



December 18, 2015

**BY CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

Joe Pizarchik  
Director  
Office of Surface Mining  
Reclamation and Enforcement  
1951 Constitution Ave. NW  
Washington, D.C. 20240

**Re: Citizen Complaint Under Surface Mining Control and Reclamation Act and  
Request for Evaluation of State Regulatory Program**

Dear Director Pizarchik:

Pursuant to the Surface Mining Control and Reclamation Act (“SMCRA”), 30 U.S.C. §§ 1267(h)(1) and 1271(a)(1), and regulations thereunder, 30 C.F.R. § 842.12(a), WildEarth Guardians hereby writes to inform the Office of Surface Mining Reclamation and Enforcement (“OSMRE”) that violations of U.S. Surface Mining Control and Reclamation Act (“SMCRA”) appear to be occurring in the State of Utah and that these violations be inspected. Specifically, it appears that reclamation bonding requirements under SMCRA rules are not being met with regards to operations at at least three coal mines owned by Canyon Fuels, a subsidiary of Bowie Resources.

Further, pursuant to regulations under SMCRA at 30 C.F.R. § 733.12, we request that you evaluate the State of Utah’s coal mining and reclamation regulatory program. This request is made on the basis that available information strongly indicates Utah is not ensuring adequate bonding of all coal mining operations within the state. Given that most operations permitted within the state are located on federal lands, this raises serious concerns that the surface impacts of coal mining operations are not being appropriately managed such that American public lands are adequately protected.

Below, we provide a written statement of the apparent violations necessitating an inspection and a concise statement of facts establishing the need for an evaluation of the State of Utah’s permanent regulatory program.

## **I. BACKGROUND**

Under SMCRA, before a company can undertake surface coal mining operations, including underground mining that impacts the surface, they must post a bond covering the cost of reclamation. *See* 30 C.F.R. §§ 773.16 and 800.11. The amount of a bond “[d]epends upon the requirements of the approved permit and reclamation plan [and shall] [r]eflect the probable difficulty of reclamation, giving consideration to such factors as topography, geology, hydrology, hydrology, and revegetation potential[.]” 30 C.F.R. § 800.13(a)(2) and (3). Above all, the bond “shall be sufficient” to ensure that reclamation can be completed in the event the work has to be performed by the regulatory authority. 30 C.F.R. § 800.13(b).

Once a bond is posted, it must be adjusted “from time to time,” as well as whenever a permit is revised, to reflect changes in future reclamation costs. 30 C.F.R. § 800.15. Furthermore, all or a portion of a bond may be released upon the completion of reclamation or a “phase of the reclamation.” 30 C.F.R. § 800.40(c). SMCRA rules identify three phase where bond release may be appropriate: “Phase I,” where backfilling and regrading occurs; “Phase II,” where vegetation is established; and “Phase III,” where all remaining reclamation has occurred. *Id.*

To guide regulatory authorities in calculating bonds under SMCRA, OSMRE has prepared a “Handbook for Calculation of Reclamation Bond Amounts.”<sup>1</sup> Among other things, the Handbook makes clear that inflation of reclamation costs must be taken into account when calculating bonds.<sup>2</sup> The Handbook recommends that permitting authorities either use an inflation factor to increase the initial bond amount during a permit term or adjust bond amounts on a fixed schedule to cover cost increases driven by inflation. Regardless of which approach to adjusting bond amounts is utilized, OSMRE recommends that an index, “such as the Construction Cost Indexes in the Engineering News Record,” be utilized.<sup>3</sup> To use this index, OSMRE recommends dividing the present monthly index value by the past index of the same month for as many years as the permitting authority may wish to project. So, for example, to determine the reclamation cost in November 2020, the November 2015 index would be divided by the November 2010 index.

