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Utah Supreme Court

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UTAH SUPREME COURT
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BRIEF
DOCKET NO. 880120

IN THE SUPREME COURT OF THE STATE OF UTAH

PLATEAU MINING COMPANY, a Delaware Corporation, and CYPRUS WESTERN COAL EQUIPMENT COMPANY, a Delaware Corp., Plaintiffs/Respondents, v. THE UTAH DIVISION OF STATE LANDS AND FORESTRY, et al., Defendants/Appellants.	CATEGORY 14 Case No. 880120
CONSOLIDATION COAL COMPANY, THE PITTSBURG & MIDWAY COAL MINING COMPANY, Plaintiffs/Respondents, v. THE UTAH DIVISION OF STATE LANDS AND FORESTRY, et al., Defendants/Appellants.	Case No. 880243
BLACKHAWK COAL COMPANY, Plaintiff/Respondent, v. THE UTAH DIVISION OF STATE LANDS AND FORESTRY, et al., Defendants/Appellants.	Case No. 880215

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TRAIL MOUNTAIN COAL COMPANY, Plaintiff/Respondent, v. THE UTAH DIVISION OF STATE LANDS AND FORESTRY, RALPH MILES, DIRECTOR OF THE DIVISION OF STATE LANDS AND FORESTRY, THE UTAH BOARD OF STATE LANDS AND FORESTRY, THE UTAH DEPARTMENT OF NATURAL RESOURCES, DEE HANSEN, EXECUTIVE DIRECTOR OF THE UTAH DEPARTMENT OF NATURAL RESOURCES, Defendants/Appellants.	:	Case No. 880300

CONSOLIDATED

BRIEF OF PLAINTIFF/RESPONDENT TRAIL MOUNTAIN COAL COMPANY

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT OF EMERY COUNTY, STATE OF UTAH
THE HONORABLE BOYD BUNNELL, JUDGE.

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CONTENTS OF BRIEF

The ten headings and sub-divisions immediately following are derived from Rule 24 (a) of the Rules of the Utah Supreme Court.

List of All Parties to the proceedings below (may be contained in the caption....all briefs)

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Summary of Argument (all briefs)

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Conclusion (Statement of relief sought by party) (all briefs)

Addendum Required if determination of the issues requires study of statutes or rules and if the statute or rule is not set forth verbatim in the brief. Also required if parts of the record are of central importance.

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Amicus/Intervenor	--------50 pages
Reply Brief/Answer	--------25 pages
Writ of Certiorari/Opponent	---20 pages
Petition for Rehearing	--------15 pages

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UTAH SUPREME COURT Case No. 880120

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATEMENT OF JURISDICTION

The Supreme Court of the State of Utah has jurisdiction to hear this Appeal under Utah Code Ann. § 78-2-2(3)(e)(iii) and § 78-2-2(3)(j).

NATURE OF THE PROCEEDINGS BELOW

In 1985, the Division of State Lands and Forestry (the "Division") demanded that Trail Mountain Coal Company ("Trail Mountain") retroactively pay royalties under State Coal Lease No. 22603 (the "Lease") at the rate of 8% of the value of coal sold. The Division also demanded significant interest and penalties for the alleged underpayment of royalties during the period from 1979 through 1985. Trail Mountain filed a Complaint for Declaratory Judgment against the defendants (hereinafter collectively the "State") challenging the State's demand for retroactive payment of royalties. Each party filed a Motion for Summary Judgment based on extensive stipulated facts. The Seventh Judicial District Court of Emery County, Bunnell, J., granted Trail Mountain's Motion for Summary Judgment against the State. The State appeals the Judgment of the District Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The dispositive issues presented for review on this appeal are as follows:[1]

1. Whether the royalty provision in the Lease is ambiguous?

2. Whether the royalty provision regarding payment of an alternate royalty amount is self-executing?

3. Whether the royalty provision should be enforced in accordance with the parties' past interpretation and course of conduct?

4. Whether the District Court properly considered the law regarding school trust lands in entering its Judgment?

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

Utah Enabling Act § 10:

> That the proceeds of lands herein granted for educational purposes, except as

---

[1] Pursuant to Rule 24(b) of the Rules of the Utah Supreme Court, Trail Mountain submits its own Statement of Issues.

In view of the fact that the State has not assigned error to the District Court's decision regarding interest and penalties, Trail Mountain will not address that issue. The District Court held that "the State had no right under the Lease to impose interest, except on delinquent payments at the legal rate, or any penalty. A legally binding lease cannot be altered or added to by by [sic] rules and regulations adopted subsequently." (R. 657-658)

> hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools, and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be surveyed for school purposes only.

Utah Constitution, Article XX, § 1:

> All lands of the State that have been, or may hereafter be granted to the State by Congress, and all lands acquired by gift, grant or devise, from any person or corporation, or that may otherwise be acquired, are hereby accepted, and declared to be the public lands of the State; and shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired.

Utah Code Ann., § 75-7-406:

> With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust power and their proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and a third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the trustee.

STATEMENT OF THE CASE

Trail Mountain and its predecessors mined coal under the Lease during the period from 1979 through 1985. (R. 669,672) The State furnished Trail Mountain a blank printed form entitled Coal Production and Settlement Transmittal on which to report quarterly production information, royalty rate, and certain other information, and upon which to calculate the amount of royalty payable to the State. (R. 675-676) Each Coal Production and Settlement Transmittal submitted during the period, plus each royalty check or check stub, reflected that royalties were calculated and paid by Trail Mountain at the rate of 15¢ per ton. (R. 676) Each Coal Production and Settlement Transmittal submitted by Trail Mountain from 1979 through 1985 was received by the State without objection. (R. 676) Each royalty check submitted by Trail Mountain from 1979 through 1985 was received and cashed by the State without objection. (R. 676)

The Coal Production and Settlement Transmittals received by the State were routinely reviewed by John T. Blake, Mineral Resources Specialist, during the period from 1979 through 1985. (R. 677-678) He made a determination that each payment was correct in light of the production. (R. 678)

In March of 1985, the State undertook an audit of the royalty payments of Trail Mountain. (R. 679) The State concluded that royalties had not been paid in accordance with the terms of the Lease, and that royalties had been underpaid.

(R. 679) The State made this same determination in regard to all other similar State Coal Leases under which royalties had been paid at the rate of 15¢ per ton during this same period. (R. 680)

As part of the audit program, an Audit Committee was formed to review the audits. (R. 680) The members of the Audit Committee had differing views as to whether or not the coal lessees had paid the proper royalty amounts under the various State Coal Leases; and whether or not the State should demand payment of royalties at a higher rate. The Committee, however, approved the audit report. (R. 681)

By letter dated October 15, 1985, the State provided Trail Mountain with a copy of the audit, and made demand for unpaid royalties, interest, and penalties of $5,222,197.20. (R. 681-682) Trail Mountain appealed to the Director of the Division of State Lands and Forestry (the "Director"), disputing the report's conclusions and requesting a redetermination of the matter. The Director denied the appeal. (R. 683-684) Trail Mountain then filed this action seeking declaratory relief against the defendants, and challenging the State's demand for retroactive payment of royalties.

This dispute centers on the royalty provision of the Lease which requires the lessee:

> To pay lessor quarterly, on or before the 15th day of the month succeeding each quarter, royalty
>
> (a) at the rate of 15¢ per ton of 2,000 lbs. of coal produced from the leased premises and sold or otherwise disposed of, or
>
> (b) at the rate prevailing at the beginning of the quarter for which payment is being made, for federal lessees of land of similar character under coal leases issued by the United States at that time,
>
> whichever is higher . . . .(R. 665)

The District Court found that the royalty provision is ambiguous, and that the parties construed the provision over the years as requiring the payment of royalties at the rate of 15¢ per ton. (R. 653-655) That decision was based upon findings that (1) the State accepted royalties at the 15¢ per ton rate; (R. 251, 792) and, (2) that the State by an established course of conduct for many years adopted a construction of the Lease that 15¢ per ton was the proper royalty rate. (R. 655, 793-794) The State claims that during the period in question, the federal prevailing rate was 8% of sales value, and that Trail Mountain was required to pay royalties at that rate. (Appellants' Brief pp. 21, 22)

SUMMARY OF ARGUMENTS

1. The royalty provision in the Lease is ambiguous as a matter of law. Numerous terms and phrases of the royalty

provision are susceptible of two or more meanings. The provision is incomplete, vague, and is missing essential terms. There is no objective standard for application of the alternate royalty provision, and the Lease fails to specify the rights and duties of the parties in relation thereto. The Lease is ambiguous by defendant's own admissions.

2. The Court should look to the past interpretation and course of conduct of the parties in determining how to apply the royalty provision. The parties' course of performance demonstrates that they construed the Lease as requiring payment of royalties at the rate of 15¢ per ton.

3. The State is estopped from retroactively assessing royalty other than at the rate of 15¢ per ton.

4. The State's assertions regarding trust land law and policy are inapposite. The trust received the full value of royalties provided for in the Lease.

ARGUMENT

I. THE ROYALTY PROVISION IN THE LEASE IS AMBIGUOUS.

Terms which are susceptible of various meanings render a contract ambiguous. Russell v. Valentine, 376 P.2d 548 (Utah 1962). See also Jones v. Acme Building Products. Inc., 450 P.2d 743, 746-747 (Utah 1969); Gibbs v. Erbert, 424 P.2d 276 (Kan. 1967); and 7-G Ranching Company v. Stites, 419 P.2d 358, 361 (Ariz. App. 1966).

A. The Term "rate prevailing" is ambiguous because it is susceptible of different meanings.

Does the "rate prevailing" mean an average of royalty rates in various leases, or the rate used in a numerical majority of leases? How many leases should be taken into account when determining the rate prevailing, and which leases should be used to make this determination?

The Lease also fails to specify who should determine the "rate prevailing." Is the State or Trail Mountain responsible for calculating the "rate prevailing"? This omission renders the term ambiguous because it could be interpreted to mean that either or both of the parties was responsible for the calculation.

B. The term "land of similar character" is ambiguous because it is susceptible of different meanings.

The Lease refers to "federal lessees of land of similar character." The phrase is ambiguous for two reasons: (1) it does not set forth the factors to be considered in determining "land of similar character"; and, (2) it does not indicate who is responsible for making that determination.

The Legislative General Counsel has concluded that:

> As used in Article III, SECOND, (c), of the attached lease, the term "land of similar character" is so vague as to defy reasonable definition. Initially the problem becomes one of kind, i.e. similar in what regard--size, productivity, value. Assuming, arguendo, that similarity can be established, the second problem arises when

> it is attempted to establish the magnitude of the lands available for comparison i.e. does the land have to be similar to land in the same county, state, region or is the entire United States available for comparative similarities.
>
> Without further explanation in the lease itself or without knowing the intent of the parties, any definition given herein would be totally inconclusive.

