HAS THE FEDERAL COURTS' SUCCESSIVE UNDERMINING OF THE APA'S PRESUMPTION OF REVIEWABILITY TURNED THE DOCTRINE INTO FOOL'S GOLD?

BY

COLIN A. OLIVERS*

The Mining Law of 1872 casts open public lands to mineral prospecting. Assuming a mining claimant can establish the existence of a valuable mineral deposit and adhere to several procedural requirements, the Secretary of Interior is authorized to sell the public land for five dollars an acre. This singular focus on resource extraction has long been criticized by opponents of the Mining Law and many have characterized the Mining Law as a relic of the disposition era of natural resources law. Therefore, when a mining company sought to acquire 174 acres of Mount Emmons in Colorado's Gunnison National Forest, an area often used by locals, it was not surprising that the residents of Crested Butte opposed the application. Despite the mining company's concession that a molybdenum mine at Mount Emmons would not be economically feasible, the Secretary of Interior granted the mining company's application. Unhappy with the administrative outcome, the residents sought to challenge the agency's determination in the federal courts under the Administrative Procedure Act's (APA) grant of judicial review to individuals "suffering a legal wrong because of agency action." However, in High Country Citizens Alliance v. Clarke*, the Tenth Circuit held that the plaintiffs did not have a right to judicial review because the Mining Law of 1872 clearly precluded the citizens from challenging the Secretary's determination and therefore fell within the APA's limiting exception for statutes that preclude judicial review.*

This Comment traces Supreme Court cases establishing when statutes preclude judicial review to understand how the Court's treatment of statutory preclusion has changed over time. The Comment asserts that the Supreme Court has progressively weakened the APA's presumption in favor of judicial review by decreasing the showing necessary to establish that a particular statute precludes judicial

* Current Materials Editor, *Environmental Law*, 2007–2008; J.D. and Certificate in Environmental and Natural Resources Law, expected 2008, Lewis and Clark Law School; B.S., 2004, University of Washington. Thank you to the dedicated staff of *Environmental Law* and to my family and Juliana Hentz for their continued support.

review. The Comment then considers how the Tenth Circuit applied this doctrine to the unique circumstances of the Mining Law of 1872. Specifically, consideration is given to the Tenth Circuit's reasoning in order to understand how the continued weakening of the APA's presumption in favor of judicial review operates to the disadvantage of plaintiffs harmed by agency actions. In the end, the Comment concludes that federal courts should reassert the APA's presumption in favor of judicial review in order to give that statute its intended effect.

I. INTRODUCTION 244
II. THE GENERAL MINING ACT OF 1872 246
A. *Mining Under the General Mining Law of 1872* 247
B. *Abuses of the Mining Law* 249
III. AVAILABILITY OF JUDICIAL REVIEW FOR THIRD PARTIES UNDER THE MINING LAW 254
A. *The APA and Preclusion of Judicial Review* 254
1. *Preclusion of Judicial Review Prior to Passage of the APA* 255
2. *Preclusion of Judicial Review after Passage of the APA* 255
3. *Weakening of the Presumption in Favor of Judicial Review* 257
4. *Block v. Community Nutrition Institute and Onward* 260
B. *An Examination of Preclusion of Judicial Review in* High Country Citizens Alliance v. Clarke 262
1. *The Court's Treatment of the APA* 263
2. *The Court's Application of the* Block *Factors* 265
a. *Import of Legislative and Judicial History* 265
b. *Contemporaneous Judicial Construction and Congressional Acquiescence* 268
c. *Statutory Scheme as a Whole* 269
IV. CONCLUSION 271

I. INTRODUCTION

In 1992, a private mining company applied for a mining patent (fee title) to 174 acres located in the Gunnison National Forest, atop Mount Emmons directly outside the Town of Crested Butte, Colorado.[1] Facing the prospect of losing access to a popular feature of the town's important tourist economy[2] and the threat of environmental harms that result from hardrock

[1] *See* High Country Citizens Alliance v. Clarke (*High Country Alliance*), 454 F.3d 1177, 1179 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 2134 (2007) (explaining that Mount Emmons Mining Company applied for a patent for "approximately 174 acres of public land in the Gunnison National Forest"); Brief of Petitioner-Appellant at 4–5, High Country Citizens Alliance v. Clarke, 454 F.3d 1177 (10th Cir. 2006) (No. 05-1085), 2005 WL 2174542 (describing the location of the lands covered by the patent as "outside the Town of Crested Butte" and describing Mount Emmons as the backdrop of the town).

[2] *See* Brief of Petitioner-Appellant, *supra* note 1, at 4–8 (describing the importance that tourism plays for the Town of Crested Butte, and the central importance that Mount Emmons

mining,[3] the Town of Crested Butte, Gunnison County, and the High Country Citizens' Alliance (plaintiffs) filed protests with the Bureau of Land Management (BLM). These protests asserted that the mining company had not made a "'discovery of a valuable mineral deposit'"[4] as required by the General Mining Act of 1872 (Mining Law).[5] Under the Mining Law, the requirement that a claim contain a valuable mineral deposit is paramount to a miner's property interest in the land and thus the ability to obtain a patent to the land. The existence of a valuable mineral deposit is dependent on a finding by the Secretary of Interior that the mineral deposit will meet the "marketability test," which "requires the miner to show that the deposit can be extracted, removed, and, marketed at a profit,"[6] such that a prudent person would be induced to proceed.[7] Despite the mining company's concession of the "'undisputed fact that development of a molybdenum mine at Mt. Emmons is not feasible due to a chronic and world-wide oversupply of molybdenum that has persisted since the early 1980s,'"[8] the Secretary of the Interior denied the citizens' protest, and granted a patent for 155 of the 174 acres.[9] In exchange for the ownership of 155 acres of the public lands, the mining company paid a token sum of $875[10]—all that is required by the Mining Law.[11]

Unhappy with the Secretary of the Interior's decision to deny the administrative protest and proceed with the patent, the plaintiffs sought redress from the federal courts. Utilizing the broad provisions for judicial review provided by the Administrative Procedure Act (APA),[12] the plaintiffs sued the federal government, challenging its decision that a valuable mineral deposit was present within the mining company's claim.[13] In response, the defendants (the federal government, the private mining company, and its parent company) brought motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), asserting that the court lacked subject matter jurisdiction.[14] The

plays to the tourism industry).

[3] *See* JOHN D. LESHY, THE MINING LAW: A STUDY IN PERPETUAL MOTION 188 (1987) (describing the environmental hazards created by toxic mining wastes).

[4] *High Country Alliance*, 454 F.3d at 1179.

[5] General Mining Act of 1872, 30 U.S.C. §§ 22–24, 26–28, 29, 30, 33–35, 37, 39–43, 47 (2000).

[6] ROBERT L. GLICKSMAN & GEORGE CAMERON COGGINS, MODERN PUBLIC LAND LAW: IN A NUTSHELL 142 (2d ed. 2001).

[7] *See id.* at 141–42 (explaining that the marketability test is really just an extension of the Department of Interior's prior prudent person test from Castle v. Womble, 19 Pub. Lands Dec. 455 (1894)).

[8] Brief of Petitioner-Appellant, *supra* note 1, at 8–9.

[9] *High Country Alliance*, 454 F.3d at 1180.

[10] Transcript, Elizabeth Arnold, *All Things Considered: Critics Call for Reform of 1872 Mining Law* (National Public Radio broadcast June 22, 2004). An audio stream of the radio broadcast may be accessed at: http://www.npr.org/templates/story/story.php?storyId=1958649.

[11] The Mining Law, when passed in 1872, required that miners pay five dollars per acre to patent their claims. Congress has never amended the Mining Law to provide for a more appropriate valuation of the public lands. 30 U.S.C. § 29 (2000).

[12] Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2000). The provisions for judicial review are at 5 U.S.C. §§ 701–706 (2000).

[13] *High Country Alliance*, 454 F.3d at 1179.

[14] *Id.* at 1180.

district court granted the defendants' motion on the ground that the Mining Law impliedly precluded requests for judicial review of administrative actions when brought by third parties.[15] From this judgment, the plaintiffs appealed to the Tenth Circuit Court of Appeals, which affirmed the district court's ruling.[16] The Tenth Circuit held that "[d]espite the presumption of reviewability, it is fairly discernable here . . . that Congress, when it enacted the 1872 Mining Law, intended to preclude judicial review to third parties claiming no property interest in the patented land and to date has not chosen to change this approach."[17]

The purpose of this Comment is to understand the basis for the Tenth Circuit's decision and to analyze whether the court's ruling ultimately was correct. Part II will provide background on the structure, procedure, and effect of the Mining Law. Part III will explain the federal courts' continued weakening of the APA's presumption in favor of judicial review, culminating in an analysis of the Tenth Circuit's holding in *High Country Citizens Alliance v. Clarke* (*High Country Alliance*).[18] Part IV concludes with a consideration of the practical effects of excluding third party review of administrative action in the context of the Mining Law and argues that the federal courts should reinforce the APA's presumption of reviewability of agency action.

