



WILLIAM WIELGUS

186 IBLA 227

Decided September 30, 2015



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

WILLIAM WIELGUS

IBLA 2015-26

Decided September 30, 2015

Appeal from a decision of the Arizona State Office, Bureau of Land Management (BLM), declaring unpatented association placer mining claims forfeited for failure to file amended claim notices to comply with the 20-acre per claimant requirement of 43 C.F.R. § 3833.33. *AMC369712 et al.*

Set aside and remanded.

1. Mining Claims: Abandonment--Mining Claims: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold--Mining Claims: Rental or Claim Maintenance Fees: Generally--Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

The holder of an unpatented mining claim is required to pay a maintenance fee for each claim or site on or before September 1 of each year. The Secretary of the Interior has the discretion to waive the maintenance fee for a claimant who certifies in writing that, on the date the payment is due, the claimant and all related parties hold not more than 10 mining claims, mill sites, tunnel sites, or any combination thereof. If a claimant pays the maintenance fee or files a small miner waiver certificate, the claimant must perform assessment work for each assessment year, and then file evidence of assessment work with the proper BLM office on or before December 30 following the end of that assessment year. These annual filings must be made independent of the claimant's obligation to comply with the limitations placed on the transfer of association placer mining claims by 43 C.F.R. § 3833.33.

2. Mining Claims: Mining Claims--Discovery--Generally:
Mining Claims--Determinations of Validity: Mining
Claims--Placer Claims

Where a mining claimant submits documentation supporting his claim of a discovery of a valuable mineral deposit on an association mining claim prior to transfer under 43 C.F.R. § 3833.33, and BLM finds that evidence to be insufficient for a finding that there is a discovery, BLM properly affords the claimant further opportunity to submit evidence in support of his claim of discovery. It is premature to summarily void the claims based on the adjudicator's finding of insufficient evidence of discovery.

APPEARANCES: William Wielgus, Wickenburg, Arizona, *pro se*; John L. Gaudio, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

William Wielgus (Appellant) appeals from and requests a stay of an October 3, 2014, decision of the Arizona State Office, Bureau of Land Management (BLM), declaring the Open Bucket, Rock On, Ranger Run, and Golden Record unpatented association placer mining claims (AMC369712, AMC369954, AMC370046, and AMC370783)¹ forfeited for failure to file amended claim notices to comply with the 20-acre per claimant requirement of 43 C.F.R. § 3833.33. For the following reasons, we set aside BLM's decision and remand for further action consistent with this decision.

¹ See 30 U.S.C. § 36 (2012) ("Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof[.]") (emphasis added); 43 C.F.R. § 3832.12(c) ("If you are describing an association placer claim by metes and bounds, you must meet [the requirements in § 3832.12(c)], according to the number of persons in your association, as described in *Snow Flake Fraction Placer*, 37 Pub. Lands Dec. 250 (1908), in order to keep your claim in compact form and not split Federal lands into narrow, long or irregular shapes[.]"); 43 C.F.R. § 3832.21 (how to locate a lode or placer claim).

Background

Eight co-locators located the four association placer mining claims at issue in November and December of 2005. Each of the eight co-locators located 20 acres in each claim, so that each association placer mining claim contained 160 acres. These locations met the requirements of the Mining Law, which provides that no placer location may include more than 20 acres for each individual claimant, and may not exceed 160 acres for an association of up to eight individual claimants. 30 U.S.C. §§ 35, 36 (2012). Regulations implementing the Mining Law require that upon transfer of an association placer claim to an individual or an association that is smaller in number than the association that located the claim, the transferor must either “have discovered a valuable mineral deposit before the transfer” or, “[upon] notice from BLM . . . reduce the acreage of the claim” to meet the 20-acre per claimant limit. 43 C.F.R. § 3833.33.

