UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Case No. 06-1129

UNITED STATES DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),

Plaintiff-Appellee,

and

UNITED MINE WORKERS OF AMERICA,

Intervenor,

v.

WOLF RUN MINING COMPANY, INC.,

Defendant-Appellant.

ON APPEAL OF A PRELIMINARY INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT REGARDING JURISDICTION

The jurisdictional statement in the appellant's brief is correct, except that the injunctive relief provision applicable in this case is 30 U.S.C. § 818(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether Wolf Run Mining Company ("Wolf Run") had sufficient notice that the district court might issue a preliminary injunction.

2. Whether the district court properly exercised its discretion in issuing a preliminary injunction enjoining Wolf Run from refusing to allow the United Mine Workers of America ("UMWA") to enter onto mine property as a "walkaround representative" designated by at least two miners to assist the Secretary of Labor in her investigation into the fatal explosion at the mine.

STATEMENT OF THE CASE

This proceeding is an interlocutory appeal of the January 26, 2006, order of the district court granting the Secretary a preliminary injunction enjoining Wolf Run from refusing to allow the UMWA to enter onto mine property as a miners' "walkaround representative" to assist the Secretary in her investigation into the January 2, 2006, explosion at the Sago Mine. The explosion killed twelve miners and seriously injured another.

The case arises under the Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"), 30 U.S.C. § 801 et seq.

The Mine Act contains detailed provisions regarding the inspection of mines. See generally Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc., 80 F.3d 110, 113-14 (4th Cir. 1996) (describing the Secretary's rulemaking and enforcement authority). In pertinent part, Section 103(a) of the Mine Act requires the Secretary, through her authorized representatives, to conduct frequent inspections and investigations of mines for the purposes, inter alia, of obtaining information relating to safety and health conditions and the causes of accidents, determining whether an imminent danger exists, and determining whether there is compliance with the mandatory safety and health standards promulgated under the Act. 30 U.S.C. § 813(a).

Section 103(f) of the Act states that

> [s]ubject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or [her] authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of [30 U.S.C. § 813](a), for the purpose of aiding such inspection and to participate in pre- and post-inspection conferences held at the mine.

30 U.S.C. § 813(f) (emphases added).[1] The miners' representative provided for in Section 103(f) is traditionally referred to as the "walkaround representative." See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 203-04 (1994). By regulation, the Secretary has defined a "representative of miners" as "[a]ny person or organization which represents two or more miners at a coal or other mine for purposes of the Act." 30 C.F.R. § 40.1(b)(1). Two United States Courts of Appeals -- the District of Columbia Circuit and the Tenth Circuit -- have held that, under Section 103(f) and the Secretary's regulations, miners at non-union mines may designate a union as their walkaround representative for the purpose of providing safety and health assistance under the Mine Act. Kerr-McGee Coal Corp. v. FMSHRC, 40 F.3d 1257 (D.C. Cir. 1994), cert. denied, 515 U.S. 1159 (1995); Thunder Basin Coal Co. v. FMSHRC, 56 F.3d 1275 (10th Cir. 1995).

Section 108(a)(1) of the Mine Act provides that the Secretary may seek injunctive relief in a variety of specified circumstances. In pertinent part, Section 108(a)(1) states:

> The Secretary may institute a civil action for relief, including a permanent or temporary

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[1] Section 103(f) further states that "[t]o the extent that the * * * authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives." 30 U.S.C. § 813(f).

> injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent * * * (B) interferes with, hinders, or delays the Secretary or his authorized representative * * * in carrying out the provisions of this Act * * *.

30 U.S.C. § 818(a)(1) (emphasis added).

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

On January 2, 2006, an underground explosion occurred in Wolf Run's Sago Mine, an underground coal mine in Upshur County, West Virginia. As a result of the explosion, twelve miners were killed and one miner was seriously injured. As part of its responsibilities under the Mine Act, MSHA is engaged, pursuant to Section 103(a) of the Act, in inspection and investigation of the mine to determine the cause of the accident and whether violations of mandatory standards occurred or are occurring.[2]

On January 17, 2006, pursuant to the regulations in 30 C.F.R. Part 40, UMWA Occupational Health and Safety Administrator Dennis O'Dell provided MSHA with information

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[2] Upon the completion of MSHA's accident investigation, MSHA will issue a public accident investigation report containing findings, conclusions, and recommendations, and will issue citations and orders for any violations related to the accident. See MSHA Handbook Series, Handbook No. PH00-1-5, Accident/Illness Investigation Procedures, Ch. 3, p. 13 (Nov. 2000), available at www.msha.gov ("Compliance Info," "Enforcement-MSHA's Handbook Series") ("The causes of accidents are determined after a complete review and analysis of all the facts and evidence").

indicating that two or more miners employed at the Sago Mine, which is a non-union mine, had designated the UMWA as their miners' representative under Section 103(f) of the Act for the purpose of accompanying MSHA inspectors on inspections they conduct of the mine pursuant to Section 103(a). J.A. 23-24. Fearing reprisal from the mine operator for their designation of the UMWA as their walkaround representative, the miners requested that their identity be kept confidential. J.A. 25. Later on January 17, MSHA District Manager Kevin Stricklin personally contacted each of the designating miners and verified that they "were, in fact, actively employed at the Sago Mine at the time of the explosion, and that they did, in fact, wish to designate the UMWA as their miners' representative for purposes of Section 103(f) of the Mine Act." J.A. 25. Having determined that the designation of the UMWA was authentic, District Manager Stricklin accorded the UMWA the status of statutory miners' representative on behalf of two or more miners. J.A. 25-26. On January 18, a UMWA representative tendered the designation information to counsel for Wolf Run, with the names of the designating miners redacted. J.A. 23-24, 25.

On January 25, 2006, MSHA investigators were prepared to commence their inspection and investigation of underground areas of the mine. UMWA representatives were present and sought to accompany the investigators on behalf of the UMWA as a

designated representative of miners. Wolf Run refused to let the UMWA representatives accompany the investigators and indicated that it would not voluntarily relent from its refusal to let them enter the mine. J.A. 27.

