FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 26, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	
NATIONAL CEMENT COMPANY OF CALIFORNIA, INC.	:	Docket No. WEST 2004-182-RM
and	:	
TEJON RANCHCORP	:	

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY: Duffy, Chairman, and Young, Commissioner

This contest proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), and involving a citation for an alleged violation of 30 C.F.R. § 56.9300(a),[1] is on remand from the United States Court of Appeals for the District of Columbia Circuit. In *Secretary of Labor (MSHA) v. National Cement Co. of California*, 494 F.3d 1066 (D.C. Cir. 2007), the court held that terms used in section 3(h)(1)(B) of the Mine Act, 30 U.S.C. § 802(h)(1)(B), to define "coal or other mine" are ambiguous, and that in order for the Secretary of Labor's interpretation of those terms to be upheld, she must address concerns regarding that interpretation raised by the other parties to this case and harmonize her interpretation with the Mine Act's overall enforcement of mine safety standards.

[1] Section 56.9300(a) requires that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment."

Id. at 1074-77. Consequently, the court vacated and remanded to the Commission its decision in *National Cement Co. of California*, 27 FMSHRC 721 (Nov. 2005), for the Secretary to submit such an interpretation. 494 F.3d at 1077. For the reasons that follow, we conclude that the Secretary's interpretation submitted on remand is not a permissible interpretation of section 3(h)(1).

I.

Factual and Procedural Background

As is more fully discussed in the Commission's original decision and the court's opinion, the issue in this case is whether the Department of Labor's Mine Safety and Health Administration ("MSHA") has jurisdiction to enforce the Mine Act with regard to the 4.3-mile two-lane access road running north from State Route 138 in northern Los Angeles County, California, to the Lebec cement plant and quarries operated by National Cement Company of California, Inc. ("National Cement") in southern Kern County, California ("Access Road"). *See* 494 F.3d at 1069-72; 27 FMSHRC at 722-25.[2] Both the National Cement facilities and the Access Road are on Tejon Ranch property ("Ranch"), which is owned by Tejon Ranchcorp ("Tejon"). 494 F.3d at 1069. National Cement leases the property from Tejon, and its use of the Access Road, which provides the sole vehicular access to the leasehold, is pursuant to easement deeds granted by Tejon. 27 FMSHRC at 722, 723.

Use of the Access Road is restricted to: (1) Tejon's employees, vendors, contractors, lessees, licensees, and visitors; (2) National Cement's employees, vendors, contractors, and visitors; and (3) those persons authorized to use the road by the State of California. *Id*. at 722. While the record reflects that the great majority of traffic on the road is due to the cement plant, the road is used by Tejon and its other lessees, licensees, and authorized visitors in the course of various other activities at the Ranch. *Id*. at 723. Some of the other activities are commercial, such as: management of ranching operations by Tejon and its lessees (27 FMSHRC at 92); entertainment production companies, commercial photographers, and others filming motion picture scenes, commercials, music videos, and taking commercial still photographs (*id*. at 92-93); and hunting and camping programs administered by Tejon management (*id*. at 93-94). The road is also used by representatives of utility companies to access portions of the Ranch subject to easements those utilities have entered into with Tejon, the Federal Aviation Administration to access a communications tower located on Tejon land, and the California Department of Water Resources ("DWR"), which owns the Access Road bridge over a DWR aqueduct. 27 FMSHRC at 723-24. Finally, as the Commission noted in its original decision, the subject road may also become a main traffic artery for an area of the Ranch for which there are extensive mixed-use development plans. *Id*. at 723 n.4.

[2] The factual record in this case consists of the 77 joint stipulations that the parties submitted to the administrative law judge, all of which he set forth in his original decision, and a book of Joint Exhibits filed by the parties. *See* 27 FMSHRC 84, 85-98 (Jan. 2005) (ALJ).

As far back as 1992, MSHA began citing National Cement for the lack of berms or guardrails along the Access Road, but MSHA subsequently vacated each of those citations on jurisdictional grounds. *Id*. at 724. In December 2003, however, MSHA definitively took the position that the Access Road was subject to the Mine Act, and shortly thereafter issued the citation that is at issue in this case, No. 6361036. *Id*. at 724-25. National Cement contested the citation, and Tejon intervened. *Id*. at 725. After filing their joint stipulations and exhibits, the parties subsequently filed cross-motions for summary decision on the issue of whether the road is subject to Mine Act jurisdiction. 27 FMSHRC at 84.

Administrative Law Judge Jerold Feldman granted the Secretary of Labor's motion for summary decision and held that the Access Road is a "coal or other mine" and is thus subject to the jurisdiction of the Mine Act and MSHA. *Id*. at 103. In determining that the road at issue was a "coal or other mine" under section 3(h)(1) of the Mine Act, 30 U.S.C.§ 802(h)(1), the judge read subsection (B) according to what he considered to be its plain meaning. 27 FMSHRC at 98-99. He concluded that the parties' stipulations established that the road was "private," and that under the commonly understood meaning of the term, the road was "appurtenant" to the cement plant. *Id*. at 99. Upon the subsequent motion of National Cement, the judge certified his interlocutory ruling (27 FMSHRC 157 (Feb. 2005) (ALJ)), and we ordered review of the judge's decision.

On the interlocutory appeal, a majority of the Commission held that applying "private" and "appurtenant to" according to the interpretation of those terms advanced by the Secretary would in this instance, under the strict liability scheme of the Mine Act, lead to the absurd result of National Cement being responsible for use of the road by parties over whom it had no control. 27 FMSHRC at 728-35.[3] Consequently, we vacated the judge's order granting the Secretary's motion for summary decision. *Id*. at 735. We also remanded the case to the judge for a determination whether any part of the Access Road was used exclusively by cement plant traffic, and thus was properly subject to Mine Act jurisdiction as a "coal or other mine" under section 3(h)(1)(B). *Id*. The judge subsequently found that the entire road was subject to use by other users authorized by Tejon and vacated the citation that had been issued to National Cement. 28 FMSHRC 21, 22 (Jan. 2006) (ALJ).

The Secretary appealed our decision, and a majority of the D.C. Circuit panel considering the case held that both "private" and "appurtenant" as they are used in section 3(h)(1)(B) each have more than one meaning, and thus are ambiguous. 494 F.3d at 1073-75. Because the Secretary had erroneously interpreted the terms as having plain, unambiguous meanings, the court vacated our decision and remanded it to us to obtain from the Secretary a "*Chevron* step 2" interpretation of subsection (B). *Id*. at 1077; *see Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).

