No. 16-73682

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COEUR ALASKA, INC.,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION and SECRETARY OF LABOR (MSHA),

Respondents.

On Petition for Review of a Decision of the Federal Mine Safety and Health Review Commission

Secretary of Labor's Response Brief

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JURISDICTIONAL STATEMENT

The Secretary of Labor ("Secretary") agrees with Coeur Alaska, Inc.'s ("Coeur's") jurisdictional statement.

STATEMENT OF THE ISSUES[1]

1. Whether substantial evidence supports the Administrative Law Judge's (judge's) findings that ground support is necessary in the cited areas of the Kensington mine.

2. Whether substantial evidence supports the judge's findings that Coeur violated 30 C.F.R. § 57.3360, and the negligence and "significant and substantial" findings associated with those violations.

3. Whether substantial evidence supports the judge's finding that Coeur violated 30 C.F.R. § 57.3200, and that the violations reflected high negligence.

4. Whether the judge's penalty assessments reflect consideration of the factors identified in Section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(i); whether substantial evidence supports the factual findings underlying those penalty assessments; and whether the amounts of the penalty assessments were within the judge's discretion.

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[1] Coeur's Statement of Issues identifies the standard of review it argues is proper for each issue. Coeur Br. at x. For the reasons explained below, the Secretary disagrees.

STATEMENT OF THE CASE

1. Statutory and regulatory background

A. MSHA's safety standards and citations

The Federal Mine Safety and Health Act of 1977 ("Mine Act"), Pub. L. No. 95-164 (1977), 30 U.S.C. § 801 *et seq.*, was enacted to improve safety and health in all of the Nation's mines in order to protect the mining industry's "most precious resource—the miner." 30 U.S.C. § 801(a). Congress stressed that "there is 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, and in order to prevent occupational diseases originating in such mines." *Id.* § 801(c). That sense of urgency was grounded in the history of "[f]requent and tragic mining disasters [that] testified to the ineffectiveness of then-existing enforcement measures." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 209–10 (1994).

Section 101(a) of the Mine Act authorizes the Secretary, acting through the Mine Safety and Health Administration ("MSHA"), to promulgate mandatory safety and health standards. 30 U.S.C. § 811(a). Section 103 authorizes MSHA inspectors to conduct inspections of

mines to ensure compliance with mandatory standards, and Section 104 requires inspectors to issue a citation or order if they believe a mine operator has violated a standard. *Id.* §§ 813(a), 814(a), 814(d).

If an inspector finds that a violation "is of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard" (*i.e.*, is "significant and substantial" or "S&S"), he must include that finding in the citation. 30 U.S.C. § 814(d). Violations that are designated S&S can lead to enhanced enforcement actions, including orders to withdraw from all or part of a mine. *Id.*; *see RAG Cumberland Res. LP v. FMSHRC*, 272 F.3d 590, 592–93 (D.C. Cir. 2001) (explaining the "d-chain" of "increasingly severe sanctions" that can be triggered by a Section 104(d)(1) citation). S&S violations can also lead to a determination that a mine has exhibited a "pattern of violations," which subjects mine operators to increased scrutiny and enforcement. 30 U.S.C. § 814(e); *Sec'y of Labor v. Brody Mining, LLC*, 37 FMSHRC 1914, 1923 (Sept. 2015).

A mine operator may contest any citation or order before the Federal Mine Safety and Health Review Commission ("the Commission"). 30 U.S.C. § 815(a). The Commission is an independent

adjudicatory agency established to provide trial-type administrative hearings and appellate review in cases arising under the Mine Act. *Id.* § 823; *Thunder Basin*, 510 U.S. at 204. Commission administrative law judges conduct initial hearings, and parties may seek discretionary review of adverse decisions from the Commission. 30 U.S.C. § 823. If the Commission does not grant review, judges' decisions become final Commission orders 40 days after they are issued. *Id.* § 823(d).

B. Civil penalties

Sections 105 and 110 of the Mine Act establish the Act's basic civil penalty scheme. 30 U.S.C. §§ 815, 820. Those sections establish substantive parameters to guide the assessment of civil penalties for violations of the Act and MSHA's mandatory safety and health standards, requiring all penalties to reflect consideration of six statutory factors:

> the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. §§ 815(b)(1)(B), 820(i).

The Secretary must propose a civil penalty for any order or citation issued under Section 104. 30 U.S.C. §§ 815(a), 820(a). That penalty takes into account the six factors listed above and may be based on "a summary review of the information available" rather than on specific "findings of fact" concerning those six factors. *Id.* § 820(i).

The Secretary's proposed penalties are governed by regulations codified at 30 C.F.R. Part 100. Part 100 provides for two types of penalties: regular formula assessments and special assessments. Regular assessments are calculated using penalty points assigned by a series of tables that correspond to the six statutory factors. *See* 30 C.F.R. § 100.3. Special assessments, which MSHA proposes when "conditions warrant" them, are authorized by 30 C.F.R. § 100.5. Special assessments are based on the six statutory factors and are provided in narrative form. *Id.* § 100.5(b).

A mine operator may contest the Secretary's proposed penalties before the Commission. 30 U.S.C. § 815(d). Commission judges are not bound by MSHA's Part 100 regulations; judges independently assess civil penalties based on the six statutory factors and the deterrent purpose civil penalties serve. *Mach Mining, LLC v. Sec'y of Labor*, 809

F.3d 1259, 1263–64 (D.C. Cir. 2016); *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151–52 (7th Cir. 1984); *Sec'y of Labor v. Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015). Within those boundaries, judges "are accorded broad discretion in assessing civil penalties under the Mine Act." *Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1086 (10th Cir. 1998) (citing *Sec'y of Labor v. Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1564 (Sept. 1996)); *Sec'y of Labor v. Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd*, 736 F.2d 1147 (a judge's "discretion is bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme").

C. The regulatory background of 30 C.F.R. §§ 57.3200 and 57.3360

This case involves two MSHA safety standards designed to ensure that rock will not fall on and injure or kill miners in underground metal and nonmetal mines. Those standards provide critical protections for miners because ground falls[2] are one of the leading causes of injury and death in mines. *Safety Standards for Ground Control at Metal and*

[2] "Ground falls" is another term for "roof falls." *See* 51 Fed. Reg. at 36,192.

Nonmetal Mines, 51 Fed. Reg. 36,192, 36,192 (Oct. 8, 1986) ("Fall of ground has historically been a leading cause of injuries and deaths in metal and nonmetal mines. From 1978 through 1984 . . . 66 [fatalities], or approximately 10% were caused by falls of roof, face, rib, side, or highwall."); *see also* MSHA, *Fatality Prevention – Rules to Live By*, https://arlweb.msha.gov/focuson/RulestoLiveBy/Reports/priority24.asp (last visited Mar. 24, 2017) (violations of 30 C.F.R. § 57.3360 caused or contributed to nine fatalities between 2000 and 2008).

The first standard, Section 57.3200, requires mine operators to correct hazardous ground conditions and prevent entry to hazardous areas until those conditions are corrected. 30 C.F.R. § 57.3200.

The second standard, Section 57.3360, requires mine operators to install ground support when it is necessary, and to maintain the ground support system so that it can effectively control the ground (*i.e.*, prevent rock falls) in areas where miners work and travel. 30 C.F.R. § 57.3360. Ground control "is made uniquely difficult because of the variety of conditions encountered and the changing nature of the forces affecting ground stability at any given operation," 51 Fed. Reg. at 36,192, so Section 57.3360 does not specify what ground support system must be

used in any particular mine. Instead, it allows the operator to design and implement its own ground support system and requires that whatever system is used must be adequate to control the ground. *Id.* at 36,195; *ASARCO Mining Co. v. Sec'y of Labor*, 15 FMSHRC 1303, 1309 (July 1993) ("The only question before [a reviewing court] is whether the particular conditions of the cited area required roof support, not which type of roof support.") (quoting *Sec'y of Labor v. White Pine Copper Div., Copper Range Co.*, 5 FMSHRC 825, 835 n.19 (May 1983)).

2. The facts

Coeur operates the Kensington Mine, an underground gold mine located about 40 miles north of Juneau, Alaska. I Coeur Excerpts of Record ("CER") 1. The mine is large: it has approximately 15 miles of underground roadways and many underground levels, employs 320 people, and operates around the clock. II CER 228; III CER 274.

In July and December 2014, two MSHA inspectors, Robert Dreyer and Thomas Rasmussen, visited the mine and conducted inspections to determine whether Coeur was complying with the Mine Act and with MSHA's mandatory safety and health standards. I CER 3. Both inspections revealed severe and pervasive damage to the wire mesh

installed to keep loose rocks from falling down and striking, crushing, or killing miners. *See generally* I CER.

Inspector Dreyer's July inspection resulted in five citations alleging that Coeur violated Section 57.3360 by failing to maintain its ground support; Inspector Rasmussen's December inspection resulted in two citations alleging that Coeur violated Section 57.3360 by failing to maintain its ground support, and two citations alleging that Coeur violated Section 57.3200 by failing to take down or support dangerous conditions or barricade the area. *Id.*[3]

A. The July 2014 inspection

On July 17, 2014, Inspector Dreyer began an inspection of the Kensington Mine. II CER 162. He inspected a travelway that miners use, both on foot and in vehicles, to enter and leave the mine. *Id.* at 173. Wire mesh—five-foot-by-ten-foot sheets made up of four-inch squares, *see, e.g.*, Secretary's Excerpts of Record ("SER") 1—and roof bolts[4] were

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[3] MSHA Inspector James Stembridge also inspected the mine in December 2014 and issued one citation. I CER 3. The judge vacated it, and it is not at issue on appeal. *Id.* at 18–19.

[4] A roof bolt is "a long steel bolt inserted into walls or roof of underground excavations to strengthen the pinning of rock strata. It is inserted in a drilled hole and anchored by means of a mechanical

installed on the roof (top) and ribs (sides) in those areas. II CER 164–65. The mesh was keeping loose rock from falling down and striking miners in the area. *Id.*

Inspector Dreyer noticed that the wire mesh was torn or damaged in five tunnels that intersected the travelway. II CER 165–72; *see* SER 1–7. He was concerned about the damage because loose rock could fall through the mesh and strike miners underneath it. II CER 165. In one intersection, an 18-by-18-by-6-or-8-inch rock that weighed more than 100 pounds was resting right beside a hole in the mesh. II CER 165–66, 174; *see* SER 2. In another, loose rock was exerting so much stress on the mesh that it was causing the mesh to bulge out and tear. II CER 168–69; *see* SER 3. Loose rock was lying near holes or behind damaged wire in virtually all of the locations the inspection party visited. II CER 165–72; *see* SER 1–7. Inspector Dreyer was particularly concerned about those hazards because the travelway where they were located was the only way for miners to enter and leave that part of the mine, so

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expansion shell that grips the surrounding rock at about 4 ft (1 m) spacing and pins steel beams to the roof." American Geological Inst., *Dictionary of Mining, Mineral, and Related Terms* 469 (2d ed. 1996) ("*DMMRT*").

the miners had "no option to get out of [that] area without re-exposing themselves to this same hazard again." *Id.* at 169.

Inspector Dreyer issued Citation No. 8611872, alleging that Coeur violated Section 57.3360 because it failed to maintain the wire mesh installed as part of its ground support system. II CER 56. He designated the violation as S&S because miners were working in the area and would use the travelway to enter and leave the mine, so they would be exposed to any rock that fell. *Id.* at 166–67. He also reasoned that, during continued mining operations,[5] loose rock could be dislodged by blasts, vibrations caused by vehicular traffic or loading material, or machinery striking the roof or ribs; and that loose rock could fall through holes or other damage in the mesh and land on miners, injuring, disabling, or killing them. *Id.* at 167, 169.

Inspector Dreyer also designated the violation as reflecting "high negligence." *See* II CER 56. He reasoned that the damaged mesh was so obvious and extensive that Coeur should have known about it, that

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[5] Whether a violation is S&S depends not just on the condition that existed when the citation was issued, but also on assuming "continued normal mining operations." *Sec'y of Labor v. U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

Coeur's failure to notice or correct the hazard demonstrated that its workplace examinations were inadequate, and that the large amount of loose rock and rusted wire showed that the hazard existed for multiple shifts. *Id.* at 167, 174–75, 197. Inspector Dreyer saw no evidence of rehabilitation work, and Coeur's representative admitted that the mesh's condition was "bad" without offering any explanation, so Inspector Dreyer concluded that there were no mitigating circumstances to justify a lower level of negligence. *Id.* at 175.

For the penalty, Inspector Dreyer recommended that MSHA propose a special assessment, rather than a regular penalty calculated under the formula at 30 C.F.R. § 100.3. II CER 175. He made that recommendation because of the obviousness and extensiveness of the hazard, because the violation was S&S and reflected high negligence, and because Section 57.3360 is one of MSHA's Rules to Live By (standards addressing hazards that frequently cause or contribute to fatalities).[6] *Id.*

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[6] MSHA's Rules to Live By are "24 frequently-cited standards . . . that cause or contribute to fatal accidents in the mining industry in 9 accident categories," including ground falls. MSHA, *Fatality Prevention – Rules to Live By*,

The next day, July 18, 2014, Inspector Dreyer continued his inspection in a second travelway, where bolts and mesh were also installed. II CER 178–80. The mesh in that area was also damaged, and one of the roof bolt plates was not properly flush against the rock, which indicated that rock had fallen from behind the plate. *Id.* at 180–82, 186–88; SER 8–10. Inspector Dreyer saw loose, flaking rock behind the mesh and, in one place, saw a pile of rock on the ground beneath the loose rock. II CER 179–80; SER 12. He saw bar marks suggesting that someone had noticed the hazard, but had not completed the process of barring down[7] the dangerous rock. II CER 179. In a nearby intersection, loose rock was also resting on and stressing the mesh, causing it to bulge out. *Id.* at 186; SER 11.

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https://arlweb.msha.gov/focuson/RulestoLiveBy/RulestoLiveByI.asp (last visited Mar. 24, 2017). MSHA inspectors automatically evaluate violations of Rules to Live By standards for potential special assessments, but whether a special assessment is ultimately proposed depends on several factors, including the operator's negligence, whether the violation is S&S, and the obviousness and extensiveness of the hazard. *See* II CER 175, 267.

[7] "Barring down" is "prying off loose rock after blasting to prevent danger of fall." *DMMRT* 40.

Inspector Dreyer issued two citations alleging violations of Section 57.3360. II CER 58, 60. He designated one violation, Citation No. 8611874, as S&S because rock was reasonably likely to fall and strike miners traveling or staging vehicles in the area. *Id.* at 184–85. He also designated that violation as reflecting "high negligence" because the hazard was obvious and extensive, suggesting that damaged wire was an "accepted practice" in the mine, and because the bar marks showed that Coeur noticed but did not correct the hazard of loose rock. *Id.* Because the violation involved a Rules to Live By standard, because it involved three areas that could each have resulted in a citation, and because the hazard was extensive and obvious, MSHA proposed a special assessment. *See id.* at 48–49.

Inspector Dreyer designated the second violation, citation No. 8611875, as non-S&S because the openings in the mesh were small, so that loose rock was unlikely to fall through, and because the pieces of loose rock behind the mesh were small and would result in less serious injuries if they did fall on miners. II CER 188. He designated the violation as reflecting "high negligence" because the hazard was extensive and obvious and because Coeur identified no mitigating

factors. *Id.* at 189. He also recommended a special assessment. *Id.*; *see also id.* at 48–49.

Finally, on July 19, 2014, Inspector Dreyer continued his inspection in another part of the mine. In a busy travelway near the primary escapeway—the main route miners would use to escape the mine in an emergency—he saw large, loose rocks, including one that was 12-inches-by-16-inches, behind torn and bent wire mesh. II CER 193–94; *see* SER 13. Some of the rock was already protruding past the mesh. II CER 194. In a nearby area, Inspector Dreyer saw still more damaged, rusted mesh with large, loose rocks behind it. *Id.* at 198–201. One rock was 25-by-15-by-10 inches; another was 17-by-29-by-7 inches and likely weighed hundreds of pounds. *Id.* at 199. When the inspection party barred down the loose rock (which, by this point, it was routinely doing to ensure everyone's safety), it came down relatively easily. *Id.* at 201.

Inspector Dreyer issued two more citations alleging violations of Section 57.3360. II CER 109, 62. He designated both violations, Citations Nos. 8611879 and 8611880, as S&S and reflecting high negligence. *Id.* Miners worked and traveled in both areas, and loose

rock—including large, heavy rocks—could fall through the damaged mesh and injure, disable, or kill them. *Id.* at 195–97. The inspector explained that the hazards were obvious and extensive and had likely existed for quite some time, and that they showed "consistent ground support maintenance issues" that Coeur should have recognized and corrected. II CER 197, 202. MSHA proposed special assessments for both violations. *Id.* at 102–03, 50.

B. The December 2014 inspection

On December 3–5, 2014, Inspector Thomas Rasmussen conducted another inspection of the mine. That inspection revealed the same pervasive ground support problems that Inspector Dreyer cited in July.

In one travelway, Inspector Rasmussen saw loose rock near a hole, approximately 12 inches wide by 36 inches long, in the wire mesh. II CER 237; *see* SER 14. He also saw loose material on the rib only 15 feet from the hole. II CER 237. In response, he issued Citation No. 8786150, alleging a violation of Section 57.3360. *Id.* at 83. He designated the violation as non-S&S, and the result of moderate negligence, because the loose rocks were small and would not result in serious injuries if

they fell, and because there was evidence of some rehabilitation work in the area. II CER 239.

That same day, in a different travelway, Inspector Rasmussen saw large, loose rocks on the rib beneath the bottom edge of the wire mesh, about four to six feet about the ground. II CER 240–41. The loose rocks were barred down with "minimal effort," which indicated that the rocks would likely have fallen down on their own during normal mining. *Id.* at 241. There were no barricades to prevent miners from entering the area or signs warning them to stay out, and miners were working in the area. *Id.* As a result, Inspector Rasmussen issued Citation No. 8786152, alleging a violation of Section 57.3200. *Id.* at 84. He designated the violation as S&S, and the result of moderate negligence, because it was the first day of his inspection and he wanted to "give [Coeur] the benefit of the doubt" about its assertion that its rehabilitation program was effective and in use. *Id.* at 243.

In another part of the mine, Inspector Rasmussen noticed the same hazard: large, loose rocks, approximately 8-by-8-by-8 inches, near the bottom of the mesh. II CER 244. Those rocks were detached from the main rock and were easily barred down. *Id.* There were no

barricades or warning signs in the area. *Id.* Inspector Rasmussen issued Citation No. 8786153, alleging that Coeur violated Section 57.3200. *Id.* at 86. He designated the violation as S&S because it was located in a travelway that miners frequently used, and because the rock would likely cause serious injuries if it struck a miner. II CER 244–47. He also designated it as reflecting moderate negligence because he wanted to give Coeur the benefit of the doubt. *Id.* at 247.

On December 5, 2014, Inspector Rasmussen saw damaged mesh in another travelway. II CER 248. He saw loose rock behind holes as large as 24 inches by 24 inches and, in one location, mesh ripped completely away from the rock, with bent bolts and missing bolt plates. *Id.* at 248–51; *see* SER 15–17. The loose material was easily barred down. II CER 252. In response, Inspector Rasmussen issued Citation No. 8786162, alleging a violation of Section 57.3360. *Id.* at 133. He designated the violation as S&S because the loose rock could fall through the damaged wire and strike miners. *See id.* at 252–57. He also designated the violation as reflecting high negligence because the hazard was obvious and extensive, and had existed for more than one shift, so that Coeur should have recognized and corrected it. *Id.* at 256. He also reasoned

that the July inspection put Coeur on notice that it needed to make additional efforts to maintain its ground support. *Id.* Because of the severity of the violation, Inspector Rasmussen recommended a special assessment. *Id.* at 257.

3. Proceedings before the Commission

Coeur timely contested the citations, and a Commission Administrative Law Judge held a hearing on November 3–5, 2015. I CER 2. On September 20, 2016, the judge issued a decision affirming the nine citations at issue in this appeal. *Id.* at 2–28. The judge largely affirmed the citations as written. *See* I CER 27.

The judge found that ground support is necessary in the mine, and that the wire mesh was installed as part of the ground support system. *See, e.g.*, I CER 7 ("Ground support is necessary in the 480 North travelway. . . . The evidence also shows that the wire mesh was designed, installed, and maintained to support the ground because it reduced the need to scale"), 15, 25.

The judge also found that Coeur violated Section 57.3360 by failing to maintain the wire mesh. I CER 7–8, 10, 12, 14, 16, 18, 24. He found that the mesh in the cited areas of the mine was torn, rusted,

broken, or damaged. *See generally id.* The judge also found that five of the seven violations were S&S because Coeur's failure to maintain the mesh contributed to the hazard that loose rock would fall and seriously injure or kill miners underneath it. *Id.* at 7–8, 11, 14–15, 16–17, 25. (The other two citations, Nos. 8786150 and 8611875, were designated as non-S&S before the hearing. II CER 83, 60.)

The judge found that five of the seven violations were the result of Coeur's high negligence, reasoning that the hazards were extensive and obvious, that there was evidence that someone began to remove loose material but did not complete the job, and that Coeur did not present any evidence of valid mitigating circumstances. I CER 9–10, 12, 14, 18, 26. Specifically, the judge rejected Coeur's argument that its rehabilitation program was a mitigating factor because that program was ineffective, and he rejected Coeur's argument that management did not know about the violations because actual knowledge of a violation is not required for a violation to reflect high negligence. *Id.* at 10.

The judge also found that Coeur violated Section 57.3200 by failing to post warning signs around or barricade areas where hazardous ground conditions were present. I CER 21, 23. The judge

found that both violations reflected high negligence. *Id.* at 21–24. The judge again rejected Coeur's rehabilitation program as ineffective, and he found that the violations were obvious and should have been detected. *Id.* at 22, 24.

The judge concluded by describing Coeur's conduct as evincing "a systematic disregard for the condition of wire mesh in the Kensington Mine." I CER 27.

On October 19, 2016, Coeur filed a petition for discretionary review with the Commission. III CER 468–519. On October 27, 2016, the Commission declined to grant review, *id.* at 520–21, and the judge's decision then became a final Commission order on October 30, 2016. *See* 30 U.S.C. § 823(d).

SUMMARY OF ARGUMENT

Substantial evidence supports all of the judge's findings in this case. The Secretary presented abundant evidence establishing that ground support is necessary to keep rock from falling and striking miners in the Kensington mine, and that wire mesh is an integral and necessary part of that ground support system. Coeur's argument that the wire mesh only reduces the need for scaling misstates the record,

ignores the great weight of the evidence, and ignores the reality of how ground support systems must be installed and maintained to be effective.

The Secretary also presented ample evidence establishing that Coeur violated Sections 57.3360 and 57.3200, and that most of those violations were S&S and reflected high negligence. Coeur's challenge to the negligence designations misunderstands the law, and its challenge to the S&S designations is cursory and unpersuasive. Similarly, ample evidence supports the facts underlying the judge's penalty assessments, and the amount of the penalty assessments was within the judge's discretion.

Finally, the Court only has jurisdiction to review the judge's decision, not to review the Commission's decision declining to grant review of the judge's decision. The Mine Act does not contain any provision authorizing the Court to review such Commission decisions, and there is no "public policy" exception to that lack of statutory authority.

ARGUMENT

1. Substantial evidence supports the judge's finding that ground support is necessary in the mine.

A. The Court reviews the judge's finding that ground support is necessary for substantial evidence.

Coeur states that the Court reviews de novo the judge's finding that ground support is necessary in the mine. Coeur Br. at x. That statement appears to be based on Coeur's argument that the judge misinterpreted the word "necessary." *See id.* at 12–14. But this case is not a dispute about what "necessary" means; it is a dispute about whether the record contains evidence to support the finding that ground support was necessary in the mine. That is a factual, not a legal, question—and that is why appellate tribunals have reviewed findings that ground support is necessary for substantial evidence. *See ASARCO*, 15 FMSHRC at 1303–08; *White Pine*, 5 FMSHRC at 833–35;[8]

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[8] *White Pine* involved 30 C.F.R. § 57.3–20, which was the predecessor standard to Section 57.3360 and which used similar language. *See* 30 C.F.R. § 57.3–20 (1985) ("Ground support shall be used if the operating experience of the mine, or any particular area of the mine, indicates that it is required.").

Eastern Ridge Lime, L.P. v. FMSHRC, 141 F.3d 1158 (4th Cir. 1998) (table), 1998 WL 169213, at *3.

The Court reviews the judge's factual findings, including the finding that ground support is necessary, to determine whether they are supported by substantial evidence. 30 U.S.C. § 816(a)(1); *Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983). "The substantial evidence test for upholding factual findings is extremely deferential to the factfinder." *Peabody Coal Co. v. Dir., Office of Workers' Comp. Programs*, 746 F.3d 1119, 1127 (9th Cir. 2014) (quotation omitted). Under that deferential standard, the Court "must uphold the factfinder's determinations if the record contains such relevant evidence as reasonable minds might accept as adequate to support a conclusion, even if it is possible to draw different conclusions from the evidence." *R. Williams Const. Co. v. OSHRC*, 464 F.3d 1060, 1063 (9th Cir. 2006) (quotation omitted).

