APPENDIX F
OFFICE OF THE SOLICITOR DECISION: MOUNT EMMONS MINING COMPANY, 4-03-2004

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Washington, D.C. 20240
http://www.blm.gov

APR 2 - 2004

CERTIFIED MAIL - Return Receipt Requested

DECISION

Board of Commissioners of Gunnison County, Colorado	:	Park City 10 (CMC 8044, 52218)
	:	Park City 15 (CMC 8048, 52222)
	:	Park City 16 (CMC 8049, 52223)
High Country Citizens' Alliance	:	Park City 17 (CMC 8050, 52224)
	:	Park City 18 (CMC 8051, 52225)
Town of Crested Butte	:	Park City 19 (CMC 8052, 52226)
	:	Park City 27 (CMC 8059, 52227)
	:	Park City 28 (CMC 8060, 52228)
	:	Park City 32 (CMC 8062, 52229)
	:	Park City 33 (CMC 8062, 52230)
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Protest Dismissed

On December 30, 1992, Mount Emmons Mining Company (Mount Emmons)[1] submitted a patent application for ten lode claims covering approximately 174 acres located for molybdenum. The mining claims were located on April 12, 1977 (amended in July 1978), and are situated within the Gunnison National Forest near Crested Butte, Colorado. The Secretary of the Interior signed the First Half of Mineral Entry Final Certificate (FHFC) on December 23, 1997.[2] The United States Forest Service (Forest Service) through an agreement with the Bureau of Land Management (BLM) examined the mining claims on November 19, 1998. The Forest Service prepared a mineral report in September 2000. Western Mine Engineering (WME) of Spokane, Washington,

[1] At the time the patent application was filed, Mount Emmons was a subsidiary of AMAX Exploration. Mount Emmons is now a subsidiary of Phelps Dodge. Mineral Report, at 4.

[2] The Secretary signed the FHFC following a decision of the United States Court of Appeals for the Tenth Circuit, which allowed the processing of this patent application to continue despite BLM's initial determination that it was prohibited from reviewing the application by the patent funding moratorium. Mount Emmons Mining Co. v. Babbitt, 117 F.3d 1167 (10th Cir. 1997).

prepared the economic analysis for the mineral report pursuant to a third party contract directed and administered by the Forest Service.

In the economic analysis it prepared for the Forest Service, WME consulted a variety of sources to estimate the costs Mount Emmons would incur in developing this deposit, including two feasibility reports that Mount Emmons included with its patent application. Mineral report, at 62. These feasibility reports included a study prepared for Mount Emmons in 1990 by American Mine Services, Inc., as well as a pre-feasibility report by Behre Dolbear & Company, Inc. (BDC Report), which analyzed the project economics.[3] Mount Emmons included the BDC Report as part of its patent application. The BDC Report concluded that the project would have a net present yield of $17.6 million at a 12% discount rate. BDC report, at 2.

The Mount Emmons underground mining operation, as analyzed by BLM and WME, would use vertical blast hole stoping to produce 6000 short tons per day. The mine would operate 24 hours per day, 365 days per year for the estimated 11-year mine life. BLM estimates that there are about 23 million tons of mineable reserves containing 0.689% molybdenite, and that Mount Emmons could recover about 267 million pounds of molybdenium trioxide.

Based on the information provided by Mount Emmons and gathered by the mineral examiners, WME initially determined that the after-tax profit from the sale of molybdenum trioxide would be approximately $152 million as of December 23, 1997, (the date the FHFC was signed) and $158 million as of November 19, 1998 (the date of the mineral examination). Based on these figures, the internal rate of return for the project was estimated to be about 14% for both dates. As detailed below, WME's subsequent recalculation of these figures lowered the internal rate of return to 11.5% for the date of the FHFC, and 11.7% for the date of the mineral examination. The mineral report was completed on September 25, 2000, and BLM's Headquarters Office gave its technical approval of the patent application on April 9, 2001.[4]

In June 1993, the Board of County Commissioners of Gunnison County, the Town of Crested Butte and the High Country Citizens Alliance (protesters)[5] filed protests against

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[3] As HCCA notes in the Supplemental protest, Supplemental protest, at 17 n.9, the BDC report was included with Mount Emmons's patent application and was not submitted to the State of Colorado or the Forest Service as part of a mining plan of operations. The BDC report does not purport to be a mining plan of operations, nor does the Mining Law require Mount Emmons to submit a mining plan of operations before applying for patent.

