IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

Appeal No. 26982

PETE LIEN & SONS, INC.,

Plaintiff/Appellee,

vs.

STEVE ZELLMER; CESAR CONDE; SUNSET PROPERTIES, LLC, a Colorado limited liability company; GCC OF AMERICA, INC., a Delaware corporation; and GCC DACOTAH, INC., a South Dakota corporation,

Defendants/Appellants.

ON APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

The Honorable Randall L. Macy,
Circuit Court Judge, Presiding

Notice of Appeal filed February 7, 2014

APPELLANTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

(Statutes:)

Secondary Authorities:

PRELIMINARY STATEMENT

Plaintiff/Appellee Pete Lien and Sons, Inc., will be referred to as "PLS," and Defendants/Appellants Steve Zellmer, Cesar Conde, Sunset Properties, LLC, GCC of America, Inc., and GCC Dacotah, Inc., will be referred to as "GCC" or "Defendants." Citations to the certified record shall be designated as "R" followed by the page number(s) assigned by the Lawrence County Clerk of Courts. The entries and exhibits in the Appendix will be designated as "App" followed by the appropriate page number(s). Citations to the transcript of the summary judgment hearing will be "HT" followed by the appropriate page number(s). The Fourth Judicial Circuit in Lawrence County will be referred to as the "trial court." Citations to the trial court's Memorandum Decision filed December 10, 2013, (R 434) shall be designated as "MD" followed by the appropriate page number.

JURISDICTIONAL STATEMENT

GCC appeals from a Memorandum Decision and Order Granting PLS Motion for Summary Judgment and denying GCC's Motion for Summary Judgment dated December 10, 2013, (R 434, App 1) along with the Judgment filed January 2, 2014 (R 446, App 10). PLS gave Notice of Entry of the Judgment on January 9, 2014. (R 448) GCC filed a timely Notice of Appeal on February 5, 2014. (R 450)

STATEMENT OF THE ISSUES

1. **WHETHER THE TRIAL COURT ERRED IN DECIDING THAT DEFENDANTS' FOURTEEN PLACER MINERAL CLAIMS ON 280 ACRES OF U.S. FOREST SERVICE PROPERTY IN LAWRENCE COUNTY, SOUTH DAKOTA, WERE INVALID.**

   The trial court found that GCC's placer mineral claims were invalid because it did not follow the proper procedure for staking and monumenting and posting notice of those claims pursuant to South Dakota law. (MD 7-8)

- 30 U.S.C. § 22;
- 30 U.S.C. § 35;
- *Pidgeon v. Lamb*, 133 Cal. App. 342, 346, 24 P.2d 206, 207 (1933);
- *Fuller v. Mountain Sculpture, Inc*., 6 Utah 2d 385, 391, 314 P.2d 842, 846 (1957).

2. WHETHER GCC'S PLACER MINERAL CLAIMS PRECLUDED PLS'S SUBSEQUENT CLAIMS.

The trial court implicitly found that because GCC's did not follow the requisite procedures in making its placer mineral claims, the U.S. Forest Service property remained open for discovery.

- *Belk v. Meagher*, 104 U.S. 279, 26 L. Ed. 735 (1881);
- *St. Louis Mining & Milling Co. v. Montana Mining Co.,* 171 U.S. 650, 655, 19 S. Ct. 61, 63, 43 L. Ed. 320 (1898);
- *Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U.S. 220, 24 S. Ct. 632, 48 L. Ed. 944 (1904).

STATEMENT OF THE CASE

PLS filed a Complaint to Quiet Title on September 14, 2012, and Amended Complaints on September 30, 2013, and October 2, 2013 in the Fourth Judicial Circuit Court. (R 1, 25, 33) The Honorable Randall L. Macy presided over the hearing. PLS claims it owns, subject only to the paramount title of the United States, fourteen unpatented placer mineral claims situated in Lawrence County, South Dakota, and recorded in the Register of Deeds office in Lawrence County, South Dakota. (R 33) The Defendants admitted service and filed a joint Answer on November 9, 2012, and an Amended Answer on November 12, 2013. (R 8, 432) Defendants claim they had paramount title to the placer mineral claims on the subject property and that PLS had no estate or interest in or to the unpatented mining claims. (R 432)

Both PLS and GCC moved for summary judgment, and a hearing was held on November 12, 2013. (R 38, 107; App 37) Both parties claimed a superior title to the placer mineral claims based on the actions of their respective employees or locators.

(R 40, 109) The trial court found that PLS, not GCC, had followed the appropriate procedure for making a valid placer mineral claim. (MD 4-8) The trial court then entered judgment quieting title in the subject mining claims in PLS subject to the paramount title in of the United States. (R 446, 448)

STATEMENT OF THE FACTS

The mineral claims at issue are on U.S. Forest Service land (federal property) located in Lawrence County, South Dakota.[1] (MD 3) The mineral claims are fourteen individual placer mineral claims that cover 280 acres in total. (MD 3-4) GCC complied with federal statutes and regulations to obtain a placer mineral claim & PLS complied with inapplicable state statutes that deal with obtaining a lode and vein mineral claim. The material facts are not in dispute.

Prior to April 5, 2007, Steve Zellmer, who at the time was the President of GCC Dacotah, Inc., and Vice President of GCC of America, Inc., discovered chemical grade limestone on the federal property. (R 109) On April 6, 2007, Zellmer signed and filed with the Lawrence County Register of Deeds fourteen placer mineral claims.[2] (MD 3) On that same day, Jim Strain, a real estate agent, and Gene Nelson, an employee of GCC, placed one four-by-four discovery post or monument on the northeast corner of the land in dispute. (*Id.*) The monument contained a copy of the 14 notices of location of placer mineral claims filed by Zellmer. (*Id.*) Each notice of location defined a single 20-acre placer mineral claim by legal description, for a total of 280 acres. (R 109) GCC

[1] The area at issue is located in Section 2 of Township 5 North, Range 4 East, of the Black Hills Meridian in Lawrence County, South Dakota. (R 40)

[2] Collectively referred to as CM 1, CM 2, CM 3, CM 4, CM 5, CM 6, CM 7, CM 8, CM 9, CM 10, CM 11, CM 12, CM 13, CM 14.

filed the fourteen claims with the Bureau of Land Management ("BLM") and has continuously paid all required fees to the BLM.[3] (R 109)

On April 18, 2007, Sam Brannan, PLS's Vice President of Corporate Development and Land Manager, observed GCC's discovery monument on CM 5. (R 370, ¶ 21) She observed GCC's fourteen notices of location that were attached to the discovery monument. (R 370, ¶ 21) GCC's notices of location included the 20-acre parcels and legal descriptions for GCC's placer mineral claims CM 1 to CM 14. (R 370, ¶ 21) PLS further acknowledged at the hearing that GCC filed its placer mineral claims before PLS. (HT 8-9)

On April 20, 2007, after noticing GCC's claims, Sam Brannan, on behalf of PLS, made discovery and posted notice of location markers on six 20-acre placer mineral claims that are relevant to this lawsuit.[4] (MD 3) These claims were staked with wooden posts that were erected on all corners, side center lines, and discovery monuments. (*Id.*) A notices of location was attached to the discovery posts on each mining claim. (*Id.*)

On February 13, 2012, approximately five years after observing GCC's claims, Brannan made discovery on eight additional 20-acre placer mineral claims.[5] (MD 4) Brannan proceeded to file claims on Chuck No. 2012-01 through Chuck No. 2012-08. (*Id.*) These claims were all staked with wooden posts that were erected on all corners, side center lines, and discovery monuments. (*Id.*) Notices of location were attached to the discovery posts for each separate mineral claim. (*Id.*)

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[3] Zellmer subsequently transferred his interest in the placer mineral claims to Sunset Properties, LLC, a company owned by GCC of America, Inc.

[4] Collectively referred to as Chuck No. 2 through Chuck No. 7.

[5] Collectively referred to as Chuck No. 2012-01 through Chuck No. 2012-08.

The fourteen placer mineral claims filed by GCC and the fourteen placer mineral claims filed by PLS cover the same 280 acres of land.

Both GCC and PLS moved for summary judgment claiming title to their respective placer mineral claims are valid and paramount in title to all but the United States Government. GCC argued that because it followed the applicable federal statutes and regulations regarding placer mineral claims, its claims were valid and precluded PLS's claims as a matter of law. PLS argued that GCC has failed to follow both state and federal law to establish a valid placer mineral claim and therefore GCC's claims are void. The trial court entered a judgment quieting title in PLS's placer mineral claims, finding that GCC failed to follow the "applicable law" in making its placer mineral claims. Two issues are raised on appeal.

ISSUES

1. **Whether the trial court erred in deciding that Defendants' fourteen placer mineral claims on 280 acres of U.S. Forest Service property in Lawrence County, South Dakota were invalid.**

2. **Whether GCC's placer mineral claims precluded PLS's subsequent claims**

STANDARD OF REVIEW

Summary judgment is appropriate if there are no disputes as to any material facts and the moving party is entitled to judgment as a matter of law. SDCL § 15-6-56. Statutory interpretation is a question of law to be reviewed under the de novo standard of review. *Discover Bank v. Stanley*, 2008 S.D. 111, 757 N.W.2d 756, 761. The issues in this appeal turn on the trial court's interpretation of federal and state law.

ARGUMENT

I. WHETHER THE TRIAL COURT ERRED IN DECIDING THAT DEFENDANTS' FOURTEEN PLACER MINERAL CLAIMS ON 280 ACRES OF U.S. FOREST SERVICE PROPERTY IN LAWRENCE COUNTY, SOUTH DAKOTA, WERE INVALID.

A. The location and filing of a limestone placer mineral claim on federal property in Lawrence County, South Dakota, is controlled by 30 U.S.C. §§ 22, 35.

The General Mining Law of 1872, codified in 30 U.S.C. § 22, allows United States citizens to "go onto unappropriated, unreserved public land to prospect for and develop certain minerals." *U.S. v. Locke*, 471 U.S. 84, 86 (1985). The statute provides:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall 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 and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, *so far as the same are applicable and not inconsistent with the laws of the United States.*

30 U.S.C. § 22 (emphasis added).

Section 35 of Title 30 to the United States Code provides how to make a placer mineral claim on federal property in Lawrence County, South Dakota.

> [W]here the lands have been previously surveyed by the United States, the entry in its exterior limits *shall conform to the legal subdivisions of the public lands. And where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the 10th day of May 1872, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys*, and no such location shall include more than twenty acres for each individual claimant[.]

30 U.S.C. § 35 (emphasis added). The regulations provide that a person locating a mining claim "must follow both state and Federal law." 43 C.F.R. § 3832.11. Reading

the federal statutes and regulations together, state law applicable to placer mineral claims should be followed unless it is not applicable or inconsistent with the federal law. 30 U.S.C. §§ 22, 35.

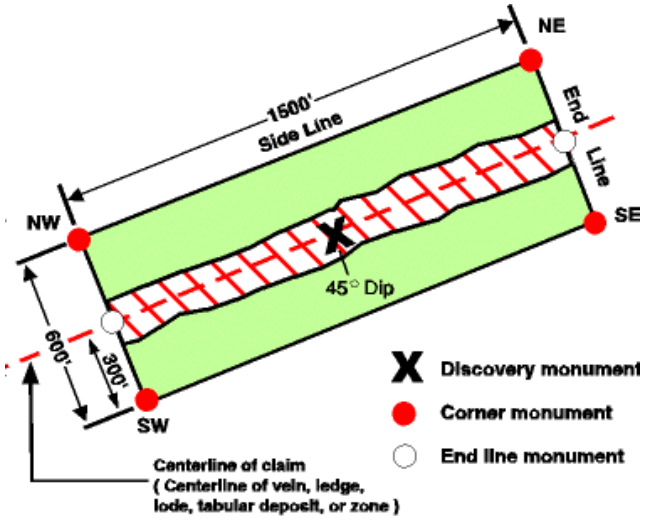
There is a significant difference between placer mineral claims and lode mineral claims and, consequently, a marked difference in how each claim is located. Locating a mineral claim means establishing the exterior lines of the claim by identifying the land claimed and recording a notice or certificate of location. 43 C.F.R. § 3832.1. The General Mining Law, the Federal Land Policy and Management Act, and the Code of Federal Regulations acknowledge the distinction between placer mineral claims and lode claims.

The term placer mineral claim refers to "ground within defined boundaries which contains mineral in its earth, sand, or gravel, ground that includes valuable deposits not in place; that is, not fixed in rock, but which are in a loose state[.]" *U.S. v. Iron Silver Min. Co., U.S. Colo.*, 128 U.S. 673, 679, 9 S. Ct. 195, 198, 32 L. Ed. 571 (1888). Placer deposits include gypsum, limestone, cinders, pumice, and other similar mineral deposits. 43 C.F.R. § 3832.21. Placer claims include all those deposits not subject to lode claims. *Mining Claims and Sites on Federal Land*, Department of the Interior, Bureau of Land Management, 8 (2011) (hereinafter "*Mining Claims*"). (App 74) Placer mineral claims on surveyed federal land are located by legal subdivision and may not exceed 20 acres in size. *See* 30 U.S.C.A § 35; 43 C.F.R. §§ 3832.12, 3832.22; *Mining Claims*, 8.