Credibility determinations, in particular, "are within the ALJ's province" and are given "great weight." *Todd Pac. Shipyards Corp. v. Dir., Office of Workers' Comp. Programs*, 913 F.2d 1426, 1432 (9th Cir. 1990); *Johnson v. Dir., Office of Workers Comp. Programs*, 911 F.2d 247,

251 (9th Cir. 1990) ("As a general rule, we will not disturb an ALJ's assessment of a witness' credibility."). That is true even if a judge makes an implicit, rather than an explicit, finding, as by adopting one version of events over another. *Andrzejewski v. FAA*, 563 F.3d 796, 799 (9th Cir. 2009) (an ALJ's "implicit credibility determination" deserves deference).

In addition to these general principles of substantial evidence review, a principle specific to Section 57.3360 should inform the Court's review. The Commission has held that, in the context of that standard, "[t]estimony by . . . MSHA inspectors that ground conditions were unsafe *constitutes substantial evidence* where the judge determines . . . that their testimony is reliable." *ASARCO*, 15 FMSHRC at 1307 (emphasis added). This Court should give the same weight to the inspectors' testimony.

B. Substantial evidence supports the judge's findings that ground support is necessary in the mine.

First, it is important to clarify the main issue on appeal. Coeur states that the question is whether wire mesh is necessary ground support. *See, e.g.*, Coeur Br. at x, 16–27. But the question is not whether

wire mesh is necessary; it is whether *ground support*, in general, is necessary. *ASARCO*, 15 FMSHRC at 1309 ("The only question before [a reviewing court] is whether the particular conditions of the cited area required roof support, not which type of roof support.") (quoting *White Pine*, 5 FMSHRC at 835 n.19). If ground support is necessary, then the standard requires that "the [ground] support system shall be . . . maintained to control the ground in places where persons work or travel." 30 C.F.R. § 57.3360. Therefore, if ground support is necessary, and the wire mesh is used as part of the mine's ground support system, Coeur is required to adequately maintain that mesh to prevent rock falls. *Id.*; *see* 51 Fed. Reg. at 36,195 ("The standard does not specify the type of ground support system to be used, only that it control the ground.").

The hazardous condition described in the first citation Inspector Dreyer issued also emphasizes that point. *See* II CER 56 ("Based on ground conditions and experience in similar ground *the support system was designed and installed with the inclusion of wire.* Failure to maintain *this essential component of the support system* . . . would be expected to result in serious injury.") (emphasis added). So does the

judge's reasoning: the judge found that ground support is necessary in the mine, and that the wire mesh was installed as part of the ground support system. *See, e.g.*, I CER 7 ("Ground support is necessary in the 480 North travelway. . . . The evidence *also* shows that the wire mesh was designed, installed, and maintained to support the ground because it reduced the need to scale.") (emphasis added), 15 ("As in the previous violations, ground support was necessary to ensure that loose material did not become a hazard *and* the wire mesh was installed to reduce scaling *and support the ground*.") (emphasis added).

Substantial evidence supports the judge's finding that ground support is necessary in the mine. Alternatively, if the Court concludes that the issue is whether wire mesh is necessary ground support, substantial evidence supports that finding, too.

To determine whether ground support is necessary, "all relevant factors and circumstances must be taken into account . . . [including] [v]isible fractures, sloughed material,[9] 'popping' and 'snapping' sounds in the ground, the presence, if any, of roof support, and the operating

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[9] "Sloughing" refers to "minor face and rib falls." *DMMRT* 515.

experience of the mine or any of its particular areas . . . ." *Sec'y of Labor v. Amax Chemical Corp.*, 8 FMSHRC 1146, 1149 (Aug. 1986) (citing *White Pine*, 5 FMSHRC at 833–37);[10] *White Pine*, 5 FMSHRC at 838 ("This determination takes into account the operating history of the mine (i.e., its past mining practice)[,] geological conditions, scientific test or monitoring data and any other relevant facts tending to show the condition of the mine roof in question and whether in light of those factors roof support is required in order to protect the miners from a potential roof fall.").

Inspectors Dreyer and Rasmussen testified extensively about why they concluded that ground support was necessary, and that wire mesh was used as ground support. Inspector Dreyer testified that the wire mesh was installed to keep loose rock from falling down. II CER 164 ("And the purpose, the intent of having [wire mesh] there is to protect

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[10] *Amax* involved 30 C.F.R. § 57.3–22 (1984), a standard that required "loose ground" to be "taken down or adequately supported." The factors the Commission identified in *Amax* are relevant to determining not just whether ground is loose but also whether ground support is necessary. As a practical matter, both questions aim to prevent the same hazard (rock falls). The *Amax* Commission also cited *White Pine*, which concerned the necessity of ground support, for its discussion of the relevant factors, demonstrating the relatedness of the issues.

individuals traveling in that area from falling material. That immediate face, or the immediate ribs, or the immediate roof can oftentimes gravel [sic] come loose or separated. . . . The mesh is just to keep that—that immediate falling hazard under control."), 165 ("the wire in areas where it was intact [was] serving the purpose of holding the material up, holding this fractured, this lodged unconsolidated material . . . It was evident that the wire mesh was a necessary component of that ground support."), 181, 203, 215. Inspector Rasmussen testified similarly. *Id.* at 236, 251–52, 259, 265.[11]

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[11] Coeur asserts that the sole basis for the inspectors' conclusion that the wire mesh was used as ground support was that the mine had installed it. *See* Coeur Br. at 22–23. That assertion mischaracterizes the record. The presence of the mesh was just one reason the inspectors concluded that ground support was necessary. *See* II CER 165 ("*In addition to it having been installed*, and deemed necessary at some point by somebody who had mined that area, it was apparent . . . that the wire in areas where it was intact [was] serving the purpose of holding the material up") (emphasis added), 236 ("They installed it, so I considered it necessary that they maintain it. *And given the amount of loose rocks that I observed caught in the wire, I believed it was necessary*") (emphasis added), 265 ("Q: Is there any other reason[] you believe that wire mesh is necessary? A: They put it up there to control the loose rocks that ravel off of the host rock. So they install to control the ground from falling, to control rocks from falling down."). And at any rate, "the presence, if any, of roof support" is relevant to determining whether it is necessary, *Amax*, 8 FMSHRC at 1149, so the inspectors properly considered the fact that Coeur had installed it.

The photographs Inspectors Dreyer and Rasmussen took during their inspections corroborate their testimony and show loose rock held up by wire mesh in various locations in the mine. *See* SER 1–17.

Testimony by Coeur's witnesses also supports the judge's finding that ground support, including wire mesh, is necessary. Mine captain Justin Wilbur testified repeatedly that the wire mesh held up loose material. III CER 281, 282, 286, 287. So did Thomas Herndon, the mine's senior safety coordinator, *id.* at 290, 291, 297, and underground trainer Eddie Petrie, *id.* at 318, 323. Even Coeur's expert witness, Radford Langston, agreed that wire mesh can be used for ground support. *Id.* at 309, 311. He also conceded that the mine's ground control manual includes wire mesh in its list of ground support fixtures and requires mesh to be installed "as needed," which means "necessary." *Id.* at 312. And he conceded that the wire mesh keeps rock "from falling from [] the back to the ground, yes." *Id.* at 315.

Even the mine's own ground control manual, *see* III CER 367–448, repeatedly states that wire mesh is used as ground support in the mine. III CER 398–99 ("Ground Support Components . . . Support consists of two components, rock reinforcement which are [sic] the bolts and

surface support which are [sic] the plates, mats, *and mesh*.") (emphasis added); *id.* at 415, 422 ("Ground Support Fixtures . . . Mesh * 4" square opening, 6 gauge (0.2" thick) strand mild steel welded wire fabric. * Pinned tight to the rock with friction bolts."); *id.* at 403, 406 ("Good Ground Support Practice . . . * Place surface support [*i.e.*, wire mesh] across rock structure and irregularities."). The manual's illustrations also show, over and over, that wire mesh and roof bolts are used together as parts of the mine's ground support system. *Id.* at 372, 379, 393, 394, 397, 402, 405, 409, 413, 421, 423, 425, 428, 432, 436, 438, 440, 445.

