

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES

601 New Jersey Avenue, N.W., Suite 9500

Washington, DC 20001

January 12, 2005

NATIONAL CEMENT COMPANY	:	CONTEST PROCEEDING
OF CALIFORNIA, INC.,	:	
Contestant	:	Docket No. WEST 2004-182-RM
	:	Citation No. 6361036; 02/09/2004
And	:	
	:	
TEJON RANCHCORP,	:	
Intervenor	:	
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Lebec Cement Plant
Respondent	:	Mine ID: 04-00213

**ORDER LIFTING STAY**

**AND**

**DECISION GRANTING SECRETARY'S MOTION**

**FOR SUMMARY DECISION**

This contest proceeding was stayed on March 18, 2004, to provide the parties with an opportunity to file joint stipulations for the purpose of filing cross motions for summary decision on the issue of jurisdiction. Specifically, the issue is whether a private paved 4.3 mile long two-lane road, beginning at State Route 138 in northern Los Angeles County and ending at the entrance to the National Cement Company of California, Inc., ("National Cement") Lebec Plant, is subject to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (Mine Act). The subject road is on land owned by Tejon Ranchcorp ("Tejon"). The jurisdictional issue arose after Citation No. 6361036 was issued on February 9, 2004, citing an alleged violation of the Secretary of Labor's ("the Secretary's") mandatory safety standard in 30 C.F.R. § 56.9300(a) that requires the construction of berms or guardrails on the banks of roadways where significant drop-offs exist.

Tejon filed an unopposed motion to intervene that was granted on June 10, 2004. National Cement, Tejon and the Secretary filed Joint Stipulations on November 17, 2004. National Cement's Motion for Summary Decision was filed on December 13, 2004. Tejon moved for summary decision and filed a memorandum in support of National Cement's motion on December 13, 2004. The Secretary's Motion for Summary Decision was filed on December 15, 2004. The parties' motions having been filed, the stay in this matter **IS LIFTED**.

National Cement, Tejon and the Secretary have stipulated to the use of joint exhibits proffered in an exhibit book. The parties' joint stipulations are set forth below.

## **A. JOINT STIPULATIONS**

### **I. Issue Presented**

1. The issue to be addressed in the parties' cross motions for summary decision is whether the roadway that is the subject of Citation No. 6361036 is a "mine" as defined by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802(h)(1), and thus whether the cited roadway is within the jurisdiction of the Mine Safety and Health Administration (MSHA).

### **II. National Cement**

2. National Cement owns and operates a facility ("cement plant") near the town of Lebec in southern Kern County, California, just north of Los Angeles County. At this location, National Cement extracts minerals such as limestone, shale and silica from quarries, and processes them with other materials that were acquired from off-site sources, to produce Portland cement for sale.

3. National Cement is engaged in mining at the cement plant, and its mining operations there affect interstate commerce. The cement plant constitutes a "mine" as defined in the Mine Act and is subject to regulation by the Mine Safety and Health Administration.

4. The cement plant is designed to have a maximum cement production capacity of 1,500,000 tons. In 2003, the cement plant produced and sold 931,882 tons of cement. National Cement expects to sell approximately the same amount in 2004.

5. The cement plant is located on the southern portion of the Tejon Ranch (the "Ranch"). Tejon owns the land on which the cement plant is situated.

### **III. Tejon Ranchcorp and the Tejon Ranch**

6. Tejon is a publicly traded corporation and is the sole owner of the Ranch.

7. The Ranch is an operating cattle ranch and commercial property consisting of approximately 270,000 acres in Los Angeles and Kern Counties in California. The Ranch is roughly 40 miles by 26 miles, or about a third of the size of Rhode Island, and is the largest contiguous expanse of land under single ownership in California.

8. A variety of commercial activities take place on the southern portion of the Ranch, where the subject road is located. Tejon and/or its lessees, licensees, and authorized visitors, use the road for livestock ranching, filmmaking and guided and unguided hunting. Tejon allows

members of a fee-for-permit program to camp, hunt on, and explore the ranch; some of them use the road for this purpose. Tejon has granted utility easements, and utility companies use [of] the road pursuant to those easements. Tejon is also seeking to develop land surrounding part of the road, and its contractors and representatives of the public and government agencies use the road to view and study the land.

9. There are approximately 30 miles of paved roads on the Ranch. The Ranch also contains a network of dirt roads. There are significantly more miles of dirt roads than paved roads on the Ranch.

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#### **IV. The Subject Road**

10. A 4.3 mile long, paved, two-lane road (the “road” or the “subject road”) begins at State Route 138 in northern Los Angeles County and runs north into Kern County to the Cement Plant. Tejon owns the land on which the road sits. Dirt roads intersect the subject road and continue onto Ranch land.

11. The subject road does not have an official, publicly recorded name. Some time ago, National Cement employees erected a sign at the highway end of the road, in honor of a deceased employee, that purported to designate the road the “Wayne Hand Road.” The sign was later removed.

12. The road has one lane in each direction and is the only paved road providing vehicular access to the cement plant. All of National Cement’s customers, contractors, vendors, and employees use the road to travel to and from the cement plant. All purchased raw materials are brought to the plant via the road, and all cement produced at the plant is trucked out to customers by use of the road. Vehicles associated with the cement plant that use the road are typically commercial, over-the-road trucks and passenger vehicles.