Legislative General Counsel Opinion No. 077-010, April 8, 1977. (R. 666, 398-399) (emphasis added).

Representations by the State demonstrate that it was uncertain as to the meaning of this term. In an October 4, 1976 letter from the Division to John L. Bell in response to Mr. Bell's questions concerning the royalty provision, the Division stated "that the royalty can be changed to the rate payable under Federal leases in the same area". (R. 666, 394) (emphasis added). There is no authority for the Division's assumption that "land of similar character" means land in the "same area."

Approximately one month later, the State admitted that it had not made a formal determination of what "land of similar character" meant. In a letter dated November 18, 1976 from the Division to Mr. Bell, the Division stated that: "The State has never made a formal decision on this because we have not yet been faced with the problem." (R. 666, 396) In the same letter, the Division stated that they "would probably recommend to the Land Board that same area be interpreted to mean a

particular drainage area . . . ." The letter concluded with the caveat, "[h]owever, I should impress that this is only a Staff recommendation . . . ." (R. 666, 396)

Further, since the "rate prevailing" is determined by reference to "land of similar character", the ambiguity is compounded.

C. The phrase "coal leases issued by the United States at that time" is ambiguous because it is susceptible of different meanings.

The Lease states that royalty should be paid "at the rate prevailing, at the beginning of the quarter for which payment is being made for federal lessees of land of similar character under coal leases issued by the United States at that time. . . ." (R. 665, 390) The phrase "coal leases issued by the United States at that time" could be interpreted to mean those leases issued only at the beginning of the quarter, or those issued during the quarter, or any previously issued lease in existence at the beginning of the quarter.

D. The Lease is ambiguous by the State's own admissions.

The Director of the Division, Ralph A. Miles, has admitted that there was not unanimity of opinion among the members of the Division's Audit Committee as to how the royalty provision should be interpreted. (R. 533-534, 681) Further, Mr. Miles has unequivocally admitted that the royalty

provision was ambiguous, and required some interpretation. (R. 534) Mr. Miles was the head of the State agency which administered these leases during most of the relevant period.

Donald G. Prince, Assistant Director of the Division, has stated that he was of the opinion that the 15¢ per ton royalty was the proper royalty as of February 17, 1981, the date the Lease was assigned to Trail Mountain. (R. 544) Mr. Prince also interpreted the Lease to give the Board of State Lands the ability to change the royalty rate but only prospectively, and not retroactively. (R. 546) Both of these interpretations are directly contrary to the State's present interpretation.

John T. Blake, a Mineral Resources Specialist with the Division, had responsibility for administering the Trail Mountain Lease. (R. 251, 547-548) Mr. Blake believes that the 15¢ per ton royalty was the proper amount during the period in question. (R. 550) He also acknowledges that he has a different interpretation of the Lease than the Division now supports. (R. 550) In fact, Mr. Blake has stated that the royalty provision is ambiguous. (R. 551)

E. The Lease is ambiguous because it is incomplete, vague, missing terms and facially deficient.

A contract is ambiguous if it is vague and uncertain. Winegar v. Smith Investment Co., 590 P.2d 348 (Utah 1979). The Lease is vague, uncertain and incomplete because it does not

define critical terms, and fails to provide a mechanism for applying the alternate royalty provision. The Lease fails to provide any objective standard with respect to: (1) which of the two royalty provisions is applicable; (2) what triggers the change from one provision to another; (3) when the change from one provision to another should be made; (4) which party is responsible for determining when a change should be made; (5) which party is responsible for determining the "rate prevailing"; (6) how the "rate prevailing" should be calculated; (7) what "land of similar character" means; and, (8) whether a change would be automatic or whether notice is required.

Thus, the royalty provision of the Lease does not provide a clear understanding as to each party's rights and duties under the contract.

F. The parties' disagreement itself creates an ambiguity.

The disagreement of the parties concerning the interpretation of a contract demonstrates that the contract is ambiguous. Jones v. Acme Building Products, Inc., 450 P.2d 743, (Utah 1969). In Acme the Court stated:

> Ordinarily the intention of the parties to a written contract must be determined by an examination of the writing, but if a phrase or a part of a written agreement is ambiguous and the intention of the parties cannot be determined from the writing itself, parol evidence is admissible to show

> the intention of the contracting parties . . . . The disagreement of the parties interested clearly shows that the contract involved is ambiguous and without extrinsic evidence the true intention of the parties cannot be determined.

Id. at 747 n.4, (quoting Milford State Bank v. West Field Canal and Irrigation Co., 162 P.2d 101, 103 (Utah 1945)) (emphasis added).

The question of ambiguity may also be affected by the conduct of the parties in interpreting the Lease. This Court has stated that:

> [E]ven if it be assumed that the words standing alone might mean one thing to the members of this court, where the parties have demonstrated by their actions and performance that to them the contract meant something quite different, the meaning and intent of the parties should be enforced. In such a situation the parties by their actions have created the 'ambiguity' required to bring the rule into operation.

Bullough v. Sims, 400 P.2d 20, 23 (Utah 1965) (quoting Crestview Cemetery Association v. Dieden, 356 P.2d 171, 178 (Cal. 1960)) (emphasis added).

G. The arguments of the State are inapposite.

The State cites Ferris v. Jennings, 595 P.2d 857 (Utah 1979), for the proposition that the royalty provision is not defective since there is a "formula or method to set the

price." (Appellants' Brief, p. 20) The Ferris case involved a dispute over the amount of commission due the defendant on the purchase of a home. Under an oral agreement, the defendant was to receive a "fair commission". The defendant had frequently asked the plaintiff what he considered to be a "fair commission", but the plaintiff failed or refused to say. The plaintiff's refusal or failure to cooperate with the defendant was key to the court's decision.

By contrast, the royalty provision defects in the instant case are found in the provision itself. Also, due to the ambiguous nature of the royalty provision, the "formula or method" of calculating the royalty cannot even be determined. The District Court found that the formula is "not immediately capable of definitive determination." (R.654) Moreover, Trail Mountain did not refuse or fail to cooperate with any request of the State to establish a reasonable interpretation of the royalty provision.

Even assuming arguendo that the royalty provision is not defective due to its ambiguity, the State has not established that the proper rate under the alternate royalty provision is 8%. The State contends that the royalty provision "formula" indicates an 8% royalty rate because the Federal Coal Leasing Amendments Act of 1976 ("FCLAA"), 30 U.S.C. § 201 et seq., increased the federal royalty rate to 8% of the value of coal produced on federal leases. (Appellants' Brief, p. 21) Although the Secretary of the Interior, pursuant to the FCLAA,

set the royalty rate for mining underground coal at 8%, the regulations also provide for the reduction of royalty to 5% or lower under various circumstances. See 43 C.F.R. § 3473.3-2 (1986). As was noted in Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), those regulations do not "automatically fix" the royalty for all underground coal leases at 8%.

II. THE AMBIGUOUS ROYALTY PROVISION SHOULD BE CONSTRUED IN ACCORDANCE WITH THE PARTIES PRACTICAL CONSTRUCTION AS REQUIRING THE PAYMENT OF 15¢ PER TON ROYALTY.

Where the terms of a contract are ambiguous, it is well established that courts may look to the interpretation of the parties, as evidenced by their course of conduct, to construe the contract. 17 Am. Jur. 2d, Contracts § 274; Restatement (Second) of Contracts § 202 (1979).

A. Ambiguities in the Lease should be construed against the State.

It is also a well established rule that if there is an ambiguity in the language of a contract, the court will construe the language against the drafter. Wells Fargo Bank, N.A. v. Midwest Realty and Finance. Inc., 544 P.2d 882 (Utah 1975). The royalty provision of the Lease was written by the State for its benefit. A dispute or ambiguity concerning the Lease language should be resolved in favor of Trail Mountain and against the drafter, the State.

B. The alternate royalty provision is not self-executing.

The Lease does not specify who has the duty of determining which royalty rate is applicable. Correspondence between the State and Trail Mountain from 1976 through 1985 indicates that the parties interpreted the Lease as requiring a 15¢ per ton royalty until some affirmative action was taken by the State to change the royalty. In other words, the parties agreed that the change in royalty rates was not self-executing. See pp. 27 to 32 for a discussion of relevant correspondence.

There is similar correspondence in the State's files for other producing state coal leases indicating that the royalty rate would remain at 15¢ per ton until the parties agreed to a higher prevailing federal rate, or until the Division made a determination as to the prevailing federal rate.

Donald G. Prince, Assistant Director of the Division, is of the opinion that affirmative action by the State was necessary before the 15¢ per ton rate would change. (R. 295, 545)

The royalty provision could not possibly be self-executing when its meaning is not clear on its face. The District Court properly held that "sub-paragraph (b) is not self-executing as to create a legal obligation on the lessee since the identifiable factors necessary for self-execution could not independently be ascertained by either party." (R. 655)

In order to be self-executing, the prevailing federal rate would have to be an identifiable figure which could be independently ascertained by either party. Thus, the royalty could only be changed upon agreement of the parties, or upon notice and actual determination by the Division, or through appropriate policy making or rulemaking procedures.

This position is consistent with the holding of two Utah cases dealing with real estate contracts. Grow v. Marwick Development Company Inc., 621 P.2d 1249 (Utah 1980); Hansen v. Christensen, 545 P.2d 1152, 1154 (Utah 1976).

The State contends that the alternate royalty provision is self-executing, and that Trail Mountain was obliged to determine the prevailing federal rate. (Appellant's Brief, p. 21) This is an extremely heavy burden to place on the coal lessee, who may or may not be familiar with the matters involved, or have access to the necessary information.

Given the fiduciary obligation of the State as trustee of its lands, the responsibility to determine the proper royalty more appropriately falls upon the State. Officials of the Division who were responsible for administering coal leases were in a much better position to determine these matters. Even these officials, however, have admitted that the royalty provision was ambiguous and uncertain of application.

C. The State did not take sufficient or positive action to establish the construction of the ambiguous Lease provision which it now asserts.

