

AMERICAN COLLOID COMPANY

IBLA 2001-53, 2001-54, 2001-55, 2001-56

Decided July 12, 2004

Consolidated appeals from decisions of the Deputy State Director, Wyoming State Office, Bureau of Land Management, rejecting mineral patent applications and cancelling first half final certificates. WYW-116303, WYW-120313, WYW-120907, WYW-121828.

Reversed and remanded.

1. Mining Claims: Contests–Mining Claims: Patent

If BLM is not satisfied with the evidence of discovery submitted by a mineral patent applicant, it may request further information. However, where a patent applicant presents an application that is correct as to form and contains information supporting the substantive question of whether a discovery has been made, and where BLM disputes that conclusion as a matter of fact by concluding that the information presented is insufficient to support a discovery, BLM may not summarily reject the patent application but must instead initiate a contest proceeding.

APPEARANCES: R. Dennis Ickes, Esq., Salt Lake City, Utah, for American Colloid Company; Lowell L. Madsen, Esq., Office of the Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

American Colloid Company (ACC) has appealed four separate decisions of the Deputy State Director, Division of Minerals and Lands, Wyoming State Office, Bureau of Land Management (BLM), each dated October 25, 2000, rejecting mineral patent applications WYW-116303, WYW-120313, WYW-120907, and WYW-121828, and cancelling the First Half Final Certificates (FHFCs) previously issued for each of those applications. The four appeals were docketed as IBLA 2001-53 (WYW-120907),

IBLA 2001-54 (WYW-116303), IBLA 2001-55 (WYW-121828), and IBLA 2001-56 (WYW-120313). By order dated February 7, 2001, the Board granted ACC's motion to consolidate the appeals for review.

ACC filed patent application WYW-116303 on May 10, 1989, seeking patent to seven placer mining claims, the Windy 131, Windy 132, Windy 140, Windy 157, Windy 158, Windy 165, and Windy 166 claims, encompassing a total of approximately 140 acres within secs. 7 and 8, T. 57 N., R. 95 W., 6th Principal Meridian (PM), Big Horn County, Wyoming. (Patent Application WYW-116303, Ex. C; see also Case Abstract as of Mar. 23, 1992.) On May 11, 1990, ACC filed patent application WYW-120313, seeking patent to six placer mining claims, the Windy 108, Windy 109, Windy 110, Windy 111, Windy 362, and Windy 363 claims, embracing approximately 120 acres within sec. 6, T. 57 N., R. 95 W., 6th PM, Big Horn County, Wyoming (Patent Application WYW-120313, Ex. C; see also Case Abstract as of July 20, 1992.) On June 22, 1990, ACC filed patent application WYW-120907, seeking patent to four placer mining claims, the WDG 29A, WDG 39, WDG 52, and WDG 53 claims, covering approximately 70 acres within sec. 18, T. 48 N., R. 90 W., 6th PM, Washakie County, Wyoming. (Patent Application WYW-120907, Ex. C; see also Case Abstract as of Dec. 9, 1992.) On September 10, 1990, ACC filed patent application WYW-121828, seeking patent to eight placer mining claims, the WDG 132, WDG 133, WDG 136, WDG 137, WDG 138, WDG 139, WDG 145, and WDG 152 claims, embracing approximately 160 acres within sec. 35, T. 49 N., R. 91 W., 6th PM, Big Horn County, Wyoming. (Patent Application WYW-121828, Ex. C; see also Case Abstract as of Dec. 4, 1992.)

Each application included 15 exhibits designed to satisfy the requirements for patent set forth in 43 CFR Subparts 3862 and 3863: Exhibit A - Certificate of Incorporation; Exhibit B - Appointment of Agent; Exhibit C - List of Claims; Exhibit D - Map of Claims and Adjoining Claims; Exhibit E - Location Notices; Exhibit F - Examination of Placer Mining Claims for Lodes or Veins; Exhibit G - Affidavit of Improvements; Exhibit H - Affidavit of Improvements by Locators; Exhibit I - Affidavit of Proof of Posting; Exhibits J and K - Notices of Application for Patent for BLM and The Loveland Chronicle; Exhibit L - Agreement of Publisher and Copy of Notice to be Published; Exhibit M - Certificate of Title on Placer Claims "to be filed later"<sup>1/</sup>; Exhibit N - Notice of Intention to Apply for United States Patent to be Posted in the Field; and Exhibit O - Maps and Lab Results.

Paragraph 6 of each application addresses the "Evidence of Discovery of Valuable Mineral":

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<sup>1/</sup> BLM received certificates of title for WYW-116303 on May 30, 1989, for WYW-120313 on June 11, 1990, for WYW-12907 on Aug. 15, 1990, and for WYW-121828 on Sept. 25, 1990, and inserted them as Exhibit M to each application.

Applicant seeks issuance of a United States Patent to the Claims in good faith because of the minerals therein, and not in order to obtain valuable timber or other vegetation or to control water courses. The known mineral deposits within the Claims are placer only, as corroborated by the Affidavit attached hereto as Exhibit F. A discovery of a valuable deposit of commercial grade bentonite has been made on the Claims.

