

OPINION NO. 74-081

Syllabus:

1. The director of natural resources has authority under R.C. 1505.07 to issue an exclusive mineral lease for a portion of the bed of Lake Erie for any reasonable term of years even though actual extraction of the minerals may not be contemplated, if he determines that the issuance of such lease does not violate the public trust doctrine under which the soil and its contents under the state's territorial waters of Lake Erie are held in trust by the State of Ohio for the people of Ohio.

2. An exclusive mineral lease to all minerals in a portion of the bed of Lake Erie issued by the director of natural resources pursuant to R.C. 1505.07, excepting the mineral rights to take and remove oil and gas, is a valid lease and is not rendered illusory by the express reservation of the rights to take and remove the oil and gas therefrom.

To: William B. Nye, Director, Dept. Natural Resources, Columbus, Ohio
By: William J. Brown, Attorney General, October 1, 1974

I have before me your request for my opinion on questions which may be stated as follows:

"1. Would the issuance of a forty-six year exclusive mineral lease by the director of natural resources pursuant to R.C. 1505.07 to all minerals beneath a 2.9 square mile area of Lake Erie violate the public trust doctrine if actual extraction of the minerals is not contemplated by the lease?

"2. Would an exclusive mineral lease to all the minerals in a portion of the bed of Lake Erie be illusory if the lease expressly prohibits the extraction of oil and gas from said portion pursuant to R.C. 1505.07?

The public trust doctrine in Ohio was established in State v. Cleveland & Pittsburgh R.R.Co., 94 Ohio St. 61 (1916), the syllabus of which reads in part as follows:

"The ownership of the waters of Lake Erie, and the land underneath them within the state is a matter of public concern. The trust with which they are held is governmental, and the state, as trustee for the people, cannot, by acquiescence or otherwise, abandon the trust property or permit a diversion of it to private uses different from the object for which the trust was created. The littoral owner is charged with knowledge that nothing can be done

by him that will destroy the rights of the public in the trust estate."

(Emphasis added.)

The General Assembly has codified much of the above holding in R.C. 123.03 which reads in part as follows:

"It is hereby declared that the waters of Lake Erie consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with the soil beneath and their contents, do now and have always, since the organization of the State of Ohio, belonged to the State as proprietor in trust for the people of the state, for the public uses to which it may be adapted, subject to the powers of the United States government, to the public rights of navigation, water commerce and fishery, and further subject to the property rights of littoral owners, including the right to make reasonable use of the waters in front of or flowing past their lands. * * *

(Emphasis added.)

* * * * *

See also Opinion No. 73-033, Opinions of the Attorney General for 1973.

In State v. City of Cleveland, 150 Ohio St. 303 (1950), the court held that the State of Ohio, as trustee of the subaqueous soil of Lake Erie for the people of Ohio, could, by proper legislative action, carry out its specific duty of protecting the trust estate and regulating its use. One of the subsequent legislative acts designed to protect and regulate the subaqueous soil of Lake Erie pertains to the extraction of minerals and other substances. R.C. 1505.07 provides as follows:

"Subject to the limitation set forth in section 1505.08 of the Revised Code, the director of natural resources, with the approval of the director of environmental protection, the attorney general, and the governor, may issue permits and make leases to parties making application, for permission to take and remove sand, gravel, stone, and other minerals or other substances from and under the bed of Lake Erie, either upon a royalty or rental basis, as he deems best for the state. No permit shall be issued or lease made to take or remove gas or oil until July 1, 1978. Such permits shall be issued for terms of not less than one year nor more than ten years, and such leases shall be for a term of years or until the economic extraction of the mineral or other substance covered thereby has been completed. Such taking and removal shall be within certain fixed boundaries that do not conflict with the rights of littoral owners. Upon request from the holder of such permit, it shall be cancelled, but in the case of any permit or lease, any equipment or buildings owned by the permittee or lessee shall be held as security by the director of natural resources for payment of all rentals or royalties due the state at the time of cancellation.

"No person shall remove sand, gravel, stone, or other minerals or other substances from and under the bed of Lake Erie without first obtaining a permit or lease therefor from the director."

(Emphasis added.)

The underlying purpose of R.C. 1505.07 is to regulate the extraction of minerals and other substances from the bed and the sub-soil of Lake Erie so as to protect and benefit the public trust. It grants to the director of natural resources, subject to the approval of the director of environmental protection, the attorney general, and the governor, discretionary power to enter into leases with, and issue permits to, parties making application for permission to remove minerals and other substances from the bed of Lake Erie. No such lease or permit for the removal of gas or oil shall be granted prior to July 1, 1978.

