FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 18, 2024

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. BRADLEY T. WILEY, Respondent	CIVIL PENALTY PROCEEDING Docket No. SE 2023-0013 A.C. No. 09-01264-563440 Mine: Jackson Quarry
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. TERRA EXCAVATING, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. SE 2023-0048 A.C. No. 09-01264-563564 Mine: Jackson Quarry
VULCAN MATERIALS COMPANY, Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Respondent	CONTEST PROCEEDING Docket No. SE 2022-0146 Citation No. 9637716; 06/23/2022 Mine: Jackson Quarry Mine ID: 09-01264

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2022-0193 A.C. No. 09-01264-561057
v.	
VULCAN CONSTRUCTION MATERIALS LLC, Respondent	Mine: Jackson Quarry
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2023-0150 Docket No. SE 2023-0151 A.C. No. 09-01264-574618
v.	
VULCAN CONSTRUCTION MATERIALS LLC, Respondent	Mine: Jackson Quarry
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2023-0172 A.C. No. 09-01264-575226
v.	
TERRA EXCAVATING, LLC, Respondent	Mine: Jackson Quarry

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2024-0010 A.C. No. 09-01264-584632
v.	
VULCAN CONSTRUCTION MATERIALS LLC, Respondent	Mine: Jackson Quarry
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2024-0011 A.C. No. 09-01264-585552
v.	
BRADLEY T. WILEY, Respondent	Mine: Jackson Quarry

ORDER GRANTING ACTING SECRETARY'S MOTION FOR PARTIAL SUMMARY DECISION AND DENYING RESPONDENTS' MOTIONS FOR PARTIAL SUMMARY DECISION ON QUESTION OF MSHA JURISDICTION

I. PROCEDURAL HISTORY

These dockets arise under the Mine Safety and Health Act of 1977, as amended (the "Mine Act" or "the Act"). An employee of Respondent Terra Excavating, LLC ("Terra"), a subcontractor for Respondent Bradley T. Wiley ("Wiley") was killed in a June 17, 2022, accident at the Jackson Quarry, a site composed of land leased in part and owned in part by Respondent Vulcan Construction Materials, LLC ("Vulcan"). The Mine Safety and Health Administration ("MSHA") issued citations and orders to all three Respondents, all of which then asserted that MSHA did not have jurisdiction over the Jackson Quarry, which they claimed was not a "mine" as defined in the Act.

The Secretary of Labor filed an unopposed motion on October 12, 2023, requesting that the common jurisdictional question be bifurcated from the individual dockets and consolidated

for decision by a single administrative law judge. Unopposed Mot. to Bifurcate and Consolidate. This proceeding is the product of the motion and the Chief Administrative Law Judge's approval of the Acting Secretary's request.

The parties requested a hearing on the jurisdictional question but were receptive to the suggestion of motions for summary decision as a possible means of resolving the question without a hearing. Each party then moved for summary decision.

The Acting Secretary's motion was filed and served on March 8, 2024. Acting Secretary's Motion for Summary Decision ("Sec'y Mot."). Respondents Vulcan, Terra, and Wiley filed and served their motions on March 20.[1] Respondent Vulcan Construction Materials LLC's Motion for Summary Decision and Opposition to Acting Secretary's Motion for Summary Decision ("Vulcan Mot."); Respondent Terra Excavating LLC's Motion for Summary Judgment ("Terra Mot."); Respondent Brad T. Wiley's Motion for Summary Judgment ("Wiley Mot."). Vulcan's motion was characterized as both a motion for summary decision and an opposition to the Acting Secretary's motion. Vulcan Mot. at 2. The Acting Secretary filed an opposition on April 1. Acting Secretary of Labor's Opposition to Respondents' Motions for Summary Decision ("Sec'y Opp'n"). For the reasons given below, the Acting Secretary's motion for summary decision on the question of jurisdiction is granted, and Respondents' motions are denied.

II. FACTS

A. Uncontested Facts

In 1995, Lafarge, an entity unrelated to Vulcan, began conducting mining operations at a stone quarry on two parcels of land in Jackson County, Ga. ("Former Quarry"). Vulcan Mot. at 4; Ex. A to Vulcan Mot. (Jimmy Fleming Decl.), ¶ 3. In 2013, Vulcan purchased a lease on the two parcels of land from Lafarge. Vulcan Mot. at 4 and Ex. A (Jimmy Fleming Decl.) ¶ 4; Ex. B (Greg Duckett Decl.) ¶ 5.

Vulcan was not an operator of the Former Quarry at any time before 2013. Vulcan Mot. at 4, and Ex. A (Jimmy Fleming Decl.) ¶ 5. Upon purchasing the lease from Lafarge, Vulcan terminated the Former Quarry's MSHA mine identification number ("Mine ID") with MSHA. Vulcan Mot. at 4 and Ex. B (Greg Duckett Decl.) ¶ 5. Between 2013 and all relevant times

[1] In March 6, 2024, motions for an extension of time, Terra and Wiley both said that they intended to adopt the reasoning and position presented by Vulcan in its motion. The extensions were granted, and the resulting motions deferred generally to Vulcan's argument. *See* Terra Mot. at 4; Wiley Mot. at 4. Therefore, references to Respondents' positions rely on Vulcan's presentation in its motion, which is wholly supported by the other two Respondents, and citations are to "Vulcan Mot."

Unless cited otherwise, all exhibits in this decision are exhibits submitted with Vulcan Mot. and cited as they were identified in that motion.

thereafter, there were no active mining operations at the site. Vulcan Mot. at 4 and Ex. A (Jimmy Fleming Decl.) ¶ 6; Ex. B (Greg Duckett Decl.) ¶ 6.

