

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, DC 20001

February 7, 2005

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

**ORDER GRANTING CONTESTANT’S MOTION  
FOR CERTIFICATION OF INTERLOCUTORY RULING**

This contest matter concerns Citation No. 6361036 that was issued for 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. The citation involves a private roadway that is appurtenant to National Cement Company of California, Inc.’s (“National Cement’s”) Lebec Plant. National Cement seeks interlocutory review of a summary decision that determined this 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 Lebec Plant, is subject to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (the “Mine Act”). 27 FMSHRC \_\_\_ (January 2005) (ALJ). National Cement’s certification request is supported by Tejon Ranch Corporation, an intervenor in this matter.

Commission Rule 76(a)(1)(i) provides that, upon motion of a party, a judge shall certify his interlocutory ruling if it involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F. R § 2700.76(a)(1)(i). The Secretary opposes National Cement’s motion for certification of the jurisdictional issue.

The question National Cement seeks to certify is whether this private road, that serves as the sole vehicular access to its cement plant, 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 summary decision held that the operative terms "private ways and roads appurtenant to" a mine in the Section 3(h)(1) statutory definition of a mine are not ambiguous. Nevertheless, the summary decision addressed National Cement's assertion that the subject road is not within the purview of Section 3(h)(1) because National Cement has neither exclusive use of the private road, nor control over individuals who travel over the road in vehicles that are used for non-mine related purposes. With respect to the exclusive use issue, the summary decision held, *inter alia*, that "National Cement's frequent and disproportionate use of the road justifies Mine Act oversight." 27 FMSHRC \_\_\_, slip op. at 18.

In support of its motion for certification, National Cement contends that this Commission has not addressed directly whether "a multi-use [private] road [appurtenant to a mine] that is used not just by the mine, but also for non-mine-related purposes by others whom the mine operator has no legal right to control" is subject to Mine Act jurisdiction. *Nat'l Cement mot.* at 3. Thus, it argues that the facts in this case present a novel controlling question of law.

The Secretary opposes the certification request because National Cement's request involves "factual issues or issues involving mixed questions of law and fact which are inappropriate for interlocutory review." *Sec'y's opp.* at 7. Moreover, although the pertinent civil penalty matter has yet to be docketed and assigned, the Secretary argues that granting certification would unduly delay the ultimate disposition of the civil penalty proceeding.

There are no outstanding factual disputes as the parties have filed joint stipulations that serve as the basis for the summary decision. I am unaware of a Commission decision that is directly on point on the exclusive use issue. Consequently, although I have concluded that the statutory terms "private ways" and "appurtenant to" are unambiguous, I will give National Cement the benefit of the doubt that the lack of exclusivity presents a controlling question of law concerning application of the statutory definition.

With respect to the remaining criteria for certification in Rule 76, immediate review will not delay disposition of this matter because the civil penalty case has yet to be assigned. Moreover, interlocutory review will materially advance the final disposition of this proceeding if National Cement prevails because such an outcome would obviate the need for further proceedings on the merits of the contested citation.

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**ORDER**

In view of the above, National Cement's Motion for Certification under Commission Rule 76 **IS GRANTED**. Accordingly, **IT IS ORDERED** that this jurisdictional issue **IS CERTIFIED** to the Commission for its determination on whether to grant interlocutory review.<sup>1</sup>

Jerold Feldman  
Administrative Law Judge

Distribution: (Certified Mail)

Margaret S. Lopez, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C.,  
2400 N Street, N.W., 5<sup>th</sup> Floor, Washington, DC 20037

Thomas C. Means, Esq., Crowell & Moring LLP, 1001 Pennsylvania Avenue, N.W.,  
Washington, D.C. 20004-2595

Timothy S. Williams, Esq., Office of the Solicitor, U.S. Department of Labor,  
1100 Wilson Blvd., 22<sup>nd</sup> Floor, Arlington, VA 22203

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<sup>1</sup> The Secretary suggests that “[the judge] cannot find . . . that ‘immediate review will materially advance the final disposition of the proceeding’ unless [the judge] concludes that [his] prior decision was incorrect and will be reversed by the Commission . . . .” *Sec’y’s opp.* at 8. The grant of the motion to certify is based on a recognition of National Cement’s colorable claim of a novel issue of law rather than a self-dissenting rejection of the prior decision on jurisdiction.