II. THE GENERAL MINING ACT OF 1872

With the passage of the General Mining Act of 1872 (Mining Law), Congress declared that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase . . . ."[19] At the time, "[t]he Mining Law was part of [a] larger set of land disposal statutes and it was intended to (and did in fact) encourage settlement and economic activity in the American West."[20] The fact that the Mining Law has survived for over 130 years with only minor statutory modifications is therefore surprising. One explanation for the Mining Law's survival might be the "combination of inertia and special interest lobbying."[21] Another explanation might be that "the Mining Law is an institutional response to the incentive problems of public ownership of resources and an effective, evolved mechanism for solving the problem of determining how to use those resources."[22] However the Mining Law is

15 *Id.*

16 *Id.* at 1193.

17 *Id.* at 1192.

18 *Id.* at 1177.

19 30 U.S.C. § 22 (2000).

20 Andrew P. Morriss et al., *Homesteading Rock: A Defense of Free Access Under the General Mining Law of 1872*, 34 ENVTL. L. 745, 762 (2004); *see also* CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 35 (1992) (discussing the important role that mining played in the settlement of the American West).

21 Morriss et al., *supra* note 20, at 763.

22 *Id.*

viewed—as "'one of the last remaining American dinosaurs of the old public resource giveaways'"[23] or as providing a necessary incentive for exploration of mineral reserves[24]—it remains an important aspect of public lands management to this day. The combination of unpatented and patented mining claims blanketing the Western States often leads to a patchwork system of privately owned, state owned, and federally owned lands,[25] often leading to land management problems.[26]

A. Mining Under the General Mining Law of 1872

The Mining Law is streamlined to get minerals out of the ground for more useful proposes. As mentioned above, the Mining Law opened most of the federal lands to mineral prospecting.[27] On lands open to mining, it is the right of a miner to enter the public land and search for valuable deposits of minerals without notification to, or consent from, the federal government.[28] Once a miner enters the land, a right of *pedis possessio*[29] is obtained, and this right protects the miner from the prospecting of other miners and allows space to work without others infringing upon the claim.[30] The right of *pedis possessio* gives the miner the right to stake his claim to the land, but the miner acquires no property interest in the land.[31] Only upon finding a valuable mineral deposit is the miner's claim converted to an unpatented mining claim—a recognized real property right.[32]

Upon finding a valuable mineral deposit the miner obtains "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations,"[33] and all the minerals found therein

---

[23] *Id.* at 749.

[24] *See id.* at 766 ("The flexibility offered by the Mining Law to rights holders, allowing them to hold claims in various postures until they are ready to develop, also provides much of the incentive for making the investment in the first instance" (internal citation and quotation omitted)).

[25] NAT'L RESEARCH COUNCIL, HARDROCK MINING ON FEDERAL LANDS 12 (1999).

[26] *See id.*

[27] *See* GLICKSMAN & COGGINS, *supra* note 6, at 135–36 (explaining the limited federal lands that are closed to mining: "among the federally owned lands that are off-limits to new locations for hardrock mineral developments are: national parks, wilderness areas, and parts of wild river corridors; acquired lands; wildlife refuges, to the extent that the Secretary [of the Interior] has not reopened them; special purpose withdrawals of lands in any management system; lands subject to valid preexisting location claims; and lands so designated by Congress or the executive.").

[28] *See* LESHY, *supra* note 3, at 26 (explaining that access to federal lands was at the discretion of the miner and that the federal government had no "explicit monitoring or supervisory role and, indeed, no formal means of learning what activity was taking place on its lands pursuant to the Mining Law").

[29] Literally, "possession of a foot." *See* BLACK'S LAW DICTIONARY 1167 (8th ed. 2004).

[30] WILKINSON, *supra* note 20, at 44–45.

[31] *See id.* at 45 (explaining that the right of *pedis possessio* is not a "constitutionally vested property right[]").

[32] *Id.*

[33] 30 U.S.C. § 26 (2000).

"throughout their entire depth."[34] The miner's property interest is "in effect a grant from the United States of the exclusive right of possession to the same. It constitutes property to its fullest extent, and is . . . subject to be sold, transferred, mortgaged, taxed, and inherited without infringing any right or title of the United States."[35] The exclusive right to the possession and enjoyment of the land can continue on indefinitely,[36] or, after completing $500 of development work, the miner can chose to apply for a patent to the land and obtain fee title for a nominal sum.[37]

To obtain a patent the miner/claimant must apply to the local land office. The application must certify that a discovery has been made,[38] specify the boundaries of such claim, and show by affidavit that notice of such application has been posted upon the claim.[39] Upon receipt of a patent application the land office is charged with publishing notice of such application for sixty days.[40] At the same time, the claimant must specify that the required work has been completed, and upon expiration of the sixty days shall affirm that notice has been posted at the claim site throughout.[41] A survey is then conducted and if the government verifies that a discovery of a valuable mineral deposit has been made it issues a patent to both the surface and mineral estates.[42]

Although a major focus of the Mining Law is passing title to the miner, the Mining Law provides for participation by third parties and competing claimants. The federal regulations implementing the Mining Law provide that

> [A]t any time prior to the issuance of patent, protest may be filed against the patenting of the claim as applied for, 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.[43]

This administrative protest may be filed by any party. Further, adverse claimants are allowed to file adverse claims with the land office, within the sixty-day publication period, and such adverse claim will stay the proceeding so that a court of competent jurisdiction may consider the validity of the adverse claim.[44] The Mining Law does not, however, expressly provide that third parties have the right to bring claims before courts of competent jurisdiction.

---

34 *Id.*

35 United States v. Etcheverry, 230 F.2d 193, 195 (10th Cir. 1956).

36 The Mining Law requires that $100 of work be completed upon each claim, each year, in order to maintain the claim. 30 U.S.C. § 28 (2000).

37 30 U.S.C. § 29 (2000).

38 The BLM in turn determines whether it believes there is a "valuable mineral deposit" within the claim. Moriss et al., *supra* note 20, at 757.

39 30 U.S.C. § 29 (2000).

40 *Id.*

41 *Id.*

42 Morriss et al., *supra* note 20, at 757.

43 Protest Against Mineral Applications, 43 C.F.R. § 3872.1 (2006).

44 30 U.S.C. § 30 (2000).

B. Abuses of the Mining Law

Although the policy of the Mining Law is to open the lands of the federal government to "exploration and purchase,"[45] it is important to note that this principle of free access does not open all lands of mineral character, because this would effectively be all the public lands.[46] The right of the miner to occupation of the land depends on the discovery of valuable minerals, and "[l]acking such discovery, the miner's right of access is only a revocable privilege or license to occupy."[47] However, the Mining Law's policy of free access, without notification to the government, and the difficulty of establishing that a claimant has not made the required discovery of a valuable mineral deposit, have led to widespread abuse of the Mining Law.[48] Due to the extreme numbers of claims under the Mining Law and the BLM's budgetary restraints, these abuses generally go unregulated.[49]

Among the problems created by the structure of the mining law are the possibilities that mineral lands will not be utilized for mining and that speculators will establish claims which they never intend to mine in order to interfere with legitimate uses of the land.[50] John Leshy states that because Congress failed to enact any time limitations on mining claims under the Mining Law, it "offered those seeking to occupy the public land for purposes other than mining a large advantage that the other disposal laws lacked—the right to remain for an indefinite period without ever having to prove good title."[51] As a result, the process of patenting a claim was of little use to the claimant unless they were looking to transfer the property.[52] If the claimant was not interested in transferring the land, they were free to remain upon an unpatented claim and enjoy the full use and enjoyment thereof while not being responsible, as a landowner would be.[53]

For many years, the Department of the Interior lacked the explicit authority to contest the validity of mining claims.[54] Further, the Mining Law did not clearly vest the BLM with the power to eject unlawful mining claimants and did not make clear whether the jurisdiction of the courts extended to such claims.[55] As a result, regulating unpatented mining claims required great expense and energy and so, more often than not, the abuses

45 *Id.* § 22.

46 LESHY, *supra* note 3, at 28. Were the Mining Law to apply to all mineral lands regardless of value, the law would apply to all the public lands because in the strictest sense, all public lands, being neither animal nor plant, are mineral.

47 *Id.* at 27.

48 *See* WILKINSON, *supra* note 20, at 48 (explaining the difficulties BLM officers have withdrawing lands from fraudulent claimants, sometimes taking over a decade).

49 *Id.* (explaining that the process of ejecting wrongful claimants "[f]or understaffed federal land agencies . . . is like killing flies with a pencil eraser").

50 LESHY, *supra* note 3, at 55.

51 *Id.* at 56–57.

52 *See id.* at 57 (explaining that "receiving a patent (title) was of little if any advantage to the claimant").

53 *Id.*

54 *Id.* at 60.