In March and April of 2006, the eight original co-locators transferred their interests in the mining claims to Appellant. There is no record that any of the co-locators complied with 43 C.F.R. § 3833.33, there being no evidence in the record that the transferors had “discovered a valuable mineral deposit before the transfer” or reduced the acreage of the claims to meet the 20-acre per claimant limit. 43 C.F.R. § 3833.33. Since becoming sole owner of the mining claims, Appellant has filed maintenance fee waiver certifications (Waiver Certifications), affidavits of performance of assessment work (Affidavits), and the required processing fees for the claims for each assessment year.

On June 20, 2014, BLM sent Appellant a notice requesting him to show compliance with 43 C.F.R. § 3833.33 by providing either documentation of a discovery of a valuable mineral deposit for each of the four claims prior to transfer of the claims to Appellant, or amendments reducing the size of the claims so that they would meet the 20-acre per locator limit. Administrative Record (AR), Tab 5, “Notice: Association Placer Mining Claims Documentation or Amendments Required.”

On July 18, 2014, Appellant responded to the notice with a document entitled “Proof of Discovery.” AR Tab 4. He stated that “[t]he purpose of this report is to prove ‘discovery’ of a valuable mineral deposit on the four prospective claims.” *Id.* at unpaginated 1. In his submittal, Appellant described in general terms how samples were collected from each of the claims and how they were assayed “using the acid test” for the presence of gold. *Id.* at unpaginated 1-2. He also discussed in general terms how the claims would be accessed and how any gold found there would be extracted and processed. *Id.* at unpaginated 2. Appellant stated that “[a] reserve estimate will be done by taking the total acreage in the claim and multiplying it times the value of the sample” which he states “will show that the claim can be used for an extended

period of time.” *Id.* He attached maps of the locations on each claim where samples were taken, and results of those samples. *Id.* at unpag. 4-7. Last, he attached a signed statement entitled “Results of Sampling Survey” dated February 8, 2005, purportedly written by Les Bender, identified as “V.P. Weaver Mining District,” summarizing the results of the sampling and test results.² *Id.* at unpag. 8.

In a second notice, dated August 18, 2014, BLM stated that Appellant’s response had been examined by a mineral examiner who determined that it was “insufficient to show that a valuable mineral deposit was discovered prior to transfer” of the claims. AR Tab 3 at unpag. 3. BLM listed the following specific deficiencies:

No information was provided as to how the samples were taken.
No data concerning sample volumes was provided. No information concerning the nature or type of material sampled was provided.
The amount of gold recovered per volume or tonnage of material was not provided. No reserve estimates were provided. No deposit boundaries were defined. No operational or development costs were provided.

Id. BLM additionally stated that “[t]here was no information submitted for AMC370783.” *Id.* BLM concluded that Appellant was required to amend each of the four claims to reduce their acreage to comply with the 20-acre claimant requirement. *Id.* at unpag. 1. BLM stated that if Appellant did not file the amendments within 30 days of receipt of the notice, the four mining claims would be declared forfeited and void. *Id.*

There is no evidence in the record that Appellant amended his claims within the 30-day period. On October 3, 2014, after Appellant failed to amend the mining claims to comply with the 20-acre claimant requirement, BLM issued its decision declaring the claims forfeited. AR Tab 2.

Appellant timely filed a “Request for Appeal” of BLM’s decision, which we treat as a Statement of Reasons (SOR) in support of his appeal. AR Tab 1 (Appeal).

² The Proof of Discovery and Results of Sampling Survey are handwritten, and the handwriting appears to match that of Appellant’s Request for Appeal and other handwritten documents in the record. If the validity of Appellant’s claims reaches the contest stage, as discussed *infra* in this opinion, the veracity of the Proof of Discovery Results of Sampling Survey, and the validity of their contents, will be evidentiary matters for resolution at the fact-finding hearing before an Administrative Law Judge. See 43 C.F.R. § 4.452-6.