The State of Utah has been delegated authority under SMCRA to regulate surface coal mining operations, with the Division of Oil, Gas and Mining (“DOG M”) being the responsible agency. *See* 30 C.F.R. § 944. To this end, Utah regulations generally echo the requirements of SMCRA with regards to bonding. *See* Utah Administrative Code (“UAC”), R645-301-800, *et seq.* However, Utah’s regulations also echo OSMRE’s Handbook, stating that “[a]n additional inflation factor will be added to the [bond] subtotal for the permit term” and that “[the] inflation factor will be based upon an acceptable Costs Index.” UAC R645-301-830.300. Utah’s regulations do not specify any schedule for adjustment of bond amounts, but make clear that they

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<sup>1</sup> OSMRE, “Handbook for Calculation of Reclamation Bond Amounts,” Revised April 2000, available online at <http://www.osmre.gov/lrg/docs/directive882.pdf>.

<sup>2</sup> *Id.* at 21.

<sup>3</sup> *Id.* The Construction Cost Index history is available at [http://www.enr.com/economics/historical\\_indices/construction\\_cost\\_index\\_history](http://www.enr.com/economics/historical_indices/construction_cost_index_history).

will be adjusted “from time to time...where the cost of future reclamation changes.” UAC R645-301-830.410.

**II. SIGNS THAT UTAH IS NOT TAKING INTO ACCOUNT INFLATION OF RECLAMATION COSTS WHEN CALCULATING BONDS, IN VIOLATION OF SMCRA**

For at least three operating mines in Utah (and likely more), information from DOGM indicates the state is not appropriately accounting for inflation of reclamation costs in calculating and adjusting bonds under SMCRA. Records, including inspection reports, midterm reviews, and permit revision documents, indicate the agency is inconsistently reviewing the adequacy of bonds and that in spite of recognizing a need to escalate bond amounts to account for inflation, such escalation has either not occurred or has not reflected actual inflation rates.<sup>4</sup> This means these three mines are very likely operating in violation of SMCRA.

Our concerns center upon three underground mines in Utah owned by Canyon Fuels, a subsidiary of Bowie Resources. These mines are identified in the table below. They represent the largest coal mining operations in the state and collectively produced more than 11 million tons of coal in 2014, nearly two thirds of Utah’s total production. As of the third quarter of 2015, the mines produced more than 8.7 million tons of coal and appear on track to produce more than 11.6 million tons by the end of the year.

**Canyon Fuels (Bowie Resources) Mines in Utah**

<u>Mine</u>	<u>Permit No.</u>	<u>Mine Owner</u>	<u>2014 Production (tons)</u>	<u>2015 Production as of 3<sup>rd</sup> Quarter</u>
Dugout Canyon	C0070039	Bowie Resources (Canyon Fuels)	676,000	1,005,182
Skyline	C007005	Bowie Resources (Canyon Fuels)	4,170,000	3,165,403
SUFCO	C0410002	Bowie Resources (Canyon Fuels)	6,539,000	4,559,566

Although underground, these mines pose impacts to the surface and are therefore regulated under SMCRA and subject to reclamation bonding requirements. See 30 C.F.R. § 800.17. Under SMCRA, bonding for underground mines must cover “long-term surface facilities and structures, and for areas disturbed by surface impacts incident to [mining].” 30 C.F.R. § 800.17(a). Below, we detail the apparent bonding shortcomings for each mine.

**A. Dugout Canyon**

The Dugout Canyon mine is located in Carbon County, Utah. According to an October 2015 inspection report, the permitted mine area is 9,801 acres. Of this, 108.70 acres are

<sup>4</sup> These records are available through DOGM’s website at <http://linux3.ogm.utah.gov/WebStuff/coaltemp/filesbypermitinfo.php>.

disturbed, 37 acres of Phase I bond release have been approved, 19 acres of Phase II bond release have been approved, and no Phase III bond release has been approved.<sup>5</sup>

In October of 1998, DOGM calculated a bond amount of \$3,682,000, which reflected the 1998 cost of reclamation escalated by 2.24% over five years, or by a factor of 1.117.<sup>6</sup> In March of 2003, the Dugout Canyon permit was renewed with the same bond of \$3,682,000 in place.<sup>7</sup> This bond amount was retained even though it reflected a 2002 reclamation cost and did not account for inflation of costs over the five-year permit term. Assuming the 2002 reclamation cost estimate would have been appropriate in 2003 (this is dubious), based on the Construction Cost Index, it should have been escalated by a factor of 1.128 (March 2003 index divided by March 1998 index) to \$4,153,296, which would have reflected 2008 costs.

