THE FIGHT TO SAVE RED LADY: DOES THE 1872 MINING LAW IMPLIEDLY PRECLUDE REVIEW OF PATENT PROTEST DETERMINATIONS?

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For over thirty years, residents and the local government of Crested Butte, Colorado have been fighting to keep a molybdenum mine out of their backyard. In 2004, the High Country Citizens Alliance, the town of Crested Butte, and the Board of County Commissioners filed an administrative protest challenging several applications to patent mineral land on nearby Mt. Emmons. The Bureau of Land Management denied their protest and issued nine mineral patents. The issuance of these patents increased the likelihood of a molybdenum mine on Mt. Emmons. The unsuccessful protestors appealed the BLM's decision in federal district court. In High Country Citizens Alliance ("HCCA") v. Clarke, *the Tenth Circuit, relying on the U.S. Supreme Court case* Block v. Community Nutrition Institute, *affirmed the district court's conclusion that the 1872 Mining Law impliedly precluded judicial review of protests to patent applications when the protesters do not have a competing property interest in the underlying land. This Note evaluates the Tenth Circuit's application of implied preclusion jurisprudence generally, and of* Block *in particular, to the Mining Law. The Note argues that the majority in* HCCA *misapplied* Block *and wrongly concluded that Congress meant to prevent citizens from seeking judicial review of allegedly unlawful patent applications. It concludes by urging other courts to read* Block *narrowly and in a manner that gives effect to the long-recognized presumption in favor of judicial review.*

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INTRODUCTION

Crested Butte, Colorado is a successful ski town in the winter and a hub for outdoor recreational activities in the summer. Area residents and the local government overwhelmingly hope to keep it that way. However, Mt. Emmons, which abuts Crested Butte's western flank and rises three thousand feet above it in striking relief, contains a world-class deposit of molybdenum, a metal used to make stainless steel and alloy steel for a variety of products.[1] Over the past thirty years, the efforts of citizen groups such as the High Country Citizens' Alliance ("HCCA"), combined with market factors, have forestalled the development of a molybdenum mine on Mt. Emmons (which locals fondly refer to as the "Red Lady").[2] Yet despite their long labors, the tide appears to have turned. Plans to develop a large-scale mine on the Red Lady are currently underway.[3]

The town's emblematic fight to save the Red Lady from mineral development began in 1977 when the international mining corporation Amax[4] filed numerous mining claims on

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1. Mineral Information Institute, Molybdenum, http://www.mii.org/Minerals/photomoly.html (last visited Apr. 20, 2008).

2. The High Country Citizens' Alliance was founded in 1977 to prevent a large-scale molybdenum mine from being developed on Mt. Emmons. Larry Mosher, High Country Citizens' Alliance, President's Message, http://www.hccaonline.org/page.cfm?pageid=2041 (last visited Apr. 20, 2008). Molybdenum mining giant Amax applied for a permit to mine molybdenum on Mt. Emmons in 1979, but Amax withdrew its application in the mid-1980s due to a crash in the price of molybdenum. DUANE A. SMITH, CRESTED BUTTE: FROM COAL CAMP TO SKI TOWN 188 (2005).

3. *See* Press Release, U.S. Energy Corp. (Mar. 31, 2008) (on file with author), *available at* http://usnrg.com/public/PressReleases/2008/March%2031,%202008.html.

4. The Mt. Emmons mining claims have changed hands numerous times since 1977. During the 1970s, Amax discovered molybdenum on Mt. Emmons on leases owned by U.S. Energy Corp. *See* U.S. Energy Corp., Mt. Emmons History, http://www.usnrg.com/MolybdenumProjects.php (last visited Apr. 20, 2008). Amax eventually purchased the Mt. Emmons mining claims from U.S. Energy Corp., with U.S. Energy retaining a six percent gross royalty. *Id.* Amax merged with Cyprus Minerals Company in 1993, forming the Cyprus Amax Minerals Co. *Company News: Cyprus Minerals-AMAX Holders Back Merger*, N.Y. TIMES, Nov. 13, 1993, *available at* www.nytimes.com (search "NYTimes Archives since 1981" for "Cyprus Minerals-AMAX Holders Back Merger" and follow hyperlink provided). Amax Minerals Company was then acquired by Phelps Dodge in 1999. *See Phelps Dodge, Cyprus Amax Acquisition Complete*, PHOENIX BUS. J., Dec. 3, 1999, *available at* http://phoenix.bizjournals.com/phoenix/stories/1999/11/29/

Mt. Emmons, pursuant to the 1872 Mining Law.[5] Locals responded quickly and decisively. A group of area residents formed HCCA in 1977 for a sole purpose: to "Save the Red Lady" from a new mine.[6] In 1979, at a city council meeting, 250 locals unanimously voted to ask the mining company to stop the Mt. Emmons project and develop a revised mining proposal.[7] Crested Butte's Mayor, W. Mitchell, declared Crested Butte to be "more valuable to this nation as a stable community in one of the really beautiful recreation areas as yet undestroyed by man" than as the site of a new mining operation.[8] Mitchell, who was confined to a wheelchair, dramatically flew via helicopter to the top of Mt. Emmons to protest the mine.[9] Local opposition gained national attention and, along

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daily37.html. By the time the patents discussed in this Note were issued, Phelps Dodge and a subsidiary, the Mt. Emmons Mining Company (collectively, "MEMCO") owned the mining claims at issue. *See* High Country Citizens Alliance v. Clarke, 454 F.3d 1177, 1179–80 (10th Cir. 2006) (noting the BLM's issuance of a patent to MEMCO in 2004). On February 28, 2006, Phelps Dodge conveyed its patented mining claims on Mt. Emmons back to U.S. Energy and to a subsidiary of U.S. Energy, Crested Corp (collectively, "U.S. Energy Corp."). U.S. Energy Corp., Mt. Emmons History, http://www.usnrg.com/MolybdenumProjects.php (last visited Apr. 20, 2008). Then, Kobex Resources, Ltd., a Canadian-based mining corporation, partnered with U.S. Energy Corp. to develop the Mt. Emmons mining claims. In April, 2007, the companies signed a definitive "Exploration, Development and Mine Operation Agreement." *See* Press Release, Kobex Resources Ltd. (Apr. 5, 2007) (on file with author), *available at* http:kobexresources.com/news/index.php?&content_id=22. However, Kobex terminated the Agreement on March 31, 2008, blaming regulatory and legal uncertainties. *See* Press Release, Kobex Resources Ltd. (Mar. 31, 2008) (on file with author), *available at* http:kobexresources.com/news/index.php?&content_id=46. Currently, U.S. Energy has sole ownership over the Mt. Emmons patents. High Country Citizens' Alliance, http://www.hccaonline.org/page.cfm?pageid=2041 (last visited Apr. 20, 2008). As this Note goes to print, U.S. Energy Corp. remains "very confident that the Lucky Jack Project will be mined in the future" and states that "we remain undeterred in our resolve to move this project forward." *Id.*

5. High Country Citizens Alliance v. Clarke, 454 F.3d 1177, 1179 (10th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 2134 (2007); *see also* General Mining Act of 1872, 17 Stat. 91 (1872) (codified at 30 U.S.C. §§ 22–24, 26–28, 29, 30, 33–35, 37, 39–43, 47 (2000)). *See supra* note 4 for an explanation of the various mergers that resulted in the parties to this lawsuit. Throughout this Note, the company name used will reflect the company structure at the time of the event discussed. For an explanation of the process of locating and filing a mining claim, and of the requirements to patent an unpatented mining claim, see *infra* Part II.

6. High Country Citizens' Alliance, Mt. Emmons Timelines: Past & Present, http://www.hccaonline.org/page.cfm?pageid=2468 (last visited Apr. 20, 2008).

7. SMITH, *supra* note 2, at 185.

8. *Id.*

9. Steve Lipscher, *Sale of Mining Patents Roils Crested Butte Residents*, DENVER POST (Apr. 6, 2004), *available at* http://www.bettermines.org/news.

with depressed molybdenum prices and increased worldwide competition, led Amax to abandon its plans to mine Mt. Emmons in 1983.[10] The company maintained its unpatented mining claims, however, and waited.

In 1993, shortly before Congress effectively imposed a moratorium on mineral patents,[11] Amax applied to patent approximately 174 acres of mining claims on Mt. Emmons.[12] HCCA, the Town of Crested Butte ("the Town"), and the Board of Commissioners of Gunnison County ("the County") filed ad-

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10. SMITH, *supra* note 2, at 188.

11. A patent transfers public land to a private party and gives that party fee title to the land. *See* discussion *infra* Part II.B. In 1993, Secretary of the Interior Bruce Babbitt issued an order that "revoked the authority of subordinate officials to issue . . . patents under the Mining Law and reserved that power to the Secretary himself." Silver Crystal Mines, Inc., 147 I.B.L.A. 146, 149 (1999) (discussing Secretarial Order No. 3163 (Mar. 2, 1993)), *available at* http://www.ibiadecisions.com/Ibla/Ibladecisions/147IBLA/147IBLA146.pdf. The order thus "resulted in a de facto moratorium on the issuance of mineral patents . . . ." Randy Hubbard, *The 1872 Mining Law: Past, Present, and Future*, 17 NAT. RES. & ENV'T 149, 151 (2003). Then, in 1994, Congress included a rider on the Department of Interior's annual appropriations bill that prevented the BLM from expending funds to accept or process mineral patent applications. Department of the Interior and Related Agencies Appropriations Act of Sept. 30, 1994, Pub. L. No. 103–332, § 112, 108 Stat. 2499, 2519 (1994); *see also* Thomas P. Erwin, *The Federal Legislative and Administrative Assault on Nevada's Mining Industry*, NEV. LAW., Oct. 1999, at 21, 21. The moratorium must be renewed annually, and "Congress could restart the issuance of patents by simply failing to include the rider in any year's appropriation bill, but in recent years its inclusion has been rather automatic." GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 589 (2007). The days of new mineral patents have probably drawn to a close, as is evidenced by the fact that a Mining Law reform bill passed by the House of Representatives last year does away with mineral patents altogether. *See* Hardrock Mining and Reclamation Act of 2007, H.R. 2262, 110th Cong. (2007). However, patent applications submitted on or prior to Babbitt's Secretarial Order, and which met all relevant requirements of the 1872 Mining Law, are not subject to the patent moratorium. *See* Department of the Interior and Related Agencies Appropriations Act of Sept. 30, 1994 , Pub. L. No. 103–332, § 113, 108 Stat. 2499, 2519 (1994).

12. High Country Citizens Alliance v. Clarke, 454 F.3d 1177, 1179 (10th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 2134 (2007). Amax filed a mineral patent application with the BLM in December, 1992. *Id.* Although the court refers to the owner of the Mt. Emmons patents as MEMCO throughout its opinion, Amax was the actual corporate actor at the time the patent application was filed. *See supra* note 4. The Secretary of the Interior took the position that the Mt. Emmons patent applications could not be processed because they were not sufficiently complete prior to the March 2nd Secretarial Order, but in *Mt. Emmons Mining Co. v. Babbitt*, the Tenth Circuit concluded that the Secretary had unlawfully withheld agency action and required the Secretary to "continue processing [the] patent application to determine whether it is sufficiently complete to qualify" for the section 113 exception. 117 F.3d 1167, 1170–73 (10th Cir. 1997).

ministrative protests with the Bureau of Land Management ("BLM"),[13] claiming that the substantive requirements of the Mining Law had not been met and that the patents could therefore not be granted.[14] On April 2, 2004, the BLM denied their protests and approved nine mineral patents on Mt. Emmons.[15] This act transferred fee title to over 150 acres of public lands from the federal government to then-owners Phelps Dodge and its subsidiary, the Mt. Emmons Mining Corporation (collectively, "MEMCO").[16]

HCCA, the Town, and the County sought judicial review of the BLM's denial of their protests challenging the validity of the Mt. Emmons patent applications.[17] The district court refused to review their substantive claims, finding that the 1872 Mining Law impliedly precluded judicial review of protests brought by citizens who lack a competing ownership interest in the land at issue.[18] On July 21, 2006, in *High Country Citizens Alliance v. Clarke* ("*HCCA*"), the Tenth Circuit Court of Appeals affirmed, finding that the statutory scheme of the 1872

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13. The BLM is an agency located within the Department of the Interior. It "administers more than 261 million surface acres of public lands" as well as all 700 million acres of subsurface mineral estate owned by the United States. DEP'T OF THE INTERIOR, AMERICAN ENERGY FOR AMERICA'S FUTURE: THE ROLE OF THE U.S. DEP'T OF THE INTERIOR 3, *available at* http://www.blm.gov/nhp/pubs/brochures/EnergyBro.pdf (last visited Apr. 20, 2008). The Secretary of the Interior exercises his authority to regulate prospecting, mining operations, other mining activities, and the perfection and issuance of patents on public lands through the BLM. 43 U.S.C. § 1201 (2000). Long after withdrawing its patent applications during the 1980s, Amax filed new applications for mineral patents to mine molybdenum on Mt. Emmons in 1992. Press Release, Bureau of Land Mgmt., BLM Director Signs Mineral Patent for Mt. Emmons Mining Company (Apr. 6, 2004), *available at* http://www.blm.gov/co/st/en/BLM_Information/newsroom/2004/blm_director_signs.html. These patents are the subject of the current lawsuit and the most recent fight to "Save the Red Lady." *See infra* Part II.