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#### **V. The Subject Citation**

13. On February 9, 2004, MSHA issued National Cement the citation that is the subject of this proceeding. Citation No. 6361036, issued pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977, alleges a violation of the standard at 30 C.F.R. § 56.9300(a). The citation reads as follows:

The mine operator failed to provide berms and guardrails on the banks of the primary access road to the Lebec Cement Plant. There were drop offs along the roadway ranging from 6 ft. to approximately 25 ft. and sufficient to cause a vehicle to overturn or endanger persons in equipment. The roadway was used extensively by large over-the-road trucks, delivery vehicles, and personal vehicles of mine personnel and vendors. The lack of berms or guardrails on the two lane

road presented a hazard particularly during inclement weather when vehicles could be expected to slide and potentially become involved in accidents.

14. The citation at issue in this case was properly served by a duly authorized representative of the Secretary upon an agent of National Cement on the date and place stated therein.

15. National Cement filed a timely Notice of Contest of the subject citation.

#### **VI. Lease and Easement Granted to National Cement**

16. Tejon executed Easement Deeds and entered into a Cement Manufacturing Plant Lease with Pacific Western Industries, Inc. (“Pacific Western”). The grantee and lessee’s rights under the easements and lease were later assigned to General Portland Cement Company and ultimately to National Cement.

17. The rights of Tejon and National Cement in the road are founded upon these documents.

#### **VII. Original Construction of the Road**

18. Before the cement plant was constructed in the mid-1960’s, Tejon relied upon a network of unimproved roads to access this part of the Ranch. Now, Tejon uses the existing dirt roads as well as the subject road

19. In 1965, Pacific Western began construction of the road. Portions of certain existing unimproved ranch roads were used as part of the route for the subject roadway. Joint Exhibit 7 shows the configuration of the unimproved roads in 1965. In 1966 the road was paved and the cement plant was constructed and became operational.

20. In 1970, Tejon executed and conveyed a Grant Deed to the State of California allowing the state to construct a state water aqueduct across this portion of the Ranch. The state did so and, later in 1970, built a bridge over the aqueduct, and realigned and re-built a portion of the road to cross the bridge.

#### **VIII. The Road and Related Features**

21. The only persons allowed on the road are Tejon’s employees, vendors, contractors, lessees, licensees and visitors; National Cement’s employees, vendors, contractors and visitors; and those persons so authorized by the State of California, in accordance with the aforementioned Grant Deed. Signs posted at the highway entrance to the road reflect this:

a. On State Route 138, on either side of the road, are posted signs which read “National Cement Plant.” Arrows on the signs point up the road.

b. On the east side of the road is a sign that reads:

PRIVATE ROAD  
KEEP OUT

NO HUNTING TRESPASSING  
RIGHT TO PASS BY PERMISSION  
AND SUBJECT TO CONTROL OF OWNER  
SECTION 1008, CIVIL CODE

VIOLATORS WILL BE PROSECUTED!  
TEJON RANCH CO.

c. On the west side of the road is a sign that reads:

PRIVATE ROAD  
NO TRESPASSING  
VIOLATORS WILL BE PROSECUTED

**HEAVY TRUCK TRAFFIC**  
NATIONAL CEMENT CO., INC.  
TEJON RANCH CO.  
CIVIL CODE 1008

d. On the east side of the road, several yards north of the sign described in subparagraph b. above, is a sign that reads:

NOTICE YOU ARE NOW ENTERING PRIVATE PROPERTY  
OF NATIONAL CEMENT CO. INC.

The possession or use of illegal or controlled substances, materials or weapons is absolutely prohibited. Removal of Company property without Company permission or defacing of such property is strictly forbidden. Vehicles and/or personal property are subject to detainment and search by the Company as required. Thank you for your cooperation. National Cement Co., Inc. California Plant [The corporate Symbol of National Cement]

e. On the east side of the road, north of the sign described in subparagraph d. above, is a sign that reads:

## PROPOSITION 65 WARNING

Warning: This area contains chemicals that are known to the State of California to cause cancer and birth defects and other reproductive harm at a level which requires a warning. These chemicals include crystalline silica, trace metals contained in raw materials and process equipment, and chemicals contained in fuels, lubricants, equipment, vehicle exhaust, use of tobacco products, and other substances coincidental to the manufacture of Portland Cement or as a result of their use in the manufacture of Portland Cement. Portland Cement contains chemicals known to the State to cause cancer and birth defects and other reproductive harm. Exercise care to avoid inhalation of dust when handling cement or its products. For more information contact the plant manager. Material safety data sheets are available on request for materials used and produced at this plant.

f. On the east side of the road is a monument displaying the National Cement corporate symbol.

22. There is fencing running along both sides of the road enclosing ranch land.

23. At the southernmost entrance to the road, just off State Route 138, there is a cattle crossing guard situated on the surface of the road. There are two more cattle guard crossings located at other points along the road.

24. There are gates located at various points in the fencing that runs alongside the road. Behind various gates are dirt roads, trails and livestock corrals. Tejon maintains locks on each of these gates. Some gates also have locks maintained by utility companies. The parties agree that at least some gates are used. The parties are unable to determine how often any given gate is used and are unable to determine if there are gates that are never used.