During the nine-year period from 1976 through 1985, the State continually represented that the 15¢ royalty was appropriate and acceptable.[2] (R. 417,464, 529-531, 554, 672, 697) See discussion pp. 27-32. During the period from 1979 through 1985, the State accepted royalty payments at the 15¢ rate without objection. (R. 676) Never once did the State indicate that a higher royalty was owing. In fact, the State made affirmative representations that the higher royalty would only take effect after readjustment of the Lease in 1986. (R. 464)

A somewhat analogous situation was presented to the Tenth Circuit Court of Appeals in the case of Rosebud Coal Sales Company v. Andrus, 667 F.2d 949 (1982). In Rosebud, the United States Department of Interior attempted to readjust a federal coal lease approximately two and one-half years after its readjustment date. The court held that this action was not authorized, and that readjustment had to be done in a timely manner, stating in part:

---

[2] Not only did the State for many years construe the royalty provision differently than it now asserts, not one of the other five producing lessees with similar royalty provisions construed the provision according to the construction which the State now asserts. (R. 153, 156, 372-73, 502-03, Plateau Mining Company, et al. v. The Utah Division of State Lands, et al.

> If no action is taken by the Government for an extended time it is reasonable to assume that a decision was made not to take advantage of the opportunity * * * . Thus a continuation of the old royalty rate and other lease provisions can be considered a choice then made by the administrators. When such a choice was made we find no provision in the Act nor in the regulations permitting the Department to reverse the position it took originally at the prescribed time.

Id. at 952 (emphasis added.)

This same reasoning applies to the State's attempt to retroactively assess Trail Mountain for additional royalties. Assuming arguendo that under the Lease, the State had the right to assert a higher royalty rate, it chose not to. Perhaps it elected not to do so because of the ambiguities in the Lease, or perhaps because a determination was made that an increase was not economically or otherwise justifiable. The exact reason is not relevant. As in Rosebud "it is reasonable to assume that a decision was made not to take advantage of the opportunity * * *. Thus, a continuation of the old royalty rate and other lease provisions can be considered a choice then made by the administrators." Id. at 952.

In fact, the Assistant Director of the Division, Donald Prince, has stated that this is exactly what happened. (R. 400, 540)

D. The Lease should be construed in accordance with the parties' past interpretation and course of conduct.

Where the terms of a contract are ambiguous, courts may look to the interpretation of the parties, as evidenced by

their course of conduct, to construe the contract. 17 Am. Jur. 2d, Contracts § 274 (1964). Restatement (Second) of Contracts § 202 (1979).

"There is no surer way to find out what parties meant, than to see what they have done. . . . Parties in such cases often claim more, but rarely less, than they are entitled to." Insurance Co. v. Dutcher, 95 U.S. 269, 273 (1877).

This rule of practical construction is applicable to the royalty provisions of mining leases:

> Where the terms of the lease are somewhat ambiguous as to the royalties, if the lessee pays royalties for some years on a certain construction of the terms, it will be regarded as the true construction, as against him; and, if the lessor accepts payment for some years on a particular construction of the lease, he cannot afterward claim royalties on a different construction or theory . . .

58 C.J.S., Mines and Minerals § 186 (1948) (citing to numerous cases) (emphasis added).

Practical construction is given even greater weight when the parties' course of conduct occurred before any controversy arose. Fanderlik-Locke Co. v. United States, 285 F.2d 939, 947 (10th Cir. 1960), cert. denied, 365 U.S. 860 (1961).

This Court has applied the doctrine of practical construction in a number of cases. Zeese v. Estate of Siegel, 534 P.2d 85 (Utah 1975); Hardinge Co., Inc. v. Eimco Corp.,

266 P.2d 494 (Utah 1954); Minersville Reservoir & Irrigation Co. v. Rocky Ford Irr. Co., 61 P.2d 605 (Utah 1936); Roberts v. Tuttle, 105 P. 916 (Utah 1909); Woodward v. Edmunds, 57 P. 848 (Utah 1899).

The contract language need not be ambiguous on its face before the doctrine of practical construction can be applied. Where a contract is clear on its face, but the parties by their course of conduct have indicated that the contract has meant something different to them, the contract is to be interpreted according to the construction adopted by the parties. Bullfrog Marina, Inc. v. Lentz, 501 P.2d 266 (Utah 1972); EIE v. St. Benedict's Hospital, 638 P.2d 1190 (Utah 1981).

The State erroneously asserts that the District Court "rewrote" or "deleted" part (b) of the royalty provision in the Lease. (Appellants' Brief, p. 23) The District Court did not rewrite or delete the ambiguous royalty provision. The District Court simply and properly interpreted the provision pursuant to an acknowledged rule of construction that courts look to the course of conduct of the parties in construing ambiguous contracts.

Case authority involving mineral royalty provisions overwhelmingly supports the Judgment of the District Court. For example, where the parties to a mining lease had previously interpreted the lease consistent with the interpretation being advanced by the lessor, the court adopted the lessor's

interpretation of the lease. Allen v. Ruby Company, 389 P.2d 581 (Idaho 1964).

In Ackerman v. Sterling Paving Company, 497 P.2d 699 (Colo. App. 1972), the court held that where lessors acquiesced in the lessee's construction of an ambiguous mineral lease for at least three years, the lessors were bound by such interpretation. The court reasoned:

> The evidence clearly supports the trial court's finding:
>
> > "That the parties by their conduct before the dispute arose, have interpreted the Lease in accordance with [Sterling's] construction of its meaning and that the plaintiffs for over three years, . . . have adopted defendant's construction of the Lease and acquiesced in such construction . . . ; that plaintiffs . . . took no sufficient or positive action to establish their now asserted construction of the Lease."
> >
> > . . .
> >
> > "We conclude that the conduct of the parties before the controversy arose, acting under the contract, is a reliable test of their interpretation of the instrument, and whatever the stress of subsequent disagreement neither in his own interest may be heard to urge a different construction."

Id. at 700-701.

The same result was also reached in Wiggins v. Engelhard Minerals and Chemicals Corporation, 328 F. Supp. 33 (M.D. Ga. 1970).

In an action by the lessor against the lessee to recover additional royalties allegedly due under a gas lease, the practical construction of the parties was adopted by the Court in Lafitte Co. v. United Fuel Gas Company, 177 F. Supp. 52 (E.D. Ky. 1959), aff'd, 284 F.2d 845 (6th Cir. 1960). The court reasoned:

> The applicable rule is best expressed by a quotation in the opinion in the case of Air King Products Company v. Hazeltine Research, D.C., 94 F. Supp. 85, 92:
>
> > 'In Carthage Tissue Paper Mills v. Village of Carthage . . . it is said: 'Practical construction by uniform and unquestioned acts from the outset, especially when continued for a long period of time, is entitled to great, if not controlling, weight, for it shows how the parties who made the contract understood it. If they do not know what they meant, who can know? Such a construction is presumed to be right, because it was made by the parties themselves when under the influence of conflicting interest. This is true whether the construction is by contemporaries or their successors . . .'

Id. at 59-60 (emphasis added).

In Hall v. Landrum, 470 S.W.2d 830 (Ky. App. 1971), a coal lease provided for royalties of 10¢ per ton, with an annual minimum royalty of $1,200. The lessee suspended payment of the minimum royalty, but continued to pay the 10¢ per ton royalty for coal actually mined. The lessor demanded retroactive payment of the minimum annual royalty. Examining

the course of conduct of the parties, the court noted that the lessor had made no complaint that the minimum royalty had not been paid, and had accepted royalty payments on coal mined at 10¢ per ton. The court ruled that the lessee did not have to retroactively pay the minimum royalty.

In Keefer Coal Co. v. United Electric Coal Cos., 10 N.E.2d 210 (Ill. App. 1937), a dispute arose between the parties as to the meaning of a coal royalty provision. The court found the royalty provision to be ambiguous and looked to extrinsic evidence, including the parties' course of conduct, to determine their intent. The court noted that the ambiguous provision was placed in the lease at the instance of the lessor for its benefit, and was drafted by the lessor's attorney. The court noted that the contract should therefore be construed more strongly against the lessor. The court also found that the lessor had represented to the lessee that the lease was to be construed as the lessee advocated.

Similarly, in Prudence Coal Company v. Perkins, 217 F. 569 (4th Cir. 1914), the court found that where a lessee of coal lands paid royalties for ten years under a certain construction of a lease which the court found to be somewhat ambiguous, such construction would be taken as the true construction of the lease.

Likewise, in City of Philadelphia v. Lehigh Valley Coal Co., 138 A. 94 (Pa. 1927), the Supreme Court of Pennsylvania held that a lessee who had acquiesced to a certain

construction of the royalty provision of a coal lease for nine years was bound by the construction adopted by the parties.

> From the time the lease went into effect until the time when the present dispute arose, covering a period of between 9 and 10 years, . . . defendant continuously, month after month, paid in accordance with plaintiff's contention . . . without any dispute as to plaintiff's alleged right. So far as this record shows, neither orally nor by writing did defendant, between June 21, 1916, and the time when the present controversy arose, ever challenge the accuracy of plaintiff's calculations, made in accordance with the agreement set forth in the letter of that date, nor, indeed, did defendant ever assert that this agreement was anything less than an amendment or interpretation of the lease itself. For these reasons, the uniform construction by the parties must prevail, and defendant cannot now effectively set up its attempted defense.

Id. at 96 (emphasis added).

In McKeever v. Westmoreland Coal Co., 68 A. 670 (Pa. 1908), the royalty provision of the coal lease was susceptible of two different constructions. The court reasoned as follows:

> The agreement was not carefully drawn so as to fix with absolute certainty the exact meaning of the parties on the question of the payment of the royalties. It is susceptible of two different meanings; and, if the case stood on the agreement alone, we would have some hesitation in reaching a conclusion. Whatever doubt has arisen in our minds in the consideration of the question involved is resolved in favor of the appellee, because of the acts of the original lessor, who for a long period of years accepted payment of the royalties from

> the lessees on the basis of $300 per acre, as determined by actual survey and receipted in full for all royalties to the date when paid. . . .
>
> The conclusion is irresistible that the original lessor interpreted his own contract to mean a sale or leasing, of his coal at an amount equivalent to $300 per acre, and for a long period of years accepted payment in full on this basis. We think the parties have construed their own contract, and courts will not disturb the rights and liabilities arising under the same when these things have been definitely determined by the contracting parties themselves.

Id. (emphasis added). See also, Lehigh Valley R. Co. v. Searle and Stark Heirs. 94 A. 74 (Pa. 1915).

In accord is Bethlehem Steel Corp. v. Shonk Land Co., 228 S.E.2d 139 (W.Va. 1982), in which the lessor, after ten years of accepting royalty payments under the lessee's interpretation of the coal lease, brought an action to recover alleged deficiencies, arguing that the lessee had incorrectly interpreted the lease. The court upheld the lessee's construction. Id. at 146.

In Champlin Petroleum Co. v. Ingram, 560 F.2d 994, 988 (10th Cir. 1977), cert. denied, 436 U.S. 958 (1978), the parties' construction of an oil and gas lease royalty provision for 30 years was upheld where both parties had knowledge of the construction.