In comparison, vein or lode claims are "lines or aggregations of metal imbedded in quartz or other rock in place." *Iron Silver Min. Co.,* 128 U.S. at 679. Lode claims must not exceed 1,500 by 600 feet. *See* 30 U.S.C. § 23; 43 C.F.R. § 3832.22(a). "If

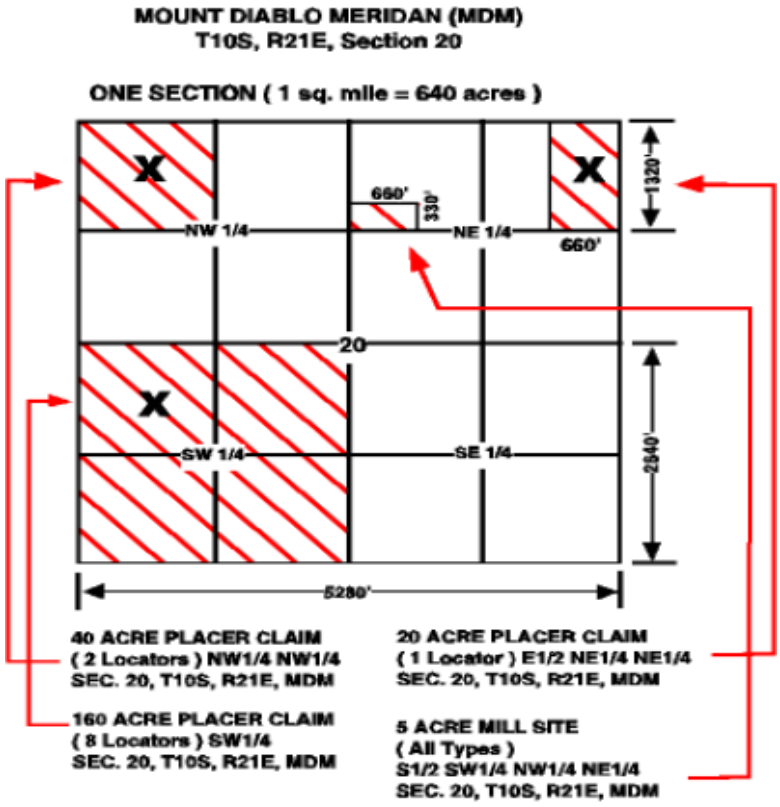
there is a vein, lode, or ledge, each lode claim is limited to a maximum of 1,500 feet along the course of the vein, lode, or ledge and a maximum of 300 feet in width on each side of the middle of the vein, lode, or ledge." 43 C.F.R. § 3832.22(a).

The BLM has primary responsibility for the administration of mining claims and sites on federal lands. 68 Fed. Reg. 61046-01. Lode claims are usually located as parallelograms with the side lines parallel to the vein or lode. *Mining Claims*, 8. Descriptions are by metes and bounds beginning at the discovery point on the claim. 43 C.F.R. § 3832.12. Unlike placer mineral claims, vein or lode mining claim boundaries are not designated by legal subdivision but must be marked by eight substantial posts. SDCL § 45-4-3; *compare* 43 C.F.R. § 3832.12(c) (placer claims). Therefore, South Dakota law requires a claimant to indicate the "feet claimed in length on either side of the discovery, and the number of feet in width claimed on each side of the lode." SDCL § 45-4-2. The image below depicts the BLM's official example of posting requirements for a vein or lode mineral claim.



Mineral Claims, 9. South Dakota law for lode claims requires that the posting is consistent with the image above, with one additional stake in the center of each side line (for a total of eight boundary stakes). SDCL § 45-4-3. This provides a means of tracing lode and vein claims' boundaries as the mineral is not readily noticeable and the claims can overlap multiple legal subdivisions, run in a multitude of directions, and cannot be immediately identifiable. This concern is not present regarding placer claims that must be claimed by legal subdivision.

The image below depicts the BLM's official example of a typical placer mineral claim.



See Mining Claims, 10. Note that the claims are made by legal description. *Id.* "A placer location is the location of a *tract of land* for the mineral bearing or other valuable deposits upon it that are not found in lodes or veins in rock in place." *Webb v. Am.*

Asphaltum Min. Co., 157 F. 203, 204 (8th Cir. 1907) (emphasis added). "It is a claim of a *tract of land* for the sake of loose deposits on or near its surface." *Id*. at 204 (emphasis added). Tracts of land are designated by legal subdivisions if the federal land has been surveyed. 30 U.S.C. § 35;[6] 43 C.F.R. § 3832.12(c).

As the above image indicates, a single 20-acre placer claim must be identified by legal description. *Id*. In the case at bar, the Defendants correctly identified each 20-acre placer mineral claim by legal description. (For example, "CM-1" is described as "E1/2 NE1/4NW1/4 Section 2, T5N, R4E, Black Hills Meridian.") (R 109)

B. Defendants have fully complied with federal statutes for locating a placer mineral claim.

The trial court erroneously concluded that GCC's fourteen placer mineral claims were invalid because it did not follow the "applicable law" and procedure for staking and monumenting or posting notice of its mining claims. The trial court ignored the controlling federal statutes at 30 U.S.C. §§ 22 and 35 and incorrectly imposed inconsistent and inapplicable state law requirements as to lode claims on GCC's placer mineral claims and also failed to acknowledge that PLS, as a subsequent locator, had actual notice of GCC's placer mineral claims. For those reasons, the trial court's order and judgment should be reversed.

GCC, through Zellmer, complied with the federal statutes and regulations regarding location and filing of placer mineral claims on the federal property in

[6] Providing in relevant part that "where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the 10th day of May 1872, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant[.]") 43 U.S.C. § 35.

Lawrence County, South Dakota. Pursuant to 30 U.S.C. § 35, entry onto federal land for placer mineral claims "shall conform to the legal subdivisions of the public lands." And, pursuant to 43 C.F.R. § 3832.11, one must:

(1) follow both state and federal law;[7]
(2) make a discovery within the boundaries of the claim on federal land open to mineral entry;[8]
(3) stake and monument the corners of a mining claim or site *which meets applicable state monumenting requirements* and the size limitations described in § 3832.22 for lode and placer claims;
(4) post the notice of location in a conspicuous place on the claim or site;
(5) record the notice or certificate of location in the local recording office and the BLM State Office with jurisdiction;
(6) follow all other relevant state law requirements; and,
(7) comply with the specific requirements for placer claims in this part.

See 43 C.F.R. § 3832.11(a)-(c).

1. Follow both state and federal law.

If state law is applicable and not inconsistent with federal law, both laws should be followed. 43 C.F.R. § 3832.11(a); 30 U.S.C. § 22. Here, only federal law applies to GCC's placer mineral claims. South Dakota mineral statutes found in SDCL ch. 45-4 only cover lode claims and are not applicable to placer mineral claims on federal land. That chapter focuses almost exclusively on "vein or lode" claims. The only statute referencing placer claims is SDCL § 45-4-20 which makes it a Class 1 misdemeanor to obtain certain claims by violence or threats of violence.[9] By listing "vein or lode"

[7] State law must be followed only if applicable and not inconsistent with federal law. 30 U.S.C. § 22; 43 C.F.R. § 3830.1.

[8] U.S. Forest Service property is open to mineral entry. 16 U.S.C.A. § 478.

[9] 45-4-20. Association with another to obtain possession of a lode, gulch, or placer claim by force and violence, by threats of violence, or by stealth—Misdemeanor. Any person who associates with another to obtain possession of a lode, gulch, or placer claim, then in the actual possession of another, by force and violence or by threats of violence or by stealth, and who carries out such purpose by:

mining claim and a "placer claim" independently, the South Dakota Legislature acknowledged the distinction between the two claims.

The remaining statutes in SDCL ch. 45-4 reference only lode and vein claims. *See* SDCL § 45-4-1 (discovery of the vein or lode); SDCL § 45-4-2 (conditions precedent to location certificate for lode claim pursuant to SDCL § 45-4-4); SDCL § 45-4-3 (marking surface boundaries regarding load claim; SDCL § 45-4-4 (location certificate requirements for load claim); SDCL § 45-4-6 (dimensions of load claim); SDCL § 45-4-10 (surface ground included in location or location certificate for lode claim). The additional statutes in SDCL ch. 45-4 do not reference placer mineral claims. It is apparent that the South Dakota statutes do not apply to placer claims. The trial court conceded the complete absence of specific state statutory language regarding placer mineral claims. (MD 7)

"The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used." *Discover Bank*, 2008 S.D. at ¶ 15, 757 N.W.2d at 761. "Words used by the legislature are presumed to convey their ordinary, popular meaning, unless the context of the legislature's apparent intention justifies departure[.]" *Moore v. Michelin*

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(1) Making threats against the person or persons in possession;
(2) Entering the lode or mining claim for such purposes; or
(3) Entering a lode, gulch, placer claim, quartz mill, or other mining property, or, not being upon the property but being within hearing distance of the property, and making threats or use of any language, sign, or gesture calculated to intimidate any person at work on the property or from continuing work on or in the property, or intimidating others from working on or in the property,

is guilty of a Class 1 misdemeanor.

Tire Co., Inc., 1999 S.D. 152, ¶ 16, 603 N.W.2d 513, 518-19 (citation omitted). Here, the South Dakota Legislature used only the words "vein or lode" in nearly every section of SDCL ch. 45-4. The statutes placing affirmative obligations as to locations, markings, and certificates for claims expressly reference only "lode claims." SDCL ch. 45-4. The statute's language indicates the legislature intentionally chose to limit the chapter's applicability to "vein or lode" mining claims. The court erred as a matter of law by not confining the applicability of SDCL ch. 45-4 to the actual language used by the legislature, i.e., to lode claims.

The legislature's silence as to placer mineral claims is not unexpected. Generally, the law does not require futile acts. *Adrian v. McKinnie*, 2004 S.D. 84 ¶ 16, 684 N.W.2d 91, 99. It would be a futile, redundant act to post the notice of location at the point of discovery and to mark and stake the boundaries when a placer mineral claim is located where the United States survey has been extended over the land embraced in the location. The boundaries have already been staked out and marked, and cannot be changed. *See Pidgeon v. Lamb*, 133 Cal. App. 342, 346, 24 P.2d 206, 207 (1933); *Kern Oil Co. v. Crawford*, 143 Cal. 298, 303-04, 76 P. 1111, 1113 (1903); 30 U.S.C. § 35; 43 C.F.R. § 3832.12(c).

Further, the lode and vein staking and monumenting requirements in SDCL ch. 45-4 would be inconsistent with federal statutes that only require locating 20-acre placer mineral claims by legal description when the United States has surveyed the federal land. 30 U.S.C. § 35; 43 C.F.R. § 3832.12. Federal statutes provide: "where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands." 30 U.S.C. § 35. "You must

describe placer claims . . . using the U.S. Public Land Survey System and its rectangular subdivisions." 43 C.F.R. § 3832.12(c). Such claims are limited to 20-acre parcels. *Id*. § 3832.11. State law regarding mineral claims need not be followed by a person if it is inconsistent with federal law. 30 U.S.C. § 22.

GCC therefore followed applicable federal statutes and regulations in making its fourteen placer mineral claims and staking and monumenting was not required.

2. Discovery of mineral within boundary of claim.

Discovery means that a mining claimant has found a valuable mineral deposit. 43 C.F.R. § 3830.5. Zellmer made a discovery of the chemical grade limestone within the boundaries of GCC's claim prior to April 5, 2007. (R 109, ¶ 4) Zellmer walked the property where the claims were located and the limestone outcroppings were visible. (R 109, ¶ 4-6) "Limestone of chemical or metallurgical grade, or that is suitable for making cement, is subject to location under the mining laws." *See* 43 C.F.R. § 3830.12(d).

3. Locating the 20-acre placer mineral claims by legal description.

GCC's placer mineral claims complied with the 20-acre size limitation described in § 3832.22 and described the claim by legal subdivision using the legal description as required by 43 C.F.R. § 3832.12 and 30 U.S.C. § 35. (R 109, ¶ 29) On April 6, 2007, GCC, through Zellmer, recorded 14 notices of location in the Lawrence County Register of Deeds. Each notice of location described a single 20-acre placer mineral claim by legal description, as required by federal law. (R 109, ¶¶ 3, 29) The placer mineral claims were also filed with the BLM.

The trial court emphasized that the regulation for locating a mining claim provides: "[s]take and monument the corners of a mining claim or site *which meets*

applicable state monumenting requirements and the size limitations described in § 3832.22 for lode and placer claims[.]" 43 C.F.R. § 3832.11(c)(2) (emphasis added). The trial court found that this provision required GCC to stake and monument the corners of all its placer mineral claims. But this provision only requires staking and monumenting "*which meets applicable state monumenting requirements*." *Id.* (emphasis added). As discussed above, and as the trial court conceded, there is no specific state statutory language regarding placer mineral claims. (MD 7) Therefore, with no applicable state staking and monumenting requirements, staking and monumenting is not required for GCC's placer claims. *See Pidgeon*, 133 Cal. App. at 346, 24 P.2d at 207; 30 U.S.C. §§ 35; *Kern Oil Co*., 143 Cal. at 303-04, 76 P. at 1113.

Additionally, imposing staking and monumenting requirements in this case would be inconsistent with federal law. Because this property has been surveyed by the United States, entry onto the land must conform to legal subdivision and need not be staked and monumented. 30 U.S.C. § 22, 35. Imposing new, additional monumenting and staking requirements by regulation would not be in harmony with the federal statute that requires only legal descriptions. *Id.* A regulation which operates to create a rule out of harmony with the statute is a mere nullity. *See Lynch v. Tilden Produce Co*., 265 U.S. 315, 320-322, 44 S. Ct. 488, 68 L. Ed. 1034, 1036 (1924); *Miller v. United States*, 294 U.S. 435, 439, 440, 55 S. Ct. 440, 79 L. Ed. 977, 980-981 (1935).

The purpose of distinctly marking the location in lode or vein claims is to provide a means of tracing their boundaries and providing notice as they can overlap multiple legal subdivisions, run in a multitude of directions, and cannot be immediately identifiable. Placer mineral claims do not have this concern. In this case, the U.S.

Government by its public survey has already provided the markings by which the boundaries can be traced and no other monuments or markings can be used with which to trace the boundaries. Simply stated, "it is unnecessary to post the notice of location at the point of discovery or to mark the boundaries when a placer claim is located where the United States survey has been extended over the land embraced in the location." *Pidgeon v. Lamb*, 133 Cal. App. at 346, 24 P.2d at 207; 30 U.S.C. §§ 35; ("where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands"); *see Kern Oil Co.*, 143 Cal. at 303-04, 76 P. at 1113; ("There is no reason why the locator should be required to stake it out and mark its boundaries, nor does the statute require it. They have already been staked out and marked, and cannot be changed.").[10]

This position was adopted by the assistant secretary of the interior department in an opinion dated March 1896:

> There is no purpose that can be subserved by [staking and monumenting]. The public surveys are as permanent and fixed as anything can be in that line, and any fractional part of a section can be readily found and its boundaries ascertained by that method for all time to come, and is necessarily more stable and enduring than marking it by perishable or destructible stakes or monuments.

Kern Oil Co., 143 Cal. at 305, 76 P. 1111 (citing 22 L.D. 408).

[10] Certain states have statutes expressly acknowledging that the legal subdivisions shall be required and the boundaries of the claim so located and described need not be staked or monumented. *See* Oregon Revised Statutes 517.042 to 517.052; West's Ann. Cal. Pub. Res. Code § 3902.