[4] An addendum to the mineral report containing the recalculations of the internal rate of return was completed in June 2003 for the reasons described on page 7 below.

[5] Because the protests filed by all three protesters were virtually identical, the protesters will be identified collectively unless otherwise noted, and all citations to the protest will be to the protest filed by HCCA.

issuance of the Mount Emmons patent.[6] The three protests raised virtually identical issues alleging the patents should not issue for failure to demonstrate a discovery of a valuable mineral deposit. On October 15, 2001, High Country Citizens Alliance (HCCA) filed a supplement to its protest. In the supplement, HCCA alleged a lack of a discovery of a valuable mineral deposit for three primary reasons. HCCA asserted that Mount Emmons (1) did not have the water rights necessary to mine; (2) had failed to meet the prudent person and marketability tests; and (3) had failed to demonstrate control over sufficient lands for the ancillary facilities.

The relief sought by each protester is slightly different. Gunnison County requests that Mount Emmons's patent application not be granted unless all applicable requirements are satisfied. Gunnison County protest, at 5. Crested Butte requests that BLM deny Mount Emmons's patent application[7] and declare the subject mining claims null and void. Crested Butte protest, at 5. Crested Butte also requests that BLM require Mount Emmons to "surrender possession" of its claims. Id. HCCA similarly requests that BLM deny Mount Emmons's patent application, and that "all proceedings [on the patent application] be suspended until a decision on the merits of this Patent Contest and Protest" has been made. HCCA protest, at 8.[8] In a supplemental protest filed on October 15, 2001, HCCA repeats several times the statement that BLM must deny Mount Emmons's patent application, as well as stating that BLM cannot issue the patent. Supplemental protest, at 1, 25, 28.

I. Standard of Review

In a patent application protest, the burden is on the protester to demonstrate by a

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[6] The protesters styled their protests as actions against Mount Emmons, rather than BLM. *See infra* note 8.

[7] Crested Butte and HCCA assert that the appropriate relief in granting their protests would be to deny Mount Emmons's patent application. See, e.g. Supplemental protest at 37. Under U.S. Steel, 52 IBLA 319, 325 (1981), if BLM concludes that the evidence submitted by the applicant does not demonstrate the discovery of a valuable mineral deposit, the proper procedure, with or without a protest, is for BLM to initiate a contest action against the claims to determine whether the claims are valid. Id. Except where claims have been declared null and void by operation of law, BLM may not simply deny a patent application. Rather, it must give patent applicants an opportunity for a hearing before invalidating a mining claim.

[8] Although HCCA captions its protest a "patent contest," HCCA has no standing to bring a contest action against Mount Emmons's mining claims.

preponderance of the evidence that the government[9] incorrectly determined that the mining claims were valid and that patent should issue. In Re Pacific Coast Molybdenum Co., 75 IBLA 16, 30 (1983). The protester's burden is similar to that of an adverse claimant in a private mining claim contest. Pacific Coast Molybdenum Co., 75 IBLA 16, 22 n.4 (1983). In a private mining contest, the adverse claimant must establish the invalidity of the other party's mining claim by a preponderance of the evidence. Morales v. Baudendistel, 105 IBLA 211 (1988). The burden is on the adverse party bringing the private mining contest, rather than the mining claimant, because the adverse party is "the proponent of the rule, i.e., the invalidity of the contested claim." Massiro v. Western Hills Mining Ass'n, 78 IBLA 155, 160 (1983).[10]

In Re Pacific Coast Molybdenum involved an appeal of a patent application protest where the protester alleged, among other things, that the patent applicant did not adequately analyze development costs, including costs of environmental protection and reclamation. Pacific Coast Molybdenum, 75 IBLA at 27. The protesters in that case did not provide any evidence to support their case beyond licensing and reclamation cost factors. The Interior Board of Land Appeals (IBLA) held that a protester's statements that environmental costs might be as much as five to ten times higher than those estimated by the company:

> miss the point that [the protesters] bear the burden of showing that the cost figures used by [the claimant] and BLM are so understated that a reasonable likelihood of success in developing a paying mine does not exist. It is not enough to merely suggest that such might be the case. Appellants are required to show that such is the case.