14. *See* High Country Citizens Alliance v. Clarke, 454 F.3d 1177, 1179 (10th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 2134 (2007).

15. *Id.* at 1180.

16. *Id.* After the issuance of these patents, MEMCO's holdings on Mt. Emmons included "25 patented and approximately 520 unpatented mining claims, which together approximate 5,400 acres, or over 8 square miles of mining claims." Press Release, U.S. Energy Corp./Crested Corp., U.S. Energy Corp./Crested Corp. and Kobex Resources Ltd. Enter into Letter Agreement Involving Lucky Jack Molybdenum Property (Oct. 10, 2006) (on file with author), *available at* http://www.usnrg.com/public/PressReleases/2006/October%2010%20%20KOBEX2.htm.

17. *See HCCA*, 454 F.3d at 1180.

18. *Id.*

Mining Law demonstrated "fairly discernible" intent to preclude judicial review of protests to mineral patent applications that are brought by third parties without a cognizable property interest in the patented land.[19] The Supreme Court denied a petition for certiorari on April 30, 2007.[20]

The issuance of these patents is likely to affect Crested Butte and the surrounding area in a variety of ways. Industrial structures on Mt. Emmons would, if visible, undoubtedly change the aesthetic of the picturesque mountain town. Air and noise pollution from the nearby mining operations would also affect the quality of life for residents and could impact the town's popularity as a tourist destination. Restricted access to popular, long-used skiing and hiking destinations might negatively impact the town's economy.[21] Perhaps most importantly, residents fear that even a well-managed mine would pollute Coal Creek and jeopardize the town's only water supply.[22]

Notwithstanding these impacts, the core of the fight over Mt. Emmons is about something more fundamental. The Red Lady has come to symbolize Crested Butte's sense of identity and its vision for the future. Over the past thirty years, Crested Butte residents and the local government have made one thing clear: they want to have a say in determining their future. The outcome in *HCCA* precludes Crested Butte, and other local citizen groups and governments, from seeking judicial review of the BLM's decision to issue other, currently-pending patent applications. This Note considers whether that outcome is supported by the 1872 Mining Law and whether it accords with the modern-day presumption favoring judicial review of agency actions.

Part I of this Note traces Crested Butte's transition from a mining economy to a tourism-based economy and considers in greater detail the potential impacts of a molybdenum mine on Crested Butte and the surrounding Gunnison County. Part II discusses the 1872 Mining Law and mining regulation on federal lands. Part III considers both the strength of the presumption of review under the Administrative Procedure Act

19. *Id.* at 1192.

20. High Country Citizens Alliance v. Clarke, ___U.S.___, 127 S. Ct. 2134 (2007).

21. *See infra* Part I.

22. *See* discussion *infra* Part I.

("APA") and the requirements for showing implied preclusion of judicial review under section 702(a)(1). Part IV details the majority's holding in *HCCA* that, when the BLM denies a protest to an illegal mining patent, citizens cannot seek judicial review of that denial. Later, that same part presents the minority's opinion. Part V argues that the holding in *HCCA* is unconvincing in its attempt to synthesize the 1872 Mining Law and the APA. This Note concludes that in light of the presumption of review, the legislative history of antiquated statutes is an unsatisfactory source for a court to rely on when conducting an implied preclusion analysis.

I. FROM MINING TO TOURISM, AND BACK AGAIN? CRESTED BUTTE'S PAST, PRESENT, AND UNCERTAIN FUTURE

Like those of many Colorado mountain towns, Crested Butte's roots stretch back to its mining days. As early as 1860, mineral prospectors frequently clashed with the Ute Indians living in the area.[23] Soon, hundreds of prospectors "invaded the Elks near present-day Crested Butte" in search of gold, silver, and coal.[24] During these early mining days, Crested Butte served as a supply town for silver mining camps in the nearby Elk Mountains.[25]

The area's rich deposits of high quality coal made Crested Butte "the state's leading mountain coal operation by 1882."[26] The "Big Mine," located on a mesa directly south of town, opened in 1894.[27] It employed approximately four hundred workers and extracted 100,000 tons of coal annually for almost half a century.[28] The closure of the Big Mine in 1952 marked the end of Crested Butte's coal mining days.[29] Local small-scale silver mining lingered on and did not completely phase

23. Duane Vandenbusche, *Crested Butte: A Town Named Desire*, http://www.soft.com/cb/624Maroon/cb.desire.html (last visited Apr. 20, 2008).

24. *Id.*

25. *Id.*

26. Western Mining History, Crested Butte, http://www.westernmininghistory.com/towns/colorado/crested-butte (last visited Apr. 20, 2008).

27. SMITH, *supra* note 2, at 65.

28. Vandenbusche, *supra* note 23.

29. *See id.* Gunnison County continued to produce coal for some time. *Id.*

out until 1974.[30] At the same time, the 1960s were a period of transition for Crested Butte, which began to move towards a tourism-based economy.[31]

A key event in this trajectory occurred in 1961: the Crested Butte Ski Area opened two miles north of town.[32] Howard Callaway and Ralph Walton purchased the ski area in 1970 and, with the addition of new lifts, trails, facilities, and other improvements, by the early 1970s the ski area had acquired a national reputation.[33] The ski area continued to grow and develop under the direction of the Callaway and Walton families until 2003, when they sold the resort to the Muellers, owners of two Vermont ski resorts.[34] At its height in the late 1990s, the resort saw approximately 550,000 skier visits a year. (By the early 2000s, those numbers had dropped to around 300,000 annual skier days).[35] Modern-day Crested Butte Mountain Resort is renowned for its extreme skiing,[36] and the town boldly proclaims itself to be "Colorado's Last Great Ski Town."[37]

Crested Butte has also developed a strong summer tourism economy based on outdoor recreation. The town, which is legislatively designated as the "Wildflower Capital of Colorado," hosts an annual wildflower festival. It also hosts "Fat Tire" bike week, an art festival, a wild mushroom festival, a summer music series, the People's Fair, and other events. It is fair to say that tourism is Crested Butte's economic backbone, and that recreation is central to the town's identity.[38] The area around Crested Butte is also known for its hiking, fly fishing,

30. U.S. Envtl. Prot. Agency Superfund Website, Region 8, Standard Mine in Ruby Mining District, Site Description, http://www.epa.gov/region8/sf/co/standard/#1 (last visited Apr. 20, 2008).

31. Western Mining History, *supra* note 26.

32. SMITH, *supra* note 2, at 180.

33. *Id.* at 181.

34. *Id.* at 190–91.

35. *Id.* at 191.

36. Crested Butte was the first ski area in the U.S. to hold an extreme skiing contest, and it continues to hold events such as the 16th Annual U.S. Extreme Skiing Championships. U.S. Extreme Freeskiing Championships: Crested Butte, Colorado, http://www.skicb.com/winter-activities-adventure-freeskiing.html (last visited Apr. 20, 2008).

37. Official Website of the Town of Crested Butte, http://www.crestedbutte.govoffice2.com (last visited Apr. 20, 2008).

38. *See* Crested Butte Chamber of Commerce, Recreation & Culture, http://www.crestedbuttechamber.com/main/rec.htm (last visited Apr. 20, 2008).

rafting, and kayaking.[39] The Oh-Be-Joyful wilderness is located within several miles of town, on the north side of Mt. Emmons. A local coffee brewer's slogan says it all: "Some people call it Paradise. We call it Tuesday."[40]

The issuance of the Mt. Emmons patents paves the way for mineral development on Mt. Emmons, which has the potential to broadly impact Crested Butte's environment, character, and economy. As the HCCA puts it, "a full-blown industrial mining development in the watershed would threaten our pristine water quality, impair our community's vision for a sustainable economy, and harm our quality of life."[41]

A primary environmental concern voiced by mine opponents is that a molybdenum mine could degrade the water quality of Coal Creek and impair the existing high water quality of nearby Ohio and Carbon Creeks.[42] Coal Creek has special importance to Crested Butte because it is the town's only permanent source of drinking water.[43] The creek's water quality is already threatened by contaminants from the Standard Mine, which is a former lead, zinc, silver, and gold mine located on the southern flanks of Mt. Emmons.[44] The proposed molybdenum mine seems particularly troubling given its proximity to town and the possibility that underground mine features would intercept groundwater that drains into Coal Creek.[45] The proposed mine on Mt. Emmons could also affect water quantity.[46]

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39. *Id.* (follow hyperlink "Summer Activities").

40. E-mail from Wythina Smith, co-owner, Camp 4 Coffee, to author (Apr. 21, 2008, 08:16 MST) (on file with author).

41. SummitPost, Mt. Emmons, http://www.summitpost.org/mountain/rock/185039/Mount-Emmons-CO-.html (last visited Apr. 20, 2008).

42. *See* HCCA, LUCKY JACK MINING PROJECT IMPACT FACT SHEET, http://www.hccaonline.org/pdf/luckyjackimpactfact.pdf [hereinafter FACT SHEET].

43. Envtl Prot. Agency, National Priorities List, Standard Mine, Site History, http://www.epa.gov/superfund/sites/npl/nar1740.htm (last visited Apr. 20, 2008).

44. *Id.* Mine wastes from the Standard Mine, a current Superfund Site, "continue to impact surface water in the area." *Id.* The EPA has "particular concern about the potential catastrophic failure of the [unlined] surface impoundment" that keeps acid mine drainage out of Elk Creek, which drains directly into Coal Creek. *Id.*

45. FACT SHEET, *supra* note 42. For a map of the newly patented claims, see Mt. Emmons Mine Proposal, http://www.hccaonline.org/pdf/EmmonsProposal MasterMap.pdf (last visited Apr. 20, 2008).

46. FACT SHEET, *supra* note 42. A proposed slurry pipeline would entail diversions of approximately thirty cubic feet per second from one or more nearby creeks, which could impact aquatic life during periods of low flow. *See id.*

Mining on Mt. Emmons would likely have recreational and aesthetic impacts on the town and surrounding area. Ever since the Mt. Emmons mining claims were patented, skiers and hikers in Red Lady Bowl now trespass on patented fee land. While U.S. Energy Corp. has not yet sought to enforce its right to exclude the public, it seems likely that the company would do so if public access to or use of the bowl interfered with mining operations. In addition, both the air pollution resulting from mining operations and the roads required for mining infrastructure would likely have aesthetic effects on Crested Butte by impairing the "viewshed" from town. Alternatively, if U.S. Energy Corp. were prevented from mining or chose not to mine on Mt. Emmons, the corporation would foreseeably sell some or all of its fee land on Mt. Emmons to developers. This scenario would also impact the viewshed.

