



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

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June 28, 2019

Submitted via email to: rulemaking@idl.idaho.gov

Idaho Department of Lands
Attn: Eric Wilson - Rulemaking
300 N. 6th St., Suite 103
Boise, ID 83702

Re: *Nez Perce Tribe's comments on the Idaho Department of Lands' June 26, 2019 draft Rules Governing Mined Land Reclamation, IDAPA 20.03.02 (Docket No. 20-0302-1902).*

Dear Mr. Wilson:

The Nez Perce Tribe submits the attached comments on the Idaho Department of Lands' June 26, 2019 draft Rule Governing Mined Land Reclamation, IDAPA 20.03.02 (Docket No. 20-0302-1902).

Please contact Mike Lopez, Senior Staff Attorney, Nez Perce Tribe Office of Legal Counsel, at (208) 843-7355, with questions. Thank you.

Sincerely,

For: Mary Jane Miller
Shannon F. Wheeler
Chairman

cc: Keith Lannom, Forest Supervisor, Payette National Forest
Kathryn Goessel, Payette National Forest

The Nez Perce Tribe (“Tribe”) has the following specific comments on the Idaho Department of Lands’ June 26, 2019 draft Rules Governing Mined Land Reclamation, IDAPA 20.03.02 (Docket No. 20-0302-1902).

001. Title and Scope; 05; Applicability b. iv.

Underground mines that existed prior to July 1, 2019, and have not expanded their surface disturbance by 50% or more after that date.

This new provision essentially exempts existing underground mines. This exemption leaves taxpayers at risk of bearing the cost of cleanup related to present and future mining. The rules should be revised so as to not exempt underground mines and instead should bring underground mines reclamation and planning and financial assurance requirements into the modern era by requiring underground mines in Idaho to meet the same requirements as open pit mines, similar to regulatory approaches in other jurisdictions.

120. Financial Assurance Requirements for Mining; 01. Submittal of Financial Assurance Before Mining.

If financial assurance is not received by the Department within eighteen (18) months of reclamation plan approval and operations have not begun, the Department will cancel the reclamation plan without prejudice. The operator must then resubmit the reclamation plan application and correct application fee to restart the approval process prior to mining. An extension to the eighteen (18) month period may be granted by the Department for reasonable cause given if the request is received prior to the end of that period.

Financial assurance (“FA”) should be submitted and secured before the reclamation plan is approved. This is a reasonable and prudent strategy to ensure FA is in hand before any mining occurs.

120. Financial Assurance Requirements for Mining; 07. Annual Financial Assurance Review.

The rules do not appear to address the time frame for which the FA should be prepared, such as for a three- or five-year future period. This section appears to suggest that the amount be calculated for the following year, and increased every year as the mining operation proceeds. The rules should be clarified to address this ambiguity.

The typical required or recommended time for review by other states varies with three- to five-year review periods being most typical, however, a one-year review period is required by some states. Bureau of Land Management calls for a three-year review while the United States Forest Service most often calls for a five-year review period. In most cases a life-of-mine plan and estimate is also made available, if not required.

When the practice of a one-year review is followed, there is a tendency for the reviews to become merely routine and less precise than three- or five-year reviews. This could be prevented by requiring a more rigorous review by an independent party periodically.

122. Form of Financial Assurance; 01. Corporate Surety Bond.

First, the Tribe recommends the word “Corporate” be removed from this definition as it may lead to confusion with Corporate Guarantees. The required provisions for a surety bond are very important and should be strengthened or augmented. Other jurisdictions, such as Montana and New Mexico, have good examples of additional provisions that have been developed as a result of FA forfeitures. Montana requires that the operator use a Bond Form provided by the state (See Attachment A). New Mexico’s rules for surety bonds are as follows:

