

REPORT TO THE
UTAH LEGISLATURE

Number 2008-13

**A Performance Audit
on the Use of
Mineral-Related Funds in Uintah Basin**

November 2008

Audit Performed By:

Audit Manager	Tim Osterstock
Audit Supervisor	Janice Coleman
Audit Staff	Christopher Otto

Digest of A Performance Audit on the Use Of Mineral-Related Funds in Uintah Basin

Chapter I: Introduction

Uintah and Duchesne counties' use of federal and state mineral-related funding does not clearly support the need for supplemental state transportation funding, a need asserted by both Uintah Basin counties. It appears that the Uintah Basin counties, particularly Uintah, could allocate a higher percentage of mineral-related money to roads, but they have used their funding in other areas they have deemed impacted by their industrial growth.

Additionally, funds are available for road projects, as evidenced by the general growth in each county's transportation special service district (SSD) unrestricted fund balance. County officials claim much of their fund balances are earmarked for future projects. Rather than adjusting expenditures or using their existing fund balances, the Uintah Basin counties have requested additional state transportation support.

This audit was to examine the amount of mineral-related funding flowing into the Uintah Basin counties and to determine how the money received was spent. In addition, the audit was to provide comparable data on how much money flowed into other counties in order to provide a reference point.

Chapter II: Uintah Basin Legislative Assertions for Additional Road Money Are Not Very Compelling

Uintah and Duchesne Are Among the Top Five Beneficiaries of Mineral-Related Money. Between fiscal years 2003 and 2007, Uintah County was the leading beneficiary of mineral-related money. Duchesne was the fifth-leading beneficiary while Carbon, Sevier, and Emery counties were second, third, and fourth, respectively. During this time period, the state returned around \$498 million in mineral-related revenues to the counties; 68 percent of this mineral-related revenue flowed into these five counties. Cumulatively, \$172 million of this \$498 million (34 percent) benefitted the Uintah Basin counties, with \$134.6 million (78 percent) flowing into Uintah County and \$36.9 million (22 percent) flowing into Duchesne County.

Overall, Mineral-Related Money Is Not Heavily Allocated to Transportation. Of the \$134.6 million that Uintah County entities received during the five-year review period, approximately \$56.4 million (42 percent) was allocated to transportation. Of the \$36.9 million that Duchesne County entities received during this same time period, approximately \$15.3 million (42 percent) was allocated to transportation.

Transportation Discretionary Income Is Available in Uintah Basin Counties. The discretionary income available within the Uintah County Transportation SSD is somewhat large (\$15 million in 2007) and, until 2007, was increasing every year. The discretionary income in Duchesne County SSD #2 is more modest (\$5 million in 2007), but has increased every year.

When viewed in total, Uintah and Duchesne counties have not offered a compelling argument to support their request for additional state transportation funds. If the Legislature wants counties to prioritize transportation needs higher when allocating mineral-related money, it would be useful to codify that intent. Toward this end, the Legislature could prioritize transportation for federal mineral lease money channeled through the Utah Department of Transportation (UDOT) by codifying the intent language that accompanies the mineral lease appropriation to UDOT.

Recommendation

We recommend the Legislature consider prioritizing transportation for the federal mineral lease money channeled through UDOT by codifying the intent language that accompanies the UDOT federal mineral lease appropriation.

Table of Contents

	Page
Digest	i
Chapter I	
Introduction	1
Mineral-Related Money Includes Federal and State Sources	1
Audit Scope and Objectives	4
Chapter II	
Utah Basin Legislative Assertions for Additional Road Money Are Not Very Compelling	5
Utah and Duchesne Are Among the Top Five Beneficiaries of Mineral-Related Money	6
Overall, Mineral-Related Money Is Not Heavily Allocated to Transportation	7
Transportation Discretionary Income Is Available In Uintah Basin Counties	13
Recommendations	16
Appendices	17
Agency Response	23

This Page Left Blank Intentionally

Chapter I

Introduction

Historical allocation and expenditure patterns of federal and state mineral-related money in Uintah and Duchesne counties do not clearly support the need for supplemental state transportation funding, a need asserted by both Uintah Basin counties. It appears that the Uintah Basin counties, particularly Uintah, could allocate a higher percentage of mineral-related money to roads, but they have used their funding in other areas and have generally increased their transportation fund balances. Funds are available for road projects, as evidenced by the unrestricted fund balances in each county's transportation special service district. Rather than adjusting expenditures or using their existing fund balances, the Uintah Basin counties have requested additional state transportation support.

If the Legislature wants counties to prioritize transportation needs first when allocating mineral-related money, it would be useful to codify that intent. Toward this end, the Legislature could codify the intent language that accompanies federal mineral lease money channeled through the Utah Department of Transportation (UDOT).

Mineral-Related Money Includes Federal and State Sources

Mineral-related money encompasses two basic sources: federal mineral lease and state severance tax. Federal mineral lease amounts are large and geographically widespread while state severance amounts are much smaller and more narrowly focused. Both are directed toward areas impacted by oil and gas development but neither need to be spent directly mitigating damage to impacted areas.

Federal Mineral Lease

An opinion written by the Utah Attorney General's Office (Opinion 92-003) provides the following general information. The federal Mineral Leasing Act of 1920 requires leaseholders on public lands to make royalty payments to the federal government for the development and production

Federal mineral lease money is to be used for planning, construction and maintenance of public facilities, and provision of public service.

of non-metalliferous minerals. In Utah, the primary source of these royalties is the commercial production of fossil fuels (bituminous coal, crude oil, and natural gas) on federal land held by the U.S. Forest Service, the Bureau of Land Management, and the various Indian tribes.

Currently, 48 percent of the royalty monies received by the federal government shall be returned to the state where the lease lands are located. The 1992 Attorney General opinion notes this money is to be used

by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially and economically impacted by the development of minerals leased under this chapter, for (i) planning, (ii) construction and maintenance of public facilities and (iii) provision of public service (Mineral Leasing Act, 30 U.S.C. 191 (1988)).

Federal mineral lease payments to Utah can be one of two types: bonus or royalty. Bonus payments can be thought of as signing bonuses. Companies pay a fee to the federal government for each new or renewed lease. Royalty payments are paid to the federal government on actual production or extraction. *Utah Code* 59-21-1 and 59-21-2 specify how bonus money and royalty money shall be allocated with the majority of the money returned to impacted counties.

Mineral lease money is provided directly to county entities through two primary sources:

- UDOT, which receives 40 percent of the federal mineral lease royalty money
- The Permanent Community Impact Fund (PCIF), which receives 32.5 percent of the mineral lease royalty money and 70 percent of the mineral lease bonus money

Utah Code 59-21-2-(2)(h)(ii) requires UDOT to distribute the federal mineral lease monies channeled through the department in amounts proportionate to the amount of federal mineral lease money generated by the county. The PCIF, on the other hand, does not distribute its money by formula. Instead, grants and loans from the PCIF are awarded to eligible entities through an application process overseen by the Permanent Community Impact Board (PCIB). While awards are not based on a

Uintah County was the leading generator of mineral lease money, generating \$243 million during fiscal years 2003 through 2007.

formula, *Utah Code* 9-4-307(2)(a) instructs the PCIB to consider mineral production when determining funding eligibility.

According to information published by the PCIB, during fiscal years 2003 through 2007, Uintah County was the leading generator of mineral lease money for the state while Duchesne County was the fifth-leading generator. Carbon, Emery, and Sevier counties were the second, third, and fourth leading generators of mineral lease money, respectively. Figure 1.1 identifies the total amount of state mineral lease revenue generated by these five counties during fiscal years 2003 through 2007.

Figure 1.1 The Top Five Generators of Mineral Lease Money. In total, Uintah generated almost twice that of Carbon, the second-leading generator, while Carbon generated over four times that of Duchesne, the fifth-leading generator.

Uintah	Carbon	Emery	Sevier	Duchesne
\$ 243,222,200	\$ 127,322,193	\$ 68,104,616	\$ 45,934,470	\$ 26,990,380

To see what each county has generated in mineral lease money for fiscal years 2003 through 2007, see Appendix A. To see what each county has received in federal mineral lease money through UDOT and the PCIB for fiscal years 2003 through 2007, see Appendix B.

State Severance Tax

County access to state severance tax by agreement is much more restricted. A portion of state severance tax collected from oil and gas development on the Uintah and Ouray reservations and the Navajo reservation is used to fund both the Uintah Basin Revitalization Fund and the Navajo Revitalization Fund, respectively. Both funds provide grants or loans to qualified entities. Money in the Uintah Basin fund benefits the Ute Tribe and two counties: Uintah and Duchesne. The Navajo Revitalization Fund benefits county or tribal government in San Juan County.

Yearly deposits of state severance tax into both funds are capped. Prior to and including fiscal year 2006, the maximum yearly deposit into the Uintah Basin Fund was \$3 million. This maximum deposit was increased to \$5 million for fiscal year 2007 and then to \$6 million for

The Uintah Basin and Navajo Revitalization Funds provide Uintah, Duchesne, and San Juan counties access to a portion of state severance tax.

fiscal years 2008 and 2009. The maximum deposit into the Navajo fund was \$2 million prior to and including fiscal year 2007; the amount increased to \$3 million beginning in fiscal year 2008.

Audit Scope and Objectives

This audit was requested by Senator Lyle Hillyard. In his audit request letter, he noted that the Legislature has had several requests for state funding to help alleviate the Uintah Basin's expenses for roads and other issues created by the recent economic impact of business in the counties. He requested an audit of the funding available and provided to the Uintah Basin from federal mineral leases, state severance taxes, and/or community impact funds. The audit was to examine the amount of funding received from each source over, at least, a four-year period and to determine how the money received was spent. Finally, the audit was to provide comparable data on how much money other counties received in order to provide a reference point.

Consequently, this audit had these objectives:

- Identify how much money the Uintah Basin counties received in federal mineral lease money and state severance tax money for fiscal years 2003 through 2007.
- Identify how the Uintah Basin counties allocated the money received during fiscal years 2003 through 2007.
- Identify how much money other counties received from these sources during fiscal years 2003 through 2007.

Chapter II

Uintah Basin Legislative Assertions for Additional Road Money Are Not Very Compelling

The justification has not been very compelling for supporting past Uintah Basin counties' assertions that more money is needed to mitigate damage to county roads. First, Uintah County entities received \$134.6 million during the five years reviewed, making Uintah County the largest beneficiary of mineral-related money; Duchesne County entities received \$36.9 million, making Duchesne County the fifth-largest beneficiary. Second, the use of mineral-related money within the counties is not heavily allocated toward roads. Around 42 percent of all mineral-related money within both Uintah and Duchesne counties were devoted to roads. Finally, the fund balance discretionary income available within two Uintah Basin transportation special service districts (SSDs) appears relatively large and, for the most part, rising.

If the Legislature intends counties to make roads a top priority for mineral-related funding, then it would be useful to codify that intent. As a start, the intent language accompanying the Utah Department of Transportation (UDOT) federal mineral lease allocation could be put in the *Utah Code*.

In the discussion that follows, it is helpful to remember two points:

- First, mineral-related money is supplemental to other state funding a county receives. For example, the amount of state money provided to counties for roads (i.e., B&C road money) is in no way impacted by a county SSD's simultaneous receipt of mineral-related money that can also be used for roads.
- Second, the county commissioners determine what percentage of mineral lease money channeled through UDOT will be allocated to SSDs within the county. For example, if a county transportation SSD receives 50 percent of the UDOT federal mineral lease money, it is because the county commissioners made that choice.

Mineral-related money is supplemental to other state funding a county receives.

County commissioners determine how federal mineral lease money channeled through UDOT will be allocated among county SSDs.

Uintah and Duchesne Are Among the Top Five Beneficiaries of Mineral-Related Money

Since receipt of mineral-related money is related to production, Uintah County was the leading beneficiary of mineral-related money between fiscal years 2003 through 2007. Duchesne County was the fifth-leading beneficiary while Carbon, Sevier, and Emery counties were second, third, and fourth, respectively. Figure 2.1 identifies the top five beneficiaries of mineral-related money, the source of the money, and the total amount of money received during fiscal years 2003 through 2007.

Figure 2.1 The Top Five Beneficiaries of Mineral-Related Money. In total, Uintah’s benefit was almost twice that of Carbon’s, the second-leading beneficiary, while Carbon’s benefit was almost twice that of Duchesne’s, the fifth-leading beneficiary.

County	Mineral Lease Through Transportation Department (FY 2003-2007)	Mineral Lease Through Permanent Community Impact Board (FY 2003-2007)	Severance Through Uintah Revitalization (FY 2003-2007)	Total (FY 2003-2007)
Uintah	\$ 90,045,000	\$ 41,945,000	\$ 2,587,000	\$ 134,577,000
Carbon	34,251,000	35,024,000		69,275,000
Sevier	14,157,000	41,876,000		56,033,000
Emery	15,938,000	27,096,000		43,034,000
Duchesne	9,415,000	25,306,000	2,187,000	36,908,000
Total	\$ 163,806,000	\$ 171,247,000	\$ 4,774,000	\$ 339,827,000

During fiscal years 2003 through 2007, Uintah Basin county entities received \$172 million, or 34 percent, of all statewide mineral-related revenues.

During this time period, the state returned around \$498 million in mineral-related money to the counties; 68 percent (340 million) flowed into these five counties. Cumulatively, \$172 million of this \$498 million (34 percent) benefitted the Uintah Basin counties, with \$134.6 million (78 percent) flowing into Uintah County and \$36.9 million (22 percent) flowing into Duchesne County.

Overall, Mineral-Related Money Is Not Heavily Allocated to Transportation

Of the \$134.6 million that Uintah County entities received during the five-year review period, approximately \$56.4 million (42 percent) was allocated to transportation. Of the \$36.9 million that Duchesne County entities received during this same time period, approximately \$15.3 million (42 percent) was allocated to transportation.

Uintah County Entities Devoted Less than Half Of Mineral-Related Money to Transportation

Overall, 42 percent of all mineral-related money was allocated by Uintah County entities to transportation. As noted earlier, mineral-related money for Uintah County entities can come through three avenues: UDOT, the Permanent Community Impact Board (PCIB), and the Revitalization Fund. Senator Hillyard requested that we review the revenues and allocation patterns of all three sources. For the five-year period reviewed, Uintah County entities allocated:

- 59 percent of federal mineral lease money received through UDOT to transportation,
- 8 percent of federal mineral lease money received through the PCIB to transportation, and
- 2 percent of state severance tax received through the Uintah Basin Revitalization Fund to transportation.

UDOT Federal Mineral Lease Funds. Uintah County SSDs received approximately \$90 million from this source during fiscal years 2003 through 2007. Of this \$90 million, around \$53.2 million was used for transportation. When the Legislature appropriates mineral lease money to UDOT, the appropriation is generally accompanied by the following legislative intent language:

The Legislature intends that the funds appropriated from the Federal Mineral Lease Account shall be used for improvement or reconstruction of highways that have been heavily impacted by energy development. The Legislature intends that if private industries engaged in developing the State's natural resources are willing to participate in the cost of the construction of highways

Uintah County entities allocated 42 percent of all mineral-related money to transportation.

The Legislature intends that UDOT federal mineral lease money shall be used to improve or reconstruct highways heavily impacted by energy development.

leading to their facilities, that local governments consider that highway as a higher priority.

Of the three sources for mineral-related money, the UDOT source is the only one providing any guidance on how these mineral lease funds should be prioritized. Given this intent language, it appears that counties should first use this money to cover transportation needs. Once transportation needs have been reasonably satisfied, then other needs as allowed by the *Utah Code* 59-21-2 (2)(h)(i) could be funded.

Over time, Uintah County has used more of the UDOT federal mineral lease funds for other purposes. In fiscal year 2003, Uintah County allocated UDOT federal mineral lease money between two Uintah County SSDs. In fiscal years 2006 and 2007, this money was allocated among six Uintah County SSDs, as Figure 2.2 shows.

Figure 2.2 Uintah County Historical Allocations Among SSDs. Over time, Uintah County has chosen to create additional SSDs to which UDOT federal mineral lease money has been allocated.

	FY 2003*	FY 2004	FY 2005	FY 2006	FY 2007
Transport.	\$4,343,000	\$7,296,000	\$10,357,000	\$16,225,000	\$14,948,000
Recreation	2,550,000	4,472,000	6,348,000	8,250,000	5,436,000
Impact Mitigation	-	-	-	1,375,000	3,261,000
Fire Suppression	-	-	-	825,000	1,903,000
Healthcare	-	-	-	550,000	1,087,000
Animal Control	-	-	-	275,000	544,000
Total	\$6,893,000	\$11,768,000	\$16,705,000	\$27,500,000	\$27,179,000
Percent Transport. Of Total	63%	62%	62%	59%	55%

* Fiscal year appropriations were obtained from UDOT records. Fiscal year allocations among SSDs were estimated, for the most part, using audited financial calendar year information.

During this five-year time period, the Uintah Transportation SSD was never the sole beneficiary of UDOT federal mineral lease money. Rather, this money was always shared with the Uintah Recreation SSD. Further,

During our five-year review period, the Uintah Transportation SSD was never the sole beneficiary of UDOT federal mineral lease money.

in 2006, three new SSDs were formed and funded with UDOT federal mineral lease money—impact mitigation, fire suppression, and animal control—while one older SSD, health care, began to receive mineral lease funding.

Not only has Uintah County spread UDOT federal mineral lease money among an increasing number of SSDs, the overall percentage allocated to transportation has also fallen. In fiscal year 2003, the percentage of UDOT federal mineral lease money allocated to transportation was 63 percent; by fiscal year 2007, this percentage had fallen to 55 percent.

The legislative intent language—priority given to transportation needs—coupled with this five-year allocation pattern leads to the conclusion that Uintah County’s transportation needs were being satisfactorily met. As noted earlier, the county commissioners choose what percentage each SSD receives. Therefore, if Uintah County commissioners believed more funding was necessary for transportation, a higher percentage of mineral-related money would have been directed to transportation.

PCIB Federal Mineral Lease Funds. Uintah County entities received approximately \$42 million from this source during fiscal years 2003 through 2007. As mentioned earlier, an application process is used to award PCIB funds to county entities. To be eligible for funding, a project must incorporate one of the following:

- Provision of public services
- Construction and maintenance of public facilities
- Planning

The Uintah Basin Association of Government members develop and prioritize a list of projects for consideration by the PCIB.

With this general guidance, the Uintah Basin Association of Government members develop and prioritize a list of projects for consideration by the PCIB.

During the five-year review period, Uintah County entities received around \$3.2 million (8 percent) in PCIB funding for roads, as shown in Figure 2.3. The remaining \$39 million was used primarily for water projects and government buildings.

Buildings and water projects were Uintah County entities' primary emphasis for PCIB funding.

Figure 2.3 Uintah County Historical PCIB Transportation Awards. The percent of PCIB funding awarded to roads is less than half of the total award in each year.

	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Funding for Roads	\$ 1,700,000	\$ 180,000	\$ 290,000	\$ 0	\$ 1,000,000
Total PCIB Funding	5,410,000	1,858,000	4,812,000	1,734,000	27,820,000
Percent of Total	31.4%	9.7%	6%	0%	3.6 %

Based on these percentages, Uintah County entities have either not been successful or have not emphasized transportation projects with the PCIB.

Uintah Basin Revitalization Severance Funds. Uintah County entities received approximately \$2.6 million from this source during fiscal years 2003 through 2007. Capital projects, including subsidized and low-income housing and other one-time-need projects, are eligible for consideration. For a county entity to receive project funding, four of the five Revitalization Board members must approve the project.

During the five-year review period, Uintah County entities used \$44,500 (2 percent) of Uintah County's \$2.6 million in Revitalization funds for transportation projects as shown in Figure 2.4.

Figure 2.4 Uintah County Historical Revitalization Transportation Awards. The percent of Revitalization funding awarded to road projects is very small.

	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Funding for Roads	\$ 0	\$ 0	\$ 10,000	\$ 0	\$ 34,500
Total Revitalization Funding	423,000	207,000	368,000	369,000	1,221,000
Percent of Total	0%	0%	2.7%	0%	2.8%

Uintah County entities emphasized public safety, cultural/recreational, and social service projects for Revitalization funding.

Uintah County entities do not use much of Revitalization’s severance money to fund transportation projects. Most of the \$2.6 million was spent on public safety projects (e.g., jail design and equipment), cultural/recreational projects (e.g., museum architecture and new director orientation, hockey dasher board system), and social service projects (e.g., emergency shelter).

Duchesne County Entities Devoted Less than Half Of Mineral-Related Money to Transportation

Overall, less than half (42 percent) of all mineral-related money was allocated by Duchesne County entities to transportation. As noted earlier, mineral-related money for Duchesne County can come through three avenues: UDOT, the PCIB, and the Revitalization Fund. When the three specific funding sources are considered separately, Duchesne County’s transportation allocation choices appear more favorable for transportation than Uintah County’s choices. Nonetheless, while Duchesne’s County’s argument that they need more money for transportation is better supported than Uintah’s, it is not strongly compelling given their spending in other areas.

Duchesne County entities allocated 42 percent of all mineral-related money to transportation.

For the five-year period reviewed, Duchesne County entities allocated:

- 100 percent of federal mineral lease money received through UDOT to transportation,
- 23 percent of federal mineral lease money received through the PCIB to transportation, and
- 5 percent of state severance tax received through the Uintah Basin Revitalization Fund to transportation.

UDOT Federal Mineral Lease Funds. Duchesne County’s SSD received approximately \$9.4 million from this source during fiscal years 2003 through 2007. As noted earlier, this appropriation is generally accompanied by legislative intent language encouraging the prioritization of transportation projects.

Duchesne County allocated 100 percent of UDOT federal mineral-lease money to transportation.