Appellant does not state that he filed amendments to the claims by the deadline. Instead, he states that he filed Waiver Certifications for the 2007 through 2015 assessment years, and Affidavits for the 2006 through 2014 assessment years, and that BLM accepted payments associated with those filings. *Id.* at unp. 2. He also states that when BLM returned to him date-stamped original copies of the documents he submitted in response to BLM's June 20, 2014, notice, including the document entitled "Proof of Discovery," he believed that BLM had approved those documents. *Id.*

BLM filed an Answer to Appellant's SOR. BLM first acknowledged that Appellant timely filed Waiver Certifications for the 2007 through 2015 assessment years, and Affidavits for the 2006 through 2014 assessment years, but stated that "compliance with those filing requirements exists independent of other requirements for mining claims." Answer at 3. BLM concluded that compliance with annual filing requirements is therefore not relevant to whether BLM's decision was proper. *Id.* BLM then asserted that its date-stamping of submissions does not constitute "approval," and that Appellant should have understood that to be the case when he received BLM's second notice, dated August 18, 2014, notifying him that his date-stamped documents were not sufficient to prove discoveries of valuable mineral deposits on in his claim. *Id.* at 4.³ In this Answer, BLM did not address the merits or sufficiency of Appellant's Proof of Discovery and Results of Sampling Survey.

Analysis

We address Appellant's two arguments in order. First we discuss how his filing of maintenance fee waiver certifications and affidavits of performance of assessment work was necessary, but provided no evidence of the validity of his unpatented mining claims. Second, we discuss whether BLM properly declared the claims forfeited when Appellant failed to reduce the claims to 20 acres in size. Answering the second question requires that we address whether BLM properly concluded that the documentation Appellant submitted in response to BLM's notice was insufficient to show a discovery of a valuable mineral deposit on the claims.

³ BLM has provided the Board with a copy of a letter dated Nov. 2014, that Appellant sent BLM in response to BLM's Answer. This letter was not sent to the Board, but we will nonetheless consider it as a Reply under 43 C.F.R. § 4.412(d). The letter, however, does not add to Appellant's arguments. It reiterates his argument regarding BLM's date-stamping of his documents and questions who determined his information regarding discovery to be insufficient, and why. BLM's Aug. 13, 2014, notice lists the reasons why "Jeff Garrett-Certified Review Mineral Examiner #40" determined Appellant's documentation was insufficient to prove a discovery.

A. *Waiver Certifications and Affidavits*

[1] Appellant states that he has successfully filed Waiver Certifications and Affidavits for his claims and that BLM has accepted his payments associated with those filings. It appears that Appellant believes that his timely filing of those documents establishes the validity of his mining claims. This is incorrect.

The law governing Waiver Certifications and Affidavits is as follows. The holder of an unpatented mining claim is required to pay a maintenance fee for each claim or site on or before September 1 of each year. 30 U.S.C. § 28f(a) (2012); *see* 43 C.F.R. § 3834.11(a)(2). Payment of the claim maintenance fee is in lieu of the assessment work requirements of the Mining Law of 1872, 30 U.S.C. §§ 28-28e (2012) (Mining Law), and the related filing requirements of section 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (2012) (FLPMA). 30 U.S.C. § 28f(a) (2012); *see* 43 C.F.R. § 3834.11(a).