25. None of the gates or fields on either side of the road are used by National Cement.

26. A gate and guardhouse is located at the north end of the paved portion of the road, in front of the cement plant. In recent years, the guardhouse has been manned only during periods in which substantial construction was being undertaken at the plant. Over a three to four year period, from time to time, when there were a number of contractors entering the plant, National Cement posted a guard at the guardhouse to screen traffic coming into the plant. Since that time, the guardhouse has not been manned.

27. Adjacent to the guardhouse, National Cement has posted a sign which reads:

NOTICE  
ANYONE ENTERING THIS FACILITY MUST STOP AT THE  
FRONT OFFICE AND CHECK IN BEFORE PROCEEDING TO  
ANY OTHER LOCATION WITHIN THE PLANT.

EXCEPT NATIONAL CEMENT EMPLOYEES, DELIVERY WORKERS and OVER THE ROAD TRUCK DRIVERS. THIS INCLUDES, BUT IS NOT LIMITED TO VENDORS, SALESMEN, CONTRACTORS, SERVICEMEN, AND VISITORS.

This is a Mine Safety and Health Administration, (MSHA) regulated site and as such requires all those who enter to comply with 30 Part 46 of the Code of Federal Regulations (CFR).

#### NOTICE

ALL VEHICLES WITH AN OBSTRUCTED VIEW TO THE REAR MUST EITHER BE EQUIPPED WITH A BACK-UP ALARM OR HAVE AN OBSERVER PRESENT WHILE BACKING UP. NO EXCEPTIONS

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#### **IX. California Department of Water Resources Aqueduct**

28. A water aqueduct owned and maintained by the California Department of Water Resources (“DWR”) crosses under the road. A bridge owned and maintained by DWR carries the road traffic over the aqueduct.

29. In early 1970, Tejon and DWR executed a Grant Deed that provided for the construction of the California Aqueduct and related facilities on Tejon lands.

30. Later that year, DWR realigned a portion of the existing road to traverse the bridge it built which crosses the aqueduct. This realignment is the present configuration of the road.

31. DWR maintains the bridge and its approaches, approximately 600 feet in all. National Cement does not perform any construction or maintenance on this part of the road.

32. The aqueduct is enclosed by fencing. At each edge of the bridge within DWR’s right of way are locked gates in that fencing. DWR controls the locks on these gates. Two roads run alongside the aqueduct, one on each side. Only one of the aqueduct roads is paved. The aqueduct roads run between State Route 138 and a pumping station. The State has posted signs notifying persons that access to the aqueduct is prohibited, that entering the aqueduct is dangerous, and that trespassing is forbidden by the California penal code.

33. DWR uses that part of the road south of the bridge to access the bridge and its approaches, but does not use the road north of that area.

34. The state has installed speed bumps and related warning signs on the road in both directions at the approaches to the bridge.

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## **X. Maintenance of the Road**

35. The cement plant lease provides that “Lessee [National Cement] and the other grantees, if any, of joint-use easements and rights of way, pro rata in accordance with their respective use thereof, shall maintain all such easements and rights of way in such condition as necessary for use thereof by Lessee in the usual conduct of its business.” National Cement (and the predecessor cement plant companies on the property) have always maintained and kept in usable condition the road (except the bridge and its approaches, which DWR maintains). This maintenance includes, from time to time, resurfacing, sealing and restriping of the pavement and seasonal patching of sections of pavement needing repair.

36. In November of 2003, National Cement resurfaced, sealed and restriped the road, and also installed speed bumps and speed limit signs on the road.

37. National Cement has not sought Tejon’s pre-approval of maintenance to be done on the road.

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## **XI. Cement Plant-Related Use of the Road**

38. The majority of traffic on the road is for cement-plant-related purposes.

39. The cement produced at the plant is transported to customers in tanker trucks. The trucks weigh approximately 25,000 pounds empty as they arrive at the plant via the road, and weigh approximately 80,000 pounds loaded as they leave the same way.

40. National Cement purchases raw materials such as silica and gypsum, which arrive at the plant via the road in similar trucks weighing approximately 80,000 pounds full. They usually leave the plant empty, weighing approximately 25,000 pounds. They exit the plant by use of the road.

41. National Cement operates 24 hours per day, 7 days per week. Trucks run 6 days per week, throughout the day and night, although the trucks leaving with cement are concentrated between midnight and the early morning hours.

42. An average 148 round-trips are made daily (6 days per week, excluding holidays) by the tanker trucks.

43. There are also an average 84 employee round-trips and 5 deliveries to the cement plant daily via car and truck.

44. Part of the written materials in National Cement’s Site-Specific Hazard Training program indicate that National Cement’s contractors, vendors and employees are to follow all traffic signs and speed limits and are not to pass other vehicles on the road.



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**XII. Use of the Road by Tejon  
and its Lessees for Livestock Operations**

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45. Tejon's ranch management staff use the road an estimated two to three times each month. The road provides access to parts of the ranch where the staff must repair fences, livestock watering facilities and corrals.