During the five-year review period, Duchesne County allocated 100 percent of UDOT federal mineral lease funding to the Duchesne SSD #2, Duchesne’s transportation district, as shown in Figure 2.5.

Figure 2.5 Duchesne County Historical UDOT Allocations. Duchesne County allocates all of its UDOT federal mineral lease money to transportation.

	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Transportation	\$ 679,000	\$ 931,000	\$ 1,903,000	\$ 2,750,000	\$ 3,152,000

* Fiscal year appropriations were obtained from UDOT records.

Based on these historical allocations, Duchesne County provides evidence that transportation is the county’s highest priority for UDOT federal mineral lease funding.

PCIB Federal Mineral Lease Funds. Duchesne County entities received approximately \$25.3 million from this source during fiscal years 2003 through 2007. Of this amount, Duchesne County entities received around \$5.8 million (23 percent) in PCIB funding for roads, as shown in Figure 2.6.

Figure 2.6 Duchesne County Historical PCIB Transportation Awards. The percent of PCIB funding awarded to roads is less than half of the total award in each year.

	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Funding for Roads	\$ 110,000	\$ 470,000	\$ 0	\$ 175,000	\$ 5,041,000
Total PCIB Funding	538,000	3,061,000	3,960,000	7,452,000	10,296,000
Percent of Total	20.4%	15.4%	0%	2.3%	48.9%

Buildings and water projects were Duchesne County entities’ primary emphasis for PCIB funding.

While fiscal year 2007 indicates strong emphasis by Duchesne County on transportation, the percentages otherwise indicate that transportation projects were not Duchesne County’s primary emphasis with the PCIB. Approximately \$16.6 million of the remaining \$19.5 million went toward various building and water projects.

Uintah Basin Revitalization Severance Funds. Duchesne County entities received approximately \$2.2 million from this source during fiscal years 2003 through 2007. During our five-year review period, Duchesne

County entities used \$112,500 (5 percent) of Duchesne County’s revitalization funds for transportation projects, as shown in Figure 2.7.

Figure 2.7 Duchesne County Historical Revitalization Transportation Awards. Duchesne County used Revitalization funds for roads in FY 2007 only.

	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Funding for Roads	\$ 0	\$ 0	\$ 0	\$ 0	\$ 112,500
Total Revitalization Funding	195,000	186,000	444,000	351,000	1,011,000
Percent of Total	0%	0%	0%	0%	11.1%

Duchesne County entities emphasized cultural/recreational projects for Revitalization funding.

Duchesne County entities appears to use very little of Duchesne County’s Revitalization severance money to fund transportation projects. Cultural/recreational projects (e.g., Westside library, park concession stand at Neola) were the most emphasized with approximately \$1 million (47 percent) awarded in this area.

Transportation Discretionary Income Is Available In Uintah Basin Counties

The discretionary income available within the Uintah County Transportation SSD is somewhat large and, until 2007, was increasing every year. The discretionary income in Duchesne County SSD #2 is more modest but has increased every year.

Discretionary income is funding contained in an entity’s unrestricted fund balance and represents funding available for discretionary spending. A restricted fund balance, on the other hand, represents funding that is legally obligated or limited to a particular use. Together, the unrestricted and restricted fund balance make up an entity’s total fund balance.

At the close of CY 2007, the Uintah Transportation SSD had \$15 million in unrestricted funds available for road projects.

Uintah Transportation SSD’s Discretionary Income Is Somewhat Large and Mostly Increasing

Within the Uintah Transportation SSD, revenues, fund balances, and, in particular, unrestricted fund balances grew between calendar years 2003 and 2006. Calendar year 2007 was the first year to show a decrease. Uintah’s funding is shown in Figure 2.8.

Figure 2.8 Revenue, Expenditure, and Fund Balance Trends for Uintah Transportation SSD. In CY 2007, mineral lease revenues decreased \$4.2 million, and the restricted fund balance increased significantly while the unrestricted fund balance declined below CY 2005 levels.

	CY 2003*	CY 2004	CY 2005	CY 2006	CY 2007
Revenues	\$6,011,000	\$8,815,000	\$15,699,000	\$18,817,000	\$14,152,000
Expenditures	3,316,000	3,796,000	8,387,000	14,321,000	15,174,000
Fund Balance	7,214,000	12,233,000	19,545,000	24,042,000	23,020,000
Restricted	825,000	814,000	1,014,000	1,051,000	8,011,000
Unrestricted	6,389,000	11,419,000	18,531,000	22,991,000	15,009,000

* All of the information in this figure was compiled using audited financial reports that present information on a calendar year, rather than a fiscal year, basis. Numbers may not add due to rounding.

In calendar year 2007, mineral lease funds provided to the district decreased by \$4.2 million due to diversion of funds to three new SSDs in Uintah County. As a result, the Transportation SSD’s overall fund balance fell for the first time in this five-year period. Also of interest, in 2007 the proportion of restricted to unrestricted funding within the overall fund balance changed dramatically.

Previous to 2007, the unrestricted fund balance grew to \$23 million, a 260 percent increase from 2003 to 2006. Discretionary funds made up 96 percent of the total fund balance in 2006. This situation changed in 2007 when the overall fund balance decreased by about \$1 million, and restricted and unrestricted fund balances changed. The restricted fund balance grew by almost \$7 million, while the unrestricted fund balance declined almost \$8 million compared to 2006 levels. The transportation SSD director indicated that unrestricted balances were high in previous years because Uintah was having trouble attracting contractors to county road construction projects and was also having problems obtaining rights-of-

The transportation SSD director stated that unrestricted balances were high because Uintah had been unable to attract contractors to county road projects.

way and environmental statements. At the end of calendar year 2007, the Uintah Transportation SSD had \$15 million of discretionary funding available for transportation projects. Uintah County representatives maintain that, with construction costs per mile around \$2.5 million, the fund balance is not large. Uintah County's stated construction cost is higher than UDOT's latest construction cost estimate of \$1.5 million per mile.

Duchesne's SSD #2 Discretionary Income More Modest But Increasing Every Year

The revenues and fund balances of the Duchesne SSD #2 increased every year within the five-year review period; this growth is shown in Figure 2.9.

Figure 2.9 Revenue, Expenditure, and Fund Balance Trends for Duchesne SSD #2. Revenues and fund balances have increased 328 percent and 662 percent, respectively.

	CY2003*	CY 2004	CY 2005	CY 2006	CY 2007
Revenues	\$ 959,000	\$1,487,000	\$2,323,000	\$3,233,000	\$4,105,000
Expenditures	844,000	966,000	1,957,000	1,200,000	2,505,000
Fund Balance	682,000	1,203,000	1,569,000	3,602,000	5,201,000
Restricted	-	-	-	-	-
Unrestricted	682,000	1,203,000	1,569,000	3,602,000	5,201,000

* All of the information in this figure was compiled using audited financial reports that present information on a calendar year, rather than a fiscal year, basis. Numbers may not add due to rounding.

At the close of CY 2007, Duchesne SSD #2 had \$5.2 million available to spend on road projects.

As can be seen in Figure 2.9, while expenditures have increased, they have not kept up with revenue increases. As a result, the fund balance has increased. All of the fund balance is classified as unrestricted; therefore, at the close of 2007, Duchesne SSD #2 had \$5.2 million available to spend on transportation projects. Duchesne County representatives indicated that the fund balance has increased because oil was unavailable for their construction projects. Further, these representatives also maintain that the fund balance is not large when compared to their construction costs per mile (\$2.5 million). Again, Duchesne County's stated cost is higher than UDOT's construction cost estimate of \$1.5 million per mile.

When viewed in total, the information on Uintah and Duchesne counties does not offer a compelling argument supporting the need for additional state transportation funding for Uintah Basin counties. Both counties and county entities have historically allocated their mineral-related money toward a variety of needs, transportation being one of many.

If the Legislature intends counties to make roads a top priority for mineral-related funding, then it would be useful to codify that intent. Toward this end, the Legislature could prioritize transportation for federal mineral lease money channeled through the Utah Department of Transportation (UDOT) by codifying the intent language that accompanies the federal mineral lease appropriation to UDOT. This intent language instructs that transportation needs should be addressed with UDOT federal mineral lease money before other county needs are addressed.

Recommendations

1. We recommend the Legislature consider prioritizing transportation for the federal mineral lease money channeled through UDOT by codifying the intent language that accompanies the UDOT federal mineral lease appropriation.

Appendices

This Page Left Blank Intentionally

APPENDIX A

Federal mineral lease money generated by county for fiscal years 2003 through 2007.

County	Mineral Lease Money Generated
Uintah	\$ 243,222,200
Carbon	127,322,193
Emery	68,104,616
Sevier	45,934,470
Duchesne	26,990,380
San Juan	16,424,916
Grand	12,858,486
Sanpete	9,855,620
Juab	4,273,753
Iron	3,081,114
Beaver	2,793,724
Daggett	2,428,488
Garfield	2,165,514
Summit	1,532,147
Piute	1,034,065
Tooele	887,516
Utah	744,284
Millard	493,157
Wasatch	350,362
Kane	277,661
Rich	193,623
Wayne	84,246
Morgan	52,545
Salt Lake	34,036
Washington	30,726
Davis	2,760
Box Elder	795
Cache	0
Weber	0
Total	\$ 571,173,397

*Total does not include \$473,198 of unallocated money.

This Page Left Blank Intentionally

APPENDIX B

Federal mineral lease money received for fiscal years 2003 through 2007, displayed by county.

County	Mineral Lease (UDOT)	Mineral Lease* (PCIB)	Total
Uintah	\$ 90,045,220	\$ 41,944,859	\$ 131,990,079
Carbon	34,250,667	35,023,900	69,274,567
Sevier	14,157,327	41,875,691	56,033,018
Emery	15,938,246	27,095,725	43,033,971
Duchesne	9,414,996	25,306,234	34,721,230
Sanpete	2,688	26,279,513	26,282,201
Beaver	241,287	18,904,000	19,145,287
Grand	3,004,942	10,795,725	13,800,667
Millard	1,694	11,345,566	11,347,260
San Juan	5,359,169	5,858,334	11,217,503
Iron	3,054	11,158,500	11,161,554
Washington	9,521	10,658,242	10,667,763
Daggett	554,251	9,576,682	10,130,933
Garfield	1,050,212	7,287,595	8,337,807
Kane	53	8,141,429	8,141,482
Utah	3,776	6,600,000	6,603,776
Summit	428,143	6,050,000	6,478,143
Davis	391	4,205,000	4,205,391
Wayne	0	3,121,700	3,121,700
Piute	2,626	2,615,608	2,618,234
Juab	8,810	2,280,000	2,288,810
Tooele	97,546	2,000,000	2,097,546
Wasatch	5,237	272,000	277,237
Rich	1,892	0	1,892
Salt Lake	1,674	0	1,674
Box Elder	316	0	316
Morgan	168	0	168
Cache	0	0	0
Weber	0	0	0
Total	\$ 174,583,906	\$ 318,396,303	\$ 492,980,209

*Total does not include \$17.4 million allocated to regional rather than county entities.

