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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

CIVIL PENALTY PROCEEDING

Docket No. WEST 88-275-M
A.C. No. 04-01937-05505

v.

Docket No. WEST 89-71-M
A.C. No. 04-01937-05506

SANGER ROCK & SAND,
RESPONDENT

Sanger Pit and Mill

ORDER

The issue in the above cases is whether respondent, Sanger Rock & Sand (Sanger), is subject to MSHA's jurisdiction.

As a threshold matter, Sanger asserts MSHA has not acquired jurisdiction over it for the reason that the federal government has failed to comply with Article I, Section 8, Clause 17(FOOTNOTE 1) of the United States Constitution. Specifically, it is argued that since the United States does not possess fee simple title to Sanger's property and since the State of California did not cede the property to the United States then the case should be dismissed for lack of "territorial jurisdiction."

For the purpose of this ruling I assume the federal government does not own this property and I further assume the property has not been ceded to the federal government by the State of California. But I nevertheless conclude that Sanger's arguments are misdirected. The cited portion of the Constitution relied on

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by Sanger relates to the District of Columbia, the seat of government of the United States. Its plain words do not constitute a grant of power to the Congress to regulate commerce nor is it a restriction on the power of Congress to regulate commerce.

Specifically, this section of the Constitution relates to the Congress having exclusive authority over the District of Columbia, (the seat of government), as well as all other places purchased by the federal government.

In support of its position Sanger relies upon and cites United States v. Benson, 495 F.2d 475 (1974).

The Benson case is not controlling. In Benson the defendants were convicted of robbery that was committed within the territorial jurisdiction of the United States. The territorial jurisdiction of the United States in the case was Fort Rucker, Alabama, a military installation. The federal military code, by virtue of Clause 17, was exclusive in this area which was a federal military reservation.

Contrary to Sanger's views, the grant of authority for Congress to regulate mines rests in Article 1, Section 8, Clause 3 (FOOTNOTE 2) of the Constitution, the "Commerce Clause."

When Congress enacted the Mine Act it considered and defined commerce as it related to mining. Specifically, Section 4 of the Act provides:

Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine and every miner in such mine shall be subject to the provisions of this Act.

Further, "Commerce" is defined in section 3(h) of the Act as:

Trade, traffic, commerce, transportation or communication among the several states, or between a place in a state and any place outside thereof, or within the District of Columbia, or a possession of the United States, or between points within the same state but through a point outside thereof."

The use of the phrase "which affect commerce" in Section 4 of the Act, indicates the intent of Congress to exercise the full reach of its constitutional authority under the commerce clause. See: *Brennan v. OSHA*, 492 F.2d 1027 (2nd Cir. 1974); *U.S. v. Dye Construction Co.*, 510 F.2d 78 (10th Cir. 1975); *Polish National Alliance v. NLRB*, 332 U.S. 643 (1977); *Godwin v. OSHRC*, 540 F.2d 1013 (9th Cir. 1976).

In *Perez v. United States*, 402 U.S. 146 (1971), it was held that Congress may make a finding as to what activity affects interstate commerce, and by doing so it obviates the necessity for demonstrating jurisdiction under the commerce clause in individual cases. Thus, it is not necessary to prove that any particular intrastate activity affects commerce if the activity is included in a class of activities which Congress intended to regulate because that class affects commerce.

In short, mining is among those classes of activities which are regulated under the Commerce Clause of the United States Constitution and thus is among those classes which are subject to the broadest reaches of Federal regulation because the activities affect interstate commerce. *Marshall v. Kraynak*, 457 F. Supp. 907, (W.D. Pa. 1978), *aff'd*, 604 F.2d 231 (3d Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980). Further, the legislative history of the Act as well as court decisions, encourage a liberal reading of the definition of a mine found in the Act in order to achieve the Act's purpose of protecting the safety of miners. *Westmoreland Coal Company v. Federal Mine Safety and Health Review Commission*, 606 F.2d 417 (4th Cir. 1979). See also: *Godwin v. Occupational Safety and Health Review Commission*, *supra*, where the court held that unsafe working conditions of one operation, even if in initial and preparatory stages, influences all other operations similarly situated, and consequently affect interstate commerce.

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The courts have consistently held that mining activities which may be conducted affect commerce sufficiently to subject the mines to federal control. See: *Marshall v. Kilgore*, 478 F. Supp. 4 (E.D. Tenn. 1979); *Secretary of the Interior v. Shingara*, 418 F. Supp. 693 (M.D. Pa. 1976); *Marshall v. Bosack*, 463 F. Supp. 800, 801 (E.D. Pa. 1978). Likewise, Commission judges have held that intrastate mining activities are covered by the Act because they affect interstate commerce. See: *Secretary of Labor v. Rockite Gravel Company*, 2 FMSHRC 3543 (December 1980); *Secretary of Labor v. Klippstein and Pickett*, 5 FMSHRC 1424 (August 1983); *Secretary of Labor v. Haviland Brothers Coal Company*, 3 FMSHRC 1574 (June 1981); *Secretary of Labor v. Mellott Trucking Company*, 10 FMSHRC 409 (March 1988).

In a decision involving the same parties, Commission Judge August F. Cetti ruled against Sanger's "territorial jurisdictional argument." *Sanger Rock & Sand*, 11 FMSHRC 403 (March 1989).

Sanger also states that the State of California has its own laws and regulations that protect the safety and health of its people.

This argument has been raised in a number of cases. Commission judges have consistently held that state and federal OSHA statutes do not preempt the 1977 Mine Act. See: *Brubaker-Mann, Inc.*, 2 FMSHRC 227 (January 1980); *Valley Rock and Sand Corporation*, 4 FMSHRC 113 (January 1982); *Black River Sand and Gravel, Inc.*, 4 FMSHRC 743 (April 1982); *San Juan Cement Company, Inc.*, 2 FMSHRC 2602 (September 1980); *Sierra Aggregate Co.*, 9 FMSHRC 426 (March 1987). I agree with these holdings, and I also take note of the fact that section 506 of the 1977 Mine Act permits concurrent state and federal regulation, and that under the federal supremacy doctrine, a state statute is void to the extent that it conflicts with a valid federal statute. *Dixie Lee Ray v. Atlantic Richfield Company*, 435 U.S. 151, 55 L. Ed. 2d 179 (1978); *Bradley v. Belva Coal Company*, 4 FMSHRC 982, 986 (June 1982).

In WEST 89-71-M Sanger has also moved to dismiss the case on the grounds that MSHA has lost or misplaced records.

It is not possible at this time to identify what records, if any, may be lost. Further, any evidence on that issue will relate to the merits of the cases.

For the foregoing reasons I conclude that the Secretary of Labor, on behalf of MSHA, has jurisdiction in this matter. Further, Sanger, as a sand and gravel operation, is generally subject to the Secretary's authority by virtue of MSHA.

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For the foregoing reasons the following order is appropriate:

ORDER

1. In WEST 88-275-M: Petitioner's motion for a preliminary finding that respondent is subject to the jurisdiction of the Secretary under the authority of the Federal Mine Safety and Health Act is granted.

2. In WEST 89-71-M: Respondent's motion to dismiss on the merits and for a lack of territorial jurisdiction are denied.

3. These cases will be shortly set for a hearing on the merits.

John J. Morris
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1. The cited portion of the Constitution provides that Congress shall have the right:

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . . "

~FOOTNOTE_TWO

2. The cited portion of the Constitution provides that Congress shall have the right

"To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes."