1980

Dan Powell et al v. Atlas Corporation et al : Brief of Appellants in Support of Petition for Rehearing

Utah Supreme Court

Duane A. Frandsen; Michael A. Harrison; Attorneys for Appellants;

IN THE SUPREME COURT OF THE STATE OF UTAH

DAN POWELL; REX T. POWELL and RAYONA T. POWELL, husband and wife; and THEORA HOLT,

Plaintiff-Appellants,

vs.

ATLAS CORPORATION, aka ATLAS MINERALS-DIVISION OF ATLAS CORPORATION, First Doe, Second Doe, Third Doe, Fourth Doe and Fifth Doe,

Case No. 16520

Defendants-Respondents.

APPELLANTS' BRIEF

Brief In Support Of Appellant's Petition
For Re-Hearing Following the Court's Decision
Rendered In the Above Matter On July 21,1980

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AUTHORITIES CITED

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STATEMENT OF THE NATURE OF THE CASE

This is a petition for re-hearing from the Court's decision filed in the above matter on July 21, 1980.

DISPOSITION OF THE COURT

This matter came on for hearing before the Court on plaintiffs-appellants' appeal on the 17th day of January, 1980. The Court then rendered its decision on July 21, 1980, finding the issues in favor of defendants-respondents and against plaintiffs-appellants and affirming the decision at the lower Court.

RELIEF SOUGHT ON RE-HEARING

On re-hearing, plaintiffs-appellants seek to have issues No.'s 1 and 3 as set forth in Appellants' Brief dated August 7th, 1979 reconsidered and the Court's ruling thereon reversed.

STATEMENT OF THE FACTS

The facts as they pertain to this case in general are set forth in pages 2 through 5 of Appellants' Brief. The facts as they relate specifically to Appellants' Petition for Re-hearing are as follows:

The Court in its decision pertaining to Issue No. 1 as set forth in Appellants' Brief, stated that in the instant case, "ownership of mining claims is challenged because of failure to comply with requirements regarding descriptions and indefinitness as to markers and boundaries." The Court then, in affirming the lower Court's decision, indicated that "minor differences in the description of a claim as recorded from the actual location will not render a claim invalid." Appellants, however, were not seeking to have respondents claims declared invalid, but only to have the Court require respondent to conform the actual locations of these claims on the ground with the claim descriptions as contained in the original and amended notices of said claims. Appellants believe, therefore, that the Court's decision that respondents Gramlich claims were valid does not address the issue raised and that a re-hearing on this issue is in order.

In affirming the lower Court's ruling on Issue No. 3 raised in Appellant's brief, the Court indicated that "plaintiff essays the position that because an expert witness expressed his opinion that work in relation to certain of the

claims would not benefit certain others, such must be the findings...". The facts in the case as brought out in trial and as set forth in Appellants' Brief indicate that two expert witnesses were called by plaintiff at trial, that each testified that the assessment work performed by respondents in the applicable years did not benefit the entier group of 114 claims sought to be held by respondent., and each expert witness gave specific reasons supporting his opinion. Respondents so called "expert", on the other hand, was an officer in defendant Atlas Corporation and while he testified in general that assessment work performed by respondent did benefit all 114 claims he failed to give any specifics as to the character and extent of such benefits. Appellant contends for these reasons that the Court overlooked material facts in this case which materially affected the outcome.

Also, it is Appellants' position that the status of the law with respect to group assessment work is that the party claiming such work must show the existence of a general plan or scheme to develop and benefit the entire group of claims for which the assessment work is sought to be applied. The facts of the present case show that no such plan existed on the part of respondents. It is Appellants' position, therefore, that had the Court considered this principle of law in reaching its decision in this matter that the decision in this case would have been materially affected.

ARGUMENT

I. THE COURT'S RULING ON ISSUE NO. 1 AS SET FORTH IN APPELLANTS' BRIEF DECLARING RESPONDENTS' GRAMLICH CLAIMS TO BE VALID DESPITE THE DESCREPANCIES BETWEEN THE DESCRIPTIONS OF THE CLAIMS AS SET FORTH IN THE ORIGINAL AND AMENDED NOTICES OF LOCATION AND THE ACTUAL LOCATION OF THE CLAIMS ON THE GROUND DOES NOT ADDRESS THE ISSUE RAISED BY APPELLANTS WHO WERE NOT SEEKING TO HAVE THE CLAIMS DECLARED INVALID, BUT WERE, RATHER, APPEALING TO THE COURT FOR AN ORDER REQUIRING RESPONDENTS TO CONFORM THE ACTUAL LOCATION OF THE CLAIMS ON THE GROUND TO THE DESCRIPTION OF THE CLAIMS AS SET FORTH IN THE ORIGINAL AND AMENDED NOTICES OF LOCATION.