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[3] Commissioner Jordan dissented on the ground that application of the plain meaning of section 3(h)(1)(B) indicated that MSHA had jurisdiction over the Access Road and that such an interpretation would not lead to absurd results. *Id*. at 737-43 (Comm. Jordan, dissenting).

Specifically, the Secretary's position had been that because the term "private" meant "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public," the Access Road could be considered to be "private" due to the fact that it could only be used by a particular group or class – those authorized to use it by Tejon. *See* 27 FMSHRC at 727-28 (citations omitted). The court held, however, that the term "private" is actually ambiguous, because it "may be construed more narrowly to mean restricted to the use of 'a particular person' such as National Cement," which it is not in this case. 494 F.3d at 1074.

Similarly, the Secretary believed that the Access Road could be considered "appurtenant to" the cement plant because National Cement had the right to use the Access Road as a result of a transferable right-of-way easement. *See* 27 FMSHRC at 728. The court concluded, however, that the term "appurtenant" was also ambiguous, as it too was subject to a narrower construction, "as suggested by the definitional language 'annexed or belonging legally to,' to mean dedicated exclusively to the use of the mine." 494 F.3d at 1074. Again, the Access Road is not dedicated exclusively to the use of National Cement.

The court further instructed that the Secretary's interpretation on remand would have to address the problematic issues raised by National Cement and Tejon before the court, which the court characterized as "not frivolous concerns." *Id*. at 1075-77. The court questioned whether National Cement, as a non-exclusive right-of-way grantee, had the right to install the guardrails or berms MSHA was seeking along the Access Road. *Id*. at 1075. The court also questioned how National Cement could carry out various obligations the Mine Act imposes on it as a mine "operator" with respect to road users "over whom it has no authority and with whom it has no business connection whatsoever." *Id*. Finally, the court suggested that the Secretary's interpretation would extend Mine Act jurisdiction to Tejon and others "with right-of-way control over the Access Road notwithstanding the party lacks any relation whatsoever to the mine's operation." *Id*. at 1076.

Subsequently, the Commission issued a briefing order requesting that the Secretary file a brief upon remand that includes the interpretation required by the Court, supported by argument and authority. Unpublished Order at 3 (Oct. 11, 2007). That order also provided for the filing of briefs by National Cement and Intervenor Tejon. *Id*.[4]

[4] On January 10, 2008, the parties jointly moved for permission for the Secretary to file a reply brief and National Cement and Tejon to file surreply briefs, and later filed such briefs. The Commission lacked a quorum at that time to act upon the joint motion. All four Commissioners subsequently voted and hereby grant the joint motion. Similarly, all four Commissioners voted and hereby grant the Secretary's unopposed January 29, 2008, motion to file a reply brief slightly in excess of the Commission's 15-page limit on reply briefs.

In her brief on remand, the Secretary stated the following as the interpretation she was offering in response to the court's opinion:

> In view of the Court's holdings that the language of Section 3(h)(1)(B) is ambiguous and that the Secretary is required to issue citations for all violations over which she has jurisdiction, even if the violative conditions have no effect on miner safety, the Secretary interprets the definition of "mine" in Section 3(h)(1)(B) of the Mine Act to encompass the [A]ccess [R]oad in this case. The Secretary, however, interprets Section 3(h)(1)(C) of the Act to exclude from the definition of "mine" vehicles on the road that are not related to National Cement's mining operations.

S. Remand Br. at 13.

II.

Disposition

The Secretary submits that using the terms of section 3(h)(1)(C) to limit the scope of her jurisdiction under section 3(h)(1)(B) is consistent with the language of section 3(h)(1)'s definition of "coal or other mine." S. Remand Br. at 13-17; S. Remand Reply Br. at 1-5. As she did the first time this case was before the Commission, the Secretary also maintains that her interpretation of section 3(h)(1)(B) is consistent with the legislative history of the Mine Act and a predecessor statute. S. Remand Br. at 17-22; S. Remand Reply Br. at 5-8. In arguing that her interpretation on remand is consistent with the overall structure of the Mine Act, the Secretary addresses the specific concerns raised in the court's opinion regarding the reasonableness of such an interpretation in light of the enforcement provisions of the Mine Act. S. Remand Br. at 23-34; S. Remand Reply Br. at 8-14. The Secretary takes the position that even though her interpretation upon remand is different than previous interpretations of section 3(h)(1) that she has advanced during and prior to this litigation, it is nevertheless entitled to deference. S. Remand Reply Br. at 14-16.

National Cement describes the Secretary's interpretation upon remand as unprecedented and illogical, arguing that it is impermissible for her to read section 3(h)(1)(C) to modify the scope of section 3(h)(1)(B). NC Remand Br. at 15, 20-23; NC Remand Surreply Br. at. 8-12. National Cement also believes that the legislative history supports its position that the Access Road is neither "private" nor "appurtenant to" the cement plant. NC Remand Br. at 16-20, 31-34. According to National Cement, the Secretary's interpretation upon remand clashes with the text and structure of the Mine Act as a whole, and thus does not satisfy the Court's instruction in remanding the case. NC Remand Br. at 23-31, 36-39; NC Remand Surreply Br. at 5-8, 13-15. National Cement suggests that because the Secretary's interpretation on remand is the latest in a series of policy shifts on her part regarding the status of the Access Road, the Commission

should refuse to accord that interpretation the deference it otherwise would be owed. NC Remand Br. at 34-36.

Intervenor Tejon objects that the Secretary's interpretation on remand would have her treating the Access Road as a mine only some of the time, depending on who was using it, which Tejon argues the Secretary cannot do under the Mine Act. T. Remand Br. at 7-14; T. Remand Surreply Br. at 6-10. Tejon is also concerned that it and other non-mine users of the Access Road will be considered as "operators" to the extent that National Cement does not control non-mine traffic on the Road. T. Remand Br. at 14-18; T. Remand Surreply Br. at 10-13. Like National Cement, Tejon believes that the Commission should reject the Secretary's interpretation upon remand because of her history of constantly changing her position on whether the Access Road is a "coal or other mine" under section 3(h)(1). T. Remand Surreply Br. at 2-6.

Section 3(h)(1) of the Mine Act reads in pertinent part:

> "coal or other mine" means (A) *an area of land from which minerals are extracted in nonliquid form* or, if in liquid form, are extracted with workers underground, (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* including impoundments, retention dams, and tailings ponds, on the surface or underground, *used in, or to be used in,* or resulting from, *the work of extracting such minerals from their natural deposits in nonliquid form,* or if in liquid form, with workers underground, *or used in, or to be used in, the 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) (emphases added).