Later on January 25, the Secretary filed an Application for Temporary Restraining Order and Complaint for Preliminary and Permanent Injunction with the United States District Court for the Northern District of West Virginia in Elkins. J.A. 5-8.[3] The parties filed memorandum briefs on January 25, and a hearing was commenced that day. See J.A. 9-27, 31-77, 138-66. On January 26, the parties filed supplemental briefs and the hearing was reconvened. See J.A. 78-127, 128-37, 167-211.

In their briefs and at the two-day hearing, the parties set forth their positions at length to the district court. On January 26, at the conclusion of the hearing, the district court reviewed the parties' positions in detail and stated orally that the issuance of a preliminary injunction was appropriate. J.A. 196-210. Shortly thereafter, the district court issued a written order granting the Secretary a preliminary injunction enjoining Wolf Run from refusing to permit the UMWA, as a designated miners' representative under Section 103(f) of the

[3] On January 25, 2006, the UMWA filed a motion to intervene in the proceeding. J.A. 28-30. On January 26, 2006, the district court granted the unopposed motion. J.A. 212-13. See also J.A. 144, 164.

Mine Act, to enter the mine in order to "accompany representatives of the Secretary on any physical inspection or investigation of the Sago Mine and to participate in pre- and post-investigation conferences at the mine site, when so requested by an authorized representative of the Secretary of Labor." J.A. 214-16. Later on January 26, Wolf Run requested the district court to stay its preliminary injunction pending appeal to this Court. J.A. 209, 217-18. The district court denied the stay request, and Wolf Run then appealed the preliminary injunction to this Court.[4]

SUMMARY OF ARGUMENT

I. Wolf Run's argument that it did not have sufficient notice that the district court might issue a preliminary injunction is not properly before this Court and is contradicted by the record. Wolf Run failed to object to the preliminary injunction on that ground before the district court. In any event, the record establishes that the Secretary's pleading and supporting briefs were not confined to requesting a temporary restraining order; rather, they explicitly requested, in addition and in the alternative, that the district court grant a preliminary injunction. Moreover, Wolf Run has failed to demonstrate any prejudice to it from the district court's

[4] Wolf Run also requested this Court to stay the preliminary injunction pending appeal. On January 31, 2006, after the parties filed briefs, this Court denied the stay request.

issuance of a preliminary injunction instead of a temporary restraining order after a two-day hearing, including the filing of briefs and supplemental briefs, and the opportunity to fully argue the matter to the district court.

II. In exercising its discretion in granting the preliminary injunction, the district court properly analyzed the four injunction factors, as set forth in Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 194-96 (4th Cir. 1977). The finding that each factor favored granting the requested relief is amply supported by the record and relevant case law.

First, the district court correctly found that the Secretary would be irreparably harmed if injunctive relief were denied because the UMWA would provide the Secretary with additional expertise and such assistance needed to be provided immediately because of the rapidly changing conditions in the mine.

Second, the district court correctly found that Wolf Run would suffer little or no harm if injunctive relief were granted, and Wolf Run has failed to allege any legally cognizable harm that resulted from injunctive relief being granted. Accordingly, it was not irreparably harmed by the grant of the preliminary injunction.

Third, the district court correctly found that the Secretary was likely to succeed on the merits of the case. The

Secretary properly provided designating miners fearful of retaliation with confidentiality under a longstanding interpretation of the Secretary's regulations, and maintaining such confidentiality does not harm Wolf Run. Two Circuit Courts of Appeals -- the District of Columbia and the Tenth Circuits -- have addressed the question of whether permitting a union that does not represent a majority of employees of the mine for collective bargaining purposes to serve as a miners' representative under the Mine Act conflicts with the National Labor Relations Act and with private property interests. Noting that Congress balanced the relevant interests in crafting the scheme of the Mine Act, both Courts answered those questions in the negative. Wolf Run has failed to identify any reason why this Court should not follow the well-reasoned holdings of those Courts.

Fourth, and finally, the district court correctly found that the public interest would be best served by a complete and thorough accident investigation resulting from the participation of the UMWA as a miners' representative. Wolf Run's private property interests cannot take priority over that public interest.

ARGUMENT

I.

WOLF RUN HAD SUFFICIENT NOTICE THAT THE DISTRICT COURT MIGHT ISSUE A PRELIMINARY INJUNCTION

Wolf Run argues that it did not have sufficient notice that the district court might issue a preliminary injunction. Br. at 6-10. Wolf Run's notice argument should be rejected both for procedural and for substantive reasons.

Procedurally, the notice argument should be rejected because it was waived. Determination of a waiver is a question of law, which this Court analyzes de novo. See United States v. Singleton, 107 F.3d 1091, 1097 n.3 (4th Cir. 1997). When the district court announced at the hearing that it was going to issue a preliminary injunction and not a temporary restraining order, Wolf Run expressed no objection. J.A. 206-10. Wolf Run never objected that it had insufficient notice that the district court might issue a preliminary injunction. Rather, it requested that the district court stay its preliminary injunction, and then appealed that preliminary injunction to this Court. J.A. 207-09, 219-21. See Ciena Corp. v. Jarrard, 203 F.3d 312, 320 (4th Cir. 2000) (party who "chose not to pursue the matter before the district court, but to appeal * * * inexplicably neglected to pursue a course that would have cured the alleged prejudice of which she now complains"). Absent

exceptional circumstances not present here, an argument that was not raised below is waived on appeal. Muth v. United States, 1 F.3d 246, 250 (4th Cir. 1993).