Impairment of Crested Butte's viewshed would have negative aesthetic impacts, and it could also have detrimental economic effects. A recent study conducted by researchers at Colorado State University found that the abundance of undeveloped space is a factor that draws tourists to Crested Butte and the Gunnison valley.[47] The study indicated that a reduction in open space, coupled with more high density development, would lead to a forty-two percent decrease in skier days at Crested Butte Mountain Resort.[48] A reduction of open space on Mt. Emmons, and especially in Red Lady Bowl just above town, thus has the potential to negatively impact winter tourism in Crested Butte, which would in turn affect the town's economy. While a molybdenum mine would provide some offsetting economic benefits, it is uncertain how many jobs would actually be created. In any case, mining jobs would do little to address local concern about the type of economy that most of Crested Butte's residents seek to maintain.

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47. ADAM ORENS & ANDREW SEIDL, WINTER TOURISM AND LAND DEVELOPMENT IN GUNNISON, COLORADO: EXECUTIVE SUMMARY 3 (2004), *available at* http://dare.agsci.colostate.edu/csuagecon/extension/docs/impactanalysis/edr04-11.pdf. Fifty-eight percent of visitors to Gunnison County who were polled in a stratified random survey said that they would decrease their visits to the county if all farms and ranches were converted to higher density developments. *Id.*

48. *Id.* At the time of this study, the ski area was called "Mt. Crested Butte." It has changed hands since the publication of this study in 2004 and is now "Crested Butte Mountain Resort."

In sum, while many of the feared impacts of mining (or residential development) on Mt. Emmons remain speculative, there are legitimate reasons to believe that a molybdenum mine would significantly impact the town, the Coal Creek watershed, the ski area, and the surrounding region. The legal issue in *HCCA*—whether local residents, organizations, and government have the power to seek judicial review of the BLM's decision to deny their protest and grant the Red Lady mineral patents—must be seen in light of the very real impacts that those patents could have on this community's identity and future.

II. THE 1872 MINING LAW AND REGULATION OF HARDROCK MINING ON FEDERAL PUBLIC LANDS

For well over a century, the federal government has exercised its Property Clause authority to regulate hardrock mining on the public lands.[49] The primary federal statute governing hardrock mining today is the 1872 Mining Law.[50] Various legislative developments since 1872 have affected its scope and operation, but "its basic architecture has stubbornly survived a century of attempts to repeal it."[51] Vociferous critics, including industrialists, environmentalists, and legislators, have called for overhaul or repeal of the Mining Law almost since its incep-

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49. The Property Clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. This clause has long been interpreted as bestowing upon Congress broad authority to regulate activities on the public lands. *See* Kleppe v. New Mexico, 426 U.S. 529, 535–47 (1976).

50. *See* General Mining Act of 1872, 17 Stat. 91 (1872) (current version at 30 U.S.C. §§ 22–24, 26–28, 29, 30, 33–35, 37, 39–43, 47 (2000)).

51. COGGINS ET AL., *supra* note 11, at 558. Several statutes have narrowed the reach of the Mining Law by removing minerals from it. *See, e.g.*, Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181–287 (2000) (removing all major fuel and fertilizer minerals from the scope of the general Mining Law, including oil and gas); Common Varieties Act of 1955, 30 U.S.C. § 611 (2000) (removing common varieties of sand, stone, gravel, pumice, cinders, and other minerals from the Mining Law in most cases); Geothermal Steam Act of 1970, 30 U.S.C. §§ 1001–1025 (2000) (removing geothermal resources). Environmental laws and regulation have also had a major impact on hardrock mining. *See* JOHN LESHY, THE MINING LAW 221 (1987) ("Though the mining law survives, its functioning has been substantially altered by [modern environmental laws] and regulations and processes deployed to implement them.").

tion.[52] Nonetheless, with some modifications, it remains on the books today.

Determining whether citizens may seek judicial review of the BLM's decision to grant a mineral patent turns on whether the Mining Law, understood in light of pertinent subsequent federal land statutes and agency regulations, implicitly precludes such review. With that aim in mind, this section first explores the historical context and legislative history that gave rise to the 1872 Mining Law. Next, it explains that statute's pertinent provisions, with an emphasis on the process by which a miner can obtain either an unpatented or a patented mining claim. Third, it discusses how both the statutory language of the Mining Law and administrative regulations interpreting the Mining Law have addressed the following issue: whether a citizen has the ability to seek judicial review of the BLM's decision to deny a protest to a mineral patent application. Finally, this section introduces the larger statutory framework governing the issuance of mineral patents on public lands today.

A. Historical Context and Legislative History of the 1872 Mining Law

When gold was discovered in 1848 in the Sierra Nevada foothills, a general federal "mining law or policy simply did not exist."[53] The gold rush, which began the following year, shaped the American West and affected the entire nation. Yet despite the significance of the western mining boom, Congress failed to implement a national mining policy until the mid-1860s.[54] Distracted by the Civil War and divided by pragmatic concerns (especially the question of whether the federal government should derive some financial benefits from mineral extraction on public lands), the legislature instead engaged in a policy of "tacit acquiescence" to the status quo. This tacit acquiescence essentially permitted miners to extract valuable minerals from the public lands without requiring compliance with any federal

52. *See* LESHY, *supra* note 51, at 4–5 (pointing to the "legion of advocates" that have urged Mining Law reform for more than a century, and noting that "[w]ith ample reason . . . no one defends the Mining Law in its present form").

53. LESHY, *supra* note 51, at 11.

54. The first federal statute regulating hardrock mining was the 1866 Lode Law, 14 Stat. 251 (1866) (currently codified at 30 U.S.C. §§ 43, 46, 51 (2000)).

regulations or payment of royalties.[55] This approach reflected the "universal agreement that mineral exploration and development on federal lands was unqualifiedly beneficial."[56]

In the absence of a federal law governing hardrock mining, the various western mining camps, which formed the basic governmental and social units in the mineral regions, developed and relied upon customary laws to determine rights and obligations among miners.[57] The laws of individual mining camps varied, but a set of unifying principles emerged. Specifically, the miners' codes recognized particular methods for staking a claim, placed limits on claim size, implemented requirements for working a claim to keep it active, and contained procedures for resolving disputes.[58] Judicial determinations typically sanctified the customary laws of the mining camps by applying them when disagreements arose.[59]

Despite the development of miners' codes and congressional acquiescence in mining activities on the public lands, the lack of explicit federal authorization prior to 1866 put a legal cloud on the miners' rights: "[t]echnically, the prospectors and the new companies were trespassers."[60] This technicality did not have much of a deterrent effect on mineral exploration but was nevertheless a source of uncertainty for miners and investors. After the Treaty of Appomattox in 1865, which signaled the end of the Civil War, Congress turned its attention to developing a federal mineral policy.[61] Congressional debates over the shape of a national mining law underscored the vulnerable status of miners' rights: some legislators advocated seizing and selling mines to obtain revenue, while other legislators pro-

55. LESHY, *supra* note 51, at 11, 13–14.

56. *Id.* at 17.

57. *See* CHARLES WILKINSON, CROSSING THE NEXT MERIDIAN 38–39 (1992). Interestingly, romantic accounts of these miners' codes as examples of true frontier democracy are off the mark: in reality, "the early participants in the California gold rush were not typically ruffians or outcast adventurers; rather, they were from the more respectable reaches of society . . . back home." LESHY, *supra* note 51, at 13 (internal quotations omitted).

58. *See* WILKINSON, *supra* note 57.

59. *See, e.g.*, Morton v. Solambo C. M. Co., 26 Cal. 527, 532–34 (1864).

60. CARL J. MAYER & GEORGE A. RILEY, PUBLIC DOMAIN, PRIVATE DOMINION: A HISTORY OF PUBLIC MINERAL POLICY IN AMERICA 43 (1985); *see also* LESHY, *supra* note 51, at 12–13.

61. LESHY, *supra* note 51, at 14.

posed less drastic action such as taxing the gross revenue obtained from the mines.[62]

Congress officially adopted a national mining policy in 1866 with the passage of the "Lode Law."[63] Because the subsequent enactment of the 1872 Mining Law was, in large part, a mere combination and codification of the Lode Law and the Placer Act, the legislative history of the Lode Law is relevant to ascertaining congressional intent behind the 1872 Mining Law.[64] Two key figures with strongly divergent views dominated the congressional debate over the Lode Law: Representative George Julian of Indiana and Senator William Stewart of Nevada.[65] Representative Julian, chair of the Public Lands Committee in the House, advocated selling the mineral lands to raise revenue and encourage western settlement.[66] By contrast, "Senator Stewart's basic effort was to obtain formal recognition of the past practices of the miners."[67] Senator Stewart, whose views ultimately won out, explained the proposed bill as a

> simple confirmation of the existing conditions of things in the mining regions, leaving everything where it was, indorsing [sic] the mining rules. It simply adopts and perfects the existing system, allowing these people to enjoy their property without being subject to the fluctuations created now by the agitations in Congress . . . . Since this agitation has

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62. John C. Lacy, *Historical Overview of the Mining Law: The Miners' Law Becomes Law, in* THE MINING LAW OF 1872: A LEGAL AND HISTORICAL ANALYSIS 13, 30–32 (T. S. Ary et al. eds., 1989).

63. 14 Stat. 251 (1866). It was passed under the misleading title of "An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes." *See id.* The title is indicative of the wiles used by Senator William Stewart to move it through the House. *See* Lacy, *supra* note 62, at 35. A lode refers to valuable minerals found in a "vein, ledge, or other rock in place between definite walls or boundaries." Bureau of Land Mgmt., Locating a Mining Claim: Frequently Asked Questions, http://www.blm.gov/ca/st/en/info/iac/faqmc.html (last visited Apr. 20, 2008).

64. High Country Citizens Alliance v. Clarke, 454 F.3d 1177, 1183 (10th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 2134 (2007) (noting congressional intent to incorporate the earlier statutes into the 1872 Mining Law); MAYER & RILEY, *supra* note 60, at 53.

65. MAYER & RILEY, *supra* note 60, at 48. For an in-depth discussion of the legislative history surrounding the Lode Law and the 1872 Mining Law, see Lacy, *supra* note 62, at 27–44.

66. LESHY, *supra* note 51, at 14.

67. Lacy, *supra* note 62, at 33.

> come up . . . there is no title, no security, no prosperity in your mines.[68]

Both Senator Stewart and Representative Julian emphasized the importance of providing security to small miners and mineral corporations.[69] However, while the idea of obtaining a patent from the government was important to both Congressmen's views, their explanations of the "security" miners needed varied. Representative Julian staunchly advocated for allowing miners to secure permanent title in the land.[70] However, Julian's vision also entailed competitive sales of the mines (with provisions for miners who were currently working claims to purchase them at the minimum price) and taxation of mining revenues.[71] His primary rationale for this approach was to promote settlement of the West: "My chief quarrel with our existing policy is that it makes the establishment of homes practically impossible in vast regions of our unoccupied territory, which else might be carved up into independent homesteads, and dotted over by smiling habitations."[72] Julian was ultimately outmaneuvered by Senator Stewart, and Julian's idea to sell the mineral lands did not take hold.[73]

Senator Stewart's vision of a general mining law was premised on the desirability of codifying the status quo in the mining regions.[74] To this end, he urged the Senate to formally endorse the approach California had already ratified: namely, that the "rules and regulations of the miners themselves might be offered in evidence in all controversies respecting mining claims, and when not in conflict with the constitution or laws of the State or of the United States should govern the decision of the action."[75] Stewart's proposal "ratified the existing practice in a broad sense" and also, "as he put it, 'perfected' many of them in statutory detail."[76]

Like Julian, Senator Stewart both emphasized the notion of obtaining security of title and strongly supported allowing

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68. CONG. GLOBE, 39th Cong., 1st Sess. 3234 (1866).
69. *See HCCA*, 454 F.3d at 1184.
70. *Id.*
71. *See* MAYER & RILEY, *supra* note 60, at 49.
72. CONG. GLOBE, 38th Cong., 2d Sess. 686 (1865).
73. *See* LESHY, *supra* note 51, at 14–15.
74. *Id.* at 15.
75. CONG. GLOBE, 39th Cong., 1st Sess. 3226 (1866).
76. LESHY, *supra* note 51, at 15.

miners to obtain fee title in the land. However, underlying Senator Stewart's notion of "security" was a deep concern that the federal government would adopt a policy based upon competitive sales of federal mineral lands. He exhorted Congress to refrain from such an approach, explaining that miners would

> look with jealous eyes upon every proposition for the sale of the mines which they have discovered and made valuable . . . . It is their all, secured through long years of incessant toil and privation, and they associate any sale with a sale at auction where capital is to compete with poverty, fraud and intrigue with truth and honesty.[77]

Senator Stewart's explanation above is noteworthy because while it disparages the sale of mineral lands, it simultaneously demonstrates that, absent a competitive federal sales policy, in reality the miners of unpatented claims already possessed a fair measure of surety in their claims. In Senator Stewart's view, the miners "secured [that surety] through long years of incessant toil and privation . . . ."[78]

Interestingly, Senator Stewart seemed to be somewhat uncomfortable with the prospect of a mandatory time period for filing patent applications, and he advocated leaving that issue for a later day.[79] In fact, he made a point to explain that his bill "simply allows [miners] to purchase [their claims]; . . . but there is nothing compulsory about it."[80] Taken together, these excerpts of legislative history suggest that Senator Stewart undoubtedly intended to secure the miners' property interests and that he saw the acquisition of fee title as a primary way, but not the only way, of securing those interests.