4. Post the notice of location.

Although not required by the federal statutes, the regulation provides that a claimant must post the notice of location in a conspicuous place on the claim or site. 43 C.F.R. § 3832.11(c)(3). It is undisputed that on or around April 6, 2007, GCC, through Zellmer, recorded the notices of location for the fourteen placer mineral claims with the Lawrence County Register of Deeds and the BLM. These recorded notices of location gave constructive notice of GCC's possession of the placer mineral claims and of the boundaries. *See Bender v. Lamb*, 133 Cal. App. 348, 350, 24 P.2d 208, 209 (1933).

On April 6, 2007, GCC, through Nelson and Strain, also placed a stake, claim marker, or discovery monument near the northwest corner of CM-5, and the stake was affixed to a PVC tube which had copies of the fourteen notices and locations of the placer mineral claims. (R 109, ¶¶ 8, 25, 29) This discovery monument posted notice of location for all GCC's fourteen 20-acre placer mineral claims, including legal descriptions for each claim as required by 30 U.S.C. § 35 and 43 C.F.R. § 3832.12. Through this discovery post, any subsequent locator would know the location and boundaries of GCC's claims.

On April 18, 2007, PLS, through Brannan, observed and noticed GCC's discovery post on the property and observed the fourteen notices of location for GCC's CM-1 to CM-14 placer mineral claims. (R 109, ¶ 21; R 370, ¶ 21) PLS acknowledged that the single post placed on CM-5 by GCC held fourteen notices of location for each 20-acre placer mineral claims (CM-1 to CM-14). (R 370, ¶ 21) After observing GCC's claims and notices, PLS attempted to make placer mineral claims on the same property

on April 20, 2007, and February 13, 2012. (MD 3-4[11]) Because PLS had already discovered, located, recorded, and paid the required fees to the BLM, PLS's placer mineral claims were void as the property was no longer open for discovery. *See* argument on Issue 2, *infra* p. 23.

Although PLS had notice of GCC's claims, PLS asserted below that GCC's posted notice was insufficient and the trial court agreed. This finding is incorrect as a matter of law. "It is well settled that minor defects in the notices, descriptions, or procedure will not defeat the location of a prior claimant at the instance of one having actual notice." *Fuller v. Mountain Sculpture, Inc*., 6 Utah 2d 385, 391, 314 P.2d 842, 846 (1957) (citing *Steele v. Preble*, 158 Or. 64, 77 P.2d 418 (1938); *Springer v. Southern Pac. Co*., 67 Utah 590, 248 P. 819*; Independence Placer Mineral Co., Ltd. v. Hellman*, 62 Idaho 180, 109 P.2d 1038, 1042; *Pease v. Johnson*, 106 Cal. App.2d 449, 453, 235 P.2d 229, 231 (1951); *Kramer v. Sanguinetti*, 33 Cal. App.2d 303, 91 P.2d 604.

Courts have stated that "[i]n the initiation of rights upon public mineral lands, as well as in the various steps taken by the miner to perfect his location, his proceedings are to be regarded with indulgence, and the notices required invariably receive at the hands of the courts a liberal construction." *Hagerman v. Thompson*, 68 Wyo. 515, 531, 235 P.2d 750, 755 (1951) (*citing* 58 C.J.S., *Mines and Minerals*, § 46, p. 101, notes 15 and 16). "The purpose of posting a notice and marking the boundary lines is to inform and

[11] PLS admitted that it "is not making any claims in this lawsuit based on the 160-acre association claim located on April 4, 2007." (R 370, ¶ 28) Therefore, its claims are based on events that occurred after it observed and noticed GCC's discovery post on CM-5. The trial court found that PLS's discovery was on April 20, 2007, and February 13, 2012. Any claim PLS would have made as to Brannan's conduct regarding the April 4, 2007, claims would be deemed forfeited as there was a failure to timely pay the required BLM fees, failed to file with the BLM, failed to list separate 20-acre parcels. (R 109); HT 8-9; *see* 43 U.S.C. § 1744 (failure to pay fees is forfeiture of claim)).

guide others who may wish to make locations in that vicinity. *Id*. (citing 58 C.J.S., *Mines and Minerals*, § 46, p. 99) (emphasis added).

> *But one who has knowledge of the boundaries of a mining claim cannot complain of the absence of stakes, monuments, etc., which are intended to identify the boundary lines. Likewise, he cannot complain because of a defect in the posted notice*. Accordingly, a mere defect in the lines or notices could avail the defendants nothing.

Id. (citing 58 C.J.S., *Mines and Minerals*, § 46, p. 99) (emphasis added).

Here, it is undisputed that PLS observed GCC's discovery marker on CM-5 on April 18, 2007, and attached to that marker was each of GCC's fourteen notices of locations. (R 370, ¶ 21) Each attached notice consisted of a separate placer mineral claim—20-acre parcels set out by legal description. (R 109, ¶¶ 3, 7-8, 25) Therefore, PLS had notice of GCC's fourteen placer mineral claims at least two days before Brennan made discovery and posted her own notice for Chuck No. 2 through Chuck No. 7 on April 20, 2007. (MD 3-4) And PLS had nearly five years' notice of GCC's placer mineral claims before discovering and posting notices on Chuck No. 2012-01 to Chuck No. 2012-08 on February 13, 2012, on the same property. (MD 3; R 370, ¶ 21)

Applying the above rule, PLS, as "one who has knowledge of the boundaries of a mining claim[,] cannot complain of the absence of stakes, monuments, etc., which are intended to identify the boundary lines. Likewise [PLS] cannot complain because of a defect in the posted notice." *Hagerman,* 68 Wyo. at 531, 235 P.2d at 755. To hold there was insufficient notice under such circumstances would work a gross injustice, forfeiture, and undermine the very purpose for which any notice is required.

The cases of *Steele v. Preble*, 158 Or. 64, 77 P.2d 418 (1938), and *Scoggin v. Miller*, 64 Wyo. 206, 235, 189 P.2d 677, 687 (1948), are instructive. In *Steele*, the

appellant asserted a right in a mining claim as a subsequent locator, arguing that the boundaries of the initial locator's claims were not properly marked and that there was insufficient posting of notice. 158 Or. at 664, 77 P.2d at 428. The *Steele* court recounted testimony indicating that the appellant, before making his mining claims, had detailed information regarding the extent, nature, and location of the initial locator's mining claims. *Id*. With such knowledge, the court stated that the appellant could not complain of a defect in the posted notice. *Id*.

In *Scoggin v. Miller*, a subsequent locator asserted rights to certain mining claims on the basis that the initial locators failed to comply with the legal requirements in locating their claims by failing to post a notice of discovery on each claim. 64 Wyo. at 225, 189 P.2d at 683. Evidence was submitted that the initial locator's discovery notices were folded four notices to a bottle dependent on the particular location where the bottle was to be placed. *Id*. at 226-27, 189 P.2d. at 683-84. Testimony reflected that anyone interested could take the cap off the bottle, take the notice or notices out and determine the exact locations of the claims. *Id*. The subsequent locator introduced conflicting testimony that no posts were erected and that no notices of location were placed upon these claims. *Id*. But it was undisputed the subsequent locator knew of the prior claims' boundaries. The *Scoggin* court stated, "Where it is shown that a subsequent locator had actual notice of the location and the boundaries, neither he nor his grantee should be permitted to take advantage of some technical defect in the notice. *Id*. at 233, 189 P.2d at 686 (citing 2 Lindley on Mines, 910, Section 383 and cases cited). The court held that the subsequent locator knew all about the location and boundaries of the claim that any

notice could have given him. *Id*. at 236, 189 P.2d at 688. Therefore, the subsequent locator could not attack the validity of the claim as to notice. *Id*.[12]

The above cases underscore the rule that "the purpose of the statutory requirements is to provide the proper form and procedure that a locator must follow but that compliance with the exact letter of the law is not indispensable." *Powell v. Atlas Corp*., 615 P.2d 1225, 1227 (Utah 1980).[13] In the case at bar, the recorded noticed provided PLS constructive notice of GCC's claims. GCC also posted notice of all fourteen placer mineral claims—setting forth the legal descriptions for each—on a discovery monument that was actually observed by PLS's locator, Brannan. Brannan and PLS therefore had actual notice as they knew all about the location and boundaries of GCC's claim that any notice could provide. Therefore, just like in *Scoggin* or *Steele*, PLS as a subsequent locator cannot attack the validity of notice provided by GCC.

Although GCC posted notice of its claim and marked its placer mineral claims, such posted notice was not required by federal statute. This property has been surveyed by the United States and entry onto the land must conform to legal subdivision which is to be recorded with the local register of deeds and BLM. 30 U.S.C. §§ 22, 35. GCC recorded fourteen notices of location of placer mineral claims. Each notice of location defined a single 20-acre placer mineral claim by legal description, for a total of 280 acres. Imposing new, additional notice requirements by regulation would not be in

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[12] For a similar analysis *see also Yosemite Gold Min. & Mill. Co. v. Emerson*, 208 U.S. 25, 31, 28 S. Ct. 196, 198, 52 L. Ed. 374 (1908).

[13] *See Young v. Papst*, 148 Or. 678, 686-87, 37 P.2d 359, 363 (1934) ("The notices are sufficient if they contain directions which, taken in connection with such boundaries, will enable a person of reasonable intelligence to find the claims and trace their lines." (citing Lindley on Mines (3d *687 Ed.) § 381)).

harmony with the federal statute that requires only legal descriptions. *Id*. A regulation which operates to create a rule out of harmony with the statute is a mere nullity. *See Lynch*, 265 U.S. at 320-322, 44 S. Ct. 488, 68 L. Ed.at 1034–1036. If GCC was required to post notice pursuant to the regulation and GCC's notice was technically insufficient, such a defect is curable. "If there is a defect in [ ] compliance with a regulatory, but not statutory, requirement, the defect is curable." 43 C.F.R. § 3830.93.

5. Record the notice of location of placer mineral claims.

The regulation and federal statutes required that GCC recorded each 20-acre placer mineral claim, described by legal description, with the Lawrence County Register of Deeds and BLM office. 43 C.F.R. § 3832.11(c)(4). It is undisputed that GCC filed fourteen 20-acre placer mineral claims with the BLM and Lawrence County Register of Deeds and ultimately paid all fees as required.

6. Other state law requirements.

There are no state statutes that place any requirements on locating placer mineral claims and therefore 43 C.F.R. § 3832.11(c)(5) is inapplicable. *See supra* section i.

7. Comply with the specific requirements for placer claims.

Pursuant to 43 C.F.R. § 3832.11(c)(6), GCC complied with all placer mineral claim requirements. As required by 30 U.S.C. § 35 and 43 C.F.R. § 3832.12(c), GCC described its "placer claims by . . . using the U.S. Public Land Survey System and its rectangular subdivisions[.]" GCC also limited its individual placer mineral claims to 20 acres in size. *Id*. § 3832.22. GCC made all requisite filings and has paid all required BLM fees since April 12, 2007. (R 109, ¶ 29) Although not required by federal statute, GCC also posted notice of its fourteen claims on the site.

The trial court erroneously found GCC's placer mineral claims to be invalid by incorrectly interpreting federal law and state law and by imposing requirements on GCC not in harmony with the controlling federal statute. GCC validly marked its fourteen placer mineral claims on federal land by making a discovery on land open for discovery, locating the fourteen claims by legal subdivision, recording the claims with the local register of deeds and BLM, and paying all required fees. GCC also posted notice on the site. PLS had notice of GCC's claims prior to making its discovery and therefore, to the extent GCC's posted notice was technically insufficient, PLS cannot attack GCC's claim on that basis. GCC's claims were valid and the land was no longer open for discovery when PLS attempted to make its claims.

II. WHETHER GCC'S PLACER MINERAL CLAIMS PRECLUDED PLS'S SUBSEQUENT CLAIMS.

When a mining location is perfected, it has the effect of a grant by the United States of the right of present and exclusive possession. *See Belk v. Meagher*, 104 U.S. 279, 26 L. Ed. 735. Essentially, once there has been a valid discovery and a proper location, an unpatented mining claim is real property that becomes segregated from the public domain. *See St. Louis Mining & Milling Co. v. Montana Mining Co.,* 171 U.S. 650, 655, 19 S. Ct. 61, 63, 43 L. Ed. 320 (1898). Stated differently, if a prior locator has perfected his claim by a mineral discovery, no subsequent valid location may be made, for it would be based on trespass, whether clandestine or open. *See Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U.S. 220, 24 S. Ct. 632, 48 L. Ed. 944 (1904); *United States v. 237.500 Acres of Land, Etc*., 278 F.2d 584 (9th Cir. 1960).

These cases stand for the proposition that when mining claim locations have been made, and a valuable mineral deposit on the lands discovered, and the location had been

perfected in accordance with law, then the lands are known mineral lands and no discovery by a subsequent locator is permitted or possible.

When GCC, through Zellmer, discovered the chemical grade limestone on the property, filed the fourteen 20-acre claims with the Lawrence County Register of Deeds and BLM, posted notice of claims CM-1 to CM-14, and paid all required fees to the BLM, PLS could no longer discover the same minerals. And PLS cannot now claim that notice was insufficient as it is undisputed that it had actual notice of all the subject GCC placer mineral claims prior to PLS's discovery and location of claims on April 20, 2007, and February 13, 2012. *Fuller*, 6 Utah 2d at 391, 314 P.2d at 846.

There is a strong public policy of disallowing subsequent claimants with actual notice to attack the validity of a prior claim as to notice. As noted above, such a holding would cause a gross injustice, forfeiture, and undermine the very purpose for which any notice is required. *See supra*, I.1.iv. Further, allowing PLS to attack the validity of GCC's placer mineral claim here encourages subsequent locators to seek out minor, technical issues with any and all prior claims leaving title issues relentlessly unresolved.

CONCLUSION

On April 6, 2007, GCC, through Zellmer, recorded fourteen separate notices of location of placer mineral claims containing 20 acres each with the Lawrence County Register of Deeds and also recorded the claims with the BLM. GCC posted a discovery monument on the property which included the fourteen notices of location. GCC also paid the required BLM fees on April 12, 2007, and the BLM processing fees for the Defendants' filing were paid on May 2, 2007. Since April 12, 2007, Defendants have paid the required annual fees to the BLM. GCC has completed the necessary federal

statutory requirements of a placer mineral claim—discovery, location, filing, and maintenance.