In 2021, Vulcan acquired five additional parcels of land contiguous to the two parcels leased from Lafarge. Vulcan Mot. at 4 and Ex. A (Jimmy Fleming Decl.) ¶ 7. On February 4, 2022, Vulcan applied with the Jackson County, Ga., Board of Commissioners to have the seven parcels of land (hereinafter "Jackson Quarry") rezoned as Heavy Industrial (HI) with a Special Use permit to allow mining. Vulcan Mot. at 4 and Ex. A (Jimmy Fleming Decl.) ¶ 8; Ex. C (Rezoning and Special Use Permit Application). Vulcan's intended function for the Jackson Quarry was to operate it as a stone quarry and crushing/milling facility. Vulcan Mot. at 5 and Ex. A (Jimmy Fleming Decl.) ¶ 9; Ex. B (Greg Duckett Decl.) ¶ 7; Ex. D (Barry Lawson Decl.) ¶ 4.

On the property of Jackson Quarry, there was an abandoned scale house that was in disrepair and could not be repaired or reused. Vulcan Mot. at 5 and Ex. D (Barry Lawson Decl.) ¶ 5. On or about February 2022, Vulcan contracted with Wiley to remove the scale house and grade ground on the property. Vulcan Mot. at 5 and Ex. D (Barry Lawson Decl.) ¶ 6.

From February 2022 to May 2022, Wiley worked at the Jackson Quarry, clearing vegetation and mulching. Vulcan Mot. at 5 and Ex. D (Barry Lawson Decl.) ¶ 7; Ex. E (Brad T. Wiley Decl.) ¶ 1. In March or April 2022, Wiley contracted Terra for grading work including clearing debris and moving dirt in preparation for the construction of a building pad at the Jackson Quarry. Vulcan Mot. at 5 and Ex. D (Barry Lawson Decl.) ¶ 8; Ex. E (Brad T. Wiley Decl.) ¶ 11; Ex. F (Wayne Yost Decl.) ¶ 2. Wiley did not contract Terra to construct the building pad at the Jackson Quarry. Vulcan Mot. at 5 and Ex. D (Barry Lawson Decl.) ¶ 8; Ex. E (Brad T. Wiley Decl.) ¶ 11; Ex. F (Wayne Yost Decl.) ¶ 2

Wayne Yost was the General Manager for Terra on the project. Vulcan Mot. at 5 and Ex. F (Wayne Yost Decl.) ¶ 1. Greg Duckett was Vulcan's Safety and Health Manager responsible for the Jackson Quarry at all times relevant to this matter. Vulcan Mot. at 5 and Ex. B (Greg Duckett Decl.) ¶ 3. Robert Ashley was the MSHA Field Office Supervisor for the Macon, Ga., field office at all times relevant to this matter. Vulcan Mot. at 5 and Ex. B (Greg Duckett Decl.) ¶ 8; Ex. G (Robert Ashley Memorandum of Interview); Ex. N (Robert Ashley Dep.) 21:2-21.

In February 2022, Duckett called Ashley and told him Vulcan intended to operate the Jackson Quarry as a stone crushing/milling facility but was not yet ready to crush for commerce. Vulcan Mot. at 6 and Ex. B (Greg Duckett Decl.) ¶ 8, 9; Ex. G (Robert Ashley Memorandum of Interview); Ex. N (Robert Ashley Dep.) 27:5-17, 32:12-18. Duckett told Ashley that Vulcan was getting ready to start preparing the site and would be moving in equipment and taking steps in preparation of building a plant and scale house. Vulcan Mot. at 6 and Ex. B (Greg Duckett Decl.) ¶ 9.

On February 22, 2022, Vulcan applied for a Mine ID in anticipation of future mining. Vulcan Mot. at 6 and Ex. B (Greg Duckett Decl.) ¶ 11; Ex. H (Mine ID Request Information Form).

Brett Calzaretta is an MSHA training specialist from the Macon field office. Vulcan Mot. at 6 and Ex. I (Brett Calzaretta Dep.) 7:19-8:2, 18:18-21. In April 2022, Calzaretta visited the Jackson Quarry for a special initiative on fatalities involving power haulage. Vulcan Mot. at 7 and Ex. E (Brad T. Wiley Decl.) ¶ 2; Ex. F (Wayne Yost Decl.) ¶ 3; Ex. J (Brett Calzaretta Time Report Activities); Ex. I (Brett Calzaretta Dep.) 23:13-19, 27:20-28:3.

During Calzaretta's visit, the only activities he witnessed at the Jackson Quarry were cleaning up (i.e., stumping and grubbing trees, cleaning up vegetation, consolidating trash piles and hauling them off) and workers hauling dirt in, dumping it, and smoothing it for later compacting. Vulcan Mot. at 7 and Ex. E (Brad T. Wiley Decl.) ¶ 4. The only equipment Calzaretta saw at the site during his visit were an excavator, haul trucks for dirt moving, and dozers moving dirt. Vulcan Mot. at 7 and Ex. E (Brad T. Wiley Decl.) ¶ 5.

Calzaretta did not see a crushing plant or equipment during his visit. Vulcan Mot. at 7 and Ex. I (Brett Calzaretta Dep.) 37:11-12. Calzaretta did not observe any blasting, drilling, crushing, extraction activities, milling, screening, or sizing of materials. Vulcan Mot. at 7 and Ex. I (Brett Calzaretta Dep.) 47:16-22, 48:5-13. Nor did he observe any maintenance or repair of equipment or materials being hauled. Vulcan Mot. at 7 and Ex. I (Brett Calzaretta Dep.) 48:14-19.