55 *Id.*

of the Mining Law were merely tolerated.[56] Ultimately, the Department of the Interior largely gave up, explaining that because

> the wheels are slow and the scales of justice are heavily weighted in favor of the mining claimant . . . . [i]t goes without saying that the time and money spent [on such proceedings] . . . far exceed the value of the claim unless it is strategically located.[57]

Because the government remains unable to actively challenge unlawful mining claims, many unscrupulous individuals are able to utilize the public lands for ulterior motives which in no way benefit the public at large. Within the Mining Law, there is nothing which mandates that the miner must utilize the unpatented claim for mining. In fact, claimants may construct homes, harvest timber, graze cattle and divert water, so long as the actions are "reasonably incident to mining."[58] This has allowed "miners" to enter federal lands and build summer houses,[59] post no trespassing signs on claims adjoining a stream to establish a private fishing camp,[60] "bluff the public off their 'property,' or . . . exact a fee from campers,"[61] and, most notably, utilize mining claims to attempt to restrict access to the Grand Canyon.[62]

The other troublesome result of the Mining Law is speculation of mining claims for the purpose of extracting payment from organizations carrying out larger projects which overlie those claims. This basic pattern of events involves an individual learning of an impending operation requiring continuous land in an area and that individual subsequently staking a large number of mining claims within the area.[63] The "miner" is then able to derail the project unless the mining claims are bought out at a handsome price.[64] These types of speculative claims, or stale claims that have existed for long periods of time,[65] often restrict otherwise legitimate uses of the public lands

---

[56] *Id.* at 64.

[57] *Id.* at 67.

[58] WILKINSON, *supra* note 20, at 45 (construing 30 U.S.C. § 612(a) (1988)).

[59] *Id.* at 46–47.

[60] *Id.* at 56–57.

[61] *Id.* at 60.

[62] *See* LESHY, *supra* note 3, at 57–60 (describing "the saga of Ralph Cameron's mining claims at the Grand Canyon"). Prior to the protection of the Grand Canyon, Ralph Cameron utilized the Mining Law to locate claims on the trails leading down to the Colorado River. *Id.* at 58. When national forests were again opened to mineral prospecting, Cameron staked claims on some of the most popular trails within the park. *Id.* Cameron had no interest in running a mining operation, but sought to restrict access to the trails and to charge tourists to use the trails. *Id.* Over several decades Cameron fought in the courts, attempting to patent his claims while remaining in possession. *Id.* at 58–60. Ultimately, "Cameron kept the federal government at bay" for 35 years by "using the Mining Law as a foothold from which to operate a tourist enterprise in one of the most popular national parks." *Id.* at 60.

[63] *See Id.* at 77–78 (describing the process and result of nuisance claims).

[64] *See id.* (describing the process and result of nuisance claims).

[65] The problem of stale claims has largely been solved by the recordation requirement of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (2000). *See* LESHY, *supra* note 3, at 81 (describing that all claims must be recorded with the federal government or be deemed abandoned, and documents indicating efforts or intent to develop the claim must be

or substantially raise the price of such projects.[66] Further, the lengthy and expensive process necessary to challenge such claims generally dictates that it is more feasible for the private company or the government to simply pay the claimant to abandon the claim.[67]

The main reason the Mining Law exists is to insure that there is an adequate supply of minerals for the public.[68] However, allowing these sorts of speculative claims actually works to the disadvantage of that goal because often in order for an actual mining company to explore an area for minerals it must first buy out several purely speculative claims.[69] This will likely discourage legitimate mineral companies from prospecting and result in fewer minerals in the U.S. marketplace. Thus, this type of nuisance claim actually harms prospecting and exploration by causing uncertainty for true miners.[70]

Although the ability of prospectors to enter the public lands and establish unpatented claims which may harm the public use or hinder other legitimate actions can lead to unfortunate results, the ability of those claimants to patent their claims leads to a much greater harm. The only benefit the public gains from the patenting of a mining claim is the nominal fee of five dollars per acre of public land; alternatively, mining an unpatented claim could benefit the public by increasing mineral supplies. Additionally, because there is no obligation to mine once a mining claimant obtains a patent, the patent holder is free to develop the land as private property for any purpose desired. Although the patenting process can benefit the applicant, it works to the disadvantage of the public at large and especially environmentalists and recreationists.

When a patent is issued, the land is no longer federal land, and the property owner has the right to exclude all others. Although the Mining Law does vest in an unpatented claimant the "exclusive right of possession and enjoyment of all the surface,"[71] this right has been restricted by the Multiple Use Mining Act.[72] The Multiple Use Mining Act can be seen as an attempt to integrate the emerging policy of multiple use with the Mining Law. In effect, the Multiple Use Mining Act reserves for the United States, in all future mining claims, the right to manage and dispose of the surface resources of

filed each year).

66 *See* LESHY, *supra* note 3, at 80 (describing how mining claims have been used to block public projects such as a radioactive waste isolation plant and a juvenile correction facility).

67 *See id.* at 83–85 (describing the complex litigation nuisance claims entail and the usual result of a negotiated settlement).

68 *See* John F. Seymour, *Hardrock Mining and the Environment: Issues of Federal Enforcement and Liability*, 31 ECOLOGY L.Q. 795, 825–26 (2004) (explaining that the Mining Law of 1872 was "entitled an act 'to promote the Development of the mining Resources of the United States'" and that "Congress believed that the United States was best served by promoting private mineral development, which, in turn, would stimulate western development and the nation's economic growth").

69 WILKINSON, *supra* note 20, at 60.

70 *Id.*

71 30 U.S.C. § 26 (2000).

72 Multiple Use Mining Act of 1955, 30 U.S.C. §§ 611–15 (2000).

such claims.[73] Further, the Multiple Use Mining Act provides that prior to patenting, the surface may be used by licensees and permittees to the extent necessary for access to adjacent land, so long as the passage does not "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto."[74] This has been held by the Ninth Circuit as subjecting unpatented mining claims to recreational activity which does not endanger prospecting or mining.[75] Thus, if a claim is unpatented, recreational users may still enjoy some benefit from the public land. However, once a claim is patented, the claimant obtains fee title and has the right to exclude the public from the land or to charge fees for access.

Further, if a mining claim remains unpatented, the federal government does not lose its interest in the land. In the situation where a claimant fails to comply with the actions necessary to maintain a valid claim, or where the claimant abandons the claim, the land reverts in full to the federal government.[76] This is of significant benefit to the public because, as long as the claim remains unpatented, there is a possibility that the claim will be abandoned and the land will revert to the public lands in full. Thus, the patenting of claims works to the substantial disadvantage of the public as a whole. The interest of the public, therefore, is to challenge such claims. This brings us to the situation outside the Town of Crested Butte.

The Mount Emmons Mining Company (a subsidiary of Phelps Dodge Mining Company) established a mining claim on the top of Mount Emmons, a popular recreational mountain and the backdrop for the Town of Crested Butte.[77] In 1992 the mining company applied for a patent to the claim.[78] The company initially gained interest in the property when the price of molybdenum justified a mine on the land.[79] However, when the market for molybdenum dropped, the mining company lost interest in developing a mine on the site.[80] Nevertheless, the government reviewed the company's application from 1992 and found the land contained a valuable mineral deposit, meaning that the government must issue a patent to the land.[81] The mining company certainly wasn't going to pass up the opportunity to gain title to 155 acres of land in an area where land now regularly sells for $100,000 for 1/10th of an acre.[82] But the mining company has no plans to develop a mine on the land because a molybdenum mine would not be

73 *Id.* § 612(b).

74 *Id.*

75 *See* United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277, 1286 (9th Cir. 1980) (holding that unpatented mining claims were available to federally licensed or permitted recreational activities so long as they did not interfere with mining activities).

76 *See* Black v. Elkhorn Mining Co., 163 U.S. 445, 450–51 (1896) (holding an abandonment of an unpatented mining claim "forfeits the locator's interest in the claim").

77 Brief of Petitioner-Appellant, *supra* note 1, at 4.

78 *High Country Alliance*, 454 F.3d 1177, 1179 (10th Cir. 2006).

79 Transcript, Elizabeth Arnold, *All Things Considered: Critics Call for Reform of 1872 Mining Law* (National Public Radio broadcast June 22, 2004) (an audio stream of the radio broadcast may be accessed at http://www.npr.org/templates/story/story.php?storyId=1958649).

80 *Id.*

81 *Id.*

82 *Id.*

profitable at current prices, a fact that has been recognized by all parties involved except the U.S. government.[83] Further, the company is seeking to get rid of the land and the $1,000,000 per year liability of operating a water treatment plant, which is necessary to clean contaminated water resulting from a prior mining activity.[84]

The citizens of Crested Butte have fought against the mining claim from the beginning and registered their administrative protests with the BLM upon the application for a patent.[85] The mountain is a key point of identification for the town and an element that many of the citizens have grown up with,[86] often utilizing the land for hiking or skiing, actions that will now make them trespassers upon the private land.[87] When the BLM granted a patent to the land, the result seemed unfounded. To say that the land contained a valuable mineral deposit (that could be brought to market for a profit[88]), yet have a mining company with no interest in opening a mine did not add up. In response, the citizens brought suit under the APA,[89] which provides citizens the redress of the courts from arbitrary agency actions.[90] However, the citizens ran into another hurdle when the district court held that "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."[91] This ruling blocked the plaintiffs' access to the courts, and so the plaintiffs appealed the district court's decision to the Tenth Circuit Court of Appeals.