South Dakota statutes do not provide requirements for placer mineral claims. Therefore, GCC was not required to stake and monument the subject placer mineral claims. The federal statute requires only a legal description when the federal property has been surveyed. Furthermore, any regulation or state law imposing such staking and monumenting requirements would be inconsistent with federal statutes and therefore inapplicable. GCC did post notice of its claims, although such notice is not required to locate a placer mineral claim pursuant to 30 U.S.C. § 35. If the posted notice was required and technically deficient, it is undisputed that PLS had actual notice of the boundaries of GCC's claims on April 18, 2007, and therefore PLS cannot attack the validity of GCC's placer claims on that basis.

Accordingly, since April 6, 2007, the 280 acres of U.S. Forest Service property upon which GCC's located its placer mineral claims was not open or available for further discovery, precluding PLS's filings on April 20, 2007, and February 13, 2012.

For the foregoing reasons, the Court should reverse and remand the trial court's decision and order the trial court on remand to enter judgment quieting title in Defendants.[14]

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument in this case.

[14] Sunset Properties, LLC, would be the entity that currently holds title to CM-1 to CM-14 and title would be quieted in that entity on remand.

Respectfully submitted on April 9, 2014.

GUNDERSON, PALMER, NELSON
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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellant's Brief complies with the type volume limitation provided for in South Dakota Codified Laws. This Appellants' Brief, including footnotes, contains 7,157 words. I have relied upon the word count of our word processing system as used to prepare this Appellants' Brief. The original Appellants' Brief and all copies are in compliance with this rule.

GUNDERSON, PALMER, NELSON
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CERTIFICATE OF SERVICE

I certify that on April 9, 2014, I e-mailed a true and correct copy of the foregoing Appellants' Brief to the following at their last-known e-mail addresses:

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APPENDIX

APP

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 26982

PETE LIEN & SONS, INC., a South Dakota Corporation,

Plaintiff/Appellee,

vs.

STEVE ZELLMER; CESAR CONDE; SUNSET PROPERTIES, L.L.C., a Colorado Corporation; GCC OF AMERICA, INC., a Delaware Corporation; and GCC DACOTAH, INC., a South Dakota Corporation,

Defendants/Appellants.

APPELLEE'S BRIEF

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

HONORABLE RANDALL L. MACY
Circuit Court Judge

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NOTICE OF APPEAL FILED FEBRUARY 6, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Regulations:

Secondary Authorities:

PRELIMINARY STATEMENT

Plaintiff/Appellee Pete Lien & Sons, Inc. will be referred to as "PLS, Inc." The named Defendants/Appellants will collectively be referred to as "GCC Entities." Reference to the record as reflected in the Register of Actions will be referred to as "R." Documents in the Appendix will be referred to by the letters "APP" followed by the appropriate letter designation.

JURISDICTIONAL STATEMENT

The GCC Entities appealed from the Memorandum Decision granting summary judgment in PLS, Inc.'s favor and the Judgment entered against the GCC Entities dated January 2, 2014. APP: A, B; R: 434, 446. The Notice of Entry of Judgment was served on January 9, 2014. R: 448. The GCC Entities' Notice of Appeal was served on February 5, 2014. R: 450.

STATEMENT OF THE ISSUES

A. Whether the trial court correctly quieted title to 14 placer mining claims in PLS, Inc. upon making the finding that the GCC Entities failed to properly locate 14 placer mining claims making the GCC Entities' claims void as a matter of law.

The trial court held that PLS, Inc. had valid title to the 14 placer mining claims and that the GCC Entities' mining claims were invalid because they did not follow the proper procedures for staking and monumenting or posting notice of their claims.

Legal Authority:

- 43 C.F.R. § 3832.11
- U.S. v. Sherman, 288 F. 497 (8th Cir. 1923)
- SDCL §§ 45-4-2 and 45-4-3

STATEMENT OF THE CASE

PLS, Inc. brought this action to quiet title to 14 mining claims located in Lawrence County, South Dakota. The GCC Entities had been involved in attempting to establish mining claims on the same land as PLS, Inc. PLS, Inc. alleged that the GCC

Entities failed to comply with state and federal laws that must be followed to establish valid mining claims, and because of that failure, the GCC Entities' claims are void. R: 1.

The parties filed cross-motions for summary judgment to adjudicate the title to the mining claims. R: 38, 107. On December 10, 2013, the trial court issued a Memorandum Decision finding as a matter of law that the GCC Entities "did not follow the procedure for staking and monumenting or posting notice of their mining claims" and granted PLS, Inc.'s motion for summary judgment. APP: A; R: 434. Judgment was entered on January 2, 2014, quieting title to the 14 mining claims in PLS, Inc. subject only to the paramount title of the United States. APP: B; R: 446.

STATEMENT OF THE FACTS

A. The Parties

1. Pete Lien & Sons, Inc.

Pete Lien & Sons, Inc. is a family owned, closely held South Dakota corporation with its principal place of business located in Rapid City, South Dakota. The company was founded in 1944. PLS, Inc. is in the business of manufacturing lime and producing sand and gravel, crushed stone, ready mix concrete, and concrete block. The company has operating locations in South Dakota, Colorado, and Wyoming.

2. GCC Entities

GCC of America, Inc. is a Delaware corporation with its principal place of business located in Denver, Colorado. It is wholly owned by Grupo Cementos de Chihuahua, a Mexican corporation. R: 45, Zellmer Dep. 5:11-15. The company is a regional manufacturer of cement, concrete and coal with locations in Colorado, Iowa, Minnesota, Montana, New Mexico, North Dakota, South Dakota, Texas, and Wyoming.

GCC Dacotah, Inc. is a South Dakota corporation with its principal place of business in Rapid City, South Dakota. GCC Dacotah owns and operates the cement plant in Rapid City. Sunset Properties, L.L.C. is a limited liability company organized under the laws of Colorado with its principal place of business in Denver, Colorado. GCC of America is the parent company of GCC Dacotah and Sunset Properties.

Steve Zellmer and Cesar Conde were, at all times relevant to this action, employed by GCC of America. Zellmer was employed as president of GCC Dacotah until 2005 and then as the vice president of sales for GCC of America until his retirement in 2012. R: 45, Zellmer Dep. 5:21-6:18. Cesar Conde is the in-house legal counsel for GCC of America. R: 45, Zellmer Dep. 7:21-23. Zellmer and Conde have both signed documents, either individually or on behalf of the GCC Entities, in connection with their attempt to establish the mining claims at issue.

B. The Mining Claims

There are fourteen 20-acre parcels of U.S. Forest Service land on which the parties have sought to establish conflicting mining claims. The mining claims are located in Lawrence County, South Dakota, near Sturgis.[1] APP: C, ¶ 1; R: 40. The GCC Entities' mining claims are not valid, because the GCC Entities failed to follow the state and federal legal requirements for establishing a mining claim.

1. PLS, Inc.'s Mining Claims

PLS, Inc. has 14 mining claims that are at issue in this action. Six of the claims were established in 2007 and are known as Chuck No. 2, Chuck No. 3, Chuck No. 4,

[1] The area at issue is located in Section 2 of Township 5 North, Range 4 East, of the Black Hills Meridian in Lawrence County, South Dakota. APP: C, ¶ 1; R: 40.

Chuck No. 5, Chuck No. 6, Chuck No. 7 (hereinafter collectively "Chuck No. 2 – Chuck No. 7"). The remaining eight mining claims at issue in this case were established in 2012 and are known as Chuck No. 2012-01, Chuck No. 2012-02, Chuck No. 2012-03, Chuck No. 2012-04, Chuck No. 2012-05, Chuck No. 2012-06, Chuck No. 2012-07, Chuck No. 2012-08 (hereinafter collectively "Chuck No. 2012-01 – Chuck No. 2012-08").

i. Establishment of Chuck No. 2 – Chuck No. 7

On April 20, 2007, Sam Brannan,[2] on behalf of PLS, Inc., made discovery of chemical grade limestone and posted notices of location on nine 20-acre placer mining claims, six of which are relevant to this lawsuit – the Chuck No. 2 – Chuck No. 7 mining claims. APP: C, ¶ 11; R: 40. After discovering the limestone on each of the claims, PLS, Inc. began the process to properly locate each of the mining claims on the ground. First, the discovery monuments were erected, followed by the posts marking the corners and sides. Wood posts measuring 4"x4"x4' were erected on all corners, side center lines, and discovery monuments[3] with shared boundaries using shared posts. Notices of location

[2] Sam Brannan is a member of the Lien family and an officer at PLS, Inc.

[3] Discovery monuments are required by SDCL § 45-4-2, which provides:

> Before filing a location certificate pursuant to § 45-4-4, the discoverer shall locate the claim:
>
> (1) By erecting a monument at the place of discovery and posting on the monument a plain sign or notice containing the name of the lode, the name of any locator, the date of discovery, the number of feet claimed in length on either side of the discovery, and the number of feet in width claimed on each side of the lode; and
>
> (2) By marking the surface boundaries of the claim.

were placed in PVC tubes and attached to discovery monuments.[4] Each post was marked using aluminum plates. On the plate for each discovery monument, "DISCOVERY" was etched with the name of the claim, Sam Brannan's name as the locator, the date of discovery, and the dimensions of the claim. The other posts were marked with the claim name and a directional indication. Posts used to mark corners (shared posts) are marked to indicate the name and direction of each claim as shown below.

APP: C, ¶ 12; R: 40.

Brannan was in the field several times before finalizing the work required to locate these claims. While present on mining claims Chuck No. 2 – Chuck No. 7, she did not observe any posts or other markings used to establish mining claims erected by the GCC Entities or anyone acting on their behalf. R: 74, Brannan Aff. ¶¶ 2, 7.

Sam Brannan filed the notices of location for mining claims Chuck No. 2 – Chuck No. 7 with the Lawrence County Register of Deeds on April 20, 2007. The notices were filed with the Bureau of Land Management on April 30, 2007. APP: C, ¶ 13; R: 40.

[4] Each PVC tube was constructed with PVC pipe with a cap glued on the bottom and another cap tapped down on the top. The tubes were secured to the posts with two metal bands that were ratcheted down.

ii. Establishment of Chuck No. 2012-01 – Chuck No. 2012-08

On February 13, 2012, Sam Brannan, on behalf of PLS, Inc., made discovery of chemical grade limestone on eight 20-acre placer mining claims Chuck No. 2012-01 – Chuck No. 2012-08. APP: C, ¶ 14; R: 40. Notices of location were posted on these mining claims on February 13-15, 2012. APP: C, ¶ 15; R: 40.

A similar procedure was used to locate mining claims Chuck No. 2012-01 – Chuck No. 2012-08 as was used on the 2007 mining claims. Discovery monuments were erected first, followed by the posts marking the corners and sides. Posts measuring 4"x4"x4' were used on all corners, center lines, and discovery monuments (9 posts marking each claim, with shared boundaries using shared posts). Notices of location were placed in PVC tubes and placed on the discovery posts and northeast corner posts. Each post was also marked with aluminum plates. On the plate for discoveries, "DISCOVERY" was etched with the name of the claim, Brannan's name as the locator, the date of discovery, and the dimensions of the claim. A photo depicting the markings on a discovery monument is shown below:

The rest of the posts were marked with the claim name and a directional indication on aluminum plates as shown below:

Shared posts used to mark corners have four aluminum plates, one indicating the name of each claim, and one PVC pipe on the northeast corner as depicted in the photos below:

APP: C, ¶ 16; R: 40.

While working on the property where the claims identified as Chuck No. 2012-01 – Chuck No. 2012-08 are located, Brannan observed one post on the northeast corner of

Section 2 (which is the northeast corner of Chuck No. 2012-01). The single post was a three-foot 4x4 wooden post with a PVC pipe attached holding 14 notices of location for mining claims CM 1, CM 2, CM 3, CM 4, CM 5, CM 6, CM 7, CM 8, CM 9, CM 10, CM 11, CM 12, CM 13, and CM 14 (hereinafter collectively "CM 1 – CM 14") naming Steve Zellmer as the locator. The single post was located on what Zellmer indicated was claim CM 5. None of the claims listed on the notices of location attached to this single post were properly marked. There was only one post on claim CM 5. Thirteen claims (CM 1 through CM 4 and CM 6 through CM 14) had no posted notices of location, nor were they marked in any other manner. R: 74, Brannan Aff. ¶ 12.

Sam Brannan filed the notices of location for mining claims Chuck No. 2012-01 – Chuck No. 2012-08 with the Lawrence County Register of Deeds on February 15, 2012, and with the Bureau of Land Management on February 27, 2012. APP: C, ¶ 17; R: 40. The PLS, Inc. mining claims at issue (Chuck No. 2 – Chuck No. 7 and Chuck No. 2012-01 – Chuck No. 2012-08) are current and up-to-date with all required filings and fees; all required affidavits of compliance have been filed pursuant to SDCL § 45-4-23 with the Lawrence County Register of Deeds, and all required fees have been paid to the Bureau of Land Management. APP: C, ¶ 18; R: 40.

2. The GCC Entities' Failed Attempt to Establish Mining Claims

On April 6, 2007, Defendant Zellmer filed 14 invalid notices of location for mining claims CM 1 – CM 14 with the Lawrence County Register of Deeds.[5] APP: C, ¶ 2; R: 40. These invalid claims covered the same land that is included in PLS, Inc.'s mining claims Chuck No. 2 – Chuck No. 7 and Chuck No. 2012-01 – Chuck No. 2012-

[5] As shown below, the notices of location were invalid, because the fieldwork required to locate valid claims had not been done.

08. Before filing the invalid notices, Zellmer had only been on the property on one occasion. R: 45, Zellmer Dep. 12:24-13:2. When testifying in his deposition, Zellmer was unable to identify the claims on which he had actually been present. He acknowledged that he had not been on all of the property comprising the 14 claims involved in this litigation. R: 45, Zellmer Dep. 13:3-12.

Zellmer testified he was not present on the mining claims at any time on April 6, 2007, the day he filed the notices of location. APP: C, ¶ 3; R: 40. GCC Dacotah employee, Gene Nelson, and a realtor, Jim Strain, erected a single post containing 14 notices of location for mining claims CM 1 – CM 14 on the property on April 6, 2007. APP: C, ¶ 4; R: 40. Steve Zellmer and Gene Nelson both admitted that *only one post was used to mark all 14 claims* (280 acres of property). APP: C, ¶ 5; R: 40.

The single post was placed on the northeast corner of CM 5. APP: C, ¶ 6; R: 40. The post had a piece of PVC pipe attached to it, which contained the 14 notices of location for all of the claims. APP: C, ¶ 7; R: 40. There were no other notices of location placed on any of the other 13 mining claims. APP: C, ¶ 8; R: 40. Nothing was done to establish the exterior lines of the mining claims. There were no stakes or monuments on the corners of the mining claims, and there were no notices on any claim other than CM 5. APP: C, ¶ 9; R: 40.

