

**UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

SIERRA CLUB, *et al.*

Plaintiffs,

v.

KEN SALAZAR, *et al.*

Defendants.

Case No. 10-1513-RBW

**UNOPPOSED MOTION OF THE UNITED MINE WORKERS OF AMERICA
FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

The United Mine Workers of America ("UMWA") respectfully seeks leave to file the accompanying brief as *amicus curiae*, in support of Plaintiffs' Motion for Summary Judgment in the above-captioned action. The UMWA has conferred with representatives for all parties to this action, who have stated they do not oppose this motion.

STATEMENT OF INTEREST

The UMWA has consistently supported and participated in efforts to preserve Blair Mountain Battlefield. UMWA members participated in some of the earliest efforts to identify and record the locations of battlefield artifacts. In 2005, UMWA President Cecil Roberts, a relative of Bill Blizzard, one of the miners' leaders at the battle of Blair Mountain, stated:

The UMWA has always believed the Blair Mountain battle site should be preserved, and I began publicly calling for it back in the 1980's. We believe a monument should be erected at the site explaining what happened there, and... [w]e support preserving the land immediately around the battle site, because we believe it's important for future generations

to stand on that ground, and understand the importance of what happened there.

Press Release, UMWA, *Statement of UMWA President Cecil Roberts Regarding Preservation of Blair Mountain Battlefield* (May 12, 2005) (on file with author). On June 17, 2010, the UMWA submitted comments to the West Virginia Transportation Secretary in opposition to a proposal to close the county road that provides the only public access to the Battlefield. Many UMWA members also hold memberships in the groups that are named Plaintiffs in the pending action. Finally, the courage and sacrifice of UMWA miners is the sole reason Blair Mountain carries historic significance that makes it eligible for inclusion on the National Register of Historic Places.

In 1921, UMWA coal miners marched into the counties of southwestern West Virginia to end coal company domination imposed by corrupt politicians, armed thugs and the company town system. They were met at Blair Mountain by an army of mercenaries paid and equipped by the companies. The miners charged into machine gun fire from the defensive positions the companies' private armies had established along the ridge above them, and neither side relented until the arrival of the U.S. Army. In the aftermath of the battle, treason trials and other legal action taken against the UMWA nearly bankrupted the Union and its membership dwindled over the decade that followed. But the miners' march focused the attention of the nation on the injustice of the political and economic order imposed by the coal barons on the citizens of West Virginia's southwestern counties.

Though the UMWA miners who marched to Blair Mountain were defeated in battle, their stand paved the way for legislative and collective bargaining achievements in the first half of the twentieth century that helped build the American middle class. The Battle of Blair Mountain was

perhaps the most significant of a number of episodes of “industrial strife and unrest” that Congress eventually sought to prevent by creating a legal framework for worker organization and peaceful resolution of industrial disputes.

The Battle of Blair Mountain is remembered today as one of the most dramatic episodes in the long history of struggle UMWA miners have consistently undertaken in spite of threats of economic ruin and physical harm. Through this struggle UMWA miners set the standards that have long been taken for granted and misunderstood to be intrinsic aspects of American work-life: the eight-hour day in 1898, legal recognition of collective bargaining rights in 1933, negotiation of health and retirement benefits in 1946, and passage of workplace safety and health legislation in 1969. The UMWA marks each of these achievements among the most significant since its 1890 founding, but considers the Battle of Blair Mountain in 1921 a defining and pivotal moment in the history of our Union and the American labor movement. Blair Mountain stands today as an enduring monument to the UMWA’s struggle and an eternal reminder of the price our forebearers paid for our way of life.

**THE UMWA PRESENTS A UNIQUE PERSPECTIVE AND BACKGROUND
INFORMATION THAT CAN ASSIST THE COURT**

Whether to permit an *amicus curiae* to file a brief is within the sole discretion of this Court. *Jin v. Ministry of State Security*, 557 F.Supp.2d 131, 138 (D.D.C. 2008). “An amicus brief should normally be allowed when... the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Id.* “Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others

argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group.” *Neonatology Associates, P.A. v. C.I.R.* 293 F.3d 128, 132 (3rd Cir. 2002) (now Justice Alito advising liberal standard for admission of amicus briefs by quoting Luther T. Munford, *When Does the Curiae Need An Amicus?*, 1 J.App. Prac. & Process 279 (1999)).

No party to these proceedings opposes the UMWA’s participation as *amicus curiae*. As the labor union whose members marched to the Battle of Blair Mountain, the UMWA is able to provide unique information about the historic significance of the nominated site and the importance of its preservation. In addition, the UMWA monitors and often participates in litigation and administrative proceedings to which coal companies are a party, and is therefore uniquely able to provide a perspective on the tactics regularly deployed in such proceedings. As described in the accompanying brief, the companies’ use of such tactics has undermined the administrative proceeding below, leading directly to the dispute presently before the Court.

