

# OSTER Researching Services

12897 Colonial Dr • Mt Airy, Md 21771  
301-253-6040

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FILED 148

SEP 18 1989 -9 45 AM

INTERSTATE COMMERCE COMMISSION

September 18, 1989

Ma. Mildred Lee  
Recordationa Unit  
Interstate Commerce Commission  
12th & Constitution Avenue, N.W.  
Washington, D.C. 20423

9-261A001

Dear Ma. Lee:

Please record the enclosed Lease of Railroad Equipment dated as of August 15, 1989, between the following parties:

Lessor: Helm Financial Corporation  
One Embarcadero Center  
San Francisco, CA 94111

Lessee: Drummond Coal Sales, Inc.  
532 Beacon Parkway West  
Birmingham, AL 35209

The equipment involved in this transaction is as follows:

Equipment: 100, 4000 cf 100-ton Open-top Hoppers  
See Attached for Car Numbers

Please record this agreement as a primary document. The filing fee of \$13 is enclosed. Thank you for your kind assistance.

Sincerely,

*Mary Ann Oster*

Mary Ann Oster  
Research Consultant

Enclosure

SEP 18 9 38 AM '89  
RECORDED  
MIS. UNIT

*C. J. [unclear]*  
*May 2 Oct-*

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SEP 18 1989 - 9 45 AM  
INTERSTATE COMMERCE COMMISSION

LEASE OF RAILROAD EQUIPMENT

BETWEEN

HELM FINANCIAL CORPORATION

AND

DRUMMOND COAL SALES, INC.

## LEASE OF RAILROAD EQUIPMENT

LEASE OF RAILROAD EQUIPMENT, dated as of August 15, 1989, between HELM FINANCIAL CORPORATION, a California corporation, (hereinafter called the "Lessor") and the DRUMMOND COAL SALES, INC., an Alabama corporation, (hereinafter called the "Lessee").

WHEREAS, the Lessor hereby represents that it has the right to lease the one hundred (100) open top hopper cars more fully described in Annex A hereto (hereinafter called the "Units");

WHEREAS, the Lessee desires to lease from the Lessor all the Units at the rentals and for the terms and upon the conditions hereinafter provided;

NOW, THEREFORE, in consideration of the premises and of the rentals to be paid and the covenants hereinafter mentioned to be kept and performed by the Lessee, the Lessor hereby leases the Units to the Lessee upon the following terms and conditions:

1. Delivery and Acceptance of Units. The Lessee hereby accepts the Units at a Kansas City Southern Railway Company interchange point to be determined (hereinafter called the "Acceptance Point") whereupon each Unit shall be subject thereafter to all terms and conditions of this Lease. Lessee will provide Lessor with a Certificate of Acceptance for the Units provided in Annex B (hereinafter "Certificate of Acceptance"). The Lessee further agrees to be responsible for any transportation cost of moving the Units from the Acceptance Point. The Lessor agrees to furnish the Units in compliance with now existing AAR rules of interchange. Lessee, at its expense, shall have the right to inspect and reject the Units subject to this Lease prior to the Lessor's transporting the Units from their present location.

2. Rentals. The Lessee agrees to pay the Lessor as rental for the Units an amount of \_\_\_\_\_ per Unit per month ("Lease Rental"). Rent shall become effective with regard to each Unit as of the date of delivery to the Acceptance Point. The effective date of the Lease shall begin on the date the last Unit is delivered to the Acceptance Point (hereinafter referred to as "Effective Date") and shall continue in effect with regard to each of the Units until returned to the Lessor at the end of the term of this Lease, as hereafter provided in Paragraph 3. Payment of Lease Rental shall be made to the Lessor at the address specified in Paragraph 15, or to such other place as Lessor may direct, with the first month's payment due on the first day of the month following the month the last Unit is delivered to the Acceptance Point. Rental for any Unit for any partial month shall be prorated on a daily basis. Lessee shall pay to Lessor an additional Mileage Lease Rental of \_\_\_\_\_.

per Unit

; on an annualized basis, mileage to be based on CSX Transportation's Monthly Private Mileage Summary Reports. Additional Mileage Lease Rental will commence during the month that a Unit travels the first mile in excess of \_\_\_\_\_ miles. Any costs incurred by the Lessor in collecting Rental wrongfully withheld by Lessee, including reasonable attorney fees, will be paid by the Lessee.

In the event the Lessee shall be in default in the payment of any sum of money to be paid under this Lease, whether rental or otherwise, the Lessee shall pay the Lessor, as additional rental, to the extent permitted by applicable law, interest on such unpaid sum from its due date to date of payment by the Lessee at a rate equal to \_\_\_\_\_ per annum.