The Mining Law, however, grants the Secretary of the Interior the discretion to waive the maintenance fee for a claimant who certifies in writing that, on the date the payment is due, the claimant and all related parties hold not more than 10 mining claims, mill sites, tunnel sites, or any combination thereof, on public lands (Waiver Certification). 30 U.S.C. § 28f(d) (2012); 43 C.F.R. § 3835.1. A claimant who files a Waiver Certification is required to (1) perform assessment work during the assessment year for which the waiver is granted, and (2) file an affidavit of the assessment work (Affidavit) on or before December 30 of the calendar year in which the assessment year ends. 43 C.F.R. §§ 3835.12, 3835.15, 3835.31(a); *see Paul Dickison*, 186 IBLA 69, 70-71 (2015); *John J. Trautner*, 165 IBLA 265, 267 (2005); *Earl Riggs*, 165 IBLA 36, 39 (2005). A failure to file either document – Waiver Certification or Affidavit – by the applicable deadline results in the affected claims being forfeited and void. *See Beverly D. Glass*, 167 IBLA 388, 394 (2006) (“Absent submission of a proper maintenance fee payment or waiver request [by the deadline for paying maintenance fees], BLM properly declared the claim forfeited and void by operation of law.”); *Audrey Bradbury*, 160 IBLA 269, 275 (2003) (filing an Affidavit “is an absolute requirement that cannot be waived” and failure to make the filing automatically results in forfeiture of a claim). *See also Paul Dickison*, 186 IBLA at 70-71.

The annual filing requirements discussed above are not, however, the only legal requirements that apply to placer mining claims, including the ones at issue in this appeal. The Mining Law also provides that no placer location may include more than 20 acres for each individual claimant, and may not exceed 160 acres for an association of up to eight individual claimants. 30 U.S.C. §§ 35, 36 (2012); 43 C.F.R.

§ 3832.22(b). Upon transfer of an association placer claim to an individual or an association that is smaller in number than the association that located the claim, the transferor must either “have discovered a valuable mineral deposit before the transfer” or, “[upon] notice from BLM . . . reduce the acreage of the claim” to meet the 20-acre per claimant limit. 43 C.F.R. § 3833.33; see *Ulysses Corporation*, 186 IBLA 101, 102 (2015); *Bruce Curtis*, 185 IBLA 371, 372 (2015).

Thus, while Appellant’s timely filings of the Waiver Certifications and Affidavits for the mining claims were required under the regulations, those filings were not related to, and cannot be used to establish the validity of his placer claims. BLM acknowledges that Appellant timely filed Waiver Certifications for the 2007 through 2015 assessment years, and Affidavits for the 2006 through 2014 assessment years. However, as BLM correctly notes in its Answer, “compliance with those filing requirements exists independent of other requirements for mining claims.” Answer at 3. As discussed above, the annual filing requirements and the limitations on placer claims stem from separate and distinct sections of the Mining Law. See 30 U.S.C. § 28f(d) (2012) (maintenance fee and waivers) and 30 U.S.C. §§ 35, 36 (2012) (placer claim acreage limitations). The regulations implementing these statutory requirements are likewise separate and distinct. See 43 C.F.R. §§ 3835.1 through 3835.1, 3835.30 through 3835.33 (maintenance fee waiver and assessment work requirements) and 43 C.F.R. § 3833.33 (requirements for transfers of placer claims). Appellant’s compliance with annual filing requirements and payment of applicable processing fees for his small miner waivers and assessment work requirements does not show that Appellant complied with the limitations placed on the transfer of placer claims by 43 C.F.R. § 3833.33. See *United States v. Webb*, 132 IBLA 152, 169 (1995).⁴

B. Discovery of a Valuable Mineral Deposit

The key issue here is whether BLM properly deemed Appellant’s Proof of Discovery and Results of Sampling Survey inadequate for proving a discovery on his mining claims, and thereafter requiring him to amend his claims to comply with the 20-acre per claimant limit of 43 C.F.R. § 3833.33. As that regulation makes clear,

⁴ Appellant argues that BLM approved the documentation he submitted to prove the discovery of a valuable mineral deposit on the claims by returning date-stamped originals of the same. The return of date-stamped originals does not signify approval. “BLM’s acknowledgement and acceptance of filings submitted in accordance with the requirements of 43 U.S.C. § 1744 [2012] do not by themselves ‘render valid any claim which would not be otherwise valid under applicable law and [do] not give the owner any rights he is not otherwise entitled to by law.’” *United States v. Webb*, 132 IBLA at 168 (quoting 43 C.F.R. § 3833.5(a)).

the controlling question is whether there was a discovery of a valuable mineral deposit on the claims prior to transfer to Appellant.