46. Tejon leases 50,000 acres on the northern part of the ranch to Echeverria Cattle Company, and 200,000 acres on the southern two-thirds of the ranch to the Centennial Livestock Company. Centennial has 7000-9000 head of cattle spread across the southern two-thirds of the ranch in various fenced fields including the fields that lie on both sides along the length of the subject road. The cattle are rotated between the various ranch fields about every six months, in order to always have access to a fresh supply of grass. The cattle operator's employees use many of the roads on the Ranch, including the subject road. They make an estimated 300 vehicle round-trips per year on the subject road to provide care for livestock in fields on the Ranch. Most of these trips entail use of a pick-up truck, which sometimes pulls a horse trailer. This use of the road by pickup truck accounts for approximately 99% of the cattle operator's total annual trips on the subject road. A few times a year, the cattle operator also uses the road to transport livestock to and from the Ranch or between fields using semi trucks pulling livestock trailers that can carry 60-70 head of cattle each. Sometimes dual trailers are used for this purpose.

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**XIII. Use of the Road by Tejon and its Licensees  
for Commercial Filmmaking and Photography**

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47. Through its Film Department, Tejon contracts with entertainment production companies, commercial photographers and others to provide locations on the Ranch for the filming of motion picture scenes, commercials, music videos and for commercial still photography.

48. Since the subject road is paved, it is sometimes accessed for filming purposes by large production company trucks and other vehicles. Tejon's Film Department and the film crews use the gates on the sides of the road that are controlled by Tejon to access dirt roads leading to the areas in this part of the Ranch that are used for filming.

49. The road is used an estimated 25 to 30 days per year to scout filming locations. On those trips, a Tejon representative and production company location scout travel to potential filming sites on the Ranch in a passenger vehicle.

50. Approximately 3% of the total number of filming licenses granted by Tejon from 2001 to mid-2004 has required use of the road to access the filming locations. In this period, 6 productions were filmed in locations requiring use of the road. (The road was not used at all for filming from July 28, 2002 to June 15, 2004). Four of those occasions required use of the road on a single day; one required use on two days, and one necessitated use of the road on five

days. Filming can involve up to 20 or 30 vehicles; it can involve substantially less. Typically, one or two persons associated with the production company may make as many as 10 to 15 trips on the road in passenger vehicles during the filming period. Larger trucks used for filming typically will make one round-trip per day on the road. Typically one or two Tejon representatives will be present at the filming location.

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**XIV. Use of the Road by Tejon and its Lessees and Licensees for Hunting and Explorer Programs**

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51. Tejon's Wildlife Management Department operates a hunting program on the Ranch in which, for a fee, hunters are permitted to hunt game. Tejon's employees and some of Tejon's hunting lessees and licensees use the road to access hunting areas on the ranch, as discussed below.

52. Tejon, for a fee, annually grants a license to a hunter permitting him and up to 8 others to hunt, from September 1 through January 30, in an area of the Ranch west of the subject road. The license also permits them to camp on a tract of land located several miles west of the road. The hunters maintain a campsite at that location, keeping trailers there year-round for overnight accommodations. The hunters access the campsite initially by traveling over the subject road to a dirt road that leads to the campsite. The license also permits the hunter to invite up to 8 other non-hunters to stay at the campsite at any given time, but not to accompany the hunters in the field. The hunters drive passenger vehicles, including SUVs or old jeeps, and may use the subject road or other dirt roads to access the camp and hunting area. They are allowed to hunt for coyote, bobcat, rabbit, gray squirrel and ground squirrel, chukker, dove, quail, bandtail pigeon, and up to 8 buck deer total between them per season. Tejon records show that they were present for at least part of an estimated 28 days during the 2002-2003 season and 32 days during the 2003-2004 season. It is impossible to know for certain how many times they may have used the road during this timeframe; however, Tejon's records reflect that the hunters signed in and out at a gated entrance to the hunting area that is along the subject road at least 38 times during the 2002-2003 season and at least 33 times in the 2003-2004 season.

53. From September through December, Tejon employees occasionally use the road to take hunters on guided pronghorn antelope hunts on the Ranch. They may use the road only once during the hunt, or may use it every day for a three or four day period. Less occasionally, National Cement requests that Tejon employees come to the cement plant to eliminate one of the many wild pigs that are on the Ranch, when one becomes a nuisance. Tejon employees respond by guiding hunters into the area, which may involve use of the road on one occasion or may require both morning and afternoon trips on the road over a three to five day period.

54. From January 1 through July 15 of each year, Tejon provides guided pig hunts. These hunts do not occur every week. On the weeks when the pig hunts occur, it is at the rate of approximately twenty hunts per week. Ten to twenty percent of these hunts will use the road to access a hunting area.

55. From early February through August 31 of each year, the road provides one of ten access points to the Ranch for participants in an off-season, family-oriented “Explorer Program.” Members pay an \$850 annual fee to explore the Ranch. Some of them camp in one of the 20 designated campsites located throughout the Ranch. Many of the members hunt ground squirrels; some also hunt coyote. In early January there is a very short bobcat season. For an additional \$350 fee, they may take one pig per year. There are currently 200 members and their families in the program, most of whom drive on the Ranch in passenger vehicles. Occasionally a member will drive a large motor home on the Ranch. There is no limit to the number of times members of this program may access the Ranch or use the road during the February 1 to August 31 program period. Tejon’s records show that, during the 7 months of the program in 2004, member vehicles used the road at least 138 times, the majority of which were round-trips.