In addition, the manual emphasizes that both bolts and mesh are part of the ground support system, and that each is necessary for the system to support the ground. III CER 399 ("Rock reinforcement [bolts] and surface support [plates, mats, and mesh] must function together as an integrated system. Without one, the other cannot function effectively."), 408 ("Make sure that all support components link together to form an integral system.").[12]

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[12] Coeur asserts that it "follows [the manual] diligently." Coeur Br. at 34. That assertion is difficult to square with Coeur's argument that wire

Finally, the manual instructs miners to install wire mesh "as needed." III CER 427, 429, 435. "Needed" means "necessary." *See* Webster's Third New International Dictionary 1512 (defining "need" as "to be necessary"). The wire mesh is indisputably installed in the mine. *See generally* II–III CER. Thus, the fair conclusion is that the wire mesh is "needed," *i.e.*, "necessary."

Coeur's witnesses did testify that the wire mesh was not used as ground support. *See* III CER 277–337. But that testimony does not justify vacating the judge's decision: the Court "must uphold the factfinder's determinations if the record contains such relevant evidence as reasonable minds might accept as adequate to support a conclusion, *even if it is possible to draw different conclusions from the evidence*." *R. Williams Const. Co.*, 464 F.3d at 1063 (quotation omitted) (emphasis added). That is particularly true where, as here, the judge made implicit credibility findings by accepting the MSHA inspectors' testimony and rejecting the conflicting testimony of Coeur's witnesses.

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mesh is not ground support, and with its (incredible) argument at trial that neither wire mesh *nor roof bolts* are necessary ground support, *see* II CER 270, even though the manual says both bolts and mesh are.

Todd Pac. Shipyards Corp., 913 F.2d at 1432; *Andrzejewski*, 563 F.3d at 799.

Nor does the testimony of Coeur's expert witness justify vacating the judge's decision. Mr. Langston testified generally that wire mesh was not ground support, and that ground support was not necessary *at all* in the mine, except in two areas. III CER 304–5, 309. The judge properly declined to credit that testimony: most tellingly, Mr. Langston's testimony directly contradicted the ground control manual, which he himself wrote—a discrepancy he did not explain. *See id.* at 312.

Coeur also suggests that the Secretary was required to present expert testimony, in addition to the inspectors' testimony about what they saw in the mine, to prove that ground support was necessary. Coeur Br. at 21. But Coeur does not cite any authority for that proposition, and the Commission has never held that expert testimony is required. *See White Pine*, 5 FMSHRC at 834–35 (discussing, but not requiring, expert testimony); *Amax*, 8 FMSHRC at 1149–50 (affirming judge's finding that ground was loose without requiring expert testimony). In fact, Coeur's suggestion contradicts what the

Commission *has* held, which is that MSHA inspectors' testimony is sufficient to support a conclusion that ground support is necessary. *ASARCO*, 15 FMSHRC at 1307 ("Testimony by . . . MSHA inspectors that ground conditions were unsafe constitutes substantial evidence where the judge determines . . . that their testimony is reliable.").[13]

Finally, the Court should reject Coeur's purported analogy between ground support and "trousers." *See* Coeur Br. at 18–19. The comparison is inapt for many reasons, not the least of which is that holding up a mine roof is considerably more complicated than holding up a pair of pants. The comparison is also cavalier and callous: when pants fall down, the result is embarrassment—but when rocks fall down, the results are fatalities.

C. Substantial evidence supports the judge's finding that the wire mesh did not just reduce the need for scaling.

Coeur argues that the judge found that wire mesh is ground support "solely because it reduces the need for scaling." *See* Coeur Br. at

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[13] Coeur's attacks on the inspectors' experience, *see* Coeur Br. at 21, are baseless. Both inspectors received extensive training and had extensive experience. *See* II CER 160–61, 234–35. Moreover, the judge credited their testimony, and the Court should not set those credibility determinations aside. *Todd Pac. Shipyards Corp.*, 913 F.2d at 1432.

14–19. That argument mischaracterizes the judge's decision. In reality, the judge found that ground support is necessary in the mine *and* that the wire mesh reduces the need for scaling. *See, e.g.*, I CER 7 ("Ground support is necessary in the 480 North travelway. . . . The evidence *also* shows that the wire mesh was designed, installed, and maintained to support the ground because it reduced the need to scale") (emphasis added), 15 ("As in the previous violations, ground support was necessary to ensure that loose material did not become a hazard *and* the wire mesh was installed to reduce scaling *and support the ground*.") (emphasis added), 25 ("For the reasons already discussed, I hold that ground support was necessary throughout the Kensington mine *and* that the wire mesh was installed to reduce scaling *and support the ground*.") (emphasis added). Coeur's selective quotation of the judge's decision takes those statements out of context; it is clear from reading the decision, as a whole, that the judge found that ground support was required not just because it reduced the need for scaling, but because it was necessary. *See generally* I CER.

Coeur's argument that the wire mesh is not ground support, but is merely "convenient" because it "reduced the need for scaling," is

unpersuasive. *See* Coeur Br. at 14–19. Scaling is not a substitute for ground control; it is a process that is integral to effective ground control. *See DMMRT* 481 ("Scaling" is the process of removing "loose, thin fragments of rock, threatening to break or fall from the roof or wall of a mine."); *Pattison Sand Co., LLC, v. Sec'y of Labor*, 33 FMSHRC 2937, 2944–45 (Comm'n ALJ Nov. 2011) ("With respect to ground control methods used . . . Pattison . . . performed hand scaling with a scaling bar," among other methods), *aff'd in part and rev'd in part*, 688 F.3d 507 (8th Cir. 2012); *Hernandez v. ASARCO Inc.*, 24 FMSHRC 293, 296 (Comm'n ALJ Mar. 2002) (a miner "alleged . . . that he had been required to 'bar down' (scale) with the jumbo, despite complaints to his supervisor that that method of ground control endangered his safety"). The mine's ground control manual also states that "barring down," *i.e.* scaling, is an important part of ground support. *See* III CER 371. Thus, even assuming that the *only* purpose of the wire mesh is to reduce scaling, that does not mean the mesh is not part of the mine's ground support system.

Moreover, the evidence plainly establishes that the wire mesh is one of the "support components [that] link together to form an integral

[ground support] system," II CER 408; that the mesh supports loose rock and keeps it from falling on miners, II CER 164, 181, 215, 236, 251–52, 259, 265; III CER 282, 286, 297, 311, 315, 318; and that if the mesh were not installed, the rock would fall. II CER 181, 203, 265; III CER 287, 297, 315, 323. That is, the mesh does far more than simply reduce the need for scaling.

The basic point is this: Coeur installed roof bolts, but the rock still fractured and would, if left alone, fall down. The wire mesh (if it is properly maintained) keeps that from happening. It is necessary ground support.

D. The judge's decision adequately explains the need for ground support in each of the cited areas.

Coeur argues that the judge did not actually find that ground support was necessary in each of the cited areas of the mine, but instead just "referred back" to one "location-specific analysis." Coeur Br. at 14–16. That is inaccurate, and even if it were true, immaterial, because the record and decision as a whole make the judge's reasoning and findings clear.

First, the judge *did* discuss the need for ground support in each of the cited areas. For each citation, the judge discussed specific ground conditions that required support. I CER 10, 12, 14, 16, 18, 24. The judge's reference back to his first, most extensive, analysis, *see id.* at 6–7, does not change that fact. Indeed, it makes sense for the judge to have referred back to that analysis rather than to have rehashed it seven different times for seven different citations.

Second, there was no evidence that ground conditions varied so dramatically from area to area as to require separate analyses. Coeur cites *Newmont Gold Co v. Sec'y of Labor*, 20 FMSHRC 1035 (Comm'n ALJ Sept. 1998), as a case involving "substantially different" ground conditions in different parts of a mine. Coeur Br. at 15. But Coeur provided no such evidence here, and it does not argue that it did. *See id.* In fact, Coeur argues that every part of the mine at issue in this case is made up of the same type of rock, which suggests that the conditions are the same. *See id.* at 2–3. Coeur gave the judge no reason to conduct an extensive, distinct analysis for each citation; it cannot now fault him for not doing so.

