket veins which lack the required dip.[18] Extralateral rights may not be exercised by entering upon the surface of a claim possessed by another,[19] and are applicable only to valuable mineral deposits locatable as lode deposits[20] on the public domain.[21]

Because ownership of an apex by means of a valid location is a prerequisite to the existence of extralateral rights, courts and commentators often refer to the statute creating this unique property interest as the "apex law" and the right

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6 The terms "vein," "lode," and "ledge" are synonymous.

7 *See* § 37.02[1], *infra*.

8 *See* § 37.02[3], *infra*.

9 *See* § 37.02[4], *infra*.

10 *See* § 37.02[5], *infra*.

11 *See generally* § 37.05, *infra*.

12 30 U.S.C. § 26 (1982). *See* Carson City Gold & Silver Mining Co. v. North Star Mining Co., 83 F. 658, 663 (9th Cir. 1897), *cert. denied*, 171 U.S. 687 (1898); Doe v. Waterloo Mining Co., 54 F. 935, 937 (C.C.S.D. Cal. 1893). See also § 32.02, *supra*, discussing the characteristics of lode and placer deposits and factors for distinguishing them.

13 30 U.S.C. § 35 (1982) excepts veins from entry and patent as a placer.

14 Such locations are void. *See* Cole v. Ralph, 252 U.S. 286, 295 (1920). But see § 32.05, *supra*, and § 37.01[5], *infra*, as to lodes in placer locations for which a placer locator may obtain rights but not extralateral rights.

15 Walsen v. Gaddis, 118 Colo. 63, 194 P.2d 306, 318 (1948). See generally § 32.06, *supra*, on mill sites.

16 After discovery of a lode within the tunnel, a surface lode location may be made and, if it contains an apex, extralateral rights attach. *See* § 32.07[7], *supra*.

17 Empire Star Mines Co. v. Grass Valley Bullion Mines, 99 F.2d 228, 234 (9th Cir. 1938) (agricultural patent); Amador Medean Gold Mining Co. v. South Spring Hill Gold Mining Co., 36 F. 668 (C.C.N.D. Cal. 1888) (agricultural entry), *rev'd on other grounds*, 145 U.S. 300 (1892).

18 *See* § 32.03[3][a], *supra*, and § 37.01[4], *infra*.

19 30 U.S.C. § 26 (1982). *See* § 37.01[3], *infra*.

20 30 U.S.C. § 23 (1982). *See* §§ 32.02[2] & .02[4], *supra*.

21 30 U.S.C. § 22 (1982). *See* Chapter 6, *supra*.

as "apex rights."[22] The apex statute and most of the cases construing it are relatively old, most of the judicial decisions having been made before 1920. Yet, the statute has not been amended,[23] and the judicial construction of it has not changed since the early years, so the early cases remain of continuing importance.

Since World War II the expenses of exploration and of mining at depths of several thousand feet have impelled miners to seek control of large acreages to assure them of the opportunity to recover their investment.[24] If sole control and ownership of deep deposits cannot be achieved, miners frequently enter into joint exploration and development agreements for cooperative efforts.[25] Both arrangements have tended to reduce the amount of apex litigation as compared with early years when litigation between apex claimants was rife.[26]

[2] Character of Estate in Granted Veins and Lodes

The extralateral rights obtained by a lode locator in "veins, lodes and ledges" as specified by the Mining Law of 1872[27] might be regarded as a modification of the common law maxim that ownership extends from the surface to the center of the earth in vertical planes.[28] Strictly speaking, this is not correct because the statutory grant constitutes a severance of the vein from the surrounding soil, is not repugnant to the common law, and should not be so interpreted or construed.[29] Rights to veins apexing within a properly located lode mining claim are part and parcel of the location, and at the time a location is perfected the locator obtains a vested estate in the veins throughout their entire length within the statutorily required parallel end lines.

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22 *See, e.g.*, Collins v. Bailey, 22 Colo. App. 149, 125 P. 543, 548 (1912); Neff, "The Law of the Apex—A Continuing Enigma," 18 *Rocky Mt. Min. L. Inst.* 387 (1973); Arnold, "Lode Locations: A Specific Question of Extralateral Rights and a General Theory of Intralimital Rights," 22 *Harv. L. Rev.* 339 (1909).

23 The forerunner of the apex statute, 30 U.S.C. § 26 (1982), was the Lode Law of 1866, ch. 262, 14 Stat. 251 (surviving portions codified at 30 U.S.C. §§ 43, 46, & 51 and 43 U.S.C. § 661 (1982). Many of the judicial decisions construing the 1866 statute are applicable to the 1872 statute. *See* § 30.03, *supra*.

24 *See* § 32.03[3][b], *supra*.

25 *See* Title XIII, *infra*.

26 Neff, "The Law of the Apex—A Continuing Enigma," 18 *Rocky Mt. Min. L. Inst.* 387, 414 (1973) (hypothesizing that the extreme cost of proving identity and continuity of veins at great depths will encourage compromise agreements between conflicting claimants).

27 30 U.S.C. § 26 (1982).

28 *See* Collins v. Bailey, 22 Colo. App. 149, 125 P. 543, 548 (1912) (" 'apex right' is in derogation of the common law which granted to the owner of lands all veins within the vertical lines of his land to the center of the earth"); Duggan v. Davey, 4 Dak. 110, 26 N.W. 887, 890-91 (1886), *appeal dismissed*, 131 U.S. 433 (1889). See § 36.02, *supra*, as to intraliminal mineral rights based upon common law.

29 3 *Lindley on Mines* § 568 (3d ed. 1914). *See* Neff, "The Law of the Apex—A Continuing Enigma," 18 *Rocky Mt. Min. L. Inst.* 387, 397-402 (1973).

The ownership estate in mining claims is subject to limitation and extension. Limitation occurs because a locator is not necessarily the owner of veins and lodes found within his claim; if their apexes are outside his claim, his rights may be subject to another's extralateral rights.[30] Extension occurs because by statute a locator owns and therefore is entitled to follow, possess, and mine any vein or lode which apexes within his claim even though it might dip beyond his side lines and under adjoining land.[31]

The estate granted by the statute is a possessory right to the minerals.[32] It is not an easement, although certain easements attach because of the need to disturb a portion of adjoining rock when following a vein into adjacent lands.[33] The exercise of extralateral rights does not depend upon seniority, but follows automatically from location of an apex whenever a claim is staked out in the manner prescribed by the statute,[34] provided that the apex dips downward into land not previously appropriated as non-mining land and does not conflict with a prior apex right.[35]

As with other real property interests, boundaries of extralateral rights to a vein may be fixed by agreement, either a conveyance or a contract.[36] Conveyances of extralateral rights, however, require a very clear-cut expression of intent as to whether or not a conveyance of a lode location includes just the minerals within the vertical boundaries of the location or some or all of the extralateral rights.[37] While a locator's interest in extralateral ore bodies may be divested by adverse possession, it is settled law that possession of the surface is not necessarily sufficient possession of the minerals underneath to give title to them.[38]

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30 Grant v. Pilgrim, 95 F.2d 562, 565 (9th Cir. 1938); Duggan v. Davey, 4 Dak. 110, 26 N.W. 887, 891 (1886).

31 St. Louis Mining & Milling Co. v. Montana Mining Co., 194 U.S. 235 (1904); Tom Reed Gold Mines v. United E. Mining Co., 24 Ariz. 269, 209 P. 283, 287, *cert. denied*, 260 U.S. 744 (1922).

32 *See* § 36.03[1], *supra*.

33 *See* § 37.01[3], *infra*.

34 Colorado Cent. Consol. Mining Co. v. Turck, 50 F. 888, 894-95 (8th Cir. 1892).

35 *See* § 37.05, *infra*.

36 *See* Kennedy Mining & Milling Co. v. Argonaut Mining Co., 189 U.S. 1 (1903); Richmond Mining Co. v. Eureka Mining Co., 103 U.S. (13 Otto.) 839 (1880).

37 *See* Montana Mining Co. v. St. Louis Mining & Milling Co., 204 U.S. 204, 216-218 (1907) (finding that conveyance of lode location by party entitled to the extralateral rights did not transfer vein *in total* but only the portion between the vertical side lines of the ground transferred); Silver Surprize, Inc. v. Sunshine Mining Co., 15 Wash. App. 1, 547 P.2d 1240 (1976), *aff'd*, 88 Wash. 2d 64, 558 P.2d 186 (1977).

38 *See* Cole v. Ralph, 252 U.S. 286 (1920); Last Chance Mining Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 131 F. 579 (9th Cir.), *cert. denied*, 200 U.S. 617 (1904); Consolidation Coal Co. v. Yonts, 25 F.2d 404, 406 (6th Cir. 1928); Gill v. Colton, 12 F.2d 531, 533 (4th Cir. 1926); Birmingham Fuel Co. v. Boshell, 190 Ala. 597, 67 So. 403, 404 (1914).

[3] Right of Pursuit Associated With Extralateral Rights

The Mining Law of 1872 grants to the locator of the apex of a vein the vein throughout its entire depth extended outside of the side lines of his location.[39] The right granted is one to follow the vein on its downward course, sometimes called the right of lateral pursuit.[40]

As a practical matter, a locator often cannot safely or economically mine his vein by following its decline from the surface. This is especially true if the decline undulates, turns, faults, or passes through unconsolidated country rock which will not support a hanging wall. Frequently, therefore, it is necessary to use other land in aid of mining and for the mine workings to consist of vertical shafts which connect to a vein by horizontal adits, cross cuts, and drifts.[41] Yet, the statute granting extralateral rights expressly provides that a locator has no right "to enter upon the surface of a claim owned or possessed by another,"[42] so there is no surface right of access to an underground vein.[43] Similarly, the common law rights of owners of other mining locations and other lands entitle them to the exclusive use and possession of the subsurface of their lands,[44] so there is no right of approach by tunnelling through land owned by another.[45] In the absence of consent by the landowner[46] or legislation allowing condemnation,[47] a locator may not enter the subsurface of adjacent land to explore, acquire a right of way, or reach the extralateral extension of his ore body.[48] When attempted, such activity may be restrained, or if completed, an action for ejectment will lie.[49]

Certain rights, however, are integrally associated with the exercise of extralateral rights, being necessary or incidental to underground mining outside the boundaries of a claim in pursuit of the extralateral extension of a vein. Assuming

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39 30 U.S.C. § 26 (1982).

40 St. Louis Mining & Milling Co. v. Montana Mining Co., 194 U.S. 235 (1904); Tyler Mining Co. v. Last Chance Mining Co., 71 F. 848, 851 (C.C.D. Idaho 1895), *appeal dismissed*, 97 F. 394 (9th Cir. 1899). *See* § 37.02[5], *infra*.

41 *See* L. Mall, *Public Land and Mining Law* 160-161 (3d ed. 1981).

42 30 U.S.C. § 26 (1982).

43 *See* St. Louis Mining & Milling Co. v. Montana Mining Co., 113 F. 900, 902 (9th Cir. 1902), *aff'd*, 194 U.S. 235 (1904); Corection Lode, 15 L.D. 67 (1892).

44 Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55 (1898). See § 36.02, *supra*, as to a locator's common law intraliminal rights.

45 St. Louis Mining & Milling Co. v. Montana Mining Co., 194 U.S. 235 (1904) (claimant may not run a tunnel from its mine shaft to the extralateral extension of a vein through nonmineralized territory outside his claim); Patten v. Conglomerate Mining Co., 35 L.D. 617, 621 (1907).

46 *See* § 112.04, *infra*.

47 *See* § 112.05, *infra*.

48 Richards v. Dower, 64 Cal. 62, 28 P. 113 (1883) (even though no apparent damages would be suffered).

49 Empire Star Mines Co. v. Grass Valley Bullion Mines, 99 F.2d 228, 235 (9th Cir. 1938); Cheesman v. Shreve, 37 F. 36 (C.C.D. Colo. 1888); Richards v. Dower, 64 Cal. 62, 28 P. 113 (1883) (perpetual injunction).

legal continuity of a vein,[50] without which a locator asserting extralateral rights would be a trespasser, excavating along its course under adjacent mining locations and other categories of land is a legitimate exercise of extralateral rights. In doing so, it is usually necessary to disturb rock surrounding the vein in order to pursue the ore zone successfully. Thus, the right exists to excavate necessary workings beyond the vein itself and into the country rock when a vein cannot economically be worked within its own confines because it is too crooked or too narrow.[51] This right is analogous to the way of necessity which attaches through the space of intersection of cross veins.[52] Because of this right, a surface owner cannot restrain the excavation of necessary ore pockets, shafts, stations, and chutes in his subsurface.[53] Easements and rights of way necessary for the practical and economical operation of a mine, such as sublateral tunnels, drainage ways, and railways, may be acquired by condemnation or otherwise as permitted by state statute.[54]

[4] Blanket Veins

Not all deposits properly located as lodes admit to the possibility of extralateral rights. The Mining Law of 1872's grant of extralateral rights[55] contemplates the location and subsequent mining of a typical fissure vein,[56] that is, a mineral mass in a more or less vertical position, occupying an extensive crack, break, or fracture in the enclosing country rock which has been filled with mineral matter different from the walls, and which outcrops at the surface, or near it, at a point known as the apex.[57] The statute grants extralateral rights in all veins which have an apex within a claimant's location, but no extralateral rights are granted

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50 *See* § 37.02[3] *infra*.

51 Twenty-One Mining Co. v. Original Sixteen To One Mine, 255 F. 658 (9th Cir. 1919). *See* Iron Silver Mining Co. v. Cheesman, 116 U.S. 529 (1886); Collins v. Bailey, 22 Colo App. 419, 125 P. 534 (1912).

52 *See* Little Josephine Mining Co. v. Fullerton, 58 F. 521 (8th Cir. 1893): Watervale Mining Co. v. Leach, 4 Ariz. 34, 33 P. 418 (1893), *appeal dismissed*, 159 U.S. 258 (1895); Lee v. Stahl, 9 Colo. 208, 11 P. 77 (1886). *See also* § 37.05[3], *infra*.

53 Twenty-One Mining Co. v. Original Sixteen To One Mine, 265 F. 547 (9th Cir. 1920).

54 30 U.S.C. § 43 (1982): "As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent." See § 112.05, *infra*, on condemnation.

55 30 U.S.C. § 26 (1982).

56 *Cf.* Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 84 (1898), Stevens v. Williams, 23 F. Cas. 40, 44 (C.C.D. Colo. 1879) (Nos. 13,413, 13,414) (jury instructions).

57 See § 37.02[1] as to the requirement of an apex. The apex is the uppermost edge of a mineral vein nearest the surface of the ground, whether it outcrops on the surface or not. *A Dictionary of Mining, Mineral and Related Terms*, (P. Thrush ed. 1968). *Accord* Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 90-91 (1898); Mining Co. v. Tarbet, 98 U.S. 463, 469 (1878); Duggan v. Davey, 4 Dak. 110, 26 N.W. 887, 901 (1886), *appeal dismissed*, 131 U.S. 433 (1889); Stewart Mining Co. v. Ontario Mining Co., 23 Idaho 724, 132 P. 787 (1913), *aff'd*, 237 U.S. 350 (1915). See § 32.03[2][a] discussing the meaning of "apex."

without such an apex.[58] Many mineral deposits which meet the definition of a "vein" or "lode" do not have an apex. This is especially true of blanket veins, mineralized zones which lie in a more or less horizontal position.[59] These wide, bedded formations, while validly located if the deposit meets the definition of a lode,[60] do not give rise to extralateral rights because they do not have an apex with the required dip.[61]

Other reasons have been given for the denial of extralateral rights to lode locations made on blanket veins. These are that the apex of a horizontal lode is coextensive with the side lines,[62] making a location so many feet on either side of the center of the vein, as contemplated by the statute,[63] a logical impossibility. Also, blanket veins do not meet the statutory provision for extralateral rights which requires that the vein be parallel with the side, but not the end, lines.[64] Extralateral rights may be obtained, however, in some lodes which have a wide apex.[65]

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[58] Montana Co. v. Clark, 42 F. 626 (C.C.D. Mont. 1890); Tom Reed Gold Mines Co. v. United E. Mining Co., 24 Ariz. 269, 209 P. 283, *cert. denied*, 260 U.S. 744 (1922); Duggan v. Davey, 4 Dak. 110, 26 N.W. 887, 901-03 (1886), *appeal dismissed*, 131 U.S. 433 (1889); Jones v. Prospect Mtn. Tunnel Co., 21 Nev. 339, 31 P. 642 (1892).

[59] *See, e.g.*, Bowen v. Chemi-Cote Perlite Corp., 5 Ariz. App. 28, 423 P.2d 104, 118-123 (1967) (perlite lying in a horizontal bed "generally parallel with the surface" and found to be from a common igneous source, segregated in physical appearance from the overlying volcanic deposits, and, at some indeterminate depth, "not too deep" from underlying volcanic deposits properly locatable as a lode deposit). *But see* Titanium Actynite Indus. v. McLennan, 272 F.2d 667 (10th Cir. 1960) (disseminated mass of vermiculite extending over 8 to 12 square miles is a placer deposit); Ranchers Explor. & Dev. Co. v. Anaconda Co., 248 F. Supp. 708 (D. Utah 1965) (widespread beryllium-bearing tuff not locatable as lode). See generally § 32.02, *supra*, on the difficulties of determining whether such widely disseminated deposits are lode or placer deposits.