This Lease is a net lease and the Lessee shall not be entitled to any abatement of rent, reduction thereof or set-off against rent, including, but not limited to, abatements, reductions or setoffs due or alleged to be due to, or by reason of, any past, present or future claims of the Lessee against the Lessor under this Lease or otherwise; nor, except as otherwise expressly provided herein, shall this Lease terminate, or the respective obligations of the Lessor or Lessee be otherwise affected, by reason of any defect in or damage to or loss of possession or loss of use of or destruction of all or any of the Units from whatsoever cause, the prohibition of or other restriction against Lessee's use of all or any of the Units, the interference with such use by any private person or entity, the invalidity or unenforceability or lack of due authorization of this Lease, or for any other cause whether similar or dissimilar to the foregoing, and present or future law to the contrary notwithstanding, it being the intention of the parties hereto that the rents and other payments payable by the Lessee hereunder shall continue to be payable in all events in the manner and at the times herein provided unless the obligation to pay the same shall be terminated pursuant to the express provisions of this Lease. To the extent permitted by applicable law, the Lessee hereby waives any and all rights which it may now have or which at any time hereafter may be conferred upon it, by statute or otherwise, to terminate, cancel, quit or surrender the lease of any Units except in accordance with the express terms hereof.

3. Term of Lease. This Lease shall remain in full force and effect, with respect to each Unit, for a period through March 31, 1990, unless sooner terminated in accordance with the provisions of the Lease.

The obligations of the Lessee hereunder (including, but not limited to, the obligations of the Lessee under Paragraphs 5, 7, and 9 hereof) shall survive the expiration or sooner termination of this Lease.

4. Identification Marks. The Lessor shall deliver each Unit numbered with the identifying number as set forth in Annex A hereto and, as part of its routine maintenance, Lessee will keep and maintain, plainly, distinctly, permanently and conspicuously marked on each side of such Unit in letters not less than one inch in height, the words "Ownership subject to a security agreement filed with the Interstate Commerce Commission" or other appropriate words with appropriate changes thereof and additions thereto as from time to time may be required by law in order to protect the title of the owner and the rights of the Lessor under this Lease. The Lessee will not place any such Unit in operation or exercise any control or dominion over the same until such names and word or words shall have been so marked on both sides thereof and will replace promptly any such names and word or words which may be removed, defaced or destroyed. The Lessee will not permit the identifying number of any Unit to be changed except in accordance with a statement of new identifying numbers to be substituted therefor, which statement previously shall have been filed with the Lessor by the Lessee and filed, recorded or deposited in all public offices where this Lease will have been filed, recorded and deposited.

Except as above provided, the Lessee will not allow the name of any person, association or corporation to be placed on the Units as a designation that might be interpreted as a claim of ownership.

5. Taxes. Lessor agrees to pay any personal property taxes associated with the Units, so long as the Units are utilized by Lessee in the carriage of coal between origins in The Commonwealth of Kentucky and Mobile, Alabama. Lessee agrees to assume responsibility for, and to pay, all other taxes, costs, fines and assessments of every kind upon the Units, and to file all reports relating thereto; provided, however, that Lessee shall not be responsible for federal or state taxes based upon the income of Lessor. In the event that Lessee utilizes such Units from loading points which increase the tax liability as contemplated herein "exclusive of any taxes based upon any income of Lessor," such additional liability shall be paid by the Lessor and reimbursed and paid in full by the Lessee. Any such additional taxes shall be invoiced by the Lessor as a separate item.

6. Loss, Damage or Destruction.

(a) Risk of Loss, Damage or Destruction. As between Lessee and Lessor and any Assignee of Lessor, Lessee hereby assumes all risk of loss, damage, theft, taking, destruction, confiscation, requisition or commandeering, partial or complete, of or to each Unit, however caused or occasioned (provided that Lessor shall be responsible for any and all damage and liabilities caused by Lessor), such risk to be borne by Lessee with respect to

each Unit from its Acceptance Date, and continuing until such Unit has been returned to Lessor in accordance with the provisions of Paragraph 9 hereof. Lessee agrees that, except as otherwise provided herein, no occurrence specified in the preceding sentence shall impair, in whole or in part, any obligation of Lessee under this Lease, including, without limitation, the obligation to pay rent.