A party who received royalty payments under an oil and gas lease for almost eight years was held bound to the parties' course of conduct in interpreting the royalty provision, in

Kretni Development Co. v. Consolidated Oil Corp., 74 F.2d 497 (10th Cir. 1934), cert. denied, 295 U.S. 750 (1935). See also Lackey v. Ohio Oil Co., 138 F.2d 449 (10th Cir. 1943), and London Extension Mining Co. v. Ellis, 134 F.2d 405 (10th Cir. 1943)

E. The parties have consistently interpreted the royalty provision as only requiring the payment of a 15¢ per ton royalty.

Beginning in October, 1976, and continuing until October, 1985, the Division has repeatedly taken the position that the proper royalty under the Lease was 15¢ per ton, and that the royalty would remain 15¢ per ton until the Lease was readjusted. This is demonstrated by the following documents.

(1) Letter of October 4, 1976, from C. J. Brinton, Economic Geographer for the Division, to John L. Bell. (R. 394-395) Mr. Brinton states that the 15¢ rate "will be the rate until one of two situations which could alter this rate occur." First, the royalty can be changed "at such time as the Federal lease in question begins production." Second, the royalty can change upon readjustment "at the end of each 20 year period of the lease term." (R. 395) The royalty rate of 15¢ per ton was not changed when any Federal lease began production. Thus, the 15¢ royalty rate was to remain in effect until readjustment of the lease terms.

(2) Letter dated September 4, 1980 from John T. Blake, Mineral Resources Specialist for the Division, to

Mr. Myron F. Fetterolf. (R. 406) This letter advised Mr. Fetterolf that the Trail Mountain Mine was in violation of the terms of the Lease due to certain activities at the mine. If there was a violation of the Lease due to underpayment of royalties, presumably this would also have been asserted by the Division. The absence of such an assertion clearly indicates that the 15¢ per ton royalty rate was acceptable to the Division as of 1980.

(3) Letter dated January 29, 1981, from John T. Blake, Mineral Resources Specialist for the Division, to the Fetterolf Group (Trail Mountain's predecessor). (R. 412) This letter increases the minimum annual royalty under the Lease to $1.50 per acre. There is no mention of a possible increase in the 15¢ per ton production royalty, despite the fact that there had been production under the Lease for 1-1/2 years. If the Division believed that the production royalty was tied to the federal 8% royalty, (which had then been in effect for 5 years), this was an appropriate time to raise the issue. Since the Division declined to do so, there is a strong presumption that the 15¢ per ton royalty was acceptable to the Division.

(4) Approval of Lease Assignment dated February 17, 1981. (R. 670, 411) The Division approved the assignment of the Lease to Trail Mountain without any notice of a deficiency in royalty payments.

(5) Letter dated May 8, 1981, from John T. Blake, Mineral Resources Specialist for the Division, to Natomas Energy Company (Trail Mountain's Predecessor). (R. 671, 414) Mr. Blake states: "Thank you for submitting royalty payments for the first quarter for the Trail Mountain Mine. The State Land Board does have a form to be used in reporting production and royalty which we ask that you use in the future." At this time, royalties had been paid at the rate of 15¢ per ton for the preceding two years. This letter clearly indicates that the 15¢ rate was still acceptable to the Division, and was appropriate under the Lease.

(6) Telephone conversation in September, 1983 between John T. Blake, Mineral Resources Specialist for the Division, and Bruce K. Anderson, Accounting Manager For Trail Mountain. (R. 672, 417) In this conversation Mr. Blake represented that the royalty under the Lease was 15¢ per ton. This was in response to Mr. Anderson's attempt to confirm the royalty rate since he was then taking over responsibility for making royalty payments to the Division. (R. 553)

(7) Letter dated May 9, 1984 from John T. Blake, Mineral Resources Specialist for the Division to Trail Mountain Coal Company. (R. 673, 462) By this letter, the Division sent a new royalty reporting form to Trail Mountain. Certainly, if there was any deficiency in royalties, the Division would have also notified Trail Mountain at this time.

(8) Several telephone conversations between 1983 and 1985 between Ervine Allen, Jr., Senior Land Management Administrator for Trail Mountain, and (1) John T. Blake, Mineral Resources Specialist with the Division, and (2) Ralph A. Miles, Director of the Division. In each case, these officials confirmed that the correct royalty rate was being paid. (R. 303-304, 526-531)

(9) Interoffice Correspondence dated July 16, 1984, from E. Allen, Jr. to R. E. Garbesi, B. B. Mullins, and J. W. Damato of Diamond Shamrock Coal Company. (R. 465) This internal memorandum notes that the State of Utah had advised the Company that the terms of the Lease would be readjusted, and "The production royalty rate, currently 15¢ per ton, will be increased to 8% of the fair market value." At this point in time, based on communications from the State, the Company was still under the impression that the proper royalty rate was 15¢ per ton.

(10) Letter dated August 24, 1984, from John T. Blake, Mineral Resources Specialist for the Division, to Trail Mountain Coal Company. (R. 697, 464) Mr. Blake states in part that "The intended twenty year readjustment will likely raise * * * production royalty to 8% of gross value." (R. 464) This clearly indicates that (1) production royalty had not then been raised to 8% of gross value, and (2) the State did not expect Trail Mountain to pay royalties at the 8% rate. This occurred 8 years after the royalty rate on new federal leases had been raised to 8% of value.

(11) Notes of a conversation on March 7, 1985, between John T. Blake of the Division and Joe Fielder, General Manager of Trail Mountain, concerning the twenty-year readjustment. (R. 697, 554) These notes indicate that Mr. Blake told Mr. Fielder that the 8% royalty would come into effect on January 1, 1986, the effective date of the readjustment. This confirmed both parties' understanding that the royalty rate had not previously increased to the federal 8% rate; but that it remained at 15¢ per ton until the readjustment was effective. See (R. 560) Raising the royalty at the 20 year readjustment period is similar to the procedure followed with federal coal leases. Under federal law, the terms of each federal coal lease may be revised or "readjusted" periodically at the discretion of the federal government. Generally this occurs 20 years after the lease is issued, and each 10 years thereafter. (R. 686)

(12) Twenty two Production and Settlement Transmittal Forms sent by Trail Mountain and its predecessors to the Division during the period from 1979 through 1985, showing that royalties were computed at the rate of 15¢ per ton. (R. 698, 418-461) Note that each of these forms contained two columns for computations of royalties. One column was based on a cents per ton rate, while the other column was based upon a percentage rate. In every case, on all 22 forms, the royalty was computed using the cents per ton column at the rate of 15¢ per ton. In every case the percentage column was left blank.

The Division has stipulated to the fact that these forms were routinely reviewed as they were received to assure that they were accurate. (R. 677) The Division's acceptance of the forms without questioning the royalty calculation, was a clear indication that the 15¢ per ton rate had been agreed upon as the proper rate.

(13) Twenty two royalty payment checks received and cashed by the Division during the period from 1979 through 1985. (R. 676, 418-461) In each case the Division sent a receipt to Trail Mountain or its predecessors. In no case did the Division indicate that there was any question regarding the amount of each check. This clearly indicates that the Division had agreed to accept 15¢ per ton as the royalty on coal produced from the Lease.

The foregoing discussion of the parties' practical construction of the royalty provision of the Lease upholds the District Court's Judgment, and is dispositive of the State's Appeal.

III. THE STATE IS ESTOPPED FROM RETROACTIVELY ASSESSING ROYALTY OTHER THAN AT 15¢ PER TON.

Trail Mountain does not believe it is necessary for the Court to determine the estoppel issue. If, however, the Court finds that the parties' practical construction is not dispositive of the State's Appeal, then Trail Mountain alleges that the State should be estopped from now asserting a

different interpretation of the Lease and from retroactively assessing royalty at a rate other than 15¢ per ton.

In the interest of judicial economy and pursuant to Rule 24(i) of the Rules of the Utah Supreme Court, Trail Mountain adopts by reference pp. 27-53 of the Brief of Respondent Plateau Mining Company, regarding the issue of estoppel. Trail Mountain, however, wishes to briefly supplement the adopted argument with the following points.

Contrary to the contention of the State, the officers of the Division who dealt with Trail Mountain acted within the scope of their authority. In fact, these individuals were specifically designated by the Division to deal with the matters involved. At no time did any of the state officials deny that they had the authority to accept royalties at the 15¢ per ton rate. At no time did the state officials indicate that the matter had to be decided by higher authority. Clearly, if these officials did not have actual authority to make the representations they did, they at least had apparent authority to do so.

The State, after supporting the authority of its officers to make decisions on royalties payable over a ten year period, should now be estopped from denying its officer's authority merely because it is in the State's present interest to do so. See City of Haileyville v. Smallwood, 441 P.2d 389 (Okla. 1968); Johnson v. Angle, 341 F. Supp. 1043 (D. Neb. 1971).

Even assuming arguendo that the representations of the Division's officers were unauthorized, the State should still be estopped in order to prevent manifest injustice. Celebrity Club, Inc. v. Utah Liquor Control, 602 P.2d 689 (Utah 1979); Utah State University v. Sutro & Co., 646 P.2d 715 (Utah 1982) (citing United States v. Lazy FC Ranch, 481 F 2d 985 (9th Cir. 1973) and United States v. Wharton, 514 F.2d 406 (9th Cir. 1975)).

Moreover, courts are disposed to apply the doctrine of estoppel against a state where the acts or representations are merely ultra vires, as opposed to acts or representations which are prohibited by statute or are malum in se. Utah State University v. Sutro & Co., 646 P.2d 715, 719 (Utah 1982).

IV. THE DISTRICT COURT PROPERLY CONSIDERED THE LAW REGARDING SCHOOL TRUST LANDS IN ENTERING ITS JUDGMENT.

In essence, the State asserts (1) that it had a constitutional and moral duty to obtain "full value" from the disposition of school trust lands; (2) that the District Court "placed impermissible restrictions" on the trust lands; and (3) that this Court now has the duty to provide the State with full value by enforcing the alternate royalty provision. (Appellants' Brief p. 10)

A. The status of the State as trustee does not alter the law of contracts.

The State carries the trust argument too far. The District Court did not restrict the use of the school trust

fund in any way; nor did the Court place any restriction on the State in contravention of the State Constitution or statutes. All the Court did was construe a contract. The fact that the State was one of the parties to the contract, does not alter the law of contracts. The fact that the State was acting as a trustee for the benefit of the school fund, does not alter the law of contracts.

