WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD
62706

August 8, 1975

FILE NO. S-941

COUNTIES:
Power of County to Lease
Coal or Mineral Rights

-

Honorable Philip C. Quindry
State's Attorney
Edwards County
Courthouse
Albion, Illinois 62806

Dear Mr. Quindry:

I have your letter wherein you ask:

"Can the County Board of Edwards County execute a Coal Lease for a term of 20 years and as long thereafter as mining operations are being conducted in the general mining area, pursuant to the provisions of Chapter 34, paragraph 303 of the Illinois Revised Statutes?"

You also ask:

"May the County Road Commissioners of Edwards County lease real estate for underground development based on the identical above facts, and execute a valid Coal Lease?"

At the outset, it must be noted that public property in Illinois cannot be used for private purposes. The bases of this established principle are Yakley v. Johnson, 295 Ill. App. 77, and section 1(a) of article VIII of the Illinois Constitution of 1970 which provides that "Public funds, property or credit shall be used only for public purposes". This principle has been reaffirmed by numerous opinions of the Attorney General. See, 1949 Ill. Att'y. Gen. Op. 251; 1964 Ill. Att'y. Gen. Op. 214; 1965 Ill. Att'y. Gen. Op. 176; Ill. Att'y. Gen. Op. S-11, March 4, 1969; Ill. Att'y. Gen. Op. S-825, October 31, 1974; Ill. Att'y. Gen. Op. NP-844, November 27, 1974.

It has been repeatedly stated that, although section 22 of "AN ACT to revise the law in relation to counties" (Ill. Rev. Stat. 1973, ch. 34, par. 303) authorizes a county to lease, that lease can be only for a public purpose regardless of the fairness of the transaction or the adequacy of the consideration. Since a lease of mineral rights to a private company would almost certainly not constitute use for a public purpose, it would appear that the lease, if a

conventional one, would not be permissible. A mineral lease, however, is not a conventional one, particularly when cast in the form which you contemplate.

It is my opinion that a coal lease for "20 years and as long thereafter as mining operations are being conducted in the general mining area" constitutes a sale in place of the coal and is, therefore, a permissible action by the county under its power to sell or convey the property of the county. (Ill. Rev. Stat. 1973, ch. 34, par. 303.) A mineral lease for coal, unlike one for oil and gas, actually involves the transfer of a property interest in the minerals. (Consolidated Coal Co. v. Peers, 150 Ill. 344, Conover v. Parker, 305 Ill. 292.) In addition, mineral rights involving solid minerals can be severed from the surface rights and conveyed separately. Fowler v. Marion and Pittsburg Coal Co., 315 Ill. 312.

Among the early cases there was some confusion as to whether a mineral lease actually transferred an interest in the minerals or was merely a license to go

onto the land of another for the purpose of removing them with no property interest arising until the coal or mineral was severed from the land. (Bannon v. Mitchell, 6 Ill. App. 17.) This question was resolved in Pennsylvania by Caldwell v. Fulton, 31 Pa. 475 (1858), which held that a lease of the right or privilege to take away coal was a grant of an interest in the land and not a mere license to take away the coal. The Caldwell case was followed by the Supreme Court of Illinois in Consolidated Coal Company v. Peers, 150 Ill. 344.

The nature of the interest granted by a mineral lease, however, is dependent upon the actual wording of the lease agreement. For example, a lease strictly limited to a term of years or terminable at will would give one an estate less than a freehold and would be construed in the same manner as a conventional lease. (Fowler v. Marion and Pittsburg Coal Co., 315 Ill. 312.) An unlimited right to mine the coal (such as "until exhausted"), however, even though subject to being forfeited on certain contingencies,

has been held to be a grant of a freehold interest. (Fowler v. Marion, 315 Ill. 312.) The court in the Fowler case, for example, held that a mining lease allowing the lessee to enter and mine coal until the coal was exhausted constituted a conveyance of a freehold interest.