This Page Left Blank Intentionally

Agency Response

Response of Uintah County to the performance audit on the use of Mineral Related Funds in the Uintah Basin.

Uintah County appreciates this opportunity to formally respond to the content, findings and conclusions of the Performance Audit (originally submitted 21 October 2008 to Uintah County, re-submitted 7 November 2008) conducted by the Legislative Auditor General of Utah (hereinafter "Audit").

Uintah County does not concur with the findings and recommendations of that report for a variety of reasons which will be addressed in this response.

DIGEST OF UINTAH COUNTIES' RESPONSE

1. Uintah County is using the portion of Title 30 funds it receives in an appropriate manner, as articulated in the Federal entitling legislation and relevant State statute, to offset the significant impacts it is experiencing due to energy exploration and extraction.
2. Adequate "Unrestricted funds" or "discretionary income" for transportation do not exist in a form which can reasonably address the maintenance which is required on Uintah County roads.
3. Energy production in Uintah County has accounted for over \$100,000,000.00 in funding for public projects in other Utah counties in the past 5 years and is projected to grow in the future.
4. The Audit unfairly combines Title 30 funding to Uintah County by combining funds directed through the CIB and those paid directly to the County. For the period in question the County allocated over half (59%) of the direct payment to transportation. All other impacts which are acknowledged by Federal law receive less than half (41%) of that direct funding. Considering the enormous financial and social impacts associated with energy development and production that percentage represents a heavy allocation to a single priority.
5. Statutory limitation of the use of Title 30 funds to only transportation impacts would be contrary to Federal intent and the historic use of those funds under Title 59, Title 17 D, and by the recipients of CIB funding.

RESPONSE

This response will address inaccuracies and misleading statements and conclusions which exist in the Audit and will focus on the intent of the federal legislation (30 USC 191, hereinafter "Title 30") which makes Mineral Lease funds available to all concerned. It also will address the distribution of Title 30 funds under U.C.A. 59-21-1 and 2 (hereinafter Title 59).

The conclusion, contained in the first paragraph of the digest, which asserts that "Uintah and Duchesne counties' use of federal and state mineral-related funding does not clearly support

the need for supplemental state transportation funding...” and “It appears that the Uintah Basin Counties, particularly Uintah, could allocate a higher percentage of mineral-related money to roads, but they have used their funding in other areas they have deemed impacted by their industrial growth” demonstrates not only the failure of the audit to recognize the clear federal and state intentions for the funds in question but also fails to acknowledge the beneficial nature of the development of energy resources in those Counties to the rest of the State.

There exists within the audit several general statements presented as “fact” which are misleading and need to be addressed (**footnote 1**). The continued reference to the Title 30 funds as being “County” funds is misleading (**footnote 2**). Without going into a lengthy discussion of the uses of 31 USC 6901 (hereinafter PILT) funds, and the loss of those funds if a county accepts for general use Title 30 funds, it is important to note that the County may not use Mineral Lease funds directly. Title 59 clearly identifies the use of those funds to be;

“ distributed as provided in Subsection (2)(h)(ii) to:
(A) counties; (B) special service districts established: (I) by counties; (II) under Title 17D, Chapter 1, Special Service District Act; and (III) for the purpose of constructing, repairing, or maintaining roads; or ©) special service districts established:
(I) by counties; (II) under Title 17D, Chapter 1, Special Service District Act; and (III) for other purposes authorized by statute.”

In the case of Uintah County all of the Title 30 funds allocated to the County are directed to single purpose special service districts as required by Title 30 and the various federal opinions regarding those funds which have been issued over the past 3 decades (**footnote 3**). The Uintah County Transportation Special Service District was formed to build new roads and to conduct major rehabilitation projects on existing roads using Title 30 funds. The Uintah County road department is tasked with the day to day maintenance of the County ‘B’ and ‘D’ roads which bear the brunt of the exploration and production of the energy resources which is the basis for the Title 30 funds. The Audit observes that “mineral-related money is supplemental to all other money a county receives from the state” and concludes that those funds can also be used for roads. This assertion is incorrect and fails to acknowledge the restrictions regarding the use of those funds created by the enabling federal legislation. Uintah County **cannot** (emphasis added) use Title 30 funds for maintenance of roads under the above referenced restrictions. Uintah County has no more funding for B and D roads than any other county. Unlike other county roads receiving state funds the heavy industrial use of Uintah County roads over the past 5 years have created a net profit to the other Counties in the state in excess of \$100,000,000.00 dollars. That industrial use, which dramatically accelerates the degradation of those roads, also immediately addresses the need for domestic energy production which is of regional and national importance. It is for these reasons that Uintah County takes issue with the conclusion of the Audit that “Uintah Basin Assertions for Additional Road Money Are Not Very Compelling”. That conclusion ignores the Federal intent regarding the use of Title 30 funds regarding the impacts of energy production. That conclusion also ignores the ‘limitations of use’ which exist regarding the use of those funds.

The continued reference to the Title 30 funds as being “UDOT” funds and “UDOT federal mineral lease appropriation” is also misleading (**footnote 4**). The association which the Audit attempts to draw between the Title 30 funds and UDOT, specifically on page 2, which state “Utah Code 59-21-2 (2)(h)(ii) requires UDOT to distribute **its** mineral lease monies...” (emphasis added) is legally incorrect. The Utah Department of Transportation under Federal law has no right or interest in the Title 30 funds and is simply the State conduit for those funds to be distributed to the entities designated under Title 59. Any implied association between UDOT, transportation, and the actual intent of either Title 30 or Title 59, which as stated above allows for the use of those funds for the purpose of constructing, repairing, or maintaining roads; **or special service districts established by counties under Title 17D, Chapter 1, Special Service District Act; and for other purposes authorized by statute.**” (emphasis added) is misleading. The purposes established by statute under Title 17D include 15 categories, transportation being only one of those purposes. All of those categories are therefore legislatively intended uses of Title 30 funds.

The intent of Congress in the use of these funds is very important to this discussion. The audit references, on page 1 “An opinion written by the Utah Attorney General’s Office” without identifying that opinion (**footnote 5**). It is therefore unknown if the reference is to AG Opinion No. 92-003 (attached hereto as appendix 1) but that opinion is very instructive regarding the intent of Congress in the appropriate uses for Title 30 funds. That opinion concludes:

“The federal legislative history consistently shows the intent\and approach of Congress regarding mineral lease monies, notwithstanding some changes in the language. Although Congress expanded the uses of the mineral lease funds by local governmental entities beyond roads and school, it resisted the Interior Department's request to remove all restrictions on the use of the funds. Congress recognized that local communities need the funds to assist them in building governmental infrastructure and providing local governmental services during the boom and bust cycles that accompany natural resources development. By restricting the use of the funds to planning, construction and maintenance of public facilities, and to the provision of public services, Congress provided a source of funding for traditional local governmental services that are impacted, such as law enforcement, public health, and governmental facilities.”

In justifying this conclusion the opinion cites the following;

“ The Report accompanying the LWCFRA explaining the expanded use of the mineral lease monies, stating: This amendment would permit each State to use its share of oil shale revenues for planning, construction and maintenance of public facilities and provision of public services.

This Nation has recently embarked on a program of leasing those public lands for the development of our shale resources. If, as seems likely, there is a substantial oil shale boom, State and local governments will have to provide a wide range of community service to large numbers of new residents. Roads and schools are just part of such services. The need to provide the necessary flexibility to State and local governments to use funds derived from sales, bonuses, royalties, and rentals of public lands for oil shale development is obvious. The local people will

bear the impact of helping to meet national energy needs. This provision will help them provide the necessary planning and construction funds to help them. S. Rep. No. 367, 94th Cong., 2d Sess. 8 (1976).

The Public Lands and Local Government Funds Act (PL & LGFA), P. L. 94-565, 90 Stat. 2662 (1976), affected a number of federal statutes that provide assistance to local governments to alleviate the impact of federal lands and activities, including 30 U.S.C. 191, the Mineral Leasing Act. The Report accompanying the PL & LGFA, Senate Report No. 94-1662, discussed the problems faced by local governments because of the limitations on the use of federal funds generally and mineral lease monies specifically:

[T]oo many of the revenue sharing provisions restrict the use of funds to only a few governmental services -most often the construction and maintenance of roads and schools. Yet, local governments are called upon to provide many other services to the federal lands or as direct or indirect result of activities on the Federal lands. These services include law enforcement; search rescue and emergency; public health; sewage disposal; library; hospital; recreation; and other general local government services. It is only the most fortunate of local governments which is able to juggle its budget to make use of those earmarked funds in a manner which will accurately correspond to its community's service and facility needs.

S. Rep. No. 1262, 94th Cong., 2d Sess. 9 (1976).

The Report also noted that not enough of the funds given to the states went to the impacted local subdivisions: In far too many States, the result has been that the funds are either kept at the State level and not distributed to local governments at all or are parceled out in a manner which provides shares to local governments other than those in which the federal lands are situated and where the impact of the revenue and fee generating activities are felt. Id.

One day after the PL & LGFA was passed, the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579 317, 90 Stat. 2743, 2770-71 (1976) returned the language of 30 U.S.C. 191 to the prior wording and phrasing of FCLAA. In discussing that prior language and its meaning, Senate Report 1262 noted: In this Congress, the Senate has made numerous efforts to amend these statutory provisions to increase the amount of, and render more useful, the payments to State and local governments. The Federal Coal Leasing Amendments Act of 1975 . . . amended section 35 of the Mineral Lands Leasing Act [30 U.S.C.191] to increase the States' share of revenues derived under the Act from 37.5 percent to 50 percent. It also authorized the use of the additional 12.5 percent not just for roads and schools but for "(1) planning, (2) construction and maintenance of public utilities [sic], and (3) provision of public services" and required that priority for distribution of that 12.5 percent be afforded the local governments which experience the social and economic impacts of the mineral development from which the revenues are derived."

The basis of the opinion regarding funding economic development is not wholly relevant to this discussion, however it's discussion of the genesis of Title 30 funds from the inception of

the act to the present intent of the Congress is fully ignored in the Audit, but is critical to this analysis. It is also important to note that the language of Title 59 directly adopts the terms of Title 30 as they concern the use of those funds. The continued recommendation of the Audit that “If the Legislature wants to continue to prioritize transportation needs first when allocating mineral-related money it would be useful to codify that intent” (**footnote 6**) is in clear contradiction to both Federal and State statutory intent.

It is also important to note that the Audit’s attempt to address only the funds disbursed through UDOT and to ignore the funds administered by the Permanent Community Impact Board is inappropriate. Both funding mechanisms receive Title 30 funds under the same federal act and for the same Congressional purposes. If the legislature intended that those funds be used primarily for transportation, an intent clearly abandoned by Congress in 1976, **all such funds would be impacted** (emphasis added). No such limiting intent has ever been articulated to the PCIB, and should not logically be codified at this time.