The cases from other jurisdictions cited by the State are inapposite. Some of these cases held that the State, as trustee, violated its own laws or Constitution (which are different from Utah's laws and Constitution). Lassen v. Arizona, 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967) held that Arizona must compensate the trust for the full value of trust lands it condemned. Utah's Enabling Act and Constitution do not contain the language relied upon by the Arizona court. Kadish v. Arizona State Land Department, 747 P.2d 1183, 1195 (Ariz. 1987), held that a disposal of school trust lands for less than their appraised value was a violation of dispositional restrictions of the Enabling Act. Utah's Enabling Act and Constitution impose no such restrictions. Oklahoma Education Association v. Nigh, 642 P.2d 230 (Okla. 1981), held that school trust assets may not be used to subsidize farming and ranching operations, and that low-interest loans of trust funds to farmers or low-rental leases of trust lands to farmers were unconstitutional.

Other cases cited by the State held that the State breached its fiduciary duty, which is not alleged in this case. County of Skamania v. Washington, 685 P.2d 576 (Wash. 1984) held that a trustee breached its fiduciary duty by disposing of a trust asset without obtaining "the best possible price" for the asset. The trustee could not use trust assets to pursue other state goals. State v University of Alaska, 624 P.2d 807 (Alaska 1981), held that inclusion of university lands in a state park without compensation was a breach of trust, and the university was entitled to compensation.

Other cases cited by the State merely held that the State was not bound by clerical errors. State v. Lamacus, 263 P.2d 426 (Okla. 1953), affirmed the holding in State v. Phillips Petroleum Company that a clerical error in a certificate of purchase did not allow the purchaser to receive a mineral interest.

Three cases cited by the State are simply irrelevant. State of Utah v. Kleppe, 586 F.2d 756, 758 (10th Cir. 1978), only held that the State of Utah was entitled to select "in lieu" lands for school land grants that were denied Utah because of "federal pre-emption, private entry prior to survey, or before title could pass to the state", without regard to whether the lands were equal in value or met other administrative criteria. Alamo Land and Cattle Company v. Arizona, 424 U.S. 295, 96 S. Ct. 910, 47 L. Ed. 2d 1 (1976), held only that a lessee of school trust lands must be

compensated when the federal government condemns the land. Department of State Lands v. Pettibone, 702 P.2d 948 (Mont. 1985) held that absent adequate consideration, the state had no power to grant lessees of trust lands permission to develop appurtenant water rights. None of these cases goes as far as the State attempts to go in this case.

The State asserts that the District Court "amended" the Lease, and then "created" a new contract. Since the new contract supposedly limits royalties to 15¢ per ton, and supposedly deletes the alternate royalty provision, the contract "created by the trial court" supposedly violates the requirement that the State receive full value for its lands, and is therefore "void." (Appellant's brief at p. 18-19). This is creative, but it does not stand up to scrutiny.

The District Court recognized in its Memorandum Decision that the alternate royalty provision was still part of the Lease. The Court did not amend the Lease or create a new Lease. It simply applied principles of contract law to the provision; found it to be ambiguous as a matter of law; and applied a legal principle of contract construction. (R. 654-655) Other principles of law may or may not have also been applicable, but the court held, as a matter of law based upon extensive stipulated facts, that the parties construed the ambiguous provision in a particular way.

B. The status of the State as trustee does not alter the State's interpretation of the royalty provision over a course of years.

Any loss of trust revenues to the State was not caused by the District Court but by the State's original failure to draft a usable royalty provision, and the State's own interpretation of its royalty language over a course of years.

The major problem with the State's position is the assertion that the Utah courts now have the obligation to enforce the alternate royalty provision, even in the face of the State's own failure to do so. In other words, since the State's officers interpreted and enforced the royalty provision over a ten year period in a manner which the State now wishes to repudiate, the State attempts to shift the burden of enforcement to the courts by arguing that there is a constitutional duty to do so.

The State's duties with respect to school trust lands stem from the Utah Enabling Act and the Utah Constitution.

Section 10 of the Utah Enabling Act provides:

> That the proceeds of lands herein granted for educational purposes . . . shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools . . .

Thus, the Enabling Act simply requires the use of proceeds from school trust lands to support the schools.

The Utah Constitution, Art. XX, § 1, provides:

> All lands of the State that have been or may hereafter be granted to the State by Congress . . . are hereby accepted, and declared to be public lands of the State; and shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired.

Thus, the Utah Constitution simply imposes an obligation to hold the lands "in trust for the people."

This case is not one in which the proceeds of school trust lands are alleged to have been used for purposes other than support of the schools; nor is it a case in which the trust status of the lands is being questioned. Therefore, the above provisions are not dispositive of any issue in this case.

Further, the State did receive full value when it imposed the alternate royalty provision as part of the Lease terms. The Lease was entered into at arm's length, presumably after negotiation of acceptable value for each party. The fact that the language used by the State was less than artful, and that the parties construed it over the years in a particular manner, does not mean that less than full value was received by the State.

Thus, there is nothing "unconstitutional" about the royalty provision or the manner in which it was construed by the parties or the District Court.

C. As trustee, the State is required to administer the trust estate under the rules of law applicable to trustees in general.

The State is required to administer school trust lands subject to the law and rules applicable to the handling of trust estates. State Board of Educational Lands and Funds v. Jarchow, 362 N.W.2d 19 (Neb. 1985).

When managing and administering school trust lands, the state must comport with the same fiduciary obligations as are applied to a private trustee. County of Skamania v. State, 685 P.2d 576 (Wash. 1984).

The State has "considerable discretionary power when dealing with the disposition of an interest in land they hold in trust for the people . . . ." State v. Babcock, 409 P.2d 808, 811 (Mont. 1966). The State must necessarily have that discretionary power because not every facet of the State's administration of the trust can be set out in the statutes or constitution. Id. See also United States v. Fenton, 27 F. Supp. 816 (D.C. Id. 1939).

Courts "may interfere with the trustees' administration of a trust only when it finds an abuse of the trustees' discretion or a violation of law." In re Estate of Bishop, 499 P.2d 670, 673 (Haw. 1972); see also Miller v. First Hawaiian Bank, 604 P.2d 39 (Haw. 1979); In re Trust Estate of Wills, 448 P.2d 435 (Ariz. App. 1968); Humane Society of Carson City v. First Nat'l Bank, 553 P.2d 963 (Nev. 1976).

"The reasonable assumption is that discretion vested in a trustee should be exercised honestly, fairly and reasonably to accomplish the stated purpose of the trust, and not in an arbitrary and negative manner to defeat it." In re Estate of Wallich, 420 P.2d 40, 43 (Utah 1966).

The State raises no inference that it has acted in anything other than good faith in fulfilling its obligations as trustee of the school lands. Trail Mountain has not alleged or implied anything to the contrary. In the absence of allegations of abuse of discretion, the presumption must be that the State fulfilled its obligation as trustee when it received and accepted royalty of 15¢ per ton.

Even assuming arguendo that the State exceeded its authority as trustee when it represented that the royalty was 15¢ per ton and when it accepted the same without protest; a third party without actual knowledge that the trustee was exceeding its powers or improperly exercising them, is fully protected in dealing with the trustee the same as if the trustee possessed and properly exercised the powers it purported to exercise.

By statute, Utah protects third persons in dealing with trustees. Utah Code Ann. § 75-7-406 provides as follows:

> With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust power and their proper exercise by the trustee may be assumed without inquiry. The

> third person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and a third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise . . . .

There have been no allegations that the State has exceeded its authority as trustee. In the absence of such assertions, the presumption must be that the State was within its authority in interpreting the royalty provision as requiring payment of royalty at the rate of 15¢ per ton.

The State, citing authority from other jurisdictions, asserts that a party leasing school trust lands is charged with knowledge of the trust. (Appellants' Brief, p. 17) Taking the State's assertion as true, Trail Mountain's knowledge of the trust has no impact on the District Court's Judgment. Pursuant to statute, Trail Mountain need not have inquired whether the State was properly exercising its authority. Trail Mountain is "fully protected" in its dealings with the trustee.

Finally, even if the Court were to find merit in the State's contentions regarding trust land law and policy, a higher royalty rate should not be assessed against Trail Mountain retroactively. The law should not be applied to work a hardship on either a public official or a citizen where both have exercised good faith under the law. Oklahoma Education Association, Inc. v. Nigh, 642 P.2d 230 (Okla. 1982).

V. AN "ARBITRARY AND CAPRICIOUS" STANDARD OF REVIEW IS NOT APPLICABLE IN THIS CASE.

The State contends that the issues before this Court were decided against Trail Mountain by the Director of State Lands, and that the Court cannot override the Director's decision unless it is "arbitrary or erroneous." (Appellants' Brief, p. 9)

The District Court has de novo review of an informal adjudicative proceeding. Utah Code Ann. § 63-46b-15. In this case, the District Court was reviewing a decision of the director at an informal hearing held on July 29, 1986. This was a hearing before the same State official whose decision was being appealed. (R. 683-684) The State never raised the issue of jurisdiction, and did not take any action to have this matter heard before this Court rather than the District Court.

The Director's decision is therefore not entitled to deference from this Court. This is especially true of issues of law. Adkins v. Division of State Lands, 719 P.2d 524, 526 (Utah 1986). The State concedes that the controlling issues in this case are issues of law. (Appellants' Brief, p. 10)

VI. THE STATE IS NOT ENTITLED TO INTEREST.

The District Court, in its Order granting Summary Judgment, made certain rulings regarding interest as claimed by

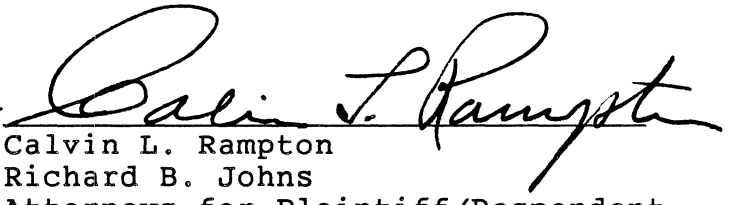
the State in its audit report. The Judge held: (1) Interest would not begin to accrue except on delinquent payments and then only after demand was made; and (2) interest would accrue only at the legal rate as provided by statute and not at the rate fixed retroactively by board regulation. The State in this appeal has not cited error as to these rulings. Inasmuch as Appellants are not responding to those matters, it is assumed that the Judge's decision is and will be the established law of the case.

CONCLUSION

For the foregoing reasons, the Judgment of the District Court should be affirmed.

Respectfully submitted this 26th day of October, 1988.