Id. To meet its burden of persuasion and prevail in a patent application protest, the protester's evidence must be supported by facts and must be more than mere suggestion. Pacific Coast Molybdenum., 75 IBLA at 30.

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[9] BLM has the authority to issue mineral patents for land managed by the Forest Service. Although the Forest Service performs mineral examinations under a memorandum of understanding, BLM makes the ultimate determination about whether patent should issue. Consequently, references to BLM in this Decision will include the Forest Service unless otherwise indicated.

[10] Similarly, the burden in a government contest rests on the proponent of the rule: the mining claimant. United States v. Knoblock, 131 IBLA 48, 49 (1994). That is, although the government is responsible for establishing a prima facie case of invalidity, the mining claimant is the proponent of the rule that the claim is valid. Id. Consequently, in government contests, the mining claimant has the burden of persuasion to overcome the government's prima facie case of invalidity by a preponderance of the evidence. Id.

II. Discussion

In general, the protesters' allegations regarding why they believe the Department of the Interior should reject Mount Emmons's patent application are unsupported in fact and in law. These allegations are related to whether Mount Emmons has produced sufficient information to satisfy the Mining Law requirements for patenting, in particular whether it has produced sufficient information with regard to environmental costs, market information, and water rights and availability to meet the prudent person and marketability tests. HCCA's supplemental protest also makes several allegations challenging whether Mount Emmons has demonstrated it has made a discovery of a valuable mineral deposit under the Mining Law.

1. Burden of proof

HCCA begins its arguments in the Supplemental protest by stating that "Mount Emmons bears a substantial burden in applying for patent." Supplemental protest, at 3. HCCA then discusses in detail the standard for granting a patent application and why it believes Mount Emmons's patent application did not meet this standard. See id. at 3-7. It appears from these arguments that HCCA believes that the burden of proof for purposes of this protest rests on Mount Emmons.

As discussed above, however, the question for purposes of reviewing this protest is whether the protesters have shown by a preponderance of the evidence that BLM was unreasonable in its determination that patent should issue. This includes showing that BLM's analysis was so insufficient and unreliable that it is unreasonable for it to have concluded that a reasonable likelihood of success in developing a paying mine exists. As described in further detail below, the protesters have not provided evidence to support such a finding, and consequently cannot prevail on their protests.

2. Prudent person and marketability tests

All of the protests allege that the mining claims did not satisfy the prudent person and marketability tests under the Mining Law due to the aggregate costs in general, and the aggregate costs of reclamation, environmental protection, and land use regulation. Protest, at 5 and 6.[11] The protesters make the contradictory allegations that these costs would reduce the net return to such an extent that the prudent person test would not be met, and that these costs are unknown. Id. The three original protests provide only these conclusory statements regarding the costs, without further specificity as to why the information BLM relied upon to make its decision was so understated that a reasonable likelihood of success in developing a paying mine does not exist.

HCCA in its Supplemental protest provides more detailed reasons for its contention that the Department should not patent Mount Emmons's mining claims. However, the

[11] The protesters similarly allege that patents cannot issue because the reclamation and environmental costs to mine the deposit are unknown. Protest at 6.

information in the Supplemental protest still fails to identify any specific BLM error. In part this is because, like the three original protests, many of the allegations do not provide sufficient detail to support the flaws HCCA alleges exist in BLM's analysis.

a. Commodity pricing

Where the protesters' allegations are more detailed, they are inaccurate or otherwise mischaracterize the facts or applicable law. For example, HCCA alleges that the Mount Emmons mine is not economically feasible because the price when Mount Emmons submitted its mining plan of operations in the 1970s was "abnormally high." Supplemental protest, at 14. HCCA also cites several other dates and prices, all to support its allegation that the mine would not be economically feasible. Id. HCCA's implication is that BLM used the highest prices in its economic evaluations and that it should have used a much lower price based on the average price for a certain timeframe, or the price in 1992 when Mount Emmons submitted its patent application.