(b) Casualty Occurrence. In the event that any Unit shall be or become lost, stolen, destroyed or irreparably damaged from any cause whatsoever, except if such cause is attributable to the Lessor, or any Unit shall be condemned, confiscated, or seized, or the title to or use of any Unit shall be requisitioned for a period of ninety (90) continuous days arising out of actions of the Lessee, (such occurrences being hereinafter called "Casualty Occurrences") during the term of this Lease, the Lessee shall on the next succeeding rental payment date after it shall have determined that such Unit has suffered a Casualty Occurrence, fully inform the Lessor in regard thereto. On such date the Lessee shall pay to the Lessor an amount equal to the accrued rental for such Unit to the date of such payment. A settlement value payment pursuant to Rule 107 of the AAR Car Service and Car Hire Agreement Code will also be made as of that date. Upon the making of such payment by the Lessee in respect of a Unit, the rental for such Unit shall cease to accrue as of the date of such payment, the term of this Lease as to such Unit shall terminate and (except in the case of the loss, theft or complete destruction of such Unit) the Lessor shall be entitled to recover possession of such Unit. Lessor has the right, in its sole discretion, to replace any and all Units subject to a Casualty Occurrence and such replacement Units will be subject to this Lease as if originally a part thereof.

7. Compliance with Laws and Rules; Insurance and Indemnification. Lessor warrants that Lessor has the right to lease the Units. Lessor hereby assigns to Lessee for the term of this Lease the benefit of all warranties and indemnities of the manufacturer, reconditioner, repairer or maintainer of the Units. Otherwise, except for the aforesaid, LESSOR MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND RESPECTING THE UNITS WHETHER STATUTORY, WRITTEN, ORAL OR IMPLIED AND LESSOR HAS NOT MADE AND DOES NOT HEREBY MAKE, NOR SHALL IT BE DEEMED BY VIRTUE OF HAVING LEASED THE UNITS PURSUANT TO THIS AGREEMENT TO HAVE MADE, ANY REPRESENTATION OR WARRANTY AS TO THE MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, DESIGN OR CONDITION OF, OR AS TO THE QUALITY OF WORKMANSHIP IN THE UNITS ALL OF WHICH ARE EXPRESSLY DISCLAIMED AND LESSOR SHALL NOT BE LIABLE, IN CONTRACT, TORT OR OTHERWISE, ON ACCOUNT OF ANY MANUFACTURER'S DEFECT, WHETHER HIDDEN, LATENT OR OTHERWISE DISCOVERABLE OR NONDISCOVERABLE RESPECTING ANY UNITS.

The Lessee agrees, for the benefit of the Lessor, to comply in all respects with all laws of the jurisdictions in which operations involving any Unit subject to this Lease may extend, with the interchange rules of the Association of American Railroads and with all rules of the Interstate Commerce Commission and any other legislative, executive, administrative or judicial body exercising any power or jurisdiction over any such Unit, to the extent such laws and rules affect the operations or use of such Unit; and in the event such laws or rules require the alteration or repairs of any such Unit, the Lessee will conform therewith, and will maintain the same in proper condition or operation under such laws and rules; provided, however, that the Lessee may, in good faith contest the validity or application of any such law or rule in any reasonable manner which does not in the reasonable opinion of the Lessor, adversely affect the property rights of the owner of the Units or the rights of the Lessor hereunder.

At all times during the term of this Lease, commencing with the Effective Date with respect to each Unit, Lessee, at its own cost and expense, shall perform or cause to be performed maintenance and repair work necessary to maintain each of the Units in good operating condition, working order, and repair, in conformity with all applicable laws and regulations including the AAR Code of Interchange Rules and FRA Railroad Freight Unit Safety Standards, 49 CFR Part 215, as amended, as it was when it first became subject to the Lease, ordinary wear and tear excepted.

Subject to Paragraph 6, the Lessee agrees it will return the Units to Lessor at the expiration of the term or sooner termination of this Lease in good order and repair, ordinary wear and tear excepted, suitable for movement in the interchange system in conformity with all applicable laws and regulations including the AAR Code of Rules and FRA Railroad Freight Car Safety Standards.

Neither party to this Agreement will alter materially the physical structure or allow any third party to alter materially the physical structure of any of the Units without the other party's written consent.

Any and all additions to any Unit and any replacements thereto and of parts thereof made by the Lessee shall constitute accessions to such Unit and, without cost or expense to the Lessor, there shall be immediately vested in the Lessor the same interest therein as the interests of the Lessor in such Unit.

Lessee shall, at all times while this Agreement is in effect at its own expense, cause to be carried and maintained:  
(i) all-risk, physical loss or damage insurance with respect to each Unit in a minimum amount equal to the settlement value (as defined in Paragraph 6b); and (ii) public liability insurance in a minimum amount of \_\_\_\_\_ per

occurrence with respect to third party personal injury and property damage, in each case for such risks and with such insurance companies as are satisfactory to the Lessor. All insurance shall be taken out in the name of Lessee and shall name Lessor and any assignee of Lessor as additional insureds and shall also list Lessor and any assignee of Lessor as loss-payees on the insurance policies. Said policies shall provide that Lessor and any assignee of Lessor shall receive thirty (30) days prior written notice of any material changes in coverage or cancellation thereof. With respect to the additional insureds, Lessee's insurance policies shall be primary to any other valid and available insurance ("Other Insurance") effected by, or for, the additional insureds. Lessee shall require its insurer specifically to waive subrogation, claim and recovery with respect to any Other Insurance. Any and all deductibles in the described policies shall be paid by the Lessee.