When the Dugout Canyon permit was renewed in 2008, however, the bond amount was, for some reason, nominally reduced to \$3,550,000 and presumably reflected 2013 reclamation costs.<sup>8</sup> This, despite the fact that if the estimated 2008 cost of \$4,153,296 (which is low) was escalated for the five-year permit term, it would have led to a bond amount of \$5,082,100 based on an escalation rate of 1.2236 based on the Construction Cost Index (March 2008 index divided by March 2003 index).

In March of 2013, when the Dugout Canyon permit was renewed, the bond remained at \$3,550,000 and presumably reflected 2018 costs.<sup>9</sup> If DOGM had been taken into account increases in reclamation costs due to inflation, however, the 2018 reclamation costs would have at least been \$5,926,296 based on the Construction Cost Index (March 2013 index divided by March 2008 index) and taking into account that the bond in 2008 should have been higher than \$5,082,100.

Even in 2015, in spite of DOGM recognizing the need to escalate the bond amount to 2020, the bond for Dugout Canyon remains at \$3,550,000.<sup>10</sup> Thus, for nearly eight years, the bond for Dugout Canyon seems to have not reflected any inflation of reclamation costs. Certainly, some Phase I and II reclamation has been approved, but DOGM has only approved a reduction in the bond in the amount of \$207,565.<sup>11</sup> All indications are that the current bond should be \$5,926,296 or higher to account for future increases in reclamation costs.

It is telling that, when adjusted for inflation, the present-day value of the bond for the Skyline mine has steadily decreased over time, even as Utah has supposedly been escalating the value to account for increased reclamation costs. Using the U.S. Bureau of Labor Statistics' calculator, the bond required in 1998 was \$5,372,512 in 2015 dollars, nearly \$2 million higher than its current 2015 value of \$3,550,000. *See* Table below.

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<sup>5</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/007/C0070039/2015/INTERNAL/10132015.pdf>

<sup>6</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/007/C0070039/1998/OUTGOING/0010.pdf>

<sup>7</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/007/C0070039/2003/OUTGOING/0004.pdf>

<sup>8</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/007/C0070039/2008/OUTGOING/0009.pdf>

<sup>9</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/007/C0070039/2013/INCOMING/01232013.pdf>

<sup>10</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/007/C0070039/2015/INTERNAL/09282015.4961.pdf>

<sup>11</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/007/C0070039/2015/OUTGOING/01122015.4711.pdf>

**Dugout Canyon Mine Bond Amounts and Dates**

<b>Date</b>	<b>Bond Amount</b>	<b>Amount in 2015 Dollars</b>
September 2015	\$3,550,000	\$3,550,000
January 2013	\$3,550,000	\$3,624,380
March 2008	\$3,550,000	\$3,921,565
March 2003	\$3,682,000	\$4,759,345
October 1998	\$3,682,000	\$5,372,512

**B. Skyline**

The Skyline mine is located in Emery and Carbon Counties, Utah. According to an October 2015 inspection report, the permitted mine acreage is 10,611.41. Of this, 122.31 acres are disturbed and no Phase I, II, or III bond release has been approved.<sup>12</sup>

In June of 1997, DOGM originally determined that the bond for the Skyline mine should be \$6,140,000 in 2002 dollars.<sup>13</sup> Nevertheless, in 1997, the permit was renewed and a bond of \$5,076,000 in 2001 dollars was imposed by DOGM.<sup>14</sup> In May of 2002, the mine’s permit was renewed and the 1997 bond amount of \$5,076,000 remained unchanged.<sup>15</sup> However, based on the Construction Cost Index, the bond should have been increased by a factor of 1.1156 (May 2002 index divided by May 1997 index) to \$5,662,996.