Senator Stewart's vision prevailed in the 1866 Lode Act, which was passed despite Julian's virulent opposition.[81] Julian

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77. CONG. GLOBE, *supra* note 68, at 3226.

78. *Id.*

79. *See id.* at 3232 (explaining that "we did not propose to force these people to lose their mines . . . before they could get to understand the operation of this law").

80. *Id.*

81. Lacy, *supra* note 62, at 35. Julian, who opposed Stewart's bill, attempted to bury it in his Public Lands Committee. LESHY, *supra* note 51, at 15. Stewart sidestepped Julian by inserting the substance of his bill into a bill already passed by the House and entitled "An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for Other Purposes." *Id.* at 15. Stewart pushed his bill through the Senate, and when it went back to the House, it went

objected to both the substance of the Act and the "trick[y]" manner in which it was enacted.[82] In addition to codifying the miners' laws, the Act served the important purpose of finally authorizing mining activities on the public lands.[83] This change in legal status at last put to rest the threat of a trespass action brought by the United States against a prospector on the public lands.[84]

The Lode Act was limited to vein-type deposits, which left the broad category of placer deposits[85] unregulated. In 1870, Congress filled this gap by passing the Placer Act.[86] The Lode and Placer Acts were essentially carried forward in the 1872 Mining Law,[87] to which this Note now turns.

B. From Pedis Possessio to Patent: The Spectrum of Property Rights Available Under the 1872 Mining Law

The 1872 Mining Law states that "[e]xcept 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."[88] The law sets forth procedures that guide the process of exploring for minerals, staking a claim to them, working the claim, and protecting it against others. Three dis-

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to the Committee on Mines and Mining, of which Julian had no control. *Id.* "The whole maneuver took less than four days, and on July 26, 1866, the first general federal mining law . . . became law." *Id.*

82. *Id.*

83. WILKINSON, *supra* note 57, at 42.

84. *Id.*

85. Placer deposits refer to mineral deposits located in river gravel rather than in veins. Bureau of Land Mgmt., Locating a Mining Claim: Frequently Asked Questions, http://www.blm.gov/ca/st/en/info/iac/faqmc.html (last visited Apr. 20, 2008). For a description of placer deposits and the process of mining one, see *Sierra Club v. Penfold*, 857 F.2d 1307, 1309 (9th Cir. 1988). To extract a placer deposit, a miner removes the vegetation and surface soil and then runs the mineral bearing soil through a sluice box (a channel with intermittent dams). *Id.* The lighter materials wash away, leaving the heavier minerals behind. *Id.* The 1872 Mining Law defines a placer claim in a residual category that includes "all forms of deposit, excepting veins of quartz, or other rock in place . . . ." 30 U.S.C. § 35 (2000).

86. WILKINSON, *supra* note 57, at 42–43.

87. *See id.* at 43; *see also* LESHY, *supra* note 51, at 16.

88. 30 U.S.C. § 22 (2000). The 1920 Mineral Leasing Act removed coal, oil, gas, shale, phosphate, and sodium from the Hardrock Mining Law and placed them under a new leasing system. WILKINSON, *supra* note 57, at 53.

tinct sets of property interests exist at various stages of mineral exploration and development: first, the *pedis possessio* rights of a person who locates a claim before discovering valuable minerals; second, the rights of a person who has an unpatented mining claim; and finally, the rights of an owner of a patented mining claim.

The text of the 1872 Mining Law provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."[89] Read literally, until a miner "discovers" a "valuable mineral deposit," he has no right to locate a mining claim. However, as the Supreme Court acknowledged in *Union Oil Co. v. Smith*, a literal interpretation of this phrase conflicts with the reality that in most situations, a miner can only discover valuable minerals by first going out onto the land and prospecting for them.[90] In *Union Oil*, the Supreme Court recognized the validity of "*pedis possessio*" rights, which give a miner a legally protected property interest in his claim prior to "discovering" a valuable mineral deposit on it.[91] Under the *pedis possessio* doctrine, a miner who "locates" a claim[92] has an exclusive possessory right against other miners but not against the United States.[93] Most courts require actual occupation of the land and diligent pursuit of exploration work to maintain *pedis possessio* rights.[94]

Actual discovery of sufficient quantities of valuable minerals, such that a "prudent person would be justified in further expenditure on the claim with a reasonable likelihood of success," creates an unpatented mining claim.[95] This gives the holder a significant property interest. As with *pedis possessio*, the holder of an unpatented claim has "the exclusive right of possession and enjoyment of all the surface" included within

89. 30 U.S.C. § 23 (2000).

90. *See, e.g.*, Union Oil Co. v. Smith, 249 U.S. 337, 346 (1919) (explaining that "as a practical matter, exploration must precede the discovery of minerals, and some occupation of the land ordinarily is necessary for adequate and systematic exploration . . .").

91. *See id.*

92. To locate a claim, a miner had to post notice of the claim, stake it, and comply with filing requirements. *See id.* at 347.

93. *See* COGGINS ET AL., *supra* note 11, 567.

94. *Union Oil Co.*, 249 U.S. at 348.

95. United States v. Coleman, 390 U.S. 599, 602 (1968). The Court in *Coleman* recognized that profitability is an important component of this test. *See id.* at 602–03.

the lines of the claim; but in contrast with *pedis possessio*, the owner of an unpatented mining claim also has possessory rights against the United States.[96] An unpatented mining claim gives the holder the right to mine, exclude others, build a home, cut wood on the property, graze cattle, and divert water.[97] A miner may also stake claims to "millsites," which are used for mining or milling purposes in connection with a specific mining claim.[98] To keep his right of possession and enjoyment of the property alive, the miner must either perform minimal "annual assessment work" or pay an annual assessment fee,[99] and he must file a single-page annual report with the BLM.[100] In the report, the miner must state his intention to hold the mining claim, provide an "affidavit of the assessment work performed," and file a copy of the official description of his claim.[101]

The holder of an unpatented mining claim may also choose to "patent" his claim. Patenting conveys fee title to the surface and the minerals underneath it from the U.S. to the patentee.[102] Obtaining a patent is relatively simple: after making a "discovery," the miner must file a patent application with the appropriate agency.[103] If his application is granted, the applicant pays a nominal fee of either $2.50 or $5.00 per acre.[104] As

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96. 30 U.S.C. § 26 (2000).

97. WILKINSON, *supra* note 57, at 45. The exclusive right of possession has been weakened by the Surface Resources Act, which gives licensees and permittees the right to use the surface of a mining claim unless such use "materially intereferes" with the mining or processing operations or uses reasonably incident to mining the claim. *See infra* Part II.D.

98. 30 U.S.C. § 42 (2000).

99. *See* 30 U.S.C. §28b, f (2000). Today, holders of unpatented mining claims pay a $100 fee per claim to maintain the claim, rather than performing the $100 of annual assessment work previously required under the Mining Law. § 28f. However, small miners (defined as miners holding "not more than 10 mining claims, mill sites, or tunnel sites, or any combination thereof, on public lands") may elect to perform assessment work rather than paying the claim maintenance fee. § 28f(d).

100. WILKINSON, *supra* note 57, at 47. The requirement for annual assessment work is satisfied if a claimant puts $100 worth of improvements into the claim each year. *Id.*

101. 43 U.S.C. § 1744(a)(1)–(2) (2000).

102. Hubbard, *supra* note 11, at 149.

103. *Id.* The BLM administers patent applications on all public lands.

104. *Id.* at 149–50. This price is incredibly low relative to the value of public land today, and the 1872 Mining Law has been staunchly criticized for maintaining this nominal fee. *See, e.g.*, Mark Humphries & Carol Hardy Vincent, Mining on Federal Lands (Cong. Research Serv., CRS Issue Brief for Congress Order

a property owner in fee simple, the patentee is not obligated to meet the statutory requirements for an unpatented mining claim. In fact, he is free to cease mining entirely and to use the land for an entirely different purpose, such as selling it at market value.[105] A miner may also patent millsite claims of five acres or less:

> [w]here nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode . . . ."[106]

Under the current administration, a miner may patent multiple five-acre mill sites in association with a single mining claim.[107]

C. Avenues for Challenging a Mining Patent

When Congress enacted the 1872 Mining Law, the possibility that non-miners without a competing, tangible property interest might seek to challenge the legality of a mineral patent application in federal court was remote.[108] It would take almost another century for the environmental movement to coa-

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Code IB89130, May 3, 2001), *available at* http://www.ncseonline.org/nle/crsreports/mining/mine-1.cfm#_1_8 ("Mining Law critics consider the claim-patent system a giveaway of publicly owned resources because of the absence of royalties and the small charges associated with keeping a claim active and obtaining a patent."). The alternative view is that the fee does not account for the financial investment required to prove a valuable discovery of minerals, which can "run into the millions of dollars." Hubbard, *supra* note 11, at 149.

105. *See* WILKINSON, *supra* note 57, at 48–49.

106. 30 U.S.C. § 42 (2000).

107. *See* Memorandum from Deputy Solicitor, Dep't of the Interior, to the Sec'y of the Interior, Mill Site Location and Patenting under the 1872 Mining Law (Oct. 7, 2003) (M-37010). The previous administration took a different view, explaining that only one dependent mill site per mining claim was permitted under the 1872 Mining Law. *See* Memorandum from the Solicitor, Dep't of the Interior, to the Dir. of the BLM, Limitations on Patenting Millsites under the Mining Law of 1872 (Nov. 7, 1997) (M-36988).

108. The fact that neither party in *HCCA*, nor the Tenth Circuit, could find a case "directly on point" to the issue raised there, namely a third party without a competing property interest in the land challenging the government's issuance of a patent, supports this conclusion. *See* High Country Citizens Alliance v. Clarke, 454 F.3d 1177, 1187–88 (10th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 2134 (2007).

lesce. Mining towns and other local governmental bodies were equally unlikely candidates to challenge mineral patent applications, given the overriding importance of mining to the settlement and development of the West. When a miner sought to patent his claim in 1872, the only realistic challenger of his patent application was a miner (or a mining corporation) who claimed a competing interest in the particular mining claim. In light of this historical context, it is unsurprising that the Mining Law clearly provides for judicial review of adverse claims by competing mineral claimants, but it fails to clarify whether non-claimant third parties may seek judicial review of protests to a patent application. This section explores the Mining Law's treatment of protests brought both by adverse claimants and by parties other than adverse claimants.