Substantively, the notice argument should be rejected because it ignores the record. Because, as noted above, the notice issue was not raised before the district court, this Court must analyze whether Wolf Run was provided adequate notice de novo, if it reaches the issue. The record shows that on January 25, before the commencement of the two-day hearing before the district court, the Secretary filed, and served on Wolf Run, a document captioned "Application for Temporary Restraining Order and Complaint for Preliminary and Permanent Injunction." J.A. 5 (emphasis added). See also J.A. 143. The document's prayer for relief requested a temporary restraining order and a preliminary and permanent injunction. J.A. 7. The memorandum brief in support of the document was captioned "Memorandum * * * in Support of Application of Temporary Restraining Order or Preliminary Injunction" (J.A. 9 (emphasis added); see also J.A. 13) and specifically stated that, where the defendant has been served, "the district court has the discretion to consider a temporary restraining application as a request for a preliminary injunction." J.A. 14-15 n.5 (citing Ciena Corp., 203 F.3d at 319). See also J.A. 128. "At the very least, [Wolf Run] thereby had notice that [the Secretary]

alternatively sought a preliminary injunction." Dominion Video Satellite, Inc. v. EchoStar Satellite Corp., 269 F.3d 1149, 1153 (10th Cir. 2001). If Wolf Run read the documents the Secretary filed, Wolf Run's assertion that the district court's announcement that it was going to issue a preliminary injunction "was the first time that Wolf Run became aware that a preliminary injunction might issue" (Br. at 8) cannot be correct. Indeed, before the hearing commenced, Wolf Run submitted a memorandum brief responding to the Secretary's application and concluding with a statement that the Secretary could not meet "any of the requirement[s] for a preliminary injunction under Fourth Circuit law * * * ." J.A. 31-53, 144 (emphasis added). See also J.A. 78-100. Therefore, it clearly had all the notice it needed or was due.

Finally, even if there were any substance to its notice argument, Wolf Run has not demonstrated prejudice. Failure to give adequate notice is not reversible error absent a demonstration of prejudice. Dominion Video, 269 F.3d at 1154; Friends of Iwo Jima v. National Capital Planning Commission, 176 F.3d 768, 774 (4th Cir. 1999). In this case, Wolf Run participated fully in the two-day hearing that culminated in the issuance of the preliminary injunction. J.A. 138-210.[5] Although

[5] Although "same-day" notice is normally insufficient for issuance of a preliminary injunction (Br. at 8; see Ciena Corp.,

Wolf Run asserts that it "would have been able to tailor its arguments * * * and may very well have decided to call live witnesses" if it "had known" that it was arguing about a preliminary injunction (Br. at 9), it does not explain "how its argument or evidence would have been materially different with more notice." Dominion Video, 269 F.3d at 154 (party merely asserted "that it would have called more witnesses and conducted a more rigorous cross-examination," and did not "indicate the substance, matter, or source of any additional evidence, or how such evidence would have affected the outcome").[6] The inescapable conclusion is that Wolf Run knew that the district court would, as the Secretary requested, consider issuance of a preliminary injunction -- and that it prepared its defense accordingly.

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203 F.3d at 319), Wolf Run is incorrect in suggesting that "all of the relevant events" in this case happened "during the same one-day period." Br. at 8-9. The parties exchanged briefs, and the district court commenced the hearing, on January 25; the district court continued the hearing until the next day; the parties exchanged supplemental briefs, and the district court reconvened the hearing, on January 26.

[6] In addition, even if Wolf Run would have developed a stronger case, as it asserts, it fails to explain how the grant of a preliminary injunction harmed it any more than the grant of a temporary restraining order purportedly would have. See discussion of Harm to Wolf Run, below.

II.

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN ISSUING A PRELIMINARY INJUNCTION ENJOINING WOLF RUN FROM REFUSING TO ALLOW THE UMWA TO ENTER ONTO MINE PROPERTY AS A "WALKAROUND REPRESENTATIVE" TO ASSIST THE SECRETARY IN HER INVESTIGATION INTO THE MINE EXPLOSION

A. Applicable Principles and Standard of Review

The factors that must be considered in determining whether a preliminary injunction should be granted were set forth by this Court in Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 194-96 (4th Cir. 1977). Those factors are: (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the injunction is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest. In re Microsoft Corp. Antitrust Litigation, 333 F.3d 517, 526 (4th Cir. 2003) (discussing Blackwelder). The plaintiff bears the burden of establishing that each of the factors supports granting the injunction. Ibid. (citing Direx Israel, Ltd. v. Breakthrough Medical Corp., 952 F.2d 802, 812 (4th Cir. 1991)). In applying the four-factor test, the factors are to be weighed as a whole. Smyth v. Rivero, 282 F.3d 268, 276-77 (4th Cir.), cert. denied, 537 U.S. 825 (2002).

"The irreparable harm to the plaintiff and the harm to the defendant are the two most important factors." Rum Creek Coal

Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991). "Emphasis on the balance of these first two factors results in a sliding scale that demands less of a showing of likelihood of success on the merits when the balance of hardships weighs strongly in favor of the plaintiff, and vice versa." Microsoft, 333 F.3d at 526. See Rum Creek, 926 F.3d at 359. "When the balance of harms decidedly favors the plaintiff, he is not required to make a strong showing of a likelihood of success * * *." James A. Merritt and Sons, Inc. v. Marsh, 791 F.2d 328, 330 (4th Cir. 1986). Accord Direx, 952 F.2d at 813, 817. Instead, the plaintiff is only required to raise questions sufficiently serious and substantial to constitute "'fair ground for litigation * * *.'" Safety-Kleen, Inc. v. Wyche, 274 F.3d 846, 859 (4th Cir. 2001) (quoting Rum Creek, 926 F.2d at 359). "In other words, the plaintiff's case must at bottom present a 'substantial question.'" Safety-Kleen, 274 F.3d at 859.

This Court carefully reviews a district court's action in granting or denying a preliminary injunction to determine whether the district court abused its discretion. Microsoft, 334 F.3d at 524-26; Ciena Corp., 203 F.3d at 322-23; Direx, 952 F.2d at 815. We show below that, in this case, the district court, after evaluating the evidence and analyzing the law, properly concluded that all four Blackwelder factors favored the

Secretary and that a preliminary injunction should be granted. See J.A. 196-210, 215.

B. The Present Case

1. Irreparable harm to the Secretary

In concluding that denial of immediate injunctive relief would cause irreparable harm to the Secretary, the district court found (1) that the UMWA's participation in the investigation would greatly help the Secretary in carrying out her statutory obligations to investigate, and (2) that the Secretary needed that help immediately. With respect to the first finding, the district court stated:

> The thing that appeals to the Court is the expertise and the experience of the [UMWA] that they have gained over the years that they have been in existence. I don't know how old or how long that's been in existence in the mining industry. But they have people, I'm sure, that would be very helpful to the Secretary of Labor in coming to the right conclusions that [] would be beneficial to all of us.