JONES, WALDO, HOLBROOK & McDONOUGH

By 

Calvin L. Rampton
Richard B. Johns
Attorneys for Plaintiff/Respondent
Trail Mountain Coal Company

MS LR

APPENDIX A

MINERAL LEASE APPLICATION

NO. 22603

MINERAL LEASE NO. 22603

GRANT: School

Utah State Lease for
COAL

THIS INDENTURE OF LEASE AND AGREEMENT entered into in duplicate this 6th day of February 1965 by and between the STATE LAND BOARD, acting in behalf of the State of Utah, hereinafter called the Lessor, and

MALCOLM R. McKINNON
1222 South Main Street
Salt Lake City, Utah 84101

party of the second part, hereinafter called the Lessee, under and Pursuant to Title 65, Utah Code Annotated, 1953.

WITNESSETH: That the Lessor, in consideration of the rents and royalties to be paid and the covenants to be observed by the Lessee, as hereinafter set forth, does hereby grant and lease to the Lessee the exclusive right and privilege to mine, remove, and dispose of all of the said minerals in, upon, or under the following described tract of land situated in Emery County, State of Utah, to-wit:

All of Section Thirty-six (36), Township Seventeen (17) South, Range Six (6) East, Salt Lake Meridian,

containing a total of 640.00 acres, more or less, together with the right to use and occupy so much of the surface of said land as may be required for all purposes reasonably incident to the mining, removal, and disposal of said minerals, according to the provisions of this lease, for the period ending ten years after the first day of January next succeeding the date hereof and as long thereafter as said minerals may be produced in commercial quantities from said lands, or Lessee shall continue to make the payments required by Article III hereof, upon condition that at the end of each twenty (20) year period succeeding the first day of the year in which this lease is issued, such readjustment of terms and conditions may be made as the Lessor may determine to be necessary in the interest of the State.

ARTICLE I

This lease is granted subject in all respects to and under the conditions of the laws of the State of Utah and existing rules and regulations and such operating rules and regulations as may be hereafter approved and adopted by the State Land Board.

ARTICLE II

This lease covers only the mining, removal, and disposal of the minerals specified in this lease, but the Lessee shall promptly notify the the Lessor of the discovery of any minerals excepting those enumerated herein.

ARTICLE III

The Lessee, in consideration of the granting of the rights and privileges aforesaid, hereby covenants and agrees as follows:

FIRST: To pay to the Lessor as rental for the land covered by this lease the sum of fifty (50) cents per acre per annum. All such annual payments of rental shall be made in advance on the 2nd day of January of each year, except the 1965 rental which is payable on the execution of this lease. All rentals shall be credited against royalties for the year in which they accrue.

SECOND: To pay to Lessor quarterly, on or before the 15th day of the month succeeding each quarter, royalty

(a) at the rate of 15¢ per ton of 2000 lbs. of coal produced from the leased premises and sold or otherwise disposed of, or

(b) at the rate prevailing, at the beginning of the quarter for which payment is being made, for federal lessees of land of similar character under coal leases issued by the United States at that time,

whichever is higher, and, commencing with the year beginning the January 1 following two years from the date hereof, to pay annual royalty of at least $1.00 multiplied by the number of acres hereby leased regardless of actual production, provided that Lessor may, at any time after the tenth anniversary date hereof, increase the minimum annual royalty by not to exceed 50%.

If the coal produced from the leased premises is washed before sale or other disposition by Lessee, Lessee may pay royalty on the washed product only, provided Lessee maintains accurate record by which the weight of washed coal originating from the leased premises can be ascertained and complies with all regulations and directives issued by Lessor to prevent waste and to insure that royalty is paid on all washed coal originating from the leased premises.

THIRD: To prepare and forward to the State Land Office, on or before the 15th day of the month next succeeding the quarter in which the material is produced, a certified statement of the amount of production of all of the leased substances disposed of from said lands, and such other additional information as the State Land Board may from time to time require.

FOURTH: To keep at the mine office clear, accurate and detailed maps on tracing cloth, on a scale not more than 50 feet to the inch, of the workings in each section of the leased lands and on the lands adjacent, said maps to be coordinated with reference to a public land corner so that they can be readily and correctly superimposed, and to furnish to the Lessor annually, or upon demand, certified copies of such maps and such written statements of operations as may be called for. All surveys shall be made by a licensed engineer and all maps certified to by him.

FIFTH: Not to fence or otherwise make inaccessible to stock any watering place on the premises without first obtaining the written consent of Lessor, nor to permit or contribute to the pollution of any surface or subsurface water available or capable of being made available for domestic or irrigation use.

SIXTH: Not to assign this lease or any interest therein, nor sublet any portion of the leased premises, or any of the rights and privileges herein granted, without the written consent of the Lessor being first had and obtained.

ARTICLE IV

The Lessor hereby excepts and reserves from the operation of this lease:

FIRST: The right to permit for joint or several use such easements or rights-of-way upon, through, or in the land hereby leased as may be necessary or appropriate to the working of these or other lands belonging to or administered by the Lessor containing mineral deposits or for other use.

SECOND: The right to use, lease, sell, or otherwise dispose of the surface of said lands or any part thereof, under existing State laws or laws hereafter enacted, insofar as said surface is not necessary for the Lessee in the mining, removal, or disposal of the leased substances therein, and to lease mineral deposits, other than those leased hereby, which may be contained in said lands so long as the recovery of such deposits does not unreasonably interfere with Lessee's rights herein granted.

ARTICLE V

Upon failure or refusal of the Lessee to accept the readjustment of terms and conditions demanded by the Lessor at the end of any twenty-year period, such failure or refusal shall work a forfeiture of the lease and the same shall be canceled.

ARTICLE VI

In case of expiration, forfeiture, surrender or other termination of this lease, all underground timbering supports, shaft linings, rails and other installations necessary for the support of underground workings of any mines, and all rails or head frames and all installations which cannot be removed without permanent injury to the premises and all construction and equipment installed underground to provide ventilation for any mines, upon or in the said lands shall be and remain a part of the realty and shall revert to the Lessor without further consideration or compensation and shall be left by the Lessee in the lands.

All personal property of Lessee located within or upon the said lands, and all buildings, machinery, equipment and tools (other than the installations to become the property of Lessor as above provided), shall be and remain the property of Lessee and Lessee shall be entitled to, and may, within six (6) months after such expiration, forfeiture, surrender or other termination of said lease, or within such extension of time as may be granted by Lessor, remove from the said lands such personal property and improvements, other than those items which are to remain the property of the Lessor as above provided.

Lessee shall, upon termination of this lease or abandonment of the leased premise for any reason, seal to Lessor's satisfaction all or such part of the mine openings on the premises as Lessor shall request be sealed.

ARTICLE VII

It shall be the responsibility of the Lessee to slope the sides of all operations of a surface nature to an angle of not less than 45° or to erect a barrier around such operation as the State Land Board may require. Such sloping or fencing shall become a normal part of the operation of the lease so as to keep pace with such operation to the extent that such operation shall not constitute a hazard.

ARTICLE VIII

Lessee shall not sell or otherwise dispose of any water rights acquired for use upon the leased premises except with Lessor's written permission. Upon termination of this lease for any reason, all such rights acquired by application to the Utah State Engineer shall revert to the Lessor as an appurtenance to the leased premises, and all such rights acquired by other means shall be offered to Lessor in writing for purchase at Lessee's acquisition costs, provided that Lessor shall be deemed to have rejected such offer if it does not accept the same within thirty days after receipt thereof.

ARTICLE IX

All of the terms, covenants, conditions, and obligations in this lease contained, shall be binding upon the heirs, executors, administrators, and assigns of the Lessee.

ARTICLE X

Lessee may terminate this lease at any time upon giving three (3) months' notice in writing to the Lessor and upon payment of all rents and royalties and other sums due and payable to the Lessor, and upon complying with the terms of this lease with respect to the preservation of the workings in such order and condition as to permit of the continued operation of the leased premises.

ARTICLE XI

Lessor, its officers and agents, shall have the right at all times to go in and upon the leased lands and premises, during the term of said lease to inspect the work done and the progress thereof on said lands and the products obtained therefrom, and to post any notices on the said land that it may deem fit and proper; and also shall permit any authorized representatives of the Lessor to examine all books and records pertaining to operations under this lease, and to make copies of and extracts from the same, if desired.

ARTICLE XII

This lease is issued only under such title as the State of Utah may now hold, and that in the event the State is hereafter divested of such title, the Lessor shall not be liable for any damages sustained by the Lessee, nor shall the Lessee be entited to or claim any refund of rentals or royalties or other monies theretofore paid to the Lessor.

STATE OF UTAH
STATE LAND BOARD

By _____
DIRECTOR

LESSOR

_____

_____
LESSEE

STATE OF UTAH
COUNTY OF } ss. LESSEE'S INDIVIDUAL ACKNOWLEDGEMENT

On the ..... day of ..... 19....., personally appeared before me .....,
the signer of the above instrument, who duly acknowledged to me that ..... executed the same.

Given under my hand and seal this ..... day of ..... 19.....

My commission Expires: _____
Notary Public, residing at:

STATE OF UTAH
COUNTY OF } ss. LESSEE'S CORPORATE ACKNOWLEDGEMENT

On the ..... day of ..... 19....., personally appeared before me .....,
who being duly sworn did say that he is an officer of ..... and that said instrument was signed
in behalf of said corporation by resolution of its Board of Directors, and said ..... acknowledged to me that said corporation executed the same.

Given under my hand and seal this ..... day of ..... 19.....

My commission Expires: _____
Notary Public, residing at:

STATE OF UTAH
COUNTY OF SALT LAKE } ss.

On the 22 day of March 19[illegible], personally appeared before me Max C. Gardner, who being by me duly sworn did say that he is the Director of the State Land Board of the State of Utah and that said instrument was signed in behalf of said Board by resolution of the Board, and said Max C. Gardner acknowledged to me that said Board executed the same in behalf of the State of Utah.

Given under my hand and seal this 22 day of March 19[illegible]

My commission Expires:
11-16-65

_____
Notary Public, residing at:

8/6 [illegible]

Myron J. Totteroff

Somerset, PA

[illegible]

By Val McORR

APPENDIX B

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR EMERY COUNTY
STATE OF UTAH

TRAIL MOUNTAIN COAL COMPANY, Plaintiff, vs. THE UTAH DIVISION OF STATE LANDS AND FORESTRY, RALPH MILES, DIRECTOR OF THE DIVISION OF STATE LANDS AND FORESTRY, THE UTAH BOARD OF STATE LANDS AND FORESTRY, THE UTAH DEPARTMENT OF NATURAL RESOURCES, DEE HANSEN, EXECUTIVE DIRECTOR OF THE UTAH DEPARTMENT OF NATURAL RESOURCES, Defendants.	MEMORANDUM DECISION Civil No. 4847

The plaintiff has moved the Court for partial summary judgment and has supported the same by the stipulated facts as set forth in the agreed Pre-trial Order and other supporting affidavits, and has submitted their Memorandum of Legal Points and Authorities. The defendants have objected to the Motion and have filed their own Motion for Partial Summary Judgment and have submitted their Memorandum of Legal Points and Authorities.

