FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 17, 2005

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, Suboleski, and Young, Commissioners

DECISION

BY: Duffy, Chairman, and Suboleski and Young, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act") and involves a citation alleging a violation of 30 C.F.R. § 56.9300(a).[1] Administrative Law Judge Jerold Feldman granted the Secretary of Labor's motion for summary decision and held that the access road to the National Cement Company of California, Inc. ("National Cement") facility in Lebec, California, is a "coal or other mine" and is thus subject to the jurisdiction of the Mine Act and the Department of Labor's Mine Safety and Health Administration ("MSHA"). 27 FMSHRC 84 (Jan. 2005) (ALJ). Upon the subsequent motion of National Cement, the judge certified his interlocutory ruling. 27 FMSHRC

[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."

157 (Feb. 2005) (ALJ). The Commission thereafter ordered review of the judge's decision. For the reasons that follow, we vacate the judge's decision and remand this proceeding to the judge.

I.

Factual and Procedural Background

At issue in this case is an access road leading to a cement plant and quarries on the Tejon Ranch property ("Ranch"). The Ranch occupies approximately 270,000 contiguous acres of land that stretch over an area approximately 40 miles by 26 miles in Los Angeles and Kern Counties, California. 27 FMSHRC at 85.[2] It is owned by Tejon Ranchcorp ("Tejon"). *Id*. The Ranch is comprised of an operating cattle ranch and other commercial operations. *Id*. On the southern portion of the Ranch a variety of commercial activities take place, one of which is National Cement's cement plant facility in southern Kern County. *Id*. at 85-86.

In 1966 Tejon entered into a long-term Cement Manufacturing Plant Lease, covering approximately 5,000 acres of Ranch land, with Pacific Western Industries, Inc. ("Pacific Western"). *Id*. at 87; Jt. Ex. 3. The lease was ultimately assigned to National Cement. 27 FMSHRC at 87. Pursuant to the terms of the lease, National Cement extracts minerals such as limestone, shale, and silica from quarries on the land, and processes them at the facility with other materials trucked in from off-site sources to produce Portland cement for sale. *Id*. at 85.

Prior to the construction of the cement plant, there was a network of dirt roads on the southern portion of the Ranch. *Id*. at 87. In 1965, Pacific Western began constructing an access road to the cement plant by using in part some of the existing dirt roads. *Id*.; Jt. Exs. 5-6. The resulting access road, which is the road at issue in this case, is a 4.3-mile-long, two-lane road that runs north from State Route 138 in northern Los Angeles County to the location of the cement plant. 27 FMSHRC at 86. In 1966, the access road was paved, and the cement plant was constructed and began operating. *Id*. at 87. Easement deeds covering the road were entered into and recorded during that time and were eventually assigned to National Cement. *Id*.; Jt. Exs. 1-2. The road is not covered by any federal or state permits required to operate the mine. Contestant's Mem. in Support of Mot. for Summ. Dec. ("Contestant's Mem."), Ex. 2, ¶ 3.

Use of the 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 it by the State of California. 27 FMSHRC at 87. Signs reflecting this restricted nature of the road, Tejon's ownership, and National Cement's operations are posted at the road's intersection with State Route 138 and on the initial segment of the road on the way to the cement plant. *Id*. at 87-89.

[2] The factual record in this case is largely based on the 77 joint stipulations that the parties submitted to the judge, all of which he set forth in his decision. *See* 27 FMSHRC at 85-98. The parties also submitted a book of Joint Exhibits. *Id*. at 85.

Adjoining the road is fenced-in Ranch land that is accessed by other dirt Ranch roads, locked gates, and three cattle guard crossings. *Id*. at 86, 89. The road ends at the cement plant site, where a gate and guardhouse, only intermittently manned, sit in front of the cement plant. *Id*. A sign next to the guardhouse informs those entering that they must check in at the front office, that MSHA regulates the site, and that those entering must comply with MSHA's regulations. *Id*. at 89-90.

The road provides the only vehicular access to the cement plant, which operates around the clock, 7 days per week. *Id*. at 86, 91. The cement plant has a maximum annual production capacity of 1-1/2 million tons, and operated at approximately 62 % capacity in 2003. *Id*. at 85. Tanker trucks, weighing approximately 25,000 pounds, bring raw material loads of approximately 55,000 pounds to the plant and leave empty. *Id*. at 91. Similarly, empty tank trucks arrive at the plant and exit with 55,000-pound loads of cement for National Cement's customers. *Id*. These trucks run 6 days a week, throughout the day and night, although the customers' truck trips are concentrated between midnight and the early morning hours. *Id*. The daily average for tanker-truck round trips on the road is 148. *Id*. In addition, on average, 84 employee round-trips and 5 non-tank truck deliveries to the cement plant occur daily. *Id*.[3]

While 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 to gain access to and exit from other commercial activities at the Ranch. *Id*. at 85-86, 91. These activities include: management of ranching operations by Tejon and its lessees (*id*. at 92, 94); 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).[4]

In addition to providing access to Tejon's commercial interests in the Ranch, the road is used by various utility companies to access portions of the Ranch subject to easements those utilities have entered into with Tejon to accommodate transmission lines and related facilities

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[3] The written materials in National Cement's Site-Specific Hazard Training program include instructions 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 access road to the plant. 27 FMSHRC at 91; *see* Jt. Ex. 65.

[4] 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. 27 FMSHRC at 94. Tejon wants to use 12,000 acres of the Ranch for a 23,000 unit commercial and residential development that would include housing, retail, schools, and office facilities. *Id*. Tejon hopes to obtain the necessary governmental approvals for the development starting this year, but it recognizes that any number of impediments to the project could delay, alter, or derail the project, known as Tejon's "Centennial" development. *Id*. at 94-95. The subject road is presently being used for accessing areas of the Ranch in the project planning process. *Id*. at 95.

that serve not only the cement plant, but also other users. *Id*. at 95-96. Similarly, representatives of the Federal Aviation Administration use the road to access a communications tower located on Tejon land adjacent to the cement plant quarry. *Id*. at 95.

The road is also used by the California Department of Water Resources ("DWR") to access an aqueduct that DWR constructed in 1970. *Id*. at 90. In fact, DWR owns the bridge that carries road traffic over the aqueduct and maintains the bridge and its approaches. *Id*. The total distance of road that DWR is responsible for maintaining is approximately 600 feet, and DWR has installed speed bumps on both approaches along with warning signs. *Id*.

Maintenance of the road is otherwise the responsibility of the various parties that use it, pro rata to their use. *Id*. at 91. In practice, however, National Cement has always maintained and kept it in usable condition. *Id*. For example, in November 2003, National Cement resurfaced, sealed, and restriped the road, and installed speed bumps and speed limit signs on the road. *Id*. National Cement has not sought Tejon's pre-approval for maintenance to be done on the road. *Id*.

In 1992, the lack of berms or guardrails along parts of the road led MSHA to cite National Cement for an alleged violation of section 56.9300(a). *Id*. at 96. MSHA soon thereafter vacated the citation on the ground that National Cement was located at the end of the access road and had no means to control the users entering the road from State Highway 138 until those users reached the cement plant. *Id*.; Jt. Ex. 66 at 2.

The road was not the subject of any further citations until February 2003, when MSHA again alleged a violation of section 56.9300(a). 27 FMSHRC at 96-97; Jt. Ex. 68. On this occasion, the citation was vacated on the ground that National Cement lacked adequate notice that the road was subject to Mine Act jurisdiction. 27 FMSHRC at 97-98; Jt. Ex. 68 at 3.

In December 2003, MSHA sent a letter to National Cement in order to put it on notice that MSHA considered the road subject to the Mine Act. 27 FMSHRC at 98; Jt. Ex. 69. On February 9, 2004, MSHA issued National Cement the citation that is the subject of this proceeding, Citation No. 6361036, once again alleging a violation of section 56.9300(a). 27 FMSHRC at 86, 98; *see* Jt. Ex. 70. The citation states:

> 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 vend[o]rs. The l[a]ck 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.

27 FMSHRC at 86-87; Jt. Ex. 70.

National Cement contested the citation, and Tejon intervened. 27 FMSHRC at 84, 87. 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. *Id*. at 84.

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. The judge rejected National Cement's argument that its lack of control over the road would prevent it from ensuring compliance with a section 104(b) withdrawal order, 30 U.S.C.§ 814(b), and held that National Cement's history of maintaining and improving the road belied the operator's argument that it does not have the authority under its agreement with Tejon to construct berms or guardrails, as MSHA would have it do pursuant to section 56.9300(a). *Id*. at 100. The judge also found that National Cement's use of the road was frequent and disproportionate as compared with other users, thus justifying Mine Act oversight of the road. *Id*. at 100-01. He additionally found that MSHA's inconsistent enforcement history with respect to the road was not a bar to the assertion of Mine Act jurisdiction and that MSHA was unlikely to require hazard training on the part of users of the road who had no connection to the cement plant. *Id*. at 101-02. Consequently the judge granted the Secretary's motion for summary decision on the jurisdictional question and scheduled further proceedings. *Id*. at 103. The judge's certification for Commission interlocutory review of the issue raised by the cross-motions for summary decision mooted that schedule. *Id*. at 157.

II.

Disposition

National Cement urges the Commission to apply the plain meaning of the definitional provisions of the Mine Act and reverse the judge's decision that the road is a "coal or other mine." NCCC Br. at 17-20, 35. The operator contends that because it does not have the power to control the road, and because it is not the only user of the road, the road qualifies as neither "private" nor "appurtenant" to the cement plant as those two terms are used in section 3(h)(1)(B) of the Mine Act. *Id*. at 17-28. National Cement also maintains that relevant legislative history and the structure of the Mine Act compel the same conclusion. *Id*. at 28-32. It further argues that, given the Secretary's enforcement history with respect to the road, her interpretation is not entitled to deference in this case. *Id*. at 32-35. Intervenor Tejon filed a brief in support of the operator's position.

The Secretary argues for affirmance of the judge's decision because the definition of "coal or other mine" plainly includes a road such as the one at issue. S. Br. at 15-19. The Secretary continues that the road is "private" as that term is commonly understood and provides access to the cement plant, thus making it "appurtenant." *Id*. at 19-21. The Secretary also submits that the legislative history supports such an interpretation of the statute and that control of the road is irrelevant to a determination of whether it is subject to the Mine Act. *Id*. at 21-30. The Secretary further contends that nothing in the Mine Act or the enforcement history prevents the road from being considered part of the mine within MSHA's jurisdiction. *Id*. at 30-35.

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 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. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

30 U.S.C. § 802(h)(1).

There is no dispute that the National Cement facility is a "mine" under section 3(h)(1) of the Mine Act,[5] and the parties have stipulated as much. 27 FMSHRC at 85. The issue here is

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[5] Pursuant to section 3(h)(1)(C), an agreement between MSHA and the Occupational Safety and Health Administration (OSHA) allocates responsibility between the two agencies for various types of operations involving the mining and milling of minerals. *See* 44 Fed. Reg. 22,827 (Apr. 17, 1979), *amended by* 48 Fed. Reg. 7,521 (Feb. 22, 1983). Paragraph B.6.a. of that agreement provides: "[p]ursuant to the authority in section 3(h)(1) [of the Mine Act] to determine what constitutes mineral milling considering convenience of administration, . . . MSHA jurisdiction includes . . . cement plants." 44 Fed. Reg. at 22,828.

whether Mine Act jurisdiction extends beyond the National Cement facility to include the 4.3-mile-long access road, because that road is, in the words of subsection (B), a "private way[] [or] road[] appurtenant" to the facility.[6] This is the first time the Commission will address the meaning of section 3(h)(1)(B).[7]

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 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990).

The starting point for interpreting the statutory definition of "coal or other mine" is the language of the definition. *See, e.g., Harman Mining Corp. v. FMSHRC*, 671 F.2d 794, 796 (4th Cir. 1981); *Justis Supply & Machine Shop*, 22 FMSHRC 1292, 1296 (Nov. 2000). Because the Mine Act does not define "private" or "appurtenant," we first look to the commonly understood definitions of those terms. *See Drillex, Inc.*, 16 FMSHRC 2391, 2395 (Dec. 1994) (relying on dictionary definition of "milling" to determine meaning of section 3(h)(1)(C)).