Even if the judge's explanation were imperfect, it should still be affirmed, because the "'context and the record make clear [what] reasoning underlies the judge's conclusion.'" *United States v. Treadwell*, 593 F.3d 990, 1010 (9th Cir. 2010) (*quoting Rita v. United States*, 551 U.S. 338, 359 (2007), and explaining that judges need not exhaustively discuss every reason for a sentencing decision). As the Supreme Court has explained, different circumstances call for different judicial approaches, and lengthy, detailed analyses are not always required:

> The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances. Sometimes a judicial opinion responds to every argument; sometimes it does not; sometimes a judge simply writes the word "granted" or "denied" on the face of a motion while relying upon context and the parties' prior arguments to make the reasons clear. The law leaves much, in this respect, to the judge's own professional judgment.

Rita, 551 U.S. at 356. Because the relevant evidence and analysis had already been discussed, it was appropriate for the judge to refer back to it.

2. Substantial evidence supports the judge's findings that Coeur violated Section 57.3360, and the associated S&S and negligence findings.

As explained above, the Court reviews the judge's factual findings under the deferential substantial evidence standard. 30 U.S.C. § 816(a)(1); *Miller Mining Co.*, 713 F.2d at 490. The judge's credibility determinations are given particular weight. *Todd Pac. Shipyards Corp.*, 913 F.2d at 1432. Substantial evidence supports the judge's findings that Coeur violated Section 57.3360, and the associated findings about the S&S nature of the violations and the level of Coeur's negligence.

A. Substantial evidence supports the judge's findings that Coeur violated Section 57.3360.

The evidence abundantly supports the judge's findings that Coeur violated Section 57.3360 for each of the seven citations. The inspectors testified about, and took photographs of, the torn, damaged mesh they saw in each cited area of the mine. *See supra* pp. 10–20. They also testified about the bulging, stressed mesh they saw in some areas. *See id.* Coeur's witnesses did not dispute, and in fact corroborated, those observations. *See, e.g.*, III CER 286, 291, 297, 318, 332, 334.

Mesh that is torn, ripped away from the rock, or full of holes, is plainly not being "maintained to control the ground in places where persons work or travel," as required by the standard, 30 C.F.R. § 57.3360, because it cannot effectively stop loose rock from falling down and injuring or killing miners. Substantial evidence therefore supports the judge's findings that Coeur violated the standard.

B. Substantial evidence supports the judge's findings that five violations were S&S.

The Commission has developed a four-step test for evaluating whether a violation is S&S. *See Sec'y of Labor v. Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984). To establish that a violation is S&S under *Mathies*, the Secretary must prove

> (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in injury; and (4) a reasonable likelihood that that injury in question will be of a reasonably serious nature.

Id.

When the judge heard this case, controlling Commission precedent held that, at the third *Mathies* step, "[t]he Secretary must prove there was a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the

violation, itself, will cause injury." I CER 5 (citing *Sec'y of Labor v. Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010)). There have since been two relevant developments in the case law. First, the Fourth Circuit adopted the Secretary's interpretation of the third *Mathies* element. *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 161–63 (4th Cir. 2016) (explaining that the third step of the *Mathies* analysis assumes the existence of the relevant hazard). The Fourth Circuit also provided its gloss on the second *Mathies* step, suggesting that it "requires a showing that the violation is at least somewhat likely to result in harm." *Id.* at 163.

The Commission then issued a split decision interpreting the Fourth Circuit's gloss, without the benefit of the Secretary's views. *See Sec'y of Labor v. Newtown Energy, Inc.*, 38 FMSHRC 2033, 2040 n.13 (Aug. 2016). A three-member majority held that the Secretary must prove, at the second *Mathies* step, that a hazard is reasonably likely to occur, and that the Fourth Circuit did not intend to articulate a different test. *Id.* at 2038–39. Two Commissioners disagreed and opined that the second *Mathies* step requires the violation "to be 'at least somewhat likely to result in harm,'" consistent with the Fourth Circuit's

interpretation. *Id.* at 2051–52 (Comm'rs Jordan and Cohen, dissenting) (quoting *Knox Creek*, 811 F.3d at 162).

Exercising his own authority to interpret the Mine Act—and in agreement with the dissenting Commissioners in *Newtown Energy*—the Secretary interprets Section 104(d)(1) as requiring that an S&S violation be of such a nature that it "could result in[] a safety hazard." *Newtown Energy*, 38FMSHRC at 2052 (Comm'rs Jordan and Cohen, dissenting). That test is consistent with the statutory text, and with the Fourth Circuit's suggestion in *Knox Creek* that "for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm." *Knox Creek*, 811 F.3d at 162. The Secretary's interpretation also is consistent with *Knox Creek*'s observation that "Congress did not intend for the S&S determination to be a particularly burdensome threshold for the Secretary to meet." *Id.* at 163 (quoting *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1085 (D.C. Cir. 1987), for the proposition that "the legislative history of the Mine Act 'suggests that Congress intended all except "technical violations" of mandatory standards to be considered significant and substantial'"). It also is consistent with the Commission's understanding of the second

step of the *Mathies* test up until *Newtown Energy*. *See, e.g.*, *Musser Eng'g*, 32 FMSHRC at 1280 (stating that, at step two, "[t]here is no requirement of 'reasonable likelihood'").

The Secretary's interpretation of Section 104(d)(1) is entitled to deference. *Am. Coal Co. v. FMSHRC*, 796 F.3d 18, 24 (D.C. Cir. 2015). Significantly, in *Newtown Energy*, neither the parties nor the Commission addressed whether the Commission should defer to the Secretary's interpretation of Section 104(d)(1) because the Commission decided the post-*Knox Creek* S&S issues in that case without briefing from the parties.

Coeur argues that "[t]he Commission has also held that an S&S determination must be based on more than a showing that a violation 'could' result in an injury." Coeur Br. at 36 (citing *Sec'y of Labor v. Wolf Run Mining Co.*, 32 FMSHRC 1669, 1678 (Dec. 2010)). That assertion does not address the recent developments in the S&S case law, and for the reasons explained above, the Court should reject that interpretation and adopt the Secretary's interpretation that a violation can be S&S if it could result in a safety hazard.

Even if the Court applies the more burdensome test announced in *Newtown Energy*, substantial evidence supports the judge's findings that five of the violations were S&S.[14] As explained above, substantial evidence supports the judge's finding that Coeur violated Section 57.3360. *See supra* p. 41. Each violation also contributed to the hazard of loose rock falling and striking, crushing, or killing a miner: the loose rock, which could easily be dislodged during the normal mining process, could fall through the damaged mesh. Miners regularly traveled in the cited areas and were exposed to the hazard. And there can be no serious dispute that large pieces of rock falling onto a miner would cause serious or disabling injuries, or even death.

Additionally, the Commission has explained that "an [MSHA] inspector's judgment is an important element in an S&S determination." *Sec'y of Labor v. Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278–79 (Dec. 1998) (collecting cases); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135–36 (7th Cir. 1995) (holding that an inspector's testimony that a violation was S&S was

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[14] Indeed, the judge found that the hazards the violations contributed to were "reasonably likely" to occur. I CER 8.

sufficient evidence to support a finding that the violation was S&S). Inspectors Dreyer and Rasmussen testified about the S&S nature of the violations—including about why they concluded some violations were *not* S&S—and that testimony, which the judge credited, further supports the judge's finding that five violations were S&S.

C. Substantial evidence supports the judge's negligence findings.

Coeur argues that the judge's negligence analysis did not properly take into account purported mitigating factors. Coeur Br. at 29–31. This argument must fail because Commission judges are not bound by the regulations Coeur cites. Coeur erroneously states that the Mine Act contains a definition of negligence that is based, in part, on the existence of mitigating factors. *Id.* at 29. But those definitions are not in the Mine Act; they are in MSHA's Part 100 regulations at 30 C.F.R. § 100.3. Those regulations apply only to MSHA's proposed penalty assessments and are not binding on Commission judges. *Mach Mining*, 809 F.3d at 1263–64; *Brody Mining*, 37 FMSHRC at 1701 ("[U]nder both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way in Commission proceedings.").

In *Mach Mining*, the D.C. Circuit rejected an argument identical to Coeur's, explaining that Commission judges undertake a traditional, holistic negligence analysis, rather than applying the definitions in Part 100. 809 F.3d at 1263–64. Specifically, the Court explained that "evidence of a mitigating circumstance [does not preclude] the Commission and its judges from finding a regulatory violation resulted from the high negligence of the mine operator." *Id.* at 1263. "[A]n ALJ 'is not limited to an evaluation of allegedly "mitigating" circumstances' and should consider the 'totality of the circumstances holistically.' For that reason, an ALJ 'may find "high negligence" in spite of mitigating circumstances or may find "moderate" negligence without identifying mitigating circumstances.'" *Id.* at 1264 (quoting *Brody Mining*, 37 FMSHRC at 1702–03). The negligence analysis focuses not on any formula, but on the fundamental question of "whether an operator met its duty of care, [considering] what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Brody Mining*, 37 FMSHRC at 1702. Thus, even assuming Coeur provided evidence of mitigating circumstances, the

judge was free to find—and properly did find—that Coeur exhibited high negligence, which the Commission has described as "suggest[ing] an aggravated lack of care that is more than ordinary negligence." *Id.* at 1703.