The defendants have objected to the publication of certain depositions requested by the plaintiff and referred to by the plaintiff in their Memorandum. The Court finds that the Motion is well taken and will not order publication of the depositions at this time, and will not consider any of the matters referred to in the deposition in the disposition of these motions.

The Court finds that there is no dispute as to the material facts in this case and has concluded therefrom that the plaintiff is entitled to partial summary judgment as prayed for and grants the plaintiff's motion.

The Court has further concluded that the defendants are not entitled to partial summary judgment and denies their motion.

The factual situation is nearly identical to the fact situation as shown in Carbon County Case No. 14890, Plateau Mining Company v. The Division of State Lands and Forestry, et al., and the Court has attached hereto a copy of its opinion in that case to show the reasoning of the Court, and the legal analysis used by the Court, in reaching its decision in this case.

The attorney for the plaintiff is directed to prepare a formal judgment in accordance with this decision.

DATED this 11th day of April, 1988.

BOYD BUNNELL, District Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed true and correct copies of the foregoing MEMORANDUM DECISION by depositing the same in the United States Mail, postage prepaid, to the following:

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Vernal, Utah 84078

David L. Wilkinson
UTAH STATE ATTORNEY GENERAL
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124 State Capitol
Salt Lake City, Utah 84114

Calvin L. Rampton
Richard B. Johns
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys at Law
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101

DATED this 7th day of April, 1988.

Secretary

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR CARBON COUNTY
STATE OF UTAH

PLATEAU MINING COMPANY, a Delaware Corporation, and CYPRUS WESTERN COAL EQUIPMENT COMPANY, a Delaware Corporation, Plaintiffs, vs. THE UTAH DIVISION OF STATE LANDS AND FORESTRY; RALPH MILES, DIRECTOR OF THE DIVISION OF STATE LANDS AND FORESTRY; THE UTAH BOARD OF STATE LANDS AND FORESTRY; THE UTAH DEPARTMENT OF NATURAL RESOURCES; DEE HANSEN, EXECUTIVE DIRECTOR OF THE UTAH DEPARTMENT OF NATURAL RESOURCES, Defendants.	MEMORANDUM DECISION ON MOTIONS FOR SUMMARY JUDGMENT Civil No. 14890

The plaintiff seeks a partial summary judgment from the Court declaring that the royalty provision contained in the State Lease of the defendants is ambiguous and that it should be construed in light of the parties course of performance; that the lease is not self-executing so as to place a legal obligation on plaintiffs to pay a higher rate of royalty after the State accepted without qualification the payment of the stated rate of $.15 per ton of coal produced; that the defendants may not retroactively apply their new policy imposing a royalty rate of 8%; that the defendants are estopped

from demanding payment of royalties on coal mined during the audit period at a rate higher than that paid by plaintiffs and accepted by defendants; that the defendants have waived their right to demand a higher royalty rate than the one accepted during the audit period; and that the ruling of the State relative to imposing interest and penalties cannot be legally enforced.

The defendants have objected to the granting of the Motion and have submitted their own Motion for Summary Judgment asking the Court to dismiss the Complaint for failure to state a cause of action; ordering the plaintiff, Plateau Mining Company, to pay the delinquent royalty payment as determined on the basis of 8% of gross sales value during the audit period; ordering that the plaintiff, Plateau Mining Company, owes interest on delinquent royalty payments at a rate set by the Board of State Lands and, further, ordering that the plaintiff, Plateau Mining Company, owes penalties on delinquent royalties pursuant to the regulation set by the Board.

Each of the parties have submitted their Memorandums of Legal Points and Authorities and have presented to the Court Affidavits and Exhibits which the Court has read and considered and the Court heard oral arguments from the parties on February 16, 1988, and took this matter under advisement and rules on the Motions as hereinafter stated.

Certain undisputed facts are, for the most part, agreed upon by the parties as set forth in their respective memorandums, and the Court will not attempt to detail all of those undisputed facts. There is no dispute as to the fact that the plaintiff, Plateau, and their predecessors in interest mined coal under a lease from the State of Utah during the period April 1, 1979, to December 31, 1984, referred to as the "audit period"; that the Lease was entered into on March 15, 1965, and that the Lease provides as follows:

> "Article III, Second: To pay to Lessor quarterly, on or before the 15th day of the month succeeding each quarter, royalty
>
> (a) at the rate of 15¢ per ton of 2000 lbs of coal produced from the leased premises and sold or otherwise disposed of, or
>
> (b) at the rate prevailing at the beginning of the quarter for which payment is being made, for federal leases of land of similar character under coal leases issued by the United States at that time,
>
> whichever is higher. . . ."

That the lease was on a standard form provided by and prepared by the State Land Board, and that throughout the audit period the plaintiff, Plateau, or their predecessors in interests, filed quarterly with the lessor (State) on a form provided by the State a report of the coal mined under the Lease and a calculation of the royalty due on the basis of 15¢ per ton. The payment was received and retained by the State without question or objection throughout the audit period and prior thereto from sometime in 1965.

The royalty reporting form was provided by the Utah Board of State Lands and under the title Royalty Data it has two columns. One is headed ¢/T Basis, and the other is headed Percentage Basis. Plateau and their predecessors in interest filled in the column entitled ¢/T Basis and paid the amount of royalty shown to be due under that column at 15¢ per ton and left the other column blank.

After the term of the lease had expired, December 1984, in approximately February of 1985, the State undertook, for the first time, an audit of the royalty payments. The audit was completed on or about May 29, 1985, and a demand was sent to the plaintiffs for delinquent royalties in October of 1985.

It was the conclusion of the audit that the federal government, during the audit period, was imposing a royalty on coal leases of 8% of the value of the coal removed. Based upon the audit, the State made a demand upon the plaintiffs for the payment of an additional $2,991,613.44 for delinquent royalties, interest and penalties based upon 8% of Gross Sales Value of coal removed.

Based upon an examination of the Lease and the parties attempts to comply with its terms, and particularly the expressed attitude of the various individuals whose responsibility it was to enforce the Lease for and on behalf of

the State, the Court finds that as a matter of law the royalty provision as contained in Article III, paragraph Second (b) of the lease is ambiguous.

The royalty provision is divided into two parts. Part (a) is definite and precise and is capable of definitive determination and provides for 15¢ per ton on coal produced from the leased premises.

Part (b) leaves the amount due based on several factors not immediately capable of definitive determination. The ambiguity arises as much from what is not stated and provided as from what is stated. In other words, at the beginning of the reporting quarter what is the prevailing federal rate and who makes that determination, the lessor or the lessee, and what factors are to be included in making a determination as what federal rate prevails and in what area is it prevalent? Who makes the determination that the land in the State Lease and the land in the Federal Lease are similar in character and what is the basis for determining similarity? What time period is used to determine federal leases "issued... at that time" and who makes that determination? Even if a prevailing federal rate is established, does it apply to the "value of the coal removed" as stated in the federal regulation or to the "gross sales value" as used by the State auditor in his assessment, and who makes that determination?

For these reasons, the Court has concluded that sub-paragraph (b) is not self-executing as to create a legal obligation on the lessee since the identifiable factors necessary for self-execution could not independently be ascertained by either party.

Sub-paragraph (b) was written by the State for its benefit and since it is not self-executing, it would require some affirmitive action on their part to bring the provision of that sub-paragraph into an enforceable position other than a retroactive audit after having accepted the provisions of sub-paragraph (a) without objection or comment.

Under these circumstances, the Court must look to the prior conduct of the lessor and the lessees under the Lease over a period of years that show that they chose to ingnore the provisions of sub-paragraph (b), and to calculate the royalty under sub-paragraph (a).

Since the State by an established course of conduct for many years adopted a construction of the Lease that provided for 15¢ a ton, they are now precluded from asserting a different construction of the Lease where they took no sufficient or positive action to establish their now asserted construction to an ambiguous lease provision.

Because of the above legal conclusion, it would not be necessary for the Court to go further, but as a further

ground for what the Court's final conclusion and ruling will be, the Court will address other issues presented.

The Court is of the opinion that regardless of whether the status of the land is School Trust Land or not, the State acts in its proprietary capacity when it enters into a contractual lease that is authorized under law and that the doctrine of equitable estoppel may be applied against the State and its Land Board as any other contracting individual.

The Court has concluded as a matter of law that the State is estopped from demanding payment of royalty based upon the 8% of value figure. The undisputed facts show that the State was aware of the provisions of sub-paragraph (b) of Article III of their own Lease and were made aware by the quarterly payments submitted by Plateau and its predecessors in interest that those provisions were being ignored by leaving that reporting column blank and by accepting, throughout the auditing period, without question or objection, royalty based upon 15¢ a ton. If the provisions of sub-paragraph (b) were going to be used, the State had a duty to speak which they did not do. By their conduct and failure to perform this duty, they induced plaintiffs to believe that 15¢ a ton was the acceptable royalty and plaintiffs, in reliance thereon, continued to mine coal under the Lease which they would not have done had they known that the defendants were going to

insist upon the 8% of value provision. The great injustice that would result to plaintiffs if we now allow the defendants to assert this position, is quite obvious since the record shows that to allow the imposition of the greater royalty, the plaintiffs would show a substantial loss on all mining activity under the State Lease.

Even if the conclusion is reached that the defendants were acting in a governmental capacity, they would still be estopped from asserting the new royalty rate. No substantial adverse effect on public policy will result if the defendants are estopped from applying this newly determined royalty retroactively. The State can still proceed to lease coal lands on any terms it feels profitable and that will give the State the maximum return. They still have the power to revise the wording of their coal leases to do away with any ambiguity and to carry out any legally established policy.

Further, the record shows that the plaintiffs would not have entered into certain stock purchases and transfers on the terms that were then agreed to had they known of the State's position and the contemplated change in the royalty provision as previously accepted, and that the plaintiffs would suffer at this time great economic loss as a result.

The Court further finds that the State had no right under the Lease to impose interest, except on delinquent

payments at the legal rate, or any penalty. A legally binding lease cannot be altered or added to by by rules and regulations adopted subsequently.

The Lease does state that it is subject to such operating rules and regulations as may be hereafter approved and adopted. Such a provision could not be interpreted to mean changes to or additions of monetary payment. "Operating Rules" has reference to method of mining and can have no other logical interpretation. Since the amount claimed by the State is not subject to definitive determination, any interest that may be due could not commence to run until demand is made.