[60] Iron Silver Mining Co. v. Mike & Starr Gold & Silver Mining Co., 143 U.S. 394 (1892). See § 32.03[3][a], *supra*, for a fuller discussion of the locatability of these deposits.

[61] Tom Reed Gold Mines Co. v. United E. Mining Co., 24 Ariz. 269, 209 P. 283 *cert. denied*, 260 U.S. 744 (1922); Stewart Mining Co. v. Ontario Mining Co., 23 Idaho 724, 132 P. 787, 792 (1913), *aff'd*, 237 U.S. 350 (1915). *See* Gilpin v. Sierra Nev. Consol. Mining Co., 2 Idaho 662, 23 P. 547 (1890). *See also* Iron Silver Mining Co. v. Cheesman, 8 F. 297 (C.C.D. Colo. 1881), *aff'd*, 116 U.S. 529 (1886); Iron Silver Mining Co. v. Murphy, 3 F. 368 (D. Nev. 1880); Stevens v. Williams, 23 F. Cas. 40, 43 (C.C.D. Colo. 1879) (Nos. 13,413, 13,414); Brugger v. Lee Yim, 12 Cal. App. 2d 38, 55 P.2d 564, 570 (1936) ("dip" is a miners' term synonymous with the expression "downward course" used in the statute, and means the direction of the vein in its descent into the earth).

[62] United States v. Arizona Manganese Corp., 57 L.D. 558, 566 (1942); Homestake Mining Co., 29 L.D. 689, 691 (1900).

[63] 30 U.S.C. § 23 (1982) ("No claim shall extend more than 300 feet on each side of the middle of the vein at the surface . . ."). See §§ 32.03[1][c], [d], *infra*, as to this requirement.

[64] *Cf.* Catron v. Old, 23 Colo. 433, 441, 48 P. 687, 690 (1897); Rico-Argentine Mining Co. v. Rico Consol. Mining Co., 74 Colo. 444, 223 P. 31 (1924).

[65] *See* § 32.03[2][b], *supra*, and § 37.03[5], *infra*.

[5] Lodes in Placers

A special problem arises with lodes which exist within placer locations.[66] Placer patents pass absolute title to veins and lodes which apex within a placer claim if they are either known to exist and specifically applied and paid for during patent proceedings or not known to exist on the date of patent application and found later.[67] On the other hand, veins or lodes known to exist within placers on the date of patent application but not specifically applied and paid for are conclusively excluded from the patent.[68] In any event, extralateral rights do not attach to placer claims and, hence, may not be asserted by placer claimants.[69]

Lode locators may obtain extralateral rights to veins or lodes apexing within placers under certain conditions. Known lodes within placers, unless applied and paid for during patent proceedings, are subject to peaceable appropriation and location as lode mining claims[70] to which extralateral rights may attach.[71] A previously unknown lode within a patented placer cannot be appropriated by a lode locator since title to it passed with the patent,[72] but such situations may give rise to litigation as to whether the lode was known or unknown at the time of the patent application.[73] Furthermore, a lode locator may obtain extra-

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66 See generally § 32.05, *supra*, as to lodes within placers.

67 30 U.S.C. § 37 (1982). *See* Inyo Marble Co. v. Loundagin, 120 Cal. App. 298, 7 P.2d 1067 (1932). *See also* § 32.02[1], *supra*.

68 30 U.S.C. § 37 (1982). *See* Clipper Mining Co. v. Eli Mining & Land Co., 194 U.S. 220, 228 (1904).

69 *See* Woods v. Holden, 26 L.D. 198, 205-206 (1898) ("It has been indisputably settled, . . . that a placer claimant cannot follow a vein or lode beyond the surface boundaries of this claim extended vertically downward."). *See also* 2 *Lindley on Mines* § 619 (3d ed. 1914).

70 Clipper Mining Co. v. Eli Mining & Land Co., 29 Colo. 377, 68 P. 286, 289 (1902), *aff'd*, 194 U.S. 220 (1904); Noyes v. Clifford, 37 Mont. 138, 94 P. 842, 844 (1908) (where a lode is known to exist, and land containing the same is patented as a placer claim, the lode is open for "exploitation and location by any citizen of the United States"). *Accord* Excelsior Iron Mining Co. v. Justheim, 122 Utah 573, 252 P.2d 1084, 1086 (1953). *See* Note, "Known Lodes Within Placers," 3 *Calif. L. Rev.* 156 (1915). *See also*, Note, "Lodes in Placers: Presumption Arising from Lapse of Time," 3 *Calif. L. Rev.* 249 (1915).

71 Excelsior Iron Mining Co. v. Justheim, 122 Utah 573, 252 P.2d 1084, 1087 (1953) ("and when the Cora lode claimant filed on this ground, he was entitled to all of the lode which apexed within the fifty feet of surface rights awarded to him by his patent, and he had a right to follow the ore beyond the sidelines to the limits of the ore body. Thus was segregated from the public domain all of the iron ore body contained within the forty-acre placer claim . . ."). *Accord* Daphne Lode Claim, 32 L.D. 513 (1904); Mt. Rosa Mining, Milling & Land Co. v. Palmer, 26 Colo. 56, 56 P. 176,177 (1899).

72 30 U.S.C. § 37 (1982). *See* Sullivan v. Iron Silver Mining Co., 143 U.S. 431 (1892), 109 U.S. 550 (1883).

73 Iron Silver Mining Co. v. Mike & Starr Gold & Silver Mining Co., 143 U.S. 394 (1892); United States v. Iron Silver Mining Co., 128 U.S. 673 (1888); Noyes v. Mantle, 127 U.S. 348 (1888); Thomas v. South Butte Mining Co., 211 F.2d 105 (9th Cir. 1914); Clark Mont. Realty Co. v. Ferguson, 218 F. 959 (D.C. Mont. 1914); Barnard Realty Co. v. Nolan, 215 F. 996 (D.C. Mont. 1914); Inyo

lateral rights to the extralateral extension of the apex of a vein which is within a prior placer location based on the concept of a "legal apex."[74]

§ 37.02 Requirements for Exercising Extralateral Rights

[1] Apex within Boundaries of the Claim

The Mining Law of 1872 provides for exclusive possession and enjoyment of veins or lodes "the top or apex of which lies inside of such surface lines. . . ."[1] Thus, among the limitations governing the exercise of extralateral rights,[2] is the universally-stated rule that in order for extralateral rights to obtain, the top or apex of the vein must be found within the surface boundaries of the claim.[3] Furthermore, the length of the apex within the surface boundaries limits the area in which extralateral rights may be exercised.[4] As suggested by the statute, the apex of a vein, lode, or ledge is the top or highest point of the vein proper, whether at or below the surface,[5] and not a mere spur, feather, or offshoot.[6] It is the terminal edge from which the vein extends downward to form its dip, and it is the point at which the vein also continues horizontally along its strike.[7]

Marble Co. v. Loundagin, 120 Cal. App. 298, 7 P.2d 1067 (1932); Mutchmor v. McCarty, 149 Cal. 603, 87 P. 85 (1906).

74 *See* Woods v. Holden, 26 L.D. 198 (1898). See generally § 37.02[2], *infra*, as to legal and theoretical apex.

1 30 U.S.C. § 26 (1982).

2 Three general conditions or limitations apply to the exercise of extralateral rights. "One conditions it on the presence of the top or apex inside the boundaries of the claim. Another restricts it to the dip or course downward, and so excludes the strike or onward course along the top or apex. And the last confines it to such outside parts as lie between the end lines continued outwardly in their own direction and extended vertically downward." Jim Butler Tonopah Mining Co. v. West End Consol. Mining Co., 247 U.S. 450, 454-455 (1918).

3 Stewart Mining Co. v. Ontario Mining Co., 237 U.S. 350 (1915), *aff'g* 23 Idaho 724, 132 P. 787 (1913); Grant v. Pilgrim, 95 F.2d 562 (9th Cir. 1938). The identity of the apex of a vein with its spurs or extensions is the crucial test which fixes proprietary rights to the vein. *See* William H. Hoegee Inv. Co. v. Burton Bros., 132 Cal. App. 2d 863, 283 P.2d 314 (1955); Brugger v. Lee Yim, 12 Cal. App. 2d 38, 55 P.2d 564 (1936); Alameda Mining Co. v. Success Mining Co., 29 Idaho 618, 161 P. 862 (1916), *appeal dismissed*, 249 U.S. 622 (1919); Butte & Boston Mining Co. v. Societe Anonyme des Mines de Lexington, 23 Mont. 177, 58 P. 111, 113 (1899). *See generally* § 32.03[2][a], *supra*.

4 Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55 (1898) (mining locator can have but the same number of feet along the dip of the vein beneath the surface as he has at its apex). *Accord* Anaconda Copper Mining Co. v. Pilot-Butte Mining Co., 52 Mont. 165, 156 P. 409 (1916). *See* § 37.03[1], *infra*.

5 Larkin v. Upton, 144 U.S. 19, 23 (1892).

6 Stewart Mining Co. v. Ontario Mining Co., 23 Idaho 724, 132 P. 787 (1913), *aff'd*, 237 U.S. 350 (1915) (the highest point of the vein must be along a more or less continuous edge of the vein proper, that is, like the roof of a house and not simply its chimney). *See* Annot., "What is 'Top' or 'Apex' of Vein or Lode," 1 A.L.R. 418 (1919). *See also* § 32.03[2], *supra*.

7 Brugger v. Lee Yim, 12 Cal. App. 2d 38, 55 P.2d 564 (1936) (apex of a vein can be ascertained by following its ascent along the line of its dip or outcropping beyond which it extends no further

Hence, the "strike" of a vein is its horizontal course,[8] and its "dip" is its downward course at a right angle to the strike.[9]

A possible exception to the requirement of an apex within the surface boundaries is the concept that extralateral rights may be predicated upon a fictional apex.[10] In any event, parallel end lines[11] and continuity of a vein with an apex[12] are required to authorize its pursuit outside the boundaries of a location, but even then extralateral rights exist only for the downward course of a vein.[13]

[2] Legal, Theoretical, or Judicial Apex

"Legal," "judicial," and "theoretical" apex are terms which have been used to express the concept of allowing a locator extralateral rights when a portion of the apex of the vein located by him is held under a prior location or patent without extralateral rights for the corresponding portion of the dip having attached. The concept is best illustrated by the case of *Woods v. Holden* in which the Mary Mabel lode claim overlapped the northwest corner of the previously patented Mt. Rosa Placer. The result was that a segment of the lode's apex, but not the entire lode claim, was bisected by the placer.[14] Since the lode was unknown at the time the Mt. Rosa was patented, the portion of the lode claim and its apex that were within the placer had been conveyed by the patent.[15] The vein dipped to the north, away from the placer claim. Since placer locations do not convey extralateral rights,[16] limiting the Mary Mabel to extralateral rights for only those portions of the apex not within the Mt. Rosa would leave a portion

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to the surface of the land); Alameda Mining Co. v. Success Mining Co., 29 Idaho 618, 161 P. 862, 865 (1916), *appeal dismissed*, 249 U.S. 622 (1919). *See* Stewart Mining Co. v. Ontario Mining Co. 237 U.S. 350, 360 (1915), *aff'g* 23 Idaho 724, 132 P. 787 (1913): "An apex is . . . 'all that portion of the terminal edge of a vein from which the vein has extension downward in the direction of the dip.' And . . . the definition has been approved in *Lindley on Mines*, because as therein expressed it 'involves the elements of terminal edge, and downward course therefrom.' We may accept the definition."

[8] Brugger v. Lee Yim, 12 Cal. App. 2d 38, 55 P.2d 564 (1936). *See also* Flagstaff Mining Co. v. Tarbet, 98 U.S. 463, 469 (1878) (course of vein is shown by surface outcrop or surface explorations and workings); Alameda Mining Co. v. Success Mining Co., 29 Idaho 618, 161 P. 862 (1916), *appeal dismissed*, 249 U.S. 622 (1919).

[9] Empire Star Mines Co. v. Butler, 62 Cal. App. 2d 466, 145 P.2d 49, 58 (1944) (" 'Dip' is broadly defined as the downward course of a vein, the direction or inclination toward the depth, while 'strike,' at right angles to dip, is used to designate the longitudinal or horizontal course of a vein."); Brugger v. Lee Yim, 12 Cal. App. 2d 38, 55 P.2d 564, 570 (1936).

[10] *See* § 37.02[2], *infra*.

[11] *See* § 37.02[2], *infra*.

[12] *See* § 37.02[3], *infra*.

[13] *See* § 37.02[5], *infra*.

[14] Woods v. Holden, 26 L.D. 198, (On Review) 27 L.D. 375 (1898).

[15] Woods v. Holden, 26 L.D. 198, 205 (1898). See § 32.05, *supra*, discussing lodes in placers.

[16] *See* § 37.01[1], *supra*.

of the dip to which neither party could claim extralateral rights. Instead of allowing this to happen, the Land Department found that:

> For the purposes of discovery and purchase under the mining laws, the legal apex of a vein like the Mary Mabel, dipping out of the ground disposed of under the placer or non-mineral laws, is that portion of the vein within the public lands which would constitute its actual apex if the vein had no actual existence in the ground so disposed of.[17]

Because the portion of the apex for which extralateral rights were allowed was not held by the lode locator but owned by the placer patentee, the "legal apex" allowed by the Land Department has also been termed a "theoretical apex."[18]

The concept of a "judicial apex" arises from a similar situation presented the United States Supreme Court in *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.*[19] Two lode claims had been placed on a winding vein so that they overlapped each other at an angle. Among the questions certified to the court was whether it had been proper for the junior locator to enter the senior location to lay his boundary lines for the purpose of establishing parallel end lines and securing extralateral rights.[20] The court held that such was proper.[21] It was careful to note that a junior locator cannot obtain rights to the prejudice of a senior locator, but it left open the extent of extralateral rights to which the junior locator was entitled.[22] Thus, while the senior locator was entitled to the full extent of the apex within his location and corresponding extralateral rights, the Court did not decide whether the junior locator's extralateral rights were to be measured from his location's original end lines or from a false end line drawn parallel to his end lines from the point the apex left his claim.[23] Because the claims crossed at an angle, the latter choice would mean that the

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17 Woods v. Holden, 26 L.D. 198, 206 (1898). *See* McElligott v. Krogh, 151 Cal 126, 90 P. 823 (1907) (permitting lode claim overlapping previously patented agricultural land and other granted land).

18 *See* 1 *Lindley on Mines* § 312a (3d ed. 1914); G. Costigan, *Mining Law* § 118m (1908).

19 171 U.S. 55 (1898).

20 *Id.* at 59.

21 *Id.* at 84-85. *See* Zula C. Brinkerhoff, 75 IBLA 179, 181, GFS(MIN) 217 (1983), *modified*, Santa Fe Mining, Inc., 79 IBLA 48, GFS(MIN) 48 (1984). *But see* Bagg v. New Jersey Loan Co., 88 Ariz. 182, 354 P.2d 40, 44 (1960) (in a possessory dispute not involving extralateral rights the court said that it is not competent for junior locators to project their location over a senior location while the senior locator has possession).

22 Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 85 (1898): "It may be observed in passing that the answer to this question does not involve a decision as to the full extent of the rights beneath the surface which the junior locator acquires. . . . Perhaps the rights of the junior locator below the surface are limited to the length of the vein within the surface of the territory patented to him, but it is unnecessary now to consider that matter. All that comes fairly within the scope of the question before us is the right of the owners of the Last Chance to pursue the vein as it dips into the earth . . . and to appropriate so much of it as is not held by the prior location of the New York, and to that extent only is the question answered. The junior locator is entitled to have the benefit of making a location with parallel end lines. The extent of that benefit is for further consideration."

23 *Id. See* §§ 37.03[2], [3], *infra*.

extralateral extensions of the end lines of the two claims would extend over the vein's dip in diverging directions, leaving a slice in the middle unowned by either party. This has led commentators to suggest that since the senior locator obtained all that he was entitled to, the junior should judicially be allowed the additional slice as though he also held its apex.[24]

Although differences can readily be found between the two cases, the concepts of legal, theoretical, and judicial apexes are basically the same in permitting extralateral rights which could not otherwise be obtained because of prior appropriation of the true apex. In doing so they implicitly engage in a legal fiction that the locator holds more of the apex than he actually does. The real difference is that the application of the doctrine to previously patented placer or nonmineral land has been recognized in *Woods v. Holden*, while its application to overlapping lode locations, although consistent with case law, is merely conjectural.[25]

[3] Continuity of Vein

While the Mining Law of 1872 grants extralateral rights in "veins, lodes, and ledges throughout their entire depth" to the locator of a vein,[26] a claimant of extralateral rights must extablish the continuity of the ore body outside his claim with a vein or lode which apexes within his location.[27] This requirement imposes substantial difficulties of proof. A vein usually cannot be directly followed in its downward course because it is discontinuous, even if only for a short distance, and it may twist or turn in such a way that it is mechanically or economically impractical to excavate an incline shaft alongside it.[28] For these reasons, extra-

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[24] 1 Snyder, *Mines* § 807 (1902); G. Costigan, *Mining Law* § 118h (1908). *See* Arnold, "Lode Locations: A Specific Question of Extralateral Rights and a General Theory of Intralimital Rights," 22 *Harv. L. Rev.* 266 (1909).