---

83 *Id.*

84 *Id.*

85 *High Country Alliance*, 454 F.3d 1177, 1179 (10th Cir. 2006).

86 Elizabeth Arnold, *supra* note 79.

87 *Id.*

88 *Id.* Further, the Department of Interior has previously argued that "[t]o the extent federal, state, or local law requires that anti-pollution devices or other environmental safeguards be installed and maintained . . . [such expenditures] may properly be considered . . . with the issue of marketability . . . ." GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 607 (5th ed. 2002) (quoting Kosanke Sand Corp., 12 Interior Bd. Land Appeals 282, 299, 1973 WL 14244 (1973)). Although this reasoning has not been affirmed by the courts, requiring that cleanup costs be considered in the overall profitability of a mine seems inherently logical. As this cleanup is now required, its cost should be factored into determining whether the mine may be profitable. As a result, in this case the $1,000,000 liability of the water treatment plant should have been considered in the analysis of the mine's marketability. Thus it seems even more unlikely that, in the face of a worldwide excess of molybdenum, the mining company had made a discovery of a valuable mineral deposit.

89 Although environmental groups often utilize NEPA to challenge agency actions they do not agree with, NEPA is not considered to apply to patenting decisions. *See* South Dakota v. Andrus, 614 F.2d 1190, 1193–95 (8th Cir. 1980), *cert. denied*, 449 U.S. 822 (1980) (reasoning that the issuance of a mineral patent is a ministerial act and thus not a federal action, and further that even if it was a federal action, it likely is not "major" because the issuance of "a mineral patent is not a precondition which enables a party to begin mining operations").

90 Administrative Procedure Act, 5 U.S.C. § 702 (2000).

91 *High Country Alliance*, 454 F.3d 1177, 1180 (10th Cir. 2006).

III. AVAILABILITY OF JUDICIAL REVIEW FOR THIRD PARTIES UNDER THE MINING LAW

In *High Country Alliance*, the court began by framing the question as "whether the APA waives sovereign immunity for Plaintiffs, who claim no adverse interest in the land, to bring a suit challenging the issuance of a patent under the 1872 Mining Law"[92] and clarified that this was a matter of first impression for the court.[93] Because the district court had granted a motion to dismiss for lack of subject matter jurisdiction, the court would review the matter de novo.[94] The plaintiffs had brought suit under the APA because that statute 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."[95] This provision of the APA acts as a waiver of sovereign immunity but is limited by the applicability of the APA, which § 701(a) provides is limited where either "statutes preclude judicial review"[96] or when "agency action is committed to agency discretion by law."[97]

A. The APA and Preclusion of Judicial Review

Before examining the court's analysis in *High Country Alliance*, a better understanding of the manner in which a court determines that a statute precludes judicial review is necessary. One of the central advantages of the APA is that "even though the particular statute under which the challenged agency activity has been conducted does not itself specify that review shall be available, an aggrieved party may turn to the APA for relief."[98] Indeed, "[t]he availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."[99] In addition, the passage of the APA in 1946 codified the developing common law presumption of reviewability[100] of agency action by allowing judicial review of agency action where a person suffered a legal wrong because of agency action[101] or

92 *Id.*

93 *Id.*

94 *Id.*

95 5 U.S.C. § 702 (2000).

96 *Id.* § 701(a)(1) (2000).

97 *Id.* § 701(a)(2) (2000). Here both parties agreed that the agency action had not been committed to agency discretion by law. Further, the Supreme Court has explained that subsection (a)(2), precluding judicial review where agency action has been committed to discretion, applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (citing S. REP. NO. 79-752, at 26 (1945)).

98 Robert F. Holland, Note, *Statutory Preclusion of Judicial Review Under the Administrative Procedure Act*, 1976 DUKE L.J. 431, 431 (1976).

99 LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965).

100 Cynthia Tripi, Note, *Availability of Judicial Review of Administrative Action*, 55 GEO. WASH. L. REV. 729, 729–30 (1987).

101 5 U.S.C. § 702 (2000).

inaction.[102] This general presumption towards reviewability has been well established in the case law of the APA,[103] even if it has not been given broad legal effect.[104] However, as described below, this presumption towards judicial review is overcome when the relevant statute precludes judicial review.[105]

1. Preclusion of Judicial Review Prior to Passage of the APA

The federal courts' case law dealing with preclusion of statutory review prior to passage of the APA was somewhat erratic.[106] Although then-Justice Sandra Day O'Connor was willing to say the common law generally favored granting judicial review of agency actions,[107] that view was not shared by all. Two commentators take the view more commonly shared: that courts were generally accepting of preclusion of judicial review and would begin their analysis from the standpoint of considering whether judicial review was authorized by the statute at issue.[108] To make this determination, the courts generally reverted to their traditional canons of statutory construction, which meant looking to the language of the statute, the overall structure of the statute, the purpose of the statute, and the history of the statute involved.[109] The tendency of the courts to defer to congressional limitations upon judicial review has resulted in a more narrow view of the availability of such judicial review.[110] Thus, if a statute was silent on its face, it was most likely that the court would simply find that judicial review was precluded as Congress had not provided for it.[111] The availability of judicial review was therefore weighted against plaintiffs—because if a statute was silent on the issue, courts construed the statute as precluding judicial review.[112]

2. Preclusion of Judicial Review after Passage of the APA

The passage of the APA in 1946 and its provision providing entitlement to judicial review for individuals suffering a legal wrong due to agency

---

102 The APA defines "agency action" as "includ[ing] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13).

103 *See, e.g.*, Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967) (asserting that the APA creates a general presumption for judicial review); Block v. Cmty. Nutrition Inst., 467 U.S. 340, 349 (1984) (discussing how the judicial presumption favoring judicial review can be overcome); Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670 (1986) (noting "the strong presumption that Congress intends judicial review of administrative action").

104 *See infra* Part III.

105 5 U.S.C. § 701(a)(1) (2000).

106 Sandra Day O'Connor, *Reflections on Preclusion of Judicial Review in England and the United States*, 27 WM. & MARY L. REV. 643, 650 (1986).

107 *Id.*

108 Tripi, *supra* note 100, at 731; Holland, *supra* note 98, at 433.

109 Tripi, *supra* note 100, at 731.

110 O'Connor, *supra* note 106, at 644.

111 Holland, *supra* note 98, at 435 (discussing the Court's decision in Ludecke v. Watkins, 335 U.S. 160 (1948)).

112 *Id.*

action[113] raised the question of whether the law simply codified the common law or provided a new standard. The common view after the passage of the APA was that it provided a strong presumption in favor of judicial review.[114] In *Abbott Laboratories v. Gardner*, the Court recognized that after the passage of the APA the question of judicial review was "phrased in terms of 'prohibition' rather than 'authorization' because a survey of [Supreme Court] cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."[115] This presumption towards the availability of judicial review most likely came from a combination of § 702's broad grant of review, and § 704, which provides that when no adequate remedy exists from final agency action access to the courts will be provided.[116] Further, in *Abbott Laboratories* the Court noted a section of the legislative history providing that "[t]o preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it."[117] These aspects of *Abbott Laboratories* support the idea that the APA created a strong presumption that, if a statute does not expressly preclude judicial review, the APA will act to provide a right of judicial review.[118]

The language of *Abbott Laboratories* clearly allows for judicial review to be withheld in situations where Congress expressly provides. However, it also demonstrates that where a statute does not expressly deny judicial review, that statute must be clear and convincing "upon its face" in precluding such review. Thus, in that case, the court considered whether judicial review was precluded by examining only the statutory scheme—an analysis entirely based on consideration of the text of the statute.[119] In this manner, the Court made it clear that the APA required that Congress either expressly preclude judicial review, or enact a regulatory scheme that as a whole clearly and convincingly precluded judicial review.

---

113 5 U.S.C. § 702 (2000).

114 *See* Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967) (providing for a presumption of judicial review).

115 *Id.*

116 5 U.S.C. § 704 (2000); *see* Holland, *supra* note 98, at 445 (asserting that § 702 and § 704, analyzed together, could be viewed as embodying the presumption toward judicial review).

117 *Abbott Labs.*, 387 U.S. at 140 & n.2 (citing H.R. REP. NO. 79-1980, at 41 (1946); S. REP. NO. 79-752, at 26 (1945)).

118 At least one commentator argues the APA did not create a presumption for judicial review at all, by noting that when Congress asked the Attorney General to issue an opinion on the legal effects of the APA, the Attorney General responded that the APA was simply a codification of the common law preceding the APA. Holland, *supra* note 98, at 438–39. Thus, the commentator argues that because there is no indication that Congress did not assent to the Attorney General's view of the APA's effect, the legislative history should be read as a simple codification of the common law prior to the APA. *Id.* Further, the common law prior to passage of the APA clearly did not provide a presumption towards judicial review. *Id.* at 438. As a result, the theory concludes that the legislative history used in *Abbott Laboratories* is not representative of the entire legislative history of the APA and thus the Court was misleading in relying so heavily upon it. *Id.* at 439 & n.47.