The Mining Law sets forth a procedure for resolving disputes among competing claimants prior to the issuance of a patent. A patent applicant must give sixty days' notice to potentially competing claimants and "provide the opportunity for competing claimants to file their adverse claims" during those sixty days.[109] If a claimant files an "adverse claim" with the appropriate agency during the sixty-day period, the Mining Law provides a cause of action in a "court of competent jurisdiction": "It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession . . . ."[110] Failure so to do "shall be a waiver of his adverse claim."[111] Once the adverse claim has been resolved, the BLM must still determine whether the requirements for a patent have been met.[112]

The Mining Law also "provides a process for third parties who claim no ownership in the land to file protests with the BLM and provide evidence as to why the applicant has not satisfied the requirements for a patent."[113] It provides that

> [i]f no adverse claim has been filed [within the statutory period], it shall be assumed that the applicant is entitled to a

109. *HCCA*, 454 F.3d at 1183 (citing 30 U.S.C. §§ 29–30 (2000)). *See also* 30 U.S.C. § 29.
110. 30 U.S.C. § 30.
111. *Id.*
112. *HCCA*, 454 F.3d at 1183.
113. *Id.*

> patent, upon the payment to the proper officer of $5 per acre, and that no adverse claim exists; and thereafter *no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of [the Mining Law's requirements for mineral patents].*[114]

BLM regulations interpret this provision as allowing parties to file a "protest" with the agency "[a]t any time prior to the issuance of a patent . . . upon any ground tending to show that the applicant has failed to comply with the law in any matter essential to a valid entry under the patent proceedings."[115] The regulations place only one limitation upon a person's ability to bring a protest: "[s]uch protest cannot, however, be made the means of preserving a surface conflict lost by failure to adverse or lost by the judgment of the court in an adverse suit."[116] In other words, an adverse claimant cannot use the "protest" procedure to bypass the explicit statutory procedure governing adverse claims. According to the regulations, the government may also contest a patent application.[117]

The issue raised in *HCCA* is whether unsuccessful protestors may seek judicial review of the BLM's decision to deny their protest and issue a mineral patent.[118]

D. Hardrock Mining Regulation Today

The Mining Law remains on the books in a form similar to that in which it was passed over a century ago. At the same time, it is apt to say that "[t]he Mining Law of 1872 has evolved into the Mining Law System . . . ."[119] The Federal Land Policy and Management Act ("FLPMA") has particular importance in this regard, because it is the primary source of statutory authority for the BLM. Unlike the Mining Law,

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114. 30 U.S.C. § 29 (emphasis added).
115. 43 C.F.R. § 3872.1 (2006).
116. *Id.*
117. *See id.*
118. High Country Citizens Alliance v. Clarke, 454 F.3d 1177 (10th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 2134 (2007). This issue will be addressed *infra* in Parts III and IV.
119. Jerry L. Haggard, *Public Land-Use Planning and the Mining Law System*, *in* THE MINING LAW OF 1872: A LEGAL AND HISTORICAL ANALYSIS 99, 99 (T. S. Ary et al. eds., 1989).

> FLPMA attempts to balance two vital—but often competing—interests. On one hand, FLPMA recognizes the need for domestic sources of minerals . . . , and, on the other hand, FLPMA attempts to mitigate the devastating environmental consequences of hardrock mining, to "protect the quality of scientific, scenic, historical, ecological, environmental, air, and atmospheric, water resource, and archaeological values."[120]

FLPMA requires the BLM to prepare, maintain, and revise land use plans for the public lands it manages, and it also imposes a consistency requirement.[121] Furthermore, while it states that it does not intend to amend the Mining Law,[122] one court has explained that "[t]he heart of FLPMA amends and supersedes the Mining Law" in two key ways: first, it instructs the Secretary of the Interior to "take any action necessary to prevent unnecessary or undue degradation of the lands"; second, it requires the Secretary to manage the public lands under the principle of "multiple use and sustained yield."[123] Thus, if a mineral patent would cause "unnecessary or undue degradation of the lands," the BLM would likely have authority under FLPMA to reject the patent application, even if the applicant had complied with all relevant requirements.

Other federal statutes have imposed some additional limits on the "location of mining claims and the conduct of activities on mining claims located under the 1872 Mining Law."[124] For example, a hardrock miner may no longer stake claims in national parks, wildlife refuges, wilderness areas, roadless areas being studied for potential wilderness designation, Indian reservations, military reservations, or areas used for water and power projects.[125] In addition, a miner's right to exclude others from his claim is limited by the Surface Resources Act.[126]

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120. Mineral Policy Center v. Norton, 292 F.Supp. 2d 30, 33 (D.C. Cir. 2003).

121. 43 U.S.C. § 1712 (2000).

122. *Id.* § 1732(b).

123. *Mineral Policy Center*, 292 F.Supp. 2d at 33 (citing 43 U.S.C. § 1732(a)–(b) (2000)).

124. Hubbard, *supra* note 11, at 150.

125. *See* WILKINSON, *supra* note 57, at 54–57; Lacy, *supra* note 62.

126. Surface Resources Act of 1955, 30 U.S.C. § 612(b) (2000). The Surface Resources Act makes explicit the right of the United States, including its licensees and permittees, to use the surface of unpatented mining claims, so long as such use does not materially interfere with mining or mining operations. *Id.* Recreationists have an implied license to use the public lands and are protected by this

These statutes do not directly touch the issue of judicial review of protests to a patent determination, but they do indicate some limits on the "most preferred status" traditionally accorded to hardrock mining.

One of the most important statutes affecting agency actions on the public lands today is the APA, which provides a cause of action for plaintiffs in many situations where it did not previously exist. This Note now considers the scope of judicial review under the APA and section 702(a)(1)'s exception for statutes that preclude review.

III. JUDICIAL REVIEW UNDER THE APA

A. The Presumption of Judicial Review Under the APA

Congress passed the APA in 1946 in an attempt to respond to the perceived problem of uncontrolled agency discretion.[127] The APA establishes a system of procedural checks and provides for judicial review of agency action.[128] Section 702 provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[129] A person is entitled to judicial review of agency action either if the agency action is "made reviewable by statute," or if the agency action is "final" and "there is no other adequate remedy in a court."[130]

The Supreme Court's 1967 landmark opinion in *Abbott Laboratories v. Gardner* ("*Abbott Labs*") interpreted the APA as codifying a presumption that agency actions are subject to judicial review.[131] The Court explained that the enactment of the

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Act. *See* United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277, 1284–86 (9th Cir. 1980).

127. RICHARD B. STEWART ET AL., ADMINISTRATIVE LAW & REGULATORY POLICY 20 (Aspen Publishers 2006).

128. *See id.*

129. 5 U.S.C. § 702 (2000).

130. 5 U.S.C. § 704 (2000).

131. 387 U.S. 136 (1967). While the Court in *Abbott Labs* attributes the presumption of reviewability to the APA, a scholarly article written by Justice O'Connor suggests that the presumption of review can potentially be justified on constitutional grounds as well. *See* Sandra Day O'Connor, *Reflections on Preclusion of Judicial Review in England and the United States*, 27 WM. & MARY L. REV. 643, 652 (1986). O'Connor reasons that judicial review of agency actions is an ex-

APA "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'"[132] Upon considering the legislative history of the APA, the Court found that the APA covers a "broad spectrum of administrative actions" and its "'generous review provisions' must be given a 'hospitable interpretation.'"[133] It stated that courts should restrict access to judicial review "only upon a showing of clear and convincing evidence of a contrary legislative intent."[134]

In *Citizens to Preserve Overton Parke v. Volpe*, the Supreme Court reaffirmed both the presumption of review and the high threshold that must be reached to overcome that presumption.[135] Applying the "clear and convincing evidence" standard, the Court concluded that Congress did not intend to preclude review of a challenge contesting the Secretary of Transportation's decision to authorize locating a highway route through a municipal park.[136] Where it applies, the presumption has been described as requiring a "heavy burden" to overcome.[137]

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ample of accommodation between the legislative and judicial branches. *Id.* Under this view, judicial review of agency actions serves as a check on legislative delegations to the agencies. *See id.* Justice O'Connor explains that the APA "supplied a statutory basis for the presumption of judicial review that the Court had fashioned on potentially constitutional grounds." *Id.* Similarly, STEWART ET AL., *supra* note 127, at 776, suggest that because the text of the APA does not expressly provide a presumption of review, a better justification might be found in considerations of governmental accountability, "legislative supremacy, . . . [and] rule-of-law considerations." The idea that the presumption of review is rooted in the Constitution or in rule-of-law considerations may underlie some of the Court's jurisprudence but has not been formally adopted by the Court. *See, e.g.*, *Abbot Labs*, 387 U.S. at 140 (explaining that the APA "embodies the basic presumption of judicial review").

132. *Abbott Labs*, 387 U.S. at 140 (quoting 5 U.S.C. § 702 (2000)).

133. *Id.* at 140–41 (quoting Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955)).

134. *Id.* at 141 (internal quotations omitted).

135. *See* 401 U.S. 402, 410 (1971) (citing *Abbott Labs*' requirement that there must be "clear and convincing evidence" of legislative intent to preclude review).

136. *Id.*

137. Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 672 (1986). One clear limit to the presumption of review is in the context of agency inaction, which the Supreme Court has explained is subject to a rebuttable presumption of unreviewability. *See* Heckler v. Chaney, 470 U.S. 821, 832–33 (1985).

The presumption of review is also well established in lower court decisions.[138] The Tenth Circuit has stated that "an agency bears a heavy burden in overcoming the presumption that Congress did not mean to prohibit all judicial review."[139] In recent years, while the presumption of review is not in doubt, the strength of the presumption has become less clear.[140] The heart of the issue raised by *HCCA* and addressed in this Note concerns the modern-day strength of the presumption, and what quantum (or type) of evidence courts require to overcome that presumption.

B. Statutory Preclusion of Judicial Review

The APA's authorization of judicial review does not apply to the extent that either "statutes preclude judicial review," [141] or the "agency action is committed to agency discretion by law."[142] The first exception for statutes that preclude review applies when Congress has affirmatively demonstrated its intent to prohibit judicial review.[143] "[E]ven where Congress has not affirmatively precluded review" under section 702(a)(1), review is not to be had under subsection (a)(2) if the statute is drawn so broadly "that a court would have no meaningful standard against which to judge the agency's exercise of discretion."[144] This Note addresses only subsection (a)(1), because both parties in *HCCA* agreed that the second exception for agency actions "committed to agency discretion by law" was inapplicable to whether third party protests to patent determinations are subject to judicial review.[145]

Statutory preclusion of review under subsection (a)(1) may be explicit or implicit in a statutory scheme. Explicit statutory preclusion is a matter of statutory interpretation and is conceptually straightforward. The harder question is what evidence

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138. *See, e.g.*, Rocky Mountain Radar, Inc. v. F.C.C., 158 F.3d 1118, 1121 (10th Cir. 1998) (stating that "the general rule is that agency actions are reviewable").

139. Thomas Brooks Chartered v. Burnett, 920 F.2d 634, 641 (10th Cir. 1990) (quoting Sierra Club v. Hodel, 848 F.2d 1068, 1075 (10th Cir. 1988)).

140. RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE 1269–70 (2002).

141. 5 U.S.C.A. § 701(a)(1) (2006).

142. *Id.* § 701(a)(2).