The Board has not resolved the precise question of what procedure BLM must follow in the context of adjudicating an interest in an association mining claim involving 43 C.F.R. § 3833.33. However, the Board has issued several opinions that lead us to remand this case to BLM for further review, in accordance with the discussion below.

The conditions that the claimant must show to prove the discovery of a valuable mineral deposit on an unpatented mining claim are set forth below:

The basic test for determining whether a mining claimant has discovered a valuable mineral deposit on his mining claim is the “prudent man rule.” This rule, enunciated in *Castle v. Womble*, 19 L.D. 455 (1894), states that in order for there to be a discovery, there must be exposed within the limits of the claim minerals of such quality and quantity 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 valuable mine. The “prudent man rule” is complemented by the “marketability test.” Simply stated, in order to establish the existence of a valuable mineral deposit, it must be shown that the mineral can be extracted, removed, and marketed at a profit. *United States v. Coleman*, 390 U.S. 599 (1968). 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).

United States v. Crawford, 109 IBLA 264, 268 (1989); see also *United States v. E. K. Lehmann & Associates of Montana, Inc.* [*U.S. v. Lehmann*], 161 IBLA 40, 43 (2004).

This Board has addressed the question of whether a valuable mineral deposit has been discovered when a claimant has filed a mineral patent application. *E.g.*, *U.S. v. Lehmann*, 161 IBLA at 43. In this context, the applicant has the burden of establishing in his application that he has made a valuable mineral discovery. *American Colloid Company*, 162 IBLA 158, 172 (2004); *Dennis J. Kitts*, 84 IBLA 338, 342 (1985) (citing *Brattain Contractors, Inc.*, 37 IBLA 233, 239 (1978)). The Board has also addressed whether a valuable mineral deposit has been discovered when the Government has filed a contest against a claim on the basis of lack of discovery.

E.g., United States v. Carlwood Development, Inc., 177 IBLA 119 (2009); *United States v. Crawford*, 109 IBLA 264 (1989).

The burdens of proof are different in patent application cases and Government contest cases, as follows:

When the Government contests a mining claim based on a charge of lack of discovery of a valuable mineral deposit, it bears the initial burden of going forward to establish a prima facie case in support of that charge, whereupon the claimant has the ultimate burden of persuasion to overcome that case by a preponderance of the evidence. See *Hallenbeck v. Kleppe*, 590 F.2d 852, 856 (10th Cir. 1979); *United States v. Winkley*, 160 IBLA [126,] 142-43 [(2003)]; *United States v. Bechthold*, 25 IBLA [77,] 82 [(1976)]. The burden is different, however, for the contestee when a contest is filed as the result of a patent application. In such a situation, it is well settled that the Government must make a prima facie case in support of its charges and that, upon such a showing, the claimant must establish that the claim is valid, even apart from the issues raised in the prima facie case. *United States v. Mannix*, 50 IBLA 110, 112 (1980).

United States v. Miller, 165 IBLA 342, 356 (2005); see also *United States v. Carlwood Development, Inc.*, 177 IBLA at 128; *United States v. Crawford*, 109 IBLA at 268.

The present case involves neither a patent application nor a Government contest. The regulation provides that the claimant “must have discovered a valuable mineral deposit before the transfer.” 43 C.F.R. § 3833.33. In order for Appellant to retain all four claims with 160 acres as located, the burden is properly placed on him to show in the first instance that there was a discovery. This approach places Appellant’s case more in line with patent application cases, in which the Board has followed the following standard for evaluating evidence submitted in support of a discovery :

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.

Dennis J. Kitts, 84 IBLA at 343 (emphasis in original).