In pages 6 through 8 of Appellants' Brief, the manner in which the Amended Notices of Location of the Gramlich claims were prepared and the claims surveyed on the ground is set forth. The record indicates that when the Gramlich claims were originally located on the ground pursuant to the Amended Notices of Location that the vertical boundaries of the claims were set on a true North-South axis. Pages 8 and 9 of Appellants' Brief point out that when the Gramlich claims were re-located on the ground by respondents in 1978 the actual location of the claims on the ground as compared with the original Location of said claims on the ground shifted approximately 17° east of north. This"shifting" or "walking" of the claims is demonstrated on plaintiffs-appellants' Exhibit 87.

Appellants do not contend that this "shifting" or "walking" of the claims rendered the claims invalid, or rather that the present location of the claims on the ground should be controlled by the description set forth in the

Amended Notices of Location and in the original location of the claims on the ground in 1951. Appellants contend that respondents cannot now come back and attempt to change the description and original location of these claims without amending their Notices of Location. The actual location of these claims on the ground should, therefore, be made to conform with the location contained in the original and Amended Notices of Location and with the original location of the claims on the ground.

II. THE COURT's RULING ON ISSUE NO. 3 AS SET FORTH IN APPELLANT'S BRIEF AFFIRMING THE LOWER COURT'S DECISION AS TO THE ADEQUACY OF RESPONDENTS GROUP ASSESSMENT WORK BEING QUESTIONED BY APPELLANTS OVERLOOKED MATERIAL FACTS AND PRINCIPLES OF LAW WHICH, IF CONSIDERED, WOULD MATERIALLY AFFECT THE OUTCOME OF THE COURT'S DECISION ON THIS ISSUE.

The Court, in its decision in this matter regarding the group assessment work issue, states as follows:

> On this point, plaintiff essays the position that because an expert witness expressed his opinion that work in relation to certain of the claims would not benefit certain others, such must be the finding. In this, the plaintiffs are mistaken. The Findings and Judgment of the Trial Court may be and should be based upon the whole evidence and if in so doing, it concludes in accordance with the above stated rule as to assessment work on interrelated claims, that meets the requirement of the statute.

Appellants contend that Court, in affirming the decision of the lower Court, has overlooked items of evidence in the record which,if considered, would materially affect the outcome of the Court's ruling on this issue.

In pages 34 through 40 of Appellants' Brief the testimony of the two geologists called by Appellants at trial, Mr. Clyde Davis and Mr. Isadore Million, is summarized and explained. Both Mr. Davis and Mr. Million are independent consulting geologists with considerable experience in Uranium Mining Activities. Mr. Davis testified that due to the lack of continuity in uranium deposits, the area benefit resulting from the type of drilling done by defendant would be limited to a 150 foot radius. Mr. Million extended the benefited area to a 300 foot radius.

Respondents, on the other hand, failed to call as their expert witness any independent geologist, but relied instead upon the testimony of Mr. Albert Durth, Vice President of the defendant, Atlas Corporation. While Mr. Durth testified, in retrospect, that the work in question would tend to benefit all of the 114 claims, he did so only in general terms and failed to specifically state how and in what manner claims situated thousands of feet from the worksite would be benefited as a result of drilling or mining performed at the site. Mr. Durth, in fact, failed to place any limit on the area benefited by a drill hole in the Morrison Ore Formation which includes most of Southeastern Utah.

Based upon the character and nature of the expert testimony in this matter, Appellants contend that had the Court based its Ruling on group assessment work upon the whole evidence that the outcome would have been altered to

limit the area of benefit of the work performed by Respondents on the claims. Certainly it cannot be said that the drilling performed on a half dozen claims in any particular year would benefit a group of 114 claims stretching miles in each direction. This is particularly the case in the Morrison Ore Formation where the uranium is found in pods and not in veins and where there is no uniformity in length, depth, tonage, etc. of these pods.

