FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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CROWN RESOURCES CORPORATION, Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST PROCEEDINGS Docket No. WEST 2017-0202-RM Citation No. 8612335; 01/19/2017 Docket No. WEST 2017-0325-RM Citation No. 8882030; 03/23/2017 Mine: Buckhorn Mine Mine ID: 45-03615
ACI NORTHWEST, INC. Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	Docket No. WEST 2017-0211-RM Citation No. 8612334; 01/19/2017 Docket No. WEST 2017-0212-RM Citation No. 8612336; 01/19/2017 Mine: Buckhorn Mine Mine ID: 45-03615 W198

BEFORE: Judge Gill

ORDER DENYING MOTIONS FOR SUMMARY DECISION

These cases involve four Notices of Contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). An authorized representative of the Secretary, on behalf of the Mine Safety and Health Administration ("MSHA"), issued Citation Nos. 8612334 and 8612336 to ACI Northwest, Inc. ("ACI Northwest") and Citation No. 8612335 to Crown Resources Corporation ("Crown Resources") following a December 21, 2016, accident resulting in the death of a miner on a mine haul road. MSHA subsequently issued Citation No. 8882030 to Crown Resources after inspecting the road on which the accident occurred. On April 7, 2017, Crown Resources and ACI Northwest (collectively referred to as "Contestants") filed a motion to consolidate, which was granted.[1]

[1] Crown Resources contracts with ACI Northwest to haul gold ore extracted from the mine.

The Contestants have filed a joint motion for summary decision, while the Secretary has filed a motion for partial summary decision. The issue before me, as framed by these motions, is whether MSHA has jurisdiction over Forest Service Road 3550-125 (the "Road at Issue").[2] The answer depends on whether this road is within the definition of "mine" under the Federal Mine Safety and Health Act of 1977 (Mine Act), Pub. L. No. 95–164, § 102(b)(3), 91 Stat. 1290 (codified at 30 U.S.C. § 802(h)(1)).

The Commission has long analogized summary decision to summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 56. *See, e.g., Kenamerican Res., Inc.*, 38 FMSHRC 1943, 1946 (Aug. 2016); *Energy W. Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994). Summary judgment should not be granted "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994) (quotation omitted). For summary judgment to be appropriate, the evidence must do more than *allow* the court to find in the movant's favor, it must "*require* that the court do so." *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (emphasis in original). If, when viewing the evidence and drawing all permissible inferences in favor of the non-movant, the record could support either party, then resolution at the summary judgment stage is inappropriate. *Id.*; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-55 (1986).

Disposition by summary decision is appropriate provided: (1) the entire record establishes that there is no genuine issue as to any material fact; and (2) the moving party is entitled to summary decision as a matter of law. 29 C.F.R. §2700.67(b). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Mo. Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). If the moving party fails to meet its burden, then summary decision must be denied, regardless of the sufficiency of the opposition. Even the absence of an opposition does not entitle the movant to summary decision when the motion is inadequately supported. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-61 (1970) (summary judgment must be denied where the evidence in support of the motion does not establish the absence of any genuine issue, even if no opposing evidence is presented). *See also In re Rogstad*, 126 F.3d 1224, 1227-28 (9th Cir. 1997); *Campbell*, 21 F.3d at 55-56.

Statement of the Case

"Coal or other mine" is defined in Section 3(h)(1) of the Act as:

> (A) *an area of land from which minerals are extracted*... (B) ***private*** ways and roads ***appurtenant to*** such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, *facilities*, equipment, machines, tools, or other property... used in, or to be used in, *or resulting from, the work of extracting such minerals*... or used in, or to be used in, the

[2] Lack of MSHA jurisdiction over the road would moot the above Citations.

> milling of such minerals, or *the work of preparing coal or other minerals*, and includes custom coal preparation facilities.