Until now, the Secretary has relied solely on subsections (A) and (B) of section 3(h)(1) of the Mine Act to argue that MSHA's jurisdiction over the cement plant extends to the Access Road.[5] She now advances an interpretation that also relies upon the final subsection of section

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[5] It is undisputed that the cement plant is a "mine" and thus subject to the jurisdiction of MSHA under the Mine Act. 27 FMSHRC at 85, 98; *see also* 27 FMSHRC at 726 n.5 (discussing interagency agreement between MSHA and the Occupational Safety and Health Administration which allocates to MSHA jurisdiction over cement plants). As we noted in our earlier decision, all parties to the case "also are apparently assuming that the entire National Cement facility qualifies as an 'area of land from which minerals are extracted' under subsection (A)" of section 3(h)(1). 27 FMSHRC at 727 n.6. Thus, the case has always focused on whether the Access Road can be considered "appurtenant to" to the cement plant, and not specifically to just that part of the plant that falls within the subsection (A) language, which possibly could be read to describe less than the entire plant, such as the quarry areas only.

3(h)(1), subsection (C), to support her position that it is reasonable for her to consider the Access Road as "private" and "appurtenant to" the cement plant property. According to the Secretary's interpretation on remand, jurisdiction under the Mine Act over "equipment, machines, tools, or other property" pursuant to subsection (C) attaches only to such items that are used or to be used in a mining, milling, or coal preparation process. Therefore, under this interpretation, vehicles not used in any of those processes that are on a road described in subsection (B) fall outside Mine Act jurisdiction. S. Remand Br. at 16-17; S. Remand Reply Br. at 1-5. The Secretary further takes the position that she can look to subsection (C) to establish the scope of subsection (B), but need not likewise do so to establish the scope of subsection (A). S. Remand Reply Br. at 3-5.

The Secretary's interpretation on remand thus raises two related questions: (1) whether her new interpretation of section 3(h)(1) is a permissible reading of that provision as a preliminary matter; and (2) if so, does her interpretation adequately address the concerns the court enumerated in questioning whether, given the enforcement provisions of the Mine Act, it is reasonable to consider the Access Road to be "private" and "appurtenant to" the cement plant and thus within the jurisdiction of the Mine Act. *See* 494 F.3d at 1075-76.

A. The Standard of Review

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842; *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 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Deference to an agency's interpretation of the statute may not be applied "'to alter the clearly expressed intent of Congress.'" *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). The Commission has held that "[i]n determining [the] coverage [of section 3(h)(1)], we must give effect to Congress' clear intention in the Mine Act, discerned from the 'text, structure, and legislative history.'" *Harless Towing, Inc.*, 16 FMSHRC 683, 687 (Apr. 1994) (quoting *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989)). In ascertaining the plain meaning of a statute, courts utilize traditional tools of construction, including an examination of the "particular statutory language at issue, as well as the language and design of the statute as a whole," to determine whether Congress had an intention on the specific question at issue. *K Mart Corp.*, 486 U.S. at 291; *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d at 44; *Coal Employment Project*, 889 F.2d at 1131.

It is only after a statute has been found to be ambiguous or silent on a point in question that the second inquiry – a "*Chevron* step 2" inquiry – is made as to whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994). Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible

interpretations the agency could have selected. *See Joy Techs., Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997) (citing *Chevron*, 467 U.S. at 843); *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

In her initial remand brief, the Secretary was silent on whether she is relying on the plain meaning of section 3(h)(1)(C), or whether its terms are, like the ones at issue in section 3(h)(1)(B), also ambiguous (and the Commission must also defer to a reasonable interpretation of that subsection by her). In her reply remand brief, however, she states that, with respect to the interaction of subsections (B) and (C) of section 3(h)(1), "[b]ecause the Secretary's interpretation is reasonable, it should be affirmed." S. Remand Reply Br. at 3. Consequently, we do not consider the Secretary to be relying upon the plain meaning of the statute.

Unlike with subsection (B) of section 3(h)(1) (*see* 27 FMSHRC at 727 & n.7), there have been numerous court and Commission cases involving the interpretation and application of the terms of subsection (C) in determining whether the definition of "coal or other mine" has been met in a particular instance. Moreover, almost from the onset of passage of the Mine Act, the meaning of subsection (C) within that definition has been described as "clear" as it relates to Mine Act jurisdiction. *See, e.g., Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 592 (3rd Cir. 1979) (finding a subsection (C) structure and facility to be a "mine" because "the word means what the statute says it means"), *cert. denied*, 444 U.S. 1015 (1980); *Harman Mining Corp. v. FMSHRC*, 671 F.2d 794, 796 (4th Cir. 1981) (under terms of section 3(h)(1)(C), it is clear that facilities and equipment used in preparing coal are included in the definition of "mine").[6]

Until now, there has been no controversy regarding the plain meaning of section 3(h)(1)(C). It means that "[t]he definition [of 'coal or other mine'] is not limited to an area of land from which minerals are extracted, but also includes facilities, equipment, machines, tools and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals." *Harless*, 16 FMSHRC at 687. In other words, and as indicated in the cited cases, subsection (C) has been interpreted to plainly mean that Mine Act jurisdiction extends beyond subsections (A) and (B), to reach subjects that may not be encompassed by the terms of those subsections. Now, the Secretary interprets subsection (C) to serve an additional purpose: to limit the scope of subsection (B).

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[6] *See also U.S. Steel Mining Co.*, 10 FMSHRC 146, 148-49 (Feb. 1988) (stating that "applicable legal framework is clear" in finding that separate repair shop for three of operator's mines is also a mine under section 3(h)(1)(C)); *Jim Walter Res., Inc.*, 22 FMSHRC 21, 25 (Jan. 2000) ("conclud[ing] that the language of [section 3(h)(1)(C)] is clear" in finding that a supply shop separate from the operator's four mines was also a mine); *Justis Supply & Machine Shop*, 22 FMSHRC 1292, 1296 (Nov. 2000) (language of section 3(h)(1)(C) is clear).

B. The Language of Section 3(h)(1)

The starting point for interpreting the statutory definition of "coal or other mine" is the language of the definition. *See, e.g., Harman*, 671 F.2d at 796; *Justis*, 22 FMSHRC at 1296. In support of the interpretation of section 3(h)(1) she has offered on remand, the Secretary argues that "the definition of 'mine' in [s]ection 3(h)(1)(B) refers only to 'private' roads 'appurtenant to' extraction areas, and is silent as to whether vehicles using such roads are also included within the definition of 'mine.'" S. Remand Reply Br. at 2.

