1210

CHIEF OF THE DIVISION OF FORESTRY MAY, WITH APPROVAL OF THE ATTORNEY GENERAL AND THE DIRECTOR OF NATURAL RESOURCES, ENTER INTO A LEASE FOR REMOVAL OF OIL AND GAS BENEATH STATE FOREST LANDS—§1503.05, R.C.

SYLLABUS:

Under the provisions of Section 1503.05, Revised Code, the chief of the division of forestry may, with the approval of the attorney general and the director of natural resources, enter into a lease for the removal of oil and gas beneath state forest lands; and the chief is not required to offer such removal rights by competitive bidding procedure before executing such a lease.

Columbus, Ohio, March 25, 1960

Honorable Herbert B. Eagon, Director,
Department of Natural Resources,
Columbus, Ohio

Dear Sir:

I have before me your communication requesting my opinion and reading as follows:

> "The Division of Forestry, Department of Natural Resources has received a request from the Ohio Fuel Gas Company to lease for oil and gas purposes all of the property known as the Shawnee State Forest and located in Athens and Scioto Counties. The forest covers an acreage in excess of 43,699 acres. The Ohio Fuel Gas Company has offered to lease this land for an annual rental of 50¢ per acre, payable quarterly, and a royalty equal to one-eighth of the gas marketed at 20¢ per thousand cubic feet.
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> "Section 1503.06 of the Revised Code provides in pertinent part as follows:
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> > 'The Chief of the Division of Forestry may sell timber and other forest products from the State forest whenever he deems such sale desirable, and with the approval of the Attorney General and the Director of Natural Resources may sell portions of the State Forest lands when such sale is advantageous to the State. The Chief may grant easements and leases on portions of the State Forest lands under such

terms as are advantageous to the State, *and he may grant mineral rights on a royalty basis* with the approval of the Attorney General and the Director.' * * *

"In Opinion No. 3099, Opinion of the Attorney General for 1953, it was held that the provisions of Section 1507.03 of the Revised Code, as it then existed, were not sufficient to authorize the Chief of the Division of Shore Erosion to grant permits for the removal of oil or gas deposits from that portion of Lake Erie, lying within the boundaries of the State of Ohio. The language of Section 1507.03 was substantially similar to the language which appears in the Section of the above quoted, referring to the Division of Forestry. In addition to the foregoing, sometime ago this Department requested the authority to enter into a lease for the removal of salt from beneath the Headlands Beach State Park. In Informal Opinion No. 92, the then Attorney General held this Department did not have such authority.

"In light of the opinions we are uncertain as to whether or not the Ohio Division of Forestry has the legal authority to enter into a lease for the removal of oil and gas beneath forestry property.

"We should very much appreciate receiving your opinion as to whether or not the language used in the above quoted Section of the Revised Code, relating to the Division of Forestry is sufficient to authorize that division to enter into a lease for the removal of oil and gas, and also whether or not such a lease should be entered into by first offering the land in question for open bid."

Your attention is referred to 26 Ohio Jurisprudence (2d), page 6, Gas and Oil, Section 2:

"* * * It is well settled that *petroleum and natural gas are minerals in the broadest sense of the term,* and lands from which minerals, including petroleum oil and natural gas, are obtained by process of mining may, with propriety, be called 'mining lands.' But oil, it has been said, and still more strongly, gas, may be classed by themselves, if the analogy is not too fanciful, as minerals ferae naturae. Both are transitory and migratory in their nature. Accordingly, and although classed as minerals, petroleum and natural gas have peculiar attributes which distinguish them from solid minerals. On account of their migratory character, the rules governing ordinary minerals cannot be applied to them without qualifications." (Emphasis added)

In this same regard, your attention is invited to 58 Corpus Juris Secundum, page 17, Mines and Minerals, Section 2, reading as follows:

"The term 'mineral' is susceptible of different meanings. In its broad and scientific sense it is a natural inorganic substance having a definite chemical composition. In its ordinary and popular meaning it is an inorganic substance found in the earth and obtained by mining or other process for bringing it to the surface for purposes of profit."

At page 22:

"The term 'mineral' ordinarily embraces oil or petroleum and natural gas.

"Unless it appears in a particular case that it is used in a more restricted sense, the term 'mineral' ordinarily embraces oil or petroleum and natural gas. These substances, however, are minerals with peculiar attributes, not common to other minerals because of the fugitive nature or vagrant habits, and may be classed by themselves as minerals forae naturae or fugacious mineral."

One of the cases cited as authority for the foregoing is the Ohio case of *The Fourth & Central Trust Company vs. Wooley,* et al, 31 Ohio App., 259. Headnote 1 of such case reads as follows:

"Oil, before its extraction from land, is a mineral, and part of the land."