During his visit, Calzaretta did not observe any mine-related hazards. Vulcan Mot. at 7 and Ex. I (Brett Calzaretta Dep.) 47:2-12. Calzaretta did not inquire as to the training status of Wiley or any Terra employee. Vulcan Mot. at 7 and Ex. E (Brad T. Wiley Decl.) ¶ 6-10; Ex. F (Wayne Yost Decl.) ¶ 4-6; Ex. I (Brett Calzaretta Dep.) 33:16-18. Calzaretta did not have authority to issue citations at the Jackson Quarry during his visit. Ex. I (Brett Calzaretta Dep.) 20:21-22. Calzaretta also stated he visited Jackson Quarry, not to conduct an inspection, but because it "[c]ame up on the data retrieval system as a new mine" when he checked to see if any new mine properties had opened. Ex. I (Brett Calzaretta Dep.) 44:7-18, 47:11-12.

On March 16, 2022, Ashley approved Vulcan's request for a Mine ID. Vulcan Mot. at 8 and Ex. H (Mine ID Request Information Form). On April 18, 2022, the Jackson County Board of Commissioners approved Vulcan's application to rezone the Jackson Quarry as Heavy Industrial (HI) with a Special Use permit to allow mining. Vulcan Mot. at 8 and Ex. K (Rezoning & Special Use Permit Approval Letters).

On June 17, 2022, a fatal accident at the Jackson Quarry killed Terra employee Brian Thigpen. Vulcan Mot. at 8 and Ex. B (Greg Duckett Decl.) ¶ 12; Ex. D (Barry Lawson Decl.) ¶ 10; Ex. E (Brad T. Wiley Decl.) ¶ 12; Ex. F (Wayne Yost Decl.) ¶ 9. At the time of the fatal accident, Thigpen was operating a compactor to settle earth for future construction of the building pad when the compactor rolled over. Vulcan Mot. at 8 and Ex. F (Wayne Yost Decl.) ¶ 9.

At the time of the fatal accident, construction of the building pad had not started, and the site was not ready for construction to begin. Vulcan Mot. at 8 and Ex. D (Barry Lawson Decl.) ¶ 11. Ashley had no knowledge of any drilling, blasting, extraction, milling, crushing, screening, or sizing of material, maintenance or repair of equipment or haulage of materials taking place at

the Jackson Quarry when the accident occurred. Vulcan Mot. at 8 and Ex. N (Robert Ashley Dep.) 47:1-48:2, 49:15-20.

On June 17, 2022, Duckett called MSHA to report the fatal accident and says that he did so as a courtesy because Vulcan had applied for a Mine ID in anticipation of future mining. Vulcan Mot. at 8 and Ex. B (Greg Duckett Decl.) ¶ 12; Ex. L (MSHA Escalation Report).

MSHA, upon receiving a report of a fatality, proceeded under the assumption that it had jurisdiction over the Jackson Quarry. Vulcan Mot. at 9 and Ex. M (Sec'y Amended Response to Resp. First Set of Interrogatories). MSHA did not consider the possibility that it did not have jurisdiction over the Jackson Quarry until Vulcan, Wiley and Terra contested MSHA's jurisdiction. Vulcan Mot. at 9 and Ex. M (Sec'y Amended Response to Resp. First Set of Interrogatories).

Attorneys in the Office of the Solicitor determined that MSHA had jurisdiction over the Jackson Quarry. Vulcan Mot. at 9 and Ex. M (Sec'y Amended Response to Resp. First Set of Interrogatories).

B. Contested Facts

Vulcan contends that during his visit, Calzaretta spoke with Wiley and Yost and informed them that MSHA did not yet have jurisdiction over the Jackson Quarry but would at some point. Ex. E (Brad T. Wiley Decl.) ¶ 8; Ex. F (Wayne Yost Decl.) ¶ 5. The Acting Secretary disputes that Calzaretta discussed jurisdiction during his visit to the Jackson Quarry. Sec'y Opp'n at 4; Ex. I (Brett Calzaretta Dep.) 56:17-58:4.

Ashley and Duckett agreed Vulcan would apply for a Mine ID, and Duckett would contact Ashley thirty days before Vulcan started crushing and sizing material so MSHA could do a courtesy inspection. Vulcan Mot. at 6 and Ex. B (Greg Duckett Decl.) ¶ 9; Ex. G (Robert Ashley Memorandum of Interview); Ex. N (Robert Ashley Dep.) 33:3-9; 40:4-11; 52:17-25-53:1-4. The Acting Secretary disputes that Ashley made any such agreement as to timing and asserts that Vulcan already had applied for a Mine ID at the time of the conversation. Sec'y Opp'n at 4; Ex. N. (Robert Ashley Dep.) 50:12-13, 52:14-15.

Vulcan also asserts that Ashley and Duckett also agreed Vulcan would provide MSHA with its Mine ID information thirty days before Vulcan started crushing and sizing material. Vulcan Mot. at 6 and Ex. B (Greg Duckett Decl.) ¶ 9. Based on this conversation with Ashley, it was Duckett's understanding that MSHA would not have jurisdiction over the Jackson Quarry until thirty days before Vulcan started crushing and sizing material. Vulcan Mot. at 6 and Ex. B (Greg Duckett Decl.) ¶ 10. The Acting Secretary states that Ashley would not have agreed to a date and that he testified that he did not do so. Sec'y Opp'n at 4; Ex. N. (Robert Ashley Dep.) 54:8-15.

III. LEGAL STANDARDS

A. Standard for Summary Decision

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission "has long recognized that . . . '[s]ummary decision is an extraordinary procedure,'" *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.,* 3 FMSHRC 2470, 2471 (Nov. 1981)) (alterations in original).

The Commission has also equated summary decision with summary judgment under the Federal Rules of Civil Procedure. *Id.*, *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Sec'y of Labor v. Hanson Aggregates N.Y., Inc.*, 29 FMSHRC 4, 8-9 (Jan. 2007). Where the resolution of an issue depends on contested material facts, entry of summary decision is improper. *Energy West Mining Co.*, 16 FMSHRC at 1419. A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. MSHA Jurisdiction

The Acting Secretary has noted that Respondents did not initially object to MSHA's jurisdiction, and that Vulcan had applied for a Mine ID from MSHA. However, jurisdictional objections may be raised by any party at any time, even where a party has previously assented to agency jurisdiction. *Sebelius v. Auburn Reg'l Med. Ctr.,* 568 U.S. 145, 153 (2013).