Illinois authority dealing with coal leases has been rather limited with more litigation in the very different field of oil and gas leases. A helpful series of cases, however, has sprung from Caldwell v. Fulton, 31 Pa. 475 (1958), in the Supreme Court of Pennsylvania. Two important cases in this series are Smith v. Glen Alden Coal Co., 347 Pa. 290, 32 A. 2d 227 (1943) and In re Essex Coal Co., 411 Pa. 618, 192 A. 2d 675 (1963).

In the Smith case the court held that a lease of coal in place, which provided for a term extending "until such time as all the available merchantable coal shall have been mined and removed", was a sale of an estate in fee simple leaving the lessor with only personalty interests consisting of the royalties to be paid under the lease and a "possibility of reverter". The court stated that the "possibility of reverter" was not an estate present or

future but a possibility of having a future estate in the coal.

The facts of the Essex case are even closer to those in the situation you present as the agreement therein provided that the term of the lease would be for ten years or until the exhaustion of the coal if that occurred first. The court in Essex held that a lease of coal in place with the right to remove until exhaustion constitutes a sale of an estate in fee simple and that the remaining royalty interest of the lessor constitutes personalty. The court further stated that a grant to a lessee of exclusive and complete dominion over coal by a mining agreement constitutes a sale in place of the coal and vests a fee in the lessee and that the lessor becomes revested with his former estate in the remaining coal upon the termination of a lease of coal land for a fixed term. On the question of the characterization of such agreement as a lease, the court stated: "The fact that an instrument is called a 'lease' is not material, it is the character of the transaction that is controlling: * * * ." In re Essex Coal Co., 411 Pa. 618, 192 A. 2d 675, at 678 (1963).

As I stated earlier, there are no Illinois cases directly on point in this matter. In regard to an oil and gas lease, however, the court has held that a lease of unlimited duration giving one the right to enter onto the land to remove all the oil is a freehold estate, and, thus, a sale of a portion of the land. (Poe v. Ulrey, 233 Ill. 56; Ohio Oil Co. v. Daughetee, 240 Ill. 361.) Had it been dealing with coal, the court could have conceivably held such lease to be a sale of the coal. Oil, however, because of its fugacious nature, is not amenable to separate ownership and, thus, is not regarded as a separate estate in these cases. Conover v. Parker, 305 Ill. 292.

The cases finding a sale in place of the coal have included situations where the term of the lease was "until exhaustion of the coal" or "for an unlimited duration". It is my opinion that a lease for "20 years and as long thereafter as mining operations are being conducted in the general mining area" is substantially equivalent to a lease extending until the exhaustion of the coal and is, thus, a sale of the coal in place. By its terms such a lease could have substantially unlimited duration terminat-

ing only when the coal in the general mining area is exhausted and the mines of the lessee are abandoned. A possibility that the lessee will be able to exhaust all of the coal and not a guarantee that he will or will be able to exhaust it is the crucial factor rendering the coal lease a sale of the coal in place. Because the lease is in actuality a sale of the coal belonging to the county, it is not necessary that a public purpose be shown before leasing as a county is authorized to sell or convey its property under section 22 of "AN ACT to revise the law in relation to counties". Ill. Rev. Stat. 1973, ch. 34, par. 303.

Therefore, the county has two options. Firstly, it can convey, by mineral deed, the coal or mineral rights to the land in question. Secondly, it can lease the coal in the terms you contemplate which would itself constitute a sale in place of the coal in question. In both cases the consideration received must be fair and adequate.

It is, therefore, my opinion that the county may lease its mineral rights if the lease agreement is cast in

the form which you have presented to me. For clarification purposes, however, you should add language to the lease specifically authorizing the lessee to mine the coal until exhaustion as this would bring it more clearly into line with the agreements discussed in the cited cases. Since the lease is in actuality a sale of the coal, there is no problem with an agreement extending beyond the term of the present county board. The reasoning of this opinion also applies to your question regarding the execution of a coal lease by the county road commissioners.

Very truly yours,

A T T O R N E Y G E N E R A L