The geologic formations associated with the beds of bentonite exposed on the Claims [are] stratified sedimentary deposits belonging to formations ranging in age from Early to Late Cretaceous. They tend to be exposed chiefly along the marginal escarpments of terraces and in ravines. The bentonite-bearing formations consist almost entirely of fine-grained sedimentary material; about one-half is shale, about two-fifths is sandy shale, and the remainder [is] calcareous shale and sandstone in equal amounts.

Applicant has established the quantity, quality, and marketability of the bentonite discovered on the Claims by auger-drilling, laboratory analysis of core samples, and determination of overburden ratios. A confidential report of these findings, including a map showing the location of each such exposure and outcrop of mineral, [is] shown in Exhibit O, along with the lab results as Exhibit P. [<sup>2/</sup>]

(Patent Applications WYW-120907, WYW-121828, WYW-116303, and WYW-120313 at 2-3.)

By letters dated March 3 (WYW-116303), June 30 (WYW-120313), August 18 (WYW-120907), and November 18 (WYW-121828), 1992, the Chief, Branch of Mining Law and Solid Minerals, BLM, informed ACC that BLM had completed its review of the patent applications. The Chief advised ACC in each letter that, although no economic analysis had been included in the application to allow a mineral specialist to determine whether a valuable mineral deposit had been found, it was nevertheless proceeding with the publication and scheduling of the field exam. The Chief requested that ACC “[p]lease see that the economic data required is available for the field examiner at or prior to the time of the field exam.” (Mar. 3, June 30, Aug. 18, Nov. 18, 1992, letters at 1.) These letters in turn were apparently based on four memoranda to the files from the Mining Engineer, Branch of Mining Law and Solid Minerals, which stated that the applications had been reviewed and

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<sup>2/</sup> Exhibit O attached to the applications in the case file is entitled “Maps and Lab Results” and contains the lab results but no maps. There is no Exhibit P appended to any of the applications.

found to be technically adequate under 43 CFR 3863.1-3, except that “no economic analysis was present,” and indicated that the Worland District geologist would acquire this information from ACC before conducting a field examination of the claims. (Mar. 3, June 30, Aug. 17, and Nov. 18, 1992, memoranda to files.)

By letter dated June 8, 1992, BLM notified ACC that it had issued the FHFC for the claims included in patent application WYW-116303, effective May 29, 1992. By letter dated September 30, 1992, BLM notified ACC that it had issued the FHFC for the claims included in patent application WYW-120313, effective September 28, 1992. By letter dated December 14, 1992, BLM notified ACC that it had issued the FHFCs for the claims included in patent application WYW-120907, effective December 8, 1992. By letter dated February 19, 1993, BLM notified ACC that it had issued the FHFC for the claims included in application WYW-121828, effective February 16, 1993. In each case, the effective date was the date payment of the purchase price had been received. In all cases, BLM stated that the FHFC confirmed that BLM had received the proofs of posting and publication, statement of charges and fees, and purchase money. BLM stated that “[p]atent may issue if all is found regular and upon demonstration and verification of a discovery of a valuable mineral deposit. This will be verified by a mineral examiner in an on-the-ground examination at a later date.” (June 8, Sept. 30, Dec. 14, 1992, and Feb. 19, 1993, letters at 1.)

On September 30, 1994, Congress enacted the Department of the Interior and Related Agencies Appropriation Act of 1995, Pub. L. No. 103-332, 108 Stat. 2499 (1994). Section 112 of that Act, 108 Stat. 2519, precluded the expenditure of funds to accept or process applications for patent for mining or mill site claims for the 1995 fiscal year from October 1, 1994, through September 30, 1995. The Act provided, however, that patent applications filed with the Secretary on or before September 30, 1994, for which all statutory requirements for patent had been met by that date would be excepted from the statutory moratorium. Id. Both the moratorium and its exceptions have been extended every succeeding fiscal year and are still in effect. See Pub. L. No. 108-108, § 307, 117 Stat. 1241, 1302-1303 (Nov. 10, 2003) (fiscal 2004); see also Ulf T. Teigen, 159 IBLA 142, 143 n.1 (2003). Since BLM had issued FHFCs for all four patent applications before September 30, 1994, the applications were “grandfathered” under the Act. See May 17, 1996, BLM letters to ACC.

Two different BLM geologists were assigned to conduct field examinations of the patent applications. On April 24, 2000, John Murray, the geologist and certified mineral examiner assigned to conduct the field examinations required to process patent applications WYW-116303 and WYW-120313, verbally requested ACC to provide information required by BLM Manual 3860-1 that he asserted was missing from the case files before he conducted the field examinations. The requested information included the mining economics, reclamation costs, transportation costs, milling costs, and planned end use for the mined material. (July 5, 2000,

memorandum from the Field Manager, Cody Field Office, BLM, to the Wyoming State Director.) ACC did not provide the requested information. Id.<sup>3/</sup>

By identical letters dated May 16, 2000, the Rawlins Field Office informed ACC that geologist Mark Newman had been assigned to conduct field examinations for patent applications WYW-120907 and WYW-121828.<sup>4/</sup> It noted that the case files for the affected claims did not contain “an economic analysis (including a market analysis and the anticipated end-use of the bentonite) or a mine and reclamation plan” and requested that ACC

submit all information developed by [ACC] showing mining methods and costs, including capital and operation costs, the cost of future development work, equipment, supplies, transportation and labor, and the cost of beneficiation. Reclamation and environmental control measure costs must be included.

