

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

January 15, 2016

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

v.

STATE OF ALASKA,
DEPT. OF TRANSPORTATION,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2008-1490-M
A.C. No. 50-01729-159523

Docket No. WEST 2011-1549-M
A.C. No. 50-01729-266809

Mine: SAG Screener

Docket No. WEST 2012-109-M
A.C. No. 50-01893-269505

Mine: Cordova Screener

DISMISSAL ORDER ON REMAND

Before: Judge Feldman

At issue is whether the State of Alaska Department of Transportation's ("Alaska") use of front-end loaders in conjunction with mobile screeners is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 801 *et seq.* (2006) ("Mine Act"). The subject front-end loaders are used to maintain the Dalton Highway, a 420-mile unpaved haul road in northern Alaska. The Dalton Highway is traveled by vehicles servicing the Alaska Pipeline.

The loaders are used to transfer to a mobile screener natural deposits of rock, gravel, and sandy material that have been extracted from a series of pits along the highway. The screened material is ultimately used to fill potholes, as necessitated by road deterioration caused by the spring thaw. The Federal Aid to Highways Act authorizes Alaska to use these federal lands adjacent to the Dalton Highway for the purposes of construction and maintenance of the highway. 23 U.S.C. § 317 (2012); 34 FMSHRC 179, 181 (Jan. 2012) (ALJ).

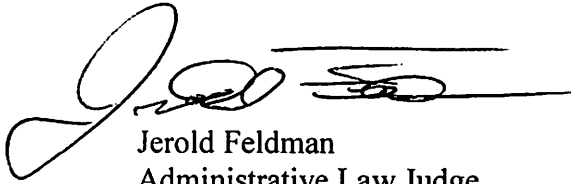
The initial decision, issued on January 10, 2012, determined that the subject operations constitute borrow pits that are exempt from Mine Act jurisdiction. 34 FMSHRC 179 (Jan. 2012) (ALJ). However, on appeal, the Commission held that there is "unquestioned [Mine Safety and Health Administration ("MSHA")] authority under the Mine Act" to regulate "operations involving the '[o]pen pit mining' of '[s]and and [g]ravel.'" 36 FMSHRC 2642, 2645 (Oct. 2014) (citing *MSHA-OSHA Interagency Agreement*, 44 Fed. Reg. at 22,829 (Apr. 17, 1979, amended by 48 Fed. Reg. 7521 (Feb. 22, 1983))). Having determined that there is Mine Act jurisdiction, the Commission remanded this matter for further proceedings which now concern a total of five

citations for Dalton Highway vehicle maintenance defects, all designated as non-significant and substantial.¹

The disposition of this remand matter was delayed to give the Secretary and Alaska the opportunity to resolve conflicts of jurisdiction between MSHA and the Alaska Occupational Safety and Health Administration. On November 18, 2015, the Secretary moved to vacate the five citations at issue, Citation Nos. 6444323, 6444324, 8605302, 8605303, and 8601014.

ORDER

In view of the above, **IT IS ORDERED** that Citation Nos. 6444323 and 6444324 in Docket No. WEST 2008-1490-M, Citation Nos. 8605302 and 8605303 in Docket No. WEST 2011-1549-M, and Citation No. 8601014 in Docket No. WEST 2012-109-M, **ARE VACATED** with prejudice. **WHEREFORE**, the above captioned civil penalty matters **ARE DISMISSED**.²



Jerold Feldman
Administrative Law Judge

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¹ Docket No. WEST 2008-1490-M was the only captioned docket dealt with in the January 10, 2012, initial decision, and the Commission's October 16, 2014, remand. Given the Commission's finding of Mine Act jurisdiction, Docket Nos. WEST 2011-1549-M and WEST 2012-109-M, which also concern defects on Dalton Highway maintenance equipment, were consolidated with Docket No. WEST 2008-1490-M following the Commission's remand by order dated March 26, 2015.

² During the course of several telephone conferences, counsel for Alaska expressed regret that the Secretary's vacatur deprived Alaska of further litigating the subject jurisdictional question. I trust that the parties have resolved this issue through mutual agreement.