For the reasons stated above, the Court grants plaintiffs' Motion for Partial Summary Judgment as prayed for and denies defendants' Motion for Summary Judgment.

The attorney for the plaintiff is directed to prepare a formal order in accordance with this opinion.

DATED this 24th day of February, 1988.

BOYD BUNNELL, District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY That I mailed true and correct copies of the foregoing MEMORANDUM DECISION ON MOTIONS FOR SUMMARY JUDGMENT by depositing the same in the United States Mail, postage prepaid to the following:

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DATED this 24th day of February, 1988.

Secretary

APPENDIX C

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF EMERY COUNTY

STATE OF UTAH

TRAIL MOUNTAIN COAL COMPANY, Plaintiff, vs. THE UTAH DIVISION OF STATE LANDS AND FORESTRY, RALPH MILES, DIRECTOR OF THE DIVISION OF STATE LANDS AND FORESTRY; THE UTAH BOARD OF STATE LANDS AND FORESTRY; THE UTAH DEPARTMENT OF NATURAL RESOURCES; DEE HANSEN, EXECUTIVE DIRECTOR OF THE UTAH DEPARTMENT OF NATURAL RESOURCES, Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 4847 Honorable Boyd Bunnell

Plaintiff, having moved for Partial Summary Judgment pursuant to Rule 56 of the Utah Rules of Civil Procedure, and the Motion having been considered by the Court, and the Court having considered the Uncontroverted Facts and Exhibits as set

forth in the agreed Pre-trial Order and having considered each party's Memoranda of Legal Points and Authorities, and now being well advised in the premises, hereby enters its Findings of Fact and Conclusions of Law in this matter.

FINDINGS OF FACT

The Uncontroverted Facts set forth in the Pre-trial Order are accepted by the Court as established for purposes of this case. Based upon said Pre-trial Order the Court makes the following findings of fact:

1. Trail Mountain Coal Company and its predecessors in interest mined coal under State Mineral Lease No. 22603 (the "Lease") during the period from 1979 through 1985.

2. The Lease was on a standard form prepared by the State Land Board.

3. Article III of the Lease provides in pertinent part as follows:

> The Lessee, in consideration of the granting of the rights and privileges aforesaid, hereby covenants and agrees as follows:
>
> SECOND: To pay Lessor quarterly, on or before the 15th day of the month succeeding each quarter, royalty
>
> (a) at the rate of 15¢ per ton of 2,000 lbs. of coal produced from the

leased premises and sold or otherwise disposed of, or

(b) at the rate prevailing, at the beginning of the quarter for which payment is being made, for federal lessees of land of similar character under coal leases issued by the United States at that time,

whichever is higher, . . .

4. The state provided Trail Mountain Coal Company and its predecessors with a form for reporting coal production and royalties under the lease. The form has two columns for calculating royalties. One column is headed ¢/T Basis and the other is headed Percentage Basis.

5. Throughout the period of mining, Trail Mountain Coal Company and its predecessors filed the reporting form on a quarterly basis with the State of Utah. Trail Mountain Coal Company and its predecessors calculated royalties by filling in the column on the form labeled ¢/Ton Basis, and paid the amount of royalty shown to be due under that column at 15¢ per ton of coal produced. The other column, labeled Percentage Basis, was left blank on each form.

6. Trail Mountain Coal Company and its predecessors made royalty payments to the State of Utah for each quarter of the years 1979 through 1985 during which coal was produced, on the basis of 15¢ per ton, as calculated on the reporting form.

7. Each reporting form and each royalty payment was received and retained by the State without question or objection.

8. At various times prior to and during the period of mining, there was written and verbal correspondence between the State of Utah and Trail Mountain Coal Company or its predecessors, regarding the royalty provision of the Lease and the amounts payable thereunder.

9. The conduct of the Lessor and the Lessees under the Lease over a period of years shows that they chose not to apply subparagraph (b) of the royalty provision, and to calculate the royalty under subparagraph (a).

10. In approximately March of 1985, the State undertook, for the first time, an audit of the royalty payments.

11. On or about October 15, 1985, the State provided Trail Mountain Coal Company with a copy of the royalty audit, and demanded payment for royalties it alleged to be delinquent.

12. It was the conclusion of the audit that Trail Mountain Coal Company and its predecessors should have been paying royalties at the rate of 8% of the value of coal removed. Based upon the audit, the State made demand upon Trail Mountain Coal Company for the payment of an additional $5,222,197.20 for delinquent royalties, interest and penalties.

13. Based upon the foregoing Findings of Fact, the Court now enters its Conclusions of Law.

CONCLUSIONS OF LAW

1. The royalty provision contained in Article III, subparagraph (b) of the Lease, is ambiguous.

2. Ambiguities in the Lease should be construed against the State.

3. The alternate royalty provision of subparagraph (b) of the Lease is not self-executing so as to create a legal obligation on the Lessee.

4. Some affirmative action on the State's part other than a retroactive audit was required to bring the alternate royalty provision into an enforceable position.

5. The Lease should be enforced in accordance with the parties interpretation and course of conduct.

6. Since the parties, by an established course of conduct for many years, and by their interpretation of the Lease, adopted a construction of the Lease that provided for payment of royalties at the rate of 15¢ per ton, the State is now precluded from asserting a different construction of the Lease retroactively.

7. Since the State took no sufficient or positive action to establish the construction of the ambiguous Lease provision which the State now asserts, the State is precluded from doing so retroactively.

8. The above Conclusions of Law are sufficient to support a judgment granting plaintiff's Motion for Partial Summary Judgment. Although it is not necessary for the Court to go further, the Court also makes the following Conclusions of Law.

9. The State acted in a proprietary capacity in entering into the Lease.

10. The doctrine of estoppel may be applied against the State.

11. The State is estopped from demanding and collecting royalty payments for coal mined under the Lease in any amount greater than 15¢ per ton for the period from 1979 through 1985.

12. The State had no right under the Lease to impose interest, except on delinquent payments of the 15¢ per ton royalty at the legal rate, or any penalty.

13. Any interest that may be due on delinquent payments does not commence to run until demand is made.

14. There is no dispute as to the material facts in this case, and plaintiff is entitled to Partial Summary Judgment as prayed for.

DATED this 13th day of June, 1988.

BY THE COURT:

Boyd Bunnell, District Judge

APPENDIX D

Calvin L. Rampton (USB #2682)
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IN THE SEVENTH JUDICIAL DISTRICT COURT OF EMERY COUNTY

STATE OF UTAH

TRAIL MOUNTAIN COAL COMPANY, Plaintiff, vs. THE UTAH DIVISION OF STATE LANDS AND FORESTRY; RALPH MILES, DIRECTOR OF THE DIVISION OF STATE LANDS AND FORESTRY; THE UTAH BOARD OF STATE LANDS AND FORESTRY; THE UTAH DEPARTMENT OF NATURAL RESOURCES; DEE HANSEN, EXECUTIVE DIRECTOR OF THE UTAH DEPARTMENT OF NATURAL RESOURCES, Defendants.	JUDGMENT Civil No. 4847 Honorable Boyd Bunnell

Plaintiff having moved for Partial Summary Judgment pursuant to Rule 56 of the Utah Rules of Civil Procedure, and the Motion having been considered by the Court, and the Court having issued its decision granting the Motion of plaintiff and

denying the Motion of defendants, and good and sufficient cause appearing therefore, the Court hereby

ORDERS, ADJUDGES and DECREES:

1. Defendants are not entitled to recover from plaintiff any royalty amounts calculated at any rate higher than 15¢ per ton of coal produced from State Coal Lease No. ML-22603 during the period from 1979 through 1985.

2. Interest due on any delinquent royalties payable under State Coal Lease No. ML-22603 only begins to accrue when demand for payment of the delinquent royalties is made, and then accrues at the statutory legal rate of interest.

3. The parties hereto shall bear their respective costs and attorneys' fees.

DATED this 3rd day of August, 1988.

BY THE COURT:

/s/ BOYD BUNNELL
Boyd Bunnell
District Judge

0851j

DLJ

APPENDIX E

LEGISLATIVE GENERAL COUNSEL

UTAH STATE LEGISLATURE

OPINION NO. 077-010

Date: April 8, 1977

Subject: Royalty on State Coal Leases

Requested by: Lennis Knighton
Legislative Auditor General

Opinion by: Steven W. Allred
Staff Attorney
Office of Legislative General Counsel

Conclusion: 1. "Prevailing price" means "market price;"

2. "Leases issued" refers to currently issue leases;

3. "Land of similar character" is sufficiently vague to defy definition; and

4. The state possesses the authority to increase the royalty on coal leases to a level equal to the current rate of federal leases.

ANALYSIS

1. As used in Article III, SECOND, (c), of the attached lease, the term "prevailing price" means the market price or the price generally prevailing in the locality for similar production. The prevailing price is a price set in the usual course of business, without undue enlargement of costs and with a reasonable profit.

2. As used in Article III, SECOND, (c), of the attached lease, the term "leases issued" refers those leases issued "at the time" that the royalty payments are due. Since those payments are due monthly, it is reasonable to believe that the leases referred to are leases currently issued.

3. As used in Article III, SECOND, (c), of the attached lease, the term "land of similar character" is so vague as to defy reasonable definition. Initially the problem becomes one of kind, i.e. similar in what regard -- size, productivity, value.

Assuming, arguendo, that similarity can be established, the second problem arises when it is attempted to establish the magnitude of the lands available for comparison i.e. does the land have to be similar to land in the same county, state, region or is the entire United States available for comparitive similarities.

Without further explanation in the lease itself or withou knowing the intent of the parties, any definition given herein would be totally inconclusive.

4. The state has, pursuant to Article III, SECOND, (c) the authority to increase the royalty rate to a level equal to the current federal rate. The three rate structures set in Article III, SECOND, are alternative rates and it should be noted that (c) specifically indicates that the lessor shall pay whichever rate is higher.

Respectfully submitted,

Steven W. Allred
Staff Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of October, 1988, I caused to be mailed, postage prepaid, four true and correct copies of the foregoing Brief of Plaintiff/Respondent Trail Mountain Coal Company, to the following parties of record:

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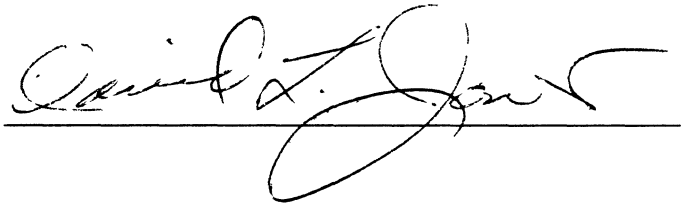

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