The Mine Act confers limited jurisdiction on the Mine Safety and Health Administration, created by the Act, over all extraction of minerals in nonliquid form (and minerals in liquid form extracted by miners working underground). Mine Act, §§ 2(g), 3(h), 30 U.S.C. §§ 801(g), 802(h).

Another federal agency under the Department of Labor, the Occupational Safety and Health Administration ("OSHA"), has general jurisdiction over all workplaces not regulated by MSHA or another specialized federal agency. *See* Occupational Safety and Health Act of 1970 § 4(b)(1), 29 U.S.C. § 653(b)(1) ("Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.").

MSHA and OSHA therefore have entered into an interagency agreement providing guidance to determine whether MSHA or OSHA should assume jurisdiction over a site. Mine Safety and Health Administration Occupational Safety and Health Administration Interagency

Agreement, 44 Fed. Reg., 22,827, 22,827 (Apr. 17, 1979). The agreement assigns MSHA jurisdiction over working conditions "on mine sites and in milling operations." *Id.*

The Mine Act's jurisdiction over "coal or other mine[s]" includes:

> 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)(C) (emphasis added).

The legislative history of the Mine Acted stated the Committee's intention to construe the Act broadly in favor of jurisdiction:

> Finally, the structures on the surface or underground, which are used *or are to be used in* or resulting from the preparation of the extracted minerals are included in the definition of 'mine'. The Committee notes that there may be a need to resolve jurisdictional conflicts, but 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 possibly [sic] 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) (emphasis added).

The Mine Act also defines who is considered an "operator" and "miner" under the Act. An "operator" is defined 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). A "miner" is defined as "any individual working in a coal or other mine." 30 U.S.C. § 802(g).

IV. DISPOSITION

A. The Acting Secretary's Motion for Summary Decision

The Acting Secretary has asserted that there are no contested issues of material fact and that she is entitled to judgment as a matter of law. Generally, the Acting Secretary has argued that the plain language of the Mine Act supports her jurisdictional claim, and that the intent of the Act and its preference for inclusion of sites which could be classified as "mines" further bolsters her claim. Sec'y Mot. at 5-8.

As the Supreme Court noted in *Chevron*, the initial inquiry into statutory meaning must be "whether Congress has directly spoken to the *precise question* at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 842-43 (1984) (emphasis added).

The precise question here is whether the location where the accident occurred is a "mine" as defined by the Act. In addressing that question, it is appropriate to consider the nature of the property, its ownership, and its intended use.

Vulcan acquired its interests in the Jackson Quarry, a property comprised of several contiguous parcels of land, for a purpose. It intended to use the land as a stone quarry—i.e. to "extract[ ] such minerals [i.e. rock] from their natural deposits" within or on "lands, excavations, . . . or other property" within the quarry. 30 U.S.C. § 802(h). Vulcan also intended that the Jackson Quarry property was "to be used in[] the milling of . . . minerals." *Id.*

There is no dispute about this intended use of the property. Vulcan has acknowledged that it had applied for, and been granted, permission from Jackson County to conduct mining operations and milling at the Jackson Quarry. More to the point, Vulcan had applied for, and had been issued, a Mine ID from MSHA approximately three months before the accident.

Thus, a refined expression of the precise question in this case is: "May jurisdiction under the Mine Act adhere to lands, excavations, and property for which a commercial entity with ownership and leasehold rights in the property has sought and received permission to extract minerals from their natural deposits in nonliquid form and to mill such minerals on the lands and property, has applied for and been issued a Mine ID from the federal agency charged with enforcing the Act, and has worked for three months after issuance of a Mine ID to prepare the site for mining and milling operations?"

The language of the Act embraces future activities, i.e. lands *to be used* in the extraction or processing of minerals. But it cannot necessarily be said that MSHA's jurisdiction adheres when the minerals are discovered in exploration, or at the first application for a permit for any sort of activity at the site. This might conform to a literal interpretation but could empower MSHA to assert jurisdiction over virtually any tract in the country—any place where a deposit of minerals in nonliquid form might be found.

Such an overbroad definition would be unlikely to serve the purposes served by the Act. One might therefore find ambiguity in circumstances where no substantial steps have been taken to cement the intent to use the "lands, excavations, or other property" for mineral extraction or milling. Therefore, the Acting Secretary, who has asserted that the plain language of the statute controls this decision, must prove that the site is unambiguously within the definition of a "mine" as defined by the Act.

The jurisdictional facts in this case do so. This was a property not only *intended* for use but *committed to it* by planning, investment, official acts, and work preparing the site for mining and milling. Every element of the definition of "mine" is attested to by uncontroverted

evidence—and, as ratification, the owner of the mine had literally submitted its property to MSHA's jurisdiction by applying for, and being issued, a Mine ID from the agency three months before the accident.

This case is thus unlike *KC Transport, Inc.*, 44 FMSHRC 211 (Apr. 2022), *rev'd and remanded* 77 F.4th 1022 (D.C. Cir. 2023). The issue in that case was whether there was jurisdiction over coal haul trucks owned by an independent company and a maintenance and storage facility for those trucks which was not located on the property of the mine. 44 FMSHRC at 211-12. The Commission held the facility was not a "mine" because it was not "located on or appurtenant to a mine site . . . engaged in any extraction, milling, preparation or other activities within the scope of subsection 3(h)(1)(A)." *Id.* at 225.