In *Kitts*, BLM rejected the mineral patent application as inadequate because the applicant failed to provide information necessary to prove discovery of a valuable mineral deposit. We noted that the appellant “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,” in addition to other deficiencies in the patent application. *Id.* at 342-43. In the absence of that information, we upheld BLM’s decision summarily rejecting the patent information for lack of necessary information. *Id.* at 343.

In *G. Donald Massey*, 114 IBLA 209 (1990), we affirmed BLM’s authority to request detailed information upon application for a patent application for a placer claim like the ones at issue here. That information included “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” *G. Donald Massey*, 114 IBLA at 210-11. We found 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.” *Id.* at 214 (quoting 43 C.F.R. § 3863.1-3(a)).

We upheld BLM’s decision to reject a patent application for a lode mining claim in *Karen Lynne Smith Harper*, 126 IBLA 301 (1993), for comparable reasons. In that case, BLM notified the appellant that her patent application was missing several items required by the applicable regulation, including evidence of a valuable mineral deposit within the claim. *Id.* at 301-02 (citing 43 C.F.R. § 3862.1). BLM subsequently rejected the patent application when the appellant failed to provide the requested information. We held that BLM properly rejected the appellant’s mining claim patent application because she failed to submit the supporting information requested. *Id.* at 303.

In contrast, we have reversed BLM decisions rejecting patent applications in cases where appellants, in the agency’s opinion, had provided insufficient evidence of discovery of a valuable mineral deposit. For example, in *Brattain Contractors, Inc.*, 37 IBLA at 240-41, we reversed BLM’s decision rejecting a patent application in the absence of information proving discovery. We “observe[d] 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,” at which point it would 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.” *Id.* at 240. However, we stated that it would be at that point “premature to reject the patent application on the adjudicator’s finding of insufficient evidence of discovery.” *Id.* On the contrary, we stated that “[b]efore 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.” *Id.*

At the point that a mineral examination is done, and it yields evidence that supports BLM’s position that no discovery has been made, it would be appropriate for BLM to initiate an administrative mining contest proceeding to challenge the validity of the claim. *Id.* BLM may initiate contest proceedings “for any cause affecting the legality or validity of any entry or settlement or mining claim.” 43 C.F.R. § 4.451-1. Mining contest challenges are brought before Administrative Law Judges (“ALJs”) in the Hearing Division, who hold evidentiary hearings and issue decisions concerning the validity of mining claims. 43 C.F.R. §§ 4.452-1 through 4.452-8. Those decisions may be appealed to this Board. 43 C.F.R. § 4.452-9.

In *Brattain Contractors*, we held that a contest proceeding was necessary when BLM concluded, based upon a mineral examination, that there is a lack of discovery, and the appellant refused to withdraw his patent application. We stated: “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” *Brattain Contractors Inc.*, 37 IBLA at 240. We explained that a contest proceeding was required because “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.” *Id.* We further noted:

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.

Id. at 241 n.2.

We affirmed this result in *United States Steel Corp.*, 52 IBLA 319, 324 (1981), stating that *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.” We further stated in that case that “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.” *Id.* at 325.

The above discussion shows that two groups of cases exist within our precedent pertaining to proof of discovery in mineral patent applications. In the first group, the Board upheld BLM decisions summarily dismissing patent applications when appellants failed to provide information required to support their patent applications. *Kitts* appears to be unique in this group in that BLM rejected the patent application without first affording the applicant an opportunity to submit additional documentation in support of a discovery. In the second group, the Board reversed BLM decisions dismissing patent applications on the basis of insufficient evidence of discovery, holding that a contest proceeding was required.