Each item obtained by Lessee pursuant to this Paragraph 7 shall be in accordance with the above terms and conditions, and such terms and conditions shall be set forth on the Certificate of Insurance provided to the Lessor pursuant to this Subsection. Lessee shall furnish to Lessor concurrently with execution hereof, and within thirty (30) days of receipt of a written request from Lessor, and at intervals of not more than twelve (12) calendar months from execution hereof, Certificates of Insurance evidencing the aforesaid insurance. Lessee shall provide Lessor a Certified Copy of each insurance policy upon written request. In the event that, and only with Lessor's written approval, Lessee shall be permitted to self-insure on any specified interests, the Lessee hereby warrants to place the Lessor in the same position as if the relating insurance had been effected.

The Lessee agrees to indemnify, save harmless and defend the Lessor against any charges or claims made against the Lessor, and against any expense, loss or liability (including but not limited to counsel fees and expenses, penalties and interest) which the Lessor may incur in any manner (unless resulting from the Lessor's sole negligence) by reason of entering into or the performance of this Lease, or which may arise in any manner out of or as a result of the ordering, acquisition, use, operation, condition, purchase, delivery, rejection, storage or return of, any Unit until such Unit is returned to the Lessor in accordance with the terms of the Lease, and to indemnify and save harmless the Lessor against any charge, claim, expense, loss or liability on the account of any accident (unless resulting from the Lessor's sole negligence) in connection with the operation, use, condition, possession or storage of such Unit resulting in damage to property or injury or death to any person. The indemnities contained in this paragraph shall survive payment or performance of all other obligations under this Lease or the termination of this Lease.

The Lessee agrees to prepare and deliver to the Lessor within a reasonable time prior to the required date of filing (or,

to the extent permissible, file on behalf of the Lessor) any and all mandatory reports of which the Lessee has actual knowledge, except income tax reports, to be filed by the Lessor, with any Federal, state or other regulatory authority by reason of the ownership by the owner of the Units or by the Lessor's leasing of the Units to the Lessee. The Lessor shall notify the Lessee of any such reports of which the Lessor has actual knowledge.

8. Liens. Lessee will not directly or indirectly create, incur, assume or suffer to exist any lien on or with respect to the Units, any Unit or any part thereof, Lessor's title thereto, or any interest therein, except (i) any lien resulting from an independent act of or claim against Lessor which does not result from, arise out of, or relate to the manufacture, acquisition, ownership or leasing of the Units or this lease or any Lease Supplement or any Event of Default, (ii) liens for taxes either not yet delinquent or being contested by Lessee in good faith by appropriate proceedings and where, in Lessor's (and in any assignee of Lessor's) opinion, there is no danger of the sale, forfeiture or loss of the Units or any part or item thereof, and (iii) materialmen's, mechanics', workmen's, repairmen's, employees' storage or other like liens arising in the ordinary course of business, which are not delinquent or are being contested by Lessee in good faith by appropriate proceedings and where, in Lessor's (and in any assignee of Lessor's) opinion, there is no danger of the sale, forfeiture or loss of the Units, or any part thereof. Lessee, at its own expense, will promptly pay, satisfy and otherwise take such actions as may be necessary to keep the Units free and clear of, and to duly discharge or eliminate or bond in a manner satisfactory to Lessor and any assignee of Lessor, any such lien not excepted above if the same shall arise at any time. Lessee will notify Lessor and any assignee of Lessor in writing promptly upon becoming aware of any tax or other lien (other than any lien excepted above) that shall attach to the Units or any Unit, and of the full particulars thereof.

9. Return of the Units Upon Expiration of Term or Termination of Lease. As soon as practicable on or after the expiration of the term or termination of this Lease with respect to any Unit, the Lessee will, at its own cost, expense, and risk, at the request of the Lessor, transport and deliver possession of such Unit(s), to any reasonable Kansas City Southern Railway Company interchange point as reasonably directed by Lessor. The condition of the Units upon such return shall be as required, pursuant to Paragraph 8 hereof.

