

granted upon the express condition that the right of way is sought and approved for the main purpose of irrigation, and that the power uses are subsidiary to and mainly for the purpose of serving and carrying out irrigation.

Accordingly, the application of the Ramona Company has been approved by letter of even date in the following form:

Approved; subject to all valid existing rights and upon the express condition that the right of way hereby approved is to be used for the main purpose of irrigation; that any electrical power or energy developed thereunder is to be primarily used in and for the purpose for which the right of way is granted, *viz.*, irrigation; and any abandonment or violation of such use, or neglect to comply with the provisions of the law, will work a forfeiture which will be enforced by appropriate proceedings.

You will promptly take up for consideration all such rights of way now pending in your office and, in cooperation with the Director of the Geological Survey, cause a field investigation and report to be made upon each application by a competent engineer of your office, or of the Survey, and thereafter transmit the entire record to the Department with the joint or separate recommendations of yourself and the Director of the Geological Survey.

The same procedure will be followed in case of such applications hereafter presented. In *all* cases the investigation and report should cover all material facts pertaining to the lands and rights applied for, including irrigation, contemplated and possible, the power possibilities and whether the application is for the main purpose of irrigation.

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**GRAVEL AND SAND DEPOSITS—CHARACTER OF LAND—HOMESTEAD ENTRY.**

ZIMMERMAN *v.* BRUNSON.

*Decided October 21, 1910.*

Deposits of gravel and sand, suitable for mixing with cement for concrete construction, but having no peculiar property or characteristic giving them special value, and deriving their chief value from proximity to a town, do not render the land in which they are found mineral in character within the meaning of the mining laws, or bar entry under the homestead laws, notwithstanding the land may be more valuable on account of such deposits than for agricultural purposes.

BALLINGER, *Secretary:*

This is an appeal from the decision of the Commissioner of the General Land Office reversing the recommendation of the register and receiver, and holding for cancellation homestead entry No. 05196, made March 1, 1909, at Great Falls, Montana, by Albert E.

Brunson, for the E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 1, T. 28 N., R. 3 W., M. M., as to the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , on the contest of William Zimmerman, filed April 30, 1909, charging that the above described 20 acres are—

wholly unfit for agricultural purposes; that it is of gravel character, and there was a long time prior to the filing of homestead entry No. 05196 in favor of Albert E. Brunson a gravel and sand pit operated upon said land; said Brunson had knowledge and was aware of the gravel character and the uses and purposes which said land was, and now is being subjected to with reference to the operation of the said sand and gravel pit, prior to his filing his homestead application above mentioned; and the said Brunson at the present time and since the filing aforesaid permits said sand and gravel pit to be operated on said land, and the said land is valuable for its gravel deposits.

The register and receiver recommended that the contest be dismissed, and concluded their opinion as follows:

We are of the opinion that the evidence fails to establish the contention that the portion of this entry involved in this contest is more valuable for its deposits of gravel and sand than it is for agricultural purposes. The evidence shows that while some gravel had been hauled from the land in question for building purposes, it was also found and used in several different locations in that vicinity, and no attempt was made to secure title to the land in question for a gravel pit, but it was simply used while it was public land.

The Commissioner found that the tract contained workable deposits of sand and gravel valuable in the manufacture of building concrete, both solid and in blocks, for use in foundations and superstructures, and that the land was therefore mineral in character, and excepted from homestead entry.

The evidence of the contestant is to the effect that the tract is worthless for agricultural purposes, can neither be dry-farmed nor irrigated, its sole value being for its deposit of gravel and sand. That it has some value for grazing purposes is conceded. His testimony further shows that gravel taken from the land since 1908 has been used, when mixed with cement, for the purpose of making concrete and concrete blocks used in the construction of buildings in the town of Conrad, Montana. The principal value of the deposit is due to its proximity to that town.