Contrary to HCCA's implication, WME's analysis was based on the average of the monthly prices for the 5-year period before the date of FHFC and the date of mineral examination. Those prices were $4.52 and $4.61 respectively, and were used in the economic analysis in the mineral examination that showed that the nine claims recommended for patent satisfied the patenting requirements. BLM did not, as the protesters allege, use the price as of the date that the mining plan of operations was submitted because that date is not relevant to the determination of whether the claims have met the requirements for patenting.

b. Economic analysis - internal rate of return

HCCA also makes erroneous and irrelevant statements about other parts of the economic analysis. HCCA alleges that in the BDC report Mount Emmons "admits that, at an internal rate of return of 12%, the molybdenum oxide price must be at least $5.00/lb" and states that molybdenum prices have not been that high since the early 1980s. Supplemental protest, at 17. HCCA's misinterpretation of the information in the BDC report demonstrates significant confusion about the use and significance of internal rates of return.[12] See also id. (misinterpreting Figure 14.3 of the BDC report at page 161 to

[12] Internal rates of return are benchmarks companies use in the planning stages to determine whether a project would be viable. Companies calculate the internal rate of return by taking the net free cash flow for each year, and discounting it by a specific rate to determine the net present value of the project. In general, a low discount rate will result in a higher net present value. As the discount rate increases, the net present value will decrease until the net present value eventually reaches zero. The discount rate at which the net present value is zero -- in other words, the discount rate that exactly balances the net present value of expenditures against the net present value of revenues -- is called the internal rate of return and is roughly equivalent to the interest rate that the operator would earn on its investment.

mean that "if the molybdenum oxide price dropped to $4.25/lb, the internal rate of return dropped to only 7.30% and the Net Present Value (at 12% internal rate of return) was $ -26,000,000"); id. at 19-20.

Contrary to what HCCA alleges in the Supplemental protest, there is no "standard mining industry benchmark" for minimum rates of return.[13] Supplemental protest, at 19-20, 20 n.11 (stating that "a prudent rate of return would be at least 15%" and citing to a brief filed in a case involving a different company, a different state, a different mineral, and a different mining method). Rather, the minimum rate of return investors will accept as reasonable varies based on several factors, including the type of mineral, where in the country or world the mine is located, the prevailing economic climate, the company proposing the project, the life and size of the project, inflation rates, interest rates, and rates of return used by industry and government.

Based on all these factors, WME concluded that discount rates of at least 10% to 12% would be of interest to investors in the Mount Emmons mine. Using a molybdenum price of $4.52 per pound, WME initially determined that the internal rate of return would be 14% for both the date of FHFC and the date of the mineral examination. Using similar parameters and based on a molybdenum price of $4.52 per pound as of the date of FHFC, BLM also calculated the internal rate of return at 14%. At a price per pound of $4.61 as of the date of the mineral examination, the internal rate of return was calculated to be 14.2%. Mineral report, at 71.

The Supplemental protest alleged that net smelter return royalties owed to third parties not considered in the economic evaluation would result in a finding that the project would be uneconomic. At the request of the Solicitor's Office, WME reevaluated the cash flow economic analysis to determine the effect of the net smelter return royalties. WME determined that the after-tax profit would be reduced from approximately $151.8 million to $120.6 million as of FHFC, and $125.5 million for the date of the mineral examination. Based on these figures, the internal rate of return realized by Mount Emmons would be reduced to 11.5% for the date of FHFC, and 11.7% for the date of the mineral examination.

The economic analysis in the revised mineral report does not change or impact the reasonableness of BLM's conclusion that the claims satisfy the requirements for patenting. Consequently, HCCA's allegations regarding the price and net present value are unsubstantiated, and do not demonstrate BLM error.

c. Other costs

HCCA also challenges the information in the BDC report contracted by Mount Emmons, alleging in particular that the BDC report fails to account for long-term costs associated

[13] The lack of a "standard industry benchmark" is in part because many mining companies consider minimum rates of return confidential and do not release discount rate information to the public for projects under development. See WME report, at 12-51.

with the water treatment plant; that the BDC report did not contain any analysis about whether any treatment will be necessary to meet the aquatic life standards; and that Mount Emmons does not have sufficient land for the water storage reservoirs based on HCCA's assertion that the BDC report does not include land acquisition costs for this purpose. Supplemental protest at 20-22. However, HCCA's examples of what it believes are flaws in Mount Emmons's contractor's analysis are not persuasive because it has not demonstrated how BLM's analysis was unreasonable.