The assembling, delivery and transporting of the Units as provided in this Paragraph 9 are of the essence of this Lease, and upon application to any court of equity having jurisdiction in the premises, the Lessor shall be entitled to a decree against the Lessee requiring specific performance of the covenants of the Lessee so to assemble, deliver and transport the Units. If the

Lessor shall elect to abandon any Unit which has suffered a Casualty Occurrence or which after the expiration of this Lease the Lessor shall have deemed to have suffered a Casualty Occurrence prior to the expiration of the term of this Lease, it may deliver written notice to such effect to the Lessee and Lessee shall thereupon assume, and hold the Lessor harmless from all liability arising in respect of any responsibility of ownership thereof.

10. Default. If, during the continuance of this Lease, one or more of the following events (hereinafter sometimes called "Events of Default") shall occur if:

(a) default shall be made in the payment of any part of the rental provided in Paragraph 2 hereof except as excused or abated as set out herein or as may be otherwise mutually agreed to, and such default shall continue for ten (10) days after written notice is sent to Lessee;

(b) the Lessee shall make or permit any assignment or transfer of this Lease or of possession of the Units, or any thereof, except as provided in Paragraph 14 hereof and such is not cured or agreement reached as to the action necessary to cure within ten (10) days after written notice is sent to Lessee;

(c) default shall be made in the material failure to observe or perform any other of the material covenants, conditions and agreements on the part of the Lessee contained herein and such default shall continue for thirty (30) days after written notice from the Lessor to the Lessee specifying the default and demanding the same to be remedied;

(d) any proceedings shall be commenced by or against the Lessee for any relief under any bankruptcy or insolvency laws, or laws relating to the relief of debtors, readjustments of indebtedness, reorganizations, arrangements, compositions or extension (other than a law which does not permit any readjustment of the obligations of the Lessee hereunder), and all the obligations of the Lessee under this Lease shall not have been duly assumed in writing, pursuant to a court order or decreed, by a trustee or trustees appointed for the Lessee or for the property of the Lessee in connection with any such proceedings in such manner that the status of such shall be the same as expense of trustees, within thirty (30) days after such appointment, if any, or sixty (60) days after such

proceedings shall have been commenced, whichever shall be earlier;

(e) any material representation made by the Lessee herein or in any certificate or other instrument delivered under or pursuant to any provision hereof shall prove to have been false or incorrect in any material respect on the date as of which made;

then, in any such case, the Lessor, at its option may:

(i) proceed by appropriate court action or actions either at law or in equity, to enforce performance by the Lessee of the applicable covenants of this Lease or to recover damages for the breach thereof; or

(ii) by notice in writing to the Lessee terminate this Lease, whereupon all rights of the Lessee to the use of the Units shall absolutely cease and determine as though this Lease had never been made, but the Lessee shall remain liable as herein provided; and thereupon, the Lessor may in a reasonable manner and without damage to the property of the Lessee or injury to any person by its agents enter upon the premises of the Lessee or other premises where any of the Units may be and take possession of all or any of such Units and thenceforth hold, possess and enjoy the same free from any right of the Lessee, or its successors or assigns, to use the Units for any purposes whatever; but the Lessor shall, nevertheless, have a right to recover from the Lessee any and all amounts which under the terms of this Lease may be then due or which may have accrued to the date of such termination (computing the rental for any number of days less than a full rental period by multiplying the rental for such full rental period by a fraction of which the numerator is such number of days and the denominator is the total number of days in such full rental period) and also to recover forthwith from the Lessee (a) as representing actual loss incurred by the Lessor, damages for loss of the bargain and not as a penalty, a sum, with respect to each Unit which represents the then present value of all rentals for such Unit which would otherwise have accrued hereunder from the date of such termination to the end of the term of this Lease as to such Unit, such present value to be computed in each case on a basis of a — per annum discount, compounded annually from the respective dates upon which rentals would have been payable hereunder had

this Lease not been terminated, and (b) any damages and expenses, including reasonable attorneys' fees, in addition thereto if a court determines that Lessor shall have sustained same by reason of the breach of any covenant or covenants of this Lease other than for the payment of rental, including, reasonable expenses of resale or re-leasing (including incidental transportation costs incurred by Lessor). In connection with the damages set out in (a) and (b), Lessor shall have an affirmative duty to mitigate it's damages and Lessee shall be entitled to a reduction or set off in the amount of the damages set out in (a) and (b) as a result of any resale, re-lease or other activities performed to sustain its duty to mitigate.

The remedies in this Lease provided in favor of the Lessor shall not be deemed exclusive, but shall be cumulative, and shall be in addition to all other remedies in its favor existing at law or in equity. The Lessee hereby waives any mandatory requirements of law, now or hereafter in effect, which might limit or modify the remedies herein provided, to the extent that such waiver is permitted by law. The Lessee hereby waives any and all existing or future claims to any offset against the rental payments due hereunder, and agrees to make rental payments regardless of any offset or claim which may be asserted by the Lessee or on its behalf.