As to whether the subject road was "private," the parties agree on the applicable definition of the operative term: "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." *Webster's Third New Int'l*

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[6] We note that neither the parties nor the judge applied the exact wording of section 3(h)(1) in this instance. Mine Act jurisdiction does not extend to private ways and roads that are appurtenant to a "mine," but rather extends to private ways and roads that are appurtenant to "an area of land from which minerals are extracted." *See* 30 U.S.C. § 802(h)(1)(A) & (B); *Bush & Burchett, Inc. v. Sec'y of Labor*, 117 F.3d 932, 936-37 (6th Cir. 1997) (discussing issue in exact language of statute). While the parties stipulated that the facility constituted a "mine" under section 3(h)(1), they also are apparently assuming that the entire National Cement facility qualifies as an "area of land from which minerals are extracted" under subsection (A) thereof. Given the parties' approach to the issue, we therefore examine the relationship of the road to the cement plant.

[7] The court in *Bush & Burchett* addressed the meaning of section 3(h)(1)(B) and agreed with the Secretary that a road and bridge connecting a coal mine to a rail loadout facility did not fall within the definition of "coal or other mine" under the facts of that case. There, OSHA had issued three citations alleging violations of the Occupational Safety and Health Act of 1970 ("OSH Act") to the contractor responsible for constructing the bridge and its approaches, which were to be used as part of the 6.5-mile route between the newly constructed surface mine and the loadout facility. 117 F.3d at 933 & n.1. The Occupational Safety and Health Review Commission ("OSHRC") rejected the contractor's arguments that the roads to be used as part of the route were "appurtenant" to an area of land from which minerals are extracted and thus within MSHA, not OSHA, jurisdiction and the court upheld OSHRC. *Id*. at 936-39.

Dictionary, 1804-05 (1993) ("*Webster's*"). *See* NCCC Br. at 21; S. Br. at 19. This definition of the term makes it clear that a road can be private even if more than one party can use it, as a user can be a member of a group or class of persons to which use is restricted. Here, the parties by their stipulations established that the road is not now open to the general public, and is intended for or restricted to the use of a particular group or class of persons — that is, those that Tejon and National Cement permit to use it. 27 FMSHRC at 86 (Stip. Nos. 10-11), 87-89 (Stip. Nos. 16-21), 99.

Regarding the meaning of the term "appurtenant," the parties again generally agree on the applicable definition, citing the dictionary definitions relied upon by the judge in his decision. NCCC Br. at 27; S. Br. at 20-21. The judge found "appurtenant" to be 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 (8th ed. 2004).

27 FMSHRC at 99. In concluding that the subject road is "appurtenant" in its entirety, both the judge and the Secretary rely on the undisputed fact that National Cement holds an easement interest in the entire road. *Id.*; S. Br. at 21. Moreover, the Secretary adds that the easement transfers to successor lessors of the cement plant and thus can be said to pass in possession with the real estate. S. Br. at 21 (citing Jt. Ex. 2).

Nevertheless, we conclude that the literal interpretation of the specific words used in section 3(h)(1)(B) offered by the Secretary is not dispositive in determining the meaning of that provision. To properly construe the phrase "private ways and roads appurtenant" as it is used in section 3(h)(1)(B), it is necessary to consider the language in the context of the Mine Act. In ascertaining the plain meaning of the 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. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *see also Local Union 1261, UMWA*, 917 F.2d at 44-45 ("If the first rule of . . . construction is 'Read,' the second rule is 'Read on!'").

Moreover, in statutory interpretation, the ordinary meaning of the words used in the statute cannot be applied to produce absurd results. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987) (citing *In re Trans Alaska Pipeline Rate Case*, 436 U.S. 631, 643 (1978)). In particular, the Sixth Circuit recognized that section 3(h)(1)(B) must not be read "contrary to common sense" and that reasonable limitations must be placed on its breadth in order to avoid

"bizarre results." *Bush & Burchett, Inc. v. Sec'y of Labor*, 117 F.3d 932, 937 (6th Cir. 1997). Similarly, that court recognized that Congress' use of the phrase "appurtenant to" with respect to a road's relationship to a mine produced a "nebulous boundary" in determining the scope of MSHA jurisdiction. *Id*. at 936-37.

The resolution of whether a particular road is "appurtenant to" a mine facility must take careful account of the specific factual circumstances and not be based on an inflexible, literal application of the statute that disregards real, practical implications and leads to an absurd result. Accordingly, we analyze in some detail the facts in this case, how they relate to the jurisdictional issue presented, and how the definition of "coal or other mine" must be applied consistently with the overall structure and purpose of the Mine Act.

In this case, Tejon, pursuant to the terms of the Cement Manufacturing Plant Lease, has granted the operator of the cement plant facility an easement which permits that operator the right of access to its facility via the entire road, and the right to grant others such access.[8] This is a non-exclusive easement, however, as Tejon reserves to itself the right to also use the road, and the right to grant others use of the road, so long as such additional use of the road does not materially interfere with the cement plant operator's use.[9]

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[8] The lease provides in pertinent part:

> 11. Easements. Lessor shall grant to Lessee without further consideration such non-exclusive rights of way and easements upon the Demised Premises and Lessor's adjacent lands as may be reasonably necessary and convenient for the erection, construction, maintenance, and operation of access roads, . . . ; provided, however, the location of any such rights of way and easements shall be subject to the prior written approval of Lessor, which Lessor agrees to give so long as such location does not unreasonably [interfere] with the present or reasonably contemplated future operations of Lessor or any tenant of Lessor. . . .
>
> Lessee 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.

Jt. Ex. 3 at 17-18.

[9] Pursuant to the Cement Manufacturing Plant Lease, a Memorandum of Easement Deed ("MED") was recorded that describes the easement for the access road. Jt. Ex. 2. In addition to

Consequently, parts of the road are used for purposes unrelated to the cement plant as Tejon permits. 27 FMSHRC at 90, 92-96. This non-cement plant traffic is beyond National Cement's control. The road leads to several locations other than the cement plant, and this traffic can enter and leave the road at a number of locations, such as, for instance, when the road is being used by members of the "Explorer Program" conducted at the Ranch.[10] *Id*. at 92-96. While, as the judge found, the vast majority of traffic on the road is to and from the cement plant, vehicles carrying Tejon employees, contractors, and others that Tejon may permit on the Ranch property for various purposes also travel over all or part of the road. *Id*. at 91-95, 100.