In 2006, Skyline’s bond was increased to \$5,137,000 in 2009 dollars. This amount was based on a reclamation cost of \$5,038,385 in 2005, which was then escalated by a factor of 1.2% over four years (2005-2009).<sup>16</sup> This bond amount subsequently remained unchanged when the Skyline permit was renewed in April 2007 and again in April 2012.<sup>17</sup> This bond amount was approved even though, based on Construct Cost Index values, the bond should have been more than \$500,000 higher.

That the bond for Skyline remained unchanged in 2012, even though it represented the cost of reclamation in 2009, clearly signals that Utah failed to appropriately bond the mine. Assuming that the cost of reclamation in 2012 remained \$5,137,000, which seems dubious, it should have been escalated for the five-year permit term, or to reflect 2017 costs. Based on the Construction Cost Index, the bond should have been increased by a factor of 1.179 (April 2012 index divided by April 2007 index), or to \$6,056,523. However, given that inflation was unaccounted for in prior years, the bond amount should have been even higher.

In 2015, the bond for Skyline was increased, supposedly to reflect updated bond calculations. Skyline calculated that, based on 2014 dollars, the bond should be \$5,278,170, far

<sup>12</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/007/C0070005/2015/INTERNAL/10222015.pdf>

<sup>13</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/007/C0070005/1997/INTERNAL/0026.pdf>

<sup>14</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/007/C0070005/1997/INTERNAL/0010.pdf>

<sup>15</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/007/C0070005/2002/OUTGOING/0003.pdf>

<sup>16</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/007/C0070005/2006/INCOMING/02032006/0002/0001.pdf>

<sup>17</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/007/C0070005/2012/OUTGOING/04042012.pdf>

lower than what the bond should have been based on escalation of the 2012 bond amount.<sup>18</sup> This amount was then escalated by 1.9%, or a factor of 1.0986, over a five-year period to \$5,799,000 in 2019 dollars. This amount is more than \$250,000 lower than what the bond should have been calculated to be in 2012. Furthermore, even considering that Skyline’s calculation of \$5,278,170 may have been correct (they were not as they were based on prior cost estimates that did not account for inflation), according to the Construction Cost Index, they should have been escalated by a factor of 1.1515 (June 2015 index divided by June 2010 index) for a 2019 bond amount of \$6,077,812. Given the past failure of DOGM to account for increased reclamation costs due to inflation, the actual bond amount should be much higher.

It is telling that, when adjusted for inflation, the present-day value of the bond for the Skyline mine has generally decreased over time, even as Utah has supposedly been escalating the value to account for increased reclamation costs. Using the U.S. Bureau of Labor Statistics’ calculator, the bond required in 1997 was \$7,521,904 in 2015 dollars, much higher than its current 2015 value of \$5,799,000. See Table below. This nearly \$2 million decrease in the bond amount has occurred despite a lack of bond release and despite increases in bond amounts due to increased surface disturbance.

**Skyline Mine Bond Amounts and Dates**

<b>Date</b>	<b>Bond Amount</b>	<b>Amount in 2015 Dollars</b>
March 2015	\$5,799,000	\$5,799,000
April 2012	\$5,137,000	\$5,321,453
April 2007	\$5,137,000	\$5,892,553
May 2002	\$5,076,000	\$6,710,759
October 1997	\$5,076,000	\$7,521,904

**C. SUFCO**

The SUFCO mine is located in Sanpete County, Utah. According to an October 2015 inspection report, the permitted mine acreage is 720.48. Of this, 49.66 acres are disturbed. There has been no approved Phase I, II, or III bond release.<sup>19</sup>

In July of 1995, DOGM required the SUFCO mine to post a bond of \$3,988,000.<sup>20</sup> This bond amount was subsequently retained when the SUFCO permit was renewed in May of 1997.<sup>21</sup> In March of 2003, the Dugout Canyon permit was renewed with the same bond of \$3,682,000 in place.<sup>22</sup> This bond amount was retained even though it reflected a 2002 reclamation cost and did not account for inflation of costs over the five-year permit term. Assuming the 2002 reclamation cost estimate would have been appropriate in 2003 (this is dubious), based on the Construction Cost Index, it should have been escalated by a factor of