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#### **XV. Tejon’s Security Program**

56. Tejon has one full-time and four part-time security persons. The full-time security person regularly uses the road to access areas of the Ranch to address security problems such as poaching, trespassing and vandalism. The part-time security persons use the road sporadically for security purposes. Tejon estimates it uses the road for security activities on average once per day (some days there may be multiple trips and some days there may be no travel on the road by Tejon’s security personnel).

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#### **XVI. Planned Community**

57. Tejon is in the planning stages of a commercial and residential development of approximately 12,000 acres of the Ranch, including land surrounding a portion of the road. Tejon’s name for the proposed new development is “Centennial” (it is unrelated to the Centennial Livestock Company). The development plans are for a 23,000 unit master plan community which would include housing, retail, schools, and office facilities.

58. As proposed, the subject road would run roughly through the center of the Centennial development. Current plans are for the subject road to be one of the main traffic arteries of Centennial. It also would continue to provide access to the cement plant. Tejon is analyzing the projected traffic patterns of Centennial to determine what the future configuration of the road would be (i.e., whether it will have additional lanes and/or turn pockets added).

59. The Centennial project has been in the planning stage for five years. Tejon has submitted a plan to Los Angeles County, which has circulated it to 60-70 agencies for comments. Environmental impact studies are being conducted, which also must be submitted to 60-80 agencies for comment and approval. Tejon’s goal is to conduct public hearings in 2005 and obtain initial approval from the county board of supervisors in 2006. If approval is granted, there would then be another round of public hearings and further approvals to be obtained. Tejon plans to begin construction five years from now, and complete the final phase of the development in twenty years. Tejon expects the project to proceed on schedule. Given the need for

government approvals, probable litigation in opposition to the development, concerns expressed by the military regarding fly-over rights and other factors, there is the possibility, as with any such project, that the project may be delayed, altered, or may never be built.

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#### **XVII. Current Use of the Road for Centennial-Related Purposes**

60. A variety of consultants have been using the road to access areas of the Ranch to conduct field studies and for other purposes related to planning for the Centennial development.

61. Tejon's records reflect that for the period from January 1, 2004 to mid-May, 2004, the road was used to access lands lying within the Centennial project area by eighteen different groups, consultants, and individuals. The lands were accessed to perform various studies of hydrogeology, geology, biology, and archaeology, and conduct site investigations with government representatives.

62. It is expected that this activity will continue through the end of 2004. Those studies and uses of the road will then cease. Tejon expects that visits via the road to the site for marketing and public relations purposes will then begin. These visits are expected to be of shorter duration but of higher frequency than the consultant visits have been.

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#### **XVIII. Use of the Road by the FAA and Utility Companies**

63. On at least one occasion, persons affiliated with the Federal Aviation Administration used the subject road to access a communications tower located on Tejon land adjacent to the cement plant quarry. It is not known how often the FAA has used the road.

64. Southern California Edison Company, SBC (Pacific Bell), and WorldCom Communications have transmission lines and related facilities (including an electrical substation) on the Ranch in the vicinity of the road, pursuant to easements granted them by Tejon. These utilities use the road from time to time to access their facilities on the Ranch but it is not known for certain how often this occurs.

65. At least one of these utilities has locks and no trespassing and other warning signs on certain gates that are located adjacent to the road. For example, a sign near one of the gates on the road reads:

Southern California Edison SCE This transmission line is patrolled. Unlawfully damaging transmission facilities is a felony punishable by fine and imprisonment in the state prison. A reward of \$1000 is offered for information leading to the arrest and conviction of such offenders.

Another sign on another gate reads:

PRIVATE PROPERTY  
KEEP OFF  
So. Calif. Edison Co.

66. The parties presume that these transmission lines do not serve the cement plant exclusively, but also serve other areas.

### **IXX. 1992 Citation**

67. On March 4, 1992, an MSHA inspector issued Citation No. 392810 alleging a section 104(a) violation of 30 C.F.R. § 56.9300(a) for failure to erect berms or guardrails. This citation reads as follows:

The main road to mine site from Hwy 138 was not equipped with berms or guardrails along the elevated portions. Several areas on both sides of road along length of road had steep banks that could cause vehicle to overturn should overtravel occur. Some of the area's elevated 20 to 30 foot and angled some areas about 60 to 80 degrees. The road access to mine site, included in leased area of mine, maintained by operator, and built for exclusive use of mine related persons, for operator. Road 4 ½ to 5 miles in length and termination due date reflects size of job to install overtravel precautions.

68. On April 9, 1992, the local MSHA field office vacated Citation No. 392810. MSHA's subsequent action notice states that:

This action is to "vacate" this citation since it was issued in error. The main entrance roadway runs from a public highway to the mine site office. Traveled by the company and public to reach the mine property. At the mine site near the main office where mine site activities begin was a posted guard shack indicating the restrictions and the actual activities of the mining operation. The main entrance from the main public highway was leased by the mine operator but used/traveled by various other personnel and the public – once arriving at mine property signs were posted that the mine office must be contacted prior to entering the work sites. The mine operator had no control over personnel using the entrance roadway until they arrived at the mine site office – (no security – locked gate at entrance off public highway).