143. Webster v. Doe, 486 U.S. 592, 599 (1985).

144. Heckler v. Chaney, 470 U.S. 821, 830 (1985).

145. *See* High Country Citizens Alliance v. Clarke, 454 F.3d 1177, 1181 n. 3 (10th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 2134 (2007).

of congressional intent suffices to demonstrate implied statutory preclusion of judicial review. *Abbott Labs* set the stage for the implied preclusion analysis and is illustrative of the approach. In *Abbott Labs*, the Commissioner of Food and Drugs argued that the statutory scheme of the Federal Food, Drug, and Cosmetic Act demonstrated congressional intent to preclude pre-enforcement review of a regulation aimed at prescription drug labels.[146] The government argued that because Congress had included pre-enforcement review provisions for certain kinds of regulations, Congress's failure to include such provisions for the challenged labeling regulations demonstrated congressional intent to make pre-enforcement review of those regulations unavailable.[147]

The Supreme Court rejected the government's argument that the Federal Food, Drug, and Cosmetic Act precluded drug manufacturers (and a pharmaceutical association) from seeking pre-enforcement review of the labeling regulation.[148] The Court explained that the government had been unable to point to any "explicit statutory authority" in support of its preclusion argument.[149] In the absence of any explicit statutory language precluding review, the Court was "wholly unpersuaded" by the government's statutory scheme argument: "'The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.'"[150]

However, the Supreme Court's subsequent decision in *Block v. Community Nutrition Institute*, upon which the Tenth Circuit relies in *HCCA*, complicates—and to some extent obfuscates—the implied preclusion analysis used in *Abbott Labs*.[151] *Block* concerned the issue of whether individual milk consumers were precluded under the Agricultural Marketing Agreement Act ("AMA") from seeking judicial review of milk market orders that set a minimum price milk handlers had to pay pro-

146. *See* 387 U.S. 136, 136–40 (1967).
147. *Id.* at 141.
148. *Id.* at 148.
149. *Id.* at 141.
150. *Id.* (quoting LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 336–59 (1965)).
151. Block v. Cmty. Nutrition Inst., 467 U.S. 340 (1984).

ducers for reconstituted milk.[152] Milk consumers claimed that these milk market orders made it uneconomical for the handlers to process reconstituted milk.[153] The Court found that the statute did preclude such review.[154]

Block's approach to analyzing implied preclusion of judicial review has become firmly embedded in the litany of implied preclusion case law.[155] Writing for the Court, Justice O'Connor explained that when a party tries to overcome the presumption of review, *Abbott Labs*' clear and convincing evidence standard should not be applied in a "strict evidentiary sense."[156] The Court reasoned that the presumption favoring judicial review could be overcome "whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'"[157] Under the *Block* approach, congressional intent to preclude review may be fairly discerned by considering the following factors: (1) specific statutory language or legislative history that is a "*reliable indicator* of congressional intent;" (2) "judicial construction barring review and the congressional acquiescence in it;" (3) inferences drawn from the statutory scheme as a whole; in particular, when a statute "provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons," preclusion of using that mechanism by others may be implied.[158]

As the Court's opinion in *Block* formed the basis for the Tenth Circuit's reasoning and conclusion in *HCCA*, it is important to understand both the facts and the Court's reasoning in

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152. *See id.* at 341, 343–44.

153. *Id.* at 344.

154. *Id.* at 352–53.

155. *See, e.g.*, Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 (1994) (citing *Block* for the proposition that, in the context of a case involving delayed judicial review of final agency action, "[w]hether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, [and] its legislative history"); Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 672 (1986) (citing *Block*'s explanation of the clear and convincing evidence standard); Natural Res. Def. Council v. Johnson, 461 F.3d 164, 172–74 (2d Cir. 2006) (applying the *Block* test to implied preclusion issue); Painter v. Shahala, 97 F.3d 1351, 1356 (10th Cir. 1996) (same).

156. Block v. Cmty. Nutrition Inst., 467 U.S. 340, 350–51 (1984).

157. *Id.* at 351 (quoting Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 157 (1970)). The Court has not overruled *Abbott Labs* and continues to require "clear and convincing" evidence after *Block*. *See Bowen*, 476 U.S. at 672 (requiring a "heavy" burden to show preclusion after *Block*).

158. *Block*, 467 U.S. at 349 (emphasis added).

Block. The essential purpose of the AMA was to control destabilizing competition in the production of fluid milk products by dairy farmers and thus raise producer prices.[159] The statutory structure of the AMA reflected this concern. Unlike its predecessor statute, the AMA explicitly contained a provision by which milk handlers could obtain review of the Secretary's market orders.[160] Importantly, when Congress added the provisions allowing for review by dairy handlers of milk market orders, it did not add a similar provision allowing consumers to obtain similar review of milk market orders.[161] The Court determined that the legislature's addition of a provision for review by handlers, but not of a provision for review by consumers, evidenced Congress's "desire that *some* persons be able to obtain judicial review of the Secretary's market orders" but not others.[162] In reaching this conclusion, the Court emphasized that the omission was sufficient evidence of intent to preclude review in the context of "a complex [statutory] scheme of this type."[163] By implication, if a less complex statutory scheme omitted a judicial review provision for a particular class of persons, that omission might not provide sufficient evidence that Congress intended to foreclose review.

The Court in *Block* was also concerned with the possibility that allowing consumers to seek judicial review under the AMA would provide a "convenient device" by which milk handlers could evade the statutory scheme (which required them to exhaust their remedies under the AMA before seeking judicial review).[164] Judicial review for consumers would allow milk handlers to sidestep the exhaustion requirement in either of two ways: a handler, who may also be a consumer, could complain directly to a court; or the handler could use a consumer to initiate a suit that he would ordinarily be required to raise administratively.[165]

Based upon its consideration of these factors, the *Block* Court found that "congressional intent to preclude judicial review [was] 'fairly discernible' in the detail of the legislative

159. *See id.* at 341–42.
160. *Id.* at 346.
161. *Id.* at 347.
162. *Id.* at 346.
163. *Id.* at 347.
164. *See id.* at 347–48.
165. *Id.* at 348.

scheme."[166] At the same time, it reaffirmed the principle that "where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling."[167] In subsequent cases, the Supreme Court has continued to apply a strong presumption that administrative actions are subject to judicial review, especially when a finding of preclusion would eliminate all avenues of judicial recourse.[168]

In the wake of *Block*, both the Supreme Court and lower courts have typically refused to treat statutory silence as sufficient evidence, without more, that judicial review has been precluded.[169] For example, in *City of Albuquerque v. Department of the Interior*, the Tenth Circuit held that a statute expressly providing for judicial review of challenges to federal contract procurement decisions by actual or potential bidders, but not expressly providing such review to non-bidders, did not preclude those non-bidders from seeking judicial review.[170]

Similarly, in *Alto Dairy v. Veneman*, the Seventh Circuit held that dairy farmers were not precluded from seeking judicial review of federal rules that regulated the price of milk.[171] The statute authorized explicit judicial review of handlers' challenges to milk market orders but was silent as to whether farmers had a similar right to review.[172] According to the Seventh Circuit, "[t]he right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases,

166. *Id.* at 351.

167. *Id.*

168. *See, e.g.*, Immigration & Naturalization Serv. v. Cyr, 533 U.S. 289, 298 (2001) (recognizing the "strong presumption in favor of judicial review of administrative action"); Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 (1994) (affirming the strong presumption of review, but not applying it when an alternative avenue of judicial review was available); Board of Governors v. MCORP Fin., Inc., 502 U.S. 32, 41, 44 (1991) (requiring a showing of clear and convincing evidence to preclude review and finding that such a showing had been made when the agency's proceedings had not yet culminated in a final order). But see United States v. Fausto, 484 U.S. 439, 452 (1988) (acknowledging the presumption of review but not describing it as a "strong" presumption).

169. *See, e.g.*, Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 674 (1986); S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 754 (10th Cir. 2005); Alto Dairy v. Veneman, 336 F.3d 560 (7th Cir. 2003) (considering all of the *Block* factors and finding that the statute did not preclude review).

170. 379 F.3d 901, 908 (10th Cir. 2004).

171. 336 F.3d 560 (7th Cir. 2003).

172. *Id.* at 566.

unless members of the protected class may have judicial review the statutory objectives might not be realized."[173]

Judge Posner found in *Alto Dairy* that the implication of *Block* was "less that judicial review should be denied to all aggrieved persons except handlers than that aggrieved persons should be required to exhaust administrative remedies before suing."[174] He explained that this distinction was not important in *Block* because the consumers who sought review in that case had similar interests to those of milk handlers, who were required to exhaust their administrative remedies before seeking judicial review.[175] By contrast, the farmers in *Alto Dairy* had a unique interest in challenging milk market orders that allegedly "pinched them" and they could seek judicial review directly because the agency had not imposed an administrative exhaustion requirement upon the farmers.[176]

Two other factors also seem particularly persuasive in leading courts to find implied preclusion. The first such factor is whether the plaintiff has an alternative means of obtaining judicial review. The second closely related factor is whether the asserted second method of obtaining review would frustrate the statutory scheme. For example, in *Natural Resources Defense Council v. Johnson*, the Second Circuit held that district court review of EPA's decision to retain certain pesticide tolerances in food was precluded, when the plaintiffs could have availed themselves of an existing statutory mechanism that allowed for review in the appropriate circuit court of appeals.[177] The Second Circuit could probably have resolved the preclusion issue based solely upon the relevant statutory language—"[a]ny issue as to which review is or was obtainable under this subsection shall not be the subject of judicial review under any other provision of law"—but instead, the court proceeded to explain that the statutory scheme evidenced "fairly discernible" intent to preclude review.[178] Specifically, the court reasoned that allowing direct review in the district court would "lead to a scheme in which the same tolerance would be subject to review

173. *Id.* at 566 (citing Barlow v. Collins, 397 U.S. 159, 167 (1970)).
174. *Id.* at 567.
175. *Id.*
176. *Id.* at 568–69.
177. Natural Res. Def. Council. v. Johnson, 461 F.3d 164, 167–76 (2d Cir. 2006).
178. *Id.* at 174.

by both the district courts and the courts of appeals at the same time."[179] Given the existing review process, the court found it "highly unlikely that Congress intended to create a scheme involving multiple avenues of review and potential contradictory results."[180]

In sum, while *Block's* "fairly discernible intent to preclude review" language has become integral to the implied preclusion analysis, subsequent cases continue to reaffirm the strong presumption of review.[181] Furthermore, even when an elaborate, modern statutory scheme explicitly provides for judicial review by one party and not another, that fact alone is not dispositive. Instead, the determination must ultimately be based upon a fact-specific inquiry. Where "substantial doubt" exists, the presumption of review controls.

IV. *HIGH COUNTRY CITIZENS ALLIANCE V. CLARKE*

A. Factual and Procedural History

The key question raised in *HCCA* and addressed in this Note is whether the 1872 Mining Law impliedly precludes judicial review of a citizen protest that is brought before the BLM to challenge the validity of a patent application. As an initial matter, it is important to acknowledge the procedural posture of the plaintiffs in *HCCA*. As is typical in cases involving challenges to patents, the protestors here brought their administrative challenges before the BLM prior to issuance of the Mt. Emmons patents.[182] However, they were obligated to seek judicial review after their administrative protest was dismissed and the BLM issued the patents.[183] Thus, for purposes of this discussion, protests to patent applications and protests to patents themselves are procedurally equivalent. The situation of a post-hoc challenge to the BLM's issuance of a patent would pose a different situation.

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179. *Id.*

180. *Id.*

181. *See supra* note 169.

182. *See* High Country Citizens Alliance v. Clarke, 454 F.3d 1177, 1179 (10th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 2134 (2007).

183. *See id.* at 1180 (noting that the BLM simultaneously dismissed their protests and issued the patents).

It is also necessary to understand the basic nature of the plaintiffs' substantive claims. HCCA, the Town, and the County filed three administrative protests with the BLM challenging the validity of then-owner MEMCO's patents under the 1872 Mining Law.[184] Their central argument alleged that the mining claims did not contain the "required discovery of a valuable mineral deposit within each claim, and that the issuance of a patent for the acreage of the claims exceed[ed] that allowed by the 1872 mining law."[185] They also raised a Freedom of Information Act ("FOIA") claim.[186] On April 2, 2004, the BLM dismissed HCCA's protests in a written decision and granted MEMCO nine of the ten patent applications.[187]

Twelve days later, the plaintiffs sued MEMCO and the BLM in the United States District Court for the District of Colorado, requesting declaratory and injunctive relief.[188] They claimed that the BLM violated

> (1) [T]he 1872 Mining Law and the [APA] by granting MEMCO the patent,
>
> (2) [The FOIA] by withholding certain documents from Plaintiffs, and
>
> (3) The [FLPMA] and the APA by depriving plaintiffs of an opportunity to review the patent application and failing to provide prompt notice of the denial of the protests and a statement of reasons for the denial.[189]

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184. *Id.* at 1179. For an explanation of the complex, changing ownership of the Mt. Emmons patents, see *supra* note 4.

185. *Id.* at 1179–80 (citations omitted).

186. *Id.*

187. *Id.* at 1180.

188. *Id.*

189. *Id.* (internal citations omitted). Specifically, the plaintiffs claimed that the BLM violated § 1701(a)(5) of FLPMA, located at 43 U.S.C., which provides that the BLM must consider the views of the national, regional, and local communities in the development, management, and implementation of resource management plans. *Id.* They also claimed that the BLM failed to comply with the FOIA, 5 U.S.C. § 552 (2000), by failing to produce agency documents in response to a request filed by HCCA. *Id.* Under § 552, the public has a right of access to federal agency records so that they may scrutinize agency action in order to hold the government accountable for its decisions. *See* Casad v. U.S. Dep't of Health & Human Servs., 301 F.3d 1247, 1250 (10th Cir. 2002).