The failure of the Lessor to exercise the rights granted it hereunder upon any occurrence of any of the contingencies set forth herein shall not constitute a waiver of any such right upon the continuation or recurrence of any such contingencies or similar contingencies.

11. Return of Units Upon Default. If this Lease shall terminate pursuant to Paragraph 11 hereof, the Lessee shall forthwith deliver possession of the Units to the Lessor. The Lessee shall transport such Units, at Lessee's expense and risk, to any reasonable Kansas City Southern Railway Company interchange point as reasonably directed by Lessor. The condition of the Units upon such return shall be as required pursuant to Paragraph 7 hereof.

Without in any way limiting the obligation of the Lessee under the foregoing provisions of this Paragraph 11, the Lessee hereby irrevocably appoints the Lessor as the agent and attorney of the Lessee, with full power and authority, at any time while the Lessee is obligated to deliver possession of any Unit to the Lessor, to demand and take possession of such Unit in the name and on behalf of the Lessee from whomsoever shall be at the time in possession of such Unit. In connection therewith Lessee will supply Lessor with such documents as Lessor may reasonably request.

12. Force Majeure. Neither party to this Lease shall be liable for nonperformance or delay in performance hereunder to the extent caused by unforeseen acts of God, government restraint, acts of the public enemy, civil commotion, strikes, nuclear or other disasters, labor disputes, labor or material shortage, fire, explosion, flood or breakdown of or damage to plant, equipment or facilities (any of such events herein called "**Force Majeure**"). If affected by Force Majeure, the party so affected will give notice to the other party as promptly as practicable, but no later than five (5) business days, of the nature and expected duration of such Force Majeure. If, because of Force Majeure, either party hereto is prevented from carrying out any of its obligations under this Lease, then the obligations of such party, except for obligations of payment of Lease Rentals by the Lessee as set forth in Paragraph 2, shall be suspended to the extent made necessary by such Force Majeure and the Lease Term and the obligations of both parties, except for payment of Lease Rentals, shall be extended for a period equivalent to the duration of the Force Majeure. The party affected shall exercise all reasonable efforts to eliminate the effect of such Force Majeure as promptly as possible.

13. Assignment; Possession and Use. Conditioned upon the Lessee performing all of the terms, covenants, and conditions of this Lease, the Lessor, its successors and assigns will not disturb the Lessee's peaceable and quiet possession and use of the Units during the term of this Lease, provided, that no Event of Default has occurred and is continuing.

This Lease shall be assignable in whole or in part by the Lessor without the consent of the Lessee, but the Lessee shall be under no obligation to any assignee of the Lessor except upon written notice of such assignment from the Lessor. All the rights of the Lessor hereunder (including but not limited to the rights under Paragraphs 5, 7 and 10) shall inure to the benefit of the Lessor's assigns. Whenever the term Lessor is used in this Lease it shall apply and refer to each assignee of the Lessor. In conjunction with any assignment of this Lease by Lessor, Lessee hereby agrees to provide any reasonable documentation requested by Lessor.

So long as the Lessee shall not be in default under this Lease, the Lessee may without any prior consent of the Lessor sublease any one or more of the Units or assign this Lease to any one or more of the Lessee's affiliates, or with the prior written consent of the Lessor sublease the Units to third parties; provided, that (i) such sublease or assignment shall provide that the subject Units shall be operated and maintained in accordance with the terms hereof; (ii) the Lessee shall provide the Lessor with ten (10) days advance notice of any such sublease or assignment and a copy of such sublease or assignment; (iii) such sublease shall be subject and subordinate to the terms and provisions of

this lease and the interests of the Lessor; and (iv) no such sublease or assignment shall relieve Lessee of its obligations hereunder, which shall remain those of a principal and not a surety.

The Lessee represents and warrants that: (i) Lessee (or any assignee or sublessee) will not at any time during the term of this Lease use or fail to use any Unit, in such a way as to disqualify it as "Section 38 property" within the meaning of Section 48 of the United States Internal Revenue Code; (ii) Lessee (or any assignee or sublessee) will at all times during the term of this Lease use each Unit in such a way that for federal income tax purposes, all amounts includable in the gross income of Lessor with respect to each Unit and all deductions allowable to Lessor with respect to each Unit will be treated as derived from, or allowable to, sources within the United States; and (iii) Lessee will maintain sufficient records to verify such use, which records will be furnished to Lessor within thirty (30) days after receipt of a written demand therefor.