119 *Abbott Labs.*, 387 U.S. at 141.

The Court reaffirmed its position that the APA created a presumption in favor of judicial review in *Association of Data Processing Service Organizations, Inc. v. Camp* (*Data Processing*).[120] There, the Court looked to its decision in *Abbott Laboratories* to assert that "[t]here is no presumption against judicial review and in favor of administrative absolutism."[121] The Court went on to explain that there was nothing within the relevant statutes that precluded the judicial review sought by a data processing association which was certainly aggrieved by the Comptroller of Currency's action allowing national banks to engage in data processing as well.[122] With the Court's holding in *Data Processing*, the Court accepted that the APA created a strong presumption in favor of judicial review that could only be overcome when a statute, on its face, clearly and convincingly establishes a congressional intent to preclude judicial review.[123] However, contemporaneous decisions and the manner in which the courts have treated this presumption merits further consideration, as the apparent meaning of *Data Processing* was possibly not as clear as it seemed.

3. Weakening of the Presumption in Favor of Judicial Review

Data Processing and *Barlow v. Collins*,[124] decided the same day, were both authored by Justice Douglas. Both of the decisions considered the presumption of judicial review embraced by the APA and *Abbott Laboratories*, but both decisions also had underpinnings of the Court's pre-APA case of *Switchmen's Union of North America v. National Mediation Board* (*Switchmen's Union*)[125]—also authored by Justice Douglas. Justice Douglas's approach in both cases adopted aspects of *Switchmen's Union*'s more skeptical analysis of judicial review.

In *Data Processing*, the Court recognized the "'generous review provisions'"[126] of the APA and noted that the Court had "construed that Act not grudgingly but as serving a broadly remedial purpose."[127] Further, the Court explained that "[t]here is no presumption against judicial review and in favor of administrative absolutism . . . unless that purpose is fairly discernible in the statutory scheme."[128] Again, the Court looked to *Switchmen's Union*, thereby grounding its analysis on the premise that "[w]here Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless

120 397 U.S. 150 (1970).
121 *Id.* at 157.
122 *Id.*
123 *See id.* at 156–57.
124 397 U.S. 159 (1970).
125 320 U.S. 297 (1943).
126 *Data Processing*, 397 U.S. at 156 (citing Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955)).
127 *Id.* at 156.
128 *Id.* at 157 (citing *Abbott Labs.*, 387 U.S. 136, 140 (1967) and comparing it with *Switchmen's Union*, 320 U.S. 297 (1943)).

supplied."[129] Thus, Justice Douglas drew the conclusion that review could be precluded when Congressional intent is "fairly discernible" from the statutory scheme. This was accomplished by relying upon *Switchmen's Union*, a case based on a presumption directly opposite to that embodied by the APA.[130] Drawing from the statutory language and legislative history of the APA, Justice Douglas's opinion in *Data Processing* demonstrates that by enacting the APA, Congress had expressly reversed this presumption to provide that, where a statute did not *clearly and convincingly* establish that judicial review should be precluded, the courts should honor the APA's strong presumption in favor of judicial review.[131]

In *Barlow*, the Court again recognized the presumption in favor of judicial review embodied in the APA, but acted to expand the scope of the Court's inquiry into whether Congress had intended to preclude judicial review. Justice Douglas began by stating that it was necessary to determine whether Congress, through express or implied terms, had acted to preclude judicial review.[132] At the same time, Justice Douglas noted that judicial review is the rule and that non-reviewability was merely the exception.[133] But Justice Douglas provided that "a clear command of the statute will preclude review; and such a command of the statute may be inferred from its purpose,"[134] again citing *Switchmen's Union*. While Justice Douglas provided that the intent to preclude judicial review could be inferred from the statute, he still required a showing of clear and convincing evidence[135] of such intent.

Although *Data Processing* gave notice to the legislative history of the APA, instructing that a statute should be clear on its face in order to preclude judicial review, *Barlow* did not. Justice Douglas, in resurrecting the pre-APA idea that preclusion could be inferred from the purpose of a statute, could no longer require that a statute be clear upon its face. Combining the two theories creates a paradox, where a court could find by clear and convincing evidence that the purpose of a statute precluded judicial review, yet be forced to allow judicial review because the statute, on its face, did not clearly preclude judicial review.[136] Thus, with the rise of implied statutory preclusion of judicial review in *Barlow*, the Court began to downplay the "upon its face" language which had guided earlier decisions.

The Court's acceptance of implying statutory preclusion of judicial review from the overall purpose of a statute was a significant departure from the Court's previous requirement that clear and convincing evidence of congressional intent could only be inferred from the scheme represented by the text of the statute. There is no doubt that to overcome the APA's

129 *Switchmen's Union*, 320 U.S. at 301.
130 *Data Processing*, 397 U.S. at 157.
131 *See id.* at 156–57.
132 *Barlow*, 397 U.S. 159, 165 (1970).
133 *Id.* at 166.
134 *Id.* at 167.
135 *Id.* (citing *Abbott Labs.*, 387 U.S. 136, 141 (1967)).
136 Holland, *supra* note 98, at 441.

presumption of judicial review the courts must find congressional intent to preclude review. However, inferring congressional intent from sources other than the text of the statute in this circumstance seems unsatisfactory. "The right to judicial review is a basic protection. It is not too great a burden upon Congress to require it to speak to the issue."[137] Indeed, this statement holds even more force when one considers the three manners in which Congress may deal with preclusion of judicial review. Congress, in forming a statute, can either: agree to preclude judicial review, agree to permit judicial review, or not consider the issue entirely. Only where Congress agrees to preclude judicial review is the APA's presumption in favor of judicial review overcome.[138] Therefore, in the situation that Congress has agreed to preclude judicial review, it does not seem like an overly broad burden for the courts to require that Congress clearly express that intent in the statutory scheme that it creates. Further, because the right of judicial review goes to the fundamental nature of our government, to the separation of powers, to the right to be free of arbitrary application of the laws, and to the right of the public to monitor and interact in its government, preclusion of such review should not be lightly inferred.[139]

To argue that Congress simply embodied the common law process of statutory construction into the APA and did not change anything is unsatisfactory. The Supreme Court has noted many times that the APA provides a presumption in favor of judicial review and further that the Act should not be construed grudgingly, "but as serving a broadly remedial purpose."[140] Thus, even if all the APA accomplished was to flip the underlying presumption from denying judicial review to allowing it, this change has a drastic effect on the analysis of the relevant statutes. After passage of the APA the courts were no longer searching statutes for authorization of judicial review, but were searching statutes to discover whether they clearly and convincingly precluded judicial review. The presumption thus creates an important rule of construction by ensuring that the courts will not presume the intent to prohibit judicial review from the mere omission of an express right to such review.[141]

---

137 JAFFE, *supra* note 99, at 373.

138 *See id.* at 372–73 (explaining the Supreme Court's statement that exemptions to the expanded mode of review allowed by the APA can only be made when clear language supporting supersedure exists).

139 *But see* Holland, *supra* note 98, at 445–46. Holland argues that there is nothing contradictory about recognizing implied statutory preclusion of judicial review, because the APA provides that it does not apply when "statutes preclude judicial review," 5 U.S.C. § 701(a)(1) (2000), and by "statutes" Congress meant the process of statutory construction by which the courts have always sought congressional intent. Holland, *supra* note 98, at 445–46. Further, Holland argues that this method of statutory construction has recognized that a statute does not consist of only express provisions but also implied provisions. *Id.*

140 *Data Processing*, 397 U.S. 150, 156 (1970).

141 Holland, *supra* note 98, at 449.

4. Block v. Community Nutrition Institute *and Onward*

Although *Barlow* created the possibility of finding implied statutory preclusion of judicial review, it is *Block v. Community Nutrition Institute*[142] that has established the modern rule. In *Block*, the Court stated that "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved."[143] In addition to laying out the method of finding implied statutory preclusion of judicial review, the Court lowered the threshold necessary to demonstrate such preclusion. The Court held that because the presumption in favor of judicial review was only a presumption, it could be overcome by specific indicators of congressional intent to preclude judicial review.[144] In conclusion, the court held that it had not used the clear and convincing standard in the same manner as when applied to evidence, but rather had found the standard satisfied when the intent to preclude was fairly discernible.[145] The court went on to say that "the 'clear and convincing evidence' standard is . . . but a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling."[146]

The limitations the *Block* Court placed upon the presumption in favor of judicial review, as well as the weakening of the "clear and convincing evidence" standard, were poorly founded. As discussed above, the APA had consistently been held to create a strong presumption in favor of judicial review. It certainly is acceptable to say that such a presumption can be overcome, but both the APA and early Supreme Court case law required that the presumption only be overcome when the statute precluded review clearly and convincingly upon its face. Therefore, by expanding the range of materials upon which the Court could find congressional intent to preclude review, the Court significantly undermined the APA's strong presumption favoring judicial review.