The Secretary does not dispute that National Cement cannot control use of the road, and instead argues that the degree of control National Cement has over the road is not a relevant consideration to a determination of whether a road is private and appurtenant under section 3(h)(1)(B). S. Br. at 25-27. The Secretary further suggests that jurisdiction in this instance be decided only within the context of the citation at issue, and alleges that, because National Cement could install berms or guardrails where needed, Mine Act jurisdiction over the road is justified in this instance. *Id*. at 30-32.

Looking at the Mine Act as a whole, as we must, we do not agree with the Secretary that National Cement's lack of control over use of the road can be ignored. A finding of Mine Act jurisdiction over the subject road in this instance would not simply mean that National Cement would be obligated to install guardrails or berms along the road; such a finding would raise a host of issues regarding compliance with the Mine Act and Mine Act standards under circumstances where National Cement could not control other users of the road. As discussed below, a determination that property is a "coal or other mine" has far-ranging consequences under the Act. *Cf. Bush & Burchett*, 117 F.3d at 937 (examining ramifications of deciding that road would fall within Mine Act jurisdiction).

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providing a description of the boundaries of the easement, the MED states that "[t]he easement is for the purpose of enabling Grantee to construct, maintain, operate, inspect, repair, remove and use an access road and right of way for the purpose of ingress and egress to and from Grantor's land leased by Grantee under [the aforementioned lease]." *Id*. at 1 & Ex. A. The MED also states that the easement runs as long as the lease runs, and that the easement's terms, covenants, and conditions are contained in a concurrently executed separate Easement Deed, which is incorporated by reference into the Memorandum. *Id*. at 1-2. While the parties did not include that Easement Deed in the Joint Exhibits, the Road Easement Deed that was superceded by the Easement Deed referred to in the MED was included as Joint Exhibit 1. That earlier easement reserved to Tejon the right to use and cross over the subject road, "and the right to grant to others easements in proximity to, crossing or overlapping the right of way and easement herein granted provided such other easement shall not materially interfere with the use and enjoyment of the right of way and easement herein granted." Jt. Ex. 1 at 1.

[10] The Ranch has approximately 30 miles of paved roads, with significantly more miles of dirt roads. 27 FMSHRC at 86.

First of all, other fundamental terms used in the Mine Act, in both establishing the reach of health and safety standards and in outlining the enforcement procedures to be followed, are defined in relation to the term "coal or other mine." For instance, section 3(d) defines "operator" in the Act to mean "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) (emphasis added). Thus, a conclusion that the entire access road is a "coal or other mine" might lead to an expansive interpretation of "operator" not intended by Congress.[11]

Similarly, section 3(g) provides that a "miner" is "any individual working in a coal or other mine." 30 U.S.C. § 802(g). Consequently, if the entire access road is a "coal or other mine," individuals over whom National Cement has no control — such as, for example, DWR personnel or a truck driver or explosives expert working for a film company — would each presumably be considered a "miner" for purposes of MSHA enforcement. There is nothing in the Mine Act or its legislative history that leads us to believe that Congress would have intended such an absurd result when it drafted the language of section 3(h)(1)(B).

The concern with such absurd results is not an idle one. Because the Mine Act is a strict liability statute, any violation of the Act or the mandatory safety and health standards adopted thereto that occurs on the road would be attributable to the mine operator, regardless of whether the operator is at fault. *See, e.g., Allied Products Co. v. FMSHRC,* 666 F.2d 890, 893-94 (5th Cir. 1982) (under section 104(a), if conditions exist which violate regulations, citations are proper); *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982) (under section 110(a), operators are liable for violations without consideration of fault).

Below, the judge expressed confidence that the Secretary would not seek to enforce Mine Act requirements with respect to those users of the road with no connection to National Cement's operations, such as cattle ranchers. 27 FMSHRC at 102. He also believed that National Cement could comply with a withdrawal order issued pursuant to section 104(b) of the Act, 30 U.S.C.

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[11] Here, the facts clearly establish that, for purposes of section 3(d), National Cement "controls" the access road only to the extent that it is used in conjunction with the activities of the quarries and the cement plant. National Cement does not and could not exercise control over non-mining activities that also utilize the access road. The Secretary intimates that in some situations it may be more appropriate for MSHA to cite Tejon instead of National Cement for a violation of a standard. S. Br. at 31-32. Citations under the Mine Act may only be issued against "operators." *See* 30 U.S.C. § 814(a) ("[i]f . . . Secretary . . . believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall . . . issue a citation to the operator"). The Secretary gives no further explanation of what could lead her to conclude that Tejon should be considered an operator under the Mine Act, so her suggestion provides no reassurance that the ramifications of asserting Mine Act jurisdiction over the access road have been thoroughly explored.

§ 814(b), by simply turning away its traffic from the road, while non-cement plant related traffic could continue to use the road. 27 FMSHRC at 100.

Regardless of whether the judge's reading of the Mine Act is correct,[12] on appeal the Secretary has reaffirmed her authority to hold National Cement strictly liable for all violations, including those committed by unrelated third parties. *See* S. Br. at 28-32 (citing *Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 491 (9th Cir. 1983)). Thus, as National Cement fears, it appears that the Secretary would issue a citation for Mine Act violations committed by a user of the road who had no connection to National Cement's operations. Such users could include Tejon ranch workers and security personnel, the various employees of movie and video production companies, those leading hunting and camping expeditions, engineers and others involved in the Centennial development project, DWR staff examining the aqueduct, and FAA employees. Again, we cannot conclude that Congress intended that the jurisdictional provisions of the Mine Act should be interpreted to cover workers with no connection to National Cement, particularly when National Cement has no control over those individuals when they use the access road.[13]

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[12] We note that section 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 access road temporally or functionally, such as only when the road is being used in furtherance of National Cement's operations. In addition, under section 103(a) of the Act, each "coal or other mine" is subject to inspection, and if a violation is found during such inspection, the inspector, pursuant to section 104(a) of the Act, "*shall* . . . issue a citation to the operator" of the mine. 30 U.S.C. §§ 813(a), 814(a) (emphasis added). The Mine Act thus does not allow for discretionary enforcement once a violation is discovered to have occurred in an area that is a "coal or other mine" under section 3(h)(1).