While the Secretary's assertion is true, it is far from persuasive. In our prior decision in this case, we interpreted section 3(h)(1), including the reference in subsection (B) to "ways and roads," as follows:

> [S]ection 3(h)(1) defines "coal or other mine" in geographic terms. *Energy West Mining Co.*, 15 FMSHRC 587, 592 & n.9 (Apr. 1993). All activities that occur within a mine's consequential boundaries are covered by the Mine Act. There is nothing in the Mine Act which would limit jurisdiction over the [A]ccess [R]oad temporally or functionally, such as only when the road is being used in furtherance of National Cement's operations.

27 FMSHRC at 732 n.12. This construction of section 3(h)(1) by the Commission was not rejected by the court. The Secretary's position that the silence in subsection (B) regarding vehicles (or any other potential subject of Mine Act jurisdiction, for that matter) permits her to look to subsection (C) to temporally or functionally limit her jurisdiction under subsection (B) flatly contradicts the statute.

We instead agree with National Cement (NC Remand Br. at 21-23) that section 3(h)(1), by including subsection (C) within the definition of "coal or other mine," provides an independent basis for jurisdiction over the enumerated subjects of the mining, milling, or coal preparation process that may not otherwise be encompassed within the geographic areas established by subsections (A) and (B). Congress recognized the potential for certain aspects of those processes to be performed beyond the extraction lands and the private roads appurtenant to those lands.[7] The three subsections of section 3(h)(1) were plainly drafted and placed

[7] Indeed, the Secretary, using the language of subsection (C), stated to the D.C. Circuit that there is "longstanding case law holding that [s]ection 3(h)(1) encompasses structures, facilities, and other areas and equipment that are *not* on the site of the extraction area." S. Court Reply Br. at 10-11 (emphasis in original) (citations omitted). *See, e.g., U.S. Steel*, 10 FMSHRC at 147-48 (central repair shop for three of operator's mines, that were as far as eight and one-half miles away, is a mine under section 3(h)(1)(C)); *Jim Walter*, 22 FMSHRC at 22, 25 (finding that a central supply shop as far as 25 miles away from the operator's four mines was also a mine); *Justis*, 22 FMSHRC at 1293, 1296 (equipment being assembled one mile away from where it was

sequentially in order to collectively cast a jurisdictional net over all those subjects that can possibly be considered to be part of the mining process, in order to reach as many of the potential dangers that are specific to mining that can possibly be reached.

In short, there simply is no precedent or support for the Secretary's argument that one of the subsections of section 3(h)(1) can be used to limit the reach of one of the other subsections and effectively modify the wording of that subsection. Nothing in section 3(h)(1) indicates that the limiting language appearing in subsection (C) – used or to be used in mining, milling, or coal preparation – was also intended to limit the subject of subsection (B).[8] Given the well-established plain meaning of subsection (C), such an interpretation is not permissible. Subsection (C) was drafted to further extend the overall definition of "coal or other mine," not for the contrary purpose of limiting the scope of subsection (B).

Moreover, the Secretary's interpretation upon remand excludes from subsection (B) jurisdiction only *vehicles* unrelated to National Cement, but many other potential subjects of MSHA regulation could conceivably arise upon the Access Road. As the Commission stated in its original decision in this case:

> Considering 30 C.F.R. Part 56 alone, National Cement would be potentially liable for violations of a myriad of Mine Act standards that would apply to parties using the [A]ccess [R]oad for any number of non-cement plant purposes if we were to uphold MSHA's jurisdiction over the [A]ccess [R]oad. While many Part 56 standards are by their nature limited in their application to mining operations, a significant number are not and are relevant to the various non-cement plant uses of the access road. *See, e.g.*, 30 C.F.R. Part 56, Subpart C (Fire Prevention and Control), Subpart D (Air Quality and Physical Agents), Subpart E (Explosives), Subpart H (includes traffic safety provisions), Subpart Q (Safety Programs), and Subpart S (Miscellaneous).

27 FMSHRC at 733. As can be seen from this partial summary of Part 56, it is not just vehicular use of the Access Road unrelated to National Cement that implicates MSHA standards; rather

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to be used in mining fell within the definition in section 3(h)(1)(C)).

[8] In our opinion, the Secretary further weakens her argument by taking the position that the terms of subsection (C) limit the scope of subsection (B), but not of subsection (A). She argues that this is a reasonable position because Congress used the "geographically encompassing term 'area'" in subsection (A) but not in subsection (B). S. Remand Reply Br. at 3-5. The subject of subsection (B) – ways and roads – seems to us to be just as "geographically encompassing" as section 3(h)(1)(A)'s reference to "area of land," and has the added benefit of being a more concretely defined subject of geographic jurisdiction.

other non-National Cement activities could occur on or along the road that would also be covered by those standards should the Access Road be considered to be part of the mine under section 3(h)(1)(B).[9] Excluding non-National Cement vehicles from the reach of MSHA's subsection (B) jurisdiction simply does not do nearly enough to prevent MSHA jurisdiction from potentially attaching to the possible non-mine uses of the Access Road should the road be subject to MSHA regulation as a mine. If the Access Road is considered to fall within the definition of "coal or other mine," it would subject those on it to regulation of much more than their use of vehicular transport over it.

C. The Legislative History of Section 3(h)(1)

The Secretary cites no legislative history in support of her interpretation upon remand that subsection (C) of section 3(h)(1) can be read to limit the scope of subsection (B). Rather, she repeats arguments she previously made before the Commission in this case that the legislative history supports a generally expansive interpretation of subsection (B), and thus the Access Road should be considered "private" and "appurtenant to" to the cement plant. S. Remand Br. at 17-21.

Specifically, the Secretary cites references in the Mine Act's history that the term "coal or other mine" should be given the broadest possible interpretation. S. Remand Br. at 17-18.[10] In response to that argument in our original decision, we relied upon the decision in *Bush & Burchett, Inc. v. Reich*, 117 F.3d 932 (6th Cir. 1977). There, the court acknowledged the legislative intention that "coal or other mine" be given "a very broad reading," but held that such general legislative history does not mean that section 3(h)(1)(B) should be read contrary to common sense. *Id*. at 936-37. The D.C. Circuit cited with approval the *Bush & Burchett* court's opinion regarding the need to read some limit into section 3(h)(1)(B). *See* 494 F.3d at 1077. Accordingly, we remain unpersuaded that this general gloss on section 3(h)(1) is adequate by itself with respect to the terms of subsection (B) at issue here.