J.A. 197. See also J.A. 188. With respect to the second finding, the district court stated:

> Due to the rapidly changing conditions of the mine, and the possibility of [MSHA] having to change mine conditions in response to safety concerns, there is an immediate need for the issuance of a temporary restraining order so as to prevent harm to the Plaintiff and her statutory obligations of investigation and disclosure of possible changes and benefits that would be visited

to the coal industry worldwide, as well as, the United States.

J.A. 202. The foregoing findings are supported by the undisputed evidence before the district court. J.A. 23 (Affidavit of UMWA Occupational Health and Safety Administrator O'Dell discussing the UMWA's experience and expertise in investigating explosions).

On similar facts, two Courts of Appeals have reached the same conclusion. See Kerr-McGee Coal Corp., 40 F.3d at 1263 (third-party representatives such as the UMWA may, *inter alia*, "provide valuable safety and health expertise [and] use their knowledge of other mines to spot problems and suggest solutions"); Utah Power & Light Co. v. Secretary of Labor, 897 F.2d 447, 451-52 (10th Cir. 1990) (to the same effect).[7] Like the district court here, these courts recognized that such third-party representatives may also act as conduits for assuring that relevant information from miners themselves is relayed to the Secretary in a timely manner. See Kerr-McGee, 40 F.3d at 1263 ("Non-employees may * * * take actions without the threat of pressure form the employer"); Utah Power & Light, 897 F.2d at 452 ("[A] nonemployee representative is not subject

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[7] The two cited decisions, as well as a Tenth Circuit decision and a Supreme Court decision that address related issues, are discussed in full in the discussion of the Secretary's likelihood of success on the merits, below.

to the same pressures that can be exerted by an operator on an employee representative").

Wolf Run argues that the Secretary did not need immediate injunctive relief because she could have "attempt[ed] to compel immediate compliance" by resorting to administrative sanctions that "could then be appealed by Wolf Run through the administrative process, and, if necessary, through judicial review." Br. at 11. To state Wolf Run's argument is to answer it. The very fact that Congress specifically authorized the Secretary to seek immediate injunctive relief when an operator "interferes with, hinders, or delays" the Secretary "in carrying out the provisions of th[e] Act" (30 U.S.C. § 818(a)(1)(B) (emphasis added)) demonstrates that the Secretary is not required to invoke the administrative process and wait for it to run its course. Certainly, application to a district court for injunctive relief is the preferred statutory course when circumstances make immediate relief necessary. Inasmuch as the conditions in effect at the time of the explosion in this case were likely to change rapidly, the Secretary needed to investigate the causes of the explosion, with the assistance of the UMWA, as quickly as possible.[8] And, contrary to Wolf Run's

[8] In addition, pursuant to the grant of a preliminary injunction, the UMWA, as the designated representative of miners, will be able to assist the Secretary in her inspections of the now reopened Sago Mine. See 30 U.S.C. § 813(a).

argument, irreparable harm to the Secretary could not have been avoided by pursuing the "natural course" of citation and administrative review. Br. at 11. Although expedited administrative and judicial review of the Secretary's administrative enforcement actions is available under the Mine Act in appropriate circumstances, there was no guarantee that Wolf Run would seek review in an expeditious manner. Indeed, there was no guarantee that Wolf Run would even initiate the administrative review process -- a process that is initiated "not by the Secretary but by a mine operator who claims to be aggrieved." Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 209 (1994) (citing 30 U.S.C. § 815(a)).[9]

2. Harm to Wolf Run

In concluding that granting immediate injunctive relief would not irreparably harm Wolf Run, the district court stated:

(requiring "inspections of each underground coal or other mine in its entirety at least four times a year").

[9] Even if Wolf Run or the Secretary had requested expedited administrative proceedings before an administrative law judge and the Review Commission, such proceedings would certainly have taken weeks if not months to conclude in this case, where the Secretary needed immediate relief.

In addition, while normally the Secretary would have been positioned to close the mine if the operator failed to abate a citation in a timely manner by permitting entry of the UMWA as a designated miners' representative (see 30 U.S.C. § 814(b)), that remedy was unavailable to the Secretary here because the mine was already closed as a result of the fatal mine accident. See 30 U.S.C. § 813(k).

> The Court can see little or no harm to the Defendant if the temporary restraining order is granted. Any concern that the Defendant may have that the [UMWA] * * * has ulterior motives and would abuse its status as a miners' representative ha[s] been adequately addressed by past Courts.

J.A. 202-03. The district court then quoted the D.C. Circuit's statement in Kerr-McGee that the motivations of a miners' representative "'are irrelevant so long as the representative, through it actions, does not abuse its designation and serves the objectives of the Act,'" and the Tenth Circuit's statement in Utah Power & Light that the appropriate solution "'is for the operator to take action against individual instances of abuse when it discovers them.'" J.A. 203 (quoting 40 F.3d at 1264 and 897 F.2d at 452).

Wolf Run's argument that it was irreparably harmed by the granting of immediate injunctive relief (Br. at 12-13) is nothing more than an argument that a non-union mine is inherently harmed by letting a union onto its premises even though the union meets the statutory and regulatory requirements for being a designated miners' representative and is subject to their restrictions. The bare assertion of irreparable harm under these circumstances, which are hardly unique to Wolf Run, is not proof that such harm actually will occur, and Wolf Run has offered none. Fairly construed, therefore, the argument is merely another way for Wolf Run to contend that the district

court erred in concluding that the Secretary was likely to succeed on the merits. This Court, however, has held that the hardship test and the likelihood-of-success test are separate tests and that it is error to confuse the two. Direx, 952 F.2d at 817. It follows that Wolf Run fails to refute the district court's conclusion that the granting of immediate injunctive relief would cause it "little or no harm." J.A. 202.