The Audit, in finding that excess funds exist for transportation by identifying funds held by the Uintah Transportation Special Service District, simply ignores the reality of road building projects under any reasonable governmental procurement policy. Mineral lease funds are not a fully stable resource and fluctuate on a quarterly basis. Each road project bid must be funded prior to contract under the rules governing governmental procurement and non-appropriation. Most major road projects involve extensive planning, issues regarding land acquisition, environmental and wetland issues and other regulatory concerns which extend such contracts beyond any reliable funding projections. The Transportation District, in having a fund balance which allows for the guaranteed payment of major projects (and it should be noted that fifteen million dollars is not an excessive amount to expend on a major road projects) is conducting it’s business in a practical and conservative manner. To criticize a governmental entity for conservative fiscal restraint and planning is inappropriate.

The Audit identifies the existence of the State severance tax, and acknowledges that the beneficial interests of the producing counties is capped. The Audit identifies funds which are received by Uintah and Duchesne Counties, but fails to address the total severance which is produced in those counties. A full discussion of the benefits not only to the producing counties but to other State entities is essential to a fair discussion of the issues but is omitted in the Audit.

The Audit identifies what funds were received by Uintah County, and does acknowledge that Uintah County was by far the highest producer of Mineral revenue for the State, but fails to conclude that during the 5 years examined that energy production in Uintah County generated **\$111,232,221.00 for the beneficial use of other Utah counties** who were not impacted by that production. (emphasis added) Only Carbon, Emery and San Juan counties produced greater revenue than they received during those years. Every other County in the State received more Mineral Lease funds than were actually produced in their County. All of the associated impacts, including providing the roads which make energy development possible, and thereby creating revenue not only for Uintah County but also for the State were born by Uintah County. The Audit fully ignores the fact that “impacts” do not necessarily include additional infrastructure which is required to facilitate continued energy development. The State and our Country are in desperate need of reliable domestic energy resources, some of which are located in Uintah

County. It is not unreasonable, in fact it is good business, for the other Counties and the State to consider assisting in funding for infrastructure, including roads, which produces a net gain to the other citizens of the state in excess of \$100,000,000.00 in a five year period. Studies indicate that it is reasonable to anticipate an increase in these revenues in the future.

Uintah County has commissioned a study of the economic and social impacts which it is experiencing and which are projected based upon the expected need for the resources which exist in the County. That study will be made available to this body and the public. The conclusions of that study state:

1. There are no viable options available to Uintah County other than to respond quickly, strategically, consistently, and aggressively to the growth it is experiencing.
2. Uintah County simply does not, at present, have adequate resources to appropriately address its current needs, let alone its projected needs.
3. Because private industry energy resource companies will make enormous profits from their activity in Uintah County, they should be engaged as both fund and planning partners.
4. There are compelling reasons why investment in the County at this time is desirable and highly attractive to the State and many others.

Uintah County is proud to be a part of the national effort to address our Country's need for domestic energy production. Uintah County is experiencing the full impact of an exponential increase of industrial expansion associated with that production. As recognized by Congress the associated impacts born by the local government of an otherwise small, rural, and agriculturally based county are extensive, and the impact to those areas include far more concerns than roads. The recommendations of the Audit fail to address the intent of Congress regarding the necessary and appropriate use of Title 30 funds and the limitations associated with the use of those funds. Those recommendations are in direct contradiction to the intent and language of Federal law and should not be followed by the Utah Legislature.

Nov 10, 08
Date

Michael McKee
Michael McKee, Chairman
Uintah County Commission

Footnotes to Uintah Counties Response to the 21 October 2008 audit, and 6 November 2008 “final” audit of the Legislative Auditor General.

1. In responding to the 21 October, 2008 Report #2008-13 Uintah County believed that document to be a final version of said report. Due to the time restraint involved in responding to the 6 November 2008 “final” report, Uintah County will rely upon it’s prior response and will footnote comments on the substantive changes which were made. Without acknowledging those changes, the response of Uintah County would appear to fail to address the issues which ultimately appear in the final report.
2. Throughout the original report the term “recipient” appears and was replaced with the term “beneficiary”. Uintah County assumes that the use of the term “beneficiary” refers to the right full and appropriate beneficiary of impact mitigation funding under Title 30. It is therefore assumed that the audit in its final form acknowledges the Federal Legislative intent in Title 30 regarding the priority of those fund to help offset the impact of heavy industrial exploration and extraction of domestic energy production. Uintah County appreciates this acknowledgment.
3. The original report referred to the recipient of the Title 30 funds as “Uintah County” or “Duchesne County”. Uintah Counties response took issue with this and the assertion and explained the necessity for the County to channel those funds to Special Service Districts. The audit in it’s final form has added the modifier “entities” after the name of each respective county, acknowledging the above referenced need. Uintah County appreciates this acknowledgment.
4. The original report continually referred to Title 30 funds as “UDOT” funds. The audit in it’s final form on page 2 and thereafter acknowledges that “*Utah Code 59-21-2-(2)(h)(ii)* requires UDOT to distribute the federal lease monies channeled through the department ...” acknowledging that those funds are not UDOT funds. Uintah County appreciates this acknowledgment.
5. The original report did not reference the Attorney Generals’ Opinion in question. The final report on page 1 does. Uintah County referenced that opinion and attached a copy of it to the Counties’ original response.
6. The recommendation stated multiple times in the original report “If the Legislature wants to continue to prioritize transportation needs first when allocating mineral-related money it would be useful to codify that intent” was modified in the final report to state “We recommend the Legislature consider prioritizing transportation for the federal mineral lease money channeled through UDOT by codifying the intent language that accompanies the UDOT federal lease appropriation”. It should be noted that the referenced “Intent” language in the stated legislation (H.B. 2, Item 162) refers to “59-21-1 (3)(d)” of the Utah Code, **a Code section which does not exist**. It remains the position of Uintah County that such a prioritization would ignore Congressional intent regarding the use of those funds as demonstrated in the Counties response and the Opinion of the Attorney General and it’s accompanying Federal opinions.

AG Opinion Number 92-003

Opinion No. 92-003

February 24, 1993

Joseph A. Jenkins

Chairman

Permanent Community Impact Board

Department of Community and Economic Development

BUILDING MAIL

Re: Attorney General Opinion 92-03

Use of Mineral Lease Monies for Economic

Development

Dear Mr. Jenkins:

You have requested an Attorney General's opinion regarding the use of Mineral Lease Funds. Specifically, you have asked whether the Permanent Community Impact Board may make loans and grants from the Mineral Lease Account for economic development projects. We conclude that an economic development project, in and of itself, is not eligible for funding with mineral lease monies because it does not qualify as "planning" construction and maintenance of public facilities," or "providing a public service." Economic development may be a goal or intended benefit of a particular project as long [as the project qualifies as "planning," "construction and maintenance of public facilities" or "provision of public services." Our opinion deals primarily with issues of federal law, although we briefly reference state law requirements that are consistent with the federal mandates and requirements.

Under the Federal Mineral Lease Act of 1920, as amended, 30 U.S.C. 181 through -195 (1988), lease holders on public domain make royalty payments to the federal government for the development and production of non-metalliferous minerals. In Utah, the primary source of these royalties is the commercial production of fossil fuels (bituminous coal, crude oil and natural gas) on federal land held by the U.S. Forest Service, the Bureau of Land Management, and the various Indian Tribes. Since the enactment of the Mineral Lease Act of 1920, a portion of these royalty payments have been returned to the States. Current law provides that one-half of the monies received by the federal government shall be returned to the state where the lease lands are located, to be used:

by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially and economically impacted by the development of minerals leased under this chapter, for (i) planning, (ii) construction and maintenance of public facilities and (iii) provisions of public services.

Mineral Lease Act, 30 U.S.C. 191 (1988) (emphasis added).

The Utah Legislature has provided for the creation of a mineral lease account and for the allocation of monies from that account in accordance with the requirements of the Mineral Lease Act. See Utah Code Ann. 59-21-1, 2 (1992). The Permanent Community Impact board allocates a portion of those mineral lease funds pursuant to Utah statute, which provides that the Impact Board shall:

make, subject to the limitations of the Leasing Act, grants and loans from the amounts appropriated by the Legislature out of the impact fund to state agencies and to subdivisions which are or may be socially or economically impacted, directly or indirectly

by mineral resource development, for:

- (i) planning;
- (ii) construction and maintenance of public facilities; and
- (iii) provision of public services

Utah Code Ann. 9-4-305(1) (Supp. 1992) (Emphasis added). As you will note, the State statute imposes the same restrictions on the use of mineral lease monies as the Federal Mineral Lease Act.

Until 1976, mineral lease monies returned to the State could only to be used for "the construction and maintenance of public roads or for the support of public schools or other public educational institutions." Mineral Lease Act, 30 U.S.C. 191 (1976). That limitation on the use of the funds was specifically addressed along with various other issues in the Federal Coal Leasing Amendments Act of 1975 (FCLAA), Pub L. No. 94-377, 9, 90 Stat. 1083 (1976). The House Report accompanying the FCLAA noted:

The current restrictions on the manner in which monies return to the States from the sale of Federal leases within their borders are onerous. When an area is newly opened to large scale mining, local governmental entities must assume the responsibility of providing public services needed for new communities including schools, roads, hospitals, sewers, police protection, and other public facilities as well as adequate local planning for the development of the community. Since Section 35 of the Mineral Lease Act of 1920 [30 U.S.C. 1991] currently provides that monies returned to the states be available only for schools and roads, it is difficult for affected areas to meet the needs of their new inhabitants. . .

The additional 12 ½ percent that will go to the states is not earmarked for schools and roads, and may be spent by the state for planning, public facilities and public services, giving priority to those communities impacted by the mineral development.

H.R. Rep. No. 681, 94th Cong., 2d Sess. 19-20 (1976).

The U.S. Department of the Interior, in its official response to Congress concerning the Act, specifically requested that the restrictions on state use of the money be deleted in their entirety. See H.R. Rep. No. 681, 94th Cong., 2d Sess. 27, 43 & 37, 42 (1976) (letters from Jack Horton, Assistant Secretary of the Interior, to the Honorable James A. Haley, Chairman, Committee of Internal and Insular Affairs, House of Representatives (March 13, 1975 and July 22, 1975). Although Congress did expand the uses of the funds being returned to the state, it did not remove all restrictions on the use of the funds.

The FCLAA allowed an additional twelve and one-half percent (12 ½) of the royalty payments received by the federal government to be returned to the states to be used solely for:

- (1) Planning;
- (2) Construction and maintenance of public facilities
- (3) Provision of public services.

FCLAA, Pub. L. No. 94-377 9, 90 Stat. 1083, 1089 (1976). In its section-by-section analysis of the FCLAA, the House Report emphasized this limitation of the allowable uses:

Section 9 amends Section 35 (30 U.S.C. 191) of the Mineral Lands Leading Act by . . . raising the percentage of the revenues going to the States from 37.5% to 50%. The 37.5% of the funds which is currently returned to the States under the law would remain available only for use in construction and maintenance of schools and roads. The additional 12.5% returned to the States would be available for use in the planning, construction and maintenance of public facilities, with priority to be given to those areas impacted by the by the development of the resources involved.