Coeur argues that the judge did not consider two mitigating factors: the fact that management did not have actual knowledge of the violation and the fact that the mine had a rehabilitation program. Coeur Br. at 30–31. But the judge did consider, and rejected, both factors.

The judge rejected the rehabilitation program because it was not properly used in the mine. I CER 9, 11, 13, 25. That makes sense: a safety program is a mitigating factor only if it is effective, not just if it exists. *Cf. Sec'y of Labor v. Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2370 (Sept. 2016) ("even though [the operator] trained its miners in [a particular set of] dangers during new miner training, experienced miner training, annual refresher training, and weekly safety talks, the company failed to enforce the training. The Judge appropriately declined to weigh the training as a mitigating factor"); *Danis-Shook Joint Venture XXV v. Sec'y of Labor*, 319 F.3d 805, 812 (6th Cir. 2003)

(affirming OSHA citations issued to an employer in part because the employer did not enforce its written safety program); *Dana Container, Inc. v. Sec'y of Labor*, 847 F.3d 495, 500 (7th Cir. 2017) ("Even in the face of a robust written program, lax disregard of the rules can send a message to employees that a company does not make safety a priority.").

The judge also rejected Coeur's argument that management's lack of actual knowledge of the violations was a mitigating factor, in part because the violations were so obvious and extensive that they should have been noticed. I CER 11. Actual knowledge of a violation and the failure to correct it does, by itself, constitute high negligence, *Sec'y of Labor v. DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3090, 3096 (Dec. 2014), *aff'd*, 632 Fed. App'x 622 (D.C. Cir. 2015), but the converse—that actual knowledge is *required* for high negligence—is not true. Management's lack of actual knowledge is even less persuasive for the December Section 57.3360 violations, because the July violations put Coeur on notice that it needed to address the pervasive problems with its wire mesh.

Finally, any mitigating factors are part of a holistic negligence analysis, and here, the aggravating factors far outweigh any mitigating ones. The damaged mesh was obvious and pervasive throughout the mine, it had existed for more than one shift—in some cases, for multiple days, and it posed a significant danger to miners. A reasonably prudent operator would have recognized and corrected the violations, but Coeur did not.

3. Substantial evidence supports the judge's findings that Coeur violated Section 57.3200 and the associated negligence findings.

Substantial evidence also supports the judge's finding that Coeur violated Section 57.3200, and that those violations reflected high negligence. Coeur's one-paragraph argument to the contrary is unpersuasive. *See* Coeur Br. at 32–33.

Section 57.3200 requires mine operators to "take[] down or support[]" hazardous ground conditions, and to barricade the hazardous area and post a warning against entry "[u]ntil the corrective work is completed." 30 C.F.R. § 57.3200. To determine whether "hazardous ground conditions" (*i.e.*, loose ground) exist, factors including "the results of sounding tests, the size of the drummy area, the presence of

visible fractures and sloughed material, 'popping' and 'snapping' sounds in the ground, the presence, if any, of roof support, and the operating experience of the mine or any of its particular areas" are relevant. *Sec'y of Labor v. ASARCO, Inc.*, 14 FMSHRC 941, 952 (Jun. 1992).

The record conclusively establishes that loose ground existed in the mine. Inspector Rasmussen testified that he saw loose rocks and that the loose material was easily barred down by hand using a scaling bar. *See, e.g.*, II CER 240–41, 244. Coeur's witnesses also testified that loose rocks were present and could be removed by hand.[15] *See, e.g.*, III CER 290, 292. It is undisputed that there were no barricades or warning signs in the area. The only reasonable conclusion is that hazardous ground conditions existed, and that Coeur did not barricade the area or post a warning—*i.e.*, that Coeur violated Section 57.3200.

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[15] Coeur states that the fact that the rock was barred down is not enough to establish a violation of the standard. Coeur Br. at 32 (citing *Amax*, 8 FMSHRC at 1149). *Amax* does not support that proposition. Instead, it explains what factors are relevant to determining whether loose ground exists, and it states that "*all relevant factors and circumstances* must be taken into account." *Id.* (emphasis added). "All relevant factors" certainly include the fact that the ground was removed with a scaling bar.

Coeur argues that "the Secretary is required to prove the existence of a 'reasonably detectable hazard'" to establish a violation of Section 57.3200. Coeur Br. at 32 (citing *ASARCO*, 14 FMSHRC at 951). That is not what that case holds. The full context of Coeur's selective quotation is this:

> The purpose of section 57.3200 is to require elimination of hazardous conditions. The fact that there was a ground fall is not by itself sufficient to sustain a violation. Rather, the Secretary is required to prove that there was a reasonably detectable hazard *before* the ground fall.

ASARCO, 14 FMSHRC at 951 (emphasis in original). That is, the Secretary must prove a "reasonably detectable hazard" when he relies on the occurrence of a ground fall to prove a violation of Section 57.3200.

If the Court concludes that the Secretary must prove a "reasonably detectable hazard" in every Section 57.3200 case, the evidence here still demonstrates that the hazards were reasonably detectable. The loose material was large, visible from travelways that miners used, and easily barred down by hand. II CER 244–45.

Substantial evidence also supports the judge's findings that the violations reflected high negligence. The dangerous conditions were

extensive and obvious. II CER 243, 247. Coeur should have noticed them, and its failure to do so demonstrated more than ordinary negligence. Additionally, Coeur's rehabilitation program was not a mitigating factor because it was not effectively implemented to remove loose ground.

4. The judge's civil penalty assessments are supported by substantial evidence and are a valid exercise of the judge's discretion.

A. The Court reviews the facts underlying the penalty assessments for substantial evidence, and the amount of the penalty assessments for abuse of discretion.

A judge's penalty assessment must reflect consideration of the six factors listed in Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), and the factual findings related to those factors must be supported by substantial evidence. *Walker Stone Co.*, 156 F.3d at 1086; *Sec'y of Labor v. Wade Sand & Gravel Co.*, 37 FMSHRC 1874, 1877 (Sept. 2015); *see Sellersburg Stone Co.*, 5 FMSHRC at 292–93 ("Findings of fact on each of the statutory criteria . . . provide the Commission and the courts, in their review capacities, with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient."). Within those boundaries,

and in light of the important deterrent purpose civil penalties serve, judges "are accorded broad discretion in assessing civil penalties under the Mine Act." *Walker Stone Co.*, 156 F.3d at 1086 (citation omitted); *Sellersburg Stone Co.*, 5 FMSHRC at 294 (a judge's "discretion is bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme"). Thus, the Court reviews the amount of the penalty for abuse of discretion. *Cordero Min. LLC v. Sec'y of Labor ex rel. Clapp*, 699 F.3d 1232, 1238 (10th Cir. 2012); *B.L. Anderson, Inc. v. FMSHRC*, 668 F.2d 442, 444 (8th Cir. 1982); *Windsor Coal Co. v. Sec'y of Labor*, 166 F.3d 337 (4th Cir. 1998) (table), 1998 WL 879062, at *5 (citing *B.L. Anderson*, 668 F.2d at 444).

B. Each penalty assessment reflects consideration of the six statutory factors, is supported by substantial evidence, and is a valid exercise of the judge's discretion.

Each penalty the judge assessed reflects consideration of the six factors listed in Section 110(i) of the Mine Act. 30 U.S.C. § 820(i).[16] For

[16] Those factors are (1) the operator's history of violations, (2) the operator's size, (3) the operator's negligence, (4) the effect of the penalty

each penalty, the judge found that Coeur is a large operator, that the penalty would not affect Coeur's ability to continue in business, and that Coeur demonstrated good faith in achieving compliance. I CER 10, 13, 16, 18, 18, 20, 22, 24, 27. With respect to the special assessments, the judge explained that the higher penalties were appropriate because the violations were serious and reasonably likely to cause permanently-disabling injuries; that the hazardous conditions were pervasive and obvious, so that Coeur should have known about them; and that the violations reflected high negligence. I CER 10–11, 13, 18, 26–27. The judge generally found Coeur's history of violations to be reasonable.

