UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2010

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

Mr. Robert V. Abbey
Director, Bureau of Land Management
U.S. Department of the Interior
Washington, DC 20240

Dear Mr. Abbey:

Thank you for your letter of January 11, 2010, concerning Red Devil Mine, as well as the meeting held at your offices on February 4, 2010. Although I was unable to attend, I understand there was a constructive discussion of alternatives to placing Red Devil Mine on the National Priorities List (NPL) pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

I appreciate your commitment to an expeditious investigation and clean up of Red Devil Mine that complies with the requirements of CERCLA, including requirements for public participation and for involvement of the Tribes and the State. These are important elements of an "alternative approach" outlined in my letter of October 1, 2009, and BLM's commitment on these elements moves the discussion forward. Yet there are two areas for which agreement has not been reached. First, your letter indicated BLM's disagreement with the EPA Administrator retaining final decision-making authority for resolving disputes, except those associated with remedy selection. Second, your proposed approach for stipulated penalties would place several conditions on EPA's authority.

We believe in both instances your proposed approach would place limitations on EPA authorities that would impair EPA's ability to assure adequate, accountable, and timely clean up of the site. In addition, the proposed limitations are inconsistent with EPA enforcement policy and past practice for sites, such as Red Devil Mine, that pose serious risks to human health and the environment. In short, EPA remains fully committed to the 5 essential elements for an enforceable agreement outlined in my October 1, 2009, letter as indispensable to any further postponement of a decision on proposing Red Devil Mine for the NPL.

Your letter suggests that collaborative decision making as envisioned in the 2007 Statement of Principles ("Principles") for mixed ownership sites should be used for Red Devil Mine. While EPA supports the 2007 Statement of Principles, we do not believe the principles were intended to serve as a substitute for NPL listing, or intended to apply to sites such as Red Devil Mine. The Principles establish a framework for collaboration

among agencies and the use of each agency's respective authorities. They do not, however, limit any agency's individual authorities or responsibilities, such as EPA's authority to place federal sites on the NPL when appropriate, or to enter into enforceable agreements under CERCLA or other authorities. The Principles are particularly valuable for guiding our respective agencies' actions at sites where private parties are involved, which is not the case at Red Devil Mine where contamination is located wholly on federal land. EPA's consideration of Red Devil Mine for the NPL, and EPA's consideration of an alternative approach based on the 5 essential elements outlined in my October 1, 2009, letter, are consistent both with EPA's statutory authority and EPA's practice at other sites, including private sites, that are eligible for the NPL.

It is important that we quickly find a path forward and avoid potential delays in work at the site level. For the last several months we have attempted to reach agreement on a comprehensive framework, during which time EPA has postponed an NPL listing decision for Red Devil Mine. We understand from our conversations that one obstacle to reaching agreement on a comprehensive framework is your concern over making a long term commitment of resources at one site before there is a broader interagency dialogue concerning potentially thousands of contaminated abandoned mines. In light of these considerations, we proposed a bifurcated approach that focuses initially on completion of the site investigation/feasibility study (RI/FS) and remedy selection. This initial agreement would not include remedial design or implementation of the remedy – likely the most significant components in terms of BLM's resource commitment. While a bifurcated approach is unusual, it affords the agencies additional time to discuss some of the remaining, complex issues associated with a comprehensive clean up agreement.

As outlined at the meeting on February 4, 2010, EPA proposes, as an <u>interim</u> agreement, that:

1. BLM accept the 5 essential elements of an alternative approach listed in my October 1, 2009, letter, including enforcement provisions for the timeliness and quality of deliverables, but negotiate at this time (within 60-90 days) an agreement that is limited in scope to include applicable CERCLA requirements for the remedial investigation and feasibility study, including a commitment by DOI and EPA to jointly select future remedy(s). As recognized in your letter of January 11, 2010, the agreement would specify selection of remedy by the Administrator in the event agreement on remedy is not reached);

2. The agencies most involved in abandoned mine issues (including Department of Interior and EPA) convene within 30 days of the interim agreement a high level interagency dialogue on abandoned mines on federal land, to include discussions on inventorying, prioritizing, and, as part of the Fiscal Year 2012 budget for the Federal Land Managers, funding for investigation and clean up. We recommend a formal exchange of letters or an MOU that commits each agency to the dialogue, and commits the agencies to providing an opportunity for public and stakeholder input.

3. EPA and BLM immediately engage the State, affected Tribes and

stakeholders on options and alternatives for a comprehensive framework for Red Devil Mine, as well as the interim agreement. (Consultation with Native Villages must be consistent with existing Executive Order 13175. EPA is planning to soon send a letter to affected Tribes to initiate this process, and we urge that BLM take a lead role and work closely with EPA on this activity.)

Under this approach, we anticipate that agreement can be reached quickly on a framework that allows work on the ground to proceed with appropriate oversight, even as we continue to discuss longer term abandoned mine issues. It is important to recognize, however, that a dialogue on broader abandoned mine issues should not interfere with progress at Red Devil Mine, either during implementation of an interim agreement, or implementation of subsequent actions. Listing Red Devil Mine on the NPL remains an option in the event of insufficient progress at the site, and listing on the NPL or a second enforceable agreement is expected to be necessary for completion of the clean up work at Red Devil Mine following remedy selection.

The contractor "conflict of interest" issue, which you mentioned in your letter, must still be resolved. We do not support the suggestion in your letter that EPA waive the conflict avoidance requirement. We would be pleased to discuss this matter further at your earliest convenience.

Obtaining your agreement on the interim approach outlined above is critical if EPA is to further postpone a proposal to place Red Devil Mine on the NPL. As a decision on in this matter is needed in the near future, we ask that BLM provide a written response to this letter by March 1, 2010.

Sincerely,

Mathy Stanislaus
Assistant Administrator

cc: David Hayes, Deputy Secretary, DOI
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