A market analysis showing the expected end-use of the bentonite, demand for the bentonite, and expected price commanded and amount to be sold must also be included. This information must be submitted by June 1, 2000, in order to continue processing your application. The information will be kept confidential.

(May 16, 2000, letters at 1.)

By letters dated June 6, 2000, the Field Office elaborated on the requested information for patent applications WYW-120907 and WYW-121828, the due date for which was extended until June 23, 2000. Specifically, the letters asked ACC to respond to the following questions:

1. What is the cost per cubic yard of mining the bentonite?
2. What is the cost per cubic yard of bentonite moved?
3. What is the cost per ton of bentonite hauled (round-trip)?
4. What are reclamation costs?

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<sup>3/</sup> ACC has attached to one of its pleadings a letter dated Sept. 15, 1999, from ACC to BLM, asserting a demand that all requests for information be made in writing.

<sup>4/</sup> The May 16, 2000, letter erroneously identified this application as WYW-121829. ACC brought this error to BLM’s attention in a letter dated May 22, 2000, and BLM corrected the error in its June 6, 2000, letter, discussed infra.

5. What is the end-use and selling price FOB the plant?
6. What are the milling costs?

(June 6, 2000, letters at 1.) ACC did not provide the information but contacted BLM advising the Bureau that it would need until early to mid-August to gather the information. See June 27, 2000, ACC letter to Mark Newman (case file WYW-121828 (IBLA 2001-55)).

By letters involving each patent application dated July 12, 2000, the Acting Deputy State Director, Minerals and Lands, advised ACC that it must submit the requested information by August 15, 2000. (July 12, 2000, letters at 2.) Citing “Public Law 104-134 [which] directed the Department \* \* \* to complete all grandfathered patent applications through patent or contest by September 30, 2001, or within a five-year time period,” and the BLM Director’s request that all applications be field examined, reported, adjudicated, and sent to the Washington Office by September 30, 2000, to allow Departmental review and final processing by September 30, 2001, he explained that compliance with the deadline was critical to ensuring BLM’s ability to meet the statutory mandate and the Director’s directive. Id. at 1. He stated that the examiners needed ACC’s economic information showing a discovery of bentonite on each of the claims in order to address whether bentonite from each claim could be produced and sold at a profit. Absent a positive determination on this issue, he stated that BLM would not recommend issuance of the patents. Id. He added that, if the information was not timely received or was incomplete or inadequate, BLM would reject the patent applications as incomplete and close the case files. Id. at 2.

By letters dated August 7, 2000, and received by BLM on August 10, 2000, ACC provided BLM a cost summary to fulfill the economic information requirements of the patent application. ACC also enclosed copies of invoices for three products, Super Gel-X, Pure Gold Chips, and Volcay Chips, to document the sales price of bentonite. ACC advised BLM that both the letter and enclosures were confidential. (Aug. 7, 2000, letters at 1.)

By virtually identical decisions dated August 30, 2000, the Deputy State Director held the patent applications for rejection, held the FHFCs for cancellation, and requested additional information. He noted that Murray and Newman, the mineral examiners, had completed the mineral examinations of the involved placer claims but had determined that insufficient information existed in the patent applications to address whether the bentonite from each claim could be produced and sold at a profit. (Aug. 30, 2000, decisions at 1.) The Deputy State Director stated that both mineral examiners had concluded that the information submitted on

August 10, 2000, was generic in nature and did not provide the economic information required to complete the mineral report for the patent applications. (Aug. 30, 2000, decisions at 2.) Citing the requirement in 43 CFR 3862.1-1(a) that a patent application contain “information sufficient ‘to enable representatives of the Government to confirm the same by examination in the field and also to enable [BLM] to determine whether a valuable deposit of mineral actually exists within the limits of each of the locations embraced in the application’,” and the variable nature of bentonite in terms of quality, products, and selling prices, the Deputy State Director identified the information ACC needed to supply to support its patent applications:

1. State the expected water loss (%) and expected density of the bentonite on the specific claims.
2. State the specific product to be made from the mined bentonite.
3. State all required physical properties of the specified product and the exact testing procedures used to evaluate these properties.
4. State and support the expected revenue for the specified product loaded at the mill.
5. A detailed description of mining methods and mining equipment to be used.
6. Cost of mining in \$/wet cubic yard or \$/bank cubic yard.
7. A detailed description of the loading and transportation of the bentonite from the mine to the mill along with the equipment to be used.
8. Cost of loading and transporting the bentonite to the mill in \$/wet ton.
9. A description of reclamation procedures and equipment required to be used.
10. Cost of reclamation in \$/acre.
11. A detailed description of milling methods used for the specified product.

12. Costs of milling the specified product, including the costs of any additives.

(Aug. 30, 2000, decisions at 2-3 (emphasis in originals).) He granted ACC 30 days from receipt of the decision to provide the requested information, adding that failure to provide all the information would result in the rejection of the patent applications and cancellation of the FHFCs. *Id.* at 3. <sup>5/</sup>

On October 3, 2000, ACC filed additional information addressing each of the 12 items listed in the August 30, 2000, decisions. ACC again designated all the information as confidential and “requested that it remain confidential both in its original form as provided, as well as any documents where portions of this information might appear in Department of Interior documents or reports.” (Sept. 29, 2000, cover letters transmitting additional information at 1.)