Moreover, the costs of the water treatment plant and the discussion of environmental permitting were indeed accounted for in BLM's economic analysis and considered when recommending Mount Emmons's application for patent. See Mineral report, at 51 (discussing existing Keystone mine water treatment plant; id. at 69 (considering long-term costs associated with water treatment as part of the discussion on environmental permitting); WME report, at 12-38 (more detailed discussion of water treatment); WME report, at 12-27 (considering costs of environmental permitting, in particular stating that the NPDES permit would require modification). With regard to land acquisition for pipelines, Mount Emmons controls over 5357 acres at the mine site. The protesters provide no evidence to demonstrate that this will not be sufficient.

Also, HCCA relies on economic feasibility reports it commissioned for the water rights dispute discussed below to argue against patent issuance. Supplemental protest, at 18-19. The documents HCCA references were not created for or by BLM, and there is no indication that HCCA's "minerals economics experts" reached their decisions regarding whether the deposit is "profitable" using the marketability and prudent person tests under the Mining Law. In addition, there is no indication that those reports were intended to be used for the purpose of determining whether the mining claims satisfy the legal requirements for patent. As such, the portions quoted cannot be considered persuasive with regard to whether BLM correctly concluded that the claims met the patenting requirements.

HCCA also raises several issues with regard to whether the economic analysis considered adequate reclamation costs. Supplemental protest, at 21-22. HCCA cites in particular costs of "infrastructure removal, tailings pipeline corridor reclamation, and other necessary reclamation costs" that it alleges BLM did not consider. HCCA also uses a comparison to an underground mining project in Montana as support for alleging that the reclamation costs are too low. HCCA acknowledges that "every mine differs in some respects" but states without further explanation or support that the estimates at the Montana mine "can serve as a model for what the Forest Service would require at Mt. Emmons." Supplemental protest, at 22.

The mineral report states that the reclamation costs in the economic analysis were based on the estimated costs of mine closure in the BDC report, with an additional $1 million for post-mining monitoring. Mineral report, at 68. These costs cover site closure and monitoring, including administration costs, mine adit sealing, revegetation, removal of buildings and ancillary facilities, and reclamation of the mill building area, roads, waste rock facility, and tailings impoundment. Id. HCCA fails to provide any specificity as to

deficiencies in BLM's analysis with regard to the "other necessary reclamation costs" and as such the Department concludes that these allegations are not sufficient to sustain the protest.

d. Discovery issues

HCCA also mischaracterizes certain deposition testimony from the water rights litigation, implying that Mount Emmons has "admitted" it does not have a discovery. Supplemental protest, at 11-12. Specifically, HCCA states that Mount Emmons "believes that undertaking mining development of the lode claims is not prudent at this time (or any time in the reasonable past or future)." Id. at 11. HCCA goes on to state that Mount Emmons "has admitted that under current conditions (i.e., lacking the necessary water rights and the patent) it has no plans to proceed with the mine" and that Mount Emmons's "Vice President Jerry Danni stated that without a patent, the mine would not go forward[.]" Id. at 12. HCCA appears to allege that Mount Emmons is "argu[ing] that it has passed the prudent person test based on an event yet to occur (i.e. the granting of the patent)."[14] Id.

Again, HCCA has not provided any evidence along with its allegation to demonstrate that BLM erred in its determination that patent should issue. As such, this allegation provides no basis on which to sustain the protest.

2. Water rights

HCCA also alleges that the claims are invalid due to a lack of water necessary to develop the deposit. Supplemental protest, at 7. This allegation was predicated on a ruling by the Colorado District Court, Water Division No. 4 (the Water Court), which denied Mount Emmons's application for a conditional water right, finding that Mount Emmons did not have a subordination contract with the Bureau of Reclamation.