The alleged mining claims made by Zellmer conflict with PLS, Inc.'s mining claims as follows:

Pete Lien & Sons mining claim	Asserted mining claim of Zellmer[6]
Chuck No. 2	CM 1

[6] On June 6, 2007, Steve Zellmer signed a Quitclaim Deed transferring his interest in mining claims CM 1 – CM 14 to Sunset Properties, L.L.C. APP: C, ¶ 10; R: 40.

Chuck No. 3	CM 6
Chuck No. 4	CM 11
Chuck No. 5	CM 12
Chuck No. 6	CM 13
Chuck No. 7	CM 14
Chuck No. 2012-01	CM 5
Chuck No. 2012-02	CM 10
Chuck No. 2012-03	CM 4
Chuck No. 2012-04	CM 9
Chuck No. 2012-05	CM 3
Chuck No. 2012-06	CM 8
Chuck No. 2012-07	CM 2
Chuck No. 2012-08	CM 7

R: 74, Brannan Aff. ¶ 15.

ARGUMENT AND AUTHORITY

A. Summary Judgment Standard.

This Court reviews a grant of summary judgment by deciding "whether genuine issues of material fact exist and whether the law was correctly applied." Fedderson v. Columbia Ins. Group d/b/a Columbia Nat'l Ins. Co., 2012 S.D. 90, ¶ 5, 824 N.W.2d 793, 795 (citations omitted). Conclusions of law are reviewed de novo. Eagle Ridge Estates Homeowners Ass'n, Inc. v. Anderson, 2013 S.D. 21, ¶ 13, 827 N.W.2d 859, 864.

B. The Trial Court Properly Quieted Title to 14 Placer Mining Claims in PLS, Inc. and Found the GCC Entities' Claims Void as a Matter of Law.

The United States Supreme Court has long held that the right to possession of a mining claim comes only from a valid location. Belk v. Meagher, 104 U.S. 279, 284 (1881). "Location does not necessarily follow from possession, but possession from location. A location is not made by taking possession alone, but by working on the

ground, recording and doing whatever else is required for that purpose by the acts of Congress and the *local laws and regulations*." Id. (emphasis added).

To properly locate a mining claim "[y]ou must follow *both* state and Federal law." 43 C.F.R. § 3832.11(a) (emphasis added). The GCC Entities failed to properly locate any mining claims under either federal law or state law.

1. The GCC Entities have no valid mining claims under federal law.

Under federal law, after making a valid discovery within the boundaries of every claim,[7] each claim is located when the following actions are completed:

> (1) Make certain that the land on which you are locating the claim or site is Federal land that is open to mineral entry;
> (2) *Stake and monument the corners of a mining claim or site which meets applicable state monumenting requirements and the size limitations described in § 3832.22 for lode and placer claims*, § 3832.32 for mill sites, and § 3832.42 for tunnel sites;
> (3) *Post the notice of location in a conspicuous place on the claim or site.* The notice must include:
> (i) The name or names of the locators;
> (ii) The date of the location; and
> (iii)A description of the claim or site;
> (iv)The name or number of the claim or site, or both, if the claim or site has both;
> (4) Record the notice or certificate of location in the local recording office and the BLM State Office with jurisdiction according to the procedures in part 3833;
> (5) Follow all other relevant state law requirements; and
> (6) Comply with the specific requirements for lode claims, placer claims, mill sites, or tunnel sites in this part.

[7] In McPherson v. Julius, the South Dakota Supreme Court discussed the importance of discovery on every claim. 95 N.W. 428 (S.D. 1903). "The discovery must be made within the limits of the location as it is ultimately marked on the ground." Id. at 435. "[T]here can be no valid mining claim until a discovery is made within the lines of such claim. . ." Id. Although Zellmer claims he made a valid discovery on every claim, he testified that he doesn't know whether he stepped foot onto each of the 14 claims. R: 45, Zellmer Dep. 13:3-12, 20:3-18. The 14 claims cover 280 acres of land, and Zellmer is not sure he was on every 20 acre parcel. One thing is certain, there were no posted discovery monuments on 13 of the 14 mining claims in which the GCC Entities claim an interest. There were no boundary markings on *any* of the claims.

43 C.F.R. § 3832.11(c) (emphasis added).

Staking a single mining claim requires: (1) Making a valid discovery within the boundary of the claim (43 C.F.R. § 3832.11(b)); (2) Erecting corner posts or monuments (43 C.F.R. § 3832.11(c)(2)); and (3) Posting a notice of location on a post or monument in a conspicuous place (43 C.F.R. § 3832.11(c)(3)). *In order to establish 14 mining claims, this process must be repeated on each claim.* The GCC Entities have failed to meet any of these legal requirements.

Under federal law, the GCC Entities would have been required to place at least *23 posts* on the 14 mining claims (with shared corners using shared posts). The use of a single post to mark 14 claims will not create any valid mining claims.

The GCC Entities admit that only one post was used to mark all 14 claims on 280 acres of property. APP: D, ¶¶ 7, 9; R: 109; R: 45, Zellmer Dep. 17:8-16; R: 45, Nelson Dep. 5:24-6:5. The single post was placed on the northeast corner of the land the GCC Entities attempted to claim as CM 5. There were no notices of location placed on any of the other 13 mining claims. APP: D, ¶¶ 6, 8-9; APP: C, ¶ 8; R: 40. There were no discovery monuments placed on any of the other 13 mining claims. Nothing was done to establish the exterior lines of the mining claims. APP: D, ¶ 9; R: 109. There were no stakes or monuments on the corners of the mining claims, and there were no notices on any claim other than CM 5. APP: D, ¶ 9; APP: C, ¶ 9.

Federal law requires each claim to have a posted notice of location and the corners of the mining claim to be staked or monumented. See 43 C.F.R. § 3832.11(c). The Rocky Mountain Mineral Law Foundation has summarized the requirements under federal law as follows:

> Under the Mining Law of 1872, the specific acts necessary to initiate a location of a lode or placer claim include locating a locatable mineral of sufficient quality and quantity to establish a discovery and distinctly marking the location so the boundaries can be traced. *Federal regulations also require the staking of the corners of the claim, the posting of a notice of location*, and compliance with state law, such as performance of discovery work or recordation of evidence of the location in the county recorder's office.

Lynn R. Cardey-Yates, 2007 No. 4 RMMLF-INST Paper No. 12 (2007) (internal citations omitted) (emphasis added). "Although not prescribed by statute, the boundaries of a placer claim must also be marked." Id. at n. 19 (citing 43 C.F.R. § 3832.11(c)(2)). A single post is not sufficient. The assertion by the GCC Entities in their brief that posting is not necessary on placer mining claims is inconsistent with this well-recognized treatise.

Under both state and federal law, posting is essential to the location of a mining claim. In U.S. v. Sherman, 288 F. 497 (8th Cir. 1923), a dispute arose regarding two lode claims in South Dakota. The locator could not remember whether he marked the corners of the claims with stakes or blazed trees. Id. at 499-500. In determining whether the location was valid, the court assumed that the locator had placed stakes at each corner. Id. at 500.

The court set forth the following South Dakota statute in effect at the time the locator attempted his location:

> Such surface boundaries shall be marked by eight substantial posts, hewed or blazed on the side or sides facing the claim and plainly marked with the name of the lode and the corner, end or side of the claim that they respectively represent, and sunk in the ground: one at each corner and one at the center of each side line, and one at each end of the lode.

Id. at 501 (quoting Rev. Code S.D. 1919, Sec. 8731). The court then stated:

> A stake is not a post. The latter signifies more permanence, and to sink it in the ground requires more effort and outlay, than to drive down a stake. It suggests larger proportions, is more readily seen than a stake. *There is no pretense by appellee that he complied with the statute. His testimony shows that he did not; and his locations were therefore void.* He acquired no possessory right to any of the ground in controversy.

Id. (emphasis added). Where substantial posts are not set, a mining claim is not valid. Sherman held not only that a stake does not constitute a substantial post, but also that the use of a stake instead of a substantial post voided the location and resulted in no possessory right in the locator. If using a stake instead of a post is insufficient to create a valid mining claim, then certainly the failure to use *any* form of marking or monument to mark the surface boundaries cannot create a valid mining claim.

In their brief, the GCC Entities make the argument that it is possible to establish federal mining claims covering 280 acres of land by erecting a single post. In fact, they assert that they need not follow posting requirements at all. The GCC Entities are essentially claiming that no groundwork or posting at the claim site is necessary. An extensive review of federal case law turned up *no* authority for the position that a placer claim need not be staked or monumented.[8]

It is clear that the federal regulations require staking the corners of each claim for a proper location. Prior to the enactment of the current version, the regulation setting

[8] The GCC Entities argue that, because there are statutes and case law in Oregon and California that seemingly waive the posting requirements for placer claims, South Dakota and federal law do not require posting on the ground to establish a mining claim. However, the GCC Entities are confused. The Oregon and California statutes were enacted under prior versions of the federal regulations, have nothing to do with the issue here, and are not authoritative in any manner. Neither of the statutes is valid under the current version of the regulation, and neither is applicable in South Dakota. There is currently no provision under federal statute or regulation that allows states to waive staking and monumenting the corners of a mining claim. *South Dakota has never had a statute that waived posting requirements on placer claims.*

forth the requirements for establishing a mining claim read, in part, "A location is made by (a) staking the corner of the claim, except placer claims described by legal subdivision where State law permits locations without marking the boundaries of the claims on the ground." 43 C.F.R. § 3831.1 (1973). This earlier version allows states to create laws permitting locations without marking the boundaries of the claims on the ground. However, in 2003, the federal regulations were revised and the current version of 43 C.F.R. § 3832.11 under which language requiring a locator to "[s]take and monument the corners of a mining claim" was adopted. See 68 FR 61046-01 (replacing 43 C.F.R. § 3831.1 with 43 C.F.R. § 3832.11). The intent of requiring locators to mark the boundaries of placer mining claims on the ground is clear.

To properly locate a mining claim "[y]ou must follow both state and Federal law." 43 C.F. R. § 3832.11(a) (emphasis added). 43 C.F.R. § 3832.11(c)(2) requires a locator to "[s]take and monument the corners of a mining claim or site which meets applicable state monumenting requirements and the size limitations described in § 3832.22 for lode and placer claims[.]" The regulation does *not* say that if there are no state monumenting requirements and size limitations that staking and monumenting the corners of the mining claim may be ignored.

After advocating that the regulation should be construed as to not require any posting on the ground, the GCC Entities next argue that the regulation should not apply at all. However, the GCC Entities have confused the laws governing mining claims when they make their argument that "[i]mposing new, additional notice requirements by regulation would not be in harmony with the federal statute that requires only legal descriptions." Appellants' Brief, pp. 21-22. Appellants ignore key language in the

United States statutes that they cite in support of their argument. In fact, 30 U.S.C. § 22 specifically directs that "regulations prescribed by law" must be followed when making mining claims:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall 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 and those who have declared their intention to become such, *under regulations prescribed by law*, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

30 U.S.C. § 22 (emphasis added). Furthermore, the Department of the Interior "has been granted plenary authority over the administration of public lands, including mineral lands; and it has been given broad authority to issue regulations concerning them." Best v. Humboldt Placer Min. Co., 371 U.S. 334, 336 (1963) (citing 30 U.S.C. § 22, 43 U.S.C. § 1201).

The GCC Entities argument that 30 U.S.C. § 35 excuses their failure to properly locate the mining claims also holds no weight. 30 U.S.C. § 35 describes the area of land that may be claimed, and requires that all placer claims on surveyed lands must conform to legal subdivisions.[9] In addition, the statute requires that placer claims be "located" by the claimant. "Locate" is a term of art in mining law.

"Location is the act or series of acts whereby the boundaries of the claim are marked[.]" Sherman, 288 F. at 499 (citing Cole v. Ralph, 252 U.S. 286, 296 (1920) where the Court discussed "location" as it relates to both lode and placer claims); see also San Francisco Chemical Co. v. Duffield, 201 F. 830 (8th Cir. 1912) (noting that locators

[9] See APP: E for the full language of 30 U.S.C. § 35.

had "duly marked the boundaries of their placer mining location in due form, posted and recorded notice of location" of the claim).

Furthermore, 30 U.S.C. § 28 is very clear that location must be distinctly marked on the ground:

> The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: *The location must be distinctly marked on the ground so that its boundaries can be readily traced.* All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. . . .

The requirements in 30 U.S.C. § 35 that all placer mining claims located on surveyed lands must conform to legal subdivisions does not dispense with the requirement of 30 U.S.C. § 28 that the location of mining claims must be distinctly marked on the ground. See Worthen v. Sidway, 79 S.W. 777, 779 (Ark. 1904).

The GCC Entities next argue that they should be excused from following federal law and state regulations, claiming that PLS, Inc., through Sam Brannan, had "actual notice" of their attempt to claim 14 mining claims covering 280 acres of land by erecting a single post. Appellants' Brief, pp. 17-21. However, there is no legal authority to support this position and the authority cited by the GCC Entities further establishes that their claims are not valid.

In Fuller v. Mountain Sculpture, Inc., the Supreme Court of Utah reviewed the validity of mining claims where the plaintiffs had located lode claims and then decided to claim the same area as a placer claim. 314 P.2d 842 (Utah 1957). The court noted that plaintiffs marked monuments at each of the four corners of the placer claim, "[a]s the law

requires," and posted a notice of location. Id. at 844. In addition, plaintiffs went further and posted a large sign reciting the location and the names of the locators. However, plaintiffs had mistakenly listed the axis of the claim as being due north-south, rather than the actual orientation of northwest-southeast. The court found that, given the defendants actual notice of the area in dispute, the "minor defects" of a technical nature in plaintiffs' location would not void plaintiffs' claim. Id. at 846.

In a later case, the Utah high court stated that the purpose of the statutory requirements for posting "is to *mark as definitely as possible* the locator's claim and to give others notice thereof." Powell v. Atlas Corp., 615 P.2d 1225, 1227 (Utah 1980) (emphasis added). The court in Powell also held that "*minor differences* in the description of a claim as recorded from the actual location will not render a claim invalid." Id. (emphasis added). The court found that the defendants had located the claims and that there was "sufficient compliance with the statutory requirements both at the places of location and as filed with the county recorder." Id.