Rather than characterize the confidential material submitted by ACC, we quote, without adopting the veracity of, ACC’s own description of the provided material as including information regarding

- (1) expected water loss [processing], (2) expected density of the bentonite [processing], (3) a description of the specified product to be manufactured from the mined bentonite [processing], (4) the required physical properties of the specific product and the exact testing procedures used to evaluate the properties of the product [processing],

<sup>5/</sup> Newman expressed his determination in an Aug. 16, 2000, memorandum transmitted by the Rawlins Field Office Manager to the State Director, which indicated that ACC’s Aug. 5 responses with respect to the patent applications under his review were incomplete because

“1. No mine and reclamation plan has been submitted which addresses the claims involved. The costs submitted do not address site-specific conditions such as protection, restoration, or mitigation for an intermittent drainage which occurs on the claims involved in WYW-121828. The costs do not address the current lack of adequate access to claims involved in WYW-120907, which would result in the necessity of constructing a haul road approximately 2.5 miles in length.

2. No bentonite has been mined or marketed from the claims. ACC’s submission contains copies of invoices for two products which “document the sales price of bentonite.” This implies an end use for the bentonite; however, ACC does not state that this is the intended market. Analysis of samples taken from the claims do not support a claim of high quality for the bentonite. Demand for the bentonite, expected price commanded, and amount expected to be sold are not addressed.

3. No geologic information was submitted.”

(Aug. 16, 2000, memorandum at 1 (emphasis in original).)

(5) the expected revenue for the specific product loaded at the mill [profitability], (6) the mining methods and equipment to be used [extraction], (7) the cost of mining in dollars per wet cubic yard [profitability], (8) a detailed description of the loading and transportation of the bentonite from the mine to the mill along with the equipment to be used [transportation], (9) the cost of loading and transporting the bentonite to the mill in dollars per wet ton [transportation], (10) a description of reclamation procedures and equipment to be used [extraction], (11) cost of reclamation in dollars per acre [extraction], (12) the description of milling methods used for the specific product [processing], and (13) the cost of milling the specific product, including the cost of any additives [processing].

ACC supplied information that covered all phases of taking a bentonite unpatented mining claim from a raw mining claim containing evidence of bentonite to the end use of the product, including the sale of the end products produced from the bentonite mined from each mining claim. The information provided by ACC included: (1) a specific description of the brand name and type of equipment to be used in the mining and reclamation process [extraction, processing], (2) a specific description of how the equipment would use a cut and fill procedure in the mining process [extraction], (3) how the overburden would be handled, how samples of the mineral would be collected and analyzed [extraction], (4) how each grade of bentonite would be segregated [processing], (5) how the bentonite would be hauled to the plant [transportation], (6) how bentonite would be graded and stockpiled [processing], (7) what types of bentonite each product requires [processing, marketing], (8) how bentonite may be blended to achieve the grade of bentonite needed for a specific product [processing], (9) how removed topsoil would be handled [extraction], (10) how removed subsoil would be handled [extraction], (11) how access and haul roads network the mining claims within the [*patent applications*] to provide means for transporting the mined material to the processing facility [transportation], (12) how those access and haul roads would be created, the dimensions of the roads, the engineering standards for constructing the roads, the disposition of the soil, and how the road would be maintained [transportation], (13) the absence of buildings, processing facilities, power transmission facilities, communication facilities, mill and tailing disposal sites, access control features, diversion and retention site, sedimentation and treatment ponds, and other facilities within the [*patent application*] [processing], (14) how V-ditches and berms would be used to divert water runoff [extraction], (15) how sediment control would be implemented

[extraction], (16) how certificates of compliance with buyer's specifications would be used to assure quality of the product [processing, marketing], (17) how testing procedures determine apparent viscosity, plastic viscosity, and yield points [processing, marketing], (18) how testing procedures would determine moisture content of bentonite-containing products such as Additrol, Nocol, and other additive materials such as seacoal, Cellflo, Colloidex, Flo-Carb, etc. [processing, marketing], (19) the test procedure that would determine the mesh sizing of granular and powder products [processing, marketing], (20) the test procedure that would determine the swelling capacity of bentonite [processing, marketing], (21) cost of manufacturing bentonite chips that would consider the cost of stripping the overburden, field drying, loading and hauling, reclamation, screening, bagging, and loading [profitability], (22) the selling price per ton [marketing, profitability], (23) revenue that would be produced from each ton of chips sold [profitability], (24) cost of manufacturing SuperGel that would consider stripping the overburden, field drying, office expenses, equipment moving, taxes, overhead expenses, development of access roads, loading raw material, hauling raw material, reclamation, seeding, bonds, drying, milling, additives, bagging, loading, bags, pallets, stretch wrap, plant and corporate overhead, the selling price per ton, and the net revenues per ton [profitability], (25) existing invoices for chips crumbles, grout, and SuperGel actually sold [marketability], [and] (26) reclamation procedures that detail the post-mining land uses, the reclamation schedule, the specific equipment to be used, the contouring plan, the hydrologic restoration process, the topsoil and/or subsoil replacement procedure, the revegetation procedure and types to be used, and when roads will be reclaimed [extraction]. ACC has extensive experience in the patenting process. The information that ACC has provided is much more extensive than what BLM has heretofore required in support of other patenting of mining claims.