Further, the *Block* Court severely limited the "clear and convincing" standard in a manner that gives no lasting effect to the APA's presumption favoring judicial review. Specifically, the Court adopted Justice Douglas's statement in *Data Processing* that the presumption in favor of judicial review should be overcome whenever a congressional intent to do so is "fairly discernible in the statutory scheme."[147] As mentioned above, this language grew out of *Switchmen's Union*, a pre-APA case, and is therefore more in line with the narrow view of the availability of judicial review which was common prior to the passage of the APA. This interpretation is not

142 467 U.S. 340 (1984).
143 *Id.* at 345.
144 *Id.* at 349.
145 *Id.* at 350–51.
146 *Id.* at 351.
147 *Data Processing*, 397 U.S. 150, 157 (1970).

consistent with the presumption in favor of reviewability that resulted from the APA. As the courts noted following the enactment of the APA, the APA created a strong presumption that agency actions are reviewable and that the agency bears a burden to show that a statute clearly and convincingly precludes judicial review. With the Court's return to pre-APA standards, it unjustifiably weakened the presumption favoring judicial review that the APA was understood to have created.

Nevertheless, two years later, in *Bowen v. Michigan Academy of Family Physicians*,[148] the Court again began its analysis "with the strong presumption that Congress intends judicial review of administrative action."[149] Additionally, the *Bowen* Court noted the comments of the Senate Committee on the Judiciary, which provided that:

> Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of the authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.[150]

The Court went on to note the similar consideration of the House of Representatives Committee on the Judiciary, providing that:

> The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.[151]

Also, the Court pointed out that "'[w]ithout judicial review, statutory limits would be naught but empty words.'"[152] But at the same time the Court quoted *Block's* holding that the presumption of judicial review could be overcome when a "'reliable indicator of congressional intent,' or a specific congressional intent to preclude judicial review [] is '"fairly discernible" in the detail of the legislative scheme.'"[153]

As stated previously, the Supreme Court declared early on that the presumption favoring judicial review could only be overcome by clear and convincing evidence. Although the courts have continued to assert this principle in case law, the courts have gradually lowered the threshold necessary to overcome the presumption of reviewability. While the early cases all asserted that clear and convincing evidence was required, the Court

148 476 U.S. 667 (1986).
149 *Id.* at 670.
150 *Id.* at 671 (quoting S. REP. NO. 79-752, at 26 (1945)).
151 *Id.* (quoting H.R. REP. NO. 79-1980, at 41 (1946)).
152 *Id.* at 672 n.3 (quoting B. SCHWARTZ, ADMINISTRATIVE LAW 436 (2d ed. 1984)).
153 *Id.* at 673.

in *Block* reduced the threshold to a question of whether an intent to preclude judicial review is "'fairly discernible in the statutory scheme.'"[154] This weakening of the threshold necessary to overcome the presumption of reviewability has worked to the detriment of plaintiffs seeking review of unlawful administrative actions.

The Court significantly departed from what is required by the APA by changing the standard from "clear and convincing evidence," to one requiring a showing that the intent is "fairly discernible in the statutory scheme." By enacting the APA, Congress granted the courts the ability to generally review any agency action.[155] One commentator asserts that this was a necessary role of the courts with the fall of the nondelegation doctrine,[156] and it was a role the courts embraced for some time. However, by changing the standard from "clear and convincing" to "fairly discernible," even if only by title, the Court departed from the underlying intent of the APA. Even Justice O'Connor accepted that "[o]verall, *Block* weakened the general presumption that agency action is reviewable, 'by lowering the standard required to demonstrate congressional intent to preclude judicial review.'"[157] The outcome of this weakening can best be discussed by examining the Tenth Circuit's recent decision in *High Country Alliance*.

B. An Examination of Preclusion of Judicial Review in High Country Citizens Alliance v. Clarke

In *High Country Alliance*, the court held that the Mining Law precluded review of the BLM's decision to issue a patent even when the plaintiffs claimed that the mining claim did not contain a "discovery of a valuable mineral deposit" as required by the Mining Law. The plaintiffs appealed from the district court's decision on the grounds that the court had erred by ignoring the APA's presumption of reviewability, and by holding that the issuance of BLM mining patents could not be judicially reviewed.[158] In upholding the district court, the Tenth Circuit upheld many of the same errors as the district court. The court applied the *Block* factors in a watered-down manner and ultimately held that the APA provided no redress for the plaintiffs. Further, the court based its decision on a narrow view of the

154 *Block*, 467 U.S. 340, 350 (1984).

155 *See* O'Connor, *supra* note 106, at 651 (explaining that the APA entrusted judicial review of agency action to the courts).

156 *See* Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 755 (1992) ("[Judicial review] was part of a constitutional quid pro quo: courts would decline to employ the nondelegation doctrine to overturn statutes and, in return, courts would preserve the power to review agency decisions.").

157 O'Connor, *supra* note 106, at 653 (quoting Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 660 (1985)).

158 *High Country Alliance*, 454 F.3d 1177, 1180 (10th Cir. 2006). The plaintiffs also claimed that the district court had erred in "dismissing Plaintiffs' substantive APA claim" and in "dismissing the private defendants from the case." *Id.* However, these issues are outside the scope of this Comment.

APA's review provisions and relied on case law from far before the rise of modern judicial review doctrines and the enactment of the APA and its strong presumption in favor of judicial review.

1. The Court's Treatment of the APA

The court's approach to the APA in its review of *High Country Alliance* can best be characterized as lip service. The court began by saying that in order for the plaintiffs to sue the BLM, the BLM must have waived its sovereign immunity.[159] Although the APA operates as a limited waiver of sovereign immunity, such waiver is not effective to the extent that a relevant statute precludes judicial review.[160] Thus the court framed the question as "whether the APA waives sovereign immunity for Plaintiffs, who claim no adverse interest in the land, to bring a suit challenging the issuance of a patent under the 1872 Mining Law."[161] The court next went on to discuss how the APA's presumption of judicial review interacts with the issue of whether a statute precludes judicial review.[162]

The court began its analysis by stating that "a presumption of reviewability accompanies agency actions under the APA, but it may be overcome."[163] The majority also noted that the Tenth Circuit characterizes "the burden to overcome the presumption as 'heavy.'"[164] However, while the Tenth Circuit and the Supreme Court have acknowledged the presumption of reviewability as strong and the burden for overcoming that presumption as "heavy," the court stated that the federal courts had applied the *Block* factors in a manner that was far more receptive to a finding of preclusion of judicial review.[165] The court explained that the *Block* standard had moved the Supreme Court away from requiring clear and convincing evidence of an

159 *Id.* at 1181.

160 *Id.* (citing Administrative Procedure Act, 5 U.S.C. § 701(a)(1) (2000)).

161 *Id.* at 1180. The dissent disagreed with the majority as to the question which the case presented. In the dissent's view, the question before the court was "whether the agency has overcome the strong presumption favoring judicial review of the agency's action under the APA, where the text of the 1872 Mining Law expressly provides for participation by protesters in the agency proceeding." *Id.* at 1193 (Briscoe, J., dissenting). Judge Briscoe reads the APA as a waiver of sovereign immunity in and of itself, limited by the exceptions of § 702 providing that

> [n]othing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Id. (citing 5 U.S.C. § 702 (2000)). Thus, the dissent explains, the APA simply does not apply if the Mining Law of 1872 precludes judicial review and does not deal with the issue of sovereign immunity. However, this distinction seems somewhat thin because in effect, if the APA does not apply, then its limited waiver of sovereign immunity does not apply and the suit is likely barred by sovereign immunity.

162 *See id.* at 1183–92 (majority opinion) (discussing factors which indicate legislative intent to preclude judicial review).

163 *Id.* at 1181 (citing *Block*, 467 U.S. 340, 349 (1984)).

164 *Id.* at 1182 (noting "[t]he Tenth Circuit . . . has consistently followed the *Block* standard").

165 *Id.* at 1181–82.

intent to preclude judicial review, to using that requirement as "a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling."[166] Therefore, the court provided that "an intent to preclude judicial review must be 'fairly discernible' from the statutory scheme."[167] Also, "[t]he fact that a statute does not explicitly provide for judicial review is not outcome determinative."[168] In the end, the court asserted that it should consider the *Block* factors in determining whether there was "sufficient evidence of congressional intent to preclude review."[169]

Thus, the court not only accepted the Supreme Court's continued weakening of the presumption in favor of judicial review, but utilized the language of *Block* in a manner that required only a showing of "sufficient evidence" of intent to preclude judicial review. The court's assertion that *Block* only requires a mere sufficiency of the evidence does have some support in the language of *Block*, but is indicative of the continued weakening of the presumption in favor of judicial review. In *Block*, the court explained that "where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling."[170] Taking the inverse of this logic would provide that where there is sufficient evidence of intent to preclude, and thus not substantial doubt, then the presumption is overcome. However, this reasoning seems far out of line with the spirit of the earlier cases considering preclusion of judicial review. The federal courts have continually characterized the APA's presumption in favor of judicial review as "strong" and allowing such a strong presumption to be overcome by a relatively small showing of congressional intent seems incongruent.

