

UNITED STATES, GEORGE B. CONWAY, INTERVENER v. GROSSO

Decided June 9, 1930

MINING CLAIM — ADVERSE CLAIM — LAND DEPARTMENT — EVIDENCE — PATENT — PRACTICE.

In adverse proceedings under section 2325, Revised Statutes, as amended by the act of March 3, 1881, each party is nominally plaintiff and must show his title, and the applicant for patent can not go forward with his proceedings in the Land Department simply because the adverse claimant had failed to make out his case, if he also had failed.

MINING CLAIM — ADVERSE CLAIM — LAND DEPARTMENT — EVIDENCE — POSSESSION — PATENT — PRACTICE.

The trial of suits under section 2325, Revised Statutes, as amended by the act of March 3, 1881, is to aid the Government in determining whether either party, and, if so, which has the exclusive right to possession arising from a valid subsisting location, and patent proceedings in the Land Department are suspended to await determination of that question.

MINING CLAIM — ADVERSE CLAIM — DEMURRER — EVIDENCE — ESTOPPEL — RES JUDICATA — PRACTICE.

Where in a suit of adverse proceedings against a mining claim a demurrer is sustained and the action is dismissed on the merits, all facts well pleaded

are admitted, and, if the facts relevant to the issue as to the validity of the claim were not determined, the Government is not estopped from fully inquiring into and determining them.

MINING CLAIM—ADVERSE CLAIM—JUDGMENT—LAND DEPARTMENT—POSSESSION—RES JUDICATA.

A judgment in adverse proceedings against a mining claim simply determines the right of possession and does not preclude the Land Department from ascertaining the character of the land and determining whether the law has been complied with in good faith.

MINING CLAIM—ADVERSE CLAIM—JUDGMENT—PATENT—PROTEST—LAND DEPARTMENT.

An unsuccessful adverse mining claimant may still by way of protest call the attention of the Land Department to irregularities in the patent application which were not determined by the court in its judgment.

MINING CLAIM—ADVERSE CLAIM—MILLSITE—PROTEST—JUDGMENT—RES JUDICATA—LAND DEPARTMENT.

A controversy between a prior millsite claimant and a placer claimant is not subject to an adverse claim, but of protest, and any finding of a court in adverse proceedings between such claimants as to the mineral or nonmineral character of the land or any fact relevant to that issue is merely advisory and not binding upon the Land Department. *Helena etc. Co. v. Dailey* (36 L. D. 144).

MINING CLAIM—ABANDONMENT—RELINQUISHMENT—EVIDENCE.

To establish abandonment both the intention to abandon and actual relinquishment must be shown; mere failure to check deterioration in value that follows from lapse of time of unproductive property is not of itself conclusive as to abandonment.

MINING CLAIM—MINERAL LANDS—TAILINGS—ABANDONMENT.

Ore when severed from the land becomes personalty, but tailings from the mine that are dumped upon nonmineral land and abandoned become, upon abandonment, a part of the realty so as to mineralize the land upon which they are placed and make it subject to mining location by the first comer.

MINING CLAIM—MINERAL LANDS—TAILINGS.

No rights can be acquired under the placer mining laws to public land, nonmineral in its natural state, that was covered by valuable tailings placed there by another where the owner of the tailings had kept and preserved them from waste and destruction pending such time as they might be profitably worked and sold. *Ritter v. Lynch* (123 Fed. 930).

MINING CLAIM—TAILINGS—ABANDONMENT—EVIDENCE.

A charge of abandonment of tailings impounded on public land on the ground that breakages in cribbing due to age and decay of the logs that retained them were not repaired, that a large amount of the tailings had escaped, and that there was an absence of any specific acts towards their conservation for a long period of time and discontinuance long ago of active mining operations by the company that placed them on the land, is refuted by the facts that about 75 per cent of the cribbing is still intact, that the tailings had settled to such an extent as to render cribbing protection no longer necessary, that they had been purchased as personal property at

a sheriff's sale and taxes paid thereupon, that rights in the land had been invoked by the purchaser under the millsite law, and that he expected to treat them at some future time.

EDWARDS, Assistant Secretary:

This is an appeal by John A. Grosso, administrator of the estate of Antone C. Grosso, deceased, from a decision of the Commissioner of the General Land Office dated July 15, 1929, which affirmed the local register in holding for rejection application, Great Falls 062827, for patent to the Bird placer, Survey No. 10408, situate in unsurveyed T. 3 S., R. 10 W., Montana Meridian, and within the Beaverhead National Forest, and further declared the claim void because made on nonmineral land.