So long as the Lessee shall not be in default under this Lease, the Lessee shall be entitled to the possession and use of the Units in accordance with the terms of this Lease, but the Lessee shall not assign or transfer (except as otherwise permitted by this Paragraph 13) or encumber its leasehold interest under this Lease in the Units; and, in addition, the Lessee, at its own expense, will as soon as possible cause to be duly discharged any lien, charge or other encumbrance (other than an encumbrance resulting from claims against the Lessor not related to the ownership of the Units) which may at any time be imposed on or with respect to any Unit or the interest of the Lessor, or the Lessee therein. The Lessee shall not, without the prior written consent of the Lessor, part with the possession or control of, or suffer or allow to pass out of its possession or control, any of the Units, except to the extent permitted by the provision of the next succeeding paragraph hereof.

Nothing in this Paragraph 13 shall be deemed to restrict the right of the Lessee to assign or transfer its leasehold interest under this Lease in the Units or possession of the Units to any corporation (which shall have duly assumed the obligations hereunder of the Lessee) into or with which the Lessee shall have become merged or consolidated or which shall have acquired the property of the Lessee as an entirety or substantially as an entirety; provided, however, (i) that such assignee or transferee will not, upon the effectiveness of such merger, consolidation or acquisition be in default under any provision of this Lease, (ii) such assignee or transferee shall be of a character so that after giving effect to such merger, consolidation or acquisition, the ability of the assignee or transferee to perform the obligations of the Lessee hereunder shall not, in the reasonable opinion of the Lessor, be adversely affected; and (iii) such assignee or

transferee shall execute an assumption agreement expressly assuming all of the obligations of the Lessee hereunder.

In connection with any sublease or assignment by Lessee under this Paragraph 13, whether or not Lessee is required to obtain the consent of the Lessor to any such transaction, Lessee agrees, at its expense, to cause any such assignment or sublease to be duly filed and recorded with the Interstate Commerce Commission in accordance with the 49 U.S.C. 11303 in order to protect the interest of the Lessor in and to the Units under this Lease.

The Lessee agrees that during the term of this Lease, the Lessee will not assign any Unit to service involving the operation and maintenance thereof outside the United States of America except that during such term of any Unit outside the United States of America will be limited to incidental and temporary use in Canada.

14. Opinions of Counsel. When requested by Lessor's lender, after the execution and delivery of this lease, the Lessee will deliver to the Lessor and the lender the written opinion of counsel for the Lessee, in scope and substance reasonably satisfactory to the Lessor and its counsel, to the effect that:

(a) the Lessee is a corporation legally incorporated and validly existing, in good standing, under the laws of its jurisdiction of incorporation, with adequate corporate power to enter into this Lease;

(b) this Lease has been duly authorized, executed and delivered by the Lessee and constitutes a valid, legal and binding agreement, enforceable in accordance with its terms;

(c) the execution and performance of this lease will not contravene or breach or create a material default under any legal, organizational or contractual obligation binding upon the Lessee;

(d) this Lease has been duly filed and recorded with the Interstate Commerce Commission under 49 U.S.C. 11303; no other filing or recording is necessary to protect in the United States of America the right, title and interest of the Lessor in and to the Units.

At the same time as delivery of the foregoing opinion of counsel for the Lessee, the Lessor will deliver to the Lessee the written opinion of counsel for the Lessor, in scope and substance reasonably satisfactory to the Lessee and its counsel, substantial-

ly to the effect set forth in subparagraphs (a) through (c) above with respect to the Lessor.

15. Notices. Any notice required or permitted to be given by either party hereto to the other shall be deemed to have been given when deposited in the United States certified mails, first-class postage prepaid, addressed as follows:

If to the Lessor: Helm Financial Corporation  
One Embarcadero Center  
Suite 3500  
San Francisco, CA 94111  
ATTN: President

If to the Lessee: Drummond Coal Sales, Inc.  
532 Beacon Parkway West  
Suite 200  
Birmingham, AL 35209  
ATTN: Director, Transportation

or addressed to either party at such other address as such party shall hereafter furnish to the other party in writing.

16. Severability. Any provision of this Lease which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition of unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

17. Effect and Modification of Lease. This Lease exclusively and completely states the rights of the Lessor and the Lessee with respect to the leasing of the Units and supersedes all other agreements, oral or written, with respect thereto. No variation or modification of this Lease and no waiver of any of its provisions or conditions shall be valid unless in writing and signed by duly authorized signatories for the Lessor and the Lessee.

18. Successors and Assigns. This Lease will bind and inure to the benefit of the respective successors and permitted assigns of the parties hereto.

19. Execution. This Lease, and any lease supplemental hereto, may be executed in several counterparts, each of which so executed shall be deemed to be an original, and in each case such counterparts together shall constitute but one and the same instrument.

20. Law Governing. This Lease shall be construed, and all questions concerning its performance and the rights and

remedies of the parties hereunder shall be determined, in accordance with the laws of California; provided, however, that the parties shall be entitled to all rights conferred by 49 U.S.C. 11303.