[25] *See* Walrath v. Champion Mining Co., 171 U.S. 293 (1898) (allowing more territory on dip of secondary vein than length of apex held); Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Dev. Co., 131 F. 591 (9th Cir. 1904) (allowing extralateral rights measured from end line laid across surface of senior location). *But see* State *ex rel.* Anaconda Copper Mining Co. v. District Court, 25 Mont. 504, 65 P. 1020 (1901), holding that a junior locator who has no apex within his surface area cannot obtain rights to an apex within other claims. The court rejected the argument that a junior locator might acquire extralateral rights under the surface of prior patented land when (1) the junior locator had to lay his lines upon a senior location to obtain parallelism, (2) the junior had no part of the apex within his claim but a valid discovery otherwise, and (3) a senior locator had the apex but no extralateral rights because he had laid his lines improperly.

[26] 30 U.S.C. § 26 (1982). *See generally* Neff, "The Law of the Apex—A Continuing Enigma," 18 *Rocky Mt. Min. L. Inst.* 387, 411-12 (1973).

[27] Iron Silver Mining Co. v. Cheesman, 116 U.S. 529 (1886); Leadville Co. v. Fitzgerald, 15 F. Cas. 98 (C.C.D. Colo. 1879) (No. 8,158).

[28] *See, e.g.*, Twenty-One Mining Co. v. Original Sixteen To One Mine, 265 F. 547 (9th Cir. 1920); Carson City Gold & Silver Mining Co. v. North Star Mining Co., 73 F. 597 (C.C.N.D. Cal. 1896) (strike of vein below surface nearly at right angles to its strike on surface), *aff'd*, 83 F. 658 (9th Cir. 1897), *cert. denied*, 171 U.S. 687 (1898).

lateral portions of veins are usually pursued by exploratory drilling, and when the locale of an ore body is established, production is often by underground mine workings consisting of vertical shafts from which horizontal adits, cross-cuts, and drifts are run to reach the ore deposits.[29]

In the early decision of *Iron Silver Mining Co. v. Cheesman*, still the leading case, the Supreme Court adopted the rule that absolute continuity of a vein need not be shown if the identity of the vein is established between two points separated by minor interruptions, but that if the mineral disappears, or the fissure and its walls disappear, so that the identity of the vein can no longer be traced, the extralateral right is lost.[30] This may have been a practical test at the time, but the current practice of exploration by expensive deep drilling cannot meet the requirement of continutiy and usually does not meet the requirement of identity if the drill holes are more than a few dozen feet apart.[31]

Continuity of a vein may, of course, be established by actual mine workings on its downward dip.[32] The vein need be continuous only in the sense that it can be traced through the surrounding rock; neither slight interruptions in the ore-bearing rock nor partial closure of the fissure for short distances destroys continuity if either resumes a little further on.[33] Continuity may also mean such mineral or geological connection as enables a person to follow the vein along its dip and through obstructions, interruptions, and breaks with reaonable certainty that it is the same vein from the apex to the point of controversy.[34] If the mineral and fissure are far from the original trend or appear under different geological conditions or surroundings, continuity does not exist.[35] The presence of

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29 *See* L. Mall, *Public Land and Mining Law* 160-61 (3d ed. 1981).

30 116 U.S. 529 (1886). The court recognized that a vein is "by no means always a straight line of uniform dip, or thickness, or richness of mineral matter throughout its course." *Id.* at 534.

31 *E.g.*, Collins v. Bailey, 22 Colo. App. 149, 125 P. 543 (1912) (continuity between an apex and a vein not established over an unexposed distance of 550 feet); Silver Surprize, Inc. v. Sunshine Mining Co., 15 Wash. App. 1, 547 P.2d 1240 (1976) (continuity of extralateral portion of vein not established by drill hole samples taken at intervals of up to 800 feet, *aff'd*, 88 Wash. 2d 64, 558 P.2d 186 (1977). *Accord* Tom Reed Gold Mines Co. v. United E. Mining Co., 24 Ariz. 269, 209 P. 283 (no extralateral rights existed if vein is interrupted "for a very great distance"), *cert. denied*, 260 U.S. 744 (1922).

32 Alameda Mining Co. v. Success Mining Co., 29 Idaho 618, 161 P. 862 (1916), *appeal dismissed*, 249 U.S. 622 (1919).

33 Gold, Silver & Tungsten, Inc. v. Wallace, 104 Colo. 273, 91 P.2d 975, *cert. denied*, 308 U.S. 612, *reh'g denied*, 308 U.S. 639 (1939). *Accord* Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S.W. 572 (1902). *See* Hyman v. Wheeler, 29 F. 347 (C.C.D. Colo. 1886).

34 *See* Butte & Boston Mining Co. v. Societe Anonyme des Mines de Lexington, 23 Mont. 177, 58 P. 111, 113-16 (1899). *Accord* Fitzgerald v. Clark, 17 Mont. 100, 42 P. 273 (1895), *aff'd*, 171 U.S. 92 (1898).

35 Tom Reed Gold Mines Co. v. United E. Mining Co., 24 Ariz. 269, 209 P. 283, *cert. denied*, 260 U.S. 744 (1922). *Accord* Utah Consol. Mining Co. v. Utah Apex Mining Co., 285 F. 249 (8th Cir. 1922) (when the mineral and fissure come to an end, the contiguity is gone and so are extralateral rights), *cert. denied*, 261 U.S. 617 (1923); Cheesman v. Shreeve, 40 F. 787 (C.C.D. Colo. 1889).

transverse veins, seams, or spurs does not necessarily destroy continuity of the main vein.[36] Likewise, the fact that the vein has step-faulted does not destroy the identity of the vein and abridge the extralateral right.[37]

It is impossible to prescribe a definite rule as to the degree of continuity or identity which an extralateral right claimant must show to exist between an apex within his claim and the vein he is pursuing under adjoining ground.[38] Absolute truth as to the identity of ore bodies found on different levels in an underground mine is difficult to obtain[39] and is legally always a question of fact.[40] The most that can be said is that identification in some reasonable manner must be made,[41] although courts will not accept speculation or conjecture as the required proof.[42]

Because a surface owner is presumed to be the owner of ores found in his subsurface,[43] one who asserts extralateral rights to a vein penetrating another claim has the burden of proving that the vein has its apex within his claim.[44] The courts have not agreed upon the required degree of proof necessary for the extralateral claimant to establish his right. A majority has required an apex claimant to demonstrate by a preponderance of the evidence that the deposit in dispute is the same vein as that which has its apex within his location.[45] Some

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36 Pennsylvania Consol. Mining Co. v. Grass Valley Explor. Co., 117 F. 509 (C.C.N.D. Cal. 1902). *See* Utah Consol Mining Co. v. Utah Apex Mining Co., 285 F. 249 (8th Cir. 1922), (dyke cutting through limestone bedded vein at approximate point where mineralization ended terminated extralateral rights), *cert. denied*, 261 U.S. 617 (1923).

37 Iron Silver Mining Co. v. Cheesman, 116 U.S. 529 (1886); Original Sixteen To One Mine, Inc. v. Twenty-One Mining Co., 254 F. 630 (D. Cal. 1918) (segment comencing 15 or more feet below fault plane held to be a continuation of the same vein), *aff'd*, 260 F. 724 (9th Cir. 1919); National Mines Co. v. Charleston Hill Nat'l Mining Syndicate, 205 F. 787 (D.C. Nev. 1912).

38 2 *Lindley on Mines* § 615 (3d ed. 1914). *See* Silver Surprize, Inc. v. Sunshine Mining Co., 15 Wash. App. 1, 547 P.2d 1240, 1246 (1976), *aff'd*, 88 Wash. 2d 64, 558 P.2d 186 (1977).

39 Justice Mining Co. v. Barclay, 82 F. 554 (C.C.D. Nev. 1897).

40 Silver King Coalition Mines Co. v. Conkling Mining Co., 256 U.S. 18 (1921); Wm. H. Hoegee Inv. Co. v. Burton Bros., 132 Cal. App. 2d 863, 283 P.2d 314 (1955); Walsen v. Gaddis, 118 Colo. 63, 194 P.2d 306 (1948).

41 Iron Silver Mining Co. v. Cheesman, 116 U.S. 529 (1886).

42 Collins v. Bailey, 22 Colo. App. 149, 125 P. 543 (1912); Silver Surprize, Inc. v. Sunshine Mining Co., 15 Wash. App. 1, 547 P.2d 1240 (1976), *aff'd*, 88 Wash. 2d 64, 558 P.2d 186 (1977).

43 Bourne v. Federal Mining & Smelting Co., 243 F. 466, 468 (C.C.D. Idaho 1908); Parrot Silver & Copper Co. v. Heinze, 25 Mont. 139, 64 P. 326 (1901). *See* § 37.01[2], *supra*.

44 Consolidated Wyo. Gold Mining Co. v. Champion Mining Co., 63 F. 540 (C.C.N.D. Cal. 1894); Mount Diablo Milling & Mining Co. v. Callison, 17 F. Cas. 918 (C.C.D. Nev. 1879) (No. 9,886); Leadville Co. v. Fitzgerald, 15 F. Cas. 98 (C.C.D. Colo. 1879) (No. 8,158); Walsen v. Gaddis, 118 Colo. 63, 194 P. 2d 306 (1948); Collins v. Bailey, 22 Colo. App. 149, 125 P. 543, 548 (1912); Barker v. Condon, 53 Mont. 585, 165 P. 909, 912 (1917); Heinz v. Boston & Mont. Consol. Copper & Silver Mining Co., 30 Mont. 484, 77 P. 421 (1904).

45 Utah Consol. Mining Co. v. Utah Apex Mining Co., 285 F. 249 (8th Cir 1922), *cert. denied*, 261 U.S. 617 (1923); Pennsylvania Consol. Mining Co. v. Grass Valley Explor. Co., 117 F. 509 (C.C.N.D. Cal. 1902); Parrot Silver & Copper Co. v. Heinz, 25 Mont. 139, 64 P. 326 (1901).

courts which require a preponderance of evidence to prove continuity have stated that there is no established degree of continuity or identity which an extralateral rights claimant must show,[46] but rather that the required showing is dependent upon the facts of each case.[47]

[4] Parallel End Lines

The Mining Law of 1872 grants extralateral rights to veins even though they "extend outside the vertical side lines" of the location.[48] Another section of the statute, pertaining to the form of a lode claim, provides that "[t]he end lines of each claim shall be parallel to each other," and also provides that a mining claim shall not exceed 1,500 feet in length along the vein.[49]

The history of disputes over rights to the dip of veins located under the Lode Law of 1866[50] suggests that the requirement of parallel end lines under the 1872 Act was intended to establish more definite boundary planes between adjacent locations.[51] This is not, however, the reason assigned to the requirement by the Supreme Court. Instead, the Court believed that Congress expected a lode locator to align his location with the course of a vein, thus appropriating the 1,500 feet of vein allowed by the statute, and to use parallel end lines, which, when extended downward, would limit the locator's extralateral rights to the same horizontal length along the vein's dip.[52] While a locator may follow his vein in its descent beyond his own side lines into another's territory, he may not follow its strike beyond his end lines.[53] Thus, the maximum length of a vein which is granted at the surface as well as in the subsurface is 1,500 feet.[54]

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46 Silver Surprize, Inc. v. Sunshine Mining Co., 15 Wash. App. 1, 547 P.2d 1240 (1976), *aff'd*, 88 Wash. 2d 64, 558 P.2d 186 (1977).

47 Gold, Silver & Tungsten, Inc. v. Wallace, 104 Colo. 273, 91 P.2d 975, *cert. denied*, 308 U.S. 612, *reh'g denied*, 308 U.S. 639 (1939).

48 30 U.S.C. § 26 (1982).

49 30 U.S.C. § 23 (1982).

50 Act of July 26, 1866, ch. 262, 14 Stat. 251 (surviving portions codified at 30 U.S.C. §§ 43, 46, 51 and 43 U.S.C. § 661 (1982)).

51 *See* § 30.03, *supra*.

52 Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 84 (1898). *See* Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State Idaho Mining & Dev. Co., 108 F. 189 (C.C.D. Idaho 1900), *aff'd*, 109 F. 538 (9th Cir.), *cert. denied*, 186 U.S. 482 (1901); Fitzgerald v. Clark, 17 Mont. 100, 42 P. 273 (1895), *aff'd*, 171 U.S. 92 (1898).

53 Butler Tonopah Mining Co. v. West End Consol. Mining Co., 247 U.S. 450, 454 (1918); Larkin v. Upton, 144 U.S. 19 (1892); Walsen v. Gaddis, 118 Colo. 63, 194 P.2d 306 (1948).

54 Golden Fleece Gold & Silver Mining Co. v. Cable Consol. Gold & Silver Mining Co., 12 Nev. 312 (1877) (Hawley, C.J. concurring). Patents issued for locations made under the Lode Law of 1866, however, are not limited by the Mining Law of 1872 to 1,500 feet along the vein. Ames v. Empire Star Mines Co., 17 Cal. 2d 213, 110 P.2d 13 (1941), *cert. denied*, 314 U.S. 651 (1941). *See* § 30.03, *supra*.

The statute does not impose a penalty for the lack of parallel end lines,[55] but it has been uniformly construed with the section granting extralateral rights to impose a condition upon the exercise of such rights.[56] Only extralateral rights are affected by non-parallel end lines, and the claim itself is not invalid.[57]

A distinction must be drawn, however, between nonparallel end lines which diverge and those which converge in the direction of the dip. In the case of diverging end lines, courts have uniformly denied extralateral rights,[58] and the locator has only intraliminal common law rights.[59] The reason for the denial is that as the vein descends into the ground, diverging end lines would include an ever increasing amount of it.[60] As to converging end lines, there is a split of authority. The strict view applies the statute literally and denies extralateral rights.[61] The liberal view permits the right because the wedge-like area of appropriation is smaller than would have been permitted had the lines been parallel.[62] In any event, substantial parallelism has been held to be sufficient for purposes of extralateral rights.[63]

While the length of an end line is not determinative of extralateral rights, it

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55 *See* 30 U.S.C. § 26 (1982).

56 Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 85 (1898). *See* Butler Tonopah Mining Co. v. West End. Consol. Mining Co., 247 U.S. 450 (1918); Elgin Mining & Smelting Co. v. Iron Silver Mining Co., 14 F. 377 (C.C.D. Colo. 1882), *aff'd*, 118 U.S. 196 (1886); Daggert v. Yreka Mining & Milling Co., 149 Cal. 357, 86 P. 968, 974 (1906). *But see* Moody v. General Beryllium Corp., 224 F. Supp. 934, 947 (D. Utah 1963) (under equitable decree of court, end lines of claims intersected by peripheral boundary line established by private contract may be deemed parallel for purposes of extralateral rights between parties and as to third parties).

57 Eureka Consol. Mining Co. v. Richmond Mining Co., 8 F. Cas. 819, 826-28 (C.C.D. Nev. 1877) (No. 4,548); Gibson v. Hjul, 32 Nev. 360, 108 P. 759, 762 (1910).

58 Iron Silver Mining Co. v. Elgin Mining & Smelting Co., 118 U.S. 196 (1886); Montana Co. v. Clark, 42 F. 626 (C.C.D. Mont. 1890); Daggett v. Yreka Mining & Milling Co., 149 Cal. 357, 86 P. 968 (1906); Quilp Gold Mining Co. v. Republic Mines Corp., 96 Wash. 439, 165 P. 57 (1917). This is not necessarily true, however, as to mining claims located prior to 1872. *See* § 30.03, *supra*.

59 Grant v. Pilgrim, 95 F.2d 562 (1938); Doe v. Waterloo Mining Co., 54 F. 935 (C.C.S.D. Cal. 1893), *aff'd*, 82 F. 45 (8th Cir. 1897).

60 *See* Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 85 (1898) ("the requisition that the end lines shall be parallel was for the purpose of bounding the extralateral rights . . . and the end lines must be parallel in order that going downwards he shall acquire no further length of the [illegible] than the planes of those lines extended downward inclose").

61 Iron Silver Mining Co. v. Elgin Mining & Smelting Co., 118 U.S. 196, 208 (1886).

62 Grant v. Pilgrim, 95 F.2d 562, 568 (9th Cir. 1938) (converging lines limit the extralateral area, and, therefore, no one can complain, citing Carson City Gold & Silver Mining Co. v. North Star Mining Co., 73 F. 597, 602 (C.C.N.D. Cal. 1896), *aff'd*, 83 F. 658 (9th Cir. 1897), *cert. denied*, 171 U.S. 687 (1898)).