Grosso filed his application January 19, 1923. Henry Knippenberg *et al.* filed mineral contest March 12, and adverse claim March 21, 1923, against the application, alleging superior rights to the greater part of the land by virtue of prior location and maintenance of Everest 2, 3, and 4 millsites, and declaring, among other things, that no discovery had been made; that the land was not valuable for mineral, but only for the stacks of tailings owned by contestant and impounded upon the land. Adverse suit was instituted by contestants April 12, 1923, in the district court for the Fifth Judicial District of Montana. Demurrers and motions to dismiss the adverse claim filed in the local office by applicant, including among others, the ground that controversies between millsite and mining claimants were not the subject of adverse proceedings under sections 2325 and 2326 of the Revised Statutes, were overruled by the local officers, and with subsequent approval by the Commissioner further proceedings on the application were stayed to await the outcome of the adverse suit.

On January 19, 1924, the Forest Service lodged protest against the application, in substance charging (1) no discovery, (2) location made because of mineral values in the tailings, the property of the Hecla Mining Company, and not because of mineral values in the land, (3) insufficient patent expenditure. Upon the doing of further work by applicant on the claim Charge 3 was later withdrawn.

On June 19, 1925, applicant filed a certified copy of the judgment roll in the adverse suit, showing that the action had been dismissed on its merits. It is conceded by all parties that the judgment was final. The applicant set up the judgment as a further bar to the prosecution of the contest by plaintiffs in the adverse suit and contended that they had lost their right to further question applicant's claim, and that by the judgment the Forest Service had lost all right to contest his application. By decision of November 11, 1925, the Commissioner upon consideration of certain matters disclosed

in the judgment roll held the judgment not *res adjudicata* as to all matters connected with the final proof and directed hearing of the protest of the Forest Service and permitted Henry Knippenberg *et al.* to intervene in that proceeding.

On December 23, 1926, George B. Conway filed a protest against the application, averring that he and the Darby Mining Company were the present owners of the tailings deposited on the land; that there was no valuable deposits of minerals thereon; that the requisite expenditure had not been made; that the mining location was made to deprive the owners of their tailings. Hearing was duly had before a United States Commissioner at Butte, Montana, from June 19 to 25, 1928, Conway in his own and the Darby Mining Company's behalf, over protest of the applicant, being permitted to intervene and adduce evidence, so much of it relevant to the charges being adopted by the Forest Service as Government testimony. The appeal is from the decision of the Commissioner in this Government proceeding. The respective contentions of each party has been presented in elaborate briefs and by oral argument before the department.

Applicants present for decision at the threshold of the case questions as to the conclusiveness of the judgment of the State court in estopping first, Conway as alleged transferee of the rights of Knippenberg *et al.* in the millsites and tailings from further contesting the claim of the applicant, and asserting a claim adverse to the applicant for the land; second, in precluding the Government from permitting Conway to participate and offer evidence as an intervenor at the hearing; third, in estopping the Government from making certain determinations as to the mineral character of the land, the validity of his claim and of other facts pertinent to the issues raised by the charges. The contention of the attorney for the applicant being to the effect that there was necessarily involved or there must necessarily be implied in the decree of the court dismissing the action on its merits determinations by the court that the applicant had a valid possession under the mining law by virtue of his placer location; that the mineral applicant owned the tailings; that they were real and not personal property; that they had been abandoned by their former owners either at the moment of their deposit on the lands or thereafter, and prior to the location of the Bird claim, and that such findings or determinations are final and conclusive and binding upon the Land Department and not open to further inquiry.

In considering this contention it is pertinent to inquire as to what are the essentials of a judgment that would so bind the department, and determine from the judgment rendered in this case whether those essentials appear.

It is settled law that in adverse proceedings contemplated by section 2325, Revised Statutes, as amended by the act of March 3, 1881 (21 Stat. 505), each party is practically plaintiff and actor and must show his title, and before the applicant for patent can have judgment he must prove his claim of title to the ground. The applicant for patent can not go forward with his proceedings in the land office simply because the adverse claimant had failed to make out his case, if he had also failed. *Brown v. Gurney* (201 U. S. 184, 191); *Perego v. Dodge* (163 U. S. 160, 167); *Cole v. Ralph* (252 U. S. 286, 297); Lindley on Mines, Sec. 763. The proceedings are suspended in the land office "to await the determination by a court of competent jurisdiction of the question whether either party, and if so, which, has the exclusive right to the possession arising from a valid subsisting location." [Italics supplied.] *Cole v. Ralph*, p. 296. In *Tonapah Fraction Min. Co. v. Douglas* (123 Fed. 936, 941), the court said—