(Statement of Reasons (SOR) at 11-13 (non-italicized brackets in original).)

On October 25, 2000, the Deputy State Director issued decisions rejecting two mineral patent applications, WYW-116303 and WYW-120313, and canceling the FHFCs for the applications. Citing an attached memorandum dated October 12, 2000, he stated that the mineral examiner had found the information ACC submitted on October 3, 2000, to be incomplete and inadequate to meet the requirements set out in BLM's August 30, 2000, decisions. The cited memorandum, prepared by the mineral examiner with the concurrence of the Acting Field Manager, Cody Field Office, stated that,

[a]fter reviewing [ACC's] response to the State Office request, John [Murray, the mineral examiner,] determined that the information required by [BLM] Manual 3860-1 was not supplied. The information requested was the mining economics, mine plan, reclamation costs, transportation, milling costs and end use. [ACC] responded to the State Office letter, but did not supply all of the needed and requested information.

John requested a mine plan for the claims in question. Due to the uniqueness of the deposit, gradational contacts would require extreme care to mine this deposit. This would also increase mine costs and/or dilute the quality of the ore and thereby have a negative effect on the mine economics. The BLM must be able to verify the mine economics behind the mining operation, but cannot verify this operation since the needed information was not supplied.

Secondly, the end use, as well as testing procedures for the end use of the product needed to be supplied by [ACC]. An end use was stated, but no testing procedures were supplied whereby the Bureau could replicate, confirm, or verify the quality of their product for their intended use. Along these same lines, the additives and costs of the additives needed to bring them up to specifications, [were] not supplied to the BLM.

Based on the lack of information in the casefile and ACC[']s lack of response to requests to supply this information, John recommends that ACC[']s patent application be dismissed by decision due to the lack of required mining, geologic and economic information.

(Oct. 12, 2000, memoranda (Murray memo) (emphasis in original).)

By decisions also dated October 25, 2000, the Deputy State Director rejected the other two mineral patent applications, WYW-120907 and WYW-121828, and cancelled the FHFCs for the applications based on an attached October 12, 2000, memorandum. In this memorandum, the mineral examiner, with the concurrence of the Rawlins Field Office Manager, advised the State Director as follows:

Mark Newman, BLM Mineral Examiner, has concluded that the data submitted still does not meet the requirements. Specifically, ACC states that, "the bentonite may be treated with chemical amendments to produce the proper qualities and specifications for the Super Gel-X Product." No information is provided regarding what the chemical amendments consist of or of the amount necessary to produce the

product (Super Gel-X) identified as an end-use product. Due to this lack of information, it is impossible to verify the possibility that chemical amendments could achieve the projected result of a product suitable for use as Super Gel-X.

(Oct. 12, 2000, memorandum (Newman memo) (emphasis in original).)

The Deputy State Director therefore concluded that the mineral report for each patent application could not be completed based on the submitted information and accordingly, rejected the applications and cancelled the FHFCs. ACC timely appealed these decisions to the Board.

### Arguments on Appeal

ACC submitted a consolidated SOR addressing all four appeals. ACC frames the issues on appeal as 1) whether BLM made a prima facie case that ACC failed to meet its burden of proving that it had made a discovery of a valuable mineral deposit; 2) whether ACC's submission of extensive information successfully rebutted BLM's prima facie case; 3) whether the submitted information was technically adequate; and 4) if not technically adequate, whether the information sufficed to prevent the rejection of the applications and the cancellation of the FHFCs and to afford ACC additional time to furnish supplemental information. (SOR at 6.)

In extensive briefing of the relevant materials, made somewhat difficult to describe here due to the confidential nature of ACC's data submissions, the parties present detailed disputes regarding the appropriate placement of burdens, the significance of the data, and the appropriate Board response to it. ACC argues that the sudden urgency with which BLM approached ACC's patent applications reflects a desire by BLM to dispense with them without undertaking the work necessary to determine whether to award the patents. BLM argues that ACC never submitted sufficient information to constitute that required for a patent application. BLM argues that a patent applicant must support his application with "sufficient descriptive information and data to permit the BLM mineral examiner, **on review in his office**, to conclude that each claim was valid \* \* \*, subject only to confirmation upon field examination." (Answer at 2, quoting Dennis J. Kitts, 84 IBLA 338, 343 (1985) (bold and emphasis BLM's).)

We do not detail further the individual arguments of the parties. For this Board to render conclusions on every evidentiary point would be impossible without the conduct of a hearing. Instead, we exercise our review authority to consider only the challenged decisions. The decisions made by BLM were to summarily reject the patent applications without a contest. It is that judgment that we review here.

### Discussion

“Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, \* \* \* shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States \* \* \* under regulations prescribed by law \* \* \*.” 30 U.S.C. § 22 (2000). The statutory procedures for obtaining a patent for claimed land located for valuable mineral deposits, including lands located for placers claims authorized under 30 U.S.C. § 35 (2000), are set forth at 30 U.S.C. § 29 (2000). These statutory procedures include, among other things: the filing of a sworn application for patent showing compliance with the statutory requirements, together with a plat and field notes showing the boundaries of the claim; the marking of the claim on the ground; the posting of a copy of the plat and a notice of the patent application in a conspicuous place on the land before the filing of the application; the filing of an affidavit by two witnesses attesting to that posting; the filing of a copy of the posted notice; the publication of a notice of the filing of the application; and the filing of a certificate that \$500 worth of labor has been performed or improvements made on the claim by the applicant or his grantors. 30 U.S.C. § 29 (2000).

