FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW SUITE 9500 WASHINGTON, DC 20001 March 1, 2005

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

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

<u>ORDER</u>

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

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On January 12, 2005, Administrative Law Judge Jerold Feldman granted the motion for summary decision filed by the Secretary of Labor and denied the cross motion filed by National Cement Company of California, Inc. ("National"). 27 FMSHRC 84 (Jan. 2005) (ALJ). In his decision, the judge concluded that a private road leading to the entrance of National's cement plant, which was owned and maintained by intervenor Tejon Ranch Corp. ("Tejon"), was a "mine" under the Mine Act. *Id.* at 98-102.

On February 7, 2005, the judge issued an order in which he granted the motion filed by National to certify for interlocutory review his order of January 12. The Secretary opposed the motion, and intervenor Tejon supported it. Commission Rule 76(a), 29 C.F.R. § 2700.76(a), provides that interlocutory review is a matter of sound discretion of the Commission and that the Commission may grant interlocutory review upon a determination that the judge's interlocutory ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding.

Upon consideration of the judge's certification, we hereby grant review of the judge's decision of January 12 and the issue of whether the private road that accesses National's cement plant is a "mine" within the definition of section 3(h)(1) of the Mine Act. 30 U.S.C. § 802(h)(1). Briefing shall be conducted in accordance with Commission Rule 76(c), 29 C.F.R. § 2700.76(c).

Michael F. Duffy, Chairman

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

27 FMSHRC 180

Commissioner Jordan, dissenting:

Given that the judge should be able to resolve all outstanding issues relatively quickly, review of his January 12 decision at this stage would not materially advance the final disposition of this case. Accordingly, I would not grant interlocutory review.

Mary Lu Jordan, Commissioner

Distribution

Margaret S. Lopez, Esq. Ogletree, Deakins, Nash, Smoak & Stewart, P.C. 2400 N Street, N.W., 5th Floor Washington, D.C. 20037

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

Timothy S. Williams, Esq. Office of the Solicitor U.S. Department of Labor 1100 Wilson Blvd., 22nd Floor Arlington, VA 22209

Administrative Law Judge Jerold Feldman Federal Mine Safety and Health Review Commission 601 New Jersey Avenue, N.W., Suite 9500 Washington, D.C. 20001