Accordingly, the UMWA seeks leave to submit the accompanying brief in order to assist this Court in evaluating the legal and practical implications of this case. The UMWA respectfully requests that this Motion to file the accompanying brief as a friend of this Court be granted, and that its brief be fully and favorably considered by this honorable Court.

Dated: April 15, 2011

UNITED MINE WORKERS OF AMERICA

Respectfully submitted,

/s/ Arthur Traynor

Arthur Traynor (D.C. Bar No. 988730)
United Mine Workers of America
18354 Quantico Gateway Drive, Ste. 200
Triangle, VA 22172

(703) 291-2400
atraynor@umwa.org
COUNSEL FOR INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2011, I electronically filed the foregoing “Unopposed Motion of the United Mine Workers of America for Leave to File a Brief as *Amicus Curiae* in Support of Plaintiffs’ Motion for Summary Judgment” accompanied by the proposed “*Amicus Curiae* Brief” and a Proposed Order with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all counsel entitled to receipt thereof.

/s/ Arthur Traynor
Arthur Traynor

**UNITED STATES DISTRICT COURT FOR
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**AMICUS CURIAE BRIEF OF
UNITED MINE WORKERS OF AMERICA
IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

The United Mine Workers of America (“UMWA”) submits this *amicus curiae* brief in support of the Motion for Summary Judgment (“Motion”) filed by the Plaintiffs in the above-captioned action. As the international labor union whose members marched to the Battle of Blair Mountain in 1921, the UMWA supports vacature of the arbitrary and capricious decision by the Keeper of the National Register of Historic Places (“Keeper”) to remove Blair Mountain Battlefield (“Battlefield”) from the National Register of Historic Places (“Register”). Preservation of the Battlefield depends in part on restoration of the outcome reached by the administrative process for nomination of historic places to the Register, and the integrity of that process depends on the intercession of this Court.¹

¹ An historic site is not automatically off-limits to development by virtue of its listing in the Register, but “[i]f a property contains surface coal resources and is listed in the National Register, certain provisions of the Surface Mining and Control Act of 1977 require consideration of a property’s historic values in the determination on issuance of a surface coal mining permit.” 36 C.F.R. § 60.2(d).

I. In 1921, Powerful Coal Companies Battled UMWA Miners At Blair Mountain

In 1921, UMWA miners, many of whom were World War I veterans, marched to organize the coalfields of southern West Virginia. These miners were met at Blair Mountain by an army of mercenaries who had been hired and equipped by the powerful coal companies that dominated the governments and economies of the state's southwestern counties. In the ensuing battle, the second largest armed insurrection on United States soil next to the American Civil War, over one million rounds were fired, National Guard airplanes dropped bombs on the miners and their bases in nearby towns, and least 16 men lost their lives. The battle finally ended when the miners laid down their weapons rather than fire on their U.S. Army brethren, who arrived on the orders of President Warren G. Harding. In the decade that followed, coal companies maintained virtually unchecked power over the company towns in and around the unorganized coalfields of southwest West Virginia.

Viewed in light of the miners' immediate objective to organize the southwestern coalfields of West Virginia, the Battle of Blair Mountain was a resounding defeat for the UMWA. But the miners' march directed national attention to longstanding political and economic injustice caused by coal company domination of West Virginia. Even though the miners did not achieve their goal of organizing the state's southwestern coalfields, the Battle of Blair Mountain was the most momentous in a series of increasingly frequent incidents of "industrial strife and unrest" in the late nineteenth and early twentieth centuries that Congress eventually sought to prevent by creating a legal framework for worker organization and peaceful resolution of industrial disputes. *See National Labor Relations Act* 29 U.S.C. § 151 (1935) (stating the purpose of the Act is creation of a legal framework that "safeguards commerce from injury, impairment, or interruption... by removing certain recognized sources of industrial strife

and unrest..."); *see also*, *National Industrial Recovery Act*, 48 Stat. 195 (1933) (the short-lived predecessor of the 1935 Act).

Under the legal framework created by Congress in response to the Battle of Blair Mountain and other episodes of industrial unrest, the miners of West Virginia were ultimately able to organize. Joined together under the banner of the UMWA, they escaped the quasi-feudal domination of the coal barons' company towns by negotiating wage, benefits and safety improvements that have set working and living standards for generations since.

