1980

Dan Powell et al v. Atlas Corporation et al : Brief of Respondent in Answer to 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,	:	
Plaintiffs-Appellants,	:	
vs.	:	Case No. 16520
ATLAS CORPORATION, also known as Atlas Minerals--Division of Atlas Corporation,	:	
Defendant-Respondent.	:	

RESPONDENT'S BRIEF IN ANSWER TO PETITION FOR REHEARING FILED ON AUGUST 7, 1980.

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STATEMENT OF THE NATURE OF THE CASE

This case involves conflicting unpatented lode mining claims in Emery County, Utah, in which each party seeks to quiet its title.

PREVIOUS DISPOSITION BY THE COURT

This matter was heard before the Court on January 17, 1980. The Court rendered its decision on July 21, 1980, unanimously affirming the decision of the trial court which found the issues in favor of Defendant-Respondent and quieted the title of Defendant-Respondent in its mining claims against Plaintiffs-Appellants.

RELIEF SOUGHT BY RESPONDENT

Defendant-Respondent requests that the petition of Plaintiffs-Appellants for rehearing be denied.

STATEMENT OF MATERIAL FACTS

Appellants, in their Rehearing Brief, assert that the facts are set forth in pages 2-5 of Appellants' Appeal Brief. Respondent's answer to that assertion is that the material facts are as stated in pages 1-10 of Respondent's Appeal Brief filed with the Court on September 6, 1979. Respondent disagrees with the Statement of Facts contained in Appellants' Rehearing Brief as follows:

1. Respondent disagrees with Appellants' assertion that Respondent's experts gave no specifics as to the character and extent of benefits from drilling on Respondent's mining claims (see Appellants Rehearing Brief, pp. 3, 6). The testimonies of Albert E. Dearth and Ray Kozusko, quoted on pages 43-46 of Respondent's Appeal Brief, are comprehensive and contain detailed explanations of the nature of the benefit from drilling done on the claims.

2. While, as hereinafter pointed out in this brief and in Respondent's Appeal Brief, the law does not require a preconceived plan or scheme, Respondent disagrees with Appellants' assertion that there was no evidence of any plan to develop and benefit the entire group of claims to which the assessment work applied. The evidence discussed on pages 42-48 of Respondent's Appeal Brief shows clearly that there was a plan, that it was successful and that the assessment work was done on a very systematic and scientific basis.

ARGUMENT

I. ANSWER TO APPELLANTS' POINT I--THE COURT HAS ALREADY ADDRESSED AND DECIDED THE QUESTION OF THE VALIDITY AND POSITION ON THE GROUND OF RESPONDENT'S GRAMLICH CLAIMS.

Appellants' argument that the Court did not address itself to Appellants' request that Respondent be compelled to conform the ground position of its Gramlich Claims with the descriptions found in the original notices of location is without merit. To say that the ground position of the claims must be made to conform in detail with the description in the notices of location is but another way of saying that the claims are invalid. Mining claims, by their very nature, represent rights in particular tracts of land marked on the ground. Appellants' claim that the Court should compel Respondent to move the claims on the ground to the position described in the notices is nothing more nor less than an assertion that the claims as situated on the ground are invalid.

The law is well settled in Utah that the actual location on the ground controls when a discrepancy arises between the description in the notices and actual ground location. (See authorities cited on page 14 of Respondent's Appeal Brief.) It follows that the mere existence of a variation between the recorded description and the marking on the ground does not result in the locator being compelled to move his markings to conform to the written description. Because the law is to the contrary, Appellants understandably do not cite any authority supporting their contention.

Appellants' attack on the Gramlich Claims has always included the assertion that their present locations represent a "shift" from their original locations without proper amendment. (See Appellant's Appeal Brief, page 9.) If such "shifting" actually occurred, the question of the validity of the claims in the "shifted" position would be worthy of consideration. But since such "shifting" didn't occur, the premise upon which Appellants' argument is based fails. The record is replete with evidence supporting the finding of the trial court that the Gramlich Claims have always been where they now are. Evidence of extensive drilling and mining operations on the claims from their earliest days is summarized on pages 1-9 and discussed on pages 14-15 of Respondent's Appeal Brief.

That the Court considered and rejected Appellants' contention that the Gramlich Claims had been shifted is clear from the third paragraph of the opinion:

> Attention is first directed to the plaintiffs' contentions concerning the group known as the Gramlich Claims. Their argument relates to the accuracy and the validity of the descriptions of those claims, particularly that some of them as now relied on have been moved from their original locations without proper amendment of the filed notices of claim thus rendering them subject to relocation. (Emphasis added.)

Appellants now claim that the Court missed the point; that Appellants desired only that the location on the ground be made to conform to the description in the location notices. This contention is sufficiently answered above.

However, a fair reading of Appellants' Appeal Brief reveals that their argument (which also surfaces on page 5 of their Rehearing Brief) is as follows:

> 1. Gramlich Claims have been moved without filing of proper amendments to the notices of location.
>
> 2. Gramlich Claims must therefore be made to conform on the ground to the original descriptions or be declared invalid.

Because the Court decided the first question in favor of Respondent, the second question was not reached. The decision, both of this Court and the trial court, was that Gramlich Claims had never been moved and that, despite some inaccuracies in the location notice descriptions, the descriptions were sufficient to identify the claim as required by 30 U.S.C.A. Section 28 and U.C.A. Section 40-1-2.

Appellants' argument in POINT I of their Rehearing Brief is founded on the proposition that this Court did not understand or consider Appellants' contention in rendering its opinion and since the above demonstrates that this Court was aware of and did deal with Appellants' contention, the premise fails and the petition should be denied.