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[9] In fact, in our earlier decision, we specifically mentioned the use of explosives by a film company along the road as one potentially problematic subject of MSHA regulation resulting from the Access Road being considered a mine under section 3(h)(1)(B). 27 FMSHRC at 731.

[10] In considering the legislation that eventually became the Mine Act, the Senate Committee responsible for drafting it stated "that what is considered to be a mine and to be regulated under this Act [should] be given the broadest possibl[e] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978).

The Secretary also cites the legislative history of a predecessor statute to the Mine Act, in which the language of section 3(h)(1)(B) originated. S. Remand Br. at 19-20. With regard to that legislative history, we stated in our first decision:

> As both parties acknowledge . . . a definition of "mine" much along the lines of that now found in section 3(h)(1) of the Mine Act, and including the subsection (B) language at issue here, originated in a predecessor statute to the Mine Act, the Federal Metal and Nonmetallic Mine Safety Act [("Metal Act")]. *See* Pub. L. No. 89-577, Sec. 2(b), 80 Stat. 772, 772-73 (1966). There is no explanation in the reports that accompanied that legislation of the meaning of "private ways and roads appurtenant to." *See* 1966 U.S.C.C.A.N. 2846 (S. Rep. No. 89-1296). Consequently, the applicable legislative history is of no assistance in determining whether Congress intended to extend MSHA's jurisdiction to a road over which the mine operator substantially lacked the ability to exclude other users, as is the case here.

27 FMSHRC at 734 n.15.

The reason that we did not further consider the legislative history when we found no report language addressing the subject is because the testimony that first suggested the enactment of language along the lines of what is now section 3(h)(1)(B) included a request for a much broader definition of "coal or other mine" with respect to access roads. An earlier version of the Metal Act defined "mine" with the language now found in subsection (A) of section 3(h)(1) of the Mine Act and some of the language found in subsection (C) of that section. However, there was as yet no reference to "private ways or roads appurtenant" as appears now in subsection (B). *See* H.R. 6961, 89th Cong. § 2(b) (1965), *reprinted in* H.R. Select Subcomm. on Labor of the Comm. on Education and Labor, *Federal Metal and Nonmetallic Safety Act: Hearings on H.R. 6961 and Similar Bills*, at 1 (1965) ("*Hearings on H.R. 6961*").

Subsequently, in hearings held on that and similar bills, Sidney Zagri, legislative counsel of the International Brotherhood of Teamsters, provided the testimony excerpted in the Secretary's brief on remand. *See* S. Remand Br. at 19-20. He specifically further testified:

> I would like to take up now specific amendments dealing with specific problems that we face as Teamsters in the mining industry.
>
> Problem No. 1.
>
> Access roads: The condition of access and service roads is a frequent cause of accidents for truckdrivers and others. Roads are too narrow, covered with dust in the summer and ice in the winter, with shoulders too soft for any

vehicle to venture into in any emergency and, in most cases, unposted with any uniform safety signs or any signs at all. Workings are often too close to access roads, adding falling rocks as an additional hazard to drivers. Blasting often takes place too close to access roads.

Amendment 1: After the word "minerals" add "all access and service roads leading into or from such areas," . . . .

[Rep]. Gibbons. Does that include public highways?

Mr. Zagri. No, sir.

[Rep]. Gibbons. You are talking about the road on the private property?

Mr. Zagri. Yes. This is an area where there is no protection afforded at the present time.

Statement of Sidney Zagri, Legislative Counsel, International Brotherhood of Teamsters, Hearing held May 5, 1965, *reprinted in Hearings on H.R. 6961*, at 220, 223.

It was after the hearing that the House legislation, like the eventual Metal Act, included the language defining "mine" presently at issue: "(1) an area of land from which minerals . . . are extracted . . . , (2) private ways and roads appurtenant to such area, and (3) . . . ." *See* H.R. 8989, 89th Cong. § 2(b) (1965), *reprinted in* Sen. Subcomm. on Labor of the Comm. on Labor and Public Welfare, *Metal and Nonmetallic Safety Act: Hearings on H.R. 8989, S. 2972, S. 996, and S. 3094*, at 2, 3 (1966). Clearly, the purpose of the Teamsters' suggested amendment to the legislation was to reach non-public roads in order to close a gap in safety coverage. In addition, the problem was described in the context of roads accessing and serving mines.

However, as National Cement points out, it is noteworthy that the more limited "private ways and roads appurtenant" language was ultimately adopted by Congress instead of the suggested broader language extending the definition to include *all* private access and service roads leading to or from a mineral extraction area. *See* NC Remand Br. at 33-34. The Teamsters' suggested language seemed designed to cover more roads less immediately connected to extraction lands, including the Access Road, because all that would need to be shown was that the road was used in accessing extraction areas from public roads.

Because the legislative history regarding the intended reach of subsection (B) is inconclusive, it is insufficient to support, by itself, the Secretary's interpretation of section 3(h)(1). The legislative history not only fails to adequately address the intent of Congress with respect to roads like the Access Road, but it offers no support whatsoever for the Secretary's use of subsection (C) to limit the scope of subsection (B) in her interpretation on remand of section 3(h)(1).

Consequently, we find that as a preliminary matter the Secretary's interpretation upon remand of section 3(h)(1) is impermissible. That the Secretary cannot find a way to assert jurisdiction over the Access Road under the terms of section 3(h)(1)(B), without also bringing non-mine use of the road under the coverage of the Mine Act, is a strong indication that the terms "private" and "appurtenant to" only make sense within the context of the Mine Act in the narrower meaning of those terms noted by the court: restricted to use by the mine and dedicated exclusively to the mine's use. *See* 494 F.3d at 1074.

D. Treating Parties Other Than National Cement as Operators of the Access Road

Because we conclude that the Secretary's interpretation upon remand of section 3(h)(1) is impermissible, we need not reach the additional question of whether that interpretation adequately addresses the concerns the court enumerated in questioning whether, given the enforcement provisions of the Mine Act, it is reasonable to consider the Access Road to be "private" and "appurtenant to" the cement plant and thus within the jurisdiction of the Mine Act. *See* 494 F.3d at 1075-76. However, we feel compelled to address the Secretary's apparent assumption that her interpretation can be easily reconciled with those provisions of the Act by treating a party other than National Cement, such as Tejon, as a mine "operator" of the Access Road for purposes of the Mine Act in situations in which National Cement is not the "operator." In response to each of the three areas of concern the court outlined in its opinion (*see supra*, slip op. at 4), the Secretary falls back on this assumption. *See* S. Remand Br. at 33-34; S. Remand Reply Br. at 10-13.