19.10.12.1208 FINANCIAL ASSURANCE MECHANISMS:

A. Surety Bonds.

- (1) A surety bond shall be executed by the applicant or the permittee and a corporate surety licensed to do business in the state of New Mexico.
- (2) Surety bonds shall be non-cancellable during their terms, except that surety bond coverage for lands not disturbed may be cancelled with the prior written consent of the director. The director shall advise the surety, within 30 days after receipt of a notice to cancel bond, whether the bond may be cancelled on an undisturbed area.
- (3) Surety bond terms shall be established for a minimum of five years. One hundred and twenty (120) days prior to the expiration of the term, the operator must provide the director with evidence that the current surety bond will be continued, another surety company is to provide a financial assurance, or another form of financial assurance will replace the surety bond. Upon receiving notification, the director shall respond to the permittee within 30 days, in writing, indicating whether or not the proposed form and amount of financial assurance will be acceptable. If adequate financial assurance is not provided 30 days prior to the expiration of the term of the original surety bond, the permittee shall cease operations and shall forfeit the existing surety bond. Mining operations shall not resume until the director has determined that an acceptable replacement financial assurance has been provided. If an acceptable financial assurance is provided within a time frame specified by the director, not to exceed 180 days, the forfeited funds, less any costs associated with the forfeiture, will be refunded to the surety company. If adequate financial assurance is not provided within the specified time

frame, the director will authorize reclamation of the mining operation using the forfeited funds.

As surety bonds are by far the most common form of FA, Idaho's rules should be strengthened to reflect aspects such as those contained in New Mexico's rules and Montana's Bond Form.

122. Form of Financial Assurance; 02. Collateral Bond.

The addition of "real property" to the collateral bond provision is highly problematic. The preferred form of FA—even over that of surety bonds—are forms of cash, which are represented by cash deposits, government securities, or certificates of deposit. Most jurisdictions have specific although limited requirements for each one of these forms, separate from that of "Collateral Bonds." "Collateral Bonds" typically are used to refer only to "real property" and the distinctions are significant. Real forms of cash are immediately available whereas realizing funds from real property requires its sale and disposal, which has an inherent risk of a fluctuation in value. New Mexico allows for a significant amount of collateral bonds in its present rules and it is recommended this approach should be emulated in Idaho's rules in 122 Form of Financial Assurance; Section 04. Real Property.

The New Mexico rule reads:

19.10.12.1208 FINANCIAL ASSURANCE MECHANISMS:

C. Collateral Bonds.

(1) Valuation of Collateral.

- (a) If the nature of the collateral proposed to be given as security for financial assurance is subject to fluctuations in value over time, the director shall require that such collateral have a fair market value at the time of permit approval in excess of the financial assurance amount by a reasonable margin. The amount of such margin shall reflect changes in value anticipated over a period of five years, including depreciation, appreciation, marketability and market fluctuation. In any event, the director shall require a margin for legal fees and costs of disposition of the collateral in the event of forfeiture.
- (b) The annual report filed by the permittee must indicate the current market value of any collateral accepted by the director pursuant to this part.
- (c) The financial assurance value of collateral may be evaluated at any time, but it shall be evaluated as part of permit renewal and, as

necessary, its amount increased or decreased. In no case shall the value attributed to the collateral exceed its market value.

- (2) Collateral bonds, except for cash accounts and real property, shall be subject to the following conditions:
- (a) the director must have custody of collateral deposited by the applicant or permittee until authorized for release or replacement as provided in this part;
 - (b) the director shall value collateral at its current market value, not at face value;
 - (c) the director shall not accept as collateral shares of stock issued by the following: applicant or permittee; an entity that owns or controls the applicant or permittee; or an entity owned or controlled by the applicant or permittee;
 - (d) the director shall require that certificates of deposit be made payable to or assigned to the state of New Mexico, both in writing and upon the records of the bank issuing the certificates; if assigned, the director shall require the banks issuing these certificates to waive all rights of setoff or liens against those certificates prior to the director's acceptance;
 - (e) the director shall not accept an individual certificate of deposit in an amount in excess of one hundred thousand dollars (\$100,000) or the maximum insurable amount as determined by the federal deposit insurance corporation or the federal savings and loan insurance corporation.
- (3) Real property provided as a collateral bond shall meet the following conditions:
- (a) the real property must be located in the state of New Mexico. The real property cannot be within the permit or affected area of a mining operation;
 - (b) the permittee shall grant the state of New Mexico a first mortgage, first deed of trust, or perfected first-lien security interest in real property with a right to sell in accordance with state law or otherwise dispose of the property in the event of forfeiture under 19.10.12.1211 NMAC;
 - (c) for the director to evaluate the adequacy of the real property, the permittee must submit the following information for the real property, unless the director, for good cause, waives any of the requirements:

- (i) a description of the property, which shall include a site improvement survey plat to verify legal descriptions of the property and to identify the existence of recorded easements;
 - (ii) the fair market value as determined by a current appraisal conducted by an independent qualified appraiser, previously approved by the director;
 - (iii) proof of ownership and title to the real property;
 - (iv) a current title binder which provides evidence of clear title containing no exceptions, or containing only exceptions acceptable to the director; and
 - (v) phase I environmental assessment.
- (d) in the event the permittee pledges water rights, the permittee shall provide such additional information as may be required by the director to meet any additional conditions prescribed by him for accepting water rights as collateral.
- (4) Persons with an interest in collateral provided as financial assurance who desire notification of actions affecting the collateral shall request the notification in writing to the director at the time collateral is offered.

122. Form of Financial Assurance; 06. Corporate Guarantees.

- A. Up to 50% of required financial assurance for reclamation costs can be provided by a corporate guarantee. Post closure costs cannot be covered by a corporate guarantee.*

The Tribe strongly objects to this provision. While the Tribe understands that corporate guarantees are allowed through statute, such guarantees are not allowed or used by most jurisdictions, including the United States Forest Service and Bureau of Land Management. The use of corporate guarantees is a limited type of FA and should be narrow in its scope of use. The simple reality is that it is not possible for a state or federal agencies to expect a mine operator to be able to provide a real form of FA to substitute for a corporate guarantee in the event they subsequently fail the financial test and are facing potential bankruptcy. This was recognized by the federal agencies nearly 20 years ago, wherein the Bureau of Land Management informed the state of Nevada of its policies and the potential consequences relative to state liability. (See Attachment B).

If corporate guarantees must be allowed, the Tribe strongly recommends they not exceed 20% of the overall required amount of FA in recognition of the relatively high level of risk they involve as compared to more traditional forms of FA.

B. The operator or parent company guarantor will submit an update of the information required under paragraph (c) of this section by April 1 following the issuance of the corporate guarantee.

Please insert the word “annual” in front of update since the state cannot physically inspect all the mines in its jurisdiction. The responsibility to provide the required information should be placed on the miner.

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 ENVIRONMENTAL MANAGEMENT BUREAU
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 PHONE:(406)444-2461 FAX:(406)444-1499

U.S.D.I. BUREAU OF LAND MANAGEMENT
 BLM ADDRESS AND PHONE #S

HARD ROCK RECLAMATION SURETY BOND

BOND NO. PROVIDED BY SURETY COMPANY

MINING COMPANY OR INDIVIDUAL'S NAME, as Principal, and FULL NAME OF SURETY, a corporation organized and existing under the laws of the State of _____ and duly authorized to transact business in the State of Montana, as Surety, are held and firmly bound to the State of Montana, acting through the Department of Environmental Quality and the United States of America acting through the U. S. Department of Interior, Bureau of Land Management, in the penal sum of TYPE OUT ENTIRE DOLLARS AND CENTS AS WORDS \$NUMERIC DOLLARS AND CENTS (USD) DOLLARS, for the reclamation performance bond required by the Metal Mine Reclamation Act, for the payment of which sum, well and truly to be made, we bind ourselves, and each of our legal representatives, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal holds or has applied for a license/permit from the Department of Environmental Quality and a plan of operations (POO) from the U.S.D.I. Bureau of Land Management to conduct exploration/mining operations on the following premises, to wit:

All lands permitted pursuant to Operating Permit # PROVIDED BY DEQ

NOW, THEREFORE, the conditions of this obligation are such that if the above bonded Principal shall, in conducting such mining operations faithfully perform the requirements of the license/permit, the reclamation plan and Title 82, Chapter 4, Part 3, MCA and the plan of operations and 43 CFR Section 3809 relating to mining and the Rules and Regulations adopted pursuant thereto, then this obligation shall be exonerated and discharged and become null and void; otherwise to remain in full force and effect. The requirements assured by this bond include those requirements imposed on Principal as a result of those activities that occurred prior to issuance of this bond and before the date the bond is canceled or released or substitute bond is approved. If this bond is forfeited, the State of Montana and the U.S.D.I. Bureau of Land Management shall be entitled to the entire amount of this bond without regard to actual damages. Reasonable attorneys' fees and costs shall be awarded to the prevailing party in an action to enforce the terms of the bond.