On appeal to the D.C. Circuit, the court found the statute to be ambiguous as to whether the trucks and facility were subject to jurisdiction as a "mine." *KC Transport*, 77 F.4th at 1030-31. The court held that, as in prior cases, the Secretary "'never grappled with' the regulation's 'clear ambiguity.'" *Id.* at 1029, *citing Akzo Noble Salt, Inc. v. FMSHRC,* 212 F.3d 1301, 1304-05 (D.C. Cir. 2000).[2] Thus, remand was necessary to permit the Secretary to apply her interpretation to the language the court held to be ambiguous in that context.

Here, though, there is no interpretive work to be done. Whatever Congress may have intended as regards roads, trucks, facilities, equipment, or rights of way, there can be no doubt about the Act's authority over a "mine" as it is traditionally understood and defined, where the mine owner has notified the agency that it intends to operate a mine on the land in question, has received a legal identification from the agency confirming its authority over the mine, and has worked for months preparing the site for extraction and milling.

In discovery, the Acting Secretary has admitted that she did not make an affirmative determination of jurisdiction before the accident. *See* Ex. M (Sec'y Amended Response to Resp. First Set of Interrogatories). While the Acting Secretary has not provided any authority establishing that a Mine ID alone is a sufficient foundation for agency jurisdiction, such authority is unnecessary in this case. The definition of "mine" clearly applies to the Jackson Quarry under the material facts agreed to by the parties.

In *KC Transport*, the D.C. Circuit recognized the distinction giving rise to ambiguity in applying the statute's jurisdictional reach to mobile equipment. *See KC Transport*, 77 F.4th at 1031-33 (noting the crucial distinction between the "three movable items—'equipment, machines, [and] tools'" enumerated in section 3(h)(1)(C) of the Mine Act and the features in that

[2] The court also cited *Secretary of Labor v. National Cement Company of California, Inc.,* 494 F.3d 1066, 1077 (D.C. Cir. 2007), which was similarly remanded for a traditional resolution of ambiguity conferring deference to the Secretary's interpretation.

section defined by physical location).[3] The Court observed that the Secretary had at no point in the litigation "grapple[d] with the conflicting, practical implications" of the definition she had advanced *as it related to those items*. *Id.* at 1032.

No such practical concerns are presented by a traditional "mine" in a fixed physical location. To the extent there could be any ambiguity about *when* the Secretary's authority over the mine would arise, that too is resolved here by the application for and issuance of a Mine ID from MSHA:

> Consider the process through which MSHA ensures compliance with the Mine Act's safety regulations. To start, Congress instructs that "[e]ach operator of a coal or other mine subject to this chapter *shall* file with the Secretary the name and *address* of such mine[.]"

KC Transport, 77 F.4th at 1030, *citing* 30 U.S.C. § 819(d) (emphases added by the court).

Had there been no fatal accident in this case, if an MSHA inspector had shown up on June 17, 2022, and demanded entry to perform an inspection, what would have happened? Is there any doubt that a district court would have enforced the demand to enter a property designated as a "mine" in the agency's records and committed on the public record to use for mineral extraction and milling?

The answer must be "no."[4] *See id.* (Secretary's authorized representatives "shall have a right of entry to, upon, or through any coal or other mine." (*citing* Mine Act § 103(a), 30 U.S.C.

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[3] The court noted the "movable items included in the middle of the list" in subsection (C) could be interpreted as being analyzed "in relation [to], and as connected, to the preceding physical manifestations" in the list:

> As applied here, there is at least a question of whether "equipment, machines, [and] tools," when read within the wider Chapter 22 context, constitute "coal or other mine[s]" only when there is an established connection to the fixed physical manifestations listed before and after them. 30 U.S.C. § 802(h)(1)(C). It is unclear, however, whether such an established connection impacts the circumstances under which the three movable types of property remain "mines" when not physically connected to the manifestations listed in subsections (A)–(C). At a minimum, the statutory language, broader context, and numerous practical concerns render subsection (C)'s meaning ambiguous.

KC Transport, 77 F.4th at 1033.

[4] This decision is limited to the circumstances present in this case. It is far from clear that mere application or even approval of an application for zoning to permit mining and/or milling would be sufficient to establish jurisdiction over a site. The jurisdictional holding as a matter of

(continued . . .)

§ 813(a))). The absence of any such doubt confirms that there is no ambiguity as to the precise question presented in this case. The agency is therefore entitled to summary decision on the question of jurisdiction over the Jackson Quarry as a "mine," based on the clear language of the Act, as applied to the undisputed facts of this case.[5]

As a final matter, the Acting Secretary cannot be entitled to summary decision on the question of fair notice because the material facts on which the issue might depend are contested. The Acting Secretary has denied that conversations took place as described by Respondents. *See* Section II.B, *supra*, slip op. at 7.

A hearing is not necessary, because the issue is resolved by resort to the plain language of the statute alone. But while Respondents' approach in seeking to extend the concept of fair notice to the general matter of jurisdiction over a "mine" is novel, it is not unique. *See Austin Powder Co.,* 37 FMSHRC 1337 (June 2015) (ALJ). That case—also decided on the plain language definition of "mine"—is discussed more fully at slip op. at 18, *infra.*

B. Respondents' Motions for Summary Decision

The Commission requires cross motions for summary decision to be considered independently, determining whether either side has demonstrated an entitlement to a decision. *Hanson Aggregates*, 29 FMSHRC 10, *citing* 11 James Wm. Moore, et al., *Moore's Federal Practice* § 56.l 1[5][a], at 56-105 to 107 (3d ed. 1999). Respondents' arguments are grounded, at least in part, on an assertion that jurisdiction is not wholly dependent on location and should thus be examined to determine whether jurisdiction over them is proper, independent of whether the Jackson Quarry was intended "to be used" for mineral extraction and/or milling. *See* Vulcan Mot. at 10-11 (stating "(1) the nature of the activities in question in relation to activities normally associated with mining; (2) the relationship in time of the activities in question to active mining operations; and (3) the nature of the land at the time of the activities in question" must all be considered when determining jurisdiction).