The court in its decision specifically stated that:

> [b]ecause the Act defines a mine "operator" expansively to include "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine," 30 U.S.C. § 802(d), under the Secretary's interpretation Mine Act jurisdiction would extend to Tejon as the "operator" (owner) of the Access Road and to any other party with right-of-way control over the Access Road *notwithstanding the party lacks any relation whatsoever to the mine's operations*. Each of them could be liable as a mine operator for mine safety infractions occurring on the Access Road.[9]
>
> [9] In fact, the Secretary acknowledges that she would treat Tejon as an operator subject to Mine Act jurisdiction.

494 F.3d at 1076 (emphasis added). The Secretary's response is to state that under her "interpretation . . . if Tejon retains (or any other entity is given) the authority to control

maintenance of the [Access R]oad, it is the operator of the road. As such, it is required to comply with MSHA standards relating to road maintenance." S. Remand Br. at 33.

The court had ample grounds to question how a party with absolutely no involvement in mine operations can nevertheless be considered a mine "operator" under the Mine Act. In *Berwind Natural Resources Corp.*, 21 FMSHRC 1284 (Dec. 1999), the Commission explained:

> When reviewing the Secretary's decision to designate an entity as an operator under the Act, the Commission will examine whether the entity has substantial involvement with the mine. . . . [W]e will evaluate the participation and involvement of the entity in the mine's engineering, financial, production, personnel, and health and safety matters to determine whether that entity qualified as an operator under the Act.

Id. at 1293. Thus, the Commission has made clear that an entity must have "substantial involvement" with mine-related activities in order to be considered a mine "operator."

The Secretary provides no supporting authority for treating an entity like Tejon as an "operator" under the Mine Act. To do so would constitute an application of the Mine Act that should be undertaken only after a thorough consideration of the ramifications. Here, however, it is offered as little more than an aside to justifying the Secretary's continued effort to establish jurisdiction over the Access Road.

On the present record, we simply cannot agree with the Secretary that the Access Road can be severed from the cement plant so that a separate entity can be deemed to be the operator of the Access Road and the Mine Act can be enforced against that operator. Given the factors that the Commission examines in determining who is a mine "operator," it is inconceivable that a road like the Access Road would be considered as a stand-alone "mine" for purposes of the Mine Act.

In summary, the Secretary's interpretation upon remand is not a permissible construction of section 3(h)(1)(B). Even if it were, it fails to adequately answer the D.C. Circuit's concerns regarding the reconciliation of the interpretation with the enforcement provisions of the Mine Act.

III.

Conclusion

For the foregoing reasons, we reject the Secretary's interpretation upon remand and vacate the citation.

_____
Michael F. Duffy, Chairman

_____
Michael G. Young, Commissioner

Commissioner Cohen, concurring in result:

I did not have a seat on the Commission when it first heard this case and issued its decision in *National Cement Co. of California*, 27 FMSHRC 721 (Nov. 2005). Had I been, I would have joined in the dissent to that decision of my colleague, Commissioner Jordan. *See* 27 FMSHRC at 737-43 (Comm. Jordan, dissenting). I believe that Commissioner Jordan's original opinion, as amplified by the subsequent dissent in the D.C. Circuit case, sets forth the proper interpretation of section 3(h)(1)(B) of the Mine Act, 30 U.S.C. § 802(h)(1)(B). *See Sec'y of Labor (MSHA) v. National Cement Co. of California*, 494 F.3d 1066, 1077-80 (D.C. Cir. 2007) (Rogers, J., dissenting).

Using, as we must, the framework for interpreting statutes first set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984), I believe that the terms "private" and "appurtenant to" as they are used in section 3(h)(1)(B) have unambiguous meanings. "[P]rivate" means not open to the public, and it is undisputed that the Access Road is not open to the public. *See* 494 F.3d at 1078; 27 FMSHRC at 737-38. The term "appurtenant" is used to describe the relationship of a lesser property interest to a greater property interest, the most common example of which is an easement. Here, again, National Cement's use of the Access Road is by way of an easement that is coincident with its leasehold interest in the Tejon Ranch property for its cement plant facility. *See* 494 F.3d at 1078; 27 FMSHRC at 738-39. Thus, I would interpret section 3(h)(1)(B) to conclude that the Access Road falls within MSHA's jurisdiction.

I believe such a conclusion is particularly appropriate given the characteristics of the Access Road which prompted MSHA to seek the installation of berms or guardrails along the road. I disagree with the original majority in this case (27 FMSHRC at 733) that the Access Road can be equated with a typical highway with respect to the hazards that drivers face in using the road. The record amply documents the dangers faced by drivers on the road, particularly the drivers of the heavy trucks that are by far the most frequent users of the road. It is a two-lane road without berms or guardrails, traveled an average of 148 round-trips a day by trucks weighing approximately 80,000 pounds when loaded. 27 FMSHRC 84, 86, 91 (Jan. 2005) (ALJ). The drop-offs along the road range from six feet to approximately 25 feet. *Id*. at 86; Jt. Ex. 70 (Citation No. 6361036). Accidents have occurred along this road, including the rollover of one heavy truck and the partial rollover of another. S. Mot. for Summ. Dec., Exs. 5 (Aff. of Goldade), 6 (NC Accident Report & Mem. from Randy Logsdon dated Sept. 8, 2003), & 7 (NC First Supplemental Resp. to Interrog. No. 19). Miners have made complaints to MSHA about the road conditions. *Id*., Ex. 5. MSHA determined that the road is hazardous, especially during inclement weather. 27 FMSHRC at 86-87; Jt. Ex. 70. Clearly, MSHA was motivated by significant safety concerns in asserting jurisdiction over the Access Road. *See* 494 F.3d at 1080; 27 FMSHRC at 741-43.

I also disagree with the original majority that the comparatively infrequent use of the Access Road for non-National Cement purposes would lead to such absurd results under the

Mine Act that the terms of section 3(h)(1)(B) cannot be literally applied in this instance. As the dissenting opinions cogently explain, concern for such results seems little more than speculation given the disparity in road use. *See* 27 FMSHRC at 739-42; 494 F.3d at 1079-80.

