



# United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Washington, D.C. 20240

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In Reply Refer To:  
1703(WO280)

**SEP 08 2009**

Mr. Mathy Stanislaus  
Assistant Administrator  
Office of Solid Waste and Emergency Response  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Re: Proposal to List Red Devil Mine Site on the National Priorities List

Dear Mr. Stanislaus:

Thank you for meeting with Rachel Jacobson, Mike Pool, Mary Josie Blanchard and other representatives from the Bureau of Land Management (BLM) and Department of the Interior (DOI) last Friday to discuss the proposal to list the Red Devil Mine site on the National Priorities List (NPL). I'm sorry I was unable to attend the meeting in person but I understand that there was a cordial and constructive discussion between the BLM and Environmental Protection Agency (EPA) representatives at the meeting.

As I understand it, you asked BLM to offer a proposal for how the agencies' shared goal of completing a comprehensive site-wide remedial investigation and feasibility study (RI/FS) in an expeditious fashion could be achieved without listing the site on the NPL. As my staff indicated during the meeting, BLM has already secured from DOI \$530,000 in fiscal year (FY) 2009 funds for the performance of the RI/FS and expects to receive an additional \$250,000 in FY 2010 funds pending final approval by the Department's Deputy Assistant Secretaries Advisory Group on Environmental Policy and Compliance. The BLM will pursue any additional funds needed to complete the RI/FS, as well as funds to implement the remedial action selected.

This funding has been secured from DOI's Central Hazardous Materials Fund (CHF) which is used by DOI to fund the Department's highest priority cleanups. Funds from the CHF may only be used to implement response action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Such response action must be conducted in a manner fully consistent with the National Contingency Plan and applicable EPA CERCLA guidance. Using CHF funds, the Department's Bureaus exercise CERCLA Section 104 and other response authorities delegated to them by Executive Order 12580, much like EPA does at privately owned Superfund sites.

At the Red Devil site, BLM has initiated the process of retaining qualified contractor assistance to conduct the RI/FS and intends to have a contract in place this month at which time planning

for the remedial investigation will move forward. In response to your request, BLM has developed an outline of the specific tasks, milestones, and other work that will be conducted to finish the RI/FS, and the schedule by which such work will be completed. I have attached that outline to this letter for EPA's consideration.

As BLM representatives suggested at last Friday's meeting, and in my earlier correspondence to you dated September 1, 2009, there are several important reasons for not listing the Red Devil site on the NPL and for not characterizing the site as a "Federal Facility" as that term is used in Section 120 of CERCLA. Abandoned mines on public land are inherently different from military bases, nuclear weapons production facilities, and other industrial sites operated by or on behalf of a federal agency. Instead, abandoned mines are private facilities that have been owned and operated on public land by private mining claimants exercising rights granted by the 1872 Mining Law.

The United States, through the Department of Justice, has long taken the position in the context of contribution litigation that federal land management agencies are not "owners" for CERCLA purposes at sites mined by private parties under the 1872 Mining Law.<sup>1</sup> The basis for this position rests on the nature of property interests created by the Mining Law. Prior to passage of the Federal Land Policy Management Act (FLPMA) in 1976, private mining claimants, exercising rights granted by Congress under the Mining Law, were free to enter public land and extract and process ore with virtually no federal oversight or control. In passing the Mining Law, Congress made over one billion acres of federal land available to private parties. Mining claimants who satisfied basic procedural steps obtained a "perfected claim" which conferred on the claimant "*exclusive right of possession and enjoyment of all surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth...*"<sup>2</sup> As described by the Supreme Court, a perfected mining claim "has the effect of a grant by the United States of the rights of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged and inherited without infringing any right or title of the United States."<sup>3</sup>

As a means of transferring to the public federal lands containing valuable minerals, the Mining Law created a "unique form of property."<sup>4</sup> "The legal title retained by the government was nominal in nature and stemmed from the government's singular role in distributing land to serve the national interest."<sup>5</sup> The right of exclusive possession of the land granted to a mining claimant included the right to exclude even the United States. Prior to the enactment of FLPMA,

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<sup>1</sup> Attached to this letter for your review is a subset of the many briefs filed by the United States adopting this position.

<sup>2</sup> 1872 Mining Law, 30 U.S.C. § 26 (emphasis added).

<sup>3</sup> Wilbur v. United States ex rel. Krushnic, 280 U.S. 306, 316 (1930).

<sup>4</sup> Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335 (1963).

when mining at the Red Devil site took place, the United States had no authority under the Mining Law to control, restrict, or regulate mining-related activities, including activities that resulted in harm to the environment. “What little authority attached to the government’s title interest merely served the sovereign function of preventing fraudulent non-mining uses of claims.”<sup>6</sup>

In other words, sites mined prior to FLPMA under the 1872 Mining Law are subject to two different types of property rights: the mining claimant’s expansive right to possess, use, convey, and exclude others, including the United States, at a perfected mining claim even if that claim remains unpatented; and the United States’ restricted right to do little more than prevent fraudulent non-mining uses of mining claims. This absence of any real authority to control activities at pre-FLPMA mine sites is why the United States has long maintained that federal land managers are not CERCLA “owners.”

Consistent with this interpretation, as the CERCLA caselaw has evolved most courts considering the issue of “ownership” have focused their analysis on the degree of control a party possesses at the site.<sup>7</sup> Analyzing this question in terms of whether the United States was an “owner” for CERCLA purposes at the Summitville Mine site in Colorado, the Federal District Court examined the Mining Law and relevant caselaw, concluding “federal law permits private parties to acquire exclusive possessory interests in federal land for mining purposes, interests which entitle claim holders to extract and sell minerals without paying royalties to the Government.”<sup>8</sup> The court then examined the absence of control possessed by the United States at the site, noting that the United States receives no financial benefit at mine sites; lacks the power to retain title to the land if the claimant seeks title; has no ability to set the boundaries of the conveyance or establish the terms of sale based on the land’s value; and is not allowed to exclude individuals from land open for mineral exploration.<sup>9</sup> Based on the mining claimant’s expansive property interest at the site and the United States’ quite limited one, the court held “the United States is not an ‘owner’ in the fullest sense of the word ... Therefore, I find it inappropriate to deem the United States an ‘owner’ for purposes of CERCLA liability.”<sup>10</sup> Other courts have agreed with

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<sup>5</sup> United States’ Memorandum of Points and Authorities in Opposition to Defendants’ Motion for Partial Summary Judgment, *United States v. Buena Vista Mines, Inc.* (2001 WL 35973531 (ENRD Briefs, p. 13))

<sup>6</sup> *Id.* at p. 10.

<sup>7</sup> “The common law defines ‘owner’ as ‘a collection of rights to possess, to use, and to enjoy property, including the right to sell and transmit it.’” United States’ Reply in Support of Cross-Motion for Partial Summary Judgment, *U.S. v. Iron Mountain Mines, Inc.*, at p.13 (September 29, 1997) citing 63C Am. Jur. 2d Property § 25.

<sup>8</sup> *U.S. v. Friedland*, 152 Supp. 2d 1234, 1245 (D. Colo.) (2001).

<sup>9</sup> *Id.* at 1246.

<sup>10</sup> *Id.*

this conclusion.<sup>11</sup> Consistent with the legal position of the United States and these court opinions, the longstanding practice of the United States has been to recognize that abandoned mine sites are not truly “federal” in character. For example, it has been EPA policy since at least 2003 to exclude so-called “mixed ownership” mine sites from the Federal Docket established under Section 120(c) of CERCLA, notwithstanding the fact that title to a portion of such sites is vested in the United States.<sup>12</sup> Abandoned mine sites without any patented land should not be treated in a different manner. Such sites, like the Red Devil site, are in essence privately owned and operated facilities that have been abandoned by mining claimants and happen to be located on federal property. As the Supreme Court has recognized, the legal distinction between a patented and an unpatented mining claim in terms of the private claimant’s ownership rights, and the corresponding absence of ownership rights held by the United States, is insignificant.<sup>13</sup>