The judge's vacating of two special assessments also demonstrates that he considered the statutory factors with respect to all the penalties, rather than rubber-stamping the Secretary's proposals. *See* I CER 14–15 (vacating the special assessment because the violation was non-S&S), 16 (vacating the special assessment after reducing the negligence from high to moderate).

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on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the operator's good faith in achieving compliance after the violation.

As explained above, the judge's factual findings underlying the statutory factors are supported by substantial evidence, and the judge properly discounted evidence of Coeur's purported mitigating factors. *See supra* pp. 41–51. The only remaining question is whether the judge abused his discretion by imposing the penalty amounts. He did not.

Abuse of discretion is "a generous standard that gives a lower court or an agency leeway in the decisions it makes." *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1071 (9th Cir. 2015). "Normally, the decision of a trial court is reversed under the abuse of discretion standard only when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances." *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000) (citation omitted). The penalties the judge assessed are not "beyond the pale of reasonable justification;" they are eminently reasonable under the circumstances. Coeur demonstrated, as the judge found, "a systematic disregard for the condition of wire mesh in the Kensington mine." I CER 27. Its failure to maintain the wire mesh in many areas of the mine exposed miners in each of those areas to fatal, or at least disabling, rock falls. Coeur offered no explanation for its failure. The combination of serious,

pervasive hazards and an aggravated lack of attention to them amply justifies the penalties the judge assessed.

5. The Court lacks jurisdiction to review the Commission's declining to review the judge's decision, and Coeur's public policy argument about that point is unpersuasive.

Coeur also argues that the Commission "abused its discretion" by declining to review the judge's decision. *See* Coeur Br. at 28–29. But the Mine Act does not provide for judicial review of the Commission's declining to grant review of a judge's decision. *Eagle Energy, Inc. v. Sec'y of Labor*, 240 F.3d 319, 322–25 (4th Cir. 2001). Instead, the Mine Act provides for review only of "orders" of the Commission. 30 U.S.C. § 816(a)(1). When the Commission declines to grant review, the judge's decision becomes the final order of the Commission. *Id.* § 823(d)(1). Thus, in those cases, the judge's decision is the only Commission order subject to judicial review; the Commission's notice declining to grant review is not.[17]

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[17] That point is reflected in the Commission's practice of issuing "Notices," rather than "Orders," to inform litigants that it has declined to grant review. *See* III CER 253–54.

That point is further underscored by the fact that the Mine Act commits the determination to review judges' decisions to the Commission's "sound discretion," 30 U.S.C. § 823(d)(2)(A)(i), and does not provide for judicial review of that discretionary decision. The Supreme Court's decision in *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667 (1986), is instructive. There, the Court held that although judicial review of administrative action is presumptively available, there are exceptions:

> The presumption of judicial review . . . may be overcome by, *inter alia*, specific language or specific legislative history that is a reliable indicator of congressional intent, or a specific congressional intent to preclude judicial review that is "fairly discernible" in the detail of the legislative scheme.

Bowen, 476 U.S. at 673 (quotation omitted). The Mine Act's judicial review provision, 30 U.S.C. § 816(a)(1), does not provide for review of a Commission decision declining to review judges' decisions, and another provision clearly commits that decision to the Commission's "sound discretion." *Id.* § 823(d)(2)(A)(i). Those two provisions are "fairly discernible"—indeed, forceful—evidence of Congress' intent not to provide review of the Commission's discretionary decisions.

Similarly, the Mine Act's judicial review provision does not grant the Court jurisdiction to review otherwise-unreviewable Commission notices because they implicate public policy issues. *See* 30 U.S.C. § 816. The Mine Act identifies "substantial question[s] of . . . policy" as one of the bases for the *Commission* to review a judge's decision, *id.* § 823(d)(2)(A)(ii)(IV), but that does not create an independent basis for *judicial* review.

If the Court concludes that it has jurisdiction to review the Commission notice declining to review the judge's decision, it should reject Coeur's arguments, which are overblown and unpersuasive.

The judge's decision does not expand liability under Section 57.3360; it simply recognizes, consistent with the meaning of the standard, that once necessary ground support is installed, it must be adequately maintained. *See, e.g.*, I CER 8 ("once installed, the wire mesh needed to be maintained"). In fact, contrary to Coeur's suggestion, *see* Coeur Br. at 28, the decision never discusses an obligation to maintain wire mesh that is not part of a necessary ground support system.

Nor is Coeur's argument that the decision "punishes [operators] for taking additional safety and convenience measures" persuasive. *See* Coeur Br. at 28. As explained above, the wire mesh is not merely a convenience; it is an integral part of the mine's ground support system. The citations in this case do not punish Coeur for installing safety equipment; they impose civil penalties on Coeur for failing to maintain the necessary equipment it has installed.

It is also not true that Coeur will face a "no-win dilemma" because it is required to maintain its ground support system. *See* Coeur Br. at 28. Coeur argues that its only options are to leave the wire mesh up and accept citations when it is damaged,[18] or to take it down and increase miners' workloads. *Id.* That argument ignores a third option: to comply with the standard by adequately maintaining ground support systems. Compliance with important safety standards does not create no-win dilemmas.

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[18] Coeur implies that every single time a piece of equipment touches the wire mesh, MSHA will issue a citation. *See* Coeur Br. at 28. But unless the mesh is damaged so badly that it cannot control the ground, *and* Coeur fails to repair any badly-damaged mesh, there would be no violation of the standard. *See* 30 C.F.R. § 57.3360. The mesh has to be effective; it does not have to immaculate.

In fact, it is Coeur's position that undermines the public policy objectives embodied in the Mine Act. According to Coeur, mine operators may install safety equipment, instruct miners to rely on that equipment, and then allow that equipment to fail. Such a result would make the dangerous work of mining even more perilous, undermine the protective purpose of the Mine Act, and jeopardize miners' lives.

CONCLUSION

For all of the foregoing reasons, the Court should affirm the judge's findings that ground support was necessary in the mine and that Coeur violated Sections 57.3360 and 57.3200, along with the associated S&S and negligence findings; affirm the judge's penalty assessments; and deny Coeur's petition for review.

Respectfully submitted,

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ADDENDUM

Statutory Provisions

Section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1)

(a) Petition by person adversely affected or aggrieved; temporary relief

(1) Any person adversely affected or aggrieved by an order of the Commission issued under this chapter may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit, by filing in such court within 30 days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of title 28. Upon such filing, the court shall have exclusive jurisdiction of the proceeding and of the questions determined therein, and shall have the power to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside, in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial

evidence on the record considered as a whole, shall be conclusive. The Commission may modify or set aside its original order by reason of such modified or new findings of fact. Upon the filing of the record after such remand proceedings, the jurisdiction of the court shall be exclusive and its judgment and degree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of title 28.

Section 113(d)(1)–(2)(B) of the Mine Act, 30 U.S.C. § 823(d)(1)–(2)(B)

(d) Proceedings before administrative law judge; administrative review

(1) An administrative law judge appointed by the Commission to hear matters under this chapter shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the chief administrative law judge of the Commission or by the Commission, and shall make a decision which constitutes his final disposition of the proceedings. The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2). An administrative law judge shall not be assigned to prepare a recommended decision under this chapter.

(2) The Commission shall prescribe rules of procedure for its review of the decisions of administrative law judges in cases under this chapter which shall meet the following standards for review:

(A)

(i) Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision. Review by the Commission shall not be a matter of right but of the sound discretion of the Commission.

(ii) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(I) A finding or conclusion of material fact is not supported by substantial evidence.
(II) A necessary legal conclusion is erroneous.
(III) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission.
(IV) A substantial question of law, policy or discretion is involved.
(V) A prejudicial error of procedure was committed.

(iii) Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations, or principal authorities relied upon. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass. Review by the Commission shall be granted only by affirmative vote of two of the Commissioners present and voting. If granted, review shall be limited to the questions raised by the petition.

(B) At any time within 30 days after the issuance of a decision of an administrative law judge, the Commission may in its discretion (by affirmative vote of two of the Commissioners present and voting) order the case before it for review but only upon the ground that the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented. The Commission shall state in such order the specific issue of law, Commission policy, or novel question of policy involved. If a party's petition for discretionary review has been granted, the Commission shall not raise or consider additional issues in such review proceedings except in compliance with the requirements of this paragraph.

Regulations At Issue

30 C.F.R. § 57.3200

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

30 C.F.R. § 57.3360

Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber use for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area.

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 7, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Emily C. Toler

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