69. Between April 1992 and February 3, 2003, the Secretary did not issue any citations concerning the subject road.

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## **XX. February, 2003 Citations**

70. On February 4, 2003, MSHA issued Citation No. 6351224 to National Cement, alleging a violation of 30 C.F.R. § 56.9300(d)(3) with respect to the road. The citation reads as follows:

The primary access road had faded and missing delineators for the entire distance of the haulway. The large over the road haul trucks are crossing over where the yellow center lines were. This could result in a catastrophic crash with the miners. Also, during rain, fog and at night the delineators are practically impossible to see. The primary access road to the plant is used extensively by the company, contractors, and large over the road haul trucks.

71. On February 5, 2003, the Secretary modified Citation No. 6351224 stating that, "This action is to add to the conditions and practices the statement that the access road include the fact that the road is also used by the 'Tejon Ranch' for egress and regress."

72. In the normal course of reviewing citations issued by the field offices, MSHA's western district office determined that 30 C.F.R. § 56.9300(d)(3) was incorrectly cited by the inspector, since that provision only applies to "elevated roadways [that] are infrequently traveled and used only by service or maintenance vehicles . . . ." Consequently, on February 13, 2003, the MSHA field office vacated Citation No. 6351224 and issued in its place Citation No. 6351230 (discussed below).

73. On February 13, 2003 the MSHA inspector issued Citation No. 6351230 to National Cement, alleging a violation of 30 C.F.R. § 56.9300(a) with respect to the subject road. The citation reads as follows:

The primary access road to the plant had no guard rails or berms to protect vehicles and persons from going over the edge of the road. There are drop offs all along the highway ranging up to approximately 25 feet where a vehicle could easily roll over. The road is used extensively by large over the highway trucks, miner's vehicles, and various other vehicles. The two lane road without berms or guard rails presents a hazard, especially during inclement weather where the possibility of sliding and crashing may be prevalent.

74. At a subsequent conference requested by National Cement, the company pointed out that the similar citation issued eleven years earlier for this condition was vacated. On April 14, 2003, the inspector lowered the negligence level, stating that "Information provided at the Health and Safety Conference, indicated that a previously issued citation for this condition was vacated, therefore the company's negligence was less than originally evaluated."

75. When reviewing this citation, the district office learned of the 1992 citation which had been vacated. The district then began a review of the issue with MSHA's national office, and requested review by the Office of the Solicitor. The District Manager then concluded that MSHA had jurisdiction over the road, but felt that he should vacate the citation to avoid any objections by National Cement that the company did not have adequate notice. On November 17, 2003, the inspector vacated Citation No. 6351230 stating that the citation "is vacated without prejudice due to inadequate notice that the road in question was subject to the Agency's jurisdiction."

76. In a letter dated December 16, 2003, from the MSHA District Manager to National Cement, MSHA informed the company that MSHA considered the road to be subject to the agency's jurisdiction:

This letter is to inform you that MSHA has carefully reviewed the facts regarding the Wayne Hand Road which is located between National Cement Company's Lebec Plant, and Highway 138. The Mine Safety and Health Act Section 3(h)(1)(B) specifically includes 'private ways and roads appurtenant to' mines, as 'mines' subject to MSHA jurisdiction. MSHA, therefore, examines all pertinent facts to determine whether such roads are to be considered as part of a mine. Here, MSHA has determined that it has jurisdiction over the Wayne Hand Road leading from Highway 138 to the Lebec Plant. This jurisdiction is based on our finding that National Cement Company maintains this road, that it holds an easement on this road and that this road is the sole means of egress to and from the mine. It also appears that traffic to and from the Lebec Plant constitutes the vast majority of traffic along this road.

National Cement Company is hereby put on notice that conditions which violate applicable MSHA regulations with respect to the road shall be subject to MSHA's enforcement authority, effective immediately.

77. On February 9, 2004, MSHA issued National Cement the citation that is the subject of this proceeding, as discussed in paragraph 13 above.

## **B. CONCLUSIONS OF LAW**

### **I. Statutory Framework**

National Cement extracts minerals such as limestone, shale and silica at its Lebec Plant. (Stip. 2). Consequently, National Cement concedes its cement plant is a "mine" as defined by the Mine Act. (Stip. 3). The issue to be resolved is whether the private road used to enter National Cement's mine facility is a "mine" as defined by section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1). Section 3(h)(1) defines a "coal or other mine" in pertinent part, as "an area of land from which minerals are extracted . . . [and] *private ways and roads*

*appurtenant* to such area . . . .” (Emphasis added).

The first inquiry in statutory construction is “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996).

If a statute is clear and unambiguous, effect must be given to its language. See *Chevron*, 467 at 842-43; accord *Local Union 1261, UMWA v. FMSHRC*, 917 F. 2d 42, 44 (D.C. Cir. 1990).