For these reasons and others, any departure from the customary practice of excluding “mixed ownership” mine sites from the Federal Docket and not listing abandoned mine sites as “Federal Facilities” deserves the benefit of an informed and thorough discussion of the broader legal and policy implications. This discussion should take place among all interested federal agencies including the National Park Service, the U.S. Forest Service, the Department of Agriculture, the Department of Justice, and BLM and DOI. Instead of embarking on this path, let me suggest that the critical objectives of EPA, BLM, and the State of Alaska can be achieved without listing Red Devil on the NPL. The purpose of NPL-listing after all, as reflected in EPA rulemakings on the subject, is “primarily to guide EPA in determining which sites warrant further investigation ...”<sup>14</sup> Certainly the agencies responsible for cleaning up Red Devil all agree that the site warrants further investigation and response action and BLM is committed to pursuing this investigation and cleanup and achieving our shared objectives with EPA and the State as full partners.<sup>15</sup>

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<sup>11</sup> See, e.g., Coeur D’Alene Tribe v. Asarco Inc., 280 F. Supp. 2d 1094, 1133-34 (D. Idaho) (2003).

<sup>12</sup> “Policy on Listing Mixed Ownership Mine or Mill Sites Created as a Result of the General Mining Law of 1872 on the Federal Agency Hazardous Waste Compliance Docket” (Federal Facilities Enforcement Office) (June 24, 2003).

<sup>13</sup> “The owner (of an unpatented claim) is not required to purchase the claim or secure patent from the United States but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, *is as good as though secured by patent ...*” Wilbur v. United States ex rel. Krushnic, supra at 316-17. (Parenthetical and emphasis added).

<sup>14</sup> 58 Fed. Reg. 27507 (May 10, 1993) “National Priorities List for Uncontrolled Hazardous Waste Sites, Proposed Rule No. 14.” “The purpose of the NPL is merely to identify releases and threatened releases of hazardous substances that are priorities for further evaluation.” Id.

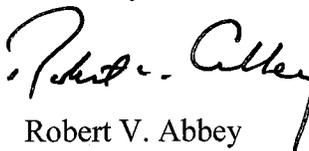
<sup>15</sup> As noted earlier, the Red Devil site already has been identified by BLM and DOI as a Departmental priority as reflected by DOI’s allocation of CHF money to the site. Listing the site on the NPL will not expand the sources or increase the level of funding available to complete the RI/FS and subsequent remedial action.

One of these shared objectives is to coordinate among the agencies to conduct a comprehensive RI/FS that fully characterizes the nature and extent of contamination at the site and evaluates the remedial alternatives for responding to this contamination. The vehicle for ensuring this coordination can be a three-party memorandum of understanding (MOU) modeled after the draft model MOU under development by EPA, DOI, and the Department of Agriculture pursuant to the "Statement of Principles for Collaborative Decision Making" that has been adopted by these agencies.<sup>16</sup> The MOU can fully describe the agencies' respective roles and responsibilities, the work to be performed, and the schedule by which the work will be completed. This will provide for full collaboration between the agencies in the development and implementation of a comprehensive RI/FS workplan. The MOU can also specify how the agencies will collaborate in the development and implementation of a CERCLA Community Involvement Plan by which the agencies can inform the public and, in particular, the Native communities that rely on subsistence resources, about the ongoing CERCLA response activities to ensure the concerns and input of the area's key stakeholders are incorporated fully into decision-making.

In closing, let me assure you that BLM understands and takes very seriously its responsibility to investigate contamination that has resulted from the abandoned mining claims of the private claimants that operated the Red Devil site. We also take very seriously the responsibility we share with EPA and the State of Alaska to remediate the risks posed by this contamination to human health and the environment. The proposal outlined by this letter will, I believe, enable the agencies to accomplish these goals and I respectfully urge EPA to give this proposal its careful attention.

Enclosures

Sincerely,



Robert V. Abbey  
Director

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<sup>16</sup> "Statement of Principles for Collaborative Decision Making at Mixed Ownership Sites," OSWER Directive 9200.06-1 (2007). For your convenience, a copy of this Statement of Principles is enclosed.