3. The Secretary's likelihood of success on the merits

Because the balance of hardships "tips decidedly" in favor of the Secretary, the district court's issuance of a preliminary injunction was proper as long as the Secretary's position on the merits presented "fair ground for litigation * * *." Rum Creek, 926 F.2d at 359. As the district court found, the Secretary's position did. Specifically, the UMWA's documentation adequately showed it had been duly designated to be a miners' representative for walkaround purposes, and the Secretary, upon ascertaining the legitimacy of the designation, was entitled to hold confidential the identities of the miners making the designation to protect them from potential retaliation. Moreover, for reasons that are set forth below, the district court was on solid legal ground in rejecting the argument that the UMWA's designation as a miners' representative under the Mine Act conflicts with the National Labor Relations Act or unconstitutionally intrudes upon Wolf Run's property rights.

(a). The asserted invalidity of the UMWA's designation.

Wolf Run asserts that the UMWA's designation as a miners' representative is invalid because the document provided to Wolf Run did not identify the miners designating the UMWA. Br. at 15-19. The Secretary's regulation, however, states only that the document submitted to MSHA under Section 40.3 and provided to the operator under Section 40.2 shall be "[a] copy of the document evidencing the designation of the representative of miners." 30 C.F.R. § 40.3(3) (emphasis added). The Secretary's reading of her regulation -- that the document need only provide evidence of the designation, and need not identify the designating miners -- is entitled to "controlling weight" because it is not "plainly erroneous or inconsistent with the regulation." District Memorial Hospital of Southwestern North Carolina, Inc. v. Thompson, 364 F.3d 513, 517 (4th Cir. 2004) (citations and internal quotation marks omitted).

The Secretary's reading of her regulation is explicitly confirmed by the preamble to the regulation. In responding to a comment that the designation of representative should be filed with MSHA's national office rather than the District Manager's office so that the identity of the designating miners could be kept confidential, the preamble stated:

> The document evidencing the designation
> * * * does not necessarily have to list the

> names of the miners who are being represented. The signed document may simply state that the representative of miners does in fact represent two or more miners for a particular purpose. Where disputes arise, MSHA may require further evidence of representation.

43 Fed. Reg. 29508, 29509 (July 7, 1978). The preamble is entitled to special weight because it represents "'a contemporaneous construction of a statute [or regulation] by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1415 (10th Cir. 1984) (quoting Udall v. Tallman, 380 U.S. 1, 16 (1965)).[10]

Wolf Run suggests that the Secretary's interpretation is inconsistent with the Tenth Circuit's statement in Utah Power & Light Co., 897 F.2d at 455, that it is imperative that the miners and the operator "know who the miners' representatives

[10] Wolf Run's protestation that "the Preamble is not the law" (Br. at 16) (emphases in original), although true, is misplaced. "While language in the preamble of a regulation is not controlling over the language of the regulation itself, * * * the preamble to a regulation is evidence of an agency's contemporaneous understanding of its proposed rules." Wyoming Outdoor Council v. Forest Service, 165 F.3d 43, 53 (D.C. Cir. 1999) (citations omitted). See also Kerr-McGee, 40 F.3d at 1262; Thunder Basin, 56 F.3d at 1279. Furthermore, courts "accord particular deference to an agency interpretation of longstanding duration." Barnhart v. Walton, 535 U.S. 212, 220 (2002), cited in Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 7 (D.C. Cir. 2003) (Court gave weight to the fact that MSHA interpreted the provisions the same way for more than 25 years).

are and the scope of their authority." Br. at 17. The Secretary's interpretation is entirely consistent with the Tenth Circuit's statement because under it, as is true in this case, the miners and the operator know precisely who the miners' representative is and what statutory authority it has. The Tenth Circuit did not suggest that it is necessary for the operator to know the identity of the miners who designated the representative.

Wolf Run also argues that the Secretary's interpretation "bears no relation to reality" because, if Wolf Run retaliates against the miners who designated the UMWA, the miners are protected by the anti-discrimination provisions of Section 105(c) of the Mine Act, 30 U.S.C. § 815(c). Br. at 16-17. Congress itself, however, recognized that it is appropriate in some circumstances to provide assurances of confidentiality beyond the after-the-fact protections provided by Section 105(c). Thus, in Section 103(g) of the Act, 30 U.S.C. § 813(g), Congress provided that the identity of miners who request inspections must be kept confidential because, while other provisions "carefully protect miners who are discriminated against because they exercise their rights under the Act, the Committee feels that strict confidentiality of complainants under [Section 103(g)] is absolutely essential." S. Rep. No. 95-181, 95th Cong., 1st Sess. at 29 (1977), _reprinted in_

Subcommittee of Labor of the Senate Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 617. Inasmuch as Congress itself recognized that it is essential to preserve the confidentiality of miners who request inspections under Section 103(g), it is not unreasonable for the Secretary to interpret her regulation here as meaning that, in some circumstances, it is appropriate to preserve the confidentiality of miners who designate a representative under Section 103(f).

Finally, Wolf Run argues that the Secretary's interpretation is unreasonable because, absent "[f]ull disclosure," Wolf Run has "no assurance" that the UMWA is actually the designated representative of two or more miners. Br. at 18-19. As the preamble indicates, however, disputes regarding designation may be brought to MSHA's attention, and MSHA may then examine the evidence, and require further evidence, to make sure that the designation is valid. That process is precisely what took place here -- and the district court properly accepted that process as adequate to address Wolf Run's concerns. See J.A. 198, 203.[11]

[11] To the extent that Wolf Run may ever question whether at least two Sago miners continue to desire that the UMWA be their representative, it may request that MSHA revisit and resolve the matter at that time.

(b). The asserted conflict with the National Labor Relations Act and private property rights.

Wolf Run asserts that permitting the UMWA to act as a miners' representative at its non-union mine conflicts with the National Labor Relations Act's ("NLRA's") representation provisions and with its constitutional private property rights. Br. at 19-28. Wolf Run's NLRA argument has been squarely considered, and squarely rejected, by both the D.C. Circuit and the Tenth Circuit. Kerr-McGee Coal Corp. v. FMSHRC, 40 F.3d 1257 (D.C. Cir. 1994), cert. denied, 515 U.S. 1159 (1995); Thunder Basin Coal Co. v. FMSHRC, 56 F.3d 1275 (10th Cir. 1995). Wolf Run's constitutional argument completely ignores, and is inconsistent with, the Supreme Court's decision in Donovan v. Dewey, 452 U.S. 594 (1981).