30 U.S.C. § 802(h)(1) (emphasis added).

The United States Court of Appeals for the District of Columbia affirmed the Secretary's interpretation of the ambiguous statutory terms "*private roads*," —which the Secretary interpreted to mean "those restricted to a particular group or class of persons (not to a particular person)"— and "*appurtenant to*," which the Secretary interpreted to mean that "the road belong and provide a right of way to some more important thing (not dedicated exclusively to use by some more important thing)." *Sec'y of Labor v. Nat'l Cement Co., Inc.*, 573 F.3d 788, 791 (D.C. Cir. 2009). The parties both agree that these definitions have established precedent. (Contestants Br. 22; Sec'y Br. 25)

Motion for Summary Decision Submitted by Crown Resources/ACI Northwest

The Contestants assert that Forest Service Road 3550-125 (the "Road at Issue") is not private because of its ongoing and frequent use by the public. Contestants also argue that the Road at Issue is not appurtenant to the Buckhorn Mine because sections of the road that fall on private and federal lands did not have a transferable easement. Finally, even if the Road at Issue was under MSHA jurisdiction, Contestants claim they did not receive fair notice because MSHA had not previously inspected the road.

"Private"

Contestants argue that the Road at Issue is not private because several of their employees declared under oath that they believed this was the case, and that they had seen members of the public using the road. (Contestants Br. 28-31) Contestants also claim that the lessors of their easement —the Washington State Department of Natural Resources ("Washington DNR" or "DNR") and the United States Forest Service ("USFS" or "Forest Service")— did not attempt to enforce agreed-upon restrictions on public access. *Id.* These opinions do not meet the evidentiary burden that would compel me to conclude as a matter of law that the Road at Issue is not private. Instead, the Contestants' underlying claim that there are no genuine issues of material fact is overtly contradicted by their own exhibits. The most salient example of this is the Contestants' internal training documents at the time of the accident, in which management not only informed employees that the Road at Issue was closed to the public, but also explicitly instructed workers to report trespassers to their supervisors. (Ex. C–21 (for the 2008 version, see Ex. S–I.)) It is incongruous for Contestants to now argue, after years of training their own employees to monitor and police the Road at Issue for trespassers, that the road could not possibly be considered private under the Mine Act.

The testimonies by Crown Resources employees are contradicted by numerous other exhibits provided by the Contestants and Secretary, which solidly creates triable and material issues of fact. Crown Resources underwent lengthy negotiations with the USFS and Washington DNR before receiving approval for the Buckhorn Access Project, which authorized Crown to

construct an access road to the mine on government-owned land. At every step of the approval process, the USFS and DNR specified that the Road at Issue would be private:

> 1) The Buckhorn Access Project's Final Environmental Impact Statement ("FEIS") repeatedly declared that the Road at Issue would be "closed to public use for safety" during mining operations. (Ex. C–13, Bates Nos. CRC 176-181, CRC 192, CRC 399-405; *see also* Record of Decision, Ex. S–C, Bates Nos. CRC 818, CRC 853)
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> 2) Public comments on the FEIS, and the Forest Service's responses to these comments, indicated a mutual understanding that the Road at Issue would be closed to public use. (Ex. C–13, Appendix F, Bates Nos. CRC 780, CRC 783, CRC 789)
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> 3) Crown Resources likewise agreed in its Commercial Easement with the Washington DNR that the Road at Issue would be closed to public use on DNR land. (Ex. S–D, p. 2 "Other entities seeking to use the access roads . . . must obtain an easement from DNR.")
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> 4) Crown Resources' Final Amended Plan of Operations ("FAPOO") stated that the Road at Issue "will be closed to public access during project operations." (Ex. S–E, Bates No. CRC 48)
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> 5) Order 673 prohibited the public from using the Road at Issue without first obtaining express permission from the Forest Service. (Ex. S–E)
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> 6) The Road Use Permit Crown obtained from the Forest Service likewise prohibited all motorized vehicles unaffiliated with the mine from using the Road at Issue. (Ex. S–G, Bates No. CRC 1180 "Forest Road 3550-125 . . . will be closed to all motorized vehicles not associated with the mine. . . .")
>
> 7) Finally, and most tellingly, when Crown Resources signed the Forest Service's Road Use Permit, it promised to furnish and install "FOR MINE USE ONLY" signs to alert the public at intersections connected to the Road at Issue. (Ex. S–G, Clause 4, Bates No. CRC 1189-90)

