



Helena, Montana, land district. The land being within the limits of the grant to the Northern Pacific Railroad Company, act of July 2, 1864 (13 Stat., 365), a controversy involving the same arose between Bradford and said company, the proceedings in which resulted in a decision of this Department, August 7, 1897 (unreported), wherein it was held that the land was excepted from the company's grant. Proceedings were subsequently had by other parties involving the land, which it is unnecessary to set forth in detail. It is sufficient to say that on July 14, 1899, Bradford was allowed to make homestead entry of said land.

July 31, 1899, Silas F. King *et al.* filed a protest against said entry, alleging that the land contains placer gold and a deposit of brick clay; that it is mineral in character; that the clay therein is valuable for the manufacture of brick; and that the land is more valuable for minerals than for agricultural purposes. A hearing was had at which all parties appeared. On the evidence submitted the local officers found that the land does not contain mineral, but that a deposit of clay exists therein from which ordinary brick can be manufactured, and, when manufactured, can be sold at a profit in Butte City, Montana, near which place the land is situated; further, that the land is more valuable for the manufacture of brick than for agricultural purposes.

July 1, 1900, on appeal, your office affirmed the finding of the local officers, in that said land is non-mineral in character, from which decision protestants have appealed to the Department.

From the evidence submitted at the hearing the following facts appear:

1. That the land in controversy is of very little value for agricultural purposes.
2. That no substance heretofore regarded as mineral by the Department exists therein.
3. That said land contains a deposit of ordinary clay from which an inferior quality of brick have been manufactured, which have been used in the erection of ordinary buildings and in the construction of a sewer in Butte City, Montana, in the immediate vicinity of said land.
4. That the brick so made have been sold at a profit in Butte City.
5. That said land is more valuable for the manufacture of such brick than for agricultural purposes.

It is a matter of common knowledge that the deposit which is found upon the land is a substance which exists generally, in quantities more or less varying, throughout the entire Rocky Mountain region, and that lands where such substances exist are usually capable of producing agricultural crops.

The facts in this case, however, bring it clearly within the rulings in Dunluce Placer Mine (6 L. D., 761), and Blake Placer, decided January 17, 1889 (unreported), which are to the effect that lands contain-

ing ordinary brick clay are not mineral lands within the meaning of the mining laws.

In the first of the above cases it was held that a deposit of *brick clay*, which rendered the land upon which it existed more valuable on that account than for agricultural purposes, was not subject to entry as mineral land; in the second it was decided that land chiefly valuable on account of deposits of *ordinary brick clay* could not be entered under the mining laws.

Notwithstanding the above rulings, it is contended by protestants that the clay found upon the land here in question is a mineral, and as the land is of more value for the manufacture of ordinary brick than for agricultural purposes it is mineral in character.

It is further insisted that the above cited cases were not well considered; that the conclusions arrived at therein are wrong in principle, not supported by authority, and that said cases have been practically overruled by later decisions of the Department.

In support of the above propositions counsel for protestants have filed an elaborate brief, which has been carefully examined and considered, but in the opinion of the Department no valid reason has been presented for disturbing the rulings heretofore made and referred to above.

While it is true, as stated by counsel, that in Dunluce Placer Mine, *supra*, no reason was given for the conclusion reached, yet it can not be assumed that the question involved and decided was not carefully considered. In Blake Placer Claim (unreported) the decision was upon a motion for review, and an examination of the papers in the case shows that the question involved and determined was thoroughly investigated before the decision was rendered.

The contention that the rulings above referred to are antagonistic to later decisions and that the Department has practically overruled the cases wherein they were made, is not supported by the citations in the brief of counsel, as an examination will disclose. The cases referred to are Pacific Coast Marble Co. *v.* Northern Pacific Railroad Co. (25 L. D., 233); Phifer *v.* Heaton (27 L. D., 57); and Richter *et al.* *v.* State of Utah (27 L. D., 95). In the first case it was held that lands chiefly valuable for deposits of marble are mineral in character; in the second, that lands containing a deposit of gypsum cement, and more valuable on that account than for agricultural purposes, are not subject to agricultural entry; and in the third, that lands wherein exist valuable deposits of guano are subject to entry as mineral land.

The distinction between the cases containing the rulings complained of and those cited by counsel as sustaining protestants' contention, is plainly apparent. Deposits, such as marble, gypsum cement, and guano, are classed by standard authorities on mining matters as mineral. On the other hand, no standard authority has been cited, nor has any been found, which in direct terms says that ordinary brick

clay is mineral, while it is a well known fact that such clay exists generally throughout the entire country, in quantities more or less varying, and that the lands where found, as a rule, are valuable for agricultural purposes.

Counsel for protestants state that no court in this country has held brick clay to be mineral. It is claimed, however, that in England judicial construction is to the effect that such substance is mineral. To sustain this latter statement but one case is cited, *viz.*, *Midland Railway Company v. Haunchwood Brick and Tile Company* (L. R., 20 ch., 552). This case does not support the statement, nor is it an authority upon the proposition advanced. The question whether or not brick clay is mineral, as the term is generally understood and accepted, was not involved, nor was it raised. The deposit which was the subject of the litigation, as appears from the statement of the case (p. 552), was a bed of brick and fire clay, while in the opinion of the court it is stated that the deposit "is a bed of clay used in making a peculiar kind of brick, and of some value, from the circumstance that it contains a certain amount of iron" (p. 560). The question involved and determined was whether or not the word "mines," as used in the 77th section of the Railways' Clauses Consolidation Act, 1845 (8 Vict. C., 20), included a bed of *brick* and *fire* clay which was being developed by *open* workings. The court held that such deposit worked in such manner was a "mine" within the meaning of the section. While in the opinion the court says that the word *minerals* means "primarily all substances (other than the agricultural surface of the ground) which may be got for manufacturing or mercantile purposes," such statement can not be accepted as authority in support of the proposition here advanced, *viz.*, that Congress intended lands which are of more value for their deposits of ordinary brick clay than for agricultural purposes should be dealt with and disposed of as mineral lands.

The long established rule of the Department is, that land of the character here involved is subject to agricultural entry. This rule has been generally accepted and acquiesced in. Unless clearly shown to be wrong in principle and in violation of both the letter and spirit of the mining laws, it should not be disturbed. In the opinion of the Department no reason exists which justifies its abrogation.

Your office decision holding said tract to be non-mineral in character is affirmed, and the protest accordingly dismissed.

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KING ET AL. *v.* BRADFORD.

Motion for review of departmental decision of October 10, 1901, 31 L. D., 108, denied by Secretary Hitchcock December 30, 1901.