My opinion on these issues, however, is moot at this point in the case. The majority of the D.C. Circuit panel hearing the appeal of the Commission's original decision held that the terms of section 3(h)(1)(B) at issue do not have plain meanings but rather are ambiguous, and ruled that in order for the Secretary to assert jurisdiction over the Access Road, on remand before the Commission she must submit an interpretation of section 3(h)(1)(B) that both addresses the concerns of National Cement and Tejon and is in harmony with the Mine Act's overall enforcement scheme. *See* 494 F.3d at 1074-77.

Having reviewed the interpretation submitted on remand by the Secretary (S. Remand Br. at 13), I conclude that this interpretation is not a reasonable construction of section 3(h)(1). From the language of section 3(h)(1) setting forth its three subsections, it is clear to me that section 3(h)(1) was designed to provide alternative bases for Mine Act jurisdiction, such that it is sufficient for that jurisdiction to attach to a subject as long as the requirements of only one of the three subsections is met. Thus, I cannot agree with the Secretary that subsection (C) limits, modifies, or otherwise explains the reach of subsection (B), and I certainly cannot agree with the Secretary that subsection (C) can serve any such purpose with respect to subsection (B) but not with respect to subsection (A). *See* S. Remand Reply Br. at 3-5.

Consequently, I join Chairman Duffy and Commissioner Young in rejecting the Secretary's interpretation as an impermissible construction of section 3(h)(1). I do so based on the language of section 3(h)(1) alone, and I join in sections II.A and II.B of their opinion. *See* slip op. at 6-11. Accordingly, I do not feel it necessary to reach the Secretary's arguments regarding legislative history (*id*. at 11-14), nor do I join in my colleagues' conclusions regarding the Secretary's position on treating Tejon as an operator under the Mine Act. *See id*. at 14-15.

_____

Robert F. Cohen, Jr., Commissioner

Commissioner Jordan, dissenting:

I agree with my colleagues that in this case the Secretary's interpretation of section 3(h)(1)(B), 30 U.S.C. § 802(h)(1)(B) (the section of the Mine Act defining a "mine,") is unreasonable. Consequently, I am also in agreement with the majority that we should not defer to the Secretary's interpretation. Nonetheless, I conclude that the statutory definition of "mine" incorporates the road at issue, and I find that the concerns articulated by the Court of Appeals, regarding the Secretary's assertion of jurisdiction over the road, *Secretary of Labor (MSHA) v. National Cement Co. of California*, 494 F.3d 1066, 1075-77 (D.C. Cir. 2007), have been addressed. Accordingly, I would reverse the judge's decision on remand in which he vacated the citation against National Cement.

Section 4 of the Mine Act provides in part that "[e]ach coal or other mine . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. The term "coal or other mine" is defined in section 3 of the Act, 30 U.S.C.§ 802. Specifically, section 3(h)(1) defines it in pertinent part as:

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (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 including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the 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).

The Secretary interprets the definition of "mine" in section 3(h)(1)(B) of the Mine Act to include the road at issue in this case. S. Remand Br. at 13. However, she interprets section 3(h)(1)(C) to qualify section 3(h)(1)(B) and thus to exclude from the definition of "mine" vehicles on the road that are not related to National Cement's mining operations. *Id*. I reject this tortured reading of the Mine Act, and agree with my colleagues and with National Cement that Congress did not, in section 3(h)(1), articulate a three-part list of criteria that must be met before an entity is a "coal or other mine." Rather, Congress set forth three alternative and independent definitions, with any one being sufficient to bring an entity under the Secretary's jurisdiction as a "coal or other mine." Slip op. at 9-10; NC Remand Br. at 21.

Furthermore, the Secretary has failed to adequately explain the inconsistency between interpreting section 3(h)(1)(B)'s definition of mine so as to not include all equipment on such roads (because, according to her, the terms of section 3(h)(1)(C) limit the scope of section

3(h)(1)(B)) but interpreting section 3(h)(1)(A)'s definition of "mine" (an "area of land from which minerals are extracted") as including everything within the extraction area (and thus not applying section 3(h)(1)(C) to limit its scope). S. Remand Reply Br. at 3. National Cement rightly notes that Congress would not have meant to meant to include everything on the land under MSHA's jurisdiction when extraction areas are involved, but not where roads leading to and from those areas are concerned. NC Remand Surreply Br. at 11. Thus, I find the Secretary's contorted interpretation unreasonable, and would not accord it deference.

That is not the end of our inquiry, however. In cases where we are not bound to accord deference to the Secretary's statutory interpretation (because we find it is not reasonable), we may proceed de novo. *See Rapaport v. Office of Thrift Supervision*, 59 F.3d 212, 216-17 (D.C. Cir. 1995) (Court proceeds with a de novo interpretation when it refuses to accord deference to an agency's statutory interpretation because the agency shared responsibility for the administration of the statute with other agencies); *Hecla Mining Co. v. U.S.*, 909 F.2d 1371, 1376-77 (10th Cir. 1990) (Court holds that agency's interpretation of the statutory language was unreasonable but upheld agency's ultimate conclusion on other grounds).[1]

As to the statutory language in the Act's definition of "mine," the Court of Appeals observed that the word "private," as used in section 3(h)(1)(B), could conceivably mean restricted to the use of a certain "'group or class of persons' – in this case, all of the grantees to whom Tejon may grant a right of way – and their invitees." 494 F.3d at 1074. It also acknowledged that the word "appurtenant" in the statute could permissibly be "construed to encompass a road such as the Access Road because it is subject to a transferable right of way benefitting the mine lessee." *Id*. As I discussed in detail in my previous dissent in this case, 27 FMSHRC 721, 737-39 (Nov. 2005), both the meaning of the statutory terms and the legislative history of the Mine Act support MSHA's jurisdiction over the road. Briefly, in terms of the statutory language, Tejon has admitted that the road is private. S. Mot. For Sum. Dec., Ex. 3 at 3 (Intervenor's Adm. No. 2). And, simply put, it is appurtenant to the mine because Tejon has granted National Cement an easement. 27 FMSHRC at 738.

Thus, I conclude that, pursuant to section 3(h)(1)(B) of the Mine Act, the Secretary may assert jurisdiction over the access road. The Court of Appeals, however, has raised legitimate concerns about the ramifications of a decision granting her such jurisdiction. I believe, however, that these concerns have been adequately addressed.