Vulcan suggests that the Acting Secretary has read the foundational definition on which jurisdiction rests in "isolation." *Id.* at 11. It argues that the definition in section 3(h)(1)(C) has a "functional, locational, and temporal component" that must be considered. *Id.* But if one concludes—as the facts here require—that the Jackson Quarry is a "mine" under the Act, the rest of the problem posed by Respondents' motions rests on that definition and essentially solves itself.

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law in this case should be viewed narrowly as dependent on the application for and issuance of a Mine ID by MSHA.

[5] The Acting Secretary has disputed several facts asserted by Vulcan as uncontested. *See* Sec'y Opp'n at 4; Section II.B., *supra*, slip op. at 7. None of those facts is material to my decision. The Secretary is entitled to judgment as a matter of law even if Vulcan's facts are accepted as true.

Respondents cite *Cyprus Industrial Minerals Company v. FMSHRC*, 664 F.2d 1116 (9th Cir. 1981), as support for their assertion that the definition of "mine" has a functional component that must be considered. Vulcan Mot. at 16. Their reliance is misplaced. The Ninth Circuit's decision did typify the operator's activities as something that could "hardly be described as anything but mining," *Cyprus Indus. Minerals,* 664 F.2d at 1118. But Respondents disregard the central point of the court's holding, which cited several precedents in diverse circuits and the legislative history of the Act and concluded that "it does not matter if what is included in the definition fails to conform to the conventional concept of mining." *Id.*

The court adopted the view of the Third Circuit in *Marshall v. Stoudt's Ferry Preparation Co*., 602 F.2d 589 (3d Cir. 1979):

> Although it may seem incongruous to apply the label 'mine' to the kind of plant operated by Stoudt's Ferry, the statute makes clear that the concept that was to be conveyed by the word is much more encompassing than the usual meaning attributed to it—*the word means what the statute says it means*.

Cyprus Indus. Minerals, 664 F.2d at 1118, *quoting Stoudt's Ferry*, 602 F.2d at 592. (emphasis added).

Resort to legislative history is also unhelpful to Respondents' argument. The Act's legislative history rather famously directs that its scope should be read expansively, as the court noted in *Cyprus Industrial Minerals*. *See* Section III.B., *supra*, slip op. at 9 (excerpt from a report of the Senate Subcommittee on Labor regarding the Mine Act); *Cyprus Indus. Minerals*, 664 F.2d at 1118 (quoting from the same report).

The Jackson Quarry, then, is a "mine" under the Act. Based on that conclusion, the definition of "operator" clearly applies to Vulcan (*"any* owner, lessee, or other person who operates, controls, or supervises a . . . *mine*"). 30 U.S.C. § 802(d) (emphasis added).

Similarly, the inclusion of "*any* independent contractor performing services or construction at such *mine*" within the definition of "operator" must be read to apply to Wiley and Terra. *See id.* (emphasis added). The definition is enormously broad and provides no exclusions or limitations on the terms "services or construction."

The D.C. Circuit has expressly rejected the position that a functional limitation may preclude enforcement actions against independent contractors whose services are not sufficiently related to mining or milling operations. *See Otis Elevator Co. v. Sec'y*, 921 F.2d 1285, 1290 (D.C. Circuit 1990) ("We think that the phrase 'any independent contractor performing services . . . at [a] mine' means just that—*any* independent contractor performing services at a mine.").[6]

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[6] In *Otis Elevator Company*, a company which serviced elevators carrying mining companies' employees into mines was found to be an independent contractor, and thus an

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The definition of "miner" as "*any* individual working in a coal or other *mine*," 30 U.S.C. § 802(g) (emphasis added), likewise does not qualify "working" in any way. Thus, the employees of any entity, or any independent contractor self-employed and working at the mine, would be "miners," and the protections of the Act would apply to *any* such persons engaged in *any* type of work at the mine.

Respondents' arguments about temporal and functional limitations on MSHA's jurisdiction are thus unsustainable in this case. The "temporal" aspect of the definition is rendered literally in the statute: the provisions of the Act apply not only to lands, excavations, etc., currently engaged in the extraction or milling of minerals but also to those "*to be used*" and "resulting from" such use. 30 U.S.C. § 802(h)(1) (emphasis added).

This temporal component expands the Act's jurisdiction and strengthens the Acting Secretary's plain language argument. By extending the definition forward and backward to times when the property in question may not yet have been or may no longer be *functionally* engaged in extraction or milling—which alone would satisfy the definition of a mine—the statute's language establishes that a property may be a mine before those activities commence and after they have ceased.

In *Lancashire Coal Company v. Secretary of Labor,* 968 F.2d 388 (3d Cir. 1992), the court found "considerable support" for and credited the Secretary's reading of the Mine Act as recognizing "three potential time periods for the involvement of structures in mining activity: (1) the term 'used in' meaning current use, i.e. 'being used in'; (2) the term 'to be used in' meaning *contemplated* use; and (3) the term 'resulting from' meaning former use." 968 F.2d at 390-91 (emphasis added).[7]

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[6] (. . . continued)
operator, under section 3(d) of the Mine Act because it "contracts to perform services at mines." 921 F.2d at 1291.

In another case, *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991 (10th Cir. 1996), the Tenth Circuit also adopted the D.C. Circuit's reasoning in *Otis Elevator Co.* to read "independent contractor" broadly. That case involved a manufacturer of mining equipment who sent a service representative to advise mine employees "with the equipment both above ground in the mine's maintenance shop and below ground in the mine." 99 F.3d at 994. The Tenth Circuit stated section 3(d) did not limit the definition of "independent contractor" to those "contractors who are engaged in the extraction process and who have a continuing presence at the mine." *Id.* at 999 (citing *Otis Elevator Co.*, 921 F.2d at 1290). Thus, the manufacturer was held to be both an independent contractor and operator under the Mine Act because the "clear" meaning of the statute encompassed contractors who "performed services at the mine." *Id.* at 1000.