BLM regulations amplify the statutorily mandated procedural requirements for patent applications. See 43 CFR 3862.1 through 43 CFR 3862.4; 43 CFR 3863.1. The regulations also expand on the showings necessary to support the discovery of a valuable mineral deposit. In order to support issuance of a patent for a placer claim, the patent application,

in addition to the recitals necessary in and to both vein or lode and placer applications, placer applications should contain, in detail, such data as will support the claim that the land applied for is placer ground containing valuable mineral deposits not in vein or lode formation and that title is sought not to control water courses or to obtain valuable timber but in good faith because of the mineral therein. This statement, of course, must depend upon the character of the deposit and the natural features of the ground, but the following details should be covered as fully as possible: \* \* \* If it be a building stone or other deposit than gold claimed under the placer laws, he must describe fully the kind, nature, and extent of the deposit, stating the reasons why the same is by him regarded as a valuable mineral claim. \* \* \*

43 CFR 3863.1-3(a). The incorporated requisites for lode claim patent applications include the requirement that “[t]he showing \* \* \* contain sufficient data to enable representatives of the Government to confirm the same by examination in the field and also enable the [BLM] to determine whether a valuable deposit of mineral

actually exists within the limits of each of the locations embraced in the application.” 43 CFR 3862.1-1(a).

A valuable mineral deposit has been discovered where “minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a paying mine.” Castle v. Womble, 19 L.D. 455, 457 (1894). This test was approved by the Supreme Court in Chrisman v. Miller, 197 U.S. 313, 322 (1905); see also United States v. Clouser, 144 IBLA 110, 113 (1998); see United States v. E. K. Lehmann & Associates of Montana, Inc., 161 IBLA 40, 43 (2004). A mining claimant must show, as an objective matter and “as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed.” In re Pacific Coast Molybdenum, 75 IBLA 16, 29, 90 I.D. 352, 360 (1983). The Supreme Court has refined the prudent man test to include a marketability component which requires a showing that the deposit is ultimately marketable at a profit. United States v. Coleman, 390 U.S. 599, 600, 602-03 (1968); see United States v. E. K. Lehmann & Associates of Montana, Inc., 161 IBLA at 43. “[A] mineral deposit will be considered valuable where there is a reasonable likelihood that the value of the deposit exceeds the costs of extracting, transporting, processing, and marketing it.” United States v. Clouser, 144 IBLA at 113 (citations omitted); see United States v. Winkley, 160 IBLA 126, 142 (2003).

The test of whether a mining claim is supported by a discovery is objective and the “prudent person’s” actions are based on objective standards related to the nature of the mineral deposit disclosed on the claim, rather than on the attributes or circumstances of the particular claimant. United States v. E. K. Lehmann & Associates of Montana, Inc., 161 IBLA at 42; United States v. Waters (On Reconsideration), 159 IBLA 248, 254 n.8 (2003). As the Board stated in United States v. Oneida Perlite, 57 IBLA 167, 190, 88 I.D. 772, 785 (1981): “The inquiry is limited to whether the mineral on the claim can be extracted, beneficiated, transported, and disposed in the market at a profit to the claimant which is sufficiently attractive to warrant a person of ordinary prudence, not necessarily a skilled miner, to expend his labor and means, with a reasonable prospect of success, in developing a paying mine.”<sup>6/</sup>

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<sup>6/</sup> We note that ACC’s various arguments that BLM should be persuaded as to the validity of the mining claims or the value of the patent applications due to the company’s strong and knowledgeable position in the bentonite industry is not supported by case law, which makes clear that the test of validity is objective and not to be governed by subjective characteristics of the claimant.

The applicant has the burden of showing in his application that he has made a valuable mineral discovery. Dennis J. Kitts, 84 IBLA 338, 342 (1985), citing Brattain Contractors, Inc., 37 IBLA 233, 239 (1978). As the Board held in Dennis J. Kitts, 84 IBLA at 343:

An applicant has an obligation to support his application for mineral patent with sufficient descriptive information and data to permit the BLM mineral examiner, on review in his office, to conclude that each claim was valid and that all prerequisites for patent had been met, subject only to confirmation upon field examination. In short, the patent applicant must make a prima facie showing that he is entitled to the patent he seeks. This is a reasonable requirement because, otherwise, BLM would be obligated to waste the valuable time of its mineral examiners to conduct costly field examinations based upon information which did not even show the patent application to be meritorious on its face.

(Emphasis in original.)

[1] In Brattain Contractors, Inc., 37 IBLA at 240-41, the Board differentiated between situations in which patent applications may be summarily rejected and those where such applications must be contested.

First, we must observe that if the BLM adjudicator is not satisfied with the evidence of discovery submitted with the patent application he has a right to so advise the applicant and request further evidence. He certainly is precluded from granting the application. Moreover, it would seem to be incumbent on the applicant to cooperate in providing such evidence in support of its own application so as to resolve any deficiencies and to facilitate the process.