On January 28, 2002, the Colorado Supreme Court overturned the Water Court's ruling that a subordination agreement with the Bureau of Reclamation was a prerequisite to a finding that water was available to satisfy the application, and remanded the matter to the Water Court for a determination of whether water was available. Mount Emmons Mining Co. v. Town of Crested Butte, 40 P.3d 1255 (Colo. 2002) reh'g denied (Feb. 25, 2002). On July 25, 2002, the Water Court issued a decree granting the water rights for which

[14] HCCA misinterprets the statements quoted from the transcript of the deposition in the water rights litigation. The question posed to Mount Emmons was whether anyone from Mount Emmons attending an unidentified meeting was given any tasks with regard to moving "the project" forward. Mount Emmons's response was in the negative, meaning that no one from Mount Emmons who attended the unidentified meeting was given any tasks related to moving the mining project forward. Mount Emmons did state that it was the company's priority to secure water rights and the patent, but nothing in the transcript indicates that Mount Emmons believes that it will not have a discovery until after the patent.

Mount Emmons had applied. Therefore, the Department concludes that this allegation does not justify granting the protest.

3. Approvals to mine

HCCA also states that Mount Emmons is not entitled to patent because it cannot show that it could obtain the necessary approvals to mine the lode claims in this patent application. HCCA bases this statement on its bare assertion that Mount Emmons's ancillary facilities, in particular the tailings impoundment, will require more mill site acreage than it is entitled to under the Mining Law and that Mount Emmons would be precluded by Forest Service regulations from using any other lands necessary for mining purposes without such mill sites. Protest, at 25-26.

HCCA's assumption that Mount Emmons requires more land than it would be entitled to under the Mining Law is premised on a Solicitor's Opinion entitled Limitations on Patenting Millsites under the Mining Law of 1872, M-36988 (Nov. 7, 1997). That Solicitor's Opinion concluded that a mining claimant was only entitled to patent five acres of mill site land per associated previously or concurrently patented mining claim. Id. at 2. It has since been superseded. See Mill Site Location and Patenting under the 1872 Mining Law, M-37010 (Oct. 7, 2003); 68 Fed. Reg. 61,046, 61,070 (Oct. 24, 2003) (to be codified at 43 C.F.R. 3832.32). Because Mount Emmons's patent application contains only lode claims, HCCA is not alleging that any of the claims in this patent application cannot be patented because they are "excess" mill sites. Rather, HCCA is arguing that the economic analysis was invalid because it did not take into account the limitations stated in the now-obsolete Solicitor's Opinion regarding the amount of mill site acreage available to Mount Emmons under the Mining Law.

The mining method analyzed for purposes of this patent application calls for approximately 85% of tailings from Mount Emmons's mining operations to be backfilled into the underground mine. Mineral report, at 51. The impoundment for the remainder of the tailings will cover about 10 acres. See WME report, at 12-28, tbl. 12.2.16. According to the BDC report, Mount Emmons controls 5457.9 acres at the proposed mine site. BDC report, at 90. Only 155 of those 5457.9 acres are the subject of this patent application. HCCA provided no specific evidence that demonstrates that the lands under patent application or the remaining lands that Mount Emmons controls are insufficient for this purpose or that BLM's determination was otherwise incorrect. HCCA's arguments with regard to the Forest Service regulations need not be addressed because there is no indication that sufficient mill site acreage does not exist.

4. Other discovery issues

HCCA further alleges that Mount Emmons has not shown that it has a discovery within the limits of each of the mining claims in this patent application. HCCA states that "many, if not most, of the mining claims" at issue do not pass the discovery test and claims that Mount Emmons is attempting to circumvent discovery requirements by "aggregating" its claims. Supplemental protest, at 28. HCCA also argues that even if

aggregation is allowed, that the claims must comply with the "pro-rata" share test for discovery.

HCCA cites, and then dismisses, a series of cases that squarely address the issue of what constitutes a discovery where the deposit is a high-tonnage, low-grade, disseminated ore body such as the molybdenum under patent application here. Those cases make it clear that for high-tonnage, low-grade, disseminated deposits such as the Mount Emmons molybdenum deposit, the focus of the discovery analysis is on whether the claimant can develop "a valuable mine." In those cases, the marketability rule is presented in terms of mining, removing, and disposing of the deposit as a whole, as opposed to whether each claim can support an individual mining operation. These cases make it clear that mining claims may be considered together for the purpose of ascertaining validity, so long as each claim contains sufficient quality and quantity of mineral that can be extracted profitably under an overall mining plan for the entire deposit. See Schlosser v. Pierce, 92 IBLA 109, 130 (1986).