The Utah cases demonstrate that *minor defects* may be corrected when there is *sufficient compliance* with the legal requirements for locating a mining claim. Here, the GCC Entities have admitted that they made no effort to post any notices on 13 of the 14 claims and that they did not mark the corners or boundaries of any of the claims.

The GCC Entities also cite Hagerman v. Thompson, 235 P.2d 750 (Wyo. 1951) in support of their argument that no posted notices were required on the mining claims. However, this case clearly holds the opposite. In Hagerman, the plaintiffs posted a discovery notice and erected substantial posts at six different corners of the claim. Id. at 526-27. Two of the stakes had disappeared at some time. Defendants had actual notice

of the claims, but argued that there were deficiencies in the location notice. The court noted that, if a location is merely defective, courts are inclined to allow the defects to be cured. However, the court warned that it would be hazardous to set forth a rule for all cases as to when a placer mining claim is merely defective:

> Such a claim doubtless cannot be located by a mere mental operation or by the mere assertion of possession or of ownership either orally or in writing. *There must doubtless be a reasonable physical substratum which marks the claim and a reasonable attempt to comply with the statutory requirements.*

Id. at 530-31 (emphasis added). Clearly the court understood the difference between making a mistake on the notice of location and the complete failure to comply with the legal requirements for locating a mining claim, which was the case with the GCC Entities' attempted claims.

The GCC Entities assert that the cases of Steel v. Preble, 77 P.2d 418 (Or. 1938) and Scoggin v. Miller, 189 P.2d 677 (Wyo. 1948) are instructive in their argument that actual notice would relieve their failure to follow the law. In fact, these cases instruct the Court that the GCC Entities' complete failure to comply with federal and state location requirements will result in invalid mining claims.

In Steel, while noting that a "mere defect in the lines or notices" would not be enough for defendants to succeed in their contention that the boundaries of mining claims were not properly marked, the court went further and detailed the markings that must be made on the ground for a valid location. 77 P.2d 418. The Steel court noted that the plaintiffs had marked the lines of the claim by blazing the trees and cutting down brush. Appropriate stakes were driven into the ground to mark the claim and landmarks were described on the notices. The court held that, by completing this work, the plaintiffs

"made the proper markings upon the ground and posted and recorded the proper notices." Id. at 428. The court held that the mere fact the stakes were no longer present when the defendant made his location did not invalidate plaintiffs' claims. Id. at 429. In Steel, all of the evidence showed that the plaintiffs had, in fact, done the required groundwork to perfect their location. Here, the GCC Entities have admitted that they never complied with the required posting and notice requirements.

In Scoggin, the court found that all provisions of the Wyoming statutes in place at the time had been complied with by defendants when locating their mining claims, including posting notices of location and marking the corners of each claim with substantial posts. 189 P.2d at 679. The court noted that the evidence showed each claim had been marked with 4x4 posts at the middle of each section and on the corners and that notices had been placed in a large number of wide mouth, screw-top bottles that were wired to the posts. Id. at 683. The plaintiffs alleged that there were no posts on the claims years later when the plaintiffs attempted to locate the claims. The court cited various authority, including Steel, for the position that a mining claim that has been *validly located* cannot be divested by the removal or obliteration of posts or notices. Id. at 685. The court held that, with the exception of a typo on the notice which was corrected, the defendants had complied with all legal requirements for locating the mining claims. Again, in Scoggin, all the required groundwork to perfect the location was completed.

Here, we are not dealing with a minor defect in location or with a case where there was sufficient compliance. The GCC Entities' posts weren't missing or removed by weather or human intervention. They were not misplaced nor were they mismarked.

Here, the GCC Entities admit that no posts ever existed on 13 of the 14 claims and no attempt was ever made to mark the corners and boundaries of each claim.

The GCC Entities have no valid mining claims on the land at issue in this case. The GCC Entities are unable to establish 14 separate mining claims covering 280 acres of land with the erection of a single post. Moreover, the GCC Entities failed to post a notice of location on each claim as required by state and federal law.

2. The GCC Entities have no valid mining claims under South Dakota law.

The GCC Entities failed to properly locate the mining claims under federal law by failing to erect corner posts or monuments on the claims (43 C.F.R. § 3832.11(c)(2)) and by failing to post a notice of location on a post or monument in a conspicuous place on each claim (43 C.F.R. § 3832.11(c)(3)). Therefore, the GCC Entities' attempted claims are void as a matter of law. This Court need exercise no further inquiry to uphold the trial court's decision. However, the GCC Entities' mining claims are also invalid under South Dakota law. And to properly locate a mining claim "[y]ou must follow *both* state and Federal law." 43 C.F. R. § 3832.11(a) (emphasis added).

South Dakota has no statutes with specific requirements for placer mining claims. Rather, its statutes cover the requirements for lode claims. See SDCL Ch. 45-4. However, South Dakota case law indicates that the requirements for lode claims should also be followed for placer claims.

Even prior to statehood, the Supreme Court of the Territory of Dakota recognized that placer claims fell under the law of other mining claims when no special provision has been made for placer claims. In Hawke v. Deffenbach, the court addressed a dispute between the owner of land acquired under the town-site law and the owner of a placer

claim on the same land. 22 N.W. 480 (Dakota 1885). In resolving the issue, the court reviewed several provisions of the federal mining laws. The Supreme Court of the Territory of Dakota noted:

> The meaning of the term "mining claim" has been defined by the supreme court in the case of Smelting Co. v. Kemp, 104 U.S. 649, as follows: "A parcel of land containing precious metals in soil or rock," and as the subject of that argument in that cause was a placer claim, of course the definition of the court included such claims. *True, at the time this proviso was first enacted placer claims had not as yet been the subject of express statutory regulations or recognitions, but they formed a very important part of the mining industry of the country, and as the words used are broad enough to include them, there is every reason to suppose that they were within the immediate contemplation of the makers of the laws.*

Id. at 487 (emphasis added). The court concluded that placer claims fell within the provisions of the federal law at issue, even though placer claims had not been the subject of statutes at the time those provisions were enacted.

In Suessenbach v. First Nat. Bank of Deadwood, 41 N.W. 662 (Dakota 1889), the Supreme Court of the Territory of Dakota addressed an issue regarding the transfer of a mining claim. In doing so, the court adopted the following factual findings of the lower court:

> [The locators] duly located, claimed, and appropriated [land] as placer mining ground . . . in accordance with the laws of the United States, the local laws, and the customs, rules, and regulations of miners in said mining district, *by distinctly marking the surface boundaries of said claim so that they could be readily traced on the ground; by setting substantial stakes at each corner of said claim, and on the sides thereof, with the name of the claim marked thereon and the name of the locators; and by putting a plain sign or notice at the points of discovery thereon, containing the name of the claim . . . and the names of the locators . . . and the date of location*[;] and by filing and recording a certificate of location in the records of the recorder of said Whitewood mining district.

Id. at 662-63 (emphasis added). Referencing a United States statute, the court stated that "placer mining claims are subject to entry and patent under like circumstances and

conditions, and upon similar proceedings, as are provided for vein and lode claims." Id. at 667.

After statehood, the South Dakota Supreme Court continued to find the same rules for lode claims would be applicable to placer mining claims where no special provisions are made for the latter. City of Deadwood v. Whittaker involved a dispute about the use of a city street located within a placer claim. 81 N.W. 908 (S.D. 1900). A locator had filed a location notice for a placer claim in 1876; however, the placer claim was on land that was part of the Great Sioux reservation, which was not opened up to settlement by treaty until February 28, 1877. Id. at 909. In addressing what rights the locator had in the placer claim, the court provided:

> [W]here a party was in possession of a mining claim on the 28th of February, 1877, with the requisite discovery, *with the surface boundaries sufficiently marked, with the notice of location posted*, and with a disclosed vein of ore, he could, by adopting what had been done, causing proper record to be made, and performing the amount of labor, or making the improvements necessary to hold the claim, date his rights from that day; and that such location and labor and improvements would give him the right of possession.

Id. (quoting Noonan v. Caledonia Gold Mining Co., 121 U.S. 393, 403 (1887)). The court then stated that "[t]he same rule has been held applicable to placer mining locators." Id. at 910. The court held that while the locator could not acquire an absolute right to his claim prior to the treaty, he had acquired a right superior to the rights of others that the courts were bound to protect. Id.

The above legal authorities demonstrate that law governing lode claims will be applied to placer claims absent specific provisions for placer claims. Therefore, under South Dakota law, a placer claim is located "[b]y erecting a monument at the place of discovery and posting on the monument a plain sign or notice" and "[b]y marking the

surface boundaries of the claim." SDCL § 45-4-2. South Dakota law also prescribes how the surface boundaries of each claim must be marked:

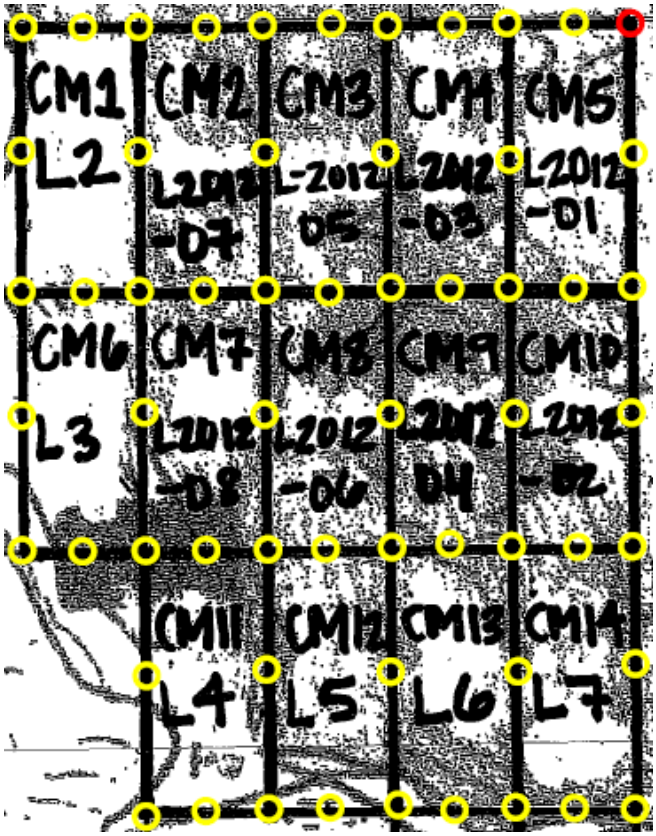
> Surface boundaries shall be marked by eight substantial posts, hewed or blazed on the side or sides facing the claim and plainly marked with the name of the lode and the corner, end, or side of the claim that they respectively represent and sunk in the ground; one at each corner and one at the center of each side line and one at each end of the lode. If it is impracticable because of rock or precipitous ground to sink such posts, they may be placed in a monument of stone.

SDCL § 45-4-3.

The GCC Entities have failed to meet any of these requirements. Steve Zellmer and Gene Nelson both admitted that only one post was used to mark all 14 claims (280 acres of property). R: 45, Zellmer Dep. 17:8-16; R: 45, Nelson Dep. 5:24-6:5. There were no other notices of location placed on any of the other 13 mining claims. APP: C, ¶ 8; R: 40. There were no other discovery monuments placed on any of the other 13 mining claims. Nothing was done to establish the exterior lines of the mining claims. There were no stakes or monuments on the corners of the mining claims, and there were no notices on any claim other than CM 5. APP: C, ¶ 9; R: 40.

At a minimum, each claim would be required to have eight substantial posts to mark the surface boundaries. See SDCL § 45-4-3. If the GCC Entities had properly located the mining claims, they would have been required to place at least *59 posts* on the 14 mining claims (with shared boundaries using shared posts).

The diagram below depicts the minimum amount of posting to mark the surface boundaries required under South Dakota law. The yellow circles represent locations where posts would be required. The red circle is the only area where the GCC Entities placed a post.



The GCC Entities' posting was not only insufficient, it was completely non-existent on 13 of the 14 claims.

Under South Dakota law, the GCC Entities have no valid mining claims on the land at issue in this case. The GCC Entities are unable to establish 14 separate mining claims covering 280 acres of land with the erection of a single post.

3. PLS, Inc. has valid mining claims under both federal and state law.

In contrast to the GCC Entities' complete failure to follow both state and federal law, PLS, Inc.'s procedure for locating the mining claims followed both state and federal law and went beyond what was required at times. Notices of location were placed on every discovery monument on every claim, and substantial posts were placed on corners and center lines of all claims. Notices of location were also placed in the northeast corner of each claim on mining claims Chuck No. 2012-01 – Chuck No. 2012-08. All posts

were marked clearly with aluminum plates so that anyone looking would have notice of the claims being made. The plates on discovery monuments were labeled "DISCOVERY" and were marked with the name of the locator, the date of discovery, and the dimensions of the claim. The aluminum plates on other posts were marked with the name of the claim and a directional indication. APP: C, ¶¶ 12, 16; R: 40. PLS, Inc. used no fewer than 66 substantial posts to mark the 14 claims.

The GCC Entities do not claim that PLS, Inc. did *anything* wrong or failed to follow any state or federal law. They only argue that the GCC Entities' claims were recorded first. However, because the GCC Entities failed to properly locate the claims, their claims are void and they "acquired no possessory right to any of the ground in controversy." Sherman, 288 F. at 501.

CONCLUSION

The GCC Entities attempted to create 14 mining claims on 280 acres of land using a single post. They failed to comply with state and federal posting and notice laws that must be followed to make a valid location; therefore, the GCC Entities' mining claims are void. See Sherman, 288 F. at 501. PLS, Inc. requests this Court affirm the trial court's decision granting summary judgment in favor of PLS, Inc. and quieting title to the 14 mining claims in PLS, Inc. subject only to the paramount title of the United States of America.

Respectfully submitted this 21st day of May, 2014.

BEARDSLEY, JENSEN & VON WALD,
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ORAL ARGUMENT IS RESPECTFULLY REQUESTED

CERTIFICATE OF COMPLIANCE

I, Jessica L. Larson, attorney for the Appellee, hereby certify that pursuant to SDCL § 15-26A-66 the foregoing brief complies with the above mentioned statute in that it is in Times New Roman font and that the word processor used to prepare this brief indicated that said brief contains 7,863 words and 37,139 characters (no spaces) in the body of this brief.

Dated this 21st day of May, 2014.

