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SALT LAKE CITY, UTAH 84111

February 21, 1994

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*Copy*  
TELECOPY NO.  
(801) 596-2814  
*Fax to Jim*

TO: James W. Carter, Director

TELECOPY NO.: 359-39<sup>4</sup>10

FROM: Denise A. Dragoo, Esq.

RE: Deed of Trust/Sunnyside Coal Co.

MESSAGE: Please see attached letter.

Total pages being transmitted, including this page: 3

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February 21, 1994

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## VIA TELECOPY

James W. Carter, Director  
Department of Natural Resources  
Division of Oil, Gas & Mining  
355 West North Temple, Suite 350  
Salt Lake City, UT 84180-1203  
(801) 359-3910

Re: Deed of Trust/Sunnyside Coal Co.

Dear Jim:

I have reviewed your letter of February 17, 1994, regarding your concern that the proposed transfer of property subject to the Deed of Trust dated March 9, 1989 (the "Trust Deed"), would result in the Division of Oil, Gas & Mining (the "Division") being left unsecured. Sunnyside Coal Co. ("SCC") believes that your concerns are unfounded because the Division has a first position under the Trust Deed and conveyance of SCC's property to Kilter, Inc. is subject to the Trust Deed.

The effect of a trust deed under Utah law is to convey real property to a trustee in trust to secure the performance of an obligation of a grantor or other person named in the deed to a beneficiary. Utah Code Ann. § 57-1-19(3), *General Glass Corp. v. Masta Construction Co.*, 766 P.2d 429, 432 (Utah Ct. App. 1988). Therefore, under the terms of the Trust Deed, SCC conveyed title to the trust property to the Trustee, Southeastern Utah Title Co. ("Southeastern"), to secure the reclamation obligation of SCC with the Division. Upon default, the Trustee has the power to sell the property to satisfy SCC's reclamation obligation to the Division. See, *Utah Code Ann.* § 57-1-23. When the obligation secured by the Trust Deed is satisfied, the Trustee, upon written request of the Beneficiary, reconveys the trust property. *Utah Code Ann.* § 57-1-33.

In view of the fact that title to the trust property is now held by Southeastern as Trustee on behalf of the Division as Beneficiary, SCC continues to satisfy the requirements for a collateral bond set forth in Utah Admin. R. 645-301-860.230. In accordance with 860.231, SCC has granted the Division a first deed of trust in real property with a right to sell in the event of forfeiture or default regarding its reclamation obligation with the State. At the time that SCC

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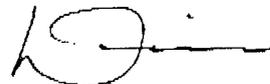
James W. Carter, Director  
February 21, 1994  
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entered into the Trust Deed with the Division, it met the requirements of 860.232 by providing the Division with a description of the property, an appraisal of its fair market value, and proof of possession and title to the real property. Pursuant to 860.232, these criteria were necessary "in order for the Division to evaluate the adequacy of the real property offered to satisfy collateral requirements." The Division apparently determined that the collateral was adequate to satisfy these requirements and entered into the Trust Deed. Therefore, the Division's reading of the rule at 232.2 to require that the permittee continue to hold "possession and title to the real property" is inconsistent with the Trust Deed itself which has conveyed title to Southeastern in trust for the Division. Furthermore, it is clear that the requirements at 860.232 were to be satisfied at the time that the Division evaluated the adequacy of the real property offered to satisfy collateral bond requirements.

For similar reasons, the case of *Pacific Coast Coal Co., Inc.*, 124 IBLA 370, December 9, 1992, is inappropriate. Under the facts of *Pacific*, the permittee offered to pledge real property not owned by the corporation as security for a performance bond. The permittee in *Pacific* did not meet the requirements of 860.232 because, at the time that OSM was evaluating the adequacy of the real property, the permittee did not hold possession and title to the real property. However, in this case, SCC held possession and title to the real property at the time that it was conveyed to the Trustee under the terms of the Trust Deed with the Division. The conveyance of SCC's remaining interest in the trust property to Kilter, Inc. is subject to the Division's first position secured by the Trust Deed. Therefore, the Trust Deed continues to meet the collateral bond requirements of R.645-301-860.231. Title to the property has been conveyed to Southeastern with the power to sell or otherwise dispose of the property in the event of default on SCC's reclamation obligation with the Division.

Please give me a call when you have reviewed this matter.

Very truly yours,



Denise A. Drago

DAD/kk

cc: Robert M. Burnham  
Kent Huett



# United States Department of the Interior



OFFICE OF SURFACE MINING  
Reclamation and Enforcement  
Suite 1200  
505 Marquette Avenue N.W.  
Albuquerque, New Mexico 87102

FEB 22 1994

Mr. James W. Carter, Director  
Division of Oil, Gas and Mining  
3 Triad Center, Suite 350  
355 West North Temple  
Salt Lake City, Utah 84180-1203

Dear Mr. Carter:

The Albuquerque Field Office (AFO) has reviewed the letter of February 17, 1994, that you sent to Denise Dragoo of the firm of Fabian and Clendenin regarding the proposed sale of real property owned by Sunnyside Mines to Kilter, Inc. The real property involved is the collateral bond which secures reclamation at the Sunnyside Mine.

AFO concurs with the action you have taken to disapprove this transaction. AFO has determined that a permittee cannot pledge property as security for a performance bond that the permittee does not own. This was established in the Interior Board of Land Appeals' decision that you referenced. In addition, this position is supported by Utah regulation R645.301.860.232.3 which requires the applicant to submit "Proof of possession and title to the real property" for any property offered to indemnify a reclamation bond.

AFO realizes that the Division of Oil, Gas and Mining (DOGM) may not be able to prevent the sale. However, because the sale would render the collateral bond invalid and a valid bond is a condition of the permit to operate, the Office of Surface Mining Reclamation and Enforcement (OSM) believes that Sunnyside Coal Company's permit to mine would be invalid the moment the sale was final. OSM believes that DOGM would then have to issue a cessation order for mining without a permit until Sunnyside Coal Company provides an appropriate replacement bond. AFO believes that in order to avoid the situation, DOGM should require that Sunnyside Coal Company submit an alternate bond in the amount required to reclaim the site in accordance with the approved program prior to the consummation of the sale.

If you need to discuss this situation further, please contact me at (505) 766-1486.

Sincerely,

Robert H. Hagen, Director  
Albuquerque Field Office

OPTIONAL FORM 99 (7-90)

### FAX TRANSMITTAL

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To <i>James Carter</i>	From <i>R. Hagen</i>
Dept./Agency <i>DOGM</i>	Phone #
Fax #	Fax #