In reaching this conclusion, the IBLA did not "drop the independent discovery requirement" as HCCA suggests. Rather, the IBLA examined the prior administrative case law, including some of the cases HCCA cites for support, and determined that the holdings do not support the proposition that each claim must be able to support an independent mine. For example, in Schlosser, the IBLA explained that the language in the two Melluzzo cases, including the identical language quoted in the Supplemental protest, is dicta and why it cannot be relied upon to require each mining claim to be able to support a paying mine. In addition, the IBLA distinguished other cases such as United States v. Bunkowski and United States v. Gardner, also cited by HCCA, as not good authority for requiring each claim to support its own mining operation because those cases dealt with claims located under the Building Stone Placer Act that have certain validity requirements in addition to the requirements for other types of mining claims. Schlosser and similar cases have not been overturned and HCCA provides no convincing reason to disregard this line of administrative case law.

HCCA also fails to provide specific, convincing evidence that the mineral examiners were incorrect in recommending nine of the claims for patent. The mineral examiners analyzed the amount of mineralization in each individual claim and made a determination for each claim as to whether the claim satisfied the requirements for patenting. This was based on the amount of mineralization on each claim. See Mineral report, at 33, fig. 24.

5. Remaining issues

HCCA raises three remaining issues. The first is that Mount Emmons has not "rebutted the presumption" that its claims are invalid for lack of development. See Supplemental protest, at 23-25. The issue HCCA raises refers to the presumption that mining claims with little or no development do not contain a discovery of a valuable mineral deposit. See, e.g., United States v. Zweifel, 508 F.2d 1150 1156 n.5 (10th Cir. 1975).

Although failure to develop may serve as an independent basis for determining a mining claim's invalidity, this is generally considered a weak basis for a contest complaint. United States v. Hess, 46 IBLA 1, 9 (1980). Any presumption of invalidity is easily rebutted by evidence of marketability, or even a reasonable justification for nondevelopment. See id.; Schlosser, 92 IBLA at 142. When analyzing whether patent to Mount Emmons's claims should issue, the mineral examiners based their recommendation on the determination that the deposit was marketable. Under the prevailing case law, this is sufficient to rebut the presumption.

HCCA also alleges that patent cannot issue because the costs of mining cannot be determined without an EIS. HCCA protest, ¶ 4(e)(i), at 6-7. It is well-established that section 102(2)(c) of the National Environmental Policy Act, 42 U.S.C. § 4332(c), does not require the Department to perform an EIS prior to the issuance of a mineral patent. See South Dakota v. Andrus, 614 F.2d 1190, 1192-95 (8th Cir. 1980) (stating that issuance of a mineral patent is not a major federal action); see also United States v. Kosanke Sand Corp. (on recon.), 12 IBLA 282, 286 (1973). Moreover, the government performed a detailed economic analysis that took into consideration all the relevant costs. The fact that an EIS was not performed is irrelevant to the Department's patenting recommendation.

HCCA's final argument is that Mount Emmons is not entitled to the full amount of land in each mining claim. See Supplemental protest, at 37-41. HCCA argues that Mount Emmons should only be entitled to the land directly overlying the "vein or lode" itself. However, HCCA provides no persuasive legal authority for this novel theory. Even if such persuasive legal authority did exist, it would be impracticable to apply to dispersed ore deposits like the one under patent application.

Consequently, none of the three remaining issues the protesters raise provides a basis for sustaining their protests.

III. Conclusion

The protesters have not demonstrated that BLM's determination regarding Mount Emmons's patent application was in error. The BLM concludes that a contest action is not warranted based on the protesters' allegations. Consequently, the protests of the Board of County Commissioners of Gunnison County, the Town of Crested Butte and the High Country Citizens Alliance are dismissed.

Kathleen Clarke
Director
Bureau of Land Management