/s/ *Jessica L. Larson*
Jessica L. Larson

CERTIFICATE OF SERVICE

I certify that on May 21, 2014, I e-mailed a true and correct copy of the foregoing Appellee's Brief to the following:

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I further certify that on May 21, 2014, I e-mailed the foregoing Appellee's Brief and sent the original and two copies of it by U.S. mail, first-class postage prepaid, to:

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/s/ *Jessica L. Larson*
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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

Appeal No. 26982

PETE LIEN & SONS, INC.,

Plaintiff/Appellee,

vs.

STEVE ZELLMER; CESAR CONDE; SUNSET PROPERTIES, LLC, a Colorado limited liability company; GCC OF AMERICA, INC., a Delaware corporation; and GCC DACOTAH, INC., a South Dakota corporation,

Defendants/Appellants.

ON APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

The Honorable Randall L. Macy,
Circuit Court Judge, Presiding

Notice of Appeal filed February 7, 2014

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Secondary Authorities:

FACTS IN REPLY

Fourteen individual placer mineral claims that cover 280 acres in total are at issue. Pete Lien & Sons, Inc. (PLS) asserts that GCC failed to establish its fourteen placer claims because the "fieldwork required to locate valid claims had not been done." Appellees' Brief, at 8, fn. 1.

The facts are undisputed. Steve Zellmer made a discovery of the chemical grade limestone within the boundaries of GCC's claims prior to April 5, 2007, as he had walked the property where the claims were located and where the limestone outcroppings were visible. (R 109, ¶ 4)[1] On April 6, 2007, Zellmer signed and filed with the Lawrence County Register of Deeds fourteen placer mineral claims. (MD 3) On that same day, Jim Strain, a real estate agent, and Gene Nelson, an employee of GCC, placed one four-by-four discovery post or monument on the northeast corner of the land in dispute. (*Id*.) The monument contained a copy of the fourteen notices of location of placer mineral claims filed by Zellmer. (*Id*.) Each notice of location defined a single 20-acre placer mineral claim by legal description, for a total of 280 acres. (R 109) GCC filed the fourteen claims with the Bureau of Land Management ("BLM") and has continuously paid all required fees to the BLM. (R 109) GCC did not stake and monument the boundaries of each placer mineral claim. GCC did not post a discovery

[1] In a footnote, PLS cites *McPherson v. Julius*, 95 N.W. 428 (S.D. 1903), for what appears to be the proposition that Zellmer did not make a proper discovery of the chemical grade limestone on all 280 acres because he did not recall stepping on each claim. *McPherson* does not stand for such proposition. It is undisputed that Zellmer walked the whole corner of the section of the property which encompassed his mining claims, that he walked the property were the claims are located and where the limestone outcroppings were visible on all claims, and that he could see all the claims although he did not walk on every square foot of the mining claims. (R 109, ¶ 4)

monument on each placer mineral claim. GCC filed its placer mineral claims before PLS. (HT 8-9)

On April 18, 2007, prior to filing notices of location for PLS, Sam Brannan observed GCC's discovery monument on CM 5. (R 370, ¶ 21)[2] She observed GCC's fourteen notices of location that were attached to the discovery monument. (R 370, ¶ 21) GCC's fourteen notices of location each included the 20-acre parcels and legal descriptions for GCC's placer mineral claims CM 1 to CM 14. (R 370, ¶ 21) The boundaries of GCC's claims could be "readily traced" from that location marker. 30 U.S.C. § 28.

On April 20, 2007, after noticing GCC's claims, Sam Brannan, on behalf of PLS, made discovery and posted notice of location markers on six 20-acre placer mineral claims that are relevant to this lawsuit. (MD 3) These claims were staked with wooden posts that were erected on all corners, side center lines, and discovery monuments. (*Id*.) A notices of location was attached to the discovery posts on each mining claim. (*Id*.)

On February 13, 2012, approximately five years after observing GCC's claims, Brannan made discovery on eight additional 20-acre placer mineral claims. (MD 4) Brannan proceeded to file claims on Chuck No. 2012-01 through Chuck No. 2012-08. (*Id*.) These claims were all staked with wooden posts that were erected on all corners, side center lines, and discovery monuments. (*Id*.) Notices of location were attached to

[2] PLS's recitation of the establishment of Chuck No. 2012-01-Chuck No. 2012-08 suggests that while working on the property where these claims are located in 2012, Brannan observed the discovery post and the fourteen notices of location. To be clear, the record reflects that Brannan observed GCC's discovery post on April 18, 2007, prior to filing notices of location for *any* of PLS's placer mineral claims at issue. (R 109, ¶ 21)

the discovery posts for each separate mineral claim. (*Id.*) The fourteen placer mineral claims filed by GCC and the fourteen placer mineral claims filed by PLS cover the same 280 acres of land.

ARGUMENT

I. GCC COMPLIED WITH FEDERAL LAW FOR LOCATING A PLACER MINERAL CLAIM BY LEGAL DESCRIPTION.

A. GCC's fourteen notices of location were sufficient to give it exclusive right to possess the property.

PLS makes much of its effort to stake and monument all boundaries of the claims. But staking and monumenting were not necessary for GCC's placer mineral claims on U.S. Forest Service property under federal law and South Dakota state law. More importantly, PLS's staking and monumenting were wrongful as they were completed *after* it had notice of the exact locations of GCC's fourteen placer mineral claims covering the same land.

Section 22 of Title 30 to the United States Code provides:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall 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 and those who have declared their intention to become such, *under regulations prescribed by law*, and according to the local customs or rules of miners in the several mining districts, *so far as the same are applicable and not inconsistent with the laws of the United States.*

(Emphasis added.)

Section 35 of Title 30 to the United States Code provides how to make a placer mineral claim on federal property in Lawrence County, South Dakota.

> [W]here the lands have been previously surveyed by the United States, the entry in its exterior limits *shall conform to the legal subdivisions of the*

> *public lands. And where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the 10th day of May 1872, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys*, and no such location shall include more than twenty acres for each individual claimant[.]

30 U.S.C. § 35 (emphasis added). The regulation for locating a mining claim provides that a person "must follow both state and Federal law." 43 C.F.R. § 3832.11. PLS relies almost exclusively on 43 C.F.R. § 3832.11, whose heading says that both "state and Federal law" must be followed. The title or heading of this federal regulation is incomplete and inaccurate. That is, the title should have more accurately stated that "both Federal and state law must be followed but only if the state law is applicable and not inconsistent with Federal law."

Reading the federal statutes and regulations together, state law and regulations applicable to placer mineral claims should be followed unless they are not applicable or inconsistent with the federal law. 30 U.S.C. §§ 22, 35. As outlined in GCC's opening brief, South Dakota has not adopted state law that would require GCC to stake and monument placer mineral claims.

Here, GCC, through Zellmer, complied with the federal statutes and regulations regarding location and filing of placer mineral claims on the federal property in Lawrence County, South Dakota. As required by 30 U.S.C. § 35, entry onto federal land for placer mineral claims "shall conform to the legal subdivisions of the public lands." GCC's placer mineral claims complied with the 20-acre size limitation described in § 3832.22 and described the claim by legal subdivision using the legal description as required by 43 C.F.R. § 3832.12 and 30 U.S.C. § 35. (R 109, ¶ 29) On April 6, 2007,

GCC recorded fourteen notices of location in the Lawrence County Register of Deeds and posted notice of the fourteen claims on CM-5. From that posted notice of location, which PLS observed prior to making its claim, the boundaries of GCC's fourteen claims could be readily traced. 30 U.S.C. § 28. Each notice of location described a single 20-acre placer mineral claim by legal description, as required by federal law. (R 109, ¶¶ 3, 29) The placer mineral claims were also filed with the BLM.

Having completed all the requirements prescribed by statute, the 280 acres of U.S. Forest Service property upon which GCC's located its placer mineral claims was not open or available for further discovery, precluding PLS's filings on April 20, 2007, and February 13, 2012. Yet, despite notice of GCC's claims, PLS entered the property and stake and monumented claims.

The crux of PLS's argument—and the trial court's decision—is that GCC's placer mineral claims were not valid because it failed to stake and monument the boundaries of the placer mineral claims and failed to post a notice of location on each claim. GCC addressed these issues in full in its opening brief. These arguments—and the findings of the trial court—are incorrect as a matter of law. These issues will be again discussed in turn.

B. Staking and monumenting placer mineral claims is not required under federal law, state law, or regulations.

The federal regulation at issue, 43 C.F.R. § 3832.11, must be read in full and in context for a proper interpretation of its requirements by giving meaning to each term. PLS often only cites the portion that provides that a locator must "stake and monument the corners of a mining claim[.]" In full, that provision reads as follows:

> Stake and monument the corners of a mining claim or site which meets *applicable state monumenting requirements* and the size limitations described in § 3832.22 for lode and placer claims, § 3832.32 for mill sites, and § 3832.42 for tunnel sites;

43 C.F.R. § 3832.11(c)(2) (emphasis added). PLS does not address this emphasized language in the regulation. Nor does PLS address the undisputed fact that South Dakota's statutes are void of any staking or monumenting requirements for placer mineral claims. In support of its position that staking and monumenting is required for placer mineral claims under this regulation, PLS cites a paper from the Rocky Mountain Mineral Law Foundation. *See* Lynn R. Cardey-Yates, 2007 No. 4 RMMLF-INST Paper No. 12 (2007). This paper is not persuasive or binding as to the interpretation of the regulation and the application of South Dakota law.

A full reading of the regulation indicates that staking and monumenting is only necessary if required by "applicable" states statutes. 43 C.F.R. § 3832.11(c)(2) ("Stake and monument the corners of a mining claim or site *which meets applicable state monumenting requirements and size limitations*[.]") Because South Dakota does not have "applicable" monument and staking requirements for placer mineral claims, such actions were not required by GCC to make the subject placer mineral claims.

As is more fully set forth in GCC's opening brief, South Dakota mineral statutes found in SDCL ch. 45-4 only cover lode claims and are not applicable to placer mineral claims on federal land. That chapter focuses almost exclusively on "vein or lode" claims. By listing "vein or lode" mining claim and a "placer claim" independently, the South Dakota Legislature acknowledged the distinction between the two claims.

PLS claims that an earlier regulation (43 C.F.R. § 3831.1)[3] allowed states to create laws permitting locations without marking the boundaries on the ground, but that the current regulation does not. But from the plain language of the new regulation (43 C.F.R. § 3832.11), it only requires staking and monumenting which meets *applicable* state monumenting requirements. If any intent can be taken from the change in this regulation, it is that the regulation was reworded to clarify that state law would determine whether staking and monumenting is required for mineral claims. *See* 68 Fed. Reg. 61046-01. In South Dakota, there are no staking and monumenting requirements for placer mineral claims. *See* SDCL ch. 45-4.

PLS then argues that 30 U.S.C. § 28 makes it "very clear" that location must be distinctly marked on the ground. That statute provides: "The location must be distinctly marked on the ground so that its boundaries can be readily traced." *Id*. This statute *does not* require a locator to physically stake and monument the *boundaries* of the claim as argued by PLS. It only requires that the *location* be marked so that the boundaries may be *readily traced*. GCC did distinctly mark the location on CM-5 with a large post with all fourteen notices of location attached. From that post/marker, it is undisputed that the boundaries of the fourteen placer mineral claims could be "readily traced." This satisfied 30 U.S.C. § 28. *See Reins v. Murray*, 22 L.D. 409 (1896); *McKindley Mining Co. v. Alaska United Mining Co.*, 183 U.S. 563 (1901); *Haws v. Victoria Copper Mining Co*., 160 U.S. 303 (1895).

[3] "A location is made by (a) staking the corner of the claim, except placer claims described by legal subdivision where State law permits locations without marking the boundaries of the claims on the ground." 43 C.F.R. 3831.1 (1973).

A review of the federal statutes confirms that staking and monumenting the boundaries of a placer mineral claim is not required. The statutes initially discuss vein or lode claims. 30 U.S.C. § 22, et seq. Then, 30 U.S.C. § 28 provides, "The location must be distinctly marked on the ground so that its boundaries can be readily traced." After the statutes discuss vein or lode claims, 30 U.S.C. § 35 provides:

> Claims usually called "placers," including all forms of deposit excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; *but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall confirm to the legal subdivisions of the public lands. And where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required*, and all placer claims located after the tenth day of May, 1872, shall conform as near as practicable with the United States system of public surveys, and the rectangular subdivisions of such surveys[.]

30 U.S.C. § 35 (emphasis added). Section 39 of Title 30 then provides for the surveying of mining claims. The statutes, when read in full, indicate that "[w]hen a location is made according to legal subdivision, no provision is made for surveying it again, for the evident reason that it is sold as per the survey that has already been made by the United States. *See Kern Oil Co v. Crawford*, 143 Cal. 298, 303-305, 76 P. 1111 (1903), (citing and interpreting 30 U.S.C. §§ 22-28, 35, 39).

In *Reins v. Murray*, 22 L.D. 409 (1896), the Secretary said the public surveys are permanent and fixed and that it is the statute's (30 U.S.C. § 28) intent that location of placer claims by legal subdivision *makes marking of boundaries an idle ceremony not contemplated by the law*.

This position was recited again in *Kern Oil Co.*:

> There is no purpose that can be subserved by [staking and monumenting]. The public surveys are as permanent and fixed as anything can be in that

> line, and any fractional part of a section can be readily found and its boundaries ascertained by that method for all time to come, and is necessarily more stable and enduring than marking it by perishable or destructible stakes or monuments.

143 Cal. at 305, 76 P. 1111 (citing *Reins*, 22 L.D. 408 and the federal statutes). Here, GCC distinctly marked a location on CM-5 which included proper notices of location for fourteen placer mineral claims. From this "distinctly marked location," the boundaries of the claims could be traced as they had to conform to the public surveys which are permanent and fixed. Any additional marking, staking, or monumenting would amount to an idle act.

PLS suggests that GCC is confused as it relies on case law from other states with different statutes that are not applicable in arguing that staking and monumenting is not required. This is not accurate. GCC is relying on the federal statutes and case law interpreting those statutes. For example, *Kern Oil Co.*, cited above and in GCC's opening brief, does not rely on a California statute. Rather, it cites nearly all of the applicable federal statutes relevant to this appeal. This case was not addressed by PLS.

PLS also states that an extensive review of federal case law turned up no authority for the proposition that staking and monumenting of placer mineral claims is not required. But in *Reins v. Murray*, 22 L.D. 409 (1896), that was precisely the Secretary's decision. The Secretary said the public surveys are permanent and fixed and that it is the statute's (30 U.S.C. § 28) intent that location of placer claims by legal subdivision *makes marking of boundaries an idle ceremony not contemplated by the law*.