[7] Both Vulcan and the Acting Secretary also cited several cases—including some of the same cases—in which administrative law judges at the Commission found a physical location to
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No tool of statutory construction can contend with the weight of contrary authority marshalled by the Acting Secretary here. Leaving aside the Act's clear language and the oft-repeated Committee instruction that its scope is to be broadly construed, any traditional interpretation of the definition of "mine" would consider the statute as a whole and would note that the definitions of "operator" and "miner" are wholly dependent on the characterization of the property in question.

Linguistically, the breadth of the definitions is consistent and mutually supportive, and the Acting Secretary has not read the definition of "mine" in isolation. That definition is part of an integrated statutory scheme that Congress intended to be broadly inclusive of properties used in, to be used in, or resulting from mineral extraction or processing (including milling), and all persons working on or within such properties.

This case, unlike *KC Transport*, does not approach the frontiers of the Act's jurisdictional limits. And unlike *KC Transport*, the precise question at issue may be resolved by considering the plain language itself.

Respondents appear to understate the difficulty of unseating a plain language interpretation. While it may not be necessary to literally show that adopting the plain language

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[7] (. . . continued)
be a mine when mining operations had not yet begun or had ceased and not resumed. *See* Sec'y Mot. at 7; Vulcan Mot. at 16-17; Sec'y Opp'n at 6. The cases cited include:

- *N.J. Wilbanks Contractor, Inc.*, 39 FMSHRC 2069, 2076 (Dec. 2017) (ALJ) (upholding jurisdiction over a mine that would eventually extract and process granite when development activities including "site grading, drilling and blasting rock, and constructing dams, as well as laying down belt structures, crushers, and shakers, and hauling clean rock to designated locations" were being performed);

- *Hills Materials Company*, 34 FMSHRC 3097, 3102-03 (Dec. 2012) (ALJ) (affirming jurisdiction found where mine was temporarily closed and had not "commenced operations," but would start the next day);

- *Royal Cement Co.*, 31 FMSHRC 1459, 1462 (Dec. 2009) (ALJ) (specifically noting Act's language including facilities where future milling is contemplated in upholding jurisdiction over facility where repairs were being performed in order to reopen quarry and cement plant that had been closed for three years); and

- *The Pit*, 16 FMSHRC 2008, 2008-10 (Sept. 1994) (ALJ) ("The plain language of the Act" clearly provided jurisdiction over equipment at a site which will be used for extraction of minerals and milling).

The anticipatory activities in these cases support the extension of jurisdiction to contemplated mining or milling but could not be read to constrain the breadth of the Act's plain language, even if the cases were precedential.

would produce an absurd result, Respondents must at least demonstrate that the outcome would be "an unreasonable one 'plainly at variance with the policy of the legislation as a whole.'" *U.S. v. American Trucking Ass'ns,* 310 U.S. 534, 544 (1940).

The pleadings and evidence provided here cannot support such a finding. On the contrary, the plain language is buttressed by the legislative history, the use of words in context, Congress' evident choice in describing activities in the broadest possible terms, and the obvious intent to apply the Act's protections to properties, like the Jackson Quarry, that were not yet engaged in extraction or milling but which were legally recognized by local and federal officials as committed to such use in the near future.

Respondents have cited no authority where the Secretary's exercise of jurisdictional authority over a piece of real property within the Act's definition of a "mine" was rejected. *See* Sec'y Opp'n at 5-6 (noting absence of such authority and citing *Cyprus Industrial Minerals*, 664 F.2d at 1117-20 and cases cited therein; and *Lancashire Coal Co.*, 968 F.2d at 390, in support of jurisdiction over areas where mining is "contemplated"). Indeed, Vulcan's motion cites extensively to both the Commission's and D.C. Circuit's decisions in *KC Transport*, even though no legal principle supporting its contentions has survived judicial review to this point.[8] *See* Vulcan Mot. at 12-14, 20-21.

The Jackson Quarry's qualification as a "mine"—as the term has been straightforwardly defined—is therefore determinative of jurisdiction, contrary to Respondents' assertions. *See* Sec'y Opp'n at 8, noting correctly that Commission's decision in *KC Transport* was based on location, where trucks were asserted to be a "mine").

C. Fair Notice

As a final point, Respondents have asserted an affirmative defense of "fair notice" and raised such an argument as a basis for summary decision, asserting that MSHA had effectively disclaimed jurisdiction at the Jackson Quarry. Vulcan Mot. at 19. The argument is untenable.

First, as noted above, slip op. at 13, *supra,* the jurisdiction question rests on plain language. But the fair notice defense operates to limit deference to an agency interpretation of an ambiguous standard, where the position is inconsistent with or departs from a previous interpretation or common understanding.

[8] The Acting Secretary's assertion that *K.C. Transport* is "not good law," Sec'y Opp'n at 8, may be premature. The D.C. Circuit did reverse and remand the case when reviewing the Commission's decision. 77 F.4th at 1031. *See also* Section IV.A. *supra*, slip op. at 11. The operator has petitioned the Supreme Court for certiorari, and the Court has not yet decided whether to accept the petition. *See* Petition for Writ of Certiorari, *KC Transport, Inc., v. Julie A. Su, Acting Sec'y of Labor*, ___ U.S. ___, No. 23-876, 2024 WL 645391 (Feb. 12, 2024); Brief for the Respondents, *KC Transport, Inc., v. Julie A. Su, Acting Sec'y of Labor*, ___ U.S. ___, No. 23-876 (Apr. 15, 2024).