If the Principal fails or refuses to fulfill its obligations pursuant to any section of its operating permit, the Department of Environmental Quality and the U.S.D.I. Bureau of Land Management shall declare this surety bond to be forfeited and the surety shall pay to the Department of Environmental Quality and the U.S.D.I. Bureau of Land Management, within thirty (30) days after receipt of notice of forfeiture by certified mail, ten (10) per cent of the bond amount with any interest on the amount accruing to the Department of Environmental Quality and U.S.D.I. Bureau of Land Management for use in interim reclamation activities pending payment in full of the entire bond amount by the surety. Interest accruing on all principal paid by the surety to the Department of Environmental Quality and U.S.D.I. Bureau of Land Management shall be the sole and exclusive property of the Department of Environmental Quality and U.S.D.I. Bureau of Land Management and shall not be refunded to the surety.

Line items prepared by the Department of Environmental Quality and U.S.D.I. Bureau of Land Management to determine the total amount of the surety bond required are not limitations on how the Department of Environmental Quality and U.S.D.I. Bureau of Land Management may spend any of the bond proceeds paid by the surety.

PROVIDED, however, the Surety shall not be liable under this bond for an amount greater in the aggregate than the sum designated in the first paragraph hereof, and shall not be liable as respects any obligation related to mining operations performed after the expiration of ninety (90) days from the date of the mailing by the Surety of a cancellation notice directed to the Principal and the Department of Environmental Quality, Helena, Montana and the local U.S.D.I. Bureau of Land Management office. The bond shall remain in full force and effect as respects any obligations related to mining operations performed prior to the effective date of such cancellation, even if mining operations continue after the effective date of such cancellation, unless the principal files a substitute bond, approved by the Department of Environmental Quality and U.S.D.I. Bureau of Land Management, or unless the Department of Environmental Quality and U.S.D.I. Bureau of Land Management shall otherwise release the Surety.

Signed, sealed and dated this _____ day of _____,

MINING COMPANY OR INDIVIDUAL'S NAME

Principal

Signature: Principal

SAME AS ONE ON DEQ'S PERMIT APPLICATION

Mailing Address

Title

City, State, Zip

Telephone No.

.....

FULL NAME OF SURETY

Surety

Signature: Surety

Mailing Address

Title

City, State, Zip

Telephone No.

(Surety Seal Here)

.....

Approved on _____,

U.S.D.I. Bureau of Land Management

By: _____

Signature: BLM

Title

SAMES AS USED AT TOP RIGHT CORNER OF PAGE 1

Mailing Address

Telephone No.

City, State, Zip

.....

Approved on _____,

Department of Environmental Quality

By: _____

Signature: DEQ

Title

PO BOX 200901

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HELENA, MT 59620-0901

City, State, Zip

PETER C. MORRIS, Director

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Water Pollution Control
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STATE OF NEVADA
KENNY C. GUINN
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Dispositive Actions
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DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF ENVIRONMENTAL PROTECTION

333 W. Nye Lane, Room 138
Carson City, Nevada 89706-0851

August 30, 2000

Mr. Robert V. Abbey
Bureau of Land Management
1340 Financial Boulevard
PO Box 12000
Reno, Nevada 89520-0006

Re: Corporate Guarantees for Mining Operations and Exploration Projects

Dear ~~Bob~~ ^{BOS}:

As you well know, the current period of low metals prices has caused financial difficulty for much of the mining industry, and has resulted in a number of bankruptcies. At such a time, reclamation surety is a critical issue. I would like to clarify the State's obligation regarding corporate guarantees as reclamation surety.