The Contestants assert that the lessors of their easement never acted to enforce these closure requirements, opining that if the Forest Service had truly cared about Crown's refusal to help restrict public access to the road as promised, they would have "insist[ed] on such closures." (Contestants Br. 28) No legal precedent is cited to support the Contestant's argument that Crown's alleged breach of its contracts with the USFS and DNR thwarts all MSHA jurisdiction over the Road at Issue as a matter of law. Even if precedent supported the Contestants, they have

not provided indisputable factual evidence that Forest Service personnel "[were] aware of the public's unrestricted use of the Road at Issue," or were even aware that Crown had failed to follow the terms of their agreement. *Id.* The Road Use Permit instructed Crown that "[i]f problems occur requiring enforcement, the Forest Service shall be promptly notified," but the Contestants have furnished no evidence that they ever gave prompt notice to the Forest Service as promised when their employees observed members of the public on the Road at Issue. (Ex. S–G, Bates No. CRC 1189) Therefore, the Secretary's reasonable inference, countering the Contestants' own narrative of events, necessarily awaits rebuttal at a hearing: that when Crown promised to give the Forest Service prompt notice of trespassers, the Forest Service assumed Crown would follow this term of their agreement. I have no way to conclude as a matter of law that the Forest Service's purported indifference to trespassers was not instead the result of their expectation that good faith notice from Crown would trigger their intervention. It appears that every signed legal document between Crown and the Forest Service and Washington DNR considered the Road at Issue to be private, and Contestants have not provided sufficient factual or legal support for me to override this evidence.

"Appurtenant to"

The Contestants assert that *Secretary of Labor v. National Cement Company, Inc.*, 573 F.3d 788 ("*National Cement II*"),[3] held that a transferable easement is a necessary condition for a road to be deemed "appurtenant to" a mine under the Mine Act. (Contestants Br. 35-36) However, the Secretary correctly noted that this is an incorrect articulation of *National Cement II*. The D.C. Circuit never stated or implied that having a transferable easement was absolutely necessary for a road to be appurtenant. They instead endorsed the Secretary's broad interpretative authority over the Mine Act's jurisdictional scope.[4] As such, a more sensible reading and understanding of *National Cement II* is that the presence of a transferable easement was found to be a sufficient condition in that case, but is not dispositive in future cases. The Court instead focused attention on whether the Secretary's interpretation of "appurtenant to" was in reasonable alignment with "a key objective of the Mine Act." *Id.* at 796. Finding a reasonable alignment depended on the highly deferential standard of review promulgated in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *National Cement II*, 573 F.3d at 792-93.

Although the Road at Issue clearly "provides a right of way to some more important thing," whether it does not "belong" to the mine is an issue of material fact that Contestants must demonstrate at a hearing. *National Cement II*, 573 F.3d at 791. The Contestants acknowledge that MSHA is not asserting jurisdiction over the entire 48-mile haul route, or even the entire 8.7-mile length of FSR 3550, but only the 3.4 miles leading up to the mine. (Contestants Br. 24) To

[3] I refer to this case as "*National Cement II*" to distinguish it from *Secretary of Labor v. National Cement Company, Inc.*, 494 F.3d 1066 (D.C. Cir. 2007).

[4] "On remand the Secretary adopted the broad reading of this provision to bring the access road within MSHA's jurisdiction. We held before that such a reading was not inconsistent with the language of subsection (B) and we will not revisit that decision." *National Cement II*, 573 F.3d at 793.

repeat, the Contestants' own exhibits show that this section of FSR 3550 was constructed and reconstructed by Crown Resources for the purpose of transporting miners and mined ore to and from a mine, and had been repeatedly designated as closed to the public by the Forest Service, Washington DNR, and the Contestants themselves.

The Contestants note that the Buckhorn Mine has an irregular boundary that overlaps with, but does not perfectly match, the benefited parcel described in the DNR's Commercial Easement ("Exhibit B"). (Ex. C–28; Ex. C–29) The benefited parcel includes land overseen by the US Forest Service and US Bureau of Land Management. (Ex. C–15) The Contestants argue that this lack of exactitude between the benefited parcel and Buckhorn Mine meant that the Washington DNR intended their easement to "[encompass] an area greater than the Buckhorn Mine and land owned by Crown Resources." (Contestant Reply Br. 4-5) While this assertion about the DNR's motives necessarily requires actual factual support from the Contestants at a hearing, the controlling interpretation of Section 3(h)(1)(B) indicates that Exhibit B's lack of complete alignment with the Buckhorn Access Project is unlikely to matter. The Road at Issue can be "...(not dedicated exclusively to use by some more important thing)" and remain appurtenant to a mine. *National Cement II*, 573 F.3d at 791.