63 Consolidated Wyo. Gold Mining Co. v. Champion Mining Co., 63 F. 540 (C.C.N.D. Cal. 1894); Tyler Mining Co. v. Sweeney, 54 F. 284, 293 (9th Cir. 1893). *See* Grant v. Pilgrim, 95 F.2d 562, 568 (9th Cir. 1938) (end lines were "substantially parallel" even though they converged at a six-degree angle).

must have sufficient distance to qualify for purposes of the law.[64] End lines, for the purpose of obtaining extralateral rights, are those originally laid out when a claim is located, and extralateral rights are not affected if prior patented claims necessitate that the territory conveyed by a later patent be bound by a zig-zag end line.[65] The United States Supreme Court has established the doctrine that a junior lode locator may enter a senior location for the purpose of making his end lines parallel so as to obtain extralateral rights.[66] Explanations for failure to comply with the parallel end lines requirement will not excuse noncompliance.[67]

While end lines must be parallel in order for the statutory grant of extralateral rights to apply, side lines need not be.[68] End lines must be straight and neither broken nor curved, but irregular side lines do not necessarily have an adverse effect upon extralateral rights; side lines may have angles and elbows and be converging or diverging so long as their general course is along the vein and the statutory restriction on width of claims is met.[69] However, extralateral rights do not attach to claims staked out in the form of a horseshoe[70] or an isosceles triangle,[71] because they do not have parallel end lines, and denomination on one side line of such an irregular location as an end line will not be controlling.

[5] Restriction to Downward Course

The Mining Law of 1872 grants extralateral rights to "veins, lodes, and ledges throughout their entire depth" even though they "depart from a perpendicular in their course downward as to extend outside the vertical side lines" of the location.[72] Restricting extralateral rights to the dip or downward course of the vein[73] excludes any right to follow the strike or onward course of the vein along

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64 Belligerent and Other Lode Mining Claims, 35 L.D. 22 (1906), *review denied*, 36 L.D. 7 (1907); Jack Pot Lode Mining Claim, 34 L.D. 470 (1906) (two-tenths of a foot in length is not an end line within the meaning of the statute).

65 Big Hatchet Copper Mining Co. v. Colvin, 19 Colo. App. 405, 75 P.605 (1904).

66 Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55 (1898).

67 *See* Montana Co. v. Clark, 42 F. 626 (C.C.D. Mont. 1890).

68 Jim Butler Tonopah Mining Co. v. West End Consol. Mining Co., 247 U.S. 250 (1918); Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55 (1898).

69 Jim Butler Tonopah Mining Co. v. West End Consol. Mining Co., 247 U.S. 250 (1918).

70 Iron Silver Mining Co. v. Elgin Mining & Smelting Co., 118 U.S. 196 (1886) (a nine-sided figure in the shape of a horseshoe with two lines denominated as end lines did not qualify for extralateral rights because the court held that one of the lines marked as an end line was a side line).

71 Montana Co. v. Clark, 42 F. 626 (C.C.D. Mont. 1890) (triangular claim geometrically could not have two parallel lines).

72 30 U.S.C. § 26 (1982).

73 King v. Amy & Silversmith Consol. Mining Co., 9 Mont. 543, 24 P. 200 (1890), *rev'd on other grounds*, 152 U.S. 222 (1894); Tom Reed Gold Mines Co. v. United E. Mining Co., 24 Ariz. 269, 209 P. 283, *cert. denied*, 260 U.S. 744 (1922). The terms "downward course" and "course downward" are used interchangeably and signify the course of the vein from the surface toward the center of the earth whether in a perpendicular or on a dip. A vein's "downward course" contrasts with

the top or apex.[74] Thus, there cannot be extralateral rights in a horizontal vein because it has no downward course.[75] Likewise, the upward trend of a vein cannot be followed.[76] Of course, the dip within the extension of the end lines may be followed to its entire depth, even though it enters another claim.[77]

The statute does not specify a degree of angle of descent, but it has been suggested that the angle must not be less than 45° for any substantial distance or the extralateral right will be lost.[78] Other courts have rejected any limitation as judicial legislation.[79] Under this view, the right to follow the dip of a vein remains if it departs from its apex at any angle other than horizontal because there is a departure from the perpendicular so long as the vein is not at a right angle to the perpendicular.[80]

§ 37.03 Relation of Location to Course of Vein as Affecting Extralateral Rights

[1] Location Parallel with Course of the Vein

Extralateral rights exist only when certain conditions and requirements have

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its "strike" or onward course. *See* King v. Amy & Silversmith Consol. Mining Co., *supra*; Duggan v. Davey, 4 Dak. 110, 26 N.W. 887 (1886), *appeal dismissed*, 131 U.S. 433 (1889).

74 Walsen v. Gaddis, 118 Colo. 63, 194 P.2d 306 (1948); Stewart Mining Co. v. Ontario Mining Co., 23 Idaho 724, 132 P. 787 (1913), *aff'd*, 237 U.S. 350 (1915).

75 Butler Tonopah Mining Co. v. West End Consol. Mining Co., 39 Nev. 375, 158 P. 876 (1916), *aff'd*, 247 U.S. 450 (1918); Tom Reed Gold Mines Co. v. United E. Mining Co., 24 Ariz. 269, 209 P. 283 (no extralateral right on a vein if it becomes "flattened and extends from thence horizontally in a departure from the approximate general plane"), *cert. denied*, 260 U.S. 744 (1922). See § 37.01[4], *supra*, as to blanket veins.

76 Tom Reed Gold Mines Co. v. United E. Mining Co., 24 Ariz. 269, 209 P. 283, *cert. denied*, 260 U.S. 744 (1922); Southern Nev. Gold & Silver Mining Co. v. Holmes Mining Co., 27 Nev. 107, 73 P. 759 (1903). *But see* Silver Surprize, Inc. v. Sunshine Mining Co., 15 Wash. App. 1, 547 P.2d 1240 (1976) (suggesting that mining upward to establish continuity with an apex at the surface would be possible except for the unfavorable economics—a procedure previous authoritites would not seem to allow), *aff'd*, 88 Wash. 2d 64, 558 P.2d 186 (1977).

77 Mining Co. v. Tarbet, 98 U.S. 463 (1879); Colorado Cent. Consol. Mining Co. v. Turck, 54 F. 262 (8th Cir.), *aff'd*, 150 U.S. 138 (1893); Arizona Commercial Mining Co. v. Iron Cap Copper Co., 27 Ariz. 202, 232 P. 545, *modified on other grounds*, 29 Ariz. 23, 239 P. 290 (1925), *cert. denied*, 270 U.S. 642 (1926). *Accord* Iron Silver Mining Co. v. Murphy, 3 F. 368 (D. Nev. 1880).

78 Stewart Mining Co. v. Ontario Mining Co., 23 Idaho 724, 132 P. 787 (1913) (dictum), *aff'd*, 237 U.S. 350 (1915).

79 Alameda Mining Co. v. Success Mining Co., 29 Idaho 618, 161 P. 862 (1916) (extralateral rights must be determined by the course of the vein at the apex at the surface and not at lower levels; there is no degree or angle which would arbitrarily bar extralateral pursuit), *appeal dismissed*, 249 U.S. 622 (1919). *Accord* Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Dev. Co., 134 F. 268 (C.C.D. Idaho 1903).

80 Stevens v. Williams, 23 F. Cas. 44 (C.C.D. Colo. 1879) (No. 13,414). *Accord* Leadville Co. v. Fitzgerald, 15 F. Cas. 98 (C.C.D. Colo. 1879) (No. 8,158).

been met.[1] The relation of a location's boundaries to the course of the vein nearest the surface may also abridge or restrict the maximum rights obtainable because the location is entitled to only as much ho. ontal length of the dip as the length of the apex within the surface boundaries.[2] The extent of extralateral rights is determined by the course or strike of the vein nearest the surface, and subsurface variations in direction do not affect extralateral rights.[3] It has been held that extralateral rights are determined by the actual course of the vein on the ground rather than as shown on the survey plat of a patent.[4]

The maximum possible extent of extralateral rights is obtained when there has been an ideal location upon an ideal lode, that is, a location with parallel end lines and side lines running generally parallel with the course of a vein which is nearly straight, has continuity and passes out of the location at each end line.[5] An ideal location is properly staked out in relation to a vein or lode so that the side lines encompass the course or strike of the vein and the vein bisects each parallel end line.[6] Because in an ideal location the strike of the vein located runs the full length of the location, and the surface boundaries of the location are the maximum statutory length of 1,500 feet, its locator is entitled to pursue the vein's dip anywhere between the extensions of the end lines, which is also the maximum allowable distance of 1,500 feet. Often, of course, mining locators mistake the true course of the vein, or the vein itself is irregular, which results in obtaining less than maximum extralateral rights.[7]

[2] Location with Vein Crossing Two Side Lines

Locators often find it difficult or impossible to determine the true direction or course of a vein at the time of location, with the result that the location is

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[1] Extralateral rights will be denied when a location fails to meet requirements as to apex, parallel end lines, and downward dip; when the location is located as a placer claim or is improperly located as a lode claim; and when the extralateral vein extends into land previously appropriated as non-mining land, or conflicts with a prior apex, or in some instances, prior dip rights. *See* §§ 37.01[1], 37.02, *supra*.

[2] Del Monte Mining & Millling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 89 (1898).

[3] Mining Co. v. Tarbet, 98 U.S. 463 (1879) (the direction of the side lines must correspond substantially with the course or strike of the vein at its apex near the surface of the ground); Arizona Commercial Mining Co. v. Iron Cap Copper Co., 27 Ariz. 202, 232 P. 545, 550, *modified on other grounds*, 239 P. 290 (1925), *cert. denied*, 270 U.S. 642 (1926); Alameda Mining Co. v. Success Mining Co., 29 Idaho 618, 161 P. 862, 866 (1916) ("[T]he course of a vein is not determined by its direction at any single given point where the vein is a crooked one. . . . The . . . extralateral rights must be determined by the course of the vein at its apex at the surface of the claim.").

[4] Consolidated Wyo. Gold Co. v. Champion Mining Co., 63 F. 540 (N.D. Cal. 1894).

[5] *See* § 37.02, *supra*.

[6] Silver King Coalition Mines Co. v. Conkling Mining Co., 256 U.S. 18 (1921). *Accord* Mining Co. v. Tarbet, 98 U.S. 463 (1879).

[7] See Clayberg, "Extralateral Rights to Quartz Veins Granted by the Act of Congress of May 10, 1872," 1 *Calif. L. Rev.* 336 (1913); Note, "Extra-Lateral Rights in Mining," 15 *Notre Dame Law.* 68, 74 (1939), for discussions of various situations which result in a locator receiving less than the maximum obtainable extralateral rights.

laid crosswise instead of lengthwise on the strike. In this event, a locator is often allowed to adjust his location within a statutory period.[8] If the statutory time has expired or it is otherwise not possible to change the lines of the location after the course of the vein is acertained, the judicial concept of "false end lines" may apply.

Since a vein cannot be pursued on its strike beyond the end lines of a location,[9] extralateral rights cannot be exercised when the strike of a vein crosses the side lines. Courts have uniformly recognized, however, that the designation of lines by a locator is not controlling and that what were specified as side lines may be regarded as end lines for extralateral rights purposes.[10] As explained by the Supreme Court:

> When, therefore, a mining claim crosses the course of the lode or vein instead of being 'along the vein or lode,' the end lines are those which measure the width of the claim as it crosses the lode. Such is evidently the meaning of the statute. The side lines are those which measure the extent of the claim on each side of the middle of the vein at the surface.[11]

Under this doctrine, a locator is entitled to the same rights regarding his new side and end lines as if they were originally located as such.[12] Hence, extralateral rights may be fully exercised beyond the originally designated end lines[13] and the originally designated side lines define the vertical planes within which the rights may be exercised.[14] In order for the side lines to become end lines, they must be opposite and parallel, and the same rules apply as for conventional end lines.[15] This "cross-lode" type of mining location is the only exception to the rule that the end lines, once located, establish limits beyond which the locator cannot go.[16]

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[8] *See* §§ 33.04[3] & [4], *supra*.

[9] Southern Nev. Gold & Silver Mining Co. v. Holmes Mining Co., 27 Nev. 107, 73 P. 759, 762 (1903).

[10] *See, e.g.*, Consolidated Wyo. Mining Co. v. Champion Mining Co., 63 F. 540, 549 (C.C.N.D. Cal. 1894). *See also* § 32.03[1][d], *supra*.

[11] Argentine Mining Co. v. Terrible Mining Co., 122 U.S. 478, 485 (1887). *Accord* Silver King Coalition Mines Co. v. Conkling Mining Co., 256 U.S. 18 (1921); King v. Amy & Silversmith Consol. Mining Co., 152 U.S. 222, 228 (1894); Mining Co. v. Tarbet, 98 U.S. 463 (1879); Northport Smelting & Ref. Co. v. Lone Pine-Surprise Consol. Mines Co., 217 F. 105 (E.D. Wash. 1920), *aff'd*, 278 F. 719 (9th Cir. 1922); Tombstone Milling & Mining Co. v. Way Up Mining Co., 1 Ariz. 426, 25 P. 794 (1883); Round Mtn. Mining Co. v. Round Mtn. Sphinx Mining Co., 35 Nev. 392, 129 P. 308, 310 (1913).

[12] Empire Milling & Mining Co. v. Tombstone Mill & Mining Co., 100 F. 910 (C.C.D. Conn. 1900).

[13] Silver King Coalition Mines Co. v. Conkling Mining Co., 256 U.S. 18 (1921).

[14] Northport Smelting & Ref. Co. v. Lone Pine-Surprise Consol. Mines Co., 271 F. 105 (E.D. Wash. 1920), *aff'd*, 278 F. 719 (9th Cir. 1922).

[15] Empire State-Idaho Mining & Dev. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 131 F. 591, 605 (9th Cir. 1904), *cert. denied*, 200 U.S. 617 (1906); Last Chance Mining Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 131 F. 579, 588 (9th Cir. 1904), *cert. denied*, 200 U.S. 617 (1906). *See* § 37.02[4], *supra*.

[16] Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 89-90 (1898).

The false end line doctrine is applicable to the discovery vein only, and cannot be applied to secondary veins so as to create more than one set of end lines for a location.[17] Within this limitation, however, any vein can be pursued extralaterally.[18]

[3] Location with Vein Departing Through Side Line or Stopping Within Location

A common cause of a location with a discovery vein which stops within a location is miscalculation of its direction so that the vein is later found to depart from the claim through a side line. Apparently this situation was not contemplated by the Mining Law of 1872, but courts have supplied a solution by a legal fiction. The judicial declaration is that extralateral rights obtain, defined by an imaginary line drawn from the point the vein passes out of the claim, opposite and parallel to the end line through which the vein passes.[19] The rule is that the end line which is crossed remains an end line for all purposes, and extralateral rights are granted within the area bounded by parallel planes drawn from the end line and the imaginary line.[20]

The same rule applies if a vein abruptly terminates within a claim after entering through an end line, except that the imaginary line is drawn parallel to the end line at the point the apex terminates.[21]

If an apex both begins and ends within a claim, the authorities are generally agreed that subsurface rights attach within imaginary planes drawn parallel to the end lines at the points the vein terminates.[22] If the vein runs more nearly parallel to the end rather than the side lines, courts will apply the false end line doctrine to the permit the exercise of extralateral rights.[23]

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17 *Id.* at 89 (the end lines as fixed relative to the discovery vein constitute an absolute limit relative to the appropriation of all other veins within the mining location); Clark-Mont. Realty Co. v. Butte & Superior Copper Co., 233 F. 547 (D. Mont. 1916), *aff'd*, 248 F. 609 (1918), *aff'd*, 249 U.S. 12 (1919).

18 *See* § 37.04, *infra*.

19 Clark v. Fitzgerald, 171 U.S. 92 (1898); Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 89 (1898); London Extension Mining Co. v. Ellis, 134 F.2d 405 (10th Cir. 1943); Bourne v. Federal Mining & Smelting Co., 243 F. 466 (C.C.D. Idaho 1908); Rico-Argentine Mining Co. v. Rico Consol. Mining Co., 74 Colo. 444, 223 P. 31, 33 (1923).

20 Clarke v. Fitzgerald, 171 U.S. 92 (1898); London Extension Mining Co. v. Ellis, 134 F.2d 405 (10th Cir. 1943); Ajax Gold Mining Co. v. Hilkey, 31 Colo. 131, 72 P. 447 (1903).

21 Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55 (1898); Tyler Mining Co. v. Sweeney, 54 F. 284, 293 (9th Cir. 1893); Carson City Gold & Silver Mining Co. v. North Star Mining Co., 73 F. 597 (C.C.N.D. Cal 1896); Wakeman v. Norton, 24 Colo. 192, 49 P. 283 (1897).

22 Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55 (1898). *See* Work Mining & Milling Co. v. Doctor Jack Pot Mining Co., 194 F. 620, 629 (8th Cir. 1912).

23 *See* § 37.03[2], *supra*.

[4] Location With Vein Entering and Departing Through the Same Boundary

Few cases have ruled on the problem presented by a vein which enters and departs a claim through the same boundary line, and they conflict. However, there would appear to be no less reason for granting extralateral rights in this circumstance than when a vein enters a claim through an end line and departs through a side line.[24] The United States Supreme Court apparently sees no difference between the two situations,[25] and a series of federal cases suggest that extralateral rights may be obtained, as defined by lines drawn parallel to the end lines at the points the vein departs through the side line.[26] If a vein enters and departs through an end rather than a side line, the false end line doctrine can apply.[27]

In any event, extralateral rights are restricted to the amount of apex actually within the claim.[28] Hence, if a vein returns to a claim after departing through a side line and then departs through an end or side line, extralateral rights will not be granted for the portion of the apex outside the claim[29] unless the legal apex doctrine applies.[30]

Unfortunately, in the only case directly on point the Colorado Supreme Court stated that extralateral rights could not be obtained when a vein enters and de-

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[24] *See* § 37.03[3], *supra*.