In Kerr-McGee, the mine operator argued, as Wolf Run argues here, that unions and other third parties may not serve as miners' representatives unless a majority of miners have selected them as their collective bargaining agent under the NLRA. The operator asserted that permitting such representation also failed to take into consideration its rights as a private property owner. In finding that the Secretary properly recognized a minority of miners' designation of the UMWA as those miners' representative under the Mine Act, the

D.C. Circuit held that Section 103(f) of the Mine Act "contemplates non-employee third parties serving as 'miners' representatives.'" 40 F.3d at 1260.[12]

The Court emphasized that Section 103(f) of the Act requires only that a miners' representative be "authorized by [the operator's] miners" and that, by regulation, the Secretary has defined "miners' representative" to include "[a]ny person or organization which represents two or more miners * * * for the purposes of the Act." 40 F.3d at 1260, 1262 (quoting 30 C.F.R. § 40.1). The Court found that, by using the word "organization," the definition "appears to contemplate that labor unions may serve as miners' representatives." 40 F.3d at 1262. The Court found that nothing in the Mine Act or the legislative history suggests any limitation on the meaning of "miners' representative." 40 F.3d at 1262-63. Indeed, the Court found that the legislative history of the 1969 Coal Act,

[12] Wolf Run makes a leap of logic in asserting that, because "at least 92 out of 97 active miners" purportedly designated representatives other than the UMWA, such miners "opposed the union's presence." Br. 12. It does not follow from the fact that certain miners designated representatives other than the UMWA that they oppose the presence of the UMWA as the representative of other miners -- any more than it follows that the miners who designated the UMWA oppose the presence of non-UMWA representatives as other representatives of other miners. Moreover, to the extent that an individual miner designated himself as his own miner's representative (J.A. 55-60, 104-10), such designations are, on their face, ineffective (unless another miner also designated him) because 30 C.F.R. § 40.1(b)(1) requires that at least two miners designate a representative.

which was the predecessor to the 1977 Mine Act, "further confirms that Congress did not intend to bar non-elected organizations from acting as miners' representatives." 40 F.3d at 1253. The Court based that finding on the fact that the Conference Report accompanying the 1969 Act stated:

> [A]s used throughout the Act, the term "representative of the miners" includes any individual or organization that represents any group of miners at a given mine and does not require that the representative be a recognized representative under other labor laws.

40 F.3d at 1263 n.10 (citation to Conference Report omitted).

The Court found that, in the preamble to the Part 40 regulations, the Secretary expressly considered and rejected the notion that miners' representatives must be selected by a majority of miners. The Court accepted the Secretary's interpretation of "miners' representative" in the preamble as not "inconsistent with the regulations or plainly wrong." 40 F.3d at 1262 (citation omitted).

The Court also found that the Secretary's interpretation of "miners' representative" was consistent with Congress' objectives in enacting the Mine Act. The Court stated:

> As the Secretary points out, and as the Tenth Circuit observed in Utah Power & Light, third-party representatives can often contribute to an inspection in ways that miners themselves cannot. Non-employees may, for example, provide valuable safety and health expertise, use their knowledge

> of other mines to spot problems and suggest solutions, and take actions without the threat of pressure from the employer.

40 F.3d at 1263 (citing Utah Power & Light, 897 F.3d at 451-52).

The Court rejected the contention that the UMWA's motive was relevant to the validity of its designation by the miners as their representative, and held instead that "'[t]he solution is for the operator to take action against individual instances of abuse when it discovers them.'" 40 F.3d at 1264 (quoting Utah Power & Light, 897 F.2d at 452). More specifically, the Court held that the operator could bring evidence of abuse to the Secretary's attention and that, if she found actual abuse, the Secretary could cease requiring the operator to treat the UMWA's designation as valid. 40 F.3d at 1264 and n.12.

Finally, the Court rejected the argument that the non-union mine operator's property interests were unlawfully infringed upon by requiring it to recognize the UMWA as a miners' representative. The Court held that the Supreme Court's decision in Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992), which is also cited by Wolf Run (Br. at 25-26) in support of its argument here, did not support the operator's argument. The Court stated:

> [T]he Act specifies particular areas, all related to miner safety and health, in which Congress has deemed participation of miners' representatives appropriate. Because Congress, rather than the agency, has

> conducted the balancing [between miner safety and health and private property interests], the Lechmere standard is inapplicable.

40 F.3d at 1265.[13]

In Thunder Basin, as in Kerr-McGee, the mine operator argued that permitting the UMWA to represent miners at its non-union mine was an abuse of the Mine Act, in derogation of the NLRA, and a violation of its private property rights. The Tenth Circuit agreed with the reasoning of the D.C. Circuit in Kerr-McGee. 56 F.3d at 1278-79. The Court rejected the operator's "potential for abuse" argument, reiterating its

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[13] Lechmere involved a fundamentally different situation than that involved here. Lechmere involved a property owner's right to prohibit non-employee union organizers from coming onto its property and engaging in organizing activities as they saw fit. This case does not involve requiring the mine owner to give non-employees "'an uncontrolled access right to the mine property to engage in any activity that the miners' representative wants." Kerr-McGee, 40 F.3d at 1265 (quoting Thunder Basin, 510 U.S. at 216-17). Instead, it only involves requiring the mine owner to allow miners' representatives onto mine property, in the company of and under the control of government inspectors, to participate in government inspections.