However, appellant is correct in arguing that it is premature to reject the patent application on the adjudicator's finding of insufficient evidence of discovery. Before there can be any final disposition of a mineral patent application which is otherwise acceptable, there must be a mineral examination of the subject claims for the purpose, inter alia, of obtaining evidence tending either to confirm or refute the allegation that qualifying discoveries have been made. If the discoveries are confirmed by the BLM's minerals personnel, and if all else be regular, the application may be processed and a patent issued without quasi-judicial proceedings. If, however the evidence yielded by the mineral examination impels a finding of "no discovery," or other impediment to issuance of patent, and the applicant does not

voluntarily withdraw his application, BLM is left with no choice but to initiate contest proceedings to determine the validity of the claims. United States v. O'Leary, 63 I.D. 341 (1956). Prior to a final holding that the claims are null and void, BLM may not summarily reject the application on any finding of disputed fact. This is because the validity or invalidity of the claims is the ultimate issue in the contest proceeding, as well as the basis for rejection of the application. But if a charge of "no discovery" is finally proven in a proper proceeding, then not only must the patent application be rejected, the claims must be held to be null and void. United States v. Carlile, 67 I.D. 417 (1960). See United States v. Heden, 19 IBLA 326, 343-344 (dissenting opinion) (1975); United States v. Taylor, 19 IBLA 9, 25-27 (1975), 82 I.D. 68, 74. 2/

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 2/ There may be situations in which the failure of mineral patent applicant to comply with a clear requirement of the regulations relating to the form of the application would result in the simple rejection of the application by the adjudicator. Such a situation might occur in an application for a patent of a lode mining claim, where the application was not accompanied by a mineral survey as required by 43 CFR 3861.1-1. The failure of an applicant to tender such a survey would necessitate the rejection of his patent application, but it would not necessarily imply that the mining claim was null and void. It is basically a distinction between the form of the patent application and its substance. The issue involved herein, i.e., the existence of a discovery at a specified date, is manifestly one of substance going to the validity of the claims or parts thereof, and is thus resolvable against the claimant only after affording the applicant notice and an opportunity for hearing on disputed issues of fact.

(Emphasis added.)

As we noted in United States Steel Corp., 52 IBLA 319, 324-325 (1981), Brattain "makes it clear that a mineral patent application may not be summarily rejected on the basis of the lack of discovery of a valuable mineral deposit without affording the applicant notice and an opportunity for hearing on the disputed issues of fact. \* \* \* If BLM considered that the record provided insufficient evidence of discovery, it should have initiated a contest proceeding. Rejection of the patent applications was improper."

The Board has upheld BLM decisions summarily rejecting patent applications for lack of necessary information. For example, in Dennis J. Kitts, BLM rejected a mineral patent application as technically inadequate because the applicant had failed

to sufficiently describe general or economic geology and mineralization, discovery points and sampling techniques, and all workings and improvements on the claims and had based his economic analysis on a hypothetical mining operation using unproven technology to recover flour gold. 84 IBLA at 339 and n.1. The Board upheld this determination, finding that

appellant has provided no meaningful description of the geology on the claims or in the general area; no substantial description of the quantity and quality of the ore alleged discovered; no description of the discovery points, no description of the samples taken in terms of their location, size, the sampling technique employed, or the means of their evaluation; no description of the workings presently existing on the respective claims, if any; and no description of the \$500 in improvements which allegedly have been installed or constructed for the benefit of each of the claims.

Moreover, appellant's economic analysis is wanting in a number of particulars. Among these are his failure to ascribe any cost to labor, his use of \$500 per troy ounce as the average price for gold when gold has not averaged that much over a sustained period for several years (as this is written it is \$296 p/tr/oz.). His production estimates are based upon a nontypical sluice box containing a special matting of his own design, which he says will increase his recovery by up to two and a half times over conventional riffle or matting material \* \* \*. He has failed to submit any evidence which would substantiate his claim that he can, in fact, recover gold in the manner or to the extent described.

84 IBLA 342-43 (emphasis in original).

In G. Donald Massey, 114 IBLA 209 (1990), BLM rejected a patent application because it had been filed more than 10 days after it had been executed in violation of 43 CFR 1821.2-2(a). BLM also advised the applicant of the requirements for any amended or re-executed application, including a detailed showing as to the nature of the mineral deposit, the methods for mining, processing, and transporting the raw material, and the estimated profitability of the mining operation, as well as a current certified certificate of title, a statement that title was not sought to control water courses or valuable timber, an affidavit that no known lodes existed on the claim, and an agreement for publication of a notice of the mineral entry and patent application. 114 IBLA at 210-211. On appeal Massey challenged only the requirements BLM indicated would be imposed on any future application. Although the Board found that BLM had properly rejected the application and dismissed the appeal, we also noted that if the issue had been before us, we would have affirmed BLM's authority to request the identified information. 114 IBLA at 212-13. The Board indicated that

BLM could justifiably require a mineral patent applicant to provide information intended to aid the mineral examiner in determining whether the mining claim contains a valuable mineral deposit, citing 43 CFR 3863.1-3(a) which states that a patent application should contain detailed data supporting the existence of a valuable mineral deposit not in vein or lode form on the claim. 114 IBLA at 213-14.