II. ANSWER TO APPELLANTS' POINT II - THE COURT'S RULING AS TO THE ADEQUACY OF RESPONDENT'S ASSESSMENT WORK IS SUPPORTED BY THE EVIDENCE.

Appellants argue in POINT II that this Court overlooked evidence that would materially affect the decision (Appellants' Rehearing Brief, page 5). They pit the testimony of their witnesses on the issue of benefit against the testimony

of Mr. Dearth, one of Respondent's witnesses. (Appellants' Rehearing Brief, pages 6-7.) While it might be pointed out that Appellants ignore the testimony of Mr. Kozusko, another witness for Respondent, on this issue (see Respondent's Appeal Brief, pages 43-46), it is sufficient to say that the argument is one going to the credibility of the witnesses (which is solely within the province of the trial court) and that the argument ignores the "standard and often repeated rules" reaffirmed in the Court's opinion that "the findings of the trial court are entitled to a presumption of validity . . ." and that, "if there is substantial evidence to support the findings and judgment, they will not be disturbed." Fuller v. Mountain Sculpture, 6 Utah 2d, 314 P.2d 842 (1957) and Fillmore City v. Reeve, 571 P.2d 1316 (Utah 1977).

The evidence supporting the finding of benefit is substantial. Albert E. Dearth and Ray Kozusko, both expert geologists, testified as to the benefit to all of Respondent's claims from drilling and mining on some of the claims. (Tr. of March 22, 1978, pp. 27-43, Tr. of March 23, 1978, pp 66-86, Tr. of March 24, 1978, pp. 36-39, Tr. of April 26, 1978, pp. 75-77.) Even Appellants' witnesses, when coaxed from their position of defining benefit by whether or not drilling showed presence of ore on a claim by "calculation of ore reserves" standards, were forced to admit that there are "general trends," "sedimentation," and "stringers"

which may lead from one ore deposit to another (Tr. of March 23, 1978, pp. 141-159, 163, Tr. of March 24, 1978, pp. 27-29).

Appellants exaggerate the size of Respondent's group of claims and assert that drilling "miles" from a claim cannot possibly benefit the claim. (Appellants' Rehearing Brief, p. 7.) Examples of this exaggeration are disucssed on pages 25-26 of Respondent's Appeal Brief. A review of the evidence summarized on pages 1-10 of Respondent's Appeal Brief shows that in successive years work was done all over the group of claims. Not mentioned is the assessment work done for the 1968 and 1976 assessment years. Appellants conceded the validity of Respondent's assessment work for those years in which the work was done directly on the claims in conflict (Appellants' Appeal Brief, p. 24). The entire evidence belies the implication that Respondent has done minimal work on a small number of claims in order to hold a large group.

Appellants assert that there must be a preconceived plan or scheme of development in order for assessment work on one claim to qualify as assessment work on contiguous claims. While Respondent and its predecessors did develop the claims in an orderly and well-planned fashion, a preconceived plan or scheme is not required. The identical contention now asserted by Appellants was made and expressly rejected by this Court in Nevada Exploration and Mining

v. Spriggs, 41 Utah 171 at 174, 124 P. 770 at 773 (1912); See also New Mercur Mining v. South Mercur Mining, 101 Utah 131, 128 P.2d 269, cert. denied 319 U.S. 753 (1942). These cases and this issue are discussed on pages 31-35, 38-39, 42-44 of Respondent's Appeal Brief.

Appellants complain that the Court's decision gives no guidelines for the mining industry to follow in carrying out assessment work. They request a rule of law on the question of how far benefit from work on one claim may extend to others. They complain that the decision sets no limit on the extent of the benefit and they raise spectres of mining companies monopolizing large areas with minimal assessment work on a single claim. These arguments are not sound. Requirements of good faith, intention to develop, benefit, and approximate contiguity are already part of the law. The Court's decision rightly warns against using assessment work in one location to monopolize too extensive an area and suggests that the requirement of contiguity or approximate contiguity provides a rough guideline.

It was conceded at the oral argument and the principle pervades all the pertinent cases that the benefit issue is one of fact. See Simmons v. Muir, 75 Wyo. 44, 291 P.2d 810 (1955); Love v. Mt. Oddie United Mines, 43 Nev. 61, 184 P. 921 (1919). To set an arbitrary limit of 10, 20, or 100 claims; one, two or three miles, would infringe upon the province of the trier of fact. An infinite variety of fact

situations are possible and the facts in each case can only be determined upon the evidence and within the framework of general principles of law. This Court quite properly has given the guidelines and left the application of those principles in each case to the trial court.

CONCLUSION

Under Rule 76(e)(1) of the Utah Rules of Civil Procedure, the burden is on Appellants to show that "the appellate court has erred." Appellants have not made any argument nor cited any authority not heretofore presented in Appellants' Appeal Brief. Their contentions have been considered and rejected by this Court. The opinion of this Court filed July 21, 1980, does not contain any errors. On issues of fact, the findings of the trial court are supported by substantial evidence. The rules of law set forth are correct and are in accordance with the Court's previous decisions. Inasmuch as Appellants have not sustained their burden of showing error, their petition for rehearing should be denied.

DATED this 27th day of August, 1980.

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CERTIFICATE OF MAILING

I hereby certify that on this 27th day of August, 1980, I mailed two (2) copies of the foregoing Respondent's Brief in answer to Petition for Rehearing, postage prepaid, addressed to Attorneys for Appellants as follows:

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