[25] In *Montana Mining Co. v. St. Louis Mining & Milling Co*., 204 U.S. 204, 211 (1906), the Court states that "the right of the St. Louis Company to follow its vein, although it enters at the side line and departs through the same line, has been established by this court in other cases." It cites *Last Chance Mining Co. v. Tyler Mining Co*., 157 U.S. 683 (1895), which concerned a claim with the vein entering through an end line and departing through a side line.

[26] St. Louis Mining & Milling Co. v. Montana Mining Co., 104 F. 664 (9th Cir. 1900) (granting extralateral rights in secondary vein). While this case is distinguishable in that subsurface rights already existed by virtue of the discovery vein which cut both end lines, it would seem that if extralateral rights are obtained in a secondary vein, they would also be obtained in a discovery vein. The decision results in the St. Louis Mining & Milling Company acquiring extralateral rights to a vein which enters and departs a claim through the same side line. The United States Supreme Court, on a writ of certiori, reviewed the case and did not question the theory of extralateral rights established by the lower court. Montana Mining Co. v. St. Louis Mining & Milling Co., 204 U.S. 204 (1906). Subsequently, in an appeal of the same case, the Ninth Circuit Court of Appeals expressed the view that the Supreme Court affirmed its decision that the St. Louis Mining Company had "the right . . . to extralegal rights . . . to the extent that the vein apexes within the St. Louis claim. . . ." Montana Mining Co. v. St. Louis Mining & Milling Co., 183 F. 51, 61 (9th Cir. 1910). Unfortunately, the matter is never discussed as being in dispute in any of these decisions.

[27] *See* § 37.03[2], *supra*.

[28] Mining Co. v. Tarbert, 98 U.S. 463 (1879). *See also* Waterloo Mining Co. v. Doe, 82 F. 45, 55 (1897) ("The grant is to lodes having their apex in the ground patented. The fact that a part of the apex may be in the ground granted would not give any right to that part of the apex which is not therein. . . .").

[29] Waterloo Mining Co. v. Doe, 82 F. 45 (9th Cir. 1897).

[30] *See* § 37.02[2], *supra*.

parts through the same boundary.[31] This case has been disregarded by the federal courts,[32] repudiated by dicta in a later Supreme Court of Colorado case,[33] and rejected by scholars.[34] However, the case has never been directly overruled.

[5] Extralateral Rights to Lodes with a Wide Apex

Some lodes have wide apexes so that, when located, they lie within more than one claim, divided by a common side line. Three positions have been taken as to whether extralateral rights can be obtained in these circumstances. First, it has been strictly ruled that in order for a mining locator to be entitled to subsurface rights, he must include within his claim the entire width of the apex.[35] Under this view, both mining locators would be denied extralateral rights to a vein bisected by their common boundary line. The second approach is to grant extralateral rights to the senior claimant when the end line extensions of both claims correspond.[36] A third, more liberal, position has been adopted which would permit both locators to obtain extralateral rights when the end lines do not correspond. Under this view, the senior locator obtains rights to any conflict area and a junior locator obtains his extralateral rights outside of the conflict area.[37]

The third rule includes the priority concepts of the second and also recognizes extralateral rights in the junior locator when there is no conflict. It has the advantage of not establishing underground areas from which minerals are unlikely to be developed, and it is more consistent with the intent of the statute and the

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31 Catron v. Old, 23 Colo. 433, 48 P. 687 (1897) (court emphasized the fact that very little of the apex was actually within the claim, and that it did not run parallel with the side lines).

32 Montana Mining Co. v. St. Louis Mining & Milling Co., 204 U.S. 204 (1906); St. Louis Mining & Milling Co. v. Montana Milling Co., 104 F. 644 (9th Cir. 1900).

33 Rico-Argentine Mining Co. v. Rico Copper Mining Co., 74 Colo. 444, 223 P. 31, 33 (1923) (the court, although dealing with a vein crossing an end line and a side line, said it was compelled "to conclude that extralateral rights are conferred where the discovery vein crosses . . . the same side line twice.").

34 G. Costigan, *Mining Law* § 118g at 63 (1908), suggests "the propriety of refusing to follow" the *Catron* case. *See also* Clayberg, "Extralateral Rights to Quartz Veins Granted by the Act of Congress of May 10, 1872," 1 *Calif L. Rev.* 336, 345-347 (1913); Note, "Extralateral Rights in Mining," 15 *Notre Dame Law.* 68, 75-76 (1939).

35 Grand Cent. Mining Co. v. Mammoth Mining Co., 29 Utah 490, 83 P. 648 (1905) (extralateral rights may not be predicated upon such bisected broad lode desposits). The court said: "What constitutes a discovery that will validate a location is a very different thing from what constitutes an apex, to which attaches the statutory right to invade the possession of and appropriate the property which is presumed to belong to an adjoining owner." *Id.* at 677. *Accord* Big Hatchet Consol. Mining Co. v. Colvin, 19 Colo. App. 405, 75 P. 605, 606 (1904).

36 Argentine Mining Co. v. Terrible Mining Co., 122 U.S. 478 (1887); United States Mining Co. v. Lawson, 134 F. 769 (8th Cir. 1904), *aff'd*, 207 U.S. 1 (1907); St. Louis Mining & Milling Co. v. Montana Mining Co., 104 F. 664 (9th Cir. 1900).

37 Empire State-Idaho Mining & Dev. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 114 F. 417, 419 (9th Cir.), *cert. denied*, 186 U.S. 482 (1902).

policy of the courts to grant extralateral rights whenever there has been reasonable compliance with the law. It appears to be the standard rule.[38]

§ 37.04 Extralateral Rights in Secondary Veins

[1] Application of Extralateral Rights to Secondary Veins

"Secondary," "accidental," and "incidental" are terms commonly applied to apexing veins or lodes other than the one upon which a mining location is based, known as the "primary" or "discovery" vein.[1] The Mining Law of 1872 constitutes a grant of rights in all veins or lodes which apex within the surface lines of a mining location,[2] and it is settled law that extralateral rights are conferred in secondary as well as primary veins.[3] Thus, extralateral rights may be based upon "blind" veins or lodes, unknown or undiscovered at the time of location.[4] In general, the same conditions and limitations apply to extralateral rights conferred in secondary veins as apply to discovery veins,[5] except that rights in secondary veins are further conditioned upon the validity of the location on the discovery vein.

[2] End Lines of Discovery Vein Control

There can be but one set of end lines for a location, and they limit all veins apexing within the surface lines.[6] Hence, extralateral rights in secondary veins are fixed by the end lines of the discovery vein.[7] Courts will not create new lines

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[38] *See* § 32.03[2][b], *supra*.

[1] *See* Cosmopolitan Mining Co. v. Foote, 101 F. 518 (C.C.D. Nev. 1900).

[2] 30 U.S.C. § 26 (1982). Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 88 (1898):

> Every vein whose apex is within the vertical limits of his [a locator's] surface lines passes to him by virtue of his location. He is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines. Not only is he entitled to all veins whose apexes are within such limits, but he is entitled to them throughout their entire depth, 'although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.' In other words, given a vein whose apex is within his surface limits, he can pursue that vein as far as he pleases in its downward course outside the vertical side lines.

[3] Ajax Gold Mining v. Hilkey, 31 Colo. 131, 72 P. 447 (1903).

[4] Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 182 U.S. 499, 508 (1901).

[5] *See* §§ 37.01, .02, .03, *supra*, and § 37.05, *infra*.

[6] Walrath v. Champion Mining Co., 171 U.S. 293, 308, 311 (1898); Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55 (1898); Ajax Gold Mining Co. v. Hilkey, 31 Colo. 131, 72 P. 447 (1903).

[7] Work Mining & Milling Co. v. Doctor Jack Pot Mining Co., 194 F. 620, 629 (8th Cir.), *cert. denied*, 226 U.S. 610 (1912); Ajax Gold Mining Co. v. Hilkey, 31 Colo. 131, 72 P. 447, 449 (1903) ("The end lines constitute a barrier, beyond which a locator cannot follow a vein on its strike, whether it be a discovery or secondary vein. . . .").

for secondary veins.[8] Thus, if the discovery vein crosses both side lines, the side lines will be regarded as end lines and will determine extralateral rights in all veins which apex within the claim, even though a secondary vein might perfectly bisect the original end lines.[9] Nor can a locator relocate his claim using new end lines so as to expand his extralateral rights in secondary veins which dip outside of the bounding planes of the location of the discovery vein. When such an attempt is made, the side lines of the new location, will be regarded as end lines.[10] Hence, it is not possible to obtain extralateral rights in a secondary vein which lies at a right angle to the discovery vein, parallel with the located end lines.[11]

[3] Amount of Apex of Secondary Vein within the Claim

Extralateral rights attach to any secondary vein or lode which apexes within a location without regard to the extent of extralateral rights obtainable in the discovery vein. Hence, the apex of a secondary vein need not be in the same part of a claim as the apex of the discovery vein, and whether it is or not, extralateral rights to the dip of a secondary vein are defined by vertical planes fixed by the original end lines.[12] This is illustrated by the not uncommon situation of a claim inaccurately located so that the discovery vein passes through an end line and a side line. Extralateral rights to the discovery vein are bounded by a vertical plane extended downward from the crossed end line and, under the false end line doctrine, another vertical plane parallel thereto drawn from the point the vein crosses the side line.[13] These planes, however, do not limit extralateral rights in the secondary vein, which are governed by planes drawn from the original end lines.[14]

Since the end line bounding planes of the discovery vein fix extralateral rights to secondary veins, it has been argued that the dip of a secondary vein may

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[8] Walrath v. Mining Co., 63 F. 552, 557 (C.C.N.D. Cal. 1894) ("The Act of 1872, in granting all other veins that were within the surface lines of previous locations, did not create any new lines for such other veins, nor invest the court with any authority to make new lines for such other veins."), *aff'd*, 171 U.S. 293 (1898). *Accord* Cosmopolitan Mining Co. v. Foote, 101 F. 518, 522 (C.C.D. Nev. 1900).

[9] Northport Smelting & Ref. Co. v. Lone Pine-Surprise Consol. Mines Co., 278 F. 719 (9th Cir. 1922). *See* § 37.03[2], *supra*.

[10] Cosmopolitan Mining Co. v. Foote, 101 F. 518, 521-23 (C.C.D. Nev. 1900). *See* Walrath v. Mining Co., 63 F. 552, 557 (C.C.N.D. Cal. 1894) ("When the end lines of a mining location are once fixed, they bound the extralateral rights to all the lodes that are thereafter found within the surface lines of the location.").

[11] Cosmopolitan Mining Co. v. Foote, 101 F. 518 (C.C.D. Nev. 1900). *See also* § 37.04[4], *infra*.

[12] Ajax Gold Mining Co. v. Hilkey, 31 Colo. 131, 72 P. 447, 450 (1903).

[13] *Id. See* § 37.03[3], *supra*.

[14] Ajax Gold Mining Co. v. Hilkey, 31 Colo. 131, 72 P. 447, 449 (1903) ("This, however, does not mean that all such veins have exactly the same extralateral rights, nor can it be said that only so much of a secondary vein as apexes within that part of the claim where the apex of the discovery vein is found has such rights."). *See* § 37.04[4], *infra*.

be followed anywhere between their extensions regardless of the amount of apex within the location. This result has been permitted by the United States Supreme Court,[15] but is contrary to the generally accepted principle of mining law that only so much of the dip of a vein may be followed as there is apex within the surface boundaries of the location.[16] The legal apex doctrine is an exception to this rule.[17]

[4] Relation of Location to Course of Secondary Vein

The rules concerning extralateral rights in discovery veins also apply to extralateral rights in secondary veins. Variations in the position of secondary veins in relation to the discovery vein do not alter these rules, but may limit their application.

There is no doubt that extralateral rights attach to secondary veins if they are approximately parallel to the discovery vein and are within the parallel planes which measure extralateral rights to it.[18] On the other hand, if a secondary vein crosses a location at a right angle to the discovery vein, extralateral rights in the secondary vein cannot be obtained because there is no right to pursue the strike or onward course of the vein.[19]

Between the two extremes, when the discovery vein and secondary vein do not have the same extent or direction, three views have been expressed. One, now in general disrepute, was to deny extralateral rights beyond the portion of the claim covered by extralateral rights in the discovery vein.[20] Another view, founded upon dicta in a Supreme Court decision, would permit extralateral rights within the area bounded by the end lines even though portions of the apex were outside the claim.[21] The view accepted by most authorities allows extralateral rights in secondary veins to the extent of their apex within a claim, limited by bounding planes drawn through the original end lines for the discovery

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15 Walrath v. Champion Mining Co., 171 U.S. 293 (1898). The effect of the decision was to grant a greater extent on the dip of a secondary vein than there was apex within the mining claim; the extralateral rights were bounded by the end lines of the discovery vein. This decision is criticized in Zane, "A Problem in Mining Law: Walrath v. Champion Mining Company," 16 *Harv. L. Rev.* 94 (1902). Lindley denied that this result was intended by the court. 2 *Lindley on Mines* § 593 (3d ed. 1914).

16 Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Dev. Co., 109 F. 538 (C.C.D. Idaho 1900), *aff'g* 108 F. 189 (C.C.D. Idaho 1900).

17 *See* § 37.02[2], *supra*.

18 Walrath v. Champion Mining Co., 197 U.S. 193 (1897). *Accord* Jefferson Mining Co. v. Anchoria-Leland Mining & Milling Co., 32 Colo. 176, 75 P. 1070 (1904).

19 Cosmopolitan Mining Co. v. Foote, 101 F. 518 (C.C.D. Nev. 1900). *See also* § 37.04[2], *supra*.

20 Jefferson Mining Co. v. Anchoria-Leland Mining Co., 32 Colo. 176, 75 P. 1070 (1904). *See* § 37.04[3], *supra*.

21 Walrath v. Champion Mining Co., 197 U.S. 193 (1897). *See* Zane, "A Problem in Mining Law: Walrath v. Champion Mining Company," 16 *Harv. L. Rev.* 94 (1902).

vein.[22] Under this approach, the fact that the apex of a secondary vein does not cross an end line would be of no consequence,[23] nor would its position in a claim, whether the claim be patented or unpatented.[24]

§ 37.05 Subsurface Conflicts as to Extralateral Rights

[1] General Rules

Conflicts as to extralateral rights may occur underneath mining or non-mining land. In general, all mining lands, whether unpatented or patented, are subject to the exercise of valid extralateral rights, even though the apex itself may be located at a later date than the land under which it dips.[1] On the other hand, previously patented non-mining lands are not subject to extralateral rights, provided that on the date patent issued the land was not known to be valuable for minerals.[2] Unpatented non-mining lands are subject to extralateral rights regardless of the date of mining location.

As a general proposition, the locator of an apex may assert his statutory right to the dip irrespective of priority of location and may follow the dip underneath mining land previously located.[3] Some courts have held to the contrary in order to prevent intrusion upon the common law rights of a prior dip locator.[4] Since statutory enactments modify the common law, intraliminal rights recognized under the common law are subject to the statutory grant of extralateral rights.[5] Nevertheless, courts might be particularly reluctant to adhere to this concept against a prior dip locator when a junior apex locator's rights are predicated

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[22] Ajax Gold Mining Co. v. Hilkey, 31 Colo. 131, 72 P. 447 (1903) (the extralateral rights of the locator of a secondary vein which had a longer apex than the discovery vein with which it united on the dip and passed out the north side line under adjoining land were determined by a line to the east parallel with the west end line). *See also* Anaconda Copper Mining Co. v. Pilot-Butte Mining Co., 52 Mont. 165, 156 P. 409 (1916).

[23] Work Mining & Milling Co. v. Doctor Jack Pot Mining Co., 194 F. 620, 629 (8th Cir.), *cert. denied*, 226 U.S. 610 (1912).

[24] Ajax Gold Mining Co. v. Hilkey, 31 Colo. 131, 72 P. 447 (1903).

[1] *See* Clark v. Fitzgerald, 171 U.S. 92 (1898).

[2] *See* § 37.05[2], *infra*.

[3] Colorado Cent. Consol. Mining Co. v. Turck, 50 F. 888, 895 (8th Cir. 1892) ("The statute conferring the right to follow a lode outside the side lines of a location, when the top or apex of the lode lies within the boundaries of the location, does not, in terms or by necessary implication, limit the exercise of that right, especially where mining claims are involved, to cases where the adjoining claims are held under junior locations or patents, and we think we would not be justified in placing such a limitation upon the right by construction."). *Accord* Cheesman v. Hart, 42 F. 98 (C.C.D Colo. 1890). See § 37.01[2], *supra*.

[4] *E.g.*, Van Zandt v. Argentine Mining Co., 8 F. 725 (C.C.D. Colo. 1881) (jury instructions). *See* § 36.03[2], *supra*, discussing common law rights in mining locations.