In Karen Lynne Smith Harper, 126 IBLA 301 (1993), BLM found a mineral patent application to be deficient because the applicant had failed to file several items required by 43 CFR 3862.1, including a duplicate of the application, a “[s]tatement of mineral character and Atomic Bomb Project,” the \$225 balance due on the \$250 service charge, evidence of a discovery of a valuable mineral deposit within the claim, evidence of citizenship, an abstract or certificate of title, mineral survey number and date approved, a certified notice of location with amendments, any adverse mining claims, the type and name of the claim, proof of notice of intention to apply for patent, and proof of \$500 or more in expenditures and improvements. 126 IBLA at 301-02. When the applicant failed to provide that information after being afforded the opportunity to do so, BLM rejected the application which consisted simply of a land description of the claim and the statement that a discovery had been made on August 7, 1988. 126 IBLA at 303. The Board affirmed BLM’s rejection decision because the applicant had failed to submit the supporting information requested by BLM. In so doing, the Board noted that BLM could not issue a mineral patent until it had assured itself that the applicant held a valid mining claim by complying with all aspects of the mining laws and that it therefore had the authority and responsibility to secure adequate information for mineral patent applications. Id.

We note as well that, while upholding a summary rejection of a patent application for failure to comply with statutory requirements, the Board has indicated that its willingness to uphold a summary rejection in another context would include consideration of BLM’s diligence in processing an application, and the extent to which it might deprive the applicant of the right to reapply. In Caroline Tucker, 148 IBLA 91, 91-92 (1999), the applicant filed a mineral patent application in 1988, before the patent moratorium. BLM rejected that application on July 18, 1996, for untimeliness because it executed more than 10 days prior to filing in violation of 43 CFR 1821.2-2(a). Although the Board affirmed BLM’s rejection of the application for untimeliness, we commented on the procedure BLM adopted in that case, noting that

BLM treated Appellant in all respects over a significant period of time (1988-1996) as if she had met all requirements for a patent, only to hold that her application had been void ab initio because it had been executed more than 10 days prior to filing. By this process, Appellant was precluded from refileing because the land, at the time of the rejection, had become subject to a patent moratorium. While it is true that the burden is on the applicant to file complete and accurate

documents with BLM that meet all procedural requirements, it is similarly incumbent upon BLM to act responsibly with respect to all applicants for patent and not mislead them through silence.

148 IBLA at 93.

It is with this precedential background in mind that we turn to the records in these appeals to determine where they fall on the line of cases in which BLM appropriately concludes that summary dismissal of the patent applications was appropriate versus those where lack of proof of a discovery would require a contest initiated by BLM. ACC argues that the information it supplied not only meets the statutory and regulatory requirements as to the form of a patent application but also establishes that it has made a valuable mineral discovery on each of the involved claims. BLM, on the other hand, maintains that, because of the omissions in that information, ACC's information does not satisfy the threshold requirements for patent applications. We have carefully scrutinized the information ACC has provided, described in detail above, in light of relevant precedent and conclude that ACC provided sufficient information to satisfy the requirements relating to the form of a placer patent application.

Thus, each patent application submitted in 1989 or 1990 was accompanied by a discussion of drilling and sample data, maps identifying the locations on each mining claim where the samples were taken, and a visual depiction on a map of ACC's inference of a bentonite zone within the contours of each claim based on that data. Other documents in the record detail particular information gathered from particular sample locations. While we cannot on this record agree with ACC that the amount of information provided regarding each mining claim is sufficient justification for the award of a patent, we cannot affirm that the patent applications must be summarily rejected on this record on the basis of BLM's complaints regarding the sufficiency of that data. As in Brattain Contractors, Inc., 37 IBLA at 240-41, the parties arguments present disputed issues of fact requiring a contest hearing before BLM may reject the patent application. See also United States Steel Corp., 52 IBLA at 325.

Our conclusion does not change, but rather is reinforced, by the record information regarding ACC's submissions in the summer of 2000. When BLM requested more data in two separate data collection events, ACC responded in short order with substantial information regarding bentonite, the products that the company produces using bentonite clays, and much of the information sought by BLM in its requests. Again we cannot find on this record, without a hearing, that ACC's confidential information would be sufficient to compel issuance of a patent. But, likewise, we cannot find that the quantum of information provided here was so deficient as to justify summary rejection of the patent applications involved. The

flaws BLM recites here, such as the omission of identification of the specific chemical additives and their individual costs and the lack of a detailed mine plan, are not technical deficiencies like untimeliness, failure to provide required statements or documents, use of unsupported price estimates, or omission of labor costs in the economic analysis involved in the cases cited above. Nor did they prevent BLM from conducting mineral examinations of the affected claims. See Aug. 30, 2000, decisions at 1, referring to completion of mineral examinations. Rather they relate to the ultimate substantive issue of whether ACC has discovered a valuable mineral deposit on the claims, and present disputed issues of fact. In such cases, as Brattain Contractors, Inc., 37 IBLA at 240, makes clear, a patent application may be rejected for lack of a discovery only after BLM initiates contest proceedings to determine the validity of the claims. See also United States Steel Corp., 52 IBLA at 324. Accordingly, we reverse BLM's decisions summarily rejecting ACC's patent applications and remand the cases to BLM for further action.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are reversed and the cases are remanded to BLM for further action.

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Lisa Hemmer  
Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge