



MODRALL SPERLING

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Via E-mail david.ohori@state.nm.us

August 3, 2015

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Mr. David Ohoi
Permit Lead
Mining Act Reclamation Program
State of New Mexico
Energy Minerals and Natural Resources Department

Re: Rio Grande Resources Response to Post-Public Hearing Comments on Amended Application for Standby Renewal including Updated Closeout Plan, Mt. Taylor Mine, Amended Revision 10-1, Permit No. CI002RE

Dear Mr. Ohoi:

Rio Grande Resource's Response to Post-Public Hearing Comments

This submittal on behalf of RGR responds to the July 2, 2015 letter of MMD. It is organized in four parts:

- 1) Response to MASE
- 2) Response to Fernandez
- 3) Response to Acoma Pueblo
- 4) Response to other commenters in opposition, which are:
 - Catholic Office of Peace, Justice and Creation Stewardship
 - LACSE
 - YM Lee
 - James Duck
 - Ryan Lee
 - David Begay

Because certain issues are raised by more than one commenter, RGR cross-references its response to such issues to avoid unnecessary duplication.

1. Response to Comments of MASE (May 29, 2015)

This section responds to MASE's written comments submitted on May 29, 2015 following the May 1, 2015 public hearing. For reasons that are not entirely clear, on pages 3 through 7 of its post-hearing submission, MASE provides an extensive "Summary of

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Proceedings” section. The section includes various gratuitous and largely inaccurate characterizations of prior submissions, determinations and proceedings leading to the public hearing that occurred on May 1, 2015. For example, MASE asserts: (a) that RGR’s application to renew its standby status contained “nothing more than a cursory statement about reserves at the Mt. Taylor Mine,” and “failed to provide any meaningful information” about economic viability; (b) that the election of a new Governor was the only circumstance leading to NMED’s May 27, 2011 determination that RGR would meet groundwater requirements at the mine during the permit renewal period; (c) that at the prior hearing MMD prohibited community members from presenting any evidence on groundwater contamination and RGR’s technical or financial ability to remediate; and (d) that RGR’s economic viability analysis released to the public by MMD had been “heavily redacted.” Although RGR objects to MASE’s self-serving casting of aspersions on RGR, MMD and NMED, RGR does not understand MASE’s “Summary of Proceedings” to amount to comments on MMD’s May 1 hearing.

MASE nowhere asserts that the May 1 hearing fell short of rectifying the issues that caused Judge Ortiz to remand for the further proceedings as addressed in *Multicultural Alliance for a Safe Environment, et al. v. NM Mining Commission, et al.*, No. D-101-CV-2012-02318. First, MASE’s witness was provided an unfettered opportunity to participate in the May 1 hearing. Second, although he generally lectured against withholding information as confidential, MASE’s post-hearing submission does not take issue with MMD’s earlier resolution of confidentiality issues that at one time were in issue, but are no longer. Third, financial assurance is adequate. As indicated in RGR’s post-hearing submission, MASE’s witness “look[ed] very positively” on and “congratulated” RGR for its updated closure plan and financial assurance estimate, and found the updates to be “consistent with the Act.” Tr., p.63, line 19, through p.64, line 12. MASE’s post-hearing submission accordingly does not address or question the adequacy of RGR’s closeout plan and financial assurance estimate. The questions raised by Judge Ortiz about these three issues have been resolved.

Therefore, at least insofar as MASE comments are concerned, the remaining issue is renewal of standby status. RGR confines its responses here to MASE’s comments that question RGR’s motives for seeking a further renewal of standby status, and the sufficiency of RGR’s showing that a further standby renewal is warranted.

The substantive comments of MASE regarding renewal of standby status generally fit into three categories. First, MASE complains about the amount of time that the Mt. Taylor Mine has been idle and asserts that RGR is merely using standby as a means to avoid reclamation “indefinitely.” Second, MASE asserts that RGR failed to demonstrate economic viability. Third, MASE asserts that RGR cannot protect the environment during the standby renewal period. RGR responds to each of these points and various related sub-points in this section.

A. MASE Comments to the Effect that RGR is Trying to Avoid Reclamation Indefinitely

MASE comments:

MASE asserts that a mine’s period of activity during which it may stay on standby is “intended to be **temporary**” (emphasis in original), that an operator “should not be allowed to receive standby permit after standby permit and not conduct any reclamation, and that “a standby permit should not “be used to evade reclamation responsibilities indefinitely.”

MASE, p. 2. MASE asserts that it is not fair to the communities where mines are located to allow multiple standby permits without any reclamation. *Id.*; *see also* p. 10 (“The Mining Act’s and its regulations’ plain language evinces the Legislature’s and Mining Commissions’ intent that standby status is to be granted only temporarily – not indefinitely.”). In the context of these assertions MASE points out that “Mt. Taylor Mine has been idle for over 20 years – an entire generation” and asks MMD to either deny the renewal of Mt. Taylor’s standby permit and “require final mine reclamation immediately,” or else “require RGR to conduct significant interim reclamation.” MASE, p. 3.

RGR Response:

The clearly intended suggestion of these MASE comments is that RGR has sought and received standby permit after standby permit, and that by doing so, it has sought to evade reclamation responsibilities indefinitely. The record reflects otherwise. RGR has received only one standby permit, and is seeking the second of three potential renewals of that permit that the Act and MARP regulations allow. It has extended its standby permit to weather unfavorable market conditions that admittedly have persisted for decades, but it has also expended significant sums: (a) to maintain the facility so that mining may more readily resume again in the future (which is a plain purpose of standby allowed by the Act and MARP rules); (b) to acquire additional uranium reserves; (c) to update its closeout plan and financial assurance cost estimates; (d) to engage in standby permit and permit renewal proceedings; (e) to permit and conduct pilot activities designed to assure that dewatering discharges meet drinking water standards when mine dewatering activities recommence; and (f) to initiate the lengthy permitting process to come off standby and commence costly redevelopment efforts in order to resume operations in the future. The wholly unsupported supposition and conjecture that RGR is attempting to remain on standby indefinitely and is nefariously scheming to avoid reclamation responsibilities are offensive and completely unwarranted mantras of Mt. Taylor Mine’s opponents. They are amply refuted by the record of RGR’s actions and statements. Indefinite avoidance of reclamation is not even possible as a legal matter since the Act and MARP rules provide that an operation may only keep a standby permit in effect for a maximum 20 years period. The fact that the Mt. Taylor Mine once produced uranium profitably but has not operated for more than 20 years, moreover, in no way means the 20 year maximum for a standby permit has been exceeded in this instance. The Mining Act was passed in 1993, and under the Act and MARP rules, RGR had no legal ability to obtain a standby permit until after it had received its existing mining permit under Part 5 of the MARP regulations, which it did on July 28, 1995.

B. MASE Comments to the Effect that RGR Has Failed to “Demonstrate” Economic Viability

MASE comments on economic viability essentially raise five sub-issues. Each sub-issue is addressed below.

1. MASE comments that a “demonstration” is required:

MASE asserts that RGR has failed to “demonstrate” that the Mt. Taylor Mine will be economically viable in the foreseeable future. MASE, pp. 2 and 10. Although MASE acknowledges that the Act merely requires that the applicant “provide” an economic viability

analysis (MASE, p. 9), and that RGR in fact submitted such an analysis to MMD (MASE, p. 6), it asserts that a “meaningful evaluation” of the analysis must be performed (MASE, p. 9), and that the Act and regulations “demand that operators demonstrate that their mine will be economically viable during and for a reasonable time after the standby period.” MASE, p. 10.

RGR Response:

Both the Act at 69-36-7(E) and the MARP regulation at Rule 701 define what all is required of an operator to obtain and maintain permits for standby status. “Demonstrating” economic viability is not one of those requirements. Providing MMD with an analysis of economic viability is one of those requirements, but neither the Act nor Rule 701 require a specific “demonstration” of viability. Of course, the Act and Rule provide no standard by which to measure the adequacy of the imaginary “demonstration”. Further missing from the Act and Rule is any suggestion that MMD must make a determination that the operation will be economically viable “during and for a reasonable time after the standby period,” as MASE alleges, or even as of a particular date in the future. Rule 701(B)(6) merely states that an operator must “provide an analysis of the anticipated future economic viability” without reference to any particular point in time, whether during or after the standby period.

RGR has met this requirement through its written economic viability analysis and ample testimony. For example, at the May 1 hearing, Mr. Lister testified that the Mt. Taylor deposit is a unique asset with a competitive edge that is well-positioned in the marketplace, in part because RGR’s predecessors invested half a billion dollars in 1970 dollars into the project. Moreover, RGR has expended millions to maintain the mine and has acquired additional mineral reserves in the area, all in anticipation of future economic viability. Although members of the public such as MASE may offer their own views about economic viability, and were allowed to do so without restriction in the May 1 hearing, it is clear from both the Act and Rule 701 that it is the operator who must analyze future economic viability of the project. Even if a rule of reasonableness were to be read into the Act and Rule 701, the question would be whether RGR’s exercise of its own business judgment about economic viability was reasonable. It clearly was for this standby renewal proceeding, just as it was in prior standby renewal proceedings. MASE’s notion that RGR must make some ill-defined “demonstration” of economic viability is not only absent from the Act or regulations, but it also makes little sense because evaluations of future economic viability are by their very nature the product of assumptions and interpretations—largely subjective—about unknown future events and market pressures. Such predictive analysis is an imperfect science.

2. MASE comments that economic viability should be based on current conditions:

MASE asserts that RGR “concedes” that the Mt. Taylor Mine is not currently economically viable. According to MASE, RGR’s witnesses admitted this when they testified that there are certain development activities that will have to occur over time in order to resume production. MASE, pp. 10 and 11.

RGR Response:

As discussed at length in RGR's post-hearing submission, MASE repeatedly has demonstrated it is confused about what is meant by economic viability as used in the Act and regulations. Nowhere is its confusion more apparent than in these comments. Economic viability is not tested by current conditions. In fact, Rule 701(B)(6) is explicit that the "economic viability" that an operator must show it has analyzed is the "anticipated future" economic viability, not "current" economic viability. It would make no sense whatsoever for "current" economic viability, in the way MASE apparently means it, to be a touchstone for standby status eligibility. If current viability were the test in the Act and Rule, the Legislature and Mining Commission would be saying that eligibility for standby status depends on the operator concluding that there is no need to be on standby status. MASE's position in this regard is nonsensical.

3. MASE comments that inadequate market demand precludes economic viability:

MASE asserts, on the one hand, that there is no indication Mt. Taylor Mine will experience a demand for uranium in the future, and on the other hand, that the global demand for uranium in the future as reflected in various sources of market information will be met or exceeded by "existing and committed mines" through 2023. MASE, pp. 11-12.

RGR Response:

By these comments, MASE is doing little more than throwing isolated pieces of information from various sources against the wall and hoping something will stick and cause MMD to doubt RGR's anticipation of future economic viability even in the absence of any standard for assessing RGR's business judgment. Moreover, MASE's comments demonstrate a complete lack of understanding both of the sources it cites and of the potential behavior of participants in entering or re-entering markets in relation to supply and demand. For example, MASE states on page 12 that the International Atomic Energy Agency (IAEA) talks about "existing" mines meeting projected demand, but offers no insight or analysis of whether IAEA would consider Mt. Taylor Mine, like the State of New Mexico does, to be one of those existing mines. More fundamentally, however, MASE makes the naïve and false assumption that it is only economically viable for one to enter or re-enter a market if none other already in the market could offer supply that would meet the demand, without any consideration of competitive factors such as relative unit costs, quality of product or any other factor. MASE's position in this regard is nonsense.

4. MASE comments based on testimony of Jim Kuipers:

Drawing on testimony from Jim Kuipers, MASE asserts that there is a "lack of demand" for uranium, and that "if uranium were to ever rebound, it would not be for another 25-50 years." MASE, p. 12. It points out that, "as of May 25, 2015, the spot price for uranium has fallen to \$30.75." MASE, p. 13. MASE concedes that uranium prices have risen since 1994, but asserts that the recent trend is falling prices. *Id.* MASE further surmises that long-term releases of existing stockpiles will further satisfy demand, making new production unnecessary. *Id.*

RGR Response:

There are several problems with these MASE comments. First, Mr. Kuipers acknowledged that he is not an economist and has not been involved in the development of a large scale underground uranium mine or mill facility. Tr., p. 67, lines 12-15 and p. 68, lines 5-7. Second, the 25 year range in Mr. Kuiper's own 25-50 year estimate itself underscores and amounts to an acknowledgment of the lack of precision with which future uranium prices may be projected. Third, large capital projects such as taking the steps necessary to put Mt. Taylor Mine back into production are not based upon spot prices. Fourth, the spot price and supposed trend of falling prices observed by MASE as of May 25 have changed in the two months since the hearing. As of July 25, 2015, the spot price was \$36.00, reflecting an upward trend from \$30.75 on May 25. <http://www.uxc.com/review/UxCPrices.aspx>. World Nuclear News headlines report that, despite Fukushima (a rallying cry for MASE in the past), "Japan Two Weeks from Nuclear Power" (see <http://www.world-nuclear-news.org/RS-Japan-two-weeks-from-return-to-nuclear-power-2706151.html>) and "Nuclear to Help Japan Meet Climate Goals" (see <http://www.world-nuclear-news.org/EE-Nuclear-to-help-Japan-meet-climate-goals-2107155.html>). Moreover, any day the United States EPA is expected to come out with its final Clean Power Plan, which is widely expected to further impede reliance on fossil fuels for electricity generation, and correspondingly improve the outlook for uranium demand and nuclear power generation. (see, e.g., <http://www.platts.com/news-feature/2014/electricpower/us-epa-nuclear/index>). The point is that Mr. Kuipers' testimony and the post-submission offerings of MASE cannot and should not be viewed as qualified or definitive statements supporting a second-guessing of RGR's business judgment. RGR's judgment is reasonable and it is based on RGR's knowledge of its own operations and the marketplace within which it is an established participant.

5. MASE comments regarding milling capacity:

MASE asserts that RGR failed to demonstrate that any milling capacity exists or will exist for ore produced from the Mt. Taylor Mine. MASE, p. 14. Mr. Kuipers testified that, without a mill, mining is not feasible. MASE acknowledges that RGR has plans to construct a mill and has provided the Nuclear Regulatory Commission (NRC) with a notice of intent that it will be applying for a mill license, but MASE points out that RGR has not yet actually applied for a mill license.

RGR Response:

The previous owner of Mt. Taylor Mine licensed a mill site. The license was voluntarily terminated due to market conditions in the late 1980s. RGR still owns the mill site, which was previously demonstrated to meet NRC requirements. On or before revision of the mine permit to return to active status, RGR plans to resume and then complete the licensing process. Mine development and mill development can proceed concurrently.

C. MASE Comments to the Effect that RGR Will Impact the Environment During Standby

MASE asserts that RGR has failed to demonstrate that it can protect the environment during the standby renewal period. MASE, p. 15. It points out that shallow perched water has uranium, nitrates and other pollutants in it. *Id.* MASE acknowledges that an abatement

plan proceeding for the Mt. Taylor Mine is ongoing at NMED, and that the NMED Secretary has issued a determination that RGR would meet all groundwater standards at the Mt. Taylor Mine for the standby renewal period. But MASE criticizes both the circumstances of the determination's issuance, and the plan to use phreatophytes (in this case, salt cedars) as a way to remediate groundwater. MASE, pp. 14 and 15-16. MASE also asserts that the mine site includes hundreds of past exploratory wells, but that no evidence was provided about the effect of the exploratory wells. MASE, p. 16.

RGR Response:

The water that was previously impacted is shallow, localized and non-recoverable. Local communities are in no way affected. The water was impacted only on a limited basis. Under the existing abatement plan, the water has been characterized and monitored. Also, RGR has provided a waste pile characterization study. Impacted water is being addressed by the abatement plan approved by NMED.

Regarding the exploratory wells, sampling indicates that exploratory wells do not affect RGR's ability to remediate. The only groundwater exceedance is in a shallow zone unconnected with exploratory wells in a deeper horizon. There is no need or basis for MMD to require anything further in terms of environmental protection measures during standby, including final or interim reclamation measures urged by MASE, and requiring such measures would defeat a basic purpose of standby to keep the facility in a ready position for the return to active status.

2. Response to Comments of Fernandez (May 29, 2015)

RGR has previously responded to the comments of Fernandez. RGR refers MMD to its response to comments of Fernandez, which is contained within RGR's post-hearing submittal in this proceeding.

3. Response to Comments of Pueblo of Acoma (May 18, 2015)

The Pueblo of Acoma letter of comment contains five bullet points. RGR responds to each in turn below.