[5] *See* § 37.01[2], *supra*.

upon the fiction of a judicial apex[6] or patent has already issued.[7]

[2] Patented Non-Mining Lands

The Mining Law of 1872 grants extralateral rights to locators and patentees of lode claims, and also makes mineral patents subject to the extralateral rights of subsequent valid apex locations.[8] Nonmineral patents, however, neither confer extralateral rights nor are made subject to extralateral rights by statute.[9] Consequently, disputes as to the exercise of extralateral rights may arise whenever nonmineral patents have been issued for land in the vicinity of either patented or unpatented lode claims.

Courts have approached such conflicts using the principle that the United States cannot convey what it no longer owns or what has been specifically reserved from transfer by statute.[10] The extralateral rights accompanying a valid mining location cannot be defeated by a subsequent nonmineral patent because the rights vested when the mining claim was perfected and from then on were not the government's to grant.[11] On the other hand, when a nonmineral patent has been issued prior to the perfection of a valid mineral location, unless miner-

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6 *See* § 37.02[2], *supra*.

7 While there is a presumption that patented nonmineral land does not contain an apex, the presumption is rebuttable, and patent proceedings establishing surface rights do not necessarily determine extralateral rights. *See* Butte & Superior Copper Co. v. Clark-Mont. Realty Co., 248 F. 609 (9th Cir. 1918), *aff'd*, 249 U.S. 12 (1919). *But see* Pacific Coast Mining & Milling Co. v. Spargo, 16 F. 348 (C.C.D. Cal. 1883), and Amador Medean Gold Mining Co. v. South Spring Hill Gold Mining Co., 36 F. 668 (C.C.D. Cal. 1888). Both cases hold that the extralateral rights of appropriators of veins apexing outside a patented claim apply only when the appropriator's claim was in existence at the time of entry and payment during patent proceedings.

8 *See* § 37.05[1], *supra*. *Cf.* Walrath v. Champion Mining Co., 171 U.S. 293 (1898) (a mineral patent is read as if the statute were written in it, whatever the terms of the patent may be).

9 *See* Empire Star Mines Co. v. Grass Valley Bullion Mines, 99 F.2d 228, 234 (9th Cir. 1939); Empire Star Mines Co. v. Butler, 72 Cal. App. 2d 466, 145 P.2d 49 (1944).

10 *See* Davis's Adm'r v. Weibold, 139 U.S. 507, 529-30 (1891) ("but if the lands patented were not at the time public property, having been previously disposed of, or no provision had been made for their sale, or other disposition, or they had been reserved from sale, the department had no jurisdiction to transfer the land, and their attempted conveyance by patent is inoperative and void"); Amador Medean Gold Mining Co. v. South Spring Hill Gold Mining Co., 36 F. 668, 669 (C.C.N.D. Cal. 1888) ("The United States can undoubtedly grant easements, and other limited rights, in any portion of the public lands, and subsequent purchasers must take them burdened with such easements or other rights, but when it has once disposed of its entire estate in the lands to one party, it can, afterwards, no more burden it with other rights than any other proprietor of lands."); Ames v. Empire Star Mines Co., 17 Cal. 2d 213, 110 P.2d 13, 16 (1941) ("Under the act they acquired legal title to such extralateral rights provided such rights had not been previously conveyed away by the government, for the Mining Act could not, of course, operate to divest private owners of existing vested rights.").

11 Hecla Mining Co. v. Atlas Mining Co., 92 Idaho 476, 445 P.2d 225, 227-228 (1968) (prior validly located claims which contained an apex carried extralateral rights as against subsequently issued nonmineral patent, and to the extent of conflict the nonmineral grant is void). *See* Ames v. Empire Star Mines Co., 17 Cal. 2d 213, 110 P.2d 13 (1941).

als were reserved or known to exist, the entire interest in the land vested in the patentee, and the subsequent mineral locator obtains no extralateral rights to minerals within the land.[12]

Nonmineral land grants and patents in the Western mining states generally reserve minerals to the United States, and it has been held that known minerals cannot pass in a nonmineral patent.[13] However, it is also a rule that, as against subsequent mineral locators, the absence of valuable minerals is conclusively established by the issuance of a nonmineral patent.[14] Therefore, a subsequent mineral locator cannot obtain extralateral rights in patented nonmineral lands by claiming that minerals were in fact known to occur at the time of patent.[15] A mineral locator who has perfected his claim prior to issuance of the nonmineral patent, however, will prevail on such a claim by virtue of the fact that his rights vested upon discovery of the minerals.[16]

Except for cases involving railroad patents,[17] the cases are not in agreement

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12 Amador Medean Gold Mining Co. v. South Spring Hill Gold Mining Co., 36 F. 668 (C.C.N.D. Cal. 1888); Reeves v. Oregon Explor. Co., 127 Or. 686, 273 P. 389, 391 (1929) ("The right of a junior lode claimant, whether his claim be patented or unpatented, to follow the dip of his vein into an adjoining patented or unpatented lode claim, is one which arises under the mining laws, and is confined to titles acquired under the mining laws, and has no application to a case where the vein of a lode claim on its dip extends to lands the title to which has been acquired under agricultural patents.").

13 Davis's Adm'r v. Weibold, 139 U.S. 507 (1891), Deffeback v. Hawke, 115 U.S. 392 (1885); Lonely v. Scott, 57 Or. 378, 112 P. 172, 174 (1910) ("The rule is, that a patent to government land transfers to the patentee all veins, lodes or other minerals, within its boundaries, unless such mineral deposits were known to exist at the time of the issuance of the patent, in which latter case the known mineral deposits do not pass by the patent.").

14 Burke v. Southern Pac. R.R., 234 U.S. 669, 691-92 (1914) ("when a patent issues it is to be taken . . . as affording conclusive evidence of the non-mineral character of the land"); Davis's Adm'r v. Weibold, 139 U.S. 507 (1891); Dredge v. Husite Co., 78 Nev. 126, 369 P. 2d 676, 682 (1962); Reeves v. Oregon Explor. Co., 127 Or. 686, 273 P. 389, 391 (1929).

15 *See* Burke v. Southern Pac. R.R., 234 U.S. 669, 692 (1914) ("Of course, if the land officers are induced by false proofs to issue a patent for mineral lands under a non-mineral land law, or if they issue such a patent fraudulently or through a mere inadvertence, a bill in equity, on the part of the Government, will lie to annul the patent and regain the title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers who had no interest in the land at the time the patent was issued and were not prejudiced by it.")

16 Helca Mining Co. v. Atlas Mining Co., 92 Idaho 476, 445 P.2d 225 (1968). *Accord* Ames v. Empire Star Mines Co., 17 Cal. 2d 213, 110 P.2d 13, 16 (1941) (an agricultural patent is conclusive as to the character of the land as against mining claims subsequently located, but such a patent, "issued merely on the basis of an ex parte hearing on behalf of the claimant to the land, can in no way abrogate the existing vested extralateral rights of parties who had nothing to do with the proceedings"); Chicago Quartz mining Co. v. Oliver, 75 Cal. 194, 16 P. 780 (1888).

17 Burke v. Southern Pac. R.R., 234 U.S. 669 (1914). *See* Wyoming v. United States, 255 U.S. 489 (1921). *See also* Northern Pac. Ry., 56 L.D. 201, 203 (1937) (the land department may inquire into the mineral character of railroad land at any time prior to the issuance of patent).

as to the date for determining when the rights of a nonmineral claimant vest so as to prevent subsequent mineral claimants from acquiring extralateral rights. Some cases hold that the date of issuance of the nonmineral patent controls,[18] while others follow the rule governing mineral patents and hold that the rights of the nonmineral claimant vest once he has done all that he was required to do to receive legal title.[19]

The specific language in the patents involved and the statutory authority for those patents are important in determining the relative rights of mineral and nonmineral patentees. Although most nonmineral grants and patents are in absolute terms and typically transfer to the patentee all unknown veins, lodes, and minerals within the boundaries of the land,[20] the language of a particular grant or patent should always be consulted for a reservation of minerals. In addition, the legislation authorizing the patent or grant should be consulted because the statute controls, and reservations required by statute are effective whether or not expressed in the patent.[21]

[3] Intersecting Veins

The Mining Law of 1872 provides that:

> Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of

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18 Davis's Adm'r v. Weibold, 139 U.S. 507 (1891) (the patent to a townsite location is conclusive as to the character of the land as against mining claims subsequently located); Reeves v. Oregon Explor. Co., 127 Or. 686, 273 P. 389, 392 (1929) (a patent issued under the Timber and Stone Act "is conclusive upon all third parties whose rights did not attach before a patent was issued"). In both bases a mineral entry was made subsequent to the nonmineral patent, and, therefore, it was unnecessary to hold that the nonmineral patentee's rights vested prior to patent issuing in order for the nonmineral patentee to prevail. The *Davis* case, however, states at p. 528 that, "proceedings for the acquisition of title to a mining claim within a townsite, commenced before the issuance of a townsite patent, could undoubtedly be prosecuted to completion afterwards," and also asserts at p. 521: "There must be some point of time, when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing patent." It is clear in *Davis* that the date of patent is considered the date when rights vest in a nonmineral patentee.

19 Wyoming v. United States, 255 U.S. 490 (1920) (nonmineral character of school grant lands determined and rights vested when lands selected even though minerals were subsequently discovered prior to issuance of nonmineral patent); Amador Medean Gold Mining Co. v. South Spring Hill Gold Mining Co., 36 F. 668, 669 (C.C.N.D. Cal. 1888) (the equitable title to agricultural lands vests in the purchaser immediately upon the lawful entry, payment of purchase money, and issue of certificate of purchase thereon and cannot be defeated by subsequent mineral grants). *See* § 12.02[5], *supra*.

20 Such purported grants are ineffectual against prior valid unpatented mining claims to the extent that extralateral rights in the claims are vested. Hecla Mining Co. v. Atlas Mining Co., 92 Idaho 476, 445 P.2d 225 (1968) (nonmineral patent purporting to grant all rights to the subsurface area, including mineral rights without regard to apexes of veins or lodes, did not negate vested extralateral rights).

21 *See* § 9.02, *supra*. See Chapter 9, *supra*, for comprehensive discussion of federal reserved mineral interests.

> intersection; but the subsequent location shall have the right-of-way through the space of intersection for the purposes of the convenient working of the mine.[22]

A basic difficulty in applying this statute is the wide variation and unconventional patterns of most veins and lodes which defy ready classification as intersecting or crossing veins.[23] The statute clearly applies where there is an intersection, which ideally involves the crossing of two vein segments resembling the letter "X," but this is in contrast to a uniting which involves three vein segments resembling the letter "Y."[24] A determination of intersection is always a question of fact which involves the position of the strike, dip, and other physical characteristics of the vein.[25] An intersection can exist within the meaning of the statute even though it is geologically impossible to tell one intersecting vein from the other, as when there is a difference in age and hence an uncertainty as to which vein in fact cuts across the other.[26] Exacting geological tests and determinations are unnecessary, however, in that title to the "ore or mineral contained within the space of an intersection" is granted by statute to the prior location.[27]

In considering the nature and extent of a junior locator's right of way through the "space of intersection," a question arises whether the statute applies to intersections on the strike as well as on the dip of a vein. The statute is clearly applicable to dip intersections. The senior locator takes the ore in the "space of intersection," subject to a right of way in the nature of an easement in the junior locator to go through the intersection[28] and take ore on the dip of his vein.[29] The latter's

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[22] 30 U.S.C. § 41 (1982).

[23] E. De Soto & A. Morrison, *Mining Rights on the Public Domain* 177, 178 (16th ed. 1936): "The U.S. Mining Acts concerning lode claims are based on the supposition or theory that a lode is a straight vein whose course can be redily ascertained and indicated by a straight line or a series of straight lines; and that occasionally such a vein is crossed by another in a similar straight line, merely requiring the right of way to give each claim its proper lode. But in fact the lode is rarely a straight line; it is seldom to be traced without confusion for more than a few hundred feet; and in its course other veins are absorbed into it; and offshoots (not only spurs, but perhaps better developed veins than itself) run about it; and in its extension downward, it invariably dips laterally; and often shows a fork of which both parts approach the surface; and it will divide, and may or may not unite at another point, and it will abut suddenly upon country rock and so be thrown far to one side; and instead of showing distinct lines, mineral veins are as irregular, as disproportioned in length and width, as much intermingled, though on a larger scale, as are the veins in a block of marble."

[24] *See* § 37.05[4], *infra*.

[25] *See* Empire Star Mines Co. v. Butler, 62 Cal. App. 2d 466, 145 P.2d 49, 62 (1944).

[26] *Id.* "[I]t seems apparent that, while the words 'intersect' and 'intersection' are used to describe the geological process by which one vein cuts across another of earlier formation, in which sense a time element inheres in the use of these words, that they were not used with that limited meaning in the statute. . . . The statute was designed to regulate subsurface ownership, rather than to describe geological development."

[27] *See id.* at 61-62.

[28] Twenty-One Mining Co. v. Original Sixteen to One Mine, Inc., 255 F. 658 (9th Cir. 1919); Watervale Mining Co. v. Leach, 4 Ariz. 34, 33 P. 418, 422 (1893) ("the ore within the space of intersection" is the body of ore contained within "the foot and hanging walls of one lode extended in a general course of that lode, and the foot and hanging walls of the intersecting lode extended upon its general course").

right is confined to a right of way to drift through, with no estate in, the vein crossed, and all ore must be left as the property of the crossed lode claimant.[30] It also seems clear that although the statute speaks of "two or more veins," the same rule applies to a dip intersection of two locations made upon different portions of one vein.[31]

With regard to the intersection of the strikes of two veins with conflicting locations made over each, there has been confusion as to the application of the statute. Early Colorado cases interpreted the statute to both grant a junior locator a right to the portion of his vein within the senior location's boundaries and a right of way for the purpose of its excavation.[32] The supreme courts of Arizona[33] and California[34] rejected the Colorado interpretation of the statute on the basis that under the Mining Law of 1872 the senior locator had by statute[35] already acquired the exclusive right to possess the ground covered by his location and all veins which apex within it. This approach was subsequently adopted by the Colorado Supreme Court in overruling its prior decision.[36] The court went on, however, to interpret "space of intersection" in the statute to mean the "intersection of the claims," and found that the statutory provision operates to reserve an easement that allows a junior locator a right of way across the senior location.[37] The decision was affirmed on review by the United States Supreme Court which agreed with the finding of a right of way but reserved its ruling as to its extent.[38]

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[29] Empire State-Idaho Mining & Dev. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 121 F. 973 (9th Cir. 1903); Davis v. Shepherd, 31 Colo. 141, 72 P. 57 (1903).

[30] Pardee v. Murray, 4 Mont. 234, 2 P. 16 (1882); Watervale Mining Co. v. Leach, 4 Ariz. 34, 33 P. 418 (1893); Wilhelm v. Silvester, 101 Cal. 358, 35 P. 997 (1894); Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 27 Colo. 1, 59 P. 607 (1899), *aff'd*, 182 U.S. 499 (1901).

[31] *See* G. Costigan, *Mining Law* § 120 (1908), "The principle of the statute covering lodes crossing on the dip is applied, on the theory that the statute is simply declaratory of that law of mining which would apply in the absence of a statute."

[32] Hall v. Equator Mining Co., 11 F. Cas. 222 (C.C.D. Colo. n.d.) (No. 5,931); Branagan v. Dulaney, 8 Colo. 408, 8 P. 669, 671 (1885). *See also* Pardee v. Murray, 4 Mont. 234, 2 P. 16 (1882).

[33] Watervale Mining Co. v. Leach, 4 Ariz. 34, 33 P. 418, 422 (1893) ("The statute does not in any place contemplate a crossing of locations.").

[34] Wilhelm v. Silvester, 101 Cal. 358, 35 P. 997, 998 (1894) (inclining towards the view that the statute only applies to intersections on dip).

[35] 30 U.S.C. § 26 (1982).

[36] Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 27 Colo. 1, 59 P. 607, 613, 616 (1899).

[37] *Id.* at 615.

[38] Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 182 U.S. 499, 505 (1901): "Section 2336 [30 U.S.C. § 41] does not conflict with § 2322 [30 U.S.C. § 26], but supplements it. Section 2336 imposes a servitude upon the senior location, but does not otherwise affect the exclusive rights given the senior location. It gives a right of way to the junior location. To what extent, however, there may be some ambiguity; whether only through the space of the intersection of the veins, as held by the Supreme Courts of California, Arizona and Montana, or through the space of intersection of the claims, as held by the Supreme Court of Colorado in the case at bar. It is not necessary to determine between these views. One of them is certainly correct, and therefore the contention of the plaintiff in error is not correct, and, more than that, it is not necessary to decide on this record."