There is no express statutory requirement that any minerals or other substances actually be removed or that a covenant to do so be included in the lease. It should be noted that a mining lease under R.C. 1505.07 differs from a lease of the water and the bed of the Lake to a littoral owner under R.C. 123.031. Such a lease must be sought from the Director of Administrative Services and it must provide for a reservation of all mineral rights to the State. R.C. 123.031(C). See Opinion No. 73-033, Opinions of the Attorney General for 1973.

When the consideration for a mining lease is an agreement to pay royalties on the product mined, there is an implied intention of the parties that the lease is executed for the mutual profit of the lessor and lessee, and therefore that the lessee will use ordinary diligence in working the mine and removing the minerals covered by the lease. Boliver Sportsmen's Club v. Whitmer, 22 Ohio Misc. 209, 725 (1969). There is, however, a difference between leases reserving a royalty in the product of the mine, and leases for which rent is paid. It is generally held that there is no implied obligation on the part of the lessee to develop the premises where there is a substantial payment of rent, as opposed to royalties. See Frieron v. International Agricultural Corp., 24 Tenn. App. 616, 148 S.W. 2d 27 (1940), Pabst v. Roxanna Petroleum Corp. 51 S.W. 2d 802 (Tex. Civ. App. 1932), aff'd 125 Tex. 52, 80 S.W. 2d 956 (1935). In such a case, there is no reason for an implied covenant to mine the minerals with reasonable diligence, because the consideration does not depend upon the extraction of minerals. Therefore, an exclusive right to minerals can be granted, even though no extraction is contemplated, if the lease is for a fixed rental amount rather than for royalties.

R.C. 1505.07, while providing that a lease may be for a term of years, does not specifically limit its duration. Where private parties are contracting, absent any statutory inhibition, leases may be made for any length of time the parties elect. See Columbia Ry. Gas & Electric Co. v. Jones, 119 S.C. 480, 112 S.E. 267 (1922). However, when the state is lessor, the public trust doctrine must also be considered. If you find that the public trust would not be violated, you may enter into a lease of the type in question, because such a lease may be in the furtherance of the public good. The people of Ohio will benefit from the rental paid to the State. In addition, if the minerals are not extracted, they will remain intact, and can be mined after the expiration of the rental period.

Whether the specific proposed lease will benefit or detract from the public good is largely a question of fact, which your department must determine in the first instance. Assuming the rental payments will be in a substantial amount, and that the delay in mining the minerals in question will not impose a hardship on the people of Ohio, a lease of this type would be acceptable under the public trust doctrine.

Your second question is whether an exclusive mineral lease in a portion of Lake Erie is rendered illusory by the express statutory prohibition in R.C. 1505.07 against the issuance of leases to extract oil and gas from the bed of Lake Erie until July 1, 1978. It is a general rule of mineral law that absent a specific agreement to the contrary, the lessee of a mineral lease has no right to remove any minerals or substances other than those specified in the lease agreement. See Wolfe v. Licking Gravel Co., 71 Ohio App. 172 (1943). It is well settled that petroleum and natural gas are minerals in the broadest sense of the term. See Kelley v. Ohio Oil Co., 57 Ohio St. 317 (1897), Detlor v. Holland, 57 Ohio St. 492 (1898), Northwestern Ohio Nat. Gas Co. v. Ullery, 68 Ohio St. 259 (1903). A lease covering only part of the minerals would not be illusory, because it would apply to certain minerals. Moreover, a lease of this type would not imply a lack of exclusive right to all minerals, because the state could not lease oil and gas rights to anyone until that date.

In specific answer to your question, it is my opinion and you are so advised that:

1. The director of natural resources has authority under R.C. 1505.07 to issue an exclusive mineral lease for a portion of the bed of Lake Erie for any reasonable term of years even though actual extraction of the minerals may not be contemplated, if he determines that the issuance of such lease does not violate the public trust doctrine under which the soil and its contents under the state's territorial waters of Lake Erie are held in trust by the State of Ohio for the people of Ohio.

2. An exclusive mineral lease to all minerals in a portion of the bed of Lake Erie issued by the director of natural resources pursuant to R.C. 1505.07, excepting the mineral rights to take and remove oil and gas, is a valid lease and is not rendered illusory by the express reservation of the rights to take and remove the oil and gas therefrom.