- First bullet point – TCP and Acoma's cultural use of the area

RGR Response:

Acoma states that it adopts the March 30, 2015, comments issued by the New Mexico Department of Cultural Affairs, Historic Preservation Division ("DCA Letter"). RGR notes that it has previously provided a detailed response to the DCA Letter in the May 22, 2015 letter from Stan Harris to David Ohori ("May 22 Letter"). RGR incorporates herein and attaches hereto a copy of the May 22 Letter.

Acoma seeks access. Of course, absent permission by RGR, Acoma members and other members of the public have no right to access property of RGR. Nevertheless, RGR has discussed with Acoma the possibility of RGR's giving permission for limited access to areas

controlled by RGR. RGR would be willing to allow limited access to Acoma on mutually acceptable conditions that recognize RGR's property rights to the area.

MMD and other agencies have considered the TCP. The closeout plan is adequate and State agencies have determined that environmental protection is adequate.

- Second bullet point – Consultation with Pueblo to reevaluate environmental impacts

RGR Response:

The evaluation and comments of State agencies are adequate. RGR understands that agencies are making appropriate consultation with Pueblos. Moreover, additional consultation opportunities will be available to the Pueblos in future permitting proceedings.

- Third bullet point – Post Mining Land Use

RGR Response:

Neither the Mining Act nor the State constitution provides for a third party or the State to require a property owner to use its property for a cultural resource and archeological park. Grazing or construction of facilities are appropriate post-mining land uses.

- Fourth bullet point – Pipeline

RGR Response:

RGR and Acoma have had preliminary discussions, and RGR is evaluating the potential for discharge of treated water to such a pipeline. Of course, approvals required for this discharge are outside the scope of this proceeding.

- Fifth bullet point – Land and Water Rights of Acoma

RGR Response:

Giving others access to property controlled by RGR and evaluating Acoma claims to land and water, some of which are disputed, are subjects that are outside the proper scope of this proceeding or the Close-out Plan. However, as noted in RGR's response to the first bullet above, RGR remains willing to discuss the possibility of giving permission to Acoma for limited access.

4. Comments of Other Commenters in Opposition

Other commenters in opposition are:

- Catholic Office of Peace, Justice and Creation Stewardship
- LACSE
- YM Lee
- James Duck
- Ryan Lee

— David Begay

Comments of these commenters are addressed by subject, and cross-references are provided where a subject is addressed elsewhere in this response.

A. Economic Viability

See RGR's response to MASE comments above. In addition to aspects of economic viability raised by comments of MASE, one commenter suggested that a schedule of rehabilitation and licensing milestones be provided. Reclamation and developing a reclamation schedule are premature. Until a mine permit is issued and NRC permitting has begun, it is not possible to schedule licensing milestones.

B. Reclamation and Legacy Sites

See RGR's response to MASE comments. In addition to aspects of reclamation raised by MASE, other commenters call for interim reclamation or "clean-up" of contamination. The Mining Act does not require interim reclamation for Mt. Taylor Mine while on standby. Given RGR's pending application to come off standby status, requiring reclamation now would be particularly inappropriate. As for "clean-up," the only known impacted water at the mine is quite limited, and it is being addressed by the abatement plan under DP-61. NMED has certified that RGR is in compliance with environmental laws. It is inaccurate to suggest that uranium legacy issues at other mine sites exist at Mt. Taylor. Presently applicable environmental standards are being met at Mt. Taylor. One commenter suggested that stockpiled waste be isolated by liners or removed. Data shows that toxic chemicals do not leach to the environment from stockpiled waste at the waste pile. The Closeout Plan adequately addresses isolation of stockpiled waste.

C. Groundwater Quality

See RGR's response to MASE comments. In addition to aspects of groundwater quality raised by comments of MASE, another commenter suggested there is a need for more baseline data characterizing ground water conditions. RGR submits that existing data is presently adequate, but in any event, evaluation of whether additional baseline data is required is beyond the scope of this standby renewal proceeding.

D. Cultural Resources

Several comments assert that Mt. Taylor is a cultural resource or sacred site and that further consultation with Pueblos is needed. RGR understands that MMD has consulted with Pueblos in the context of Mt. Taylor Mine. RGR's door remains open to discuss the subject with the Native American community. Moreover, additional consultation can occur in the context of other permits. RGR supports adherence to existing laws concerning tribal consultation.