Also, in *McKindley Mining Co. v. Alaska United Mining Co.*, 183 U.S. 563, 570 (1901), a locator posted the notices of location for two placer mineral claims on a stump

or snag in the creek which identified the creek and measurement of the boundaries. No staking of the boundaries was completed. Like here, the location was challenged on the basis that the claims were not "distinctly marked on the ground." *Id*. The U.S. Supreme Court held that the notices constituted sufficient location even absent staking the boundaries because the boundaries could be "readily traced." *Id*. at 571.

In *Haws v. Victoria Copper Mining Co*., 160 U.S. 303, 318 (1895), a locator located two notices of location for two mining claims by writing on a tree standing in close proximity to the place or places of discovery of a vein or lode. *Id*. at 305. One notice of location was posted for each claim. *Id*. at 305. These notices described the claims by reference to the tree and *describing* the boundaries of each claim from the tree. *Id*. Subsequently, another locator entered the property, wrongfully took possession of the same, and challenged the sufficiency of the prior location. *Id*. at 306. The U.S. Supreme Court held that the acts of the locator, specifically the act of posting notice on the tree that *described* the boundaries, constituted a sufficient location by him of the two claims, as against subsequent locators, *irrespective of the posting of notices*. *Id*. at 318 (30 U.S.C. § 28, originally enacted as Rev. Stat. § 2324) (emphasis added). The Court also noted that 30 U.S.C. § 28 merely required that the location shall be distinctly marked on the ground, so that their boundaries can be readily traced. *Id*. If this is a proper location, then GCC's location wherein Zellmer posted a monument on CM-5 that described the boundaries for all fourteen claims by legal description is sufficient.

PLS's reliance on *U.S. v. Sherman*, 288 F. 497 (8th Cir. 1923), for the proposition that marking the surface boundaries of a placer mineral claim is required is misplaced. That case discusses a dispute regarding two *lode* claims in South Dakota. South Dakota

had and still has a specific statute mandating that surface boundaries of lode claims be marked by eight substantial posts. *Id*. at 500-01. In *Sherman*, there was no dispute that the locator did not comply with South Dakota statutes in locating a lode claim. Therefore, the Court held that the locations were void. This is inapplicable to GCC's placer mineral claims for which South Dakota has no applicable staking or monumenting requirements.

The federal statutes do not require the boundaries of a placer mineral claim to be staked and monumented. The federal statutes require that the location be marked so the boundaries can be "readily traced." 30 U.S.C. § 28. The Secretary of the Interior confirmed that "public surveys are permanent and fixed and that it is the statute's (30 U.S.C. § 28) intent that location of placer claims by legal subdivision *makes marking of boundaries an idle ceremony not contemplated by the law*." *Reins*, 22 L.D. 409. From the posted discovery monument on CM-5 that included fourteen notices of location, including legal descriptions, the location was distinctly marked and the boundaries could be readily traced using the permanent and fixed public surveys.

II. A DEFECT IN POSTED NOTICE OF CLAIM DOES NOT MAKE GCC'S CLAIMS INVALID AS PLS HAD ACTUAL NOTICE OF THE CLAIMS.

PLS claims that although it had actual notice of GCC's claims, its subsequent claims were valid. But the legal authority from both the U.S. Supreme Court and other sources provide that

> *one who has knowledge of the boundaries of a mining claim cannot complain of the absence of stakes, monuments, etc., which are intended to identify the boundary lines. Likewise, he cannot complain because of a defect in the posted notice*.

Hagerman v. Thompson, 68 Wyo. 515, 531, 235 P.2d 750, 755 (1951), (*citing* 58 C.J.S., *Mines and Minerals*, § 46, p. 101, notes 15 and 16); *see also Haws v. Victoria Copper Mining Co*., 160 U.S. 303, 318 (1895), (holding that the acts of the locator, specifically the act of writing on a tree notices of location that *described the boundaries*, constituted a sufficient location by him of the two claims, as against subsequent locators, *irrespective of the posting of notices*. *Id*. at 318 (30 U.S.C. § 28, originally enacted as Rev. Stat. § 2324) (emphasis added).

A well-respected treatise on this issue stated, "In the initiation of rights upon public mineral lands, as well as in the various steps taken by the miner to perfect his location, his proceedings are to be regarded with indulgence, and the notices invariably receive at the hands of the courts a liberal construction." Hagerman, 68 Wyo. 515, (*citing* 2 Lindley on Mines, § 381).

While in *Hagerman* there were six posts, rather than one like the case at bar, in both cases the subsequent locator had *actual notice* of the placer mineral claims and the boundaries could be readily traced. GCC by posting a notice on CM-5 distinctly marked the location and created "some physical marks placed on the ground itself which of themselves, or in connection with writings, signs, or other marks on the ground, will tend to inform one seeking to identify the claim as to the quantity and identity of the ground claimed." *Hagerman*, 68 Wyo. 515, 531, 235 P.2d 750, 755 (citing 58 C.J.S. 100).

The cases cited in GCC's opening brief, including *Scoggin v. Miller*, 189 P.2d 677 (Wyo. 1948), *Steel v. Preble*, 77 P.2d 418 (Or. 1938), and *Hagerman*, 68 Wyo. 515, indicate that the purpose of the requirement for posting and recording notice of location

is to make known the purpose of the discoverer to claim title to the same to the extent discovered. *See Yosemite Gold Mining & Milling Co. v. Emerson*, 208 U.S. 25, 52 L. Ed. 374, 28 S. Ct. 196.

The U.S. Supreme Court was asked in *Yosemite Gold* to determine whether a locator's failure to post notice under a California statute would make a claim void. The Court held that to hold a claim invalid for want of notice would work a forfeiture as the claim was "fully known" to the subsequent locator and he knew all about the location and the boundaries. *Id*. at 31.

The *Yosemite Gold* rule applies to GCC's claims. To hold GCC's claims invalid because of a want of a posted notice on each 20 acre claim "would work a forfeiture [and] would be to permit the rule to work gross injustice and to subvert the very purpose for which it was enacted. *Id*. at 31. "The object of posting the preliminary notice of the claim is to make known the purpose of the discoverer to claim title to the same to the extent described and to warn others of the prior appropriation." *Id*. (citing Lindley on Mines (2d ed.) § 350.) Here, Sam Brannan saw the posted notice on CM-5 with the fourteen notices of location attached. Therefore, PLS was fully aware of GCC's claim and was fully aware of the boundaries of its placer mineral claims.[4] PLS "knew all about the location and boundaries of the claim that any notice could have given." *Id*. In addition, all she had to do was check the records at the Lawrence County Register of Deeds' office to further confirm Zellmer's (GCC's) claims. Under these circumstances, like in *Yosemite Gold*, PLS cannot claim a forfeiture for want of notice.

[4] If GCC's posted notice was insufficient under the regulations, such a defect is curable. "If there is a defect in [ ] compliance with a regulatory, but not statutory, requirement, the defect is curable." 43 C.F.R. § 3830.93.

III. SOUTH DAKOTA LAW IS INAPPLICABLE TO GCC'S PLACER MINERAL CLAIMS.

PLS acknowledges that South Dakota has no statutes with specific requirements for staking and monumenting the boundaries or posting notice of a placer mineral claim. Appellees' Brief, at 21. Although the South Dakota statutes are silent as to placer mineral claims, PLS nonetheless claims that South Dakota case law indicates that South Dakota lode claim statutes requiring staking and monumenting should be followed for placer mineral claims on federal property.

Generally, the law does not require futile acts. *Adrian v. McKinnie*, 2004 S.D. 84 ¶ 16, 684 N.W.2d 91, 99. It would be a futile, redundant act to mark and stake the boundaries when a placer mineral claim is located where the United States survey has been extended over the land embraced in the location. The boundaries have already been staked out and marked and cannot be changed. *Kern Oil Co.*, 143 Cal. 298, 303-04, 76 P. 1111, 1113 (1903); *Reins*, 22 L.D. 409 (1896); 30 U.S.C. § 35; 43 C.F.R. § 3832.12(c).

Further, the lode and vein staking and monumenting requirements in SDCL ch. 45-4 would be inconsistent with federal statutes that only require locating 20-acre placer mineral claims by legal description when the United States has surveyed the federal land. 30 U.S.C. § 35; 43 C.F.R. § 3832.12. Federal statutes provide: "where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands." 30 U.S.C. § 35. "You must describe placer claims . . . using the U.S. Public Land Survey System and its rectangular subdivisions." 43 C.F.R. § 3832.12(c). Such claims are limited to 20-acre parcels. 43 C. F.R. § 3832.11; 43 C.F.R. § 3832.22(b). State law regarding mineral claims need not

be followed by a person if it is inconsistent with federal law or not applicable. 30 U.S.C. § 22; 43 C.F.R. § 3832.11(c)(2).

PLS's reliance on *Hawke v. Deffenbach*, 22 N.W. 480 (1885), for the proposition that SDCL ch. 45-4 applies to placer mineral claims is misplaced. That case dealt with federal statutes, and the Court determined that the term "mining claim" used in a federal statute could be construed to include placer mining claims. *Id*. at 487. At that time, the Court indicated that placer mining claims were not yet subject to express statutory recognition. *Id*. This does not support the position that SDCL ch. 45-4 was meant to impose requirements on placer mineral claims. The South Dakota legislature would have been well aware of placer mineral claims and the federal statutes governing them. Had they intended to impose statutory obligations for locating placer mineral claims, the language of the statutes would have reflected it. In South Dakota the statutes specifically discuss lode and vein claims.

"The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used." *Discover Bank v. Stanley*, 2008 S.D. 11, ¶ 15, 757 N.W.2d 756, 761. The South Dakota Legislature used only the words "vein or lode" in nearly every section of SDCL ch. 45-4. Only the legislature can amend these statutes to cover placer mineral claims. The trial court erred as a matter of law by not confining the applicability of SDCL ch. 45-4 to the actual language used by the legislature, i.e., to lode claims.

PLS also cites *Suessenbach v. First Nat. Bank of Deadwood*, 41 N.W. 662 (Dakota 1889). The issues in that case did not at all touch upon whether a locator was required to follow SDCL ch. 45-4 as to staking and monumenting.

Finally, PLS cites *City of Deadwood v. Whittaker*, 81 N.W. 908 (S.D. 1900), for the proposition that SDCL ch. 45-4 must be adhered to when making placer claims. The issue was whether and how a locator could acquire rights in property after ratification of a treaty regarding land on Indian reservations. The Court decided that so long as the locator had done the required work and adopted the work after February 1877, the claim would be considered valid. The court did not hold that staking and monumenting placer mineral claims are required or that locators must follow SDCL ch. 45-4.

In this case the issue is placer mineral claims on *surveyed* U.S. Forest Service property. Moreover, SDCL ch. 45-4 includes staking and monumenting requirements only for lode and vein claims. The purpose of distinctly marking the boundary in lode or vein claims is to provide a means of tracing their boundaries and providing notice as they can overlap multiple legal subdivisions, run in a multitude of directions, and cannot be immediately identifiable. Placer mineral claims do not have this concern. In this case, the U.S. Government by its public survey has already provided the markings by which the boundaries can be traced and no other monuments or markings can be used with which to trace the boundaries.

IV. GCC'S PLACER MINERAL CLAIMS PRECLUDED PLS'S SUBSEQUENT CLAIMS.

When a mining location is perfected, it has the effect of a grant by the United States of the right of present and exclusive possession. *See Belk v. Meagher*, 104 U.S. 279, 26 L. Ed. 735 (1881). Essentially, once there has been a valid discovery and a proper location, an unpatented mining claim is real property that becomes segregated from the public domain. *See St. Louis Mining & Milling Co. v. Montana Mining Co.,* 171 U.S. 650, 655, 19 S. Ct. 61, 63, 43 L. Ed. 320 (1898). Stated differently, if a prior

locator has perfected his claim by a mineral discovery, no subsequent valid location may be made, for it would be based on trespass, whether clandestine or open. *See Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U.S. 220, 24 S. Ct. 632, 48 L. Ed. 944 (1904); *United States v. 237.500 Acres of Land, Etc*., 278 F.2d 584 (9th Cir. 1960).

There is a strong public policy of disallowing subsequent claimants with actual notice to attack the validity of a prior claim as to notice. As noted above, such a holding would cause a gross injustice, forfeiture, and undermine the very purpose for which any notice is required.

CONCLUSION

On April 6, 2007, GCC, through Zellmer, recorded fourteen separate notices of location of placer mineral claims containing 20 acres each on federal property with the Lawrence County Register of Deeds and also recorded the claims with the BLM. GCC posted a discovery monument on the property which included the fourteen notices of location and distinctly marked the location of the claim so the boundaries could be readily traced. GCC also paid the required BLM fees on April 12, 2007, and the BLM processing fees for the Defendants' filing were paid on May 2, 2007. Since April 12, 2007, Defendants have paid the required annual fees to the BLM. GCC has completed the necessary federal statutory requirements of a placer mineral claim—discovery, location, filing, and maintenance.

South Dakota statutes do not provide requirements for placer mineral claims. Only when the South Dakota Legislature determines that placer mineral claims should also be subject to SDCL ch. 45-4 will the statutes be amended and staking and monumenting the boundaries of a placer mineral claim be required. Finally, it is

undisputed that PLS had actual notice of the boundaries of GCC's claims on April 18, 2007, and therefore PLS cannot attack the validity of GCC's placer claims on that basis to work a forfeiture.

Accordingly, since April 6, 2007, the 280 acres of U.S. Forest Service property upon which GCC's located its placer mineral claims was not open or available for further discovery, precluding PLS's filings on April 20, 2007, and February 13, 2012.

For the foregoing reasons, the Court should reverse and remand the trial court's decision and order the trial court on remand to enter judgment quieting title in Defendants.

Respectfully submitted on June 6, 2014.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By___*/s/James S. Nelson*_____
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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellant's Brief complies with the type volume limitation provided for in South Dakota Codified Laws. This Appellants' Reply Brief, including footnotes, contains 5,442 words. I have relied upon the word count of our word processing system as used to prepare this Appellants' Reply Brief. The original Appellants' Reply Brief and all copies are in compliance with this rule.

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CERTIFICATE OF SERVICE

I certify that on June 6, 2014, I e-mailed a true and correct copy of the foregoing Appellants' Reply Brief to the following at their last-known e-mail addresses:

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I further certify that on June 6, 2014, I e-mailed the foregoing Appellants' Reply Brief and sent the original and two copies of it by United States mail, first-class postage prepaid, to:

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