The district court addressed the plaintiffs' second claim by requiring both parties to make submissions so that the district court could ascertain whether the BLM violated FOIA.[190] With regard to claims one and three, the district court held that it lacked subject matter jurisdiction, because "third parties who claim no ownership interest in the land subject to a mineral patent cannot challenge the issuance or validity of the patent under the 1872 Mining Law and have no right to relief under the APA."[191] Accordingly, the court entered judgment in favor of the defendants on claims one and three.[192]

B. The Tenth Circuit's Decision

1. Majority Opinion

HCCA, the Town, and Gunnison County appealed the district court's decision to dismiss their motion for a preliminary injunction that would have restored federal title to the Mt. Emmons patents. On appeal, HCCA and the other plaintiffs asserted that the district court had ignored the APA's presumption of review and had improperly concluded that the mining law precluded review of their claims.[193] The Tenth Circuit affirmed the lower court's decision by a two-to-one vote.[194] The two-judge majority concluded that because the Mining Law impliedly precluded review of the plaintiffs' claims, the APA did not waive the BLM's sovereign immunity.[195] These judges evaluated the Mining Law in the context of the *Block* factors.[196]

The majority opinion focused on four basic aspects of the Mining Law: legislative history (including the legislative history of the Lode and Placer Laws); contemporaneous judicial constructions of the Mining Law; congressional "acquiescence" in the Mining Law's status quo—by which the court meant that Congress had amended the Mining Law many times and yet

190. *HCCA*, 454 F.3d at 1180.
191. *Id.*
192. *Id.*
193. Appellant's Opening Brief, High Country Citizens Alliance v. Clarke, No. 05-1085, 2005 WL 2174542, at * 9–10 (10th Cir. 2005).
194. *HCCA*, 454 F.3d at 1192–93.
195. *Id.* at 1192.
196. *Id.* For a discussion of the *Block* factors, see *supra* note 158 and accompanying text. *See generally* Part III.B.

not explicitly created a right of action for parties without a competing property interest; and the structure of the statutory scheme as a whole.[197]

With regard to the statute's legislative history, Judge Kelly, writing for the majority, properly concluded that "[i]t is beyond doubt that in 1872 Congress was concerned with finality of title."[198] To resolve the difficulty of finding legislative intent concerning an issue over which Congress had clearly been divided, the *HCCA* majority sought to find instances where legislators on both sides of that issue had found common ground. The majority noted that amidst the heated debate over the shape of a new federal mineral policy, "[t]he one common thread was a desire to establish secure and permanent title to the land in the miners."[199]

The *HCCA* majority relied on a key assumption in its interpretation of the legislative history: namely, that the concept of finality of title was synonymous with the ability to patent.[200] As a logical corollary to this assumption, the majority reasoned that allowing a third party without a competing property interest to challenge a mineral patent application would frustrate the Mining Law's purpose to ensure finality of title.[201] Third party challenges to mineral patents would "allow the kind of lengthy litigation over rights that a patent was designed to avoid."[202]

The majority next analyzed judicial constructions of the Mining Law.[203] Judge Kelly implicitly acknowledged that the issue raised here was a matter of first impression: "we have been unable to find, and the parties have not provided, a case directly on point . . . ."[204] Despite this acknowledgment, he found it to be "essentially undisputed" that cases decided both before and after the APA had precluded persons situated similarly to the Crested Butte plaintiffs from obtaining judicial review.[205] Undoubtedly, the pre-APA cases typically contained

197. *HCCA*, 454 F.3d at 1183–92.
198. *Id.* at 1185.
199. *Id.* at 1184.
200. *See id.* at 1183–92.
201. *See id.* at 1185.
202. *Id.* at 1185.
203. *Id.* at 1186–90.
204. *Id.* at 1187–88.
205. *See id.* at 1186.

strong language emphasizing the ministerial nature of processing patent applications and the "unassailability" of a patent.[206] For example, a passage from *Wight v. Dubois* cited by the Tenth Circuit in *HCCA* stated that

> [w]hen the patent issues the title passes from the government, and no one can question that title who has not prior thereto, by compliance with the conditions prescribed by the government, himself acquired an interest in the land. It matters not what wrong the patentee may have perpetrated upon the government; it, and it alone, can complain. In other words, when grantor and grantee are satisfied, a stranger has nothing to say.[207]

Yet while the Tenth Circuit cited the language of *Wight*, it did not explain the context in which the court made this statement.[208] In fact, Wight and the other plaintiffs were actually adverse claimants who had unsuccessfully attempted to contest a patent application after the 60-day statutory notice period, lost, and then sought to collaterally attack the patent in court.[209] Recall that the Mining Law expressly provides that failure to file an adverse claim within the statutory period amounts to forfeiture of the adverse claim.[210] Even if the adverse claimants in *Wight* had not been statutorily precluded from challenging the patent in court, under *Block* they would likely be precluded from end-running the Mining Law's statutory scheme in this manner.[211] The quoted language from *Wight* thus has less persuasive force than the majority accords it with respect to third parties who are not prevented by any explicit language in the Mining Law from seeking judicial review of protests to patent applications. While this Note does not purport to analyze in exacting detail the facts of each case relied on by the majority (or the dissent) in *HCCA*, the Note does point out that the case law—especially the pre-APA case law like *Wight*—does not precisely address the issue raised in *HCCA*. Therefore, to the extent that these cases do have per-

206. *See id.* at 1186–87.
207. 21 F. 693, 693–94 (C. C. Colo. 1884).
208. *See HCCA*, 454 F.3d at 1187.
209. *Wight*, 21 F. at 693–94.
210. *See supra* notes 109–112 and accompanying text.
211. *See supra* notes 165–66 and accompanying text.

suasive power, such power must be limited to the extent that they are taken in context.

The majority in *HCCA* also briefly analyzed whether Congress acquiesced in judicial interpretations of the Mining Law.[212] Its analysis produced little support for its conclusion that the Mining Law impliedly precluded review in this case.[213] The court acknowledged that the question of congressional acquiescence on the particular facts at issue in *HCCA* was a "difficult and close question."[214] It ultimately avoided any conclusive determination by explaining that consideration of the other *Block* factors was sufficient to resolve the preclusion issue.[215] Finally, the majority reviewed the Mining Law's statutory scheme.[216] Its reasoning on this prong was relatively straightforward: the fact that the Mining Law expressly provides for judicial review of challenges to patents by some parties but not others "suggest[ed] an intent to preclude review."[217]

In sum, the majority in *HCCA* seemed to rely primarily on three factors to reach its conclusion that individuals, citizen groups, and local governments cannot seek judicial review of the BLM's decision to deny their protest and grant a mineral patent. First, the majority relied upon the legislative history of the Mining Law—specifically, on the relationship between finality of title and judicial review of protests brought by third parties. Second, it relied on pre-1905 cases construing the Mining Law and more recent circuit cases that "do not involve the Mining Law" at all. Third, it relied on the fact that the Mining Law expressly provides for review by some parties but not others.[218] Based upon its consideration of these factors (and, to a lesser extent, of the other factors discussed above), the majority found that intent to preclude judicial review was "fairly discernible" in the statutory scheme.[219]

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212. *HCCA*, 454 F.3d at 1190.

213. *See id.* (equivocating as to whether Congress had acquiesced in "judicial interpretations of *Steel v. Smelting Co.*[, 106 U.S. 447 (1882),] and its progeny").

214. *Id.*

215. *Id.*

216. *See id.* at 1191–92.

217. *See id.* at 1191–92.

218. *Id.* at 1188; *see id.* at 1183–88.

219. *See id.* at 1192.

2. Dissenting Opinion

One judge vigorously dissented.[220] With regard to the presumption of review, Judge Briscoe "took the court to task" for its analysis of whether the presumption of review had been overcome.[221] Reciting the litany of *Abbott Labs*, he affirmed the "strong presumption favoring judicial review" and rejected what he characterized as the majority's resort to a lesser "sufficiency of the evidence" standard.[222] Judge Briscoe stated that the majority had construed *Block* too narrowly.[223] Furthermore, he criticized the majority for failing to charge the agency "with the burden to establish preclusion" and for requiring an inadequate showing of intent to preclude review.[224]

Judge Briscoe concluded that the Mining Law's text, its legislative and judicial history, and its statutory scheme all left substantial doubt as to whether Congress intended to preclude review of third party protests to patents.[225] While Judge Briscoe unconvincingly reasoned that the legislative history of the Lode and Placer Acts was irrelevant to understanding the Mining Law,[226] he more persuasively argued that the text, statutory scheme, and judicial history surrounding the Mining Law "fail[ed] to show that Congress intended to preclude judicial review."[227]

Judge Briscoe's dissent criticized the majority's conclusion that when Congress enacted the Mining Law, it intended to minimize lengthy litigation.[228] He pointed out that by creating mechanisms for resolving adverse claims and protesting patent applications, the Mining Law "unquestionably *increased* litigation over the issuance of a patent by granting adverse claimants a cause of action and allowing third parties to participate

220. *HCCA*, 454 F.3d at 1193 (Briscoe, J., dissenting).
221. *Id.* at 1194–95.
222. *Id.* at 1194.
223. *Id.*
224. *See id.*
225. *Id.*
226. Most authorities on the Mining Law agree that the 1872 Act essentially codified, with some modifications, the Lode and Placer Acts. *See, e.g.*, *supra* note 87 and accompanying text. For example, Mayer and Riley explain that the 1872 Law "codified the acts of 1866 and 1870" and that "[t]he most important elements of [the earlier laws] were untouched." MAYER & RILEY, *supra* note 60, at 53.
227. *HCCA*, 454 F.3d at 1195 (Briscoe, J., dissenting).
228. *See id.* at 1195–96.

in the administrative proceeding."[229] Thus, the majority's argument that allowing judicial review of third party protests would contravene legislative intent to decrease mining litigation was undermined by the statutory text itself. Judge Briscoe found the majority's reasoning on this point especially troubling because, in his words, the preclusion analysis should generally "give greater weight to the statute's text, and little, if any, weight to legislative history that conflicts with it."[230]

The dissent also criticized the majority's reliance on cases that have "little, if any, applicability to the questions presented."[231] More precisely, "[n]one of the majority's cases involve[d] preclusion of judicial review as to a protester's challenge of the BLM's determination."[232] He further explained that the pre-1905 Mining Law cases cited by the majority were "distinguishable because they concerned the limited concept of standing at the time."[233] With regard to *Wight*, Judge Briscoe explained that its analysis "rested on the premise that a protester, in 1884, had no standing to sue in court regarding the issuance of a patent."[234] He also distinguished two other early mining cases, *Smelting Company v. Kemp*,[235] and *Steel v. St. Louis Smelting & Refining Company*,[236] as addressing the distinction between courts of law and equity. Judge Briscoe pointed out that according to *Steel*, a plaintiff *could* "seek relief from a court of equity [concerning a patent] if he had an equitable right to the premises."[237]

Judge Briscoe dismissed the modern Ninth Circuit cases cited by the majority as distinguishable because they simply "did not involve the Mining Law."[238] He did, however, find analogous a modern Eighth Circuit case, *South Dakota v. Andrus*, which involved a state's challenge to a mineral patent that it "had no ownership interest in."[239] In *Andrus*, the Eighth Circuit evaluated the merits of South Dakota's chal-

229. *Id.* at 1196.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. 104 U.S. 636 (1881).
236. 106 U.S. 447 (1882).
237. *HCCA*, 454 F.3d at 1197 (Briscoe, J., dissenting).
238. *Id.*
239. *Id.* (citing South Dakota v. Andrus, 614 F.2d 1190 (8th Cir. 1980)).

lenge to the mineral patent "without discussing whether the [Mining Law] precluded judicial review" of the state's claim.[240] The Eighth Circuit's omission of an implied preclusion analysis suggests that the Mining Law does not preclude judicial review of all third party challenges to mineral patent applications. However, the issue in *Andrus* was whether the National Environmental Policy Act ("NEPA")required the BLM to file an Environmental Impact Statement before issuing a mineral patent on national forest land.[241] Thus, *Andrus* does not directly address the question of whether the Mining Law precludes review of third party challenges brought under the Mining Law or the APA.