Indeed, the dissent strongly argued that the majority had ignored the strong presumption in favor of judicial review that has been asserted in federal case law since the passage of the APA. Specifically, the dissent took exception with the majority's requirement of a mere sufficiency of the evidence and further asserted that the court had not even placed the burden of overcoming the presumption on the agency.[171] The dissent characterized the majority's treatment as "narrow" and asserted that the court should have looked to the language of *Abbott Laboratories*, requiring "clear and

166 *Id.* (quoting *Block*, 367 U.S. at 351).

167 *Id.* (citing *Data Processing*, 397 U.S. 150, 157 (1970)).

168 *Id.* (citing *Data Processing*, 397 U.S. at 157). Interestingly, the court in *Data Processing* was actually quoting the legislative history of the APA, which provided that "[t]he mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." H.R. REP. NO. 79-1980, at 41 (1946). Although the court is correct in saying that the failure to provide for judicial review explicitly in the statute is not outcome determinative, the *Data Processing* language actually indicates this omission should *not* be evidence of an intent to preclude judicial review. Thus, the court seems to be misconstruing the language in a manner which reverses the interpretation of the Supreme Court.

169 *Id.* at 1183.

170 *Block*, 467 U.S. at 351.

171 *High Country Alliance*, 454 F.3d at 1194–95 (Briscoe, J., dissenting).

convincing evidence of a contrary legislative intent."[172] In the end, the dissent concluded that "[g]iven the strong presumption favoring reviewability, the *Block* inquiry requires a more rigorous showing than a mere sufficiency of the evidence."[173]

2. The Court's Application of the Block *Factors*

All possible arguments as to the how the court should have characterized *Block* aside, the court did ultimately adopt and apply the *Block* factors. The court explained that the *Block* factors should be examined to consider whether the presumption of reviewability had been overcome. These factors provide that the intent necessary to preclude judicial review can be inferred from judicial construction of the statute precluding judicial review and congressional acquiescence, from the legislative and judicial history of a statute, and from considerations of the entire statutory scheme.[174]

a. Import of Legislative and Judicial History

While considering the legislative history of the Mining Law, the court relied mostly upon legislative history outside of what directly became the Mining Law and concluded that "judicial review of a grant of a patent by a third party (with no colorable property interest) conflicts with what Congress sought to achieve."[175] The court asserted that the main purpose of the Mining Law and the similar laws preceding the Mining Law's passage[176] was to provide patents (fee title) to miners so that they would settle upon the land and develop it.[177] Indeed, the court concluded that "security of title was integral to and paramount in the passage of the mining laws."[178] Consequently, the court concluded that to provide absolute title to miners, Congress had chosen not to allow third parties access to judicial review to challenge the validity of a patent unless that third party had a possessory interest in the land at question.[179] As a result, because the plaintiffs' interests here were not possessory, but mainly recreational and environmental—neither of which were important at the time of passage—Congress had not intended to protect their interests.[180] Thus, the court concluded that allowing third parties to challenge the

172 *Id.* at 1194.

173 *Id.* at 1195.

174 *Id.* at 1182 (majority opinion) (citing *Block*, 467 U.S. at 349).

175 *Id.* at 1183.

176 The court relied heavily upon legislative history from the Lode Law of 1866 and the Placer Act of 1870, which it asserted were incorporated into the Mining Law of 1872. *Id.* The dissent, on the other hand, did not think there was sufficient evidence to conclude that the prior laws had been incorporated into the Mining Law of 1872. *Id.* at 1195 (Briscoe, J., dissenting).

177 *Id.* at 1183–86 (majority opinion).

178 *Id.* at 1183.

179 *Id.* at 1185.

180 *Id.*

issuance of patents would be contrary to the aims of the drafters and that they had thus intended to preclude judicial review initiated by third parties.[181]

The dissent, on the other hand, disagreed that the legislative history indicated a Congressional intent to preclude judicial review for third parties. The dissent did not accept the majority's finding that the Lode Law of 1866[182] and the Placer Act of 1870[183] had been incorporated into the Mining Law.[184] The dissent contended that Congress was clearly concerned "that the passage of the 1872 Mining Law not affect existing rights under the prior statutes," and argued that "there [was] no statement in the congressional debate regarding the 'incorporation' of the" prior mining laws.[185]

Further, the dissent did not accept that the majority's use of the legislative history was representative and felt that the history conflicted with the text, structure, and effect of the Mining Law.[186] The dissent pointed out that although the majority asserted that the purpose of the Mining Law was to reduce litigation and fix title, the Mining Law actually provided for more litigation by providing an express claim of action for adverse claimants and by allowing third parties to protest the issuance of a patent at the administrative stage, without having an ownership interest in the land.[187] Thus, the dissent concluded that the Mining Law could not be considered an instrument seeking to avoid litigation and that the majority should have given "greater weight to the statute's text, and little, if any, weight to legislative history that conflicts with it."[188]

The majority then examined the judicial history of the Mining Law. When considering what cases to examine, the court concluded that while the APA had changed the landscape upon which to examine agency decisions, cases prior to the APA could still be instructive upon its decision.[189] As such, the majority examined two cases from the early 1880s holding that once a patent is issued it can only be challenged by a claim that the BLM lacked jurisdiction to issue the patent.[190] Further, the court depended on cases deciding the rights of two private claimants in providing that once a patent has been issued, an adverse claimant must demonstrate a greater right to the land to support a claim. If the adverse

181 *Id.*

182 Act of July 26, 1866, ch. 262, 14 Stat. 251 (1866) (current version at 30 U.S.C. §§ 43, 46, 51 (2000)). Most sections of the original Lode Law have been repealed by, e.g., The General Mining Act of 1872, ch. 152, § 9, 17 Stat. 91 (1872).

183 Act of July 9, 1870, ch. 235, §§ 12–13, 16 Stat. 217 (1870) (current version at 30 U.S.C. §§ 35–36, 38 (2000)).

184 *High Country Alliance*, 454 F.3d at 1195 (Briscoe, J., dissenting).

185 *Id.*

186 *Id.* at 1196.

187 *Id.*

188 *Id.*

189 *Id.* at 1186 (majority opinion).

190 *Id.* (citing Smelting Co. v. Kemp, 104 U.S. 636, 646 (1881); Steel v. St. Louis Smelting & Refining Co., 106 U.S. 447, 451 (1882)).

claimant cannot demonstrate a greater right, then the adverse claimant should have nothing to say about the issuance of the patent.[191] While the plaintiffs asserted that these suits between claimants should not inform this case, the court asserted that the goal at the core of the issues was the same—to invalidate the patent—and that these cases demonstrated a judicial concern with the finality of patents.[192] The court recognized that although the public has an interest in "making sure the patents conform to law, the mechanism Congress established is an administrative one (through the BLM), not a judicial one."[193]

In considering cases subsequent to the passage of the APA, the court recognized that there were no cases directly on point, but that "analogous situations after the enactment of the APA provide some insight."[194] The court pointed out that in *Kale v. United States*[195] the Ninth Circuit held that "[a] United States patent is protected from easy third-party attack"[196] and that one challenging a land patent had to show that the challenger was entitled to the patent, not merely that the patentee was not entitled to it.[197] The court ultimately concluded that "[i]t is essentially undisputed that the cases, both contemporaneous with the 1872 Mining Law and subsequent to the enactment of the APA, uniformly preclude persons situated similarly to Plaintiffs, that is, not claiming a property interest in the land, from judicially contesting the validity of the patent."[198]

The dissent, on the other hand, was unwilling to accept that the judicial history evidenced a clear intent on the part of Congress to preclude judicial review for the plaintiffs here. The dissent first took exception to the fact that the cases relied upon by the majority were mostly decided prior to the development of modern standing and judicial review doctrines.[199] Further, the majority relied on cases that were decided on the distinction between courts of law and equity, with the court actually "holding that, while the plaintiff could not assail a patent based on a false and perjured affidavit in an action at law, he could seek relief from a court of equity if he had an equitable right to the premises."[200] Additionally, the dissent took issue with the majority's use of *Wight v. Dubois*[201] for the proposition that once a protest is denied by the agency, "'the protestant has no further standing to be heard anywhere'" and that "'[t]he protest

191 *Id.* at 1187 (citing Sparks v. Pierce, 115 U.S. 408, 413 (1885)).

192 *Id.*

193 *Id.* (citation omitted).

194 *Id.* at 1187–88.

195 489 F.2d 449 (9th Cir. 1973) (regarding a Chickasaw Indian who challenged a holder of a federal Soldier's Additional Homestead Rights land patent).

196 *Id.* at 454.

197 *Id.*

198 *High Country Alliance*, 454 F.3d at 1186.

199 *Id.* at 1196 (Briscoe, J., dissenting).

200 *Id.* at 1197 (citing *Smelting Co.*, 104 U.S. 636, 645–47 (1881); *Steel*, 106 U.S. 447, 452–53 (1882)).