Like Lechmere, Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975), which is also cited by Wolf Run (Br. at 21), is distinguishable from the situation presented here. In Emporium Capwell, the Supreme Court held that the protection of the NLRA did not extend to a non-majority group of employees who attempted, in derogation of the exclusive collective-bargaining agent's role under the NLRA, to bargain directly with the employer about alleged racial discrimination. The present situation is fundamentally different because, under the Mine Act, a miners' representative role is strictly limited to providing safety and health assistance and may not include any form of collective bargaining.

earlier holding that "'[t]he solution is for the operator to take action against individual instances of abuse when it discovers them.'" 56 F.3d at 1279 (quoting Utah Power & Light, 897 F.2d at 452). The Court stressed that the Supreme Court had endorsed that analysis in Thunder Basin Coal Co. v. Reich, 510 U.S. at 216-17 (holding that the operator was not entitled to pre-enforcement review) (aff'g Thunder Basin Coal Co. v. Martin, 969 F.2d 970 (10th Cir. 1992)). 56 F.3d at 1280. Accordingly, the Court held that the miners' representative's motive in accepting a miners' representative designation is irrelevant and that there is "no room for an operator to refuse to accept a properly designated miners' representative because of some perceived potential for 'per se abuse.'" Ibid.

The Tenth Circuit rejected the operator's Lechmere argument for the same reasons the D.C. Circuit rejected that argument. 56 F.3d at 1281. Finally, the Tenth Circuit rejected the operator's argument that MSHA violated its due process rights by issuing it a citation for failing to post the designation of miners' representative in violation of the Mine Act,[14] relying

[14] Neither Kerr-McGee nor Thunder Basin involved an emergency situation requiring injunctive relief, as in the instant case. Rather, in those cases, the operators simply challenged the UMWA's right to be a miners' representative for purposes of regular mine inspections, rather than an accident investigation. Accordingly, there was no need in those cases for the Secretary to seek injunctive relief and the issues were presented on appeal to the Commission from the issuance of citations under

primarily on the grounds that "the rights of a miners' representative do not include unimpeded access to mine property for any conceivable purpose" and that "'the potential for abuse of the miners' representative position appears limited.'" 56 F.3d at 1281 (quoting Thunder Basin, 510 U.S. at 216).

Wolf Run, relying on three arguments, claims that Kerr-McGee and Thunder Basin "were incorrectly decided and/or did not fully address all of the arguments which Wolf Run asserts in this appeal." Br. at 23-28. Wolf Run's arguments only underscore that the Secretary is likely to prevail on the merits of this issue.

First, Wolf Run argues that the D.C. Circuit's reliance in Kerr-McGee on the Conference Report statement quoted above was erroneous because the report was part of the legislative history of the Coal Act and not the legislative history of the Mine Act. Br. at 23-24. The Courts, however, have frequently relied on the legislative history of predecessor statutes in interpreting subsequent statutes. See, e.g., Examining Board of Engineers, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 590-91 (1976); John T. v. Delaware County Intermediate Unit, 318 F.3d 545, 556-58 (3d Cir. 2003); Weber v. Cranston School Committee, 212 F.3d 41, 52 (1st Cir. 2000); City of Bridgeton v. FAA,

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the Mine Act.

212 F.3d 448, 462-63 (8th Cir. 2000), cert. denied, 531 U.S. 1111 (2001). Such reliance is especially appropriate where, as here, the same language appeared in both statutes and there is no indication that Congress intended to change the language's meaning when it enacted the subsequent, successor statute.

Second, Wolf Run argues that the D.C. Circuit's reliance on legislative history in Kerr-McGee is called into question by the Supreme Court's decision in Exxon Mobil Corp. v. Allapattah Services, Inc., 125 S.Ct. 2611, 2626 (2205). Br. 23-24. Wolf Run's invocation of Exxon Mobil is unavailing. In Exxon Mobil, the Supreme Court observed that legislative history is vulnerable to two serious criticisms: (1) that it is often "murky, ambiguous, and contradictory," and (2) that it may give committee members, staffers, and lobbyists "the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." 125 S.Ct. at 2626. The Court found that both problems were present in that case. 125 S.Ct. at 2626-27. The Court declined, however, to find that the two problems are so prevalent as to render legislative history "inherently unreliable in all circumstances * * *." 125 S.Ct. at 2626.[15]

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[15] Since the decision in Exxon Mobil was issued, this Court has continued to consult legislative history when the language of a statute is unclear. See Black & Decker Corp. v. United States, 436 F.3d 431, 435-37 (4th Cir. 2006); United States v.

Neither problem is present in this case; on the contrary, the legislative history relied on in Kerr-McGee could hardly be clearer and is not at all at odds with the plain text of the statute it elucidates. In any event, the primary basis for the D.C. Circuit's conclusion in Kerr-McGee was the statutory text and not the legislative history. 40 F.3d at 1262-63.

Third, Wolf Run argues that requiring it to honor the UMWA's designation would violate its constitutional right as a property owner to exclude strangers from its property. Br. at 25-28. Wolf Run's argument ignores the Supreme Court's decision in Donovan v. Dewey, which held that Section 103(a) of the Mine Act, permitting MSHA inspectors to enter onto a mine owner's property without a warrant to conduct an inspection, does not violate the Fourth Amendment. Emphasizing that "the interest of the owner of commercial property is not one in being free from any inspections," and instead is only one "in being free of unreasonable intrusions * * * by agents of the government," the Court stated that warrantless searches of such property are constitutional "if Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property

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T.M., 413 F.3d 420, 426-27 (4th Cir. 2005).

cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes."

452 U.S. at 599-600 (emphasis added).

Analyzing the scheme of the Mine Act, the Court held that Section 103(a) is constitutional because "the Act is specifically tailored to address [mine safety and health] concerns, and the regulation of mines it imposes is sufficiently pervasive and defined that the owner of such a facility cannot help but be aware that he will be subject to effective inspection." 452 U.S. at 603 (footnote, internal quotation marks, and citation omitted). In addition, the Court stressed that the Act "provides a specific mechanism for accommodating any special privacy concerns that a specific mine operator might have" because, by refusing entry and triggering an injunction proceeding under Section 108(a) of the Act, an operator can obtain an adequate forum "to show that a specific search is outside the federal regulatory authority, or to seek from the district court an order accommodating any unusual privacy interests that the mineowner might have."