[4] Uniting Veins

The Mining Law of 1872 provides that "where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."[39] It has been uniformly ruled in vein junction cases that the senior locator takes the entire vein below the point of union,[40] including forks and other splits below the junction into which the vein might later divide.[41] The rule of priority of location applies even though a junior locator has been granted a prior patent.[42] If two veins unite on their dip and enter into a third mining claim, the third claimant has no right to the veins.[43]

Whether a junction actually exists is a question of fact, and the same considerations apply as for intersections.[44] Sufficient doubt as to the existence of a junction will defeat the assertion that there is one, and it is not necessary to show as a defense that the vein structure is an intersection or otherwise.[45] If a junction is shown to exist, however, the junior locator may take the ore in his vein to the boundary of the union, and there is no duty to leave a barrier of ore for the convenience of the senior locator.[46] The statute's provision does not apply to veins uniting on the strike, and such veins belong to the senior location in which they apex.[47]

[5] Conflicts on Different Portions of the Same Vein

Two or more mining claims may be staked upon a single vein without conflicting because their end lines may be placed so that, when projected in the direction of the dip, they do not cross and include extralateral territory belonging to the other claim. Conflicts as to extralateral rights on a single vein can arise,

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39 30 U.S.C. § 41 (1982).

40 Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 182 U.S. 499 (1901); Little Josephine Mining Co. v. Fullerton, 58 F. 521, 522 (8th Cir. 1893); Consolidated Wyo. Gold Mining Co. v. Champion Mining Co., 63 F. 540 (C.C.N.D. Cal. 1894); Watervale Mining Co. v. Leach, 4 Ariz. 34, 33 P. 418 (1893); Wilhelm v. Silvester, 101 Cal. 358, 35 P. 997 (1894); Stinchfield v. Gillis, 96 Cal. 33, 30 P. 839 (1892); Rico-Argentine Mining Co. v. Rico Consol. Mining Co., 74 Colo. 444, [illegible] P. 31 (1923).

41 Empire Star Mines Co. v. Butler, 62 Cal. App. 2d 466, 145 P.2d 49, 56-57 (1944).

42 *See* Champion Mining Co. v. Consolidated Wyo. Gold Mining Co., 75 Cal. 78, 16 P. 513 (1888). *See also* Little Josephine Mining Co. v. Fullerton, 58 F. 521 (8th Cir. 1893); Consolidated Wyo. Gold Mining Co. v. Champion Mining Co., 63 F. 540 (C.C.N.D. Cal. 1894); Lee v. Stahl, 13 Colo. 174, 22 P. 436 (1889); Anaconda Copper Mining Co. v. Pilot-Butte Mining Co., 51 Mont. 443, 153 P. 1006 (1915).

43 Roxanna Gold Mining & Tunneling Co. v. Cone, 100 F. 168 (C.C.D. Colo. 1899).

44 *See* § 37.05[3], *supra*.

45 Clark-Mont. Realty Co. v. Butte & Superior Copper Co., 233 F. 547, 559 (D. Mont. 1916). *See also* Keely v. Ophir Hill Consol. Mining Co., 169 F. 601 (8th Cir. 1909).

46 Empire Star Mines Co. v. Butler, 62 Cal. App. 2d 466, 145 P.2d 49, 82-83 (1944).

47 Book v. Justice Mining Co., 58 F. 106 (C.C.D. Nev. 1893); Lee v. Stahl, 13 Colo. 174, 22 P. 436 (1889).

however, if the end lines of two locations are laid at such angles to each other that their extensions in the direction of the dip cross each other. This may occur if the strike of the vein is iregular, or even if the strike is straight if the end lines of the locations are laid at an angle, perhaps because the direction of the strike was misapprehended.

The general rule applicable to the crossing of extralateral rights on the dip of a vein is that priority of location governs as to the conflict area, so the senior locator prevails.[48] It is also recognized that a junior locator has the right to follow his vein to the point of conflict, that he has an easement through the conflict area, and that he is entitled to extralateral rights in the extension of his vein beyond the point of conflict.[49] This is true even when a junior locator's extralateral plane of rights is wholly bisected by the senior locator's extralateral plane.[50] The right of a junior locator to his vein beyond the conflict area obtains from a literal reading of the statute that possessory rights in veins are granted "throughout their entire depth" between the end lines of a location.[51] While an easement through the conflict area is not given by the statute, granting such an easement is consistent with the portion of the statute applicable to cross lodes,[52] providing the same result for one vein as for two.

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48 Argentine Mining Co. v. Terrible Mining Co., 122 U.S. 478 (1887). *See* § 37.05[3], *supra*.

49 Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Dev. Co., 134 F. 268 (C.C.D. Idaho 1903); Empire State-Idaho Mining & Dev. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 121 F. 973 (9th Cir. 1903); Empire State-Idaho Mining & Dev. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 114 F. 417 (9th Cir. 1902). *Accord* Davis v. Shepherd, 31 Colo. 141, 72 P. 57 (1903).

50 Empire State-Idaho Mining & Dev. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 121 F. 973, 976 (9th Cir. 1903).

51 30 U.S.C. § 26 (1982). Even if it were supposed that the junior locator has no right of easement through the conflict area, that would be a mere inconvenience to the junior locator and not a limitation upon his title beyond the area of conflict.

52 *See* § 37.05[3], *supra*. The easement granted by the statute in the case of cross lodes, or intersecting veins, is declaratory of the mining law and "would probably be recognized in the absence of a statute. . . ." Empire State-Idaho Mining & Dev. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 121 F. 973, 977 (9th Cir. 1903). Since the government owns title to all of the land and all of the vein, grants of a portion to *A* and a subsequent portion to *B* would be subject to the rule relative to private conveyances that a right of access is reserved even though not explicitly stated. *See* Montana Mining Co. v. St. Louis Mining & Milling Co., 204 U.S. 204, 218 (1907).

IN THE HOUSE BY DUNCAN

HOUSE BILL NO. 273

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to extralateral rights of federal lode mining claims."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 38.05 is amended by adding a new section to read:

Sec. 38.05.252. EXTRALATERAL RIGHTS UNDER SHORE, TIDE, AND SUBMERGED LAND. (a) An owner of a lode mining claim located before January 3, 1959 under the mining laws of the United States ~~is granted~~ extralateral rights under shoreland, tideland, and submerged land ~~subject to AS 38.05.275~~ are confirmed and granted to

(b) In this section, "extralateral rights" means rights given to an owner of a mining claim under 30 U.S.C. 26 to follow, and mine, any vein or lode the apex of which lies within the boundaries of ~~the~~ location of the surface of the mining claim, notwithstanding the course of the vein or lode on its dip or downward direction may so far depart from the perpendicular as to extend beyond the planes which would be formed by the vertical extension downwards of the sidelines of the location.

14-0886
Moen
3/13/85

IN THE SENATE BY THE RESOURCES COMMITTEE

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to extralateral rights of federal lode mining claims."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 38.05 is amended by adding a new section to read:

Sec. 38.05.252. EXTRALATERAL RIGHTS UNDER SHORE, TIDE, AND SUBMERGED LAND. (a) Extralateral rights under shoreland, tideland, and submerged land are confirmed and granted to an owner of a lode mining claim located before January 3, 1959 under the mining laws of the United States.

(b) In this section, "extralateral rights" means rights given to an owner of a mining claim under 30 U.S.C. 26 to follow, and mine, any vein or lode the apex of which lies within the boundaries of the location of the surface of the mining claim, notwithstanding that the course of the vein or lode on its dip or downward direction may so far depart from the perpendicular as to extend beyond the planes which would be formed by the vertical extension downwards of the sidelines of the location.

WORK ORDER REQUEST FORM

14 - 0886

KEYWORDS: mines/minerals

lands

ASSIGNED TO Moen

REQUEST FOR: BILL [X] RESOLUTION [ ] RESEARCH [ ] OTHER [ ]

SUBJECT Extralateral rights - lode mining claims

REQUESTED FOR Sen. Resources Com. BY Sen. Resources Com EXT.

* DELIVER TO Sen. Sturgulewski TAKEN BY Moen

INSTRUCTIONS, EXPLANATIONS Do a draft bill for Senate Resources Committee

presented after HB 373 with the attached changes.

OBTAIN

SPECIAL DRAFTING INSTRUCTIONS ATTACHED [ ]

AUTHORIZED TO CONFER WITH

RETURN

TO REQUESTER

APPROVED: SGB Director, Legal Services

REVIEWED

IN 03/12 DUE

TYPED - Draft DATE

Final DATE

PROOFED DELIVERED

SPECIAL INSTRUCTIONS TO TYPIST/PROOFREADER

DRAFT [X] FINAL [ ]

LA-L 10

AS 27.10.075 Extralateral Rights.

(a) The State of Alaska hereby confirms and grants to the owners of federal lode mining claims located prior to January 3, 1959, extralateral rights under shorelands, tidelands, and submerged lands.

(b) In this section,

(1) "extralateral rights" means the rights provided for under 30 U.S.C. § 26 which arise because the top or apex of a vein, lode, or ledge lies within a federal lode mining claim;

(2) "shorelands," "tidelands," and "submerged lands" have the meanings assigned to them in AS 38.05.965.

14-0800
Moen
3/5/85✓

IN THE HOUSE BY DUNCAN

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to extralateral rights of federal lode mining claims."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 38.05 is amended by adding a new section to read:

Sec. 38.05.252. EXTRALATERAL RIGHTS UNDER SHORE, TIDE, AND SUBMERGED LAND. (a) An owner of a lode mining claim located before January 3, 1959 under the mining laws of the United States is granted extralateral rights under shoreland, tideland, and submerged land, subject to AS 38.05.275.

(b) In this section, "extralateral rights" means rights given to an owner of a mining claim under 30 U.S.C. 26 to follow, and mine, any vein or lode the apex of which lies within the boundaries of the location of the surface of the mining claim, notwithstanding the course of the vein or lode on its dip or downward direction may so far depart from the perpendicular as to extend beyond the planes which would be formed by the vertical extension downwards of the sidelines of the location.

Summary Explanation of Proposed Extralateral Rights Legislation

The doctrine of extralateral rights originated under the Federal Mining Law of 1872 and provides that the owner of a federal lode mining claim is entitled to follow a vein downward outside the vertical boundaries of his claim if the top or apex of the vein is within his claim. The doctrine only relates to the title to the minerals contained in the specific vein. It does not entitle the owner to any surface use outside his claim, does not relieve the owner from obtaining all the necessary permits required by law before conducting operations, and does not apply to placer claims. The doctrine of extralateral rights has been around for over 100 years and is clearly applicable to all uplands in the United States, including Alaska. The law is not clear, however, on whether the doctrine applies to lands underneath navigable waters, such as tidelands and submerged lands.

The purpose of the proposed legislation is to clarify the law in Alaska and confirm that owners of federal lode mining claims located prior to statehood are entitled to extralateral rights under shorelands, tidelands, and submerged lands. This will ensure that the owners of such claims have secure title to these deposits so that they may obtain the necessary development financing.

The principal areas in the state which will be affected by this legislation are Southeast and Prince William Sound, although the legislation will also have some impact on the Interior and other regions where veins may trend under bodies of navigable water.

JPT:029

DRAFT
2/25/85
#4972W

AS 27.10.075 Extralateral Rights.

(a) The State of Alaska hereby confirms and grants to the owners of federal lode mining claims located prior to January 3, 1959, extralateral rights under shorelands, tidelands, and submerged lands.

(b) In this section,

(1) "extralateral rights" means the rights provided for under 30 U.S.C. § 26 which arise because the top or apex of a vein, lode, or ledge lies within a federal lode mining claim;

(2) "shorelands," "tidelands," and "submerged lands" have the meanings assigned to them in AS 38.05.965.

DRAFT
2/25/85
#4972W

ALTERNATE NO. 2

AS 27.10.075 Extralateral Rights.

(a) The State of Alaska hereby confirms and grants to the owners of federal lode mining claims located prior to January 3, 1959, extralateral rights under shorelands, tidelands, and submerged lands.

(b) In this section,

(1) "extralateral rights" means the rights provided for under 30 U.S.C. § 26 which arise because the top or apex of a vein, lode, or ledge lies within a federal lode mining claim;

(2) "shorelands," "tidelands," and "submerged lands" have the meanings assigned to them in AS 38.05.965.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

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May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

SENATE RESOURCES COMMITTEE, 4/1/85, 1:35
" " , 4/24/85, 1:10

DRAFT
2/25/85
#4964W

ALTERNATE NO. 1

AS 27.10.075 Extralateral Rights. The State of Alaska hereby confirms and grants to the owners of federal lode mining claims located prior to January 3, 1959, extralateral rights under shorelands, tidelands, and submerged lands as the terms are defined in AS 38.05.965.

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

11/24/89
Date

02-519 (REV 8/78)

SB

241

DELIVER TO: JPOM

ORIGINAL
SENT: 03/26/85 TIME: 10:41
FROM: MARTIE ROZKYDAL
SUBJECT: POM - MATR-0132
PRINT DATE: 03/26/85 TIME: 10:41

TO: SENATORS STURGULEWSKI, FAHRENKAMP, COGHILL, ELIASON, V. FISCHER, HALFORD-AND ZHAROFF

FROM: WYVON WRIGHT
BOX 3
PALMER 99645
745-3655

RE: SB 241, PREDATOR CONTROL

THIS IS A PROTEST TO SENATOR COGHILL'S BOUNTY BILL. I AM OPPOSEDTO A BOUNTY OR ANY STATE MONEY BEING USED IN ANY WAY FOR ANY KIND OF TRAINING FOR KILLING WOLVES. PLEASE SUPPORT SB 62 IN SEN. VIC FISCHER'S ORIGINAL BILL.

SB 241

Most hearing speakers against aerial wolf hunts

By PETER PORCO
Daily News reporter

Aerial wolf hunting in Alaska was attacked as "ludicrous" and a "black eye" for Alaska, and defended as an efficient way to regulate Interior moose and caribou populations during a state Board of Game public hearing Friday.

A small parade of witnesses at the Hotel Captain Cook calmly and earnestly voiced their opinions on a series of proposed regulations put before the board; most speakers opposed the state's aerial wolf-hunting program.

The proposals cover several wolf-control programs in a handful of Interior game management units and ways to implement them, including aerial gunning and the use of radio collars.

Aerial shooting of wolves in Alaska by the state Department of Fish and Game was discontinued in February after a ruling by the Federal Communications Commission that the use of radio collars to track wolves in order to kill them violated provisions of the ADF&G permit.

The new proposals, in effect, have put the entire Alaska wolf-control program on the table for reconsideration by the Board of Game. The Game Division of ADF&G has advised the board on several methods of controlling wolf populations besides aerial gunning, including improving moose habitat, relocation of wolves, sterilization, poison, public shooting, trapper incentives, and others.

Alan Gaddie of Anchorage told the board he opposes gunning of wolves from planes.

"I have no close association with any political groups," Gaddie told the board. "I have no vested interest. I try to read every side. I don't want to be tagged as a knee-jerk, been-here-only-one-year urban greenie.

"I'm a schoolteacher and I have three businesses.

"I love Alaska and I'm going to be here until I die. But I'm real concerned about aerial wolf hunting. I'm against wolf control."

Board member Joel Bennett of Juneau saw a distinction in Gaddie's comments between the issue of predator control in general and aerial gunning of wolves.

"Is that your genuine feeling?" Bennett asked Gaddie. "Is (the aerial program) something that doesn't sit right?"

"It doesn't sit right," Gaddie answered. "I'm not emotional, but it doesn't seem to make sense on what the policy is doing to Alaska's image around the world."

One of the few witnesses who favored the state's wolf control policies was Tom Scarborough, a consulting engineer and the chairman of the Fairbanks advisory committee.

Scarborough said his committee opposed most of the wolf proposals simply because, "We want to stay with the status quo (aerial hunting)."

Scarborough said he's testified for the last 15 years in favor of wolf control "because there are certain populations in the state with one moose for every 10 square miles — the Tok area, for instance."

Scarborough has been a hunter since he was a child, he said. "My kids were raised on moose."

He stressed, however, that he's "not a hunter of horns. The guides would call me a meat hunter. You'll find most resident hunters are in my situation. You'll find a moose is worth a lot of money (in meat value)."

Scarborough said aerial trapping of wolves has worked in certain portions of game unit 20A and showed up through increased caribou and moose populations.

"The surviving calf rates in the spring rose dramatically from about 15 to 60 percent," he said, during the years the program was in effect, from the late 1970s to the early 1980s.

"You see immediate results. The other result you'll see is a growing wolf population" because larger herds of moose and caribou can support more wolves.

By contrast to 20A, Scarborough said, the moose population in unit 20E, where no aerial hunting was applied, is "extremely depressed. There shouldn't even be a (hunting) season."

The board will continue to hear public testimony today starting 9 a.m. in the Endeavor Room.

Times 3-23-85

Petition challenges wolf hunts

by Christopher Jarvis
Times Writer

The state is violating a 1983 court ban on aerial wolf kills by disguising it with legal "land-and-shoot" trapping, an attorney for the Alaska Wildlife Alliance said Friday.

In a lawsuit filed Friday in Anchorage Superior Court, attorney Edgar Paul Boyko asked to reopen a lawsuit from July. That lawsuit was dismissed when the state agreed to end the aerial wolf population control program until new regulations governing such programs could be developed.

The alliance, a wildlife preservation group, and some traditional wolf hunters also are seeking a

Petition opposes wolf hunt
— page A-8

temporary restraining order to prevent further aerial trapping — also known as "land-and-shoot" wolf hunting.

The lawsuit claims that "by indirection, evasion and through perceived legal loopholes," the state has subverted and defeated the intent of the December 1983 court order to stop aerial wolf population control until regulations are adopted. The Board of Game approved regulations for areas near Fairbanks in April but a general moratorium on the state program was ordered in February.