[13] While our dissenting colleague may not believe that the Secretary intends "to enforce the Act in such a bizarre fashion" (slip op. at 20), this is not the first time the Secretary has taken the position that an operator is strictly liable for any violation occurring on mine property. *See Extra Energy, Inc.*, 20 FMSHRC 1, 8 n.11 (Jan. 1998) (Secretary argued that operator is strictly liable for violations that take place at its mine, including "private ways and roads appurtenant thereto," "even if it was the victim of an unrelated party's actions"). In fact, she has done so in this case. *See supra* n.11. Furthermore, unlike the dissent (slip op. at 20), we do not read the Secretary's citation in her brief to *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285, 1290 n.3 (D.C. Cir. 1990), to provide any comfort to National Cement. There the court suggested that there may be a case in which a contractor's connection to a mine is so infrequent or *de minimis* that the *contractor* would not be subject to the Mine Act jurisdiction as an operator. *Id.*; *see also Northern Illinois Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 846-49 (7th Cir. 2002). There is no suggestion whatsoever in *Otis* that in such a circumstance the *operator* of the mine where the violation occurs would also escape liability under the Act's strict liability standard.

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 access road for any number of non-cement plant purposes if we were to uphold MSHA's jurisdiction over the access road. 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). Moreover, Subpart H of Part 56 defines "mobile equipment" as "wheeled, skid-mounted, track-mounted, or rail-mounted equipment capable of moving or being moved." 30 C.F.R. § 56.9000. That broad application covers every conceivable vehicle that could be operated on the road by entities other than National Cement.[14]

In deciding whether Mine Act jurisdiction extends to the road, we cannot ignore the potential application of various Mine Act standards to those users of the road who have no relation to mining and cannot be controlled by National Cement. Due process requires that an operator must be in a position to prevent a violation before it can be charged with the violation under the strict liability of the Mine Act. *Cf. Miller*, 713 F.2d at 491 (operator held liable for violation that occurred when unknown party entered operator's underground mine and altered ventilation system); *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981) (holding that mine owner can be held liable for violation by its independent contractor because the owner is generally in continuous control of conditions at mine). Here, given the lack of control National Cement has over use of the access road by others, National Cement is in no position to prevent Mine Act violations by those other users.

Furthermore, application of the definition of "coal or other mine" must be guided by the purposes and policies of the Mine Act. *See Local Union 1261, UMWA*, 917 F.2d at 47-48. It is significant here that the hazards to which miners and other persons are exposed on the access road are essentially typical highway hazards — they are not hazards peculiar to quarries, other mining operations, or traditional mine haulage roads. Indeed, we note that, from the lengthy videotape evidence submitted, the access road appears to be virtually indistinguishable from State Route 138 in its composition, layout, and terrain. Jt. Ex. 71. Thus, we conclude that placing commonsense limitations on Mine Act jurisdiction in this case is consistent with the purposes and policies of the Act.

Finally, the Secretary points to the legislative history of the Mine Act as support for the notion that Congress nevertheless intended that the road fall under Mine Act jurisdiction. S. Br.

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[14] In addition to the requirements of Part 56, the extensive requirements of Part 50 governing notification, investigation, reporting, and recording of accidents, injuries, and illnesses attributable to any worker's use of the road, regardless of whether the worker had a connection to National Cement, would also presumably apply, as those regulations use the Mine Act definitions of "mine" and "miner." *See* 30 C.F.R. § 50.1 et seq.

at 22-25. In discussing the issue of jurisdiction, the Committee responsible for drafting the Mine Act stated that:

> it is the Committee's intention that what is considered to be a mine and to be regulated under this Act 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 Sixth Circuit in *Bush & Burchett*, however, specifically rejected the idea that this portion of the Mine Act's legislative history can be used to extend Mine Act jurisdiction to areas that defy common sense and lead to bizarre results. 117 F.3d at 937.[15]

The Secretary also argues that National Cement should not be permitted to escape Mine Act jurisdiction over the road because of agreements it entered into with Tejon. S. Br. at 29. The Commission has generally refused to let parties' commercial agreements limit the reach of the Mine Act. *See, e.g., Mineral Coal Sales, Inc.*, 7 FMSHRC 615, 620-21 (May 1985) ("the operations taking place at a single site must be viewed as a collective whole. Otherwise, facilities could avoid Mine Act coverage simply by adopting separate business identities along functional lines, with each performing only some part of what, in reality, is one operation."); *Republic Steel Corp.*, 1 FMSHRC 5, 11 (Apr. 1979) ("[a] mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted.").

Here, however, there is no credible allegation that National Cement's agreements with Tejon were designed to limit Mine Act jurisdiction over the road. The agreements establishing the cement plant and the use of the access road predate the enactment of the Mine Act (Jt. Exs. 1-3), and there is no evidence that the agreements were entered into for any reason other than legitimate business concerns on the part of Tejon and the original cement plant operator. Moreover, the record establishes that Tejon uses the southern portion of the Ranch to pursue

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[15] As both parties acknowledge (S. Br. at 23-24 n.8; NCCC Br. at 28), 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. *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.

other significant commercial interests, and that the road at issue here is necessary to those uses. *See* Contestant's Mem., Ex. 1, ¶¶ 5-6.

As discussed above, the definition of "coal or other mine" must be applied to the unique factual circumstances in this case in a way that avoids absurd or unintended results and is consistent with the purposes and policies of the Act. Accordingly, we reverse the judge's conclusion that the entire access road is subject to Mine Act jurisdiction. Interpreting section 3(h)(1)(B)'s extension of Mine Act jurisdiction over "appurtenant" roads in the context of the Mine Act as a whole, we hold instead that only such portion of the access road over which National Cement and its customers have exclusive use can be considered an appurtenant road in this instance. While not established with specificity below, it appears from the record that there is a point on the road, at or near the last crossroads departing the access road on the way to the cement plant, beyond which traffic authorized by Tejon but unrelated to National Cement's facility ceases.[16] On remand, the judge should ascertain that point, reopening the record if necessary, and Mine Act jurisdiction would extend under section 3(h)(1)(B) only to the segment of the road between that point and the entrance to the National Cement facility.