<sup>18</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/007/C0070005/2015/INCOMING/01302015.4792.pdf>

<sup>19</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/041/C0410002/2015/INTERNAL/10072015.pdf>

<sup>20</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/041/C0410002/1995/OUTGOING/0010.pdf>

<sup>21</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/041/C0410002/1997/OUTGOING/0008.pdf>

<sup>22</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/007/C0070039/2003/OUTGOING/0004.pdf>

1.128 (March 2003 index divided by March 1998 index) to \$4,153,296, which would have reflected 2008 costs.

In 2001, the bond was increased to \$4,439,000 to account for increased disturbance.<sup>23</sup> It is unclear whether this amount represented an escalated bond when it was approved. In May of 2002 when the SUFCO permit was renewed, the bond amount of \$4,439,000 was retained.<sup>24</sup> This same amount was retained even when the permit was renewed in May of 2007.<sup>25</sup> Thus, after six years, DOGM made no adjustment to the SUFCO bond to account for inflation of reclamation costs. Based on the Construction Cost Index, however, it appears that when the bond was reviewed and approved in 2007, it should have been escalated by a factor of 1.4253 (May 2007 index divided by May 1996 index), which would reflect both the six years of prior cost inflation and inflation over the five year permit term. This would amount to a bond of \$6,326,906. Nevertheless, in 2007, the bond was set at \$4,439,000.

In 2010, the SUFCO bond was adjusted and reduced by \$1,565,000, from \$4,439,000 to \$2,874,000.<sup>26</sup> However, the bond amount of \$4,439,000 did not reflect what the bond should have been in 2010. Rather, it reflected the bond amount set in 2001. As explained above, when the permit was renewed in 2007, it appears the bond should have been set at at least \$6,326,906. If the bond reduction in 2010 was even justified (it is questionable whether it was justified given that it does not appear to have accounted for future inflated reclamation costs and DOGM later questioned the rationale for the reduction), then it should have led to a reduction of \$1,565,000 from \$6,326,906, or to a bond of \$4,761,906.

When the SUFCO permit was renewed in 2012, the bond amount of \$2,874,000 was retained.<sup>27</sup> It wasn't until 2015 that DOGM discovered numerous discrepancies in SUFCO's bonding and determined that an increase was necessary. In 2015, the agency increased the bond amount from \$2,874,000 to \$3,944,000, based on 2019 dollars.<sup>28</sup> While this increase certainly was warranted, it was based on earlier bond amounts that were not adjusted for inflation and did not account for the fact that the 2010 bond reduction appears to have been in error.

It is telling that, when adjusted for inflation, the present-day value of the bond for the SUFCO mine has decreased over time, even as Utah has supposedly been escalating the value to account for increased reclamation costs. Using the U.S. Bureau of Labor Statistics' calculator, the bond required in 1997 was \$5,909,644 in 2015 dollars, much higher than the current amount of \$3,944,00, which is based on 2019 dollars. See Table below. This nearly \$2 million decrease in the bond amount has occurred despite a lack of bond release and despite acknowledged increases in reclamation costs.

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<sup>23</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/041/C0410002/2001/INTERNAL/0009.pdf>

<sup>24</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/041/C0410002/2002/INCOMING/0028.pdf>

<sup>25</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/041/C0410002/2007/OUTGOING/0014.pdf>

<sup>26</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/041/C0410002/2010/OUTGOING/05242010.pdf>

<sup>27</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/041/C0410002/2012/OUTGOING/05082012.pdf>

<sup>28</sup> <https://fs.ogm.utah.gov/FILES/COAL/PERMITS/041/C0410002/2015/INCOMING/05202015.4898.pdf>