The early case of *J. T. Jones vs. W. T. Wood,* 1 O.N.P., 155 (1894) held that under the tax statutes, petroleum and natural gas were minerals, but indicated a contrary view had a conveyance or reservation been involved. Most recent decisions by our Ohio Courts have adhered to the prevailing American authority, namely, that petroleum and natural gas do qualify as minerals in absence of language indicating a more restricted meaning or existence of unusual surrounding circumstances.

In this latter regard, attention is referred to the oft-quoted case of *Kelley vs. The Ohio Oil Company,* 57 Ohio St., 317. Headnote 1 of such case reads as follows:

"*Petroleum oil is a mineral,* and while it is in the earth, it forms a part of the realty; and when it reaches a well and is produced on the surface, it becomes personal property, and belongs to the owner of the well." (Emphasis added)

To the same general effect, is the case of *Detler et al, vs. Holland,* 57 Ohio St., 492. At page 504, the Court states as follows:

"The words 'other minerals' or 'other valuable minerals,' taken in their broadest sense, would include petroleum oil; but

> the question here is, did the parties intend to include such oil in the mining right? Taking all the terms of the conveyance in the light of the surrounding circumstances, and in view of the above rule of construction, and upon authority of the case of *Dunham & Short vs. Kirkpatrick,* 101 Pa. St., 36, we conclude that the title to the oil did not pass under said conveyance, but remained in the owner of the soil, and upon his death pass to his heirs."

You have referred to an opinion by one of my predecessors, being Opinion No. 3099, Opinions of the Attorney General for 1953, with reference to the authority of the Chief of the division of shore erosion under the provisions of Section 1507.03, Revised Code. It is significant that such section, at that time, contained peculiar, limited language with reference to issuance of permits "for permission to take and remove *sand, gravel, stone, minerals and other substances, from the bottom of Lake Erie.*" (Emphasis added) My predecessor, in such opinion, stated as follows:

> "It is true that authority is given in very general language to license the removal of 'mineral and other substance', and this expression is quite clearly susceptible, *standing alone,* of an interpretation which would include petroleum and gas." (Emphasis added)

Because of its use following the words "sand, gravel, stone," he properly concluded that 'minerals and other substances,' "must be deemed to be limited to the rocky sedimentary deposits usually associated with deposits of gravel and sand at or near the surface of the soil beneath the lake".

The opinion, in this instance, also revolved on the peculiar language "from the bottom of Lake Erie" whereas the gas and oil deposits existed beneath the bottom of said lake. In the instant case, Section 1503.05, Revised Code, does not designate any specific minerals, but specifies as a general category "Mineral rights," standing alone and without limitation. Such factor constitutes an important distinction, and permits the inclusion of gas and oil as minerals in the statute under consideration. Moreover, the General Assembly has recognized elsewhere that oil and gas are included in the mineral category. In this respect, attention is invited to Section 155.01, Revised Code, which provides as follows:

> "All sales and leases of public or other state lands, except canal lands other than reservoirs and lands appurtenant and adjacent to reservoirs, shall include all *oil, gas,* coal, *or other min-*

> *erals* on or under such lands, except lands specifically leased for such purposes separate and apart from surface leases, and all deeds for such lands executed and delivered by the state shall expressly reserve to the state all *gas, oil,* coal, *or other minerals* on or under such lands with *the right of entry in and upon said premises for the purpose of selling or leasing the same,* or prosecuting, developing, or operating the same." (Emphasis added)

You have also made reference to Informal Opinion No. 92, Opinions of the Attorney General for 1958, as being a possible limitation. Such opinion was rendered to your department, and you will recall the conclusion that salt, in that instance *did* qualify as a mineral, but the lack of authority to lease under Section 1501.01, Revised Code, was due to the absence of specific language which would include minerals. In fact the section under consideration (Section 1503.05, Revised Code) was cited as an example of an instance in which the General Assembly had granted such authority.

Accordingly, in specific answer to your inquiry, it is my opinion that the authority given in Section 1503.05, Revised Code, to "grant mineral rights on a royalty basis," without further limitation, includes gas and oil in such mineral category, and the division of forestry may execute a lease for the removal of same.

Further reference is made in your request as to any requirements for competitive bidding. Such a requirement is made in the instance of the director of public welfare under Section 5101.12, Revised Code. The general assembly has not seen fit to impose such requirement in this instance. In absence of such, the chief of the division of forestry, in the exercise of discretion, may require bidding, but is not required to do so.

Answering your specific questions, therefore, it is my opinion and you are advised that under the provisions of Section 1503.05, Revised Code, the chief of the division of forestry, may, with the approval of the attorney general and the director of natural resources, enter into a lease for the removal of oil and gas beneath state forest lands; and the chief is not required to offer such removal rights by competitive bidding procedure before executing such a lease.

Respectfully,
MARK MCELROY
Attorney General