[16] Our holding does not leave the remainder of the access road unregulated. As in the case of *Bush & Burchett*, (*see supra* n.7), jurisdiction for workplace health and safety would lie with OSHA, its state counterpart in California, or both. *See* 29 U.S.C. § 653(b)(1) (OSHA has jurisdiction to regulate working conditions of those employees whose occupational health and safety is not regulated by other federal agencies or by state agencies pursuant to the OSH Act); Cal. Lab. Code § 6307 (Division of Occupational Safety and Health in California Department of Industrial Relations "has the power, jurisdiction, and supervision over every employment and place of employment in this state, which is necessary to adequately enforce and administer all laws and lawful standards and orders, or special orders requiring such employment and place of employment to be safe, and requiring the protection of the life, safety, and health of every employee in such employment or place of employment").

III.
Conclusion

For the foregoing reasons, we vacate the judge's decision granting the Secretary's motion for summary decision and remand the case for further proceedings consistent with this decision.

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Michael F. Duffy, Chairman

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

The majority states that in order to avoid "absurd results," it must find that the Department of Labor's Mine Safety and Health Administration ("MSHA") has no jurisdiction over most of an access road leading to a cement plant and quarries owned by National Cement Company of California, Inc. ("National Cement"). Slip op. at 8-14. Accordingly, miners driving on the road are bereft of protection under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). In reaching their conclusion, my colleagues caution against an interpretation of the jurisdictional language in the Mine Act "that disregards real, practical implications," slip op. at 9, and yet they fail to mention, much less analyze, the "real, practical implications" of a completely unregulated road over which miners working for National Cement travel daily and where they are exposed to safety hazards. Because I disagree with the majority's rationale, I dissent and would hold that MSHA has jurisdiction over the entire road at issue.

My analysis of this jurisdictional question begins, as it must, with the language of the Mine Act. Section 4 of the Mine Act states in part that "[e]ach coal or other mine . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. Like other terms used in the statute, 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 relevant 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, [and] (B) private ways and roads appurtenant to such area . . . .

30 U.S.C. § 802(h)(1). Thus, the controlling question in this case is whether the road at issue is private and appurtenant to an area of land from which minerals are extracted.

Substantial evidence supports the judge's conclusion that the road is private, and the majority appears to have implicitly adopted this finding. Slip op. at 7-8.[1] The parties, by their stipulations, established that the road is not now available to the public and is intended for or restricted to the use of a particular group or class of persons — that is, those that Tejon and National Cement permit to use it. 27 FMSHRC 84, 86 (Stip. Nos. 10-11), 87-89 (Stip. Nos. 16-21), 99 (Jan. 2005) (ALJ). For example, the signs erected by National Cement at the entrance to the road warn the public that the road is private. One states "You Are Now Entering Private Property Of National Cement Co., Inc." Jt. Ex. 22. The terms of the easement that National Cement holds in the road actually require the operator to post the road as private. Jt. Ex. 1 at 2. The road's use is restricted to those permitted there by National Cement and Tejon, 27 FMSHRC at 87 (Stip. No. 21), and trespassing is explicitly forbidden. *Id*. at 88 (Stip. No. 21b, c).; Jt. Exs.

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[1] The parties agree that "private" means "intended for or restricted to the use of a particular person or group or class of persons; not freely available to the public." Slip op. at 7-8, citing *Webster's Third New Int'l Dictionary* 1804-05 (1993).

18, 19. In fact, Tejon admits that the road is private. Sec'y's Mot. for Summ. Dec., Ex. 3 at 3 (Intervenor's Adm. No. 2). Moreover, the agreed upon definition of "private" makes it clear that something can be private even if more than one party can use it, as the definition contemplates that a user can be a member of a group or class of persons to which use is restricted.

Substantial evidence also supports the judge's finding that the road is appurtenant. The parties do not dispute the definitions relied upon by the judge in his decision:

> "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 (8th ed. 2004).

27 FMSHRC at 99.

As my colleagues acknowledge, slip op. at 8, it is undisputed that National Cement's property interest in the road is by way of easement. 27 FMSHRC at 99. Furthermore, the Secretary points out that the road is incident to, and would pass in possession with the lease from Tejon pursuant to which National Cement operates the cement plant. *Id.*; S. Br. at 21 (citing Jt. Ex. 2). In contrast, National Cement argues that the road is not annexed to the mine in this instance, as the mine does not control the road, and despite the easement National Cement has to use the road, the road exists not to exclusively benefit the mine, but rather benefit the larger Tejon tract of property of which the mine is but a part. NCCC Br. at 27-28.

National Cement argues that the plain meaning of the term "appurtenant" as it applies to private roads reaches only those private roads over which the mine has exclusive use and control, but the dictionary definition of that term explains it by way of references that run counter to such a notion. There is no denying that a "right-of-way to land or buildings," referred to in the first *Webster's* definition of the term, can be granted to or otherwise possessed by more than one party. The same can be said with respect to an "easement," referred to in the second definition. Indeed, the Memorandum of Easement submitted by the parties describes the "right-of-way easement" granted as "non-exclusive." Jt. Ex. 2 at 1.

Moreover, *Webster's* additionally defines "appurtenant" as "belonging, appropriate, accessory." *Webster's* at 107. The parties have stipulated that the subject road provides the only vehicular *access* to the cement plant for raw materials entering it and cement product exiting it. 27 FMSHRC at 86 (Stip. No. 12). It appears, therefore, that the plant cannot operate without the road. Accordingly, I do not agree that considerations of exclusive control override the plain meaning of the term "appurtenant" as it is used in section 3(h)(1)(B). *Cf. RNS Servs., Inc. v.*

Sec'y of Labor, 115 F.3d 182, 186 (3rd Cir. 1997) (refusing to read a purity requirement into "coal" as it is used in section 3 definitions).[2]

Furthermore, there is nothing in the legislative history of the Mine Act that supports the notion that Congress intended the Act to cover only those private access roads over which a mine operator had exclusive use and control. The legislative history, in comparing the definition of "mine" in the Mine Act with that found in its predecessor statute, the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 ("Coal Act"), states that "*all* private roads" appurtenant to mineral extraction areas were to be included in the definition of "coal or other mine." 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) ("*Legis. Hist.*"). This passage clearly cuts against the restrictive interpretation of "private" and "appurtenant" urged by National Cement and accepted by the majority.