RGR appreciates this opportunity to respond to comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Stuart R. Butzier". The signature is written in a cursive style with a large, prominent "S" and "B".

Stuart R. Butzier



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Via E-Mail david.ohori@state.nm.us

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May 22, 2015

Mr. David Ohoi
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Re: Comments on Amended Application for Standby Renewal Including Updated Closeout Plan, Mount Taylor Mine, Amended Revision 10-1, Permit No. CI1002RE

Dear Mr. Ohoi:

On behalf of Rio Grande Resources (RGR), this is in response to the letter to you from New Mexico Department of Cultural Affairs Archaeologist Michelle M. Ensey, dated March 30, 2015 (DCA Letter). You forwarded it by email to Joe Lister.

RGR is committed to its compliance with laws concerning protection of cultural resources, and RGR anticipates coordination with the State and relevant tribes in this regard. The DCA Letter recommends that, for various reasons, an archaeological consultant should conduct an archaeological survey of some portions of the mine permit area. RGR is not necessarily averse to having a survey conducted for specified areas under certain conditions. Indeed, RGR plans to have archeological surveys conducted before any previously undisturbed areas are disturbed in the future in the mine permit area. However, RGR anticipates, as described in its permit, that the great majority of its operations in the future will be on lands previously disturbed. Archeological surveys on such lands are unnecessary. Further, RGR believes that some of the reasons given in the DCA Letter for such surveys are mistaken, and desires to clarify applicable requirements.

For example, the DCA Letter indicates that activities associated with the proposed RGR permit "have the potential to inadvertently damage cultural resources that may be eligible for listing on the State Register of Cultural Properties or the National Register of Historic Places." RGR notes that there is no statute that authorizes state agencies to consider unidentified properties that "may be eligible for listing" on the referenced State or Federal registers. Instead, state statutes only allow

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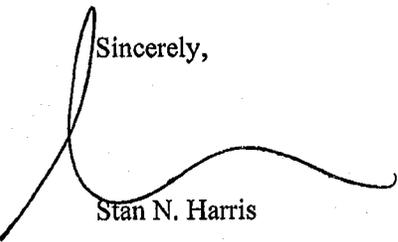
for consideration of properties that are in fact listed on either the State or Federal registers. *See, e.g.*, NMSA 1978, §§ 18-6-3(C), (D).¹

Similarly, the DCA Letter indicates that issuance of the permit somehow requires DCA consultation pursuant to the New Mexico Prehistoric and Historic Sites Preservation Act (PHSPA), NMSA 1978, § 18-8-7. This is incorrect. Section 18-8-7 of the PHSPA applies to the spending of "public funds" by state agencies. *See id.* The implementing regulations for Section 18-8-7 define "public funds" as "any moneys, financial consideration or direct or indirect financial support from any political subdivision of the state or from any entity acting on behalf of or with the authority of any political subdivision of the state." 4.10.12.7(M) NMAC. RGR's permit application neither requests nor would result in the receipt of any moneys, financial consideration, or direct indirect financial support from the MMD or any other state agency. Likewise, Section 18-8-7 applies to projects that "require[] the use of any portion of or any land from a significant prehistoric or historic site" *See id.* The permit application, however, does not include any land within the Mt. Taylor TCP, and therefore does not require the use of the TCP as contemplated by Section 18-8-7. Further, the specific request at issue is for a standby permit, which simply extends the status quo, and therefore without question requires no use of the TCP. Section 18-8-7 does not apply to the permit application.

In this same regard, the DCA Letter appears to be concerned with activities that are not at issue in the permit application. In particular, the HPD Letter discusses claimed adverse effects to the Mt. Taylor TCP that would assertedly result from "[r]eactivation of the mine." RGR's permit application, however, is for a standby permit.

RGR looks forward to working with the State and tribes to comply with cultural resource protection laws. Thank you for the opportunity to address the DCA Letter.

Sincerely,



Stan N. Harris

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¹ The DCA's Letter's reference to cultural resources that "may be eligible for listing" may be a reference to a federal standard used by federal agencies in determining whether federal projects might affect certain types of historic properties. *See* 16 U.S.C. § 470f.