H.R. Rep. 681, 94th Cong., 2d Sess. 25 (1976).

The operative section returning mineral lease monies to the states, 30 U.S.C. 191, was amended one month later by the Land and Water Conservation Fund Act of 1965 (LWCFA), Pub. L. No. 94-422, 90 Stat. 1313, 1323 (1976). The LWCFA made two changes to 191. First, it eliminated the distinction between the use of the 37.5% revenues (to be used in construction and maintenance of schools and roads) and the 12.5% revenues (to be used in planning, construction and maintenance of public facilities and provisions of public services), by allowing the entire 50% of the royalties returned to the state to be used in the same manner. Second, it required that the money only be used for "planning, construction and maintenance of public facilities, and the provisions of public services." In making the change the LWCFA altered the operative language of section 191 to the language used in the congressional report that accomplished the prior FCLAA:

All monies paid to any state from the sales, bonus, royalties and rentals of oil shale from public lands may be used by such state and its subdivision for planning, construction, and maintenance of public facilities, and provision of public services, as the legislature of the state may direct, giving priority to those subdivisions of the State socially or economically impacted by the development of the resource.

LWCFA, Pub. L. No. 94-422 301, 90 Stat. 1313, 1323 (1976). The Report accompanying the LWCFA explaining the expanded use of the mineral lease monies, stating:

This amendment would permit each State to use its share of oil shale revenues for planning, construction and maintenance of public facilities and provision of public services.

This Nation has recently embarked on a program of leasing those public lands for the development of our shale resources.

This Nation has recently embarked on a program of leasing those public lands for the development of our shale resources.

If, as seems likely, there is a substantial oil shale boom, State and local governments will have to provide a wide range of community service to large numbers of new residents. Roads and schools are just part of such services.

The need to provide the necessary flexibility to State and local governments to use funds derived from sales, bonuses, royalties, and rentals of public lands for oil shale development is obvious. The local people will bear the impact of helping to meet national energy needs. This provision will help them provide the necessary planning and construction funds to help them.

S. Rep. No. 367, 94th Cong., 2d Sess. 8 (1976).

The Public Lands and Local Government Funds Act (PL & LGFA), P. L. 94-565, 90 Stat. 2662 (1976), affected a number of federal statutes that provide assistance to local governments to alleviate the impact of federal lands and activities, including 30 U.S.C. 191, the Mineral Leasing Act. The Report accompanying the PL & LGFA, Senate Report No. 94-1662, discussed the problems faced by local governments because of the limitations on the use of federal funds generally and mineral lease monies specifically:

[T]oo many of the revenue sharing provisions restrict the use of funds to only a few governmental services -most often the construction and maintenance of roads and schools. Yet, local governments are called upon to provide many other services to the federal lands or as direct or indirect result of activities on the Federal lands. These services include law enforcement; search rescue and emergency; public health; sewage disposal; library; hospital; recreation; and other general local government services. It is only the most fortunate of local governments which is able to juggle its budget to make use of those earmarked funds in a manner which will accurately correspond to its community's service and facility needs.

S. Rep. No. 1262, 94th Cong., 2d Sess. 9 (1976). The Report also noted that not enough of the funds given to the states went to the impacted local subdivisions:

In far too many States, the result has been that the funds are either kept at the State level and not distributed to local governments at all or are parceled out in a manner which provides shares to local governments other than those in which the federal lands are situated and where the impact of the revenue and fee generating activities are felt.

Id.

One day after the PL & LGFA was passed, the Federal Land Policy and Management Act of 1976

(FLPMA), Pub. L. No. 94-579 317, 90 Stat. 2743, 2770-71 (1976) returned the language of 30 U.S.C. 191 to the prior wording and phrasing of FCLAA. In discussing that prior language and its meaning, Senate Report 1262 noted:

In this Congress, the Senate has made numerous efforts to amend these statutory provisions to increase the amount of, and render more useful, the payments to State and local governments. The Federal Coal Leasing Amendments Act of 1975 . . . amended section 35 of the Mineral Lands Leasing Act [30 U.S.C. 191] to increase the States' share of revenues derived under the Act from 37.5 percent to 50 percent. It also authorized the use of the additional 12.5 percent not just for roads and schools but for "(1) planning, (2) construction and maintenance of public utilities [sic], and (3) provision of public services" and required that priority for distribution of that 12.5 percent be afforded the local governments which experience the social and economic impacts of the mineral development from which the revenues are derived.

S. Rep. No. 1262, 94 Cong., 2d Sess. 7 (1976).

The federal legislative history consistently shows the intent and approach of Congress regarding mineral lease monies, notwithstanding some changes in the language. Although Congress expanded the uses of the mineral lease funds by local governmental entities beyond roads and school, it resisted the Interior Department's request to remove all restrictions on the use of the funds. Congress recognized that local communities need the funds to assist them in building governmental infrastructure and providing local governmental services during the boom and bust cycles that accompany natural resources development. By restricting the use of the funds to planning, construction and maintenance of public facilities, and to the provision of public services, Congress provided a source of funding for traditional local governmental services that are impacted, such as law enforcement, public health, and governmental facilities.

Your question centers on whether the Permanent Community Impact Board may make grants and loans for economic development consistent with the state and federal restrictions on the use of the funds. Specifically, it must be determined if a grant or loan for economic development constituent "planning," "construction and maintenance of public facilities" or the "provision of public services." Based on the language of the acts and the purposes for which they were passed, it is our conclusion that grants or loans "merely" for economic development are not authorized under the state and federal acts. However, a grant and loan for the construction and maintenance of a public facility or the provision of public service, which may have economic development as an additional goal or benefit, would be authorized

Economic development, by itself is not one of the traditional local government services that Congress intended to be eligible for funding by mineral monies. Had Congress adopted the interior Department's suggestion of removing all restrictions on the use of the funds so that the funds could be spent on any lawful public purpose, undoubtedly economic development would be an appropriate program to be funded. Congress, however, chose to limit the use of the funds to assist local communities in providing those traditional local government services and facilities that may be impacted by resource development.

This conclusion is consistent with past interpretations of the federal law by the Utah Legislature and the Impact Board. The Impact Board in its rules and regulations and in its grants and loans had avoided projects that only provide economic development as an appropriate grant project. The Board has always required the construction and maintenance of a public facility or the provision of a traditional local governmental service in order to fund a project.

This is not to say that economic development cannot be a goal or purpose of a funded project. Many of the project funded over the years by the Impact Board and the Legislature have had the enhancement of

economic development as a main component. The funded project, however, has always been the construction and maintenance of a public facility or the supervision of a traditional local governmental service. For example, the Board funded a golf course to be owned and operated by a local governmental entity. Recreation is a traditional public service provided by local government but, as in this case, it may also be designed to further economic development, encourage tourism, and encourage the influx of new business. To retain its character as a public facility, however, the golf course was required to be publicly owned and operated. See Informal Op. Utah Att'y Gen. No. 84-80 (December 3, 1984). If the Impact Board is funding: (1) a project which is a public facility, i.e., one owned and operated by a public entity or to which the public has a right to use that cannot be denied at the pleasure of the owner, *Union Pac. R.R. v. Public Serv. Comm'n* 211 P.2d 851, 895 (Utah 1949); or (2) a project that provides a traditional local governmental service, such as public safety or public health, funding the project would be a lawful use of the mineral lease monies even if economic development were one of the primary anticipated results.

The use of mineral lease monies for "mere" economic development--usually meaning assistance to private businesses and enterprises in their operations--raises Utah Constitutional issues. The Utah Supreme Court has held that article VI, section 29 of the Utah Constitution bars the State from subscribing to stock (or lending its credit) in aid of any private enterprise, regardless of whether or not there are public benefits. *Utah Technology Finances Corp. v. Wilkinson*, 723 P.2d 406, 413-14 (Utah 1986). In addition, the Court has recognized a constitutional principle that "public funds cannot be expended for private purposes." See *id.* at 412-13. The Court stated:

[T]he fundamental test of the constitutionality of the statute requiring the use of public funds is whether the statute is designed to promote the public interest, as opposed to the furtherance of the advantage of individuals.

Tribe v. Salt Lake City Corporation, 540 P.2d 499, 504 (Utah 1975).
Further:

While it is improper to send public funds for private purposes, such private benefits incidental to a dominant public purpose do not detract from the constitutionality of the legislation.

Utah Housing Finance Agency v. Smart, 561 P.2d 1052, 1055 (Utah 1977.)

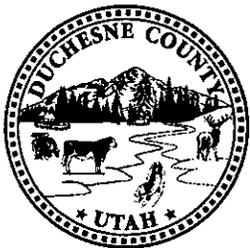
The funding by the Impact Board of economic development projects, without extensive legislative factual determinations of public purposes and need, raises significant constitutional issues that would have to be resolved on a fact intensive basis for each proposed project. *Utah Technology Finance Corp. v. Wilkinson*, 723 P.2d 406, 412-413 (Utah 1986). Limiting grants and loans to funding the construction and maintenance of public facilities and providing public service avoids such constitutional questions.

If you have additional questions or if we may be of further assistance to you in this matter, please do not hesitate to call.

Sincerely,

RICHARD D. WYSS
Assistant Attorney General

THOM D. ROBERTS
Assistant Attorney General



DUCHEсне COUNTY COMMISSION

W. Rod Harrison, Chairman; Kent R. Peatross, Member; Kirk J. Wood, Member
P.O. Box 270
Duchesne, Utah 84021-0270
Phone (435) 738-1100
Fax (435) 738-5522

November 10, 2008

John M. Schaff, CIA
Auditor General
Office of the Utah Legislative Auditor General
W315 Utah State Capitol Complex
PO Box 145315
Salt Lake City, Utah 84114-5315

RE: Duchesne County's response to the Performance Audit on the Use of Mineral-Related Funds in the Uintah Basin dated November 6, 2008.

Dear Mr. Schaff:

Recently the Duchesne County Board of County Commissioners ("Commission") received a copy of "A Performance Audit on the Use of Mineral-Related Funds in the Uintah Basin" ("Audit") from your office, dated November 6, 2008. We appreciate the opportunity to review the Audit. It appears that even after receiving Duchesne County's response to the previous draft your office has not substantially revised the tone or conclusions of the Audit. Therefore, the Commission submits its response again to take issue with factual misrepresentations, inaccurate legal conclusions, and extremely biased analysis presented in the Audit.

I. Factual Misrepresentations Permeated the Audit.

- A. Previous drafts of Audit mislabeled federal mineral lease funds as "UDOT federal lease money" which inappropriately placed the State's focus only on transportation.

The Audit is extremely narrow in scope and biased in its conclusions

Throughout the previous draft of the Audit the label "UDOT federal lease money" was consistently used. While it is true that a portion of the federal mineral lease funds received by the State are administered by UDOT, this simple act does not change the origin, or name, of these funds. While using the term "UDOT" may help distinguish these federal funds from the other categories in U.C.A. § 59-21-2, the very liberal use of "UDOT" portrayed the unfounded idea that these funds are to be used primarily for roads. While the November 6th draft has removed this term it is clear that the

Audit continues to place an unsupported view that federal mineral lease funds are only available to alleviate one of the many incredibly expensive impacts imposed on the Uintah Basin.