21. Paragraph Headings. The headings appearing at the commencement of certain paragraphs or subparagraphs herein are for convenience only, and the content or body of the paragraph(s) or subparagraph(s) thereunder shall control. The numbering system is also included for convenience only.

22. Confidentiality. The parties shall keep confidential the terms and conditions of this Lease. Neither party shall disclose the terms and conditions of this Lease to a third party, excluding any parent, affiliate, subsidiary company, potential buyers of the cars, or Lessor's lender, without the written permission of the other party or unless readily ascertainable from public information or public sources requested by regulatory commissions, subpoenaed by court or governmental agencies, or otherwise required by law to be disclosed. The existence of this Lease may be disclosed without such consent.

23. Attorney's Fees. In the event that a dispute arises hereunder which is resolved by a competent court jurisdiction, negotiated between the parties, or some other commercially acceptable dispute resolution procedure, the prevailing party (the party recovering damages) shall be entitled to recover it's reasonable attorneys' fees and costs from the other party herein. In the event such dispute is resolved by negotiation, between the parties, such Attorneys' fees and costs shall be mutually agreed to as part of such resolution.

IN WITNESS WHEREOF, the Lessor and the Lessee, each pursuant to due authority, have caused these presents to be signed in their respective names as of the date first above written.

HELM FINANCIAL CORPORATION

By 

Title President

DRUMMOND COAL SALES, INC.

By 

 Title VP So. America

8/4/89

STATE OF CALIFORNIA )  
 ) §  
COUNTY OF SAN FRANCISCO )

On this 7<sup>th</sup> day of SEPTEMBER, 1989, before me personally appeared RICHARD C KIRCHNER, to me personally known, who, being by me duly sworn, says that he is PRESIDENT of HELM FINANCIAL CORPORATION, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

Lynda A Herskovitz  
Notary Public

My Commission Expires: July 16, 1993

[Notarial Seal]



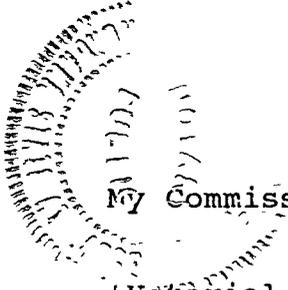
STATE OF ALABAMA )  
 ) §  
COUNTY OF JEFFERSON )

On this 15<sup>th</sup> day of AUGUST, 1989, before me personally appears RANDALL A. TISDALE, to me personally known, who being by me duly sworn says that he is a VP SO & Admin of DRUMMOND COAL SALES, INC., that said instrument was signed and sealed on behalf of said corporation by authority of its President and Directors and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

David Lytle  
Notary Public

My Commission Expires: January 11, 1990

[Notarial Seal]



ANNEX A

to

Lease of Railroad Equipment

Dated as of August 15, 1989

Equipment Description

One hundred (100) 4,000 cubic foot, 100-ton capacity, roller bearing, three pocket, open top coal hopper railcars built by Thrall in 1986.

Equipment Numbers

KCS	222003	KCS	222330	KCS	222593	KCS	222844
	222011		222348		222607		222852
	222038		222356		222615		222861
	222046		222364		222623		222879
	222062		222372		222631		222887
	222071		222381		222640		222895
	222089		222399		222658		222909
	222097		222411		222666		222917
	222101		222429		222674		222925
	222127		222437		222682		222933
	222135		222445		222691		222941
	222143		222453		222704		222950
	222151		222461		222712		222968
	222160		222470		222721		222976
	222178		222488		222739		222984
	222186		222496		222747		222992
	222208		222500		222755		223018
	222224		222518		222763		223026
	222241		222526		222771		223034
	222267		222534		222780		223042
	222275		222542		222798		223051
	222283		222551		222801		223069
	222291		222569		222810		223077
	222313		222577		222828		223085
	222321		222585		222836		223093

ANNEX B

CERTIFICATE OF ACCEPTANCE

The undersigned, a duly authorized representative of Drummond Coal Sales, Inc. (the "Lessee"), does hereby certify that he has caused to be inspected and, on the date set out below, has accepted on behalf of the Lessee the following described Units of equipment, which Units are in good order, condition and repair (except for latent defects) and conform in all respects to the terms, provisions, requirements and standards of the certain Lease of Railroad Equipment dated as of August 15, 1989 between Helm Financial Corporation and Lessee.

<u>Equipment Description</u>	<u>No. of Cars</u>	<u>Car Number</u>	<u>Date Accepted</u>
4,000 cubic foot, 100-ton capacity, roller bearing, three-pocket, open top, coal hopper railcars. Built by Thrall Car in 1986.	100		

\_\_\_\_\_  
Authorized Representative