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DIVISION OF
RECLAMATION MINING & SAFETY

December 11, 2012

Mr. Dustin Czapla
Environmental Protection Specialist
Department of Natural Resources
Colorado Division of Reclamation, Mining and Safety
Grand Junction Field Office
101 S. Third St., Suite 301
Grand Junction, CO 81501

RE: CM-25 Mine, Permit No. M-1977-307, Response to Comments from State Historic Preservation Officer (SHPO)

Dear Mr. Czapla:

I am writing in response to your letter dated October 25, 2012, which requests that Cotter Corporation (N.S.L.) ("Cotter") inform the Division of Reclamation, Mining and Safety ("Division") of how it will respond to the jurisdictional issues presented by the State Historic Preservation Officer ("SHPO") in his letter, dated October 17, 2012, to the Division, regarding Cotter's 110d Amendment Application ("Amendment") for the CM-25 Mine. In that letter, the SHPO asserts that because the Amendment "involves Federal oversight," it is the "responsibility of the Federal agency to comply" with section 106 ("Section 106") of the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f, and the NHPA's implementing regulations, codified at 36 C.F.R. Part 800. The SHPO also asserts that, prior to ground-disturbing activities, an inventory for cultural resources should be conducted with the results provided to the SHPO.

Cotter agrees with the SHPO that it is the responsibility of the Federal government to comply with Section 106 and 36 C.F.R. Part 800, as those laws apply expressly to Federal agencies. Section 106 states that "The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall . . . take into account the effect of the undertaking . . ." 16 U.S.C. § 470f (emphasis added). Likewise, the regulations that implement Section 106 are clear that the Federal government is responsible for implementing that statute. *See, e.g.*, 36 C.F.R. § 800.1(a) ("Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties . . .") (emphasis added); 36 C.F.R. § 800.2(a) ("It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part.") (emphasis added). Accordingly, the Federal government has the jurisdiction to implement Section 106 in this matter and to ensure that its requirements are met.

Cotter also wishes to reaffirm its position that the Colorado Mined Land Reclamation Board ("Board") and the Division are not responsible for: (a) identifying historic properties within the area of potential effects of the Amendment; (b) determining whether the Amendment will have an effect upon such properties; (c) conducting consultation with interested Tribes; or (d) otherwise ensuring or overseeing compliance with Section 106. As established by the Colorado legislature, the Board has jurisdiction over reclamation. *Colorado Mining Ass'n v. Board of County Commissioners*, 199 P.3d 718, 727 (Colo. 2009) (Mined Land Reclamation Act "vests the Board with sole authority for reclamation permitting and standard setting). Consistent with this statutory delegation of authority, the Board's jurisdiction does not extend to historic resource protections: "[i]mpacts to air quality, threatened or endangered species, discharges into waters of the United States and historic resource protections are regulated by agencies other than the Board." Memorandum dated October 2, 2001 (revised January 12, 2006), from the Division, re: "Guide to Citizen Participation in the 112 Reclamation Permit Application Process for Construction Material and Hard Rock/Metal Mining Operations," at 3 (emphasis added). Likewise, the Division's jurisdiction does not include historic resource protections. As explained by the Division in its Designated Mining Limited Impact (110d) Operation Reclamation Permit Application Package, the applicant "MUST contact" the Colorado State Historical Preservation Office and the U.S. Bureau of Land Management ("BLM") to determine whether or not it "need[s] to comply with their legal requirements."

Notwithstanding the above, Cotter recognizes that the BLM, through the U.S. Department of Energy, requires that Cotter conduct a cultural resource inventory prior to initiating additional ground disturbing activities on previously undisturbed Federal public lands covered by its mine permits, including permit M-1977-307. Cotter intends to comply with this requirement, and will submit plans for such inventory prior to initiating any new ground disturbance on Federal public lands covered by permit M-1977-307.

If you have questions regarding this submittal please call me at Cotter's Nucla office, 970-864-7347.

Respectfully,



Glen Williams
Vice President, Mining Operations