In addition, when Congress enacted the Mine Act, the Conference Committee stated that the definition of "mine" should include "roads . . . related to the mining activity." S. Conf. Rep. No. 95-461, at 38 (1977), *reprinted in Legis. Hist.* at 1316. The road at issue is certainly "related to mining activity," as it provides the sole means of access to the cement plant and is used almost continuously by heavy trucks carrying materials and products to and from the plant. 27 FMSHRC at 91 (Stip. Nos. 39-42).

Despite the fact that both the plain meaning of the statutory terms and the legislative history of the Mine Act support MSHA's jurisdiction over the road, the majority reads a third criterion into the Mine Act jurisdictional language (private and appurtenant *and* exclusive use) under the protective guise of the "absurd results" doctrine. Slip op. at 8-14. In effect, the majority's ruling changes the language of the Mine Act, "read[ing] into the statute a drastic limitation that nowhere appears in the words Congress chose . . . ." *Hercules, Inc. v. EPA*, 938 F.2d 276, 280 (D.C. Cir. 1991). *See also Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1280 (10th Cir. 1995); *Asarco, Inc. - Northwestern Mining Dept. v. FMSHRC*, 868 F.2d 1195, 1197 (10th Cir. 1989). Relying on the necessity to avoid "absurd results," the majority holds that only the portion of the road over which the operator has "exclusive use can be considered an appurtenant road in this instance." Slip op. at 15. The occasional and sporadic use of the road by others should not deprive the National Cement trucks of Mine Act protection – *that* is the absurd result occurring here.[3]

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[2] I note that National Cement chose to acquire a cement plant on leased property with road access pursuant to a non-exclusive easement. The Commission has generally refused to permit the design of employers' commercial relationships to limit the reach of the Mine Act where it would otherwise apply. *See Mineral Coal Sales, Inc.*, 7 FMSHRC 615, 620-21 (May 1985).

[3] Although my colleagues cite *Bush & Burchett, Inc. v. Secretary of Labor*, 117 F.3d 932 (6th Cir. 1997), when they suggest that, despite their holding, the access road would be regulated,

The Secretary's reminder that mine operators have frequently been held liable even for violations for which they were not at fault, S. Br. at 28-32, is interpreted by the majority as an indication the Secretary is prepared to cite National Cement for a violation that might be committed by a user of the road who had no connection to National Cement's operations. Slip op. at 12. The specter of National Cement receiving a citation, for example, because of a condition observed on the vehicle of an employee of a movie and video production company causes my colleagues great discomfort. As well it should. In fact, I share their concern about the fairness of such an enforcement action. But I see no evidence that the Secretary intends to enforce the Act in such a bizarre fashion. Indeed, citing to *Otis Elevator Co. v. Sec'y of Labor*, 921 F.2d 1285, 1290 n.3 (D.C. Cir. 1990), the Secretary acknowledges authority stating that there may be occasions when an entity's contact with a mine is "so attenuated as to remove it from MSHA jurisdiction." S. Br. at 31.[4]

Accordingly, I am reluctant to join the majority in basing my decision in this matter on the proposition that the Secretary may cite "workers with no connection to National Cement." Slip op. at 12. The Secretary simply has not indicated any intent to cite National Cement to address conditions it is not in a position to correct.

In any event, other than with respect to the road itself, MSHA's regulation of transportation under 30 C.F.R. Part 56 is largely drafted to apply only to mine vehicles and equipment, so the regulations should not reach non-mine users of the road. *See* 30 C.F.R. Part 56, Subpart H ("Loading, Hauling, and Dumping"). Thus, the majority's concerns are not only misplaced but possibly unfounded. Many of the regulations apply only to vehicles that would not

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slip op. at 15 n.16, their reliance is misplaced. That case involved a construction site located on a haul road and bridge. 117 F.2d at 935. The court ruled that the worksite was covered by the Occupational Safety and Health Act instead of the Mine Act. *Id*. at 940. The violations at issue did not involve road conditions; rather, they included alleged safety violations at the construction worksite itself (e.g., rung spacing on a ladder, fire extinguishers, fall protection, etc.). *Bush & Burchett, Inc.*, 17 OSHC 1531, 1538, 1540, 1542 (1995). My colleagues have failed to point out any regulation promulgated by the Occupational Safety and Health Administration that would require the installation of a berm or guardrail on the road at issue here, and indeed, I have been unable to locate one.

Also, although my colleagues appear to suggest that the Court upheld the ruling of the Occupational Safety and Health Review Commission that the road was "'appurtenant' to an area of land from which minerals are extracted," slip op. at 7 n.7, the court expressly refused to address that issue, because it found the road to be public, not private. 117 F.3d at 936-37 n.6.

[4] My colleagues are not reassured by the Secretary's citation to *Otis*, because, according to them, the case involved a contractor, rather than an operator. Slip op. at 12 n.13. However, under section 3(d) of the Mine Act, 30 U.S.C. § 802(d), such a contractor performing services at a mine is an operator.

be driven by non-cement plant users of the road or reference activities that would only occur within the confines of the cement plant itself. Those regulations which do apply to all vehicles require nothing out of the ordinary of their drivers and recognize different standards are appropriate for different vehicles. *See, e.g.,* 30 C.F.R. § 56.9101 ("Operators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion. Operating speeds shall be consistent with conditions of roadways, tracks, grades, clearance, visibility, and traffic, and the type of equipment used.").