It should also be remembered that in cases involving group assessment work the burden is on the prior locator to prove that he performed the work for the claim outside of its boundaries and that the work, in fact, tends to benefit each and every claim sought to be held by the performance of said assessment work. Hall vs Kearney, 18 Colorado 505, 33 P. 373 (1893); New Mercur Mining Company vs South Mercur Mining Company, 102 Utah 131, 128 P. 2d 269, cert-denied, 63 Sup. Ct. 1162, 319 U.S. 753, 87 Ed. 1707, (1942). Appellants certainly feel that had the Court considered the character and nature of the expert testimony introduced at the trial in this case the fining of the Court would have been that Respondents have not met this burden.

Appellants further contend that the Court, in deciding the group assessment work issue raised in this case, failed to apply and important and well-recognized principle of law. The legal principle referred to is that the party seeking to hold claims under group assessment work must show

the existence of a pre-conceived general plan or scheme to develope and benefit the entire group of claims for which the assessment work is sought to be applied through the actual work performed in any particular assessment year. Pinkerton vs Moore, 66 NM 11,340 P. 2nd 844,(1959), New Mercur Mining Company vs South Mercur Mining Company, 102 Utah 131, 128 P. 2d 260, cert-denied, 63 Sup. Ct. 1162, 319 U.S. 753, 87 L. Ed., 1707, (1942); Parker vs Belle Fouche Bentonite Products Company, 64 Wyoming 269, 189 P. 2d 882, (1948). Nowhere in the facts of the instant case did respondents exhibit any evidence of a pre-conceived plan or scheme to develope 114 claims through drilling and a small amount of mining on only a half a dozen of the claims. In fact, the only evidence presented by Respondents that the work in question did tend to benefit the claims was the after the fact testimony of Albert Durth, Vice President of defendant Atlas Corporation. Appellants feel that if this principle of law is ignored the gates will be flung open for prior locators to use assessment work in one location to monopolize an extensive area and thus prevent the location and development of claims by others.

In the recent annual seminar of the Rocky Mountain Mineral Law Institute held in Sun Valley, Idaho on July 17, 18 and 19, 1980 which was attended by approximately 1,000 natural resource attorneys across the United States, the appeal pending before this Court in the above case was discussed. The focus

of the discussion was directed towards the Institute Members hopeful anticipation that the Court's decision might contain some definite guidelines to assist miners in performing group assessment work. In no other case dealing with group assessment work that has been decided by a Court of these United States have there been so many claims involved as there are with the 114 claims with this case. In fact, in most cases dealing with the group assessment work issue fewer than a dozen claims are involved. The Court's ruling on the group assessment work issue in this case fails, however, to give any of these hoped for guidelines. Certainly, based on the testimony of the three expert witnesses in this case, it cannot be said that the area benefited by the group assessment work in question is limitless, nor that an area as large as that contained within the 114 claims in question would be benefited by drilling them on a mere half dozen of the claims. This is particularly so considering the isolated and poddy nature of the ore in the Morrison formation together with the fact that Respondents failed to introduce any evidence of a pre-conceived scheme or plan to develope the entire area covered by the 114 claims through the work performed.

SUMMARY

It is Appellants' position, therefore, that because the Court failed to consider the Issue raised in Appellants' Brief as Issue No. 1 that a re-hearing on that Issue should be granted.

Appellants further contend that the Court's failure to carefully consider the testimony of all expert witnesses who testified at the trial in this matter, together with the Court's failure to apply a well-recognized rule of law are grounds for a re-hearing on the assessment work issue raised as Issue No. 3 in Appellant's Brief.

If the Court believes and holds that the Rule of Law in assessment work done on a small number of claims for the benefit of a large group of claims is as testified by the witness Albert Durth, Vice President of Atlas Corporation, and as held by the trial court, then the plaintiff and defendant in the instant case and the mining industry are entitled to know the Court's position on this important question. The Court should then set forth in its opinion such ruling and why it so rules. The original opinion of the Court does not answer this very basic question of law and does not give guideline that are needed by the mining industry and lawyers engaged in mining litigation and the Court's that will be confronted with this question in the future.

DATED this 20th day of August, 1980.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF MAILING

I hereby certify that on the 20 day of August, 1980 I mailed a true and correct copy of the above and foregoing Appellant's Brief to L. Robert Anderson, Respondent's attorney as follows:

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Debbie Christensen
SECRETARY