II. Today, Powerful Coal Companies Have Undermined the Process For Nomination of Blair Mountain Battlefield to the National Register

It is beyond dispute that powerful coal companies continue to wield considerable influence over the economy and politics in West Virginia and beyond. Indeed, the instant matter demonstrates that the present-day administration of federal statutes in the state is not immune from such influence. The federal Circuit Courts of Appeal have observed in other contexts that where "large coal companies" can leverage "infinitely more resources" than comparatively less resourced participants to an administrative process to effectively overwhelm the administrative record, "the truth seeking function of the administrative proceeding is skewed and directly undermined." *See Duncan v. Director, OWCP*, 67 F.3d 294 (4th Cir. 1995) (unpublished opinion quoting from the discussion in *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993) of the deleterious effects of coal companies' financial ability to distort the record in administrative proceedings under the Black Lung Benefits Act). While the discussion of coal company influence in these cases concerned evidentiary rules designed to limit the companies' ability to hire an inordinate number of expert medical witnesses to overwhelm black lung claimants' ability to prove pneumoconiosis, their financial ability to overwhelm and muddle the

evidentiary record in administrative proceedings similarly influenced the final outcome of the National Historic Preservation Act (“NHPA”) administrative process at issue here.

The coal companies successfully skewed and undermined the truth seeking function of the administrative process for determining whether a majority of properly verified owners of private property within the nominated Battlefield site filed timely objections. *See* 36 C.F.R. § 60.6(r) (precluding listing of a nomination in the Register where the majority of verified owners of property within the nominated site object by notarized statements received by the Keeper prior to listing). As part of a larger campaign of opposition, the coal companies ultimately undermined the process for calculation of property owners’ objections by submitting for the Keeper’s consideration their own “recalculated” list of property owners purportedly eligible to make such objections.²

The companies had been unsuccessful in their initial efforts to derail the nomination by presenting the conclusions of paid experts that the nomination was accompanied by “[i]nsufficient documentation of the archaeological integrity and the potential to contribute data important to history.”³ A.R. 108-09; A.R. 233. But their campaign ultimately delivered success for the companies only after the Battlefield was listed on the Register, when the Keeper relied on their invalid list of property owners to determine that an “erroneous counting” of objections amounted to “a prejudicial procedural error in the nomination or listing process” that required removal of the Battlefield from the Register. A.R. 502.

² Jackson Kelly has consistently opposed the nomination at various stages of the administrative process, apparently on behalf of Arch Coal, Inc and Massey Energy Company – two of the largest coal mining companies in the nation. *See* Pls.’ Statement of Material Facts (“S.M.F.”) ¶¶ 20, 37; Administrative Record (“A.R.”) 243-51; 877-944.

³ The historical significance and archaeological integrity of the Battlefield are not at issue. The NPS previously identified Blair Mountain is being potentially eligible for National Historic Landmark designation, the highest form of recognition reserved for those properties “which possess exceptional value as commemorating or illustrating the history of the United States.” 36 C.F.R. 65.1(b)(1).

The coal companies' "recalculated" list of private property owners was first provided to the Keeper on February 27, 2009, enclosed in a letter describing for the Keeper the technological and other resources Arch Coal used to create the list, which stated:

Arch Coal, which has access to advanced engineering and mapping capabilities, digitally created the boundary drawing provided by the SHPO on a USGS topographical map. Arch was then able to superimpose the tax tract boundaries for lands affected by the proposed Historic District onto this digitized map. Arch determined these tax tract boundaries based on the maps used by the Logan County Assessor's Office... Based on the map prepared by Arch, we identified a list of tracts, in Tax Map and Parcel number format, found in the proposed historic District Boundary. With this information, we determined the individuals who are currently listed as the owners of those various parcels. Based on this identification we prepared our own owners' list (the "Petitioner's List").

A.R. 238. Missing from this description of the technological bells and whistles Arch Coal used and financial resources it expended to produce its "own owners' list" is any mention of the critical fact that the company's list was prepared outside the limited window of time in which such a list may be created. *See* 36 C.F.R. § 60.6(c) (providing the list of property owners eligible to make a valid objection "shall be obtained... within 90 days prior to the notification of intent to nominate.") Worse yet, the coal companies' letter does not advise the Keeper that their "own owners list" was a selectively modified version of an outdated property owners list originally compiled in 2007, and not an "update" to the October 24, 2008 list compiled by the Attorney General's Office within the appropriate period specified by regulation. S.M.F. ¶¶ 37-40.