In addition, it needs to be absolutely clear that UDOT does not own these funds, nor does the State have unfettered control over these funds. The State only charged UDOT with the task of administrating these funds. In fact, *U.C.A. § 59-21-2* makes it clear that at issue is “**federal** mineral lease money” and that UDOT is merely the conduit in returning these federal monies back to the impacted counties, or special service districts created within these counties, as the case may be. *U.C.A. § 59-21-2(2)(h)(i)*.

At issue is federal mineral lease money. *See U.C.A. § 59-21-2(2)(b)*. Federal law, as discussed below, requires that priority be given to those subdivisions of the State that are socially and economically impacted by mineral extraction. While it may be arguably permissible for UDOT to be the administrator of these funds, the illogical, and factually inaccurate, leap that these funds should be spent primarily on transportation is only perpetuated by the Auditor’s prior use of the term “UDOT federal lease money” and the absence of any analysis regarding the other impacts placed on high production counties.

- B. It is disingenuous and misleading to quantify the cost of building a mile of road in absolutes.

On pages 15-16 of the Audit, it appears the various parties have unfortunately conducted an exercise in futility in trying to absolutely quantify the cost of building one mile of road. The counties used a justifiable estimate as one of many reasons it has become difficult to complete road projects (thus, inhibiting the SSDs’ ability to lower their fund balance). The Auditor misunderstood this as an absolute. Of course the Commission and SSDs understand that some roads may be less expensive. However, we are also painfully aware that some of these vital road projects can, and have, vastly exceeded these estimates. Therefore, it is misleading to contrast the fund balances to the cost of a mile of road.

II. Inexcusable Lack of Information Presented or Analysis Given to the Social and Economic Impacts Carried Directly and Solely on the Shoulders of Uintah Basin Residents.

Because the Audit only focused on transportation its findings and conclusions are inept and completely inadequate in addressing the tremendous social and economic impacts imposed on counties in extraction areas. Further, it is shockingly silent on the benefits enjoyed by unaffected residents in other regions of the state, as addressed later. An analogous list of some of the impacted areas has been codified by the State of Utah, as follows:

During the five year review period, Duchesne County allotted 100% of federal mineral lease funding to their transportation district

The Audit’s proposal to codify a priority towards roads would be in direct violation of federal law

- (1) water;
- (2) sewerage;
- (3) drainage;
- (4) flood control;
- (5) garbage collection and disposal;
- (6) health care;
- (7) transportation;
- (8) recreation;
- (9) fire protection and, if fire protection service is provided, emergency medical or ambulance or both;
- (10) providing, operating, and maintaining correctional and rehabilitative facilities and programs for municipal, state, and other detainees and prisoners;
- (11) street lighting;
- (12) consolidated 911 and emergency dispatch;
- (13) animal shelter and control;
- (14) receiving federal mineral lease funds under Title 59, Chapter 21, Mineral Lease Funds, and expending those funds to provide construction and maintenance of public facilities, traditional governmental services, and planning, as a means for mitigating impacts from extractive mineral industries; and
- (15) in a county of the first class, extended police protection.

U.C.A. § 17D-1-201.

It should be noted that these areas are not listed in any preferential order in which SSDs should be created.

Further, Duchesne County is in a unique position regarding the relationship between the impacts of the mineral industry and federal funds received. Unlike the other top 6 producing counties mentioned in the audit, 87% of production within Duchesne County occurs on private and tribal lands. Thus, the impacts listed above are directly placed on the citizens of the county; yet, the county does not receive a proportional amount of the revenues received as mandated by federal and state law.

Federal mineral lease funds are to be used to address impacts directly inflicted on traditional governmental functions

The actual production rate in Duchesne County should place it as number 2 or 3 in Appendix A of the audit. However, because of the unique makeup of landownership in our county we bear an even more disproportionate impact than Uintah County. While some may argue that Duchesne County's portion of severance tax is suppose to offset this amount it equals, at best, to only one penny on the dollar. Further, that amount, while recently increased, is capped; therefore, not allowing the amount to correlate with the impacts born by the county.

Even more appalling are the figures provided concerning counties that really have no impacts yet receive a large amount of federal mineral lease money. For example, the Audit states that Washington County generated \$30,726 of federal mineral lease money over the review period. Yet, they received \$10,667,763 in federal mineral lease money during the same time period. That is a very large return for a county that has suffered a *de minimis* impact from mineral production.

Clearly the Audit fails to consider any other legitimate and important use of federal mineral lease funds. In fact it uses the term “beneficiary” suggesting that these funds are analogous to trust funds and the County needs State approval to spend them on projects other than roads. Finally, the Audit fails to consider that the Uintah Basin has produced 50% of the minerals extracted in the State of Utah and has only received 34% of those funds. Thus, these percentages alone show that state law is not being followed requiring the distribution of federal mineral lease funds to be “proportionate to the amount of federal mineral lease money generated by the count[ies].” See Audit pg 2.

III. Federal Law Prohibits the State to Follow the Recommendation Proffered by the Audit.

Without presenting an elaborate legal brief on the proper use of these funds, it is instructive to highlight a few key statements issued by the Utah Attorney General’s Office (“Opinion”) concerning the purpose and proper use of federal mineral lease funds. See Attorney General Opinion 92-03. These statements provide a clear understanding of federal law and intent and show that the Audit’s recommendation would be in violation thereof.

Congress intended these federal mineral monies to be used for “traditional governmental services.” It is important to note that the Opinion stated emphatically that “recreation is a traditional public service provided by local [government].” Not surprisingly, the Opinion also highlighted other “traditional governmental services that are impacted, such as law enforcement, public health, and governmental facilities,” and “governmental infrastructure.” Therefore, it is uncontroverted that the fifteen (15) purposes for special services districts, listed above, are synonymous with “traditional governmental services.”

Finally, federal law is clear that priority shall be given to local governments that are directly impacted by mineral extraction. The United States Senate unequivocally stated:

“In far too many States, the result has been that the funds are either kept at the State level and not distributed to local governments at all **or are parceled out in a manner which provides shares to local**

Duchesne County is second only to Uintah County in production yet #5 in federal dollars received.

governments other than those in which the federal lands are situated and where the impacts of the revenue and fee generating activities are felt.”

Opinion, quoting S. Rep. No. 1262, 94th cong., 2d Sess. 9 (1976) (emphasis added).

In addition, the Senate ardently expressed its intent to insure that these funds were not even limited to the traditional governmental function they could address. In very clear terms the Senate stated, “too many of the revenue sharing provisions restrict the use of funds to only a few governmental services-most often the construction and maintenance of roads.”

Given the statistics outlined in the Audit, it appears even the current distribution method created by the State may be unlawful. In the very least, any effort by the State to follow the recommendations of the Audit would be in direct violation of federal law and Congressional intent.

IV. Conclusion

Unfortunately the Audit, as drafted, is extremely narrow in scope and biased in its conclusions. The federal government has realized and acknowledged the myriad ways local governments are impacted by mineral extraction. The Audit completely failed to consider these impacts and chose instead to focus only on roads. Further, the Audit did not take any effort whatsoever to understand and address the unique position of Duchesne County in being the second highest impacted county while only receiving the fifth highest amount of funds. Further, it appears Utah’s current distribution of federal mineral lease funds is at odds with federal law and any additional movement in restricting these funds would be a continued violation of federal law.

Therefore, Duchesne County adamantly opposes the purpose and conclusions of the Audit. We respectfully requests its conclusion that the “Uintah Basin assertions for additional road money are not very compelling,” and its recommendation of codifying any priority towards transportation be entirely discarded. Please feel free to contact us regarding this response if you have any questions

Very Truly Yours,

Kent R. Bantam
AR Hanson
Kris J. Good

Encl(s)

February 24, 1993

Joseph A. Jenkins
Chairman
Permanent Community Impact Board
Department of Community and Economic Development
BUILDING MAIL

Re: Attorney General Opinion 92-03 Use of Mineral Lease Monies for Economic
Development

Dear Mr. Jenkins:

You have requested an Attorney General's opinion regarding the use of Mineral Lease Funds. Specifically, you have asked whether the Permanent Community Impact Board may make loans and grants from the Mineral Lease Account for economic development projects. We conclude that an economic development project, in and of itself, is not eligible for funding with mineral lease monies because it does not qualify as "planning" construction and maintenance of public facilities," or "providing a public service." Economic development may be a goal or intended benefit of a particular project as long as the project qualifies as "planning," "construction and maintenance of public facilities" or "provision of public services." Our opinion deals primarily with issues of federal law, although we briefly reference state law requirements that are consistent with the federal mandates and requirements.

Under the Federal Mineral Lease Act of 1920, as amended, 30 U.S.C. 181 through -195 (1988), lease holders on public domain make royalty payments to the federal government for the development and production of non-metalliferous minerals. In Utah, the primary source of these royalties is the commercial production of fossil fuels (bituminous coal, crude oil and natural gas) on federal land held by the U.S. Forest Service, the Bureau of Land Management, and the various Indian Tribes. Since the enactment of the Mineral Lease Act of 1920, a portion of these royalty payments have been returned to the States. Current law provides that one-half of the monies received by the federal government shall be returned to the state where the lease lands are located, to be used:

by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially and economically impacted by the development of minerals leased under this chapter, for (i) planning, (ii) construction and maintenance of public facilities and (iii) provisions of public services.

Mineral Lease Act, 30 U.S.C. 191 (1988) (emphasis added).

The Utah Legislature has provided for the creation of a mineral lease account and for the allocation of monies from that account in accordance with the requirements of the Mineral Lease Act. See Utah Code Ann. 59-21-1, 2 (1992). The Permanent Community

Impact board allocates a portion of those mineral lease funds pursuant to Utah statute, which provides that the Impact Board shall:

make, subject to the limitations of the Leasing Act, grants and loans from the amounts appropriated by the Legislature out of the impact fund to state agencies and to subdivisions which are or may be socially or economically impacted, directly or indirectly by mineral resource development, for:

- (i) planning;
- (ii) construction and maintenance of public facilities; and
- (iii) provision of public services

Utah Code Ann. 9-4-305(1) (Supp. 1992) (Emphasis added).

As you will note, the State statute imposes the same restrictions on the use of mineral lease monies as the Federal Mineral Lease Act.

Until 1976, mineral lease monies returned to the State could only to be used for "the construction and maintenance of public roads or for the support of public schools or other public educational institutions." Mineral Lease Act, 30 U.S.C. 191 (1976). That limitation on the use of the funds was specifically addressed along with various other issues in the Federal Coal Leasing Amendments Act of 1975 (FCLAA), Pub L. No. 94-377, 9, 90 Stat. 1083 (1976). The House Report accompanying the FCLAA noted:

The current restrictions on the manner in which monies return to the States from the sale of Federal leases within their borders are onerous. When an area is newly opened to large scale mining, local governmental entities must assume the responsibility of providing public services needed for new communities including schools, roads, hospitals, sewers, police protection, and other public facilities as well as adequate local planning for the development of the community. Since Section 35 of the Mineral Lease Act of 1920 [30 U.S.C. 1991] currently provides that monies returned to the states be available only for schools and roads, it is difficult for affected areas to meet the needs of their new inhabitants. . .