Fair Notice

The Contestants complain that they received insufficient notice of potential Mine Act liability because MSHA declined to assert jurisdiction over the Road at Issue during the numerous inspections that preceded this case. (Contestants Br. 23) However, this lack of notice is wholly irrelevant to the jurisdictional dispute before me, as MSHA cannot be estopped from enforcing its regulations simply because it did not previously cite the mine operator. *See Mainline Rock & Ballast, Inc. v. Sec'y of Labor*, 693 F.3d 1181, 1187 (10th Cir. 2012) (citing *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1416-17 (10th Cir. 1984)). The Mine Act is a strict liability statute. As long as a regulation is sufficiently specific that a reasonably prudent person, familiar with the conditions the regulation is meant to address and the objective the regulation is meant to achieve, would have fair warning of what the regulation requires, then the due process requirements for notice are satisfied. *Mainline Rock & Ballast, Inc.*, 693 F.3d at 1187 (citing *Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1083-84 (10th Cir. 1998)). A mine operator that instructs its miners that the section of road connecting its mine to the outside world is closed to the public has reasonably fair warning that MSHA could one day assert jurisdiction over that road. (Ex. C–21)

I am also not persuaded by Contestants' argument that MSHA expressly waived jurisdiction during a June 2013 inspection when Inspector Urnovitz, an authorized Representative of the Secretary, chose not to assert jurisdiction over the Road at Issue after conversing with Crown Resources Superintendent John Gianukakis. (Contestants Br. 14) As plausibly noted by the Secretary, Inspector Urnovitz may have been misled by Superintendent Gianukakis's representations that the Road at Issue could not be subject to MSHA jurisdiction because it had been made available by the Forest Service for public use. (Ex. C–25, p. 2; Sec'y Reply Br. 4)

For the reasons discussed above, the Contestants' Joint Motion for Summary Decision is denied.

Motion for Partial Summary Decision Submitted by the Secretary

The Secretary's motion asserts the following: (1) the Road at Issue is private; (2) the Road at Issue is appurtenant to the Buckhorn Mine; and, therefore, (3) the Road at Issue falls under MSHA's jurisdiction. As stated previously, summary decision should not be granted "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." *Campbell*, 21 F.3d at 55 (quotation omitted).

A hearing is needed to resolve conflicting evidence about whether restrictions on public use of the Road at Issue expired at the time of the citations. Forest Service Order 673 set September 30, 2016, as the expiration date of the Road at Issue's closure to the public. (Ex. C–16) If Crown's permit granting exclusive use of the contested road had expired on that date without an extension, the road may have become legally public at the time of the disputed citations. This material fact would bar MSHA jurisdiction under the Secretary's interpretation of Section 3(h)(1) of the Mine Act. *National Cement II*, 573 F.3d at 791. The Secretary provided testimony from District Ranger Matthew Reidy that the agency had initially set the expiration date *for one year later*, on September 30, 2017, and that the Order is still in effect "until the completion of the Buckhorn Access Project." (Ex. S–F, p. 2) Other Forest Service documents, from the FEIS onward, also indicate an intent to restrict public access to the Road at Issue beyond the date when the citations at issue occurred. (*See, e.g.*, Ex. S–C, Bates No. CRC 818, "Forest Road 3550-125 past the junction with Forest Road 3550-130 will be closed to public use *for the life of the project.*" (emphasis added); Ex. S–G, Bates No. CRC 1183, "This permit shall terminate on December 31, 2017. . . .") A trial is necessary before I conclude that Order 673 accidentally contains (or does not contain) a significant typo (as opposed to Mr. Reidy accidentally misremembering the Order's expiration date) or is counteracted by the other legal agreements between the Contestants and USFS.

For the reasons discussed above, the Secretary's Motion for Partial Summary Decision is denied.

ORDER

For the reasons discussed above, the Contestants' joint motion for Summary Decision is **DENIED** and the Secretary's Motion for Partial Summary Decision is also **DENIED**.

L. Zane Gill
Administrative Law Judge

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