It must constantly be remembered that the trial of suits of this character, under the provisions of the statute, is had in order to aid the Government, through its proper department, in determining whether the applicant or the adverse claimant is entitled to a patent. The Government is not strictly speaking, a party to the suit, but it is interested in the proceedings to the extent of having it not only established by the courts, under the evidence at the trial which of the parties has the better or superior right to the land in controversy, but also whether there has been full compliance with the mining laws, rules and regulations; and if it should be found, upon the proofs, that neither of the parties to the proceedings has complied with the laws, it is the duty of the court to render judgment against both. *Jackson v. Roby*, 109 U. S. 440, 442, * * * It will thus be seen that the government acts upon the proofs established at the trial, and requires that certain facts be found whether alleged in the pleadings or not. [Italics supplied.]

The plaintiff may be nonsuited, but this will not avail the defendant unless he thereupon proceeds to establish his rights affirmatively and secures a judgment. *Kirk v. Meldrum* (Colo.) (65 Pac. 633); 3 Lindley on Mines, Sec. 763, and cases cited. If the plaintiff is nonsuited the case proceeds *ex parte*. *Lozar v. Neill* (37 Mont. 287, 96 Pac. 343, 346).

Now in the adverse suit in this case, Knippenberg and his co-plaintiffs alleged in their complaint in addition to certain matters of fact in support of their claim to the millsites and tailings thereon that no discovery had been made on the Bird placer of gold or other minerals; that the land was nonmineral in character; that the location was made for the purpose of obtaining and holding the mill tailings thereon lying loose upon the surface of the ground and that the tailings were the property of the plaintiff. Demurrer to the complaint was sustained on the ground of incapacity of one of the plaintiffs to sue, and that the complaint did not state a cause of action. Thereafter a supplemental and amended complaint was filed

by the Hecla Consolidated Mining Company, a common-law trust. Demurrer to this amended complaint was also interposed and sustained on the specific grounds, (1) that the plaintiff was without capacity to sue, and (2) that the complaint did not state facts sufficient to constitute a cause of action. On motion of defendant the action was dismissed on the merits. The amended complaint contained the identical statements contained in the original as to the lack of discovery, and nonmineral character of the Bird placer, and as to the ownership of the tailings by plaintiff. Nowhere in the pleadings did the defendant set up affirmatively his rights to the ground under a placer location nor did he in his prayer in the complaint ask for a judgment as to its validity. The facts as to his possessory right under a valid and subsisting mining location were not passed on by the court, and as by the demurrer all facts well pleaded are admitted (49 C. J. 438, note 4), if any findings are to be implied, they are that the land is nonmineral in character, that no discovery was made, and that the ownership of the tailings was in the plaintiffs notwithstanding that they were adjudged to have no right of possession to the land under their alleged millsite claims.

In *Lehman v. Sutter* (198 Pac. 1100), the Supreme Court of Montana held (syllabus)—

Where plaintiff, in action in pursuance of Rev. Stat., Sec. 2326, to determine an adverse claim to mining locations, unnecessarily attempts in the complaint to show that the defendant's adverse claims are without foundation, a demurrer admits the truth of plaintiff's allegations in this behalf.

Whatever may have been the effect of the judgment of dismissal on the merits as a bar to the prosecution of another suit by the adverse claimants or their successors in interest for the same cause of action, a matter with which the department has now no present concern, it is clear that no issues or facts relevant to the issues as to validity of applicant's claim, raised in the present proceedings, were determined in that suit, and the Government is not estopped to fully inquire into and determine them. The judgment at the most established that the adverse claimants had no right of possession. It did not establish a valid possession in the applicant to the Bird placer claim. As to the contention that it estops Conway and his associates from litigating their rights as millsite claimants again before the department, it suffices to say that those rights are not litigated in this proceeding. And as to the contention that it was improper to allow the transferees of the adverse claimants to intervene in the Government proceedings, the answer is that it is well settled that the unsuccessful adverse claimant may still by way of protest call the department's attention to irregularities in the patent application which were not determined by the court in its judgment. *Hughes v. Ochsner* (27 L. D. 396); *Opie v. Auburn Gold Mining and Milling Co.*

(29 L. D. 230) ; Lindley on Mines, Sec. 765. The interveners have the same right as any other person to come in and enter this protest or objection; in other words to say to the officers of the Government that the applicant has not complied with the terms of the statute, and to insist that there shall be an examination made by such officers to see if the terms in fact have been complied with. *Wight v. Dubois* (21 Fed. 693) ; *Poore v. Kaufman* (44 Mont. 248, 119 Pac. 785).