Finally, the dissent rejected the majority's analysis of the Mining Law's statutory scheme. The starting point for his analysis was the *Abbott Labs* concept that mere silence in a statute "should not be read as precluding judicial review under the APA."[242] Applying this framework, Judge Briscoe found that the statutory scheme for judicial review set forth in the Mining Law was easily distinguishable from the AMA's judicial review provisions.[243] Specifically, Judge Briscoe noted that "[u]nlike the milk consumers in *Block*, Congress expressly allowed protesters, as a class, to participate in the regulatory process under the Mining Law, and Congress relied upon third parties to ensure that patent applications complied with the statute by filing protests with the agency."[244] He concluded that the Mining Law did not preclude judicial review of third party protests to patent applications.[245]

V. ANALYSIS OF THE TENTH CIRCUIT'S APPROACH TO IMPLIED PRECLUSION OF JUDICIAL REVIEW AS DEMONSTRATED BY ITS APPLICATION OF *BLOCK* TO THE 1872 MINING LAW

Given the marked difference between the *HCCA* majority and dissent's application of implied preclusion jurisprudence, and their contradictory conclusions, it is appropriate to ask

240. *See Andrus*, 614 F.2d at 1192.
241. *See id.*
242. *HCCA*, 454 F.3d at 1197 (quoting Sierra Club v. Peterson, 705 F.2d 1475, 1478–79 (9th Cir. 1983)) (Briscoe, J., dissenting).
243. *See id.* at 1199.
244. *Id.*
245. *Id.*

whether the majority's reasoning and conclusion are correct. It is important to keep in mind that the answer to this question does not turn on whether the majority's analysis of the Mining Law or the dissent's analysis is more persuasive. Rather, the question that must be asked is whether, notwithstanding the conflicting evidence cited by the dissent, the majority's analysis provides clear and convincing evidence of fairly discernible intent to preclude judicial review of protests to mineral patent applications that are brought by third parties. This Part looks critically at the evidence relied on by the majority in *HCCA*, and it compares the majority's analysis with the Supreme Court's analysis of the AMA in *Block*. The Note concludes that the *HCCA* majority fails to meet the standard for finding implied preclusion that the Supreme Court set forth in *Block*.

An initial problem with the majority's reliance on *Block* is that the statutory structure of the Mining Law is not analogous to the complex statutory scheme of the AMA.[246] The Mining Law is far simpler than the AMA at issue in *Block*. The Mining Law sets forth the process for obtaining a mineral patent in a few paragraphs,[247] and its explanation of the entire adverse claimant procedure involves fewer than 400 words.[248] As noted earlier, the Mining Law essentially codified the customary laws of the early mining camps, with some modifications.[249] Codification of such rules is hardly analogous to a complex, modern statute created through the traditional legislative process.

Second, the Mining Law's treatment of third party protesters also differs significantly from the AMA's treatment of milk consumers. The Mining Law's provision of judicial review must be understood in light of the time period during which it was enacted. Under contemporary jurisprudence in 1872, third parties lacked standing to get into federal court.[250] This fact alone makes it unlikely that legislators explicitly considered the possibility of judicial challenges to patent applications brought by third parties. Historical realities also suggest that Congress probably did not give much thought to the question of whether citizens or local governments could challenge mineral

246. *See* discussion *supra* Part III.B.
247. *See* 30 U.S.C. § 29 (2000).
248. *See id.* § 30.
249. *See* WILKINSON, *supra* note 57, at 38–39.
250. *See HCCA*, 454 F.3d at 1199 (Briscoe, J., dissenting).

patent applications in the courts.[251] This is borne out by the complete lack of case law or historical challenges to mining patents by citizens who lacked a competing property interest.

Given that it seems likely that Congress did not specifically address the question of whether third parties could seek judicial review of protests to patent applications, it is significant that the text of the Mining Law itself leaves the door open for third parties to play an administrative role in the patent process. Section 29's protest mechanism appears on its face to provide third parties with a means by which to challenge patent applications, and it has been interpreted accordingly by the BLM's own regulations.[252] The very fact that the Mining Law provides a separate mechanism for such challenges demonstrates congressional recognition that a third party's interest in challenging a patent application is distinct from an adverse claimant's interest in doing so. These distinctions demonstrate that the Mining Law's protest provision places third party challengers to mining patents in a very different statutory position from the milk consumers in *Block*, who were left entirely out of the AMA.[253]

It is also notable that unlike the legislative amendments to the AMA, the Mining Law's procedures for bringing adverse claims and protests have never been amended. Thus, unlike in *Block*, subsequent legislative events shed little light on Congress's intent regarding judicial review of administrative protests to patent applications. [254] Even Judge Kelly seemed unwilling to suggest that Congress's failure to amend section 29 was evidence of congressional intent to preclude review by third parties.[255]

Third, unlike the situation in *Block*, interpreting the Mining Law to allow judicial review of administrative challenges that are already permitted by the statute would not frustrate

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251. *See supra* Part II.C.

252. *See id.*

253. *See* Block v. Cmty. Nutrition Inst., 467 U.S. 340, 347 (1984).

254. The one significant change to the patent process, the effective moratorium on new patents issued by Secretary Babbitt in 1993, sheds little light on the question of whether Congress intended third parties to be able to bring judicial challenges to mineral patents. *See supra* note 11.

255. *See HCCA*, 454 F.3d at 1190 (assuming that early case law interpreting this provision would have precluded the *HCCA* plaintiffs from having a cause of action, and yet equivocating as to whether Congress had acquiesced in the early case law); *supra* notes 215–18 and accompanying text.

the Mining Law's statutory scheme.[256] As interpreted by the BLM's regulations, section 29 does not permit adverse claimants to bypass the adverse claim procedures in section 30.[257] The court's opinion in *Wight* similarly rejected the idea that an adverse claimant could use this provision to avoid challenging a patent application after the statutory limitations period had ended.[258] Moreover, judicial review in this case would be consistent with Judge Posner's interpretation of *Block* as primarily concerning exhaustion of administrative remedies, because section 29 clearly requires protestors to first go before the agency.[259]

Finally, while the *HCCA* majority rightly emphasizes the importance of finality of title to the Mining Law, its conclusions about what that concept implies with regard to judicial review of patent protests are unconvincing. In particular, the majority overstates the connection between finality of title and a citizen's ability to seek judicial review of a protest challenging a patent application. While the concept of securing title was undoubtedly paramount to Congress in 1872, the legislative history demonstrates that security of title was not synonymous with the ability to patent a mining claim. Senator Stewart actually argued against requiring miners to file patent applications within a set period of time and advocated leaving that possibility for a later day.[260] The very fact that Senator Stewart resisted a plan to require miners to file patent applications demonstrates that patenting was a bonus for the hard-working miner, but it was not a necessary step to secure one's title to work and live on a mining claim.

Even the Supreme Court has acknowledged that a mineral patent is not essential to secure a miner's title to his mining claim. About ten years after the passage of the 1872 Mining Law, the Court clarified that the security of the property right enjoyed by an unpatented mining claimant was not significantly less than that enjoyed by a patentee: "the possession under a claim established according to law is fully recognized by the acts of Congress, and the patent adds little to the secu-

256. *See supra* discussion Part III.B.

257. For a discussion of section 29's protest provision and BLM regulations interpreting it, see *supra* notes 113–17 and accompanying text.

258. *See supra* notes 208–12 and accompanying text.

259. *See supra* note 175 and accompanying text.

260. *See supra* notes 79–80 and accompanying text.

rity of the party in continuous possession of a mine he has discovered or bought."[261] Senator Stewart's own comments and Supreme Court jurisprudence thus undermine the *HCCA* majority's conclusion that mineral patents were so essential to ensure finality of title that Congress must have intended for such patents to be unassailable.

The majority's conclusion that the emphasis on security of title demonstrates congressional intent to preclude third parties from judicial review is also undermined by the actual text of the Mining Law.[262] As Judge Briscoe's dissent illuminated, sections 29 and 30's mechanisms for bringing protests and adverse claims, respectively, actually provided for increased participation by the public in patent protests.[263] The effect of these sections was to increase litigation over mining claims, not to decrease it.[264] These facts thus suggest that Congress intended to provide a means for resolving disputes and proving up claims, so that a mineral patent would only be granted to a claimant who met the legal requirements to obtain the patent. This purpose is consistent with allowing judicial review of third party challenges to patent applications.

While finality of title was undoubtedly central to the Mining Law, that law had the equally important purpose of legalizing mining.[265] Remember that until the passage of federal legislation authorizing mining activities, hardrock miners were technically trespassers on the public lands.[266] Under the federal mining laws, the owner of an unpatented mining claim was no more of a trespasser than was the owner of a patented mining claim; both had property interests against other miners and the U.S.[267] Once this dual purpose of the Mining Law is accounted for, it becomes even less clear that Congress's interest in security of title can or should be taken as evidence of congressional intent to preclude review of third party patent protests.

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261. Chambers v. Harrington, 111 U.S. 350, 352–53 (1884).
262. *See supra* notes 229–31 and accompanying text.
263. *Id.*
264. *Id.*
265. High Country Citizens Alliance v. Clarke, 454 F.3d 1177, 1183–92 (10th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 2134 (2007).
266. *See* WILKINSON, *supra* note 57, at 42.
267. *See* discussion *supra* Part II.

The foregoing analysis goes a long way towards demonstrating that Congress did not intend to preclude third parties from seeking judicial review of administrative protests to mineral patent applications. More importantly, it shows that at the least, substantial doubt remains concerning congressional intent to preclude review of patent protests by third parties. As the Court explained in *Block*, "where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling."[268] Thus, the presumption of review should control here. This result is consistent with the Eighth Circuit's assumption in *South Dakota v. Andrus* that a state without a competing property interest could seek judicial review of a NEPA challenge to a mineral patent application.[269] It is also consistent with a Ninth Circuit case not mentioned in *HCCA*, which reached the merits of an environmental group's claim that the government violated the Wilderness Act by issuing a mineral patent application that allegedly did not contain a "valuable mineral deposit."[270] In sum, the majority's conclusion in *HCCA* is not supported by the Supreme Court's reasoning in *Block* and cannot be reconciled with the presumption in favor of review.

CONCLUSION

The analytical difficulty with the *HCCA* majority's approach, in the final instance, is its application of the somewhat misleading concept of "fairly discernible" intent to preclude judicial review, the concept established by the Supreme Court in *Block*. The majority's analysis transforms the presumption of review into something that more closely resembles a sufficiency of the evidence analysis. This modification of the *Block* test, if followed by other courts, could significantly erode the presumption of review and could frustrate the important purposes served by that presumption.[271]

This Note concludes that the presumption of review must remain a vital part of the implied preclusion analysis. The pre-

268. Block v. Cmty. Nutrition Inst., 467 U.S. 340, 351 (1984).
269. *See supra* notes 239–41 and accompanying text.
270. *See* Wilderness Soc'y v. Dombeck, 168 F.3d 367 (9th Cir. 1999).
271. *See supra* Part III.

sumption of review ensures that courts do not erroneously preclude citizens or local governments from challenging agency actions that directly affect them and their communities. Furthermore, the real-life consequences to an individual or a community of being precluded from seeking judicial review may be severe. This factor also mitigates in favor of grounding the implied preclusion analysis in concrete evidence rather than in the remnants of a murky historical trail.

As a result of the Tenth Circuit's decision in *HCCA*, the High Country Citizens' Alliance, the Town of Crested Butte, and Gunnison County have no judicial recourse to challenge the lawfulness of the Mt. Emmons mineral patents. That decision has potential to shake their entire community and way of life in the near future: plans to develop the "Lucky Jack" mine on Mt. Emmons are currently underway. These parties and their constituents may not know what the APA says, or what the presumption of review entails, but many of them have been fighting for almost thirty years to keep a molybdenum mine out of their backyard. Their right to be heard should not depend on such flimsy evidence.