Corporate guarantees are allowed by state law (NRS 519A.130) and regulation (NAC 519A.350). The State may accept a corporate guarantee for a mining operation or exploration project when the legal requirements are met. If an operator suffers financial distress and cannot or will not fulfill the obligations of the corporate guarantee, the State cannot assume those obligations. We will, however, work cooperatively with the Bureau of Land Management and all other appropriate agencies to use available resources to ensure the completion of as much reclamation at the site as possible.

The effectiveness of the mining regulatory programs in Nevada is in large part due to the close working relationship we enjoy with our fellow agencies, especially the BLM. We hope to continue and even improve our good working relationship with your agency, and look forward to coming out of these difficult financial times with environmental programs that are even stronger and more effective than before.

Sincerely,

A handwritten signature in dark ink, appearing to read "All Biaggi".
Allen Biaggi
Administrator

cc: Tom Leshendok, BLM NSO
Gabrielle Carr
Jolaine Johnson
David Gaskin

\\AWPFILES\BMRR\DAVID\CG.BLM

**Testimony of Allen Biaggi and David Gaskin, Nevada Division of Environmental
Protection
on AB 321 (Financial Assurance for Mine Reclamation)**

Before Assembly Committee on Natural Resources, Agriculture and Mining

April 2, 2003

Good afternoon, Mr. Chairman and Committee members. My name is Allen Biaggi and I am the Administrator of the Nevada Division of Environmental Protection. With me today is Dave Gaskin, Chief of the Division's Bureau of Mining Regulation and Reclamation.

AB 321 makes important and sweeping changes to Nevada's mining laws. The bill ultimately removes corporate guarantees and other forms of security from the list of available financial assurance mechanisms.

Since its formation in 1990, the state reclamation program has worked well to ensure the physical stability of reclaimed exploration projects and mine sites in order to provide for public safety and a productive post-mining land use. To do this, the legislature wisely established a requirement where mines are required to have a financial mechanism in place to ensure reclamation is accomplished when mining is completed. The statutes currently allow a number of financial instruments available to the industry to meet this requirement including corporate guarantees.

In the late 1990's, as a result of depressed precious metals prices, a number of challenges were presented to the program in terms of the scope of reclamation, the way the bonding obligation is calculated and the frequency and methods corporate guarantees are evaluated. On top of this, the September 11th terrorist attacks changed the perspective of the surety and bonding industry on providing financial instruments not only for the mining industry but also for others such as the health care and construction. The Division recognized and responded to these challenges by establishing a Mining Bonding Task Force to identify the problems and potential solutions

associated with financial mechanisms. We also established a Corporate Guarantee Review Panel to review not only individual company guarantees but also the system in general. Finally, from the lessons learned from the mining bankruptcies that occurred in the late 1990's we put into place a number of institutional and regulatory changes that we believe made the program stronger and reduced the potential liability to the public.

The public policy decisions before you today through this bill are significant and far-reaching. It involves a delicate act of balance between the levels of risk, liability, public health and environmental quality verses the economic viability of this important industry; one critically important to Nevada's our rural communities.

I would like to turn the remainder of the Division's testimony over to Dave Gaskin who will provide the Committee with details of our position regarding this legislation.

Good afternoon Mr. Chairman, Committee members I am Dave Gaskin, Chief of the Division's Mining Regulation and Reclamation program.

The major change to current mining reclamation requirements occurs on Page 1 section 1 of the bill. This section currently allows a number of different mechanisms for financial assurance, including trust funds, surety bonds, letters of credit, insurance and corporate guarantees. Each form of surety carries a certain amount of risk, from the possible financial failure of the mine operator as well as the possible failure of the financial institution. The general requirements were established to minimize risk to the State without imposing overly burdensome requirements on the mining industry. This section is addressing the risk involved with the use of corporate guarantees.

The control and minimization of such risk is accomplished in a number of ways: through regulatory requirements, agency policy and the judgment of the Administrator of the Division. The regulations under NAC 519A contain specific financial criteria an applicant must meet to obtain a corporate guarantee. As a result of decreased metals prices in the late 1990's, these criteria were put to the test. One company with a corporate guarantee, a copper mining company from Arizona called Arimetco Inc., declared bankruptcy in 1997. The company abandoned its operations, including the Yerington Mine, in early 2000. This placed the State and its partner in reclamation bonding, the Bureau of Land Management, in a position of having to deal with closure and reclamation of a mine with only a fraction of the necessary funding. The State managed to prevent immediate environmental impacts through the Division's Emergency Mitigation and Restoration funding. Much of the expense has been reimbursed and is currently being covered by Atlantic Richfield, owner of a previous operator of the Yerington Mine. The State is working with the numerous parties involved to accomplish permanent closure and reclamation.