We recognized and identified these two groups of cases in *American Colloid Company*, 162 IBLA 158, 176-77 (2004). In that case, we examined the records in the appeals at issue “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.” 162 IBLA at 176. Each patent application involved in *American Colloid Company* “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.” *Id.* In addition, other record documents provided additional information regarding particular sample locations. On this record, we were unwilling to “affirm that the patent applications must be summarily rejected . . . on the basis of BLM's complaints regarding the sufficiency of that data.” *Id.* We further contrasted the discovery dispute with “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” in which we upheld BLM's summary dismissal of patent applications. *Id.* at 176-77. We accordingly concluded that “[a]s in *Brattain Contractors, Inc.*, 37 IBLA at 240-41, the parties['] arguments present[ed] disputed issues of fact requiring a contest hearing before BLM [could] reject the patent application.” *Id.* at 176 (citing *United States Steel Corp.*, 52 IBLA at 325).

As noted, the Board stated in *Brattain* that it would be proper for the BLM adjudicator to request further evidence of discovery, and that it would be premature to

reject the patent application based strictly on insufficient evidence in the patent application. 37 IBLA at 240. We believe that the present appeal presents a situation that is more in common with the appeals in *American Colloid Company* and *Brattain Contractors, Inc.*, than with those in which BLM was justified in summarily dismissing patent applications. We recognize the line dividing the two groups of cases may not appear terribly distinct. For example, much of the information lacking in *Dennis J. Kitts*, 84 IBLA 338, in which we upheld BLM's summary dismissal, pertained to the question of whether there was a discovery of a valuable mineral deposit. Similarly, a paucity of information contributed significantly to the factual dispute regarding discovery in *Brattain Contractors, Inc.*, 37 IBLA 233, where we reversed BLM's summary dismissal. Nonetheless, here Appellant has provided sample locations, analysis, and a purported expert who provided evidence supporting discovery. This is comparable to the "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" accompanying the patent applications in *American Colloid Company*. 162 IBLA at 176. We are not faulting BLM's conclusion that Appellant's information was insufficient for a finding that there was a discovery of a valuable mineral deposit on the subject claims. However, we cannot affirm BLM's decision to void Appellant's claims in the absence of an opportunity to submit additional information to support a discovery.

[2] As was the case with the patent application at issue in *Brattain*, "[t]he 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 . . ." *Brattain Contractors, Inc.*, 37 IBLA at 241 n.2. We therefore follow *Brattain* and reiterate that "if the BLM adjudicator is not satisfied with the evidence of discovery submitted . . . he has a right to so advise the applicant and request further evidence" at which point it would 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." *Id.* at 240.

BLM's actions in the cases we have discussed supports our conclusion that Appellant has submitted sufficient information to warrant an opportunity to submit additional documentation. In the majority of those cases, the agency provided appellants multiple opportunities to submit information proving discovery. For example, *American Colloid Company* failed to submit any economic analysis that would "allow a mineral specialist to determine whether a valuable mineral deposit had been found" in its initial patent application. *American Colloid Company*, 162 IBLA at 160. The BLM field offices involved in that case repeatedly requested that information, specifying particular analyses and costs that the agency needed for confirming discovery. *Id.* at 161-63. The Appellant provided the requested information approximately 2 to 2½ months later, at which point BLM requested

additional information. *Id.* at 163-65. Only after American Colloid Company responded to that request did BLM reject the patent applications because the information submitted was “incomplete and inadequate” such that the “mineral report for each patent application could not be completed based on the submitted information.” *Id.* at 167, 169. BLM’s efforts to obtain information necessary to process the patent application in that case conformed to the agency’s Manual, in which it states that the agency will reject applications when applicants fail to submit additional information within reasonable timeframes. BLM Manual 3860.06B.

Based on the facts of this case, which are in many respects unique, we conclude that BLM should not have summarily required Appellant to reduce the acreage of his claims in this case. As a matter of due process, BLM should have requested more information from Appellant regarding discovery, to the extent it was lacking. We accordingly set aside BLM’s decision and remand the case for BLM to provide Appellant with the opportunity to prove a discovery prior to the date he obtained the claims at issue.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is set aside and remanded for further action consistent with this decision.

/s/
James F. Roberts
Administrative Judge

I concur:

/s/
Eileen Jones
Chief Administrative Judge