Furthermore, even if the department should be in error as to the scope and effect of the judgment above considered, and there was in fact a judgment awarding the right of possession to the applicant, notwithstanding, it still remains for the Land Department to pass upon the sufficiency of the proofs, ascertain the character of the land, and determine whether the conditions of the law have been complied with in good faith.

The judgment simply determines the right of possession and not the right to a patent. *Alice Placer Mine* (4 L. D. 314), approved in *Perego v. Dodge*, *supra*, and *Clapper M. Co. v. Eli M. & L. Co.* (194 U. S. 220, 234). The Land Department can yet declare the claim not valid, *Upton v. Santa Rita Min. Co.* (89 Pac. 275), and the land non-mineral, *Cameron v. Bass* (Ariz.) (168 Pac. 645), U. S. C. A. Title 30, Sec. 30, Notes 71 and 125, and cases cited.

Finally, the weakness of applicant's position urging any contention of *res adjudicata* based upon the court's judgment may be pointed out from another point of view. While the Supreme Court of Montana announced a contrary rule in *Shafer v. Constans* (3 Mont. 369), the department has repeatedly held that sections 2325 and 2326, Revised Statutes, relative to adverse claims contemplate proceedings to determine only the right of possession between claimants of the same unpatented mineral lands, not to decide controversies respecting the character of public lands, that is, whether they are mineral or non-mineral. *Ryan v. Granite Hill M. & D. Co.* (29 L. D. 522). See also *Harkerader v. Goldstein* (31 L. D. 87), *Lalande v. Townsite of Saltese* (32 L. D. 211), *Low v. Katalla Company* (40 L. D. 534, 538), *Bailey v. Molson Gold Min. Co.* (43 L. D. 502).

The rule is supported by the weight of authority in the courts, and in its application the department has held that as between a prior millsite claimant and a placer claimant the only question involved would be the character of the land which is not the subject of an adverse claim, but of protest. *Helena etc. Co. v. Dailey* (36 L. D. 144) ; Lindley on Mines, Sec. 724. Any finding of the court therefore in such a suit as to the mineral or nonmineral character of the land or of any fact relevant to that issue would be considered as advisory and not binding upon the department.

Turning now to the evidence, it is disclosed that the applicant sought by the testimony offered by him to base his discovery on the showings of gold found in the ground apart from the superincumbent tailings. A large mass of testimony was adduced as to pannings, much of it being performed a few days before the hearing, which resulted in the recovery of a few colors of gold and black sand. Of 75 pans taken by all parties about 60 contained no colors of gold. Twelve of the 15 pans taken by applicant's witnesses from concentrated material in the bottom of ditches showed one or more colors. The claimed profitable values in the black sand rested on surmise and conjecture. Assay of this sand made at the instance of the Government showed a value of \$19 a ton in gold and uncontradicted evidence was introduced that it would take 8,000 cubic yards of material or 500 cubic yards of concentrated material to produce a ton of black sand. Several witnesses for the applicant admitted that there was not enough in what was found to justify working, but were of the opinion that the explorations should be pursued to bed rock where gold in sufficient quantities to mine would be found. The decided weight of opinion by the mining engineers, supported by better reasoning and more cogent facts is that the lands are not favorable for the deposition of gold. It is sufficiently shown that the material in the Bird placer is glacial débris, not material carried by erosion and transportation by stream action which would favor the sorting and segregation of free gold in gravel and at bedrock; that the mining above the claim has been from rock in place principally for silver and lead containing little or no free gold from which valuable placer deposits could originate; that Trapper Creek, along which this claim is located, has no history of placer mining or recoveries of placer gold although mining and prospecting has been carried on for years in the locality and evidence of placer diggings exist along its course. The claim has been located for nine years and no attempts to mine it have been shown nor to reach bedrock. Without mentioning other details that point persuasively to the nonmineral character of the land, those above stated are sufficient to warrant the concurrent findings below.