As a result of the Artimetco situation and the overall economic climate, the Division reevaluated its ability to address mine bankruptcy and abandonment. In cooperation with the mining industry, a major revision was made to the reclamation regulations to give the Division the authority to require bonding for process fluid stabilization. Previously, bonding could only cover the cost of physical reclamation. However, it was recognized that stabilization of fluids could

present the largest cost of reclamation at a mine site. NAC 519A was revised in July of 2000, and the Division now has the authority to ensure that adequate surety is in place to cover stabilization of process solutions.

In September of 2000, another significant measure was taken by the Division, again in cooperation with industry. The reclamation regulations were revised to establish a trust fund for short-term fluid management, known as the Interim Fluid Management or IFM fund. Fees were assessed on mine operators to provide a fund of \$1,000,000. This money is used by the Division to manage fluids at abandoned sites until resources are made available from the surety.

These two measures have greatly enhanced the Division's ability to address bankrupt and abandoned mines. I should mention that we have had no bankruptcies of mine operators since 1999.

Additionally, a number of revisions were made to address the adequacy of the regulatory criteria for corporate guarantees. After thorough review and discussion with environmental groups and industry, the reclamation regulations were revised in October of 2001 in three areas:

- Provide for periodic review of the financial health of mining companies vs. one-time qualification. This helps us account for economic ups and downs.
- Provide the Division the flexibility to adjust the amount of reclamation obligation covered by corporate guarantee. Previously, corporate guarantees were automatically set at 75% of the total reclamation obligation. This allows us to adjust individual corporate guarantees as necessary to address risk.
- Ensure financial information is prepared in accordance with United States Generally Accepted Accounting Principles. This allows fair and balanced evaluation of foreign-based corporations.

Along with the regulatory revision, the Division also developed a Corporate Guarantee Policy. This document describes the corporate guarantee qualification process, defines document requirements for periodic reviews, and established the Corporate Guarantee Review Panel. This panel was established to advise the Administrator in making decisions regarding corporate guarantees. The panel consists of a representative from NDEP, the Division of Minerals, the Risk Management Division, and a CPA from the general public.

Currently, the total amount of financial assurance in the State represented by corporate guarantees stands at approximately \$230 million. That is out of a total of approximately \$550 million in all types of financial assurance for mine reclamation. Due to mergers and consolidations, we are only dealing with three companies with corporate guarantees at this time: Barrick, Newmont and Glamis. Recent revisions to the Bureau of Land Management's regulations now prohibit new corporate guarantees on public land, so it is unlikely that we will receive many more requests for corporate guarantees. Mainly, we will be managing the existing agreements.

The corporate guarantee system is not without risk. The key is to control the risk and to keep it at an acceptable level. This is a balance between two primary factors. On one side is the economic

health of members of the mining industry, the second largest industry in the state. On the other side are the potential impacts, both environmentally and financially, of bankruptcy and abandoned mining operations. This balance is clearly stated in the legislative findings at the very beginning of the reclamation statutes, in NRS 519A.010: (a) The extraction of minerals by mining is a basic and essential activity making an important contribution to the economy of the State of Nevada, and (b) Proper reclamation of mined land, areas of exploration and former areas of mining or exploration is necessary to prevent undesirable land and surface water conditions detrimental to the ecology and to the general health, welfare, safety and property rights of the residents of this state.

The corporate guarantee system was established as a valid means of financial assurance when the reclamation statutes were adopted in 1990. The security of the corporate guarantee system is under constant scrutiny – by NDEP, by environmental groups, by the mining industry, and the public. The changes we have instituted over the past few years are evidence that the system is flexible and can incorporate constructive improvements to maintain the proper balance of risk.

Thank you for your consideration of these comments.

If you have any questions, we will be happy to answer them.