The additional 12 1/2 percent that will go to the states is not earmarked for schools and roads, and may be spent by the state for planning, public facilities and public services, giving priority to those communities impacted by the mineral development.

H.R. Rep. No. 681, 94th Cong., 2d Sess. 19-20 (1976).

The U.S. Department of the Interior, in its official response to Congress concerning the Act, specifically requested that the restrictions on state use of the money be deleted in their entirety. See H.R. Rep., No. 681, 94th Cong., 2d Sess. 27, 43 & 37, 42 (1976) (letters from Jack Horton, Assistant Secretary of the Interior, to the Honorable James A.

Haley, Chairman, Committee of Internal and Insular Affairs, House of Representatives (March 13, 1975 and July 22, 1975). Although Congress did expand the uses of the funds being returned to the state, it did not remove all restrictions on the use of the funds.

The FCLAA allowed an additional twelve and one-half percent (12 1/2) of the royalty payments received by the federal government to be returned to the states to be used solely for:

- (1) Planning;
- (2) Construction and maintenance of public facilities
- (3) Provision of public services.

FCLAA, Pub. L. No. 94-377 9, 90 Stat. 1083, 1089 (1976).

In its section-by-section analysis of the FCLAA, the House Report emphasized this limitation of the allowable uses:

Section 9 amends Section 35 (30 U.S.C. 191) of the Mineral Lands Leading Act by . . . raising the percentage of the revenues going to the States from 37.5% to 50%. The 37.5% of the funds which is currently returned to the States under the law would remain available only for use in construction and maintenance of schools and roads. The additional 12.5% returned to the States would be available for use in the planning, construction and maintenance of public facilities, with priority to be given to those areas impacted by the by the development of the resources involved.

H.R. Rep. 681, 94th Cong., 2d Sess. 25 (1976).

The operative section returning mineral lease monies to the states, 30 U.S.C. 191, was amended one month later by the Land and Water Conservation Fund Act of 1965 (LWCFA), Pub. L. No. 94-422, 90 Stat. 1313, 1323 (1976). The LWCFA made two changes to 191. First, it eliminated the distinction between the use of the 37.5% revenues (to be used in construction and maintenance of schools and roads) and the 12.5% revenues (to be used in planning, construction and maintenance of public facilities and provisions of public services), by allowing the entire 50% of the royalties returned to the state to be used in the same manner. Second, it required that the money only be used for "planning, construction and maintenance of public facilities, and the provisions of public services." In making the change the LWCFA altered the operative language of section 191 to the language used in the congressional report that accomplished the prior FCLAA:

All monies paid to any state from the sales, bonus, royalties and rentals of oil shale from public lands may be used by such state and its subdivision for planning, construction, and maintenance of public facilities, and provision of public services, as the legislature of the state may direct, giving priority to those

subdivisions of the State socially or economically impacted by the development of the resource.

LWCFA, Pub. L. No. 94-422 301, 90 Stat. 1313, 1323 (1976).

The Report accompanying the LWCFA explaining the expanded use of the mineral lease monies, stating:

This amendment would permit each State to use its share of oil shale revenues for planning, construction and maintenance of public facilities and provision of public services.

This Nation has recently embarked on a program of leasing those public lands for the development of our shale resources.

This Nation has recently embarked on a program of leasing those public lands for the development of our shale resources.

If, as seems likely, there is a substantial oil shale boom, State and local governments will have to provide a wide range of community service to large numbers of new residents. Roads and schools are just part of such services.

The need to provide the necessary flexibility to State and local governments to use funds derived from sales, bonuses, royalties, and rentals of public lands for oil shale development is obvious. The local people will bear the impact of helping to meet national energy needs. This provision will help them provide the necessary planning and construction funds to help them.

S. Rep. No. 367, 94th Cong., 2d Sess. 8 (1976).

The Public Lands and Local Government Funds Act (PL & LGFA), P. L. 94-565, 90 Stat. 2662 (1976), affected a number of federal statutes that provide assistance to local governments to alleviate the impact of federal lands and activities, including 30 U.S.C. 191, the Mineral Leasing Act. The Report accompanying the PL & LGFA, Senate Report No. 94-1662, discussed the problems faced by local governments because of the limitations on the use of federal funds generally and mineral lease monies specifically:

[T]oo many of the revenue sharing provisions restrict the use of funds to only a few governmental services -most often the construction and maintenance of roads and schools. Yet, local governments are called upon to provide many other services to the federal lands or as direct or indirect result of activities on the Federal lands. These services include law enforcement; search rescue and emergency; public health; sewage disposal; library; hospital; recreation; and other general local government services. It is only the most fortunate of local governments which is able to juggle its budget to make use of those earmarked

funds in a manner which will accurately correspond to its community's service and facility needs.

S. Rep. No. 1262, 94th Cong., 2d Sess. 9 (1976).

The Report also noted that not enough of the funds given to the states went to the impacted local subdivisions:

In far too many States, the result has been that the funds are either kept at the State level and not distributed to local governments at all or are parceled out in a manner which provides shares to local governments other than those in which the federal lands are situated and where the impact of the revenue and fee generating activities are felt.

Id.

One day after the PL & LFGA was passed, the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579 317, 90 Stat. 2743, 2770-71 (1976) returned the language of 30 U.S.C. 191 to the prior wording and phrasing of FCLAA. In discussing that prior language and its meaning, Senate Report 1262 noted:

In this Congress, the Senate has made numerous efforts to amend these statutory provisions to increase the amount of, and render more useful, the payments to State and local governments. The Federal Coal Leasing Amendments Act of 1975 . . . amended section 35 of the Mineral Lands Leasing Act [30 U.S.C. 191] to increase the States' share of revenues derived under the Act from 37.5 percent to 50 percent. It also authorized the use of the additional 12.5 percent not just for roads and schools but for "(1) planning, (2) construction and maintenance of public utilities [sic], and (3) provision of public services" and required that priority for distribution of that 12.5 percent be afforded the local governments which experience the social and economic impacts of the mineral development from which the revenues are derived.

S. Rep. No. 1262, 94 Cong., 2d Sess. 7 (1976).

The federal legislative history consistently shows the intent and approach of Congress regarding mineral lease monies, notwithstanding some changes in the language. Although Congress expanded the uses of the mineral lease funds by local governmental entities beyond roads and school, it resisted the Interior Department's request to remove all restrictions on the use of the funds. Congress recognized that local communities need the funds to assist them in building governmental infrastructure and providing local governmental services during the boom and bust cycles that accompany natural resources development. By restricting the use of the funds to planning, construction and maintenance of public facilities, and to the provision of public services, Congress provided a source of funding for traditional local governmental services that are impacted, such as law enforcement, public health, and governmental facilities.

Your question centers on whether the Permanent Community Impact Board may make grants and loans for economic development consistent with the state and federal restrictions on the use of the funds. Specifically, it must be determined if a grant or loan for economic development constituent "planning," "construction and maintenance of public facilities" or the "provision of public services." Based on the language of the acts and the purposes for which they were passed, it is our conclusion that grants or loans "merely" for economic development are not authorized under the state and federal acts. However, a grant and loan for the construction and maintenance of a public facility or the provision of public service, which may have economic development as an additional goal or benefit, would be authorized

Economic development, by itself is not one of the traditional local government services that Congress intended to be eligible for funding by mineral monies. Had Congress adopted the interior Department's suggestion of removing all restrictions on the use of the funds so that the funds could be spent on any lawful public purpose, undoubtedly economic development would be an appropriate program to be funded. Congress, however, chose to limit the use of the funds to assist local communities in providing those traditional local government services and facilities that may be impacted by resource development.

This conclusion is consistent with past interpretations of the federal law by the Utah Legislature and the Impact Board. The Impact Board in its rules and regulations and in its grants and loans had avoided projects that only provide economic development as an appropriate grant project. The Board has always required the construction and maintenance of a public facility or the provision of a traditional local governmental service in order to fund a project.

This is not to say that economic development cannot be a goal or purpose of a funded project. Many of the project funded over the years by the Impact Board and the Legislature have had the enhancement of economic development as a main component. The funded project, however, has always been the construction and maintenance of a public facility or the supervision of a traditional local governmental service. For example, the Board funded a golf course to be owned and operated by a local governmental entity. Recreation is a traditional public service provided by local governmental but, as in this case, it may also be designed to further economic development, encourage tourism, and encourage the influx of new business. To retain its character as a public facility, however, the golf course was required to be publicly owned and operated. See Informal Op. Utah Att'y Gen. No. 84-80 (December 3, 1984). If the Impact Board is funding: (1) a project which is a public facility, i.e., one owned and operated by a public entity or to which the public has a right to use that cannot be denied at the pleasure of the owner, *Union Pac. R.R. v. Public Serv. Comm'n* 211 P.2d 851, 895 (Utah 1949); or (2) a project that provides a traditional local governmental service, such as public safety or public health, funding the project would be a lawful use of the mineral lease monies even if economic development were one of the primary anticipated results.

The use of mineral lease monies for "mere" economic development--usually meaning assistance to private businesses and enterprises in their operations--raises Utah Constitutional issues. The Utah Supreme Court has held that article VI, section 29 of the Utah Constitution bars the State from subscribing to stock (or lending its credit) in aid of any private enterprise, regardless of whether or not there are public benefits. Utah Technology Finances Corp. v. Wilkinson, 723 P.2d 406, 413-14 (Utah 1986). In addition, the Court has recognized a constitutional principle that "public funds cannot be expended for private purposes." See id. at 412-13. The Court stated:

[T]he fundamental test of the constitutionality of the statute requiring the use of public funds is whether the statute is designed to promote the public interest, as opposed to the furtherance of the advantage of individuals.

Tribe v. Salt Lake City Corporation, 540 P.2d 499, 504 (Utah 1975).

Further:

While it is improper to send public funds for private purposes, such private benefits incidental to a dominant public purpose do not detract from the constitutionality of the legislation.

Utah Housing Finance Agency v. Smart, 561 P.2d 1052, 1055 (Utah 1977.)

The funding by the Impact Board of economic development projects, without extensive legislative factual determinations of public purposes and need, raises significant constitutional issues that would have to be resolved on a fact intensive basis for each proposed project. Utah Technology Finance Corp. V. Wilkinson, 723 P.2d 406, 412-413 (Utah 1986). Limiting grants and loans to funding the construction and maintenance of public facilities and providing public service avoids such constitutional questions.

If you have additional questions or if we may be of further assistance to you in this matter, please do not hesitate to call.

Sincerely,

RICHARD D. WYSS
Assistant Attorney General

THOM D. ROBERTS
Assistant Attorney General

RDW\TDR\bbs