The question remains to consider whether under conditions shown the deposit of the tailings mineralized the land and render it subject to location under the mining law. Intervener showed without contradiction that the Hecla Consolidated Mining Company between 1882 and 1889, during their mining and milling operations, deposited the tailings on the land in controversy and upon other land covered by the Everest millsite locations; that the tailings were confined by cribbing consisting of several thousand logs, costing fifty cents to one

dollar each exclusive of construction costs; that to prevent the escape of the tailings ore sacks and canvas were placed in the interstices between the logs; that the tailings pile, about 1200 by 600 feet in areal extent and 25 feet high in places, is divided by cross cribbing into four bins; that average assays of the tailings disclose that they contain per ton 8.8 ounces in silver, $2\frac{1}{2}$ per cent lead, fractions of an ounce in copper and zinc, and gold to the value of 93 cents; that these mineral values were known to the company by frequent assay at the times of deposit, but that the processes then used did not permit of their recovery, and it was their expectation that metallurgical processes would improve so as to justify milling them again. It is shown that the Greenwood Mining Company obtained a lease upon the tailings, installed a new concentrator and operated on the tailings until about 1892, but the endeavor was not a success and these tailings were sold as personal property at a sheriff's sale in 1894. The operations of both of these companies ceased and the machinery was moved away. Application for patent to all but Everest Millsite No. 1 was denied. (*Hecla Consolidated Mining Co.*, 12 L. D. 75.) Later the Penobscot Mining Company obtained a lease of the mill-sites and tailings and their superintendent looked after them. In 1918 money was raised to buy machinery to further treat the tailings but the man that had the money absconded. Conway after he had acquired an interest in the tailings shipped several car loads to Helena and Salt Lake in 1924, but the returns were not profitable. Conway testified that about \$200 was expended in repairs in 1922 or 1923 to the cribbing by propping and shoveling at the weakest places, and that he paid taxes on these millsites from 1921 to 1927, inclusive, either for the Knippenberg crowd or in his own behalf and taxes had been paid thereon theretofore, certain of the tax receipts being filed as exhibits. His testimony as to repairs is corroborated by one of the men employed to make them. Conway testified also without contradiction that he had warned Fabian, one of the witnesses who admits interest in the Bird placer that he was trespassing and to keep off the premises. He further testified that the purpose of putting the sacks between the timbers was to prevent the tailings from going to waste, and at the time there was hope of treating the tailings, but admitted a subsidiary reason was to prevent damage to the farmers below that would follow from their escape to the creek.

The application sought to show that abandonment of the tailings by the owners is clearly indicated by the unrepaired breakages in the cribbing due to the age and decay of the logs that retained them and consequent wastage of material so impounded, and by the ab-

sence of any specific acts towards their conservation in recent years and by facts showing discontinuance long ago of active mining operations by the company that placed them and its successors, prior to the location of the placer claim. A large amount of conflicting testimony was introduced as to the extent of such wastage and breakage. Photographs of the condition of the cribbing were introduced by applicant and the Government.

The applicant, however, did not refute the opposing evidence that his pictures are largely representations from different angles of the same, and the worst break; and that about 75 per cent of the cribbing is still intact. Engineers for the Government and intervener declared their opinions that the tailings had settled and reached such an angle of repose as to render cribbing protection no longer a necessity. A mining engineer testifying for applicant estimated that 1500 tons of tailings had escaped. Considering the undisputed fact that there was an estimate that 20,000 tons had escaped during the operation of the Greenwood Mining Company on the dump, and that 75,000 tons remained after that company ceased operations, the degree of wastage, if this were accepted, is not such as to indicate an indifference by the claimants thereof as to what became of them. The inference sought to be drawn that the tailings were impounded only to avoid lawsuits because of damages to stock of farmers on lower lands that would be occasioned by the escape of noxious mineral substances is little more than a suggestion of counsel for applicant that is dispelled by positive testimony to the contrary of Conway, who was in charge of the offices of the Hecla Mining Company, such statement being satisfactorily buttressed by the *ante litem motam* statement of said company years ago set forth in the department's decision above cited, wherein the company in speaking of the tailings on Everest Millsites Nos. 1 and 2 represented as follows:

That in treating ores in the concentrator the portion of the ore richest in lead is taken out and sent to the smelter for reduction; that the overflow or tailings though not so rich in lead is by no means valueless; that it carries grains of ore too light to be recovered by concentration, but rich in silver; that it has been the policy of claimant to retain the tailings resulting from concentration with the expectation of erecting further machinery for the profitable treatment of the same.