My colleagues reject the "literal interpretation" of the statutory language offered by the Secretary because it is "necessary to consider the language in the context of the Mine Act." Slip op. at 8. However, the context chosen by the majority appears to be one of operator convenience, rather than of miner safety. The majority gives lip service to an interpretation "consistent with the purposes and policies of the Act" but never discusses the safety implications of its decision and the lack of protection it creates for miners traveling on the road. Inexplicably, and with no citation to the record nor with any explanation, the majority opines that "the hazards to which miners . . . are exposed on the access road are essentially typical highway hazards — they are not hazards peculiar to . . . traditional mine haulage roads." Slip op. at 13. I fail to see how the miners driving these trucks are not at risk for some of the same hazards found on mining roads.[5] In fact, the potential dangers that miners driving trucks could face on the road, described by MSHA Assistant District Manager Ronald Goldade (Sec'y's Mot. for Summ. Dec., Ex. 5 (Aff. of Goldade) at 1-2), are addressed by MSHA regulations regarding haulage roads found in Part 56 Subpart H ("Loading, Hauling, and Dumping"). *See, e.g.*, 30 C.F.R. § 56.9100 ("Traffic Control"); 30 C.F.R. § 56.9101 ("Operating Speeds and Control of Equipment"); 30 C.F.R. § 56.9300 ("Berms or Guardrails").

Permitting concerns about future National Cement liability for non-mining related activity to guide the outcome of this case is letting the tail wag the dog. The majority lists a speculative

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[5] The citation issued in this case (for a violation of 30 C.F.R. § 56.9300, requiring berms or guardrails) describes a situation typically found on mine haulage roads. It states:

> 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.

27 FMSHRC at 86-87; Jt. Ex. 70. In addition, although the majority focuses on the type of road at issue, the type of truck used by National Cement has been identified by MSHA as particularly hazardous. ("[L]arge haulage vehicles with a high center of gravity and relatively narrow wheel track width are more susceptible to overturning than small utility trucks." Safety Standards for Loading, Hauling, and Dumping at Metal and Nonmetal Mines, 49 Fed. Reg. 49,202, 49,209, (proposed Dec. 18, 1984)) .

parade of horribles that could be created if jurisdiction were found here. It fails to focus on the ongoing use of the road by heavy mine trucks and fails even to mention the concrete reality of the dangerous situations that have already occurred on this road. The parties stipulated that most of the traffic on the road is for cement-plant related purposes. 27 FMSHRC at 91 (Stip. No. 38). In fact, the judge found that "[n]on-National Cement use of the road is dwarfed by National Cement traffic." *Id*. at 101. National Cement trucks run 6 days per week, with an average 148 round-trips made daily by the tanker trucks. *Id*. at 91 (Stip. No. 42). As many as 33,887 trucks travel up the mine road annually. Jt. Ex. 64. The trucks weigh approximately 25,000 pounds empty as they arrive at the plant and approximately 80,000 pounds loaded as they leave. 27 FMSHRC at 91 (Stip. No. 39). In addition, there are also an average of 84 employee round trips and 5 deliveries to the cement plant daily. *Id*. (Stip. No. 43). Accidents have occurred on the road, including the rollover of one heavy truck and the partial rollover of another. Sec'y's Mot. for Summ. Dec., Ex. 5 (Aff. of Goldade); *Id*., Ex. 6 (National Cement Accident Report & Mem. from Randy Logsdon dated Sept. 8, 2003); *Id*., Ex. 7 (Contestant's First Supplemental Resp. to Interrog. No. 19). Furthermore, miners have made numerous complaints to MSHA regarding the road conditions. *Id*., Ex. 5 (Aff. of Goldade).

It appears that my colleagues, in addressing the interpretive and jurisdictional questions raised by this case, have not focused on the concerns outlined above. Thus, while basing their entire analysis on the "absurd results" exception to the plain meaning doctrine of statutory interpretation, they completely ignore an equally important canon of statutory construction stating that remedial legislation should be construed broadly so as to effectuate its purpose, and that therefore questions of interpretation should be resolved to ensure consistency with the safety-promoting purposes of the Mine Act. *See Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 155 (2d Cir. 1999); *RNS Servs. Inc.*, 115 F.3d at 186-87.

Finally, my colleagues restrict jurisdiction to that part of the road where National Cement has exclusive use, but appear unable to cite to any part of the record demonstrating that such exclusive use in fact exists ("While not established with specificity below, it appears from the record that there is a point on the road . . . beyond which traffic . . . unrelated to National Cement's facility ceases," slip op. at 15, is as clear as the majority could get on this point). Thus, they are merely presuming that there actually is a portion of the road where other individuals (with no connection to National Cement's work) could be banned or would not venture. This is pure speculation.[6] However, what *is* established is that heavy trucks are making 148 round trips

[6] National Cement has consistently protested throughout this litigation that it does not have exclusive control over the road. *See, e.g.*, Contestant's Mem. in Support of Mot. for Summ. Dec. at 1, 2, 4, 21. *See also id*. at 6 ("National Cement does not and cannot control who travels on the 4.3 mile portion of the road lying between the highway and the entrance to the plant . . . ."). Also, according to the National Cement plant manager, "[o]n its northern end, on the eastern side of the Lebec Plant, the road continues beyond the cement plant in a northeasterly direction." *Id*., Ex. 2 at 1, ¶ 4 (Aff. of Byron E. McMichael). Tejon also stated that "the actual ranch road continues on past where the paved portion ends near the cement plant, and serves

on the road every day, that some miners have complained of dangerous conditions and that, due to the majority's decision, there is no legal entity with the authority to impose safety measures that could prevent accidents and possibly save lives. Accordingly, I respectfully dissent.

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Mary Lu Jordan, Commissioner

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other purposes and persons unrelated to the cement plant, as it has for many years . . . ." Sec'y's Mot. for Summ. Dec., Ex. 3 at 3 (Intervenor's Adm. No. 1); *see also* Jt. Ex. 10 (map of area). Accordingly, I am puzzled by the majority's assertion that "it appears from the record that there is a point on the road, at or near the last crossroads departing the access road on the way to the cement plant, beyond which traffic authorized by Tejon but unrelated to National Cement's facility ceases." Slip op. at 15. The majority's holding would appear to lead to a kind of "floating jurisdiction" for MSHA, because if National Cement has exclusive use over a different portion of the road in the future, it seems as if jurisdiction will subsequently attach there as well.

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