"'The due process clause prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.'" *DQ Fire and Explosion Consultants, Inc.*, 36 FMSHRC 3083, 3087 (Dec. 2014), aff'd, 632 F. App'x 622 (D.C. Cir. 2015) (unpublished), *quoting General Electric Co. v. EPA,* 53 F.3d 1324, 1328 (D.C. Cir. 1995) (citation omitted). Deference is not an issue here, where the Secretary relies on a straightforward reading of the statute because the clear language therein provides an operator fair notice. *See Dynamic Energy Inc.*, 32 FMSHRC 1168, 1172 (Sept. 2010); *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997).

Second, if there were any ambiguity in the statutory definition (again, there is not), a decision on the fair notice question would depend on contested material facts. Relying on Ashley's sworn testimony, the Secretary has denied that any representations were made about jurisdiction in conversations with Respondents' representatives.

Finally, the requirement of fair notice generally applies to particular regulatory provisions. *See DQ Fire and Explosion Consultants, Inc.,* 36 FMSHRC at 3087-88. Every binding precedent case cited by Respondents involves a particular regulatory provision. *See* Vulcan Mot. at 19-20.[9]

Vulcan asserts that the "standard" is the scope of MSHA's jurisdiction under Section 3(h)(1)(C). Vulcan Mot. at 20. But it has provided no authority in support of its position. This is a foundational, statutory definition, not a safety standard, and the fair notice argument is not readily adaptable to the broader context, where the question is not "What conduct is prohibited or required?" but "Does this statute apply at all to the property in question?"

Respondents have cited one case in which an administrative law judge rejected a contractor's challenge to MSHA's jurisdiction on notice grounds. *See* Vulcan Mot. at 23, citing *Austin Powder Co.*, 37 FMSHRC at 1358. There, the independent explosives contractor similarly argued that MSHA had disclaimed jurisdiction over its facility, and that it lacked fair notice when jurisdiction was reasserted. 37 FMSHRC at 1358.

Unlike the present case, the facility was not itself a "mine" in the traditional sense but a storage facility on property located nearby and connected to the extraction area by a road on property owned by the mine owner. *Id.* Even so, the judge rejected the fair notice argument and determined that the plain language of the statute—the definition of "mine" at issue here—established that jurisdiction was proper. *Id.*

[9] Vulcan cited the following cases which discuss fair notice within the context of specific regulations under the Mine Act: *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990) (30 C.F.R. § 56.9002); *Alan Lee Good*, 23 FMSHRC 995, 1005 (Sept. 2001) (Jordan, C, & Beatty, C, separate opinion) (30 C.F.R. § 56.14107(a)); *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694-95 (July 2002) (30 C.F.R. § 75.364(b)(1)); *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1682 (Dec. 2010) (30 C.F.R. § 75.521); *DQ Fire and Explosion Consultants*, 36 FMSHRC at 3088 (30 C.F.R. § 48.5).

The judge considered the factors established for determining whether notice of the standard's requirements had been provided and determined that even if the language did not plainly establish jurisdiction over the facility, the Commission's objective "reasonably prudent person" test would support a finding that fair notice had been provided. *Id.* at 1359, *citing Alan Lee Good,* 23 FMSHRC 995, 1005 (Sept. 2001) (Jordan, C., & Beatty, C., separate opinion).

Thus, the fair notice argument would fail even if one were to agree that ambiguity could be inferred from "the inconsistency of the agency's enforcement, including pre-enforcement contact from MSHA officials, and the lack of guidance informing the regulated community with ascertainable certainty of its interpretation." Vulcan Mot. at 20. The due process analysis first asks "whether a reasonably prudent person *familiar with the mining industry and the protective purposes of the standard* would have recognized the specific prohibition or requirement of the standard." *DQ Fire and Explosion Consultants,* 36 FMSHRC at 3087, *quoting Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990) (emphasis added). *See also Alan Lee Good,* 23 FMSHRC at 1005, *citing Island Creek Coal Co.*, 20 FMSHRC 14, 24-25 (Jan. 1998).

A reasonably prudent person familiar with the mining industry would be familiar with the breadth of its jurisdictional provisions and the common definition of "mine," including its applicability to prospective operations. Inconsistency of agency enforcement and a lack of notice to the regulated community are indeed valid factors one may use to determine whether a party has notice of an agency's interpretation of an ambiguous regulation. However, they do not apply here to a plainly worded statute that has been consistently read, by courts, the Commission, and its judges, to mean what it says. [10]

In sum, Congress has spoken plainly in simple declarative sentences. Such clear language leaves no room for ambiguity or interpretation. Thus, Respondents' arguments about the type of activity involved at the mine, *see* Vulcan Mot. at 13, are refuted by the fact that the activities at issue in this case were undertaken *at a mine, by miners* as those terms are plainly and unequivocally defined. Respondents' motions must therefore be denied.

[10] While the Secretary has proved MSHA's jurisdictional claim over the Jackson Quarry, Respondents' notice and other arguments might pertain to one or more of the citations or orders issued in these cases. Those standards have not been considered here because they are not "jurisdictional" questions and are beyond the scope of the issue assigned for disposition in this proceeding. However, the Acting Secretary must yet bear the burden of proving that the violations occurred and that the persons cited were responsible, and this decision should not be read as offering any opinion on the validity of the citations and orders issued in the individual dockets, or the vitality of a fair notice defense in response to any of the citations or orders.

V. CONCLUSION

The Jackson Quarry is a "mine," as defined in the Act. Each Respondent was an "operator," as that term is defined in the Act, and the employees of each respondent who were engaged in any type of work at the quarry were "miners" as that term is defined in the Act. The Secretary's motion for summary decision on the question of MSHA's jurisdiction over the Jackson Quarry is therefore **GRANTED**, and Respondents' motions for summary decision on the same question are **DENIED**.

Michael G. Young
Administrative Law Judge

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