Neither will the contention of applicant be accepted that the levy of taxes was invalid, or the sheriff's sale unauthorized, or that abandonment is shown by the neglect to subsequently seek a patent for the millsites on proper grounds as invited in the department's decision. As the department did not declare the millsites void, the sheriff's sale does not appear to have been set aside, and the mineral

claimants, if they saw fit, need never apply for patent, provided they maintained the claims by the uses the law requires. Even if it were true as to the invalidity of tax assessment and sheriff's sale, such sale and payment of the assessments were evidence of the recognition and assertion of ownership and dominion of the property, and negative the inference of abandonment.

Conceding that if the tailings had been abandoned at the date of the location of the Bird claim, subsequent acts of dominion and assertion of claim to them would not restore the owner's rights, there were no such acts or failure to act shown in this record up to that time that satisfied the rule as to proof of abandonment. It is clear from the foregoing that the tailings were deposited on the claims with the intention of retaining the possession of them, and rights under the millsite law were invoked, no matter whether successful or not, to be secure in that possession. No rule of law has been called to the department's attention where mere failure to check deterioration in value that follows from lapse of time of unproductive property is of itself conclusive of abandonment, and that is practically all that has been proven. The tailings were deposited to wait for better days, and from the evidence in the record as to the improvement in processes of treating complex ores, and the strenuous struggle for possession, those days have but recently come.

To establish abandonment both the intention to abandon and actual relinquishment must be shown. In the opinion of the department neither was shown in this case. No abandonment being shown, but on the contrary a clear intention to preserve and protect the property right in the tailings, there is no room for the conclusion under the authorities cited by appellant that the tailings became a part of the realty so as to mineralize the public land upon which they were placed and make it subject to mining location. It is clear that by severance of the ore from the land in which it existed for milling and sale it became personalty (2 R. C. L. Secs. 50 and 52), and that it did not lose that character by its retention for further utilization.

In *Steinfeld v. Omega Copper Co.* (141 Pac. 847), the court said—

* * * The intention with which the owner of the property extracted the ore from the ground and the purpose and intention of the owner with which it was placed on the dump is controlling in arriving at the solution of the question of whether the ore after having been extracted and placed in the dump was personalty or realty.

While it may be true that—

To suffer tailings to flow where they may without obstruction to confine them is equivalent to their abandonment. If they lodge on lands of another, they are considered as an accretion and belong to him. If they accumulate on vacant

unappropriated public land, it has been the custom in the mining regions of the west to recognize the right of the first comer to appropriate them by proceedings analogous to the location of placer claims. (Lindley on Mines, Sec. 426, and cases cited.)

Yet, it is manifest that this doctrine is not applicable to the facts in the instant case. In *Ritter v. Lynch* (123 Fed. 930), in holding that no rights could be acquired under the placer mining law to public land nonmineral in its natural state that was covered by valuable tailings where the owner thereof had kept and preserved them from waste and destruction until such time as they could profitably be worked and sold, it was said—

It must be admitted that, if the tailings had been suffered by Mr. Lynch to flow where they listed, his claim of ownership therein would have to be considered as abandoned; or if the tailings were, by their own uninterrupted flow, lodged upon the land of another, they would be considered as an accretion, and belong to the owner of the land. If they were allowed to flow in their natural course, and accumulate on vacant and unappropriated public land, they would become subject to appropriation by any one who took them up and pursued the steps and proceedings analogous to the location of placer mining claims. (Lindley on Mines (2d Ed.), Sec. 426, and authorities there cited. But no such conditions appear in this case.

The grounds of invalidity are all the stronger in the instant case where not only were the tailings deposited under conditions practically the same as the *Lynch case*, but the lands were embraced in an asserted millsite location by the claimants of the tailings, the invalidity of which had not been declared by the rejection of the application for patent thereto. (See *Alaska Copper Co. et al.*, 43. L. D. 257.) As the evidence shows convincingly that the land in its natural condition is nonmineral in character, and that under the conditions shown no mineral character is imparted to it by the deposit of the tailings, the Commissioner's decision is

Affirmed.

UNITED STATES, GEORGE B. CONWAY, INTERVENER v. GROSSO

Motion for rehearing of departmental decision of June 9, 1930 (53 I. D. 115), denied by First Assistant Secretary Dixon, July 29, 1930.

UNITED STATES, GEORGE B. CONWAY, INTERVENER v. GROSSO

Petition for the exercise of supervisory authority in the above-entitled case (53 I. D. 115, 126), denied by Secretary Wilbur, March 16, 1931.