201 21 F. 693 (C.C.D. Colo. 1884).

cannot be made the basis of any litigation in the court.'"[202] The dissent asserted that this decision regarded the protestant's right to sue based on the standing laws of 1884 and "did not concern Congressional intent to preclude judicial review under the Mining Law."[203]

With regard to the majority's use of post-APA case law, the dissent asserted that "these cases are distinguishable because they did not involve the Mining Law."[204] In effect, the dissent argued that the cases relied upon by the majority were inapplicable because, although they dealt with land patents generally, they did not deal with patents under the Mining Law. As a result, none of the cases cited by the majority were looking to the question of whether third party judicial review under the APA was precluded by the Mining Law. Further, the dissent pointed to *South Dakota v. Andrus*[205] as the most analogous case available, explaining that the Eighth Circuit heard a suit filed by the state of South Dakota to compel an environmental impact statement prior to the issuance of a patent "without discussing whether the statute precluded judicial review."[206] Ultimately, the dissent asserted that because "the majority overstate[d] the holdings of the cases cited," it had "fail[ed] to place the burden on the agency and fail[ed] to apply the strong presumption favoring judicial review."[207]

b. Contemporaneous Judicial Construction and Congressional Acquiescence

The court began its consideration of whether Congress had acquiesced to a judicial construction of the Mining Law barring judicial review by noting that Congress had never overturned any of the judicial decisions relied upon by the court in considering the legislative and judicial history. However, the majority accepted that "[t]o find that Congress has acquiesced in a court or agency interpretation, the BLM . . . must show by 'abundant evidence that Congress both contemplated and authorized' the interpretation at issue."[208] Further, although Congress had made many changes to the Mining Law, it had not amended the "Mining Law to provide [the] Plaintiffs with a right of action."[209] But the court also recognized that "Congressional silence alone is

202 *High Country Alliance*, 454 F.3d at 1196 (Briscoe, J., dissenting) (quoting *High Country Alliance*, 454 F.3d at 1187 (majority opinion) (quoting *Wight*, 21 F. at 696)).

203 *Id.* at 1196 (Briscoe, J., dissenting).

204 *Id.* at 1197.

205 614 F.2d 1190 (8th Cir. 1980).

206 *High Country Alliance*, 454 F.3d at 1197–98 (Briscoe, J., dissenting). The majority did not address *Andrus*, asserting that because the BLM initiated the case and not South Dakota, that the case dealt with a challenge to a patent prior to issuance, and that the ultimate issue did not affect whether the patent would issue, only whether an environmental impact statement had to be completed prior to issuing a patent. *Id.* at 1189 n.14 (majority opinion).

207 *Id.* at 1198 (Briscoe, J., dissenting).

208 *Id.* at 1190 (majority opinion) (citing Catron County Bd. of Comm'rs v. U.S. Fish & Wildlife Serv. (*Catron County*), 75 F.3d 1429, 1438 (10th Cir. 1996)).

209 *Id.*

not enough to prove acquiescence"[210] even though "[s]ilence as to one area . . . coupled with a myriad of revisions within the same statutory scheme begins to look like acquiescence."[211] However, in the end, whether or not there was evidence of contemporaneous judicial construction and Congressional acquiescence did not matter, because "consideration of the other *Block* factors [was] sufficient to evidence an intent to preclude review."[212]

The dissent did not challenge the majority on its treatment of Congressional acquiescence for the simple reason that the majority did not depend upon the issue in its ultimate decision due to a lack of evidence of Congressional acquiescence. The dissent did point out, however, that the court had prior held that "'[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.'"[213]

c. Statutory Scheme as a Whole

The majority began its consideration by rejecting the plaintiffs' claim that the substantive requirements laid out in the statute gave rise to a cause of action for third parties. The court asserted that "[t]he substantive requirements have no bearing on what class of people Congress envisioned being able to challenge an issued patent."[214] What was important then, was the role provided for third parties under the Mining Law. Focusing on the fact that the Mining Law allowed adverse claimants a right to challenge the issuance of a patent in the courts prior to the BLM's final decision, the court concluded that the only role contemplated for third parties in the Mining Law was administrative protest and that once the BLM ruled on that protest, third parties no longer had any interest.[215] Because Congress had provided a right of judicial review for adverse claimants, it "certainly knew how to provide [a right of action] for unsuccessful protestors,"[216] but did not, out of a desire that patents be final once issued by the BLM. As a result, "[d]espite the presumption of reviewability, it [was] fairly discernable here . . . that Congress, when it enacted the 1872 Mining Law, intended to preclude judicial review to third parties claiming no property interest in the patented land and to date has not chosen to change this approach."[217]

The dissent was unwilling to accept that "the statutory scheme as a whole establish[ed] that Congress intended to preclude judicial review."[218] More specifically, the dissent took issue with the fact that the majority relied so heavily on the fact that the Mining Law provided a right of protest to third

210 *Id.*
211 *Id.*
212 *Id.* at 1191.
213 *Id.* at 1199 (Briscoe, J., dissenting) (quoting *Catron County*, 75 F.3d at 1438).
214 *Id.* at 1191 (majority opinion).
215 *Id.* at 1191–92.
216 *Id.*
217 *Id.*
218 *Id.* at 1198 (Briscoe, J., dissenting).

parties, but not a right to have that protest heard in the courts, as is the case with adverse claimants. The dissent explained that preclusion cannot turn on whether Congress has expressly *authorized* review,[219] because the APA was intended to allow suit where there was not express authorization so that plaintiffs no longer had to rely upon implied causes of action under other statutes.[220] Further, the majority unfairly relied upon judicial silence, when "[m]ere silence in the statute should not be read as precluding judicial review under the APA."[221] Further, according to the dissent, the majority did not consider the facts of *Block*, where the Supreme Court held that the plaintiffs were precluded from obtaining judicial review largely because the statute did not involve them in the administrative proceedings and thus did not rely upon the plaintiffs to challenge unlawful agency action.[222] Applying this consideration to the present case, the dissent asserted that "[b]ecause the Mining Law allows protesters to participate in the administrative process, Congress did not intend to preclude judicial review of protesters as a class."[223]

Indeed, the dissent's consideration of *Block*'s holding warrants further examination. In *Block*, the Court focused on the fact that the preclusion issue turns ultimately on whether Congress depended upon the class seeking review to challenge unlawful agency action.[224] In that case, the court concluded that "[t]he structure of this Act indicates that Congress intended only producers and handlers, and not consumers, to ensure that the statutory objectives would be realized."[225] Central to this assertion is the idea that when Congress acts, it intends not to use empty words, but intends to set statutory limits[226] and that it depends upon classes of individuals to ensure that the administrative agency stays within their statutory power. However, in *Block* consumers were not the class depended on to ensure that the agency stayed within the law, and to allow consumers to occupy that role would "severely disrupt [the] complex and delicate administrative scheme."[227] However, under the Mining Law, third parties must be relied upon to challenge unlawful agency action because it cannot be assumed that adverse claimants will exist in every patenting decision. Indeed, it is more likely than not that no adverse claimant will be present. As a result, third parties are the only class that can be relied upon to ensure that the Secretary of the Interior issues patents only when they comply with the statutory mandates laid out in the Mining Law. As such, the dissent's treatment of *Block* is much more in line with that case's holding.

---

219 *Id.*

220 *Id.* (citing Hernandez-Avalos v. Immigration & Naturalization Serv., 50 F.3d 842, 846 (10th Cir. 1995)).

221 *Id.* (quoting Sierra Club v. Peterson, 705 F.2d 1475, 1478–79 (9th Cir. 1983)).

222 *Id.* at 1199.

223 *Id.*

224 *Block*, 467 U.S. 340, 347 (1984).

225 *Id.*

226 *Bowen*, 476 U.S. 667, 672 n.3 (1986).

227 *Block*, 467 U.S. at 347–48.

IV. CONCLUSION

The Tenth Circuit's decision in *High Country Alliance* should be viewed as a continuance of the trend of federal courts to weaken the APA's strong presumption in favor of judicial review. In light of the public's extensive interest in obtaining review in this case it is clear just how extensively this progressive weakening has harmed plaintiffs seeking redress from unlawful agency actions. In the end, the court's decision in *High Country Alliance* will allow the BLM to act arbitrarily and capriciously to remove public lands and provide no meaningful public participation in deciding how to manage those federal lands. As a result, the public is left $875 richer, but without access to public lands and resources worth far more than that. While the Supreme Court denied certiorari,[228] federal courts should take notice of the continued weakening of the APA's strong presumption in favor of judicial review to allow such review where agencies act outside their legal jurisdiction. In the end, as the modern Congress has often embraced judicial review in the context of public natural resources,[229] to find that the Mining Law impliedly precludes judicial review is simply another manner in which the Mining Law has become an antiquated federal resource management statute in desperate need of amendment.

[228] High Country Citizens Alliance v. Clarke, 127 S. Ct. 2134 (2007).

[229] COGGINS ET AL., *supra* note 88, at 285.