The Wildlife Alliance lawsuit says the state is permitting the wolf population to be severely reduced by allowing private hunters to spot wolves from the air, land and then kill them.

The state's aerial wolf hunts ended in late December when the Federal Communications Commission ruled the use of radio collars to track wolves for population control was illegal. But the

See Aerial, page A-8

c.1985, Gordon Haber

A wolf pack feeds on a moose in the Denali National Park region in the shadow of wildlife scientist Gordon Haber's observation airplane. Haber says Interior wolf packs have learned to flee in panic at the approach of low-flying planes, which often carry aerial hunters. The wolves shown above are in a protected region.

3-23-85

Aerial wolf trapping hearing

Continued from page A-1

hunts continue, the alliance claims, because the population control programs are "euphemistically called aerial trapping or land-and-shoot hunting," which is legal.

Game Director Lew Pamplin of the Department of Fish and Game said that while the charges sound serious, the allegations probably have little merit. Pamplin said he has not yet had an opportunity to review the lawsuit.

A public hearing on aerial hunting for wolf population management began Friday and continues today. Environmental groups say they will demonstrate against resumption of aerial hunting this morning outside the Hotel Captain Cook, where the board is meeting.

Hunters "haven't broken any law," Pamplin said, noting that aerial trapping has been allowed under state law for years.

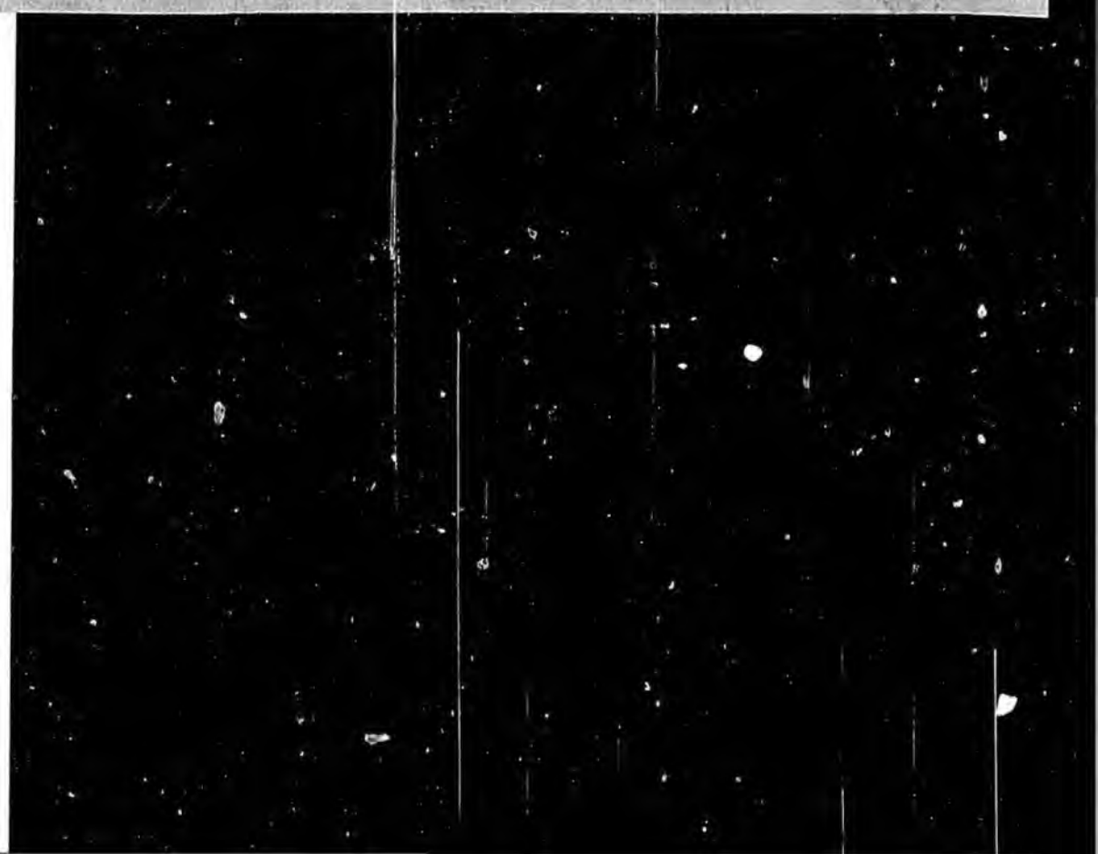
"It's not something we just dreamed up," to control wolf populations, he said. "Land and shoot wouldn't accomplish (population) control anyway."

The lawsuit asks that hunters pay the state the value of wolf pelts taken by aerial trapping. It also asks trapping be done only with conventional traps or snares and that automatic or semi-automatic firearms in either hunting or trapping of wolves never be used again.

The state has been "encouraging private people to do the dirty work," Boyko said.

Wildlife scientist Gordon Haber called aerial trapping "double-speak."

According to the lawsuit, "the only issue is that of making the government bureaucrats . . . obey the laws which they are sworn and paid to enforce."



6

DELIVER TO: JPOM

ORIGINAL
SENT: 03/21/85 TIME: 10:58
FROM: LIODJT
SUBJECT: POMS
PRINT DATE: 03/21/85 TIME: 10:59

DELTA POMS

FROM: TOM DOWLING,2465 MILLTAN ROAD,DELTA JUNCTION, ALASKA 99737

TO: SEN. V. FISCHER,HALFORD,STURGULEWSKI,FAHRENKAMP,ZHAROFF

RE: SB 241

I AM ADAMANTLY OPPOSED TO SEN. COGHILL'S SB 241. THE REAL PROBLEM IS 500,000 PEOPLE PUTTING PRESSURE ON MOOSE AND CARIBOU, NOT THE WOLVES TRYING TO SURVIVE. LAY OFF THE WOLVES.

DELIVER TO: JPOM

ORIGINAL
SENT: 03/21/85 TIME: 10:58
FROM: LIOA
SUBJECT: BOM
PRINT DATE: 03/21/85 TIME: 10:58

21

TO: ALL SENATORS

FROM: MARILYN HOUSER
2411 INGRA
ANCHORAGE, AK. 99508
PHONE 278-2122 HM 274-6524 WK

RE: SB 241-WOLF BOUNTIES

INSTITUTION OF BOUNTIES WILL [illegible] THE EXTRIPATION OF WOLVES IN ALASKA WHICH EVEN ADF AND G O [illegible]. ADF AND G DOESN'T EVEN HAVE WOLF POPU'ATION DATA. PLEASE DON'T ALLOW SUCH ARCHAIC PRACTICES TO RETURN TO ALASKA. BOUNTY PROGRAMS ARE DIFFICULT TO MONITOR AND WILL BE COSTLY TO ALASKA'S TREASURY, PUBLIC IMAGE AND WILDLIFE.

Board studies wolf report

Times 3-22-85

by Mary Scarpinato
Times Writer

Aerial shooting and poisoning are apparently the most effective methods for controling wolves and protecting moose populations from these predators.

Sterilization of wolves is another method that deserves study.

A bounty system, such as the recent legislative proposal for a $250 payment per wolf kill, would probably have little success.

These are among report findings on possible alternatives to aerial wolf hunting. The report was to be presented here today at a meeting of the Alaska Board of Game.

The board is expected to decide next week whether to allow resumption of the aerial hunts — a highly controversial topic for environmentalists, hunters and wildlife managers.

A public hearing on the issue also is scheduled to begin today and will resume at 9 a.m. Saturday.

The board called a moratorium on aerial hunts in December, when the Federal Communications Commission halted the use of radio collars to track the wolves to kill. Animal protectionists complained that the broadcast license for such collars is restricted to research projects.

In its considerations, the board must also determine if aerial hunts can be effective without the use of radio collars. The animals are collared by

See Wolf, page B-3

Wolf report tells alternatives

Continued from page B-1

game officials for a variety of purposes.

The report on alternatives to aerial hunting was prepared at the board's request by the Game Division of the state Department of Fish and Game.

It included these findings:

• Aerial hunting results in the past have varied "but generally the level of wolf harvests increased . . . Departmental costs to administer such a program are relatively low.

"A disadvantage, similar to bounties, is there is little field monitoring of actual take by the public, thus there is a potential for abuse whereby wolves could be taken from locations other than the specified control areas."

• Poisons can be very effective, but they also can kill or harm other species.

• Female animal sterilization is a research project being considered by the department. But this would be dependent on available funding and staffing for such a project. Also, three to five years would be needed to compile sufficient data on its success potential.

• Bounty programs have not proven very effective in increasing the level of predator harvests. Another option of hiring expert trappers or training and assisting local trappers would be costly.

• Capturing and relocating wolves would be a complicated and costly alternative, and not very promising within the state as most suitable habitats here already are supporting acceptable wolf population levels.

The state has a standing offer to send wolves to other states (the animals are endangered in all states but Alaska) if the other states or some organization would pay the expense. To date, no state has accepted the offer.

• Hunting seasons and bag limits on moose already are reasonably restrictive, and on wolves they are now considered liberal. Further changes would not have any significant impact.

The report discounted the practicality of attempting to enhance moose habitats in this state.

Enhancement is typically accomplished by increasing a species' feed supply, which for moose is mainly tender vegetation.

Tractor plowing and selective cutting could be used among the more mature tree stands to allow newer growth for feeding, but this can be expensive. Prescribed burns could be used, but these may have control problems.

"In much of Interior Alaska, habitat quality or quantity are not factors currently limiting moose populations," the report concluded. "There is presently more habitat available for moose than there are moose to utilize it."

Biologist submits anti-hunt petition

by Mary Scarpinato
Times Writer

Calling Alaska's wolves a "national treasure — not just a resource to be exploited by a few greedy individuals," a wildlife biologist presented the state Board of Game with a 14,000-signature petition against aerial wolf hunting.

Albert Manville handed the board the petition with signatures from across the United States and Canada, on behalf of the Defenders of Wildlife.

The state constitution "requires that resources be managed for all the citizens, not just a minority (of hunters and trappers)," he said.

Manville traveled from the organization's Washington, D.C. headquarters to testify Friday against resumption of aerial wolf hunts as part of the state's animal control program.

A general moratorium is in effect on the state's hunt method.

The public hearing continues today at the Hotel Captain Cook. The board is expected to rule on the matter later in the week.

Board Chairman Brenda Johnson listened to Manville's testimony, then noted that many Alaskans in remote areas cannot afford costly food shipments and rely on healthy moose herds to hunt for their daily nutrition.

Wolves, a main predator of moose, are sometimes hunted by the state in an effort to protect moose populations.

"How can we sit here as a board and not do something to help other people who are also part of the universe?" Johnson asked Manville.

Manville responded that his organization recognized that "certain emergency situations" might exist. It is primarily concerned with pressure for more predator control from recreational moose hunters, he said.

Manville's group "would not approve but it would not oppose" short-term control programs in emergency cases when subsistence hunters' food supply was at stake, he said.

However, Manville said the effectiveness of aerial hunting as a predator control is not supported by scientific argument.

Factors such as mild or harsh winters contribute to the balance of wolf populations, he said, and past experience with aerial hunts show the method provides only temporary management solutions.

Mike Lannigan, who spoke on behalf of the Copper Basin Sportsmen's Association, said he had no proposal of his own to offer on the issue. But he added that when control measures are limited to emergency situations, "often it's too late and the damage is already done."

Lannigan said it was "ridiculous to attempt to control" game officials' wildlife management goals. "We pay them to manage our resources, so let's let them do it."

Cliff Eames, representing the Alaska Center for the Environment, said that his organization "favors a policy of maintaining a natural diversity" and not selecting the survival of one species over another.

Eames said the center also recognized that threat to subsistence hunters' survival at times may require emergency measures.

But to use aerial hunting as a method to do this, he said, "is clearly counter to the standards of fair chase we all say we believe in."

LACHER: Her style draws admirers, critics

Continued from Page B-1

the 1985 mayoral race. "She would tend to butt heads in a confrontational manner."

"She's aggressive," agreed Assemblyman John Musgrove, who also served with her. "Sometimes too much. She sure could cause an awful rumpus."

Lacher came to Alaska when she was 12, the product of a broken home. That situation is largely responsible for her attitudes about a strong family and establishing roots, she says, and is one she can't discuss to this day without her voice cracking. She attended local schools, at 17 married her high school sweetheart, Bob Lacher, and started raising children.

Since then she has owned a beauty shop — Bessie's Beauty Bar — a motorcycle parts store, driven a school bus and currently is the co-owner and manager of Alaska First Title insurance agency.

"She's a modern-day phenomenon," Alford said.

Lacher's political evolution was undramatic. Her family never talked politics and she never envisioned she'd be involved. Her early influences were bi-partisan, and she says Barry Goldwater, Lyndon Johnson and John Kennedy all sparked her equally. But beliefs "most Americans felt strongly about" generally held sway and she found herself more often aligned with the Republican Party.

She ran successfully for the borough assembly in 1981 after watching what she says was an arrogant indifference to constituents from members of that body. The realization that "things needed to be said" prompted her run for the House the next year, a race she also won.

But her sights were set higher, and in 1984 she took on 22-year incumbent Kerttula. Today she talks about that campaign as a victory.

"The race against Kerttula was successful," she says. A "nobody" who came within 1,000 votes of someone as powerful as Kerttula after being outspent in the campaign cannot be described as a loser, she says. She has no regrets.

The loss the next year to Jones, however, hurt. Running for borough mayor was a "terrible mistake," she says now, one that she made only because her supporters urged her to. Again, her voice cracks.

But even with two losses behind her, she is running again, becoming a perennial candidate. She's running not to fulfill an ambition or gain power, she says, but solely for altruistic reasons.

"You can do more public good as a senator than you can as a private individual," she says. "How can you not be involved when there's so many important issues?"

But such sentiments may not be enough.

"Our graveyards are filled with people who have thought they were indispensable to the public good," said Kay Bills, vice chairman of the Valley Democratic party.

"Already I've had people say to me they're not going to vote for her because she's been defeated twice," Jones said. "And those are far more politically astute people than I am."

Democrats are delighted at the prospect of Lacher as an opponent, according to Bills.

"She's an ideal candidate," she said. "We were hoping she would come out. She's the best thing for organizing Democrats in the Valley."

Lacher is known for personal attacks, using innuendo and running a negative campaign, Bills said, factors that can only work to her opponents' advantage.

But Lacher is misperceived, her friends say, and there is a side to her the public never sees. The real Barbara, they say is the one who spends every Sunday with her family, who cares deeply about people, who is intensely loyal to the Valley, and who is a tremendous problem solver and astute businesswoman.

"She's a symbol for other women," Alford said. "I'm amazed at what she has done with her own life. Every year has been a giant step forward."

Timber, agriculture interests clash over Susitna forest use

By CHRIS GEIGER
Daily News reporter

3/12/86

WASILLA — Hoping to stimulate Alaska's fledgling timber industry, the governor's office and state Division of Forestry have proposed creating a half-million-acre state forest in the Susitna Valley.

The scattering of parcels involved stretches from Petersville to Mount Susitna, from Skwentna to the upper Kashwitna River. A mixture of swampy meadows and forest stands, about one-third of the land holds commercial-grade timber.

The bill creating the state forest — originally introduced last spring — resurfaced Monday for hearings in the Senate Resources Committee. But if the hearing was any indication of things to come, the state forest issue may pit Alaska's fledgling agriculture and logging industries against each other in a competition for land.

The Alaska Farmers and Stockgrowers Association and the Matanuska-Susitna Borough's Agriculture and Forestry Advisory Committee opposed the bill at the hearing, decrying it as an unnecessary "lockup" of state lands.

State foresters, however, said the state needs to designate land for future timber production if loggers are to invest in long-term, large-scale timber harvests.

Under state forest designation, lands are managed on a "multiple use" basis. Multiple use management allows for grazing, mining, recreation, and wildlife and watershed preservation areas — but not agriculture.

It is the exclusion of agriculture that farmers oppose, according to Jerry Giaugue, president of the Alaska Farmers and Stockgrowers Association. The association's Southcentral chapter passed a resolution against the proposal at its meeting last week, he said.

Giauque and others at the hearing cited passages in the state constitution that call for the state to encourage settlement of its land. Setting aside state forests contradicts this goal, they said.

"Loggers need to know there's going to be trees 50 years from now, but the people of Alaska need to know there's going to be agricultural land in 50 years, too," Giauque said.

Most of the proposed state forest was previously outlined in the Susitna Area Plan, a land-use plan for state holdings completed last June.

Proponents of the state forest argue that the plan already set aside the best land in the basin — about 26,000 acres — for agricultural disposals. Another 82,000 acres of prime land are reserved for future land disposals, and an additional 150,000 acres of remote areas are designated "resource management" areas, which could some day be used for agriculture.

Borough Forester Zane Cornett said the state forest is a "direct product of the Susitna Area Plan," which was three years in the making. If critics are going to make an issue out of something that's a product of the plan, he said, they might as well throw the whole plan out.

"I don't think anybody wants to start over again," Cornett said.

Delon Brown, a member of the agriculture and forestry committee, said only foresters believe creation of a state forest is necessary yet. The state should consider giving more land to private control

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