The parties’ stipulations establish that the subject road is a “private way.” (See, e.g., Stip. 10-12, 16-17, 21, 35-37, 44). Turning to whether the subject private way is appurtenant to the mine as contemplated by section 3(h)(1), the term “appurtenant” is commonly defined as: “a: annexed or belonging legally to some more important thing (a right-of-way – to land or buildings); b: incident to and passing in possession with real estate – used of certain profits or easements.” *Webster’s Third New International Dictionary* 107 (1993). An “easement appurtenant” is defined as: “an easement created to benefit another tract of land, the use of easement being incident to the ownership [or leasehold] of that other tract.” *Black’s Law Dictionary* 549 (8<sup>th</sup> ed. 2004).

It is undisputed that Tejon has granted National Cement an easement to traverse a private road on Tejon property that serves as the exclusive means of vehicular traffic in and out of the Lebec cement plant. (Stip. 12, 16, 17). The private road is a roadway appurtenant to the Lebec mine site. Consequently, the subject road is squarely within the purview of the section 3(h)(1) definition of a mine that includes “private ways and roads appurtenant to” a mine site.

Although the operative terms “private ways and roads appurtenant to” a mine are not ambiguous; in cases of ambiguity, the Commission and the courts have recognized that the legislative history encourages a broad, inclusive application of the definition of “a mine” embodied in section 3(h)(1). *Drillex, Inc.*, 16 FMSHRC 2391, 2394 (December 1994) (Citations omitted). Assuming, for the sake of argument, that the circumstances of this case create ambiguity, National Cement argues, in essence, that the roadway should not be included under the broad reach of section 3(h)(1) because the road is a multi-purpose road that is owned by the Tejon Ranch; because National Cement does not have exclusive use of the road; and because of the Secretary’s prior reticence to assert Mine Act jurisdiction.

## **II. Road Ownership**

With respect to Tejon’s ownership of the road, the Commission has recognized that, in appropriate circumstances, there is a jurisdictional basis even if a mine operator lacks ownership when the cited conditions would affect miners. *TXI Operations, LP*, 23 FMSHRC 54, 60 (Jan. 2001) (ALJ) citing *Justice Supply & Machine Shop*, 22 FMSHRC 1292, 1297 (Nov. 2000). As an initial matter, the road conditions affect the welfare of miners as evidenced by National Cement’s Site-Specific Hazard Training program that seeks to ensure that cement plant contractors and employees traveling the road obey traffic signs and speed limits. (Stip. 44).



While lacking an ownership interest, National Cement has an easement granted by Tejon to use the road at will, and there are several road signs posted that evidence National Cement's use and control of the road. (Stip. 16, 17, 21). For example, a posted sign on the east side of the road warns travelers that they are "ENTERING PRIVATE PROPERTY OF NATIONAL CEMENT CO. INC." (Stip 21(d)). The majority of the traffic on the road is for cement plant related purposes as evidenced by a posted road sign reflecting "HEAVY TRUCK TRAFFIC." (Stip. 21(c), 38). Moreover, National Cement has a history of maintaining the road, and it recently resurfaced, sealed and restriped the road, and it installed speed bumps and speed limit signs. (Stip. 35, 36). Significantly, National Cement has not sought Tejon's pre-approval for its road maintenance projects. (Stip. 37).

Despite the above indicia of control, National Cement asserts a finding of jurisdiction is inappropriate because it lacks the requisite control of the roadway in the event it was called upon to obey a 104(b) withdrawal order. This argument is unpersuasive. Compliance with a 104(b) order simply would require National Cement to turn away its traffic at the private road's entrance at the intersection of State Route 138. National Cement's additional claim that it is precluded from constructing berms and guardrails where appropriate because it lacks the authority to make major changes to the road is belied by its construction of speed bumps and its posting of speed limits. Obviously, it is in the interests of both Tejon and National Cement to make road improvements that ensure safety. Consequently, it is apparent that National Cement retains the requisite degree of control over the road to warrant Mine Act jurisdiction.

I can discern no rational reason why National Cement truck drivers should be exempt from Mine Act protection because it has a right of easement rather than an ownership interest of the land on which the road is built. I note that National Cement also does not own the land on which its Lebec Plant is built. (Stip. 5). Accordingly, National Cement's lack of an ownership interest is not a bar to Mine Act jurisdiction.

### **III. Non-Exclusive Use**

The road is the only paved road providing vehicular access to the cement plant. All of National Cement's customers, contractors, vendors, and employees traverse the road to travel to and from the cement plant. Vehicles associated with the cement plant that use the road are typically commercial, over-the-road trucks and passenger vehicles. All purchased raw materials are brought to the plant via the road, and all cement produced is transported by truck to customers by use of the road. (Stip. 12). While National Cement does not have exclusive use of the road, as noted, the vast majority of the traffic is for plant related purposes. (Stip. 38).

Cement trucks weigh approximately 25,000 pounds empty as they arrive at the plant via the subject road. The loaded trucks exit the plant via the road weighing approximately 80,000 pounds. (Stip. 39). Raw materials, such as silica and gypsum, arrive at the plant over the road in similar trucks weighing approximately 80,000 full and these trucks depart the plant weighing approximately 25,000 pounds empty. (Stip. 40).