### SUFCO Mine Bond Amounts and Dates

Date	Bond Amount	Amount in 2015 Dollars
September 2015	\$3,944,000	\$3,944,000
May 2012	\$2,874,000	\$2,977,196
May 2010	\$2,874,000	\$3,134,728
May 2007	\$4,439,000	\$5,091,891
May 2002	\$4,439,000	\$5,868,609
May 2001	\$4,439,000	\$5,961,394
May 1997	\$3,988,000	\$5,909,644

### **III. VIOLATIONS OF SMCRA AND NEED FOR EVALUATION OF STATE PROGRAM**

All told, it appears that the failure of the DOGM to consistently account for inflation in the bonding of the Dugout Canyon, Skyline, and SUFCO mines has led to bond amounts that, based on our estimates, are collectively \$6 million lower than what they should be. All indications are the bonds for these mines should be set much higher. This means these mines are likely operating in violation of SMCRA.

Although it may be asserted that Utah has accurately set bond amounts based on calculated reclamation costs, this is a dubious claim. As explained above, bond amounts for the mines have consistently remained unchanged for years, reflecting no inflation of costs. This, despite the fact that no bond release has occurred at Skyline and SUFCO and only nominal release at Dugout Canyon, and that disturbance and reclamation costs appear to have increased at all three mines. The fact that present-day bond amounts are consistently significantly lower than bond amounts calculated in the 1990's, as adjusted for inflation, indicates that something is amiss.

Plain and simple, any adjustments made by DOGM over the years do not appear to have kept sufficient pace with inflation. Although some escalation of bonds has occurred, such increases have been based on outdated baseline amounts, effectively keeping bond amounts consistently behind the rate of inflation. It is telling that DOGM has no specific schedule for adjusting bond amounts, but rather appears to address adjustments almost on a random basis. This inconsistent and uncertain approach to reviewing bonds appears partly responsible for the present-day lack of compliance with SMCRA.

Where there is reason to believe that a violation of SMCRA exists, OSMRE is required to notify the state regulatory authority pursuant to 30 C.F.R. § 842.11(b)(1)(ii)(B). Where a state fails to respond within 10 days, or otherwise fails to take appropriate action, OSMRE must conduct an inspection of mining operations. If a violation is found as a result of an inspection, OSMRE must issue a "notice of violation" pursuant to 30 C.F.R. § 843.12(a) to remedy the violations.



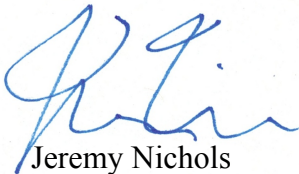
Based on the aforementioned information, there is reason to believe that violations of SMCRA are occurring with regards to the operation of the Dugout Canyon, Skyline, and SUFCO mines. OSMRE must therefore notify the state and accordingly conduct inspections and issue notices of violation.

In light of this apparent failure to appropriately bond mining operations, we also request that OSMRE review the State of Utah's regulatory program to ensure it is being appropriately implemented, administrated, maintained, and enforced pursuant to 30 C.F.R. § 733.12(a). Not only does bonding of the Dugout Canyon, Skyline, and SUFCO mines appear insufficient, there are signs that DOGM has similarly inconsistently failed to increase bond amounts to account for inflation of reclamation costs at other mines in the state. Other mines currently producing in Utah include Castle Valley (Permit No. C0150025), Coal Hollow (Permit No. C020005), Deer Creek (Permit No. C0150018), Lila Canyon (Permit No. C0070013), and West Ridge (Permit No. C0070041). We request that OSMRE review whether Utah is appropriately implementing, administrating, maintaining, and enforcing its SMCRA program with regards to its procedures and practices around bond adjustments to ensure that bond amounts are sufficiently and consistently reviewed and increased as necessary.

#### **IV. CONCLUSION**

We look forward to a timely response from OSMRE to our requests. It is critical that adequate bonding be assured in Utah, particularly given that most of the state's mines underlie public lands. It is important that these lands, which are owned by all Americans, receive adequate protection so that their productivity is not hindered. Thank you for your time and attention to this matter.

Sincerely,



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