The contestee's testimony tends to show that all except about two acres can successfully be dry-farmed; that the tract can be irrigated; that the gravel and sand is of a poor quality, being mixed with dirt, and that a portion of the gravel used in the town of Conrad came from another source of supply, locally known as Dry Fork, where there is a large amount of sand and gravel available for the same purpose, and of a better quality. He does not deny that prior to his entry gravel was removed from this land and used in the construction of buildings in Conrad, but contends that it is valueless upon the

ground, the hauling alone placing the value thereon. Zimmerman apparently staked out a so-called placer claim, but never filed the same of record.

Conceding that the 20 acres are chiefly valuable for their deposit of gravel and sand which can be used in connection with cement forming concrete used in the construction of buildings, does such a deposit confer upon them a mineral character so as to except them from homestead entry?

Under section 2302, Revised Statutes, mineral lands are not liable to entry and settlement under the provisions of the homestead laws. Section 2318 reserved lands "valuable for minerals" from sale, and section 2319 declares that "all valuable mineral deposits" in the public lands are free and open to exploration and purchase under the provisions of the mining laws.

The question of what constitutes "mineral" within the meaning of the above statutes is not free from doubt, and has frequently been before the Department for adjudication. In *Pacific Coast Marble Co. v. Northern Pacific R. R. Co. et al.* (25 L. D., 233), the Department laid down the general rule that—

Whatever is recognized as a mineral by the standard authorities, whether of metallic or other substances, when found in the public lands, in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, must be treated as coming within the purview of the mining laws.

A search of the standard American authorities has failed to disclose a single one which classifies a deposit such as claimed in this case as mineral, nor is the Department aware of any application to purchase such a deposit under the mining laws. This, taken into consideration with the further fact that deposits of sand and gravel occur with considerable frequency in the public domain, points rather to a general understanding that such deposits, unless they possess a peculiar property or characteristic giving them a special value, were not to be regarded as mineral.

In *Conlin v. Kelly* (12 L. D., 1) it was held that stone useful only for general building purposes did not render land containing it subject to appropriation under the mining laws, and except it from pre-emption entries. On page 3 the Department pointed out that the stone had no peculiar property or characteristic giving it a special value, and that its chief value was its proximity to the town of Alexandria. So here, the sand and gravel have no peculiar property or characteristic, and their chief value is their proximity to the town of Conrad.

That case was distinguished in *McGlenn v. Wienbroer* (15 L. D., 370), the Department pointing out, at page 374, that in the *Conlin v.*

Kelly case the stone was valuable only for general building purposes, while there it was very valuable for ornamentation of buildings, and for monuments and other commercial purposes. In *Clark et al. v. Ervin* (16 L. D., 122), the holding in *Conlin v. Kelly* was reaffirmed; while the distinction pointed out in *McGlenn v. Wienbroe* was emphasized in *Van Doren v. Plested* (16 L. D., 508). The above cases, it should be observed, involved a state of facts existing prior to the act of August 4, 1892 (27 Stat., 348), authorizing the entry of lands chiefly valuable for building stone under the placer mining laws.

In *Dunluce Placer Mine* (6 L. D., 761) it was held that a deposit of brick clay will not warrant the classification of land as mineral, or entry thereof as a placer claim. This holding was affirmed in *King et al. v. Bradford* (31 L. D., 108), the facts being stated on page 109 as follows:

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.

There, again, a material valuable solely for general building purposes, and whose chief value was its proximity to a town or city, was held not to be a mineral.

From the above resume it follows that the Department, in the absence of specific legislation by Congress, will refuse to classify as mineral land containing a deposit of material not recognized by standard authorities as such, whose sole use is for general building purposes, and whose chief value is its proximity to a town or city, in contradistinction to numerous other like deposits of the same character in the public domain.

It is true that the nonmineral affidavit required of the homestead entryman required him to state that the land did not contain any deposit of "coal, placer, cement, gravel, \* \* \* nor any other valuable mineral deposit." The word "gravel" there used refers rather to gravels bearing gold or other metallic substances, giving the gravel a peculiar value therefor.

The decision of the Commissioner is therefore reversed, and Brunson's entry will remain intact, if no other objection appear.