At the outset, it is essential to focus on the usual, day-to-day uses of the road in question. National Cement's activities dominate use of the road – it is undisputed that the majority of traffic on the road is for cement-plant-related purposes. 27 FMSHRC 84, 91 (Jan. 2005) (ALJ) (citing Stip. 38). As the judge found in his initial decision, "[n]on-National Cement use of the road is dwarfed by National Cement traffic." 27 FMSHRC at 101. Consequently, as I noted in

[1] My colleagues do the same, articulating their own interpretation of the statutory language after rejecting the Secretary's. Slip op. at 13-14.

my dissent in the first Commission decision in this case, we should not focus on theoretical scenarios that may be troubling at the expense of taking into account the potential dangers involved with the ongoing use of the road by heavy mine trucks. 27 FMSHRC at 741-43. Miners on a road with steep drops (up to 25 feet) driving heavy cement trucks more than 45,000 times a year, during all hours of the day and night, 27 FMSHRC at 86, 91 (citing Stips. 13, 41); S. Br. at 3, should not be deprived of the protection of berms and guardrails due to mere conjecture about the erratic, infrequent use of the road by a movie truck or hunter.

My colleagues' restrictive use of the terms "private" and "appurtenant," and their emphasis on the exclusive use of a road as a requirement for MSHA jurisdiction, slip op. at 13-14, creates as tortured a scenario as the interpretation of the Secretary that they reject. The cement trucks using the access road are under MSHA jurisdiction while at the quarry, and, as the case law cited by the majority holds, slip op. at 9-10 & n.7, could be under MSHA jurisdiction while being fixed at a repair shop off of the mine property. *See, e.g., U.S. Steel Mining Co*., 10 FMSHRC 146, 147-48 (Feb. 1988) (central repair shop for three of operator's mines that were as far as eight and one-half miles away, constitutes a mine under section 3(h)(1)); *Jim Walter Res., Inc.*, 22 FMSHRC 21, 22-25 (Jan. 2000) (holding that a central supply shop as far as 25 miles away from the operator's four mines was a mine). Thus, the result of the majority's decision today means that MSHA cannot require protections for National Cement truck drivers as they traverse the access road from the quarry to the highway, but their trucks could be under MSHA jurisdiction once they are in a central repair shop located miles away from the mine.

It is in this context that I consider the three concerns set forth by the Court of Appeals. First, the Court questioned whether National Cement has the authority to alter the road as the Secretary requires. 494 F.3d at 1075. However, substantial evidence supports the finding of the judge that National Cement has the requisite control to install berms or guardrails on the road. 27 FMSHRC at 100 (citing Stips. 35, 36, 37). The stipulations establish that National Cement has a history of maintaining and improving the road without Tejon's pre-approval. This includes resurfacing, sealing, and restriping the road and installing speed limit signs and constructing speed bumps.

Next, the Court expressed a concern that National Cement would be required to assume responsibility for all road users, including those over whom it had no authority. 494 at F.3d 1075. This would include compliance with withdrawal orders,[2] accident notification, and hazard training. 494 F.3d at 1075-76. These concerns articulated by the Court are dramatically reduced,

[2] The Secretary rightly notes that if MSHA were to issue a withdrawal order to an independent contractor at a mine, the contractor likely would not have the authority to withdraw employees of the production operator from the affected area. S. Remand Br. at 28-29. Nonetheless, as the Secretary explains, the extraction area would still be a "mine" and, as she correctly reasons, "the fact that an independent contractor who is an operator does not have the requisite control to withdraw all persons from an affected area which it 'operates' is not a basis for determining that the affected area is not a 'mine . . . .'" *Id*. at 29.

however, by the fact that Tejon, which owns the road, may be considered an operator. Section 3(d) of the Mine Act defines an "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d). Moreover, case law makes clear that the "owner" of a mine is an operator, regardless of whether the owner exercises control or supervision of the mine. *Assoc. of Bituminous Contractors, Inc. v. Andrus*, 581 F.2d 853, 862 (D.C. Cir. 1978).

Berwind Natural Resources Corp., 21 FMSHRC 1284 (Dec. 1999), cited by my colleagues, slip op. at 15, does not require a different conclusion. In *Berwind,* the Commission rejected the Secretary's decision to cite an entity that lacked substantial involvement with the mine, but in that case, unlike here, the Secretary was also able to cite the entity that exerted day-to-day supervision over the area in question.[3] *Id*. at 1300-05. Here, National Cement has contended that it might not be able to abate violations or comply with withdrawal orders because it does not own the road or have any control over certain persons who use the road. In such a case it would be entirely appropriate to cite Tejon because, in spite of its non-involvement in the mining operations, as the owner Tejon can authorize any necessary construction to the road and impose any necessary conditions to persons' access to the road. If National Cement lacked the authority to construct the necessary berms, and guardrails, Tejon can construct them. Alternatively, Tejon's agreement with National Cement could provide National Cement with the authority to perform those repairs and alterations MSHA deems necessary for the road to comply with mandatory safety standards. Furthermore, Tejon can condition access to the road to those persons who agree to comply with withdrawal orders, accident reporting requirements, hazard training, or standards relating to the handling of explosives.

To the extent these obligations are viewed as burdensome for Tejon, given its lack of involvement in the mining operation, it is worth noting that as the mine owner, Tejon receives royalty payments based on cement sales and thus profits from National Cement's use of the road. Jt. Ex. 3 at 4-6. I believe that this satisfies the Court of Appeal's third concern, 494 F.2d at 1076, that Tejon (or others with right-of-way control over the road) could be liable as an operator for mine safety infractions occurring on the road.

In any event, such compliance is not as burdensome as National Cement implies. For example, the immediate notification reporting requirements only apply when an operator knows or should know that an accident has occurred. *See* 30 C.F.R. § 50.10. Furthermore, generally only road accidents involving death, injury to an individual that has a reasonable potential to cause death, or entrapment for more than 30 minutes must be immediately reported and investigated. *See* 30 C.F.R. § 50.2(h). Finally, the record reflects that National Cement has previously reported accidents that occurred on the road. S. Mot. for Summ. Dec., Ex. 6.

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[3] In light of the D.C. Circuit's decision in *Sec'y of Labor v. Twentymile Coal Co*., 456 F.3d 151 (D.C. Cir. 2006), one could question the vitality of the Berwind holding cited by my colleagues.

For the reasons stated above, I would uphold the Secretary's jurisdiction over the access road. I agree with Judge Rogers that "[a] speculative concern about a tiny fraction of access-road users should not be used to uproot the major purpose of the Mine Act." 494 F.2d at 1080 (Rogers, J., dissenting). Accordingly, I respectfully dissent.

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Mary Lu Jordan, Commissioner

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