452 U.S. at 604-05.

The Supreme Court's analysis in Dewey is applicable here. If a mine owner's property rights are not violated by the entry of MSHA inspectors to conduct an inspection, they are not violated by the derivative right of entry that the Act bestows

on a designated miners' representative, who is entering along with the inspectors and is entering to participate in the inspection. In particular, the miners' representative's role, like the inspectors' role, is carefully tailored and clearly defined: the Act "specifies the level of intrusion on private property interests necessary to advance the safety objectives of the Act" and "specifies particular areas, all related to miner safety and health, in which Congress has deemed the participation of miners' representatives appropriate." Kerr-McGee, 40 F.3d at 1265.[16] The miners' representative is subject to the inspectors' on-site control, and if the miners' representative attempts to exceed his statutory role, the mine owner may ask the inspectors to take appropriate action.[17]

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[16] As explained in footnote 13, supra, Lechmere, which Wolf Run principally relies on to support this argument, is completely inapposite. The other cases cited by Wolf Run (Br. at 25) are Fifth Amendment takings cases. Inasmuch as a taking occurs "where governmental action results in a permanent physical occupation of the property, by the government itself or by others" (Nolan v. California Coastal Commission, 483 U.S. 825, 831 (1987) (internal quotation marks and citation omitted, emphasis added)), those cases are also inapplicable here.

[17] If confusion, disruption, and delay occur, MSHA inspectors have discretionary authority to deal with them in an appropriate manner. An MSHA Interpretive Bulletin issued in 1978 gives inspectors "[c]onsiderable discretion" to deal with confusion or delay by, inter alia, limiting the number of participating miners' representatives or requiring miners' representatives to reconcile their differences. 43 Fed. Reg. 17546 (April 25, 1978). "[T]he inspection itself always takes precedence[,]" and if such measures prove inadequate, the inspector is authorized to proceed with the inspection without a miners' representative.

Similarly, if the mine owner has specific evidence of miners' representative abuses or has special privacy concerns, it can obtain an adequate forum to present such evidence or concerns by triggering an injunction proceeding before a district court. Wolf Run had just such a forum before the district court here -- and presented no such evidence and no such concerns.

In light of the Supreme Court decision in Dewey disposing of Fourth Amendment objections to MSHA inspections, and of the D.C. Circuit's and the Tenth Circuit's persuasively reasoned decisions concerning the interplay of MSHA with the NLRA, which the district court carefully considered (J.A. 199-203), there can be little question that the Secretary has presented "fair ground for litigation" (Rum Creek, 926 F.2d 359) and is likely to prevail on the merits.

4. The public interest.

In enacting the Mine Act, Congress recognized "an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's * * * mines in order to prevent death and serious physical harm * * *." Section 2(c) of the Act, 30 U.S.C. § 801(c). In the legislative history of the Act, Congress recognized a strong public interest in allowing miners a major role in enforcement of the Act: "It is * * * apparent from the language [of the Senate Report] that

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Ibid.

miners' participation in inspections [was] considered by the committee to be [an] important tool[] in the effort to increase miners' awareness of the hazards they face and the measures they can take to achieve a safe and healthy working environment." UMWA v. FMSHRC, 671 F.2d 615, 625 (D.C. Cir.) (discussing the need to interpret miners' "walkaround rights" broadly), cert. denied, 459 U.S. 927 (1982).

If the UMWA's participation in the investigation into the explosion at the Sago Mine can assist the Secretary in determining why the tragedy occurred and how such tragedies can be prevented -- and the district court found that it can (J.A. 196-97) -- the public interest is best served by requiring Wolf Run to permit that participation to take place.[18] Whatever objections Wolf Run may harbor do not outweigh the public interest in ensuring that UMWA assistance and expertise, when requested by two or more designating miners, is available to the

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[18] Wolf Run's contention (Br. 28) that it is not in the public interest to recognize the UMWA as a miners' representative because "92 of 97 active Sago miners have expressly stated that they want to be represented by fellow Sago miners and not by the UMWA" is misplaced. First, even if factually true, see note 13, supra, these miners also did not designate Wolf Run to assert their interests in this litigation, and it is doubtful it has standing to do so here. Second, the experience and expertise that the UMWA brings to the role of miners' representative is independent of the number of miners who designated it. Moreover, it bears repeating that this role, as important as it is to the Mine Act's inspection and accident investigation scheme, is advisory only, and in no way involves collective bargaining.

Secretary in her efforts to improve safety and health both in the Sago Mine and in mines throughout the Nation. As the district court found, "there is no question that the public interest is best served by a complete and thorough investigation into the causes of the problems at the Sago Mine * * *." J.A. 203. See also J.A. 160, 179, 196.

CONCLUSION

For the foregoing reasons, the district court's issuance of a preliminary injunction should be affirmed.

STATEMENT WITH RESPECT TO ORAL ARGUMENT

The Secretary agrees with Wolf Run's suggestion that oral argument would be helpful in this case and notes that, by order dated March 28, 2006, the Court has scheduled oral argument for May 22, 2006.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
UNDER FED. R. APP. P. 32(A)(7)

I certify that this brief has been prepared using Courier New, twelve point, monospaced typeface in the Microsoft Word word processing system.

Exclusive of the table of contents, table of citations, statement with respect to oral argument, the certificate of service, and this certificate of compliance, the brief contains 9,014 words.

April 25, 2006

____
Jerald S. Feingold

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Brief for the Secretary of Labor were served by Fed Ex Overnight Delivery, this 25th day of April, 2006, on:

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Re: United States Dept. of Labor, et al. v. Wolf Run Mining Co., 4th Cir. No. 06-1129 (D.C. No. 2:06CV8)

Dear Ms. Connor:

Pursuant to the Court's order of February 22, 2006, enclosed for filing please find the original and seven copies of the Brief for the Secretary of Labor.

Thank you for your assistance.

Sincerely,

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Enclosures

cc (by OVERNIGHT DELIVERY):
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April 25, 2006 by FIRST CLASS MAIL

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P.O. Box 591
Wheeling, West Virginia 26003

Re: United States Dept. of Labor, et al. v. Wolf Run Mining Co., 4th Cir. No. 06-1129 (D.C. No. 2:06CV8)

Dear Betsy:

Enclosed please find a copy of the Brief for the Secretary of Labor filed in the Fourth Circuit.

Thank you for all your assistance.

Sincerely,

Jerald S. Feingold
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(202) 693-9335
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Enclosure