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State of Utah
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING

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Michael O. Leavitt
Governor

Lowell P. Braxton
Division Director

August 21, 1998

TO: File

FROM: Pamela Grubaugh-Littig, Permit Supervisor

RE: Bonds Replaced/Bonds Released, White Oak Mining Company, White Oak Mine #1 and #2, ACT/007/001, Horizon Mining, LLC, Horizon Mine, ACT/007/020, Folder #4, Carbon County, Utah

Bonds were replaced for the Horizon Mine and White Oak Mine #1 and #2 on July 28, 1998, by letter dated July 28, 1998 to Denise Dragoo from Lowell P. Braxton that was notification that the Division had accepted the replacement bonds.

On July 31, 1998, Tina Coconougher at Van American Insurance called and requested the original bonds. There was concern because no company had ever requested an "original bond" when a bond is replaced. In response to my concern I requested Denise Dragoo to contact Frontier Insurance Company to add a rider to the bond which had just been issued that stated, "this bond accepts all of the reclamation liability since the issuance of the initial permit", which is what the replaced bond implicitly does. However, Frontier Insurance Company would not do that.

Due to my concern, I requested Dan Moquin, Assistant Attorney General for the Division, to research whether a rider needs to be attached to the replacement surety explicitly stating the replacement surety will assume responsibility for all disturbances which occurred prior to the issuance of the replacement surety. His research revealed that this was probably not necessary, but could not give 100% assurance that the issued might not be litigated, see. memo attached.

The "original" bonds were returned to the insurance company on August 11, 1998.

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Enclosure
cc: PFO
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M E M O R A N D U M

TO: Mary Ann Wright & Pam Grubaugh-Littig

FROM: Dan Moquin

SUBJECT: Surety Release

DATE: August 9, 1998

You have asked me to research whether a rider needs to be attached to a replacement surety explicitly stating that the replacement surety will assume responsibility for all disturbances which occurred prior to the issuance of the replacement surety. My research reveals that this is probably unnecessary. However, due to the lack of case law in this state, I cannot give a 100% assurance that the issue might not be litigated.

The standard rule for sureties is:

> Whether or not a guaranty is retrospective or is merely prospective depends entirely upon the form of the contract. It is easily possible to make the contract one or the other, or both, but an undertaking of guaranty will not be construed to have a retroactive effect unless such purpose appears by express words or by necessary implication to have been the intention of the parties.

ARTHUR ADELBERT STEARNS & JAMES L. ELDER, THE LAW OF SURETYSHIP § 4.10 (5th ed. 1972)

Arguably the type of bonds in this case require a finding that the surety is by "necessary implication" retroactive. Both

the language of the new sureties and the coal rules support this contention.

The new sureties each state that the purpose of the surety is to guarantee the "timely performance of reclamation responsibilities of the permit area described in Exhibit "A" of this Reclamation Agreement". Since the reclamation responsibilities of the coal mines arose prior to the new sureties, logically the agreement must be retroactive. Additionally, R645-301-870.100 & 200 (the rules allowing the replacement of sureties)also support the contention that the bonds must have a retroactive effect. In fact, R645-301-870.100 only allows replacement when the other bonds "provide equivalent coverage." That would require that the new sureties be retroactive in order to be equivalent coverage. Arguably, any surety company issuing a replacement surety should be aware of the need for retroactive application of the surety. Unfortunately, case law in Utah does not exist that conclusively supports this view.

The only Utah case on point is Home Sav. & Loan v. Aetna Cas. & Sur., 817 P.2d 341 (Utah App. 1991) in which the court did apply retroactive effect to a replacement bond. However, in that case the court was partially persuaded by "extrinsic evidence"

that the bond was to provide full retroactive coverage. 817 P.2d at 351. The evidence was that "[t]he Aetna sales agent prepared the Aetna bond proposal, which read in part: "I propose a bond be issued effective June 21 to replace the present bond. It will provide full retroactive coverage." Id. (Emphasis in original). In the present situation I have not seen any extrinsic evidence that clearly indicates an intention to provide full retroactive coverage.

Because of this lack of legal precedence, I cannot offer you 100% assurance that the replacement surety company would not argue for just prospective application of the surety.