

BETTANCOURT ET AL. v. FITZGERALD.

Decided January 29, 1912.

PLACER CLAIM—CLAY SUITABLE FOR USE IN MANUFACTURE OF CEMENT.

A deposit of clay suitable only for use in the manufacture of Portland cement does not render the land containing it subject to disposition under the placer mining laws.

THOMPSON, *Assistant Secretary*:

This case comes before the Department on the appeal of John Z. Bettancourt from the Commissioner's decision of May 25, 1911, dismissing his protest against the application (Serial 01303) of Minnie B. Fitzgerald, widow of Hiram E. Fitzgerald, deceased, by her attorney in fact John F. Leghorn, to select, under the act of July 1, 1898 (30 Stat., 597, 620), and May 17, 1906 (34 Stat., 197), a certain unsurveyed area, aggregating 80 acres, described by metes and bounds, lying within what, when surveyed, will be T. 39 N., R. 43 E., W. M., Spokane land district, Washington, in lieu of the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 5, T. 4 N., R. 2 E., same land district, relinquished by her.

The application was filed October 20, 1908, and, April 14, 1909, John Z. Bettancourt filed a protest against it, charging that the land is mineral in character and is embraced in the Mark Tapley placer mining location made February 5, 1902. Previous to the filing of Fitzgerald's application, certain proceedings with respect to the land, not necessary to be here stated, were had. As a result thereof, however, a number of residents of the town of Metaline, situated within the limits of the tract here in question, on September 9, 1908, filed a protest against the patenting of the land embraced in the Mark Tapley mining location to said Bettancourt, or any other person or corporation, charging that the area is not and never has been mineral in character; that a portion thereof has been for many years used for townsite purposes, and that the entire area is chiefly valuable therefor.

Hearing was ordered on both sets of charges and was duly had, commencing September 15, 1909, the two proceedings being consolidated for trial purposes. In the meantime, however, to wit, on July 14, 1909, Fitzgerald filed a relinquishment of her right, title and interest in and to certain area, of approximately 19 acres, embraced in her application, alleged to be occupied and claimed for townsite purposes; and, October 7, 1909, the townsite protestants dismissed their protest, so far as it had reference to the unrelinquished portion of the application, but specifically continued it as to the mineral claim of Battancourt. This left the proceeding a matter between Bettancourt and the selector, on the one hand, and the townsite claimants and Battancourt, on the other.

As result of the hearing, the local officers found the land embraced in the mining location to be nonmineral in character, thus sustaining the protest of the townsite people against Battancourt's claim. They also, for the same reason, recommended that the protest of Battancourt against the selection be dismissed. This action was affirmed in the decision appealed from.

The only substance of a mineral nature possessing any claimed economic importance that is shown to exist upon or within the area embraced in the Mark Tapley mining location, which also includes the entire area selected by Fitzgerald, is a deposit of clay. This deposit, it is testified by the witnesses for the mineral claimants, is such a substance as, if mixed in proper proportions with limestone and subjected to the usual process of burning and grinding, would produce a commercial quality of Portland cement. They also testified that the deposit existed upon the land in such quantities as to warrant the establishment of a cement manufacturing plant at or near that point for the purpose of so utilizing it. It is denied by witnesses for the nonmineral claimants that a mixture of this clay, in any conceivable proportion, with a limestone would produce a satisfactory Portland cement. They further state that the substance exists upon the land in such small quantities and is so intimately intermixed or associated with sand and gravel that, even if it otherwise possessed the necessary properties as a cement material, it would be impracticable to attempt to make use of it for cement manufacturing purposes.

Upon consideration of the voluminous record presented in the case, the Department believes that it fails to disclose the existence upon any portion of the land in question of any deposit of clay of such quality and dimensions as would render practical its removal for use in the manufacture of Portland cement. But, whatever the facts may be, the Department is of opinion, from an examination of standard authorities on cement materials and manufacture, that clay suitable for use in the manufacture of Portland cement is so widely distributed; that its value in a natural state in place constitutes such a small element of the cost of the manufactured product; and that its practical availability as a cement ingredient is so largely dependent upon the existence of certain extremely favorable artificial as well as natural conditions, it can not properly be regarded in and of itself as a valuable mineral deposit within the meaning of the mining laws.

In Dunluce Placer Mine (6 L. D., 761), the Department held that the existence within the limits of a tract of a deposit of ordinary brick clay would not warrant the classification of the tract as mineral nor afford any proper basis for the entry thereof under the placer mining laws. This ruling was reaffirmed in *King et al. v. Bradford* (31 L. D., 108), involving a tract expressly found by the Department to be more valuable on account of a deposit of ordinary brick

clay thereon than for agricultural purposes, it being there held that Congress did not intend that lands containing merely a deposit of brick clay should be dealt with and disposed of as mineral lands. There is no substantial distinction, so far as the mining laws are concerned, between a deposit of clay suitable for the manufacture of ordinary bricks and one capable of being utilized in the production of Portland cement. The rule applied to the former is therefore clearly applicable to the latter.

For the reasons above stated, it must be held that the area in question is not mineral in character, within the contemplation of the mining laws. The judgment appealed from is accordingly affirmed.

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Motion for rehearing of departmental decision of June 8, 1912, 40 L. D., 620, denied by First Assistant Secretary Adams, June 28, 1912.

GEORGE H. UPTHEGROVE.

DESERT-LAND ENTRY IN RECLAMATION PROJECT—RELINQUISHMENT.

An unperfected desert-land entry in a reclamation project which has been reduced to 160 acres by relinquishment of the excess area under the act of June 27, 1906, and has thereby become subject to the reclamation act and qualified to take water from the project, may be assigned in part under the provisions of the act of March 28, 1908.

First Assistant Secretary Adams to George H. Upthegrove, Secretary of the Umatilla River Water Users' Association, Hermiston, Oregon, March 11, 1912.

I further reply to your letter of October 23, 1911, I enclose, for your information, copy of my letter of February 23, to the Chairman of the Senate Committee on Public Lands, reporting adversely upon Senate Bill 4206, "To authorize the issuance of final certificates and patents to desert-land entrymen in certain cases," and giving the reason why the Department opposes the policy advocated by your letter and embodied in said bill.

You are in error in stating that an unperfected desert-land entry in a reclamation project which has been reduced to 160 acres by relinquishment of the excess area under the act of June 27, 1906 (34 Stat., 520), and has thereby become subject to the reclamation act and qualified to take water from the project, can not be assigned in part. Departmental instructions of January 20, 1912 (40 L. D., 386), to the Commissioner of the General Land Office, held that a desert-land entry, reduced to 160 acres or less by assignment of a part