Non-National Cement use of the road is dwarfed by National Cement traffic. National Cement operates 24 hours per day, 7 days per week. (Stip. 41). Trucks operate 6 days per week, day and night, although trucks leaving the cement plant are concentrated between midnight and early morning hours. (Stip. 41). An average of 148 round-trips (6 days per week excluding holidays) are made by tanker trucks. (Stip. 42). In addition, 84 employee round-trips and 5 deliveries to the cement plant via car and truck occur each day. (Stip. 43).

In contrast, Tejon's ranch management staff uses the road only approximately 3 times each month. (Stip. 45). Tejon's cattle raiser lessees traverse the road approximately 300 round-trips per year to care for livestock. (Stip. 46). Parenthetically, National Cement users travel more than 300 round-trips in 2 days. Other non-cement plant users include filmmakers scouting film locations approximately 20 to 30 times per year, and hunter licensees who use the road approximately 40 round-trips during each annual hunting season. (Stip. 49, 52). Consequently, National Cement's frequent and disproportionate use of the road justifies Mine Act oversight.

#### **IV. Enforcement History**

Prior to issuing the subject Citation No. 6361036 on February 9, 2004, for an alleged violation of 30 C.F.R. § 56.9300(a) because of a lack of berms or guardrails, MSHA issued several citations that were subsequently withdrawn. In March 1992 MSHA issued a similar citation citing a lack of berms or guardrails that was vacated the following month after MSHA determined "[t]he mine operator had no control over personnel using the entrance roadway until they arrived at the mine site office . . . ." (Stip. 67, 68). MSHA did not issue any citations concerning the subject road from April 1992 until February 2003. (Stip. 69).

On February 4, 2003, MSHA issued a citation for an inadequate roadway centerline delineation that was vacated because the cited mandatory standard only applied to elevated roadways infrequently traveled by service or maintenance vehicles. (Stip. 72). The citation was superceded on February 13, 2003, by a citation citing a lack of berms or guardrails. (Stip. 73). The citation was vacated without prejudice for lack of notice on November 17, 2003, following a Health and Safety Conference wherein National Cement pointed out that a similar citation had been withdrawn for lack of jurisdiction in 1992. (Stip. 74, 75).

In a letter dated December 16, 2003, MSHA's District Manager informed National Cement that MSHA was asserting jurisdiction over the roadway. (Stip. 76). On February 9, 2004, Citation No. 6361036 was issued resulting in this contest proceeding.

MSHA's on-again, off-again, approach to its oversight responsibility with respect to the subject roadway is disconcerting for it undermines industry confidence in consistent Mine Act administration. However, MSHA's lack of consistent enforcement cannot preclude the exercise of MSHA jurisdiction. It is well recognized that jurisdiction attaches to all mine facilities despite MSHA's discretionary lapses. In this regard, the court has stated:

Congress was sufficiently concerned about the health and safety conditions at mines that, as was stated in [the Commission's decision in] *Air Products*, “[u]nder the Mine Act, enforcement is not left to MSHA’s discretion. Section 103(a) [codified at 30 U.S.C. § 813(a)] requires the agency to inspect all surface mines in their entirety at least twice a year.” 15 FMSHRC at 2436 n.2 (Commissioner Doyle, concurring).

*RNS Services, Inc.*, 115 F.3d 182, 187 (3<sup>rd</sup> Cir. 1997). Accordingly, an inconsistent enforcement history cannot bar MSHA’s current assertion of jurisdiction.

#### **V. Part 46 Training**

Finally, both National Cement and Tejon argue that a finding of jurisdiction would give rise to the absurdity of requiring all roadway users, including Tejon employees, hunters, cattle ranchers, filmmakers, campers and a myriad of consultants involved with the future residential and commercial development of ranch property, to have the Part 46 hazard training that is required of miners. 30 C.F.R. Part 46. This argument is unpersuasive. Although the courts are split on whether all contractors performing services at a mine, or only contractors performing significant services at a mine, are mine operators as defined by section 3(d) of the Mine Act, 30 U.S.C. § 802(d), the fact remains that, as a general proposition, non-mine operator Part 46 candidates must be connected with the performance of services at a mine, such as truck drivers. *Williams Natural Gas Company*, 19 FMSHRC 1863 (Dec. 1997). While it is true that 30 C.F.R. § 46.11(b) of the Secretary’s regulations also requires site specific training, *as appropriate*, for visitors of a mine site, such as delivery workers, I am confident that MSHA would not seek to impose hazard training on the likes of cattle ranchers.

Consequently, the subject private roadway that is the sole means of vehicular access to the cement plant is a mine within the plain meaning of section 3(h)(1) of the Mine Act. In addition, the hazards posed to truck drivers as a consequence of a lack of appropriate berms and guardrails, as well as the degree of National Cement’s utilization and control of the roadway, provide additional justification for Mine Act coverage.

## **ORDER**

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In view of the above, the roadway that is the subject of Citation No. 6361036 is a "mine" as defined by 30 U.S.C. § 802(h)(1) of the Mine Act. Accordingly, the Secretary's Motion for Summary Decision on the jurisdictional question **IS GRANTED. IT IS ORDERED** that the parties advise, within 30 days of the docketing and assignment of the pertinent civil penalty case, whether they have reached a settlement agreement with respect to the proposed civil penalty for Citation No. 6361036, or whether they desire a hearing on the merits of the citation.

Jerold Feldman  
Administrative Law Judge

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