The Arch Coal list added to the "majority of property owners" equation objectors whose ownership of private property had not been verified, while selectively removing the names of non-objectors whose property ownership had been verified by the Attorney General. The Attorney General's October 24, 2008 list identifying 65 private property owners is the only list of private property owners prepared within 90 days of the notification of intent to nominate, and

therefore the percentage of property owners who objected to the nomination could only be calculated by reference to this Official list. Once the Keeper relied on Arch Coal's selectively "recalculated" list, including only 57 private property owners, the administrative process was undermined by illegitimate evidence of the appropriate baseline for calculating the percentage of owners who objected to the listing.

Plaintiffs' claims in the pending action are appropriately directed at the arbitrary and capricious decision by the Keeper to remove the Battlefield from the Register in reliance on the coal companies' illegitimate list. Accordingly, the actions of the Keeper are the proper focus of the instant litigation, not the actions of the West Virginia State Historic Preservation Officer ("SHPO") nor the representatives of the coal companies with mining interests in the nominated site. Nevertheless, the manner in which a team of attorneys financed by the coal companies produced and presented superficially appealing but ultimately illegitimate evidence related to the property owner objections process should not escape comparison to similar "muddy the waters" tactics that have elicited the disapproval of more than one Circuit Court of Appeals when deployed in federal black lung proceedings.

Plaintiffs' memorandum of law demonstrates clearly that the Keeper's decision to de-list the Battlefield site violates the NHPA and the Administrative Procedures Act as alleged in the Complaint. It also provides a compelling explanation of the reasons why "counting only objections from owners whose names are on the official list of owners that was compiled strictly in conformance with 36 C.F.R. § 60.6(c) is essential to protecting the integrity of the process for calculating owner objections under the NHPA." Pls. Mem. at 16. Of course, the Keeper bears responsibility for her reliance on the coal companies' invalid list to determine the baseline for calculation of the majority threshold and for counting objections from persons whose property

ownership had not been properly verified. These mistakes are especially egregious in light of the Keeper's refusal to receive evidence of numerous errors in the company's "recalculated" list offered by comparatively less resourced preservationists. *See* Pls. Mem. at 18; A.R. 525-27.

The Keeper's reliance on the coal companies' property owner list when verifying and counting objections, even though it was not compliant with the federal regulations she is charged with enforcing, renders her decision to de-list the Battlefield reversible error. *See California Human Development Corp. v. Brock*, 762 F.2d 1044, 1049 (D.C. Cir. 1985) ("[I]f an agency decides to promulgate rules, then it is bound by its own regulations even if the action of the agency was discretionary."). Her failure to articulate a "clear and coherent rationale" for her decision to de-list the Battlefield by reference to property owner calculations made using the coal company list instead of the list produced by the West Virginia Attorney General in compliance with applicable regulations, especially in light of credible evidence in the record that the company list is unreliable, renders her decision arbitrary and capricious. *See Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 437 F.3d 75, 83 (D.C. Cir. 2006).

For these and other reasons argued by Plaintiffs in support of their Motion, the UMWA respectfully requests this Court restore Blair Mountain Battlefield to its proper place on the National Register of Historic Places.

Dated: April 15, 2011

UNITED MINE WORKERS OF AMERICA

Respectfully submitted,

/s/ Arthur Traynor

Arthur Traynor (D.C. Bar No. 988730)

United Mine Workers of America

18354 Quantico Gateway Drive, Ste. 200

Triangle, VA 22172

(703) 291-2400
atraynor@umwa.org
COUNSEL FOR INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA

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**[PROPOSED] ORDER GRANTING THE UNITED MINE WORKERS OF AMERICA
LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Upon consideration of the United Mine Workers of America's Unopposed Motion for Leave to File a Brief as *Amicus Curiae* in Support of Plaintiffs' Motion for Summary Judgment, it is hereby:

ORDERED that the Motion is **GRANTED**, and the brief of the United Mine Workers of America as *Amicus Curiae* is hereby accepted as filed on April 15, 2011.

Dated: _____

Judge Reggie B. Walton

Copies to:

Andrea C. Ferster
2121 Ward Court, N.W. 5th Fl.
Washington, D.C. 20037
aferster@railstotrains.org

Counsel for Plaintiffs

Aaron Isherwood
Jessica Yarnell
Sierra Club Environmental Law Program
85 Second Street, 2d Floor
San Francisco, CA 94105
aaron.isherwood@sierraclub.org
Counsel for Plaintiff Sierra Club

Elizabeth S. Merritt
National Trust for Historic Preservation
1785 Massachusetts Avenue NW
Washington, D.C. 20036
betsy_merritt@nthp.org
*Counsel for Plaintiff National Trust
for Historic Preservation*

Ignacia S. Moreno
Kenneth Rooney
Ty Bair
United States Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 663
Washington, D.C. 20044-0663
E-mail: kenneth.rooney@usdoj.gov
Counsel for Defendants