

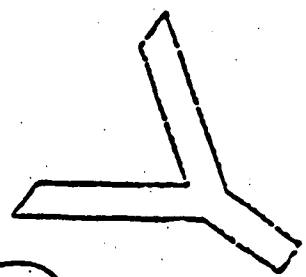


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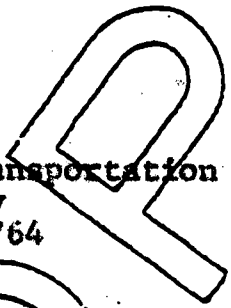
October 29, 1980

FILE NO. 80-039

STATE MATTERS:
Authority of Department of
Transportation to Enter into
Coal Mining Lease with
Respect to Land within Its
Jurisdiction

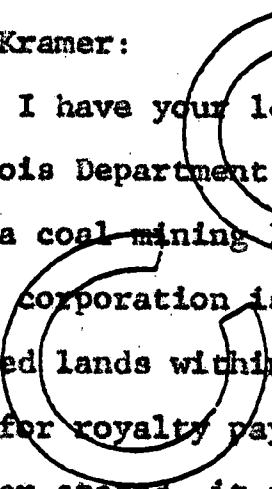


John D. Kramer, Director
Illinois Department of Transportation
2300 South Dirksen Parkway
Springfield, Illinois 62764



Dear Mr. Kramer:

I have your letter wherein you inquire whether the Illinois Department of Transportation has the authority to enter a coal mining lease with a private corporation under which the corporation is granted the right to mine under State-owned lands within the Department's jurisdiction in exchange for royalty payments to the State. For the reasons hereinafter stated, it is my opinion that the Department of Transportation may, under the facts of this particular case, enter into such an agreement.



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According to your letter, the facts are presently as follows:

"A private coal company wishes to enter an agreement with the Department of Transportation under which the company will mine coal under lands upon which a State highway is situated. The State has title to the coal. The company originally planned to conduct normal mining operations but this was rejected by the Department on the ground that there would be an unacceptable risk of subsidence. The company has submitted a revised plan under which coal would be mined under the highway only in tunnels which would allow access to coal owned by the company which is situated on the other side of the State highway right-of-way. The revised plan has been reviewed by the Department's geologist and by officials of the State Geological Survey. It is their opinion that subsidence is unlikely under the revised plan.

* * * It is proposed that the State, by and through the Department, enter a coal mining lease for a period not to exceed five years under which the company is allowed to mine coal under the revised plan in exchange for royalty payments to the State.

* * *

Under the proposed lease, the mining would be underground and would not involve alteration of the highways for mining purposes. The Department would insist that any lease entered include a provision that the mining company be responsible for any damage to the highway caused by subsidence due to the mining."

From an examination of the statutes, it is clear that the Department of Transportation has the authority, subject to certain conditions, to lease any land or property within its jurisdiction. (Ill. Rev. Stat. 1979, ch. 127, par. 49.13.) Section 49.13 of the Illinois Civil Administrative Code (Ill. Rev. Stat. 1979, ch. 127, par. 49.13) provides that the Department of Transportation has the power:

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"From time to time to lease any land or property, with or without appurtenances, of which the department has jurisdiction, and which are not immediately to be used or developed by the State; provided that no such lease be for a longer period of time than that in which it can reasonably be expected the State will not have use for such property, and further provided that no such lease be for a longer period of time than 5 years." (Emphasis added.)

Thus, it appears from the statute itself that it is the intent of the General Assembly that property not currently nor expected to be used may be leased and put to some use, provided that no such lease be longer than five years.

According to your letter, the proposed lease will authorize only the limited mining operations. This plan has been reviewed by the Department's geologist and officials of the State Geological Survey and it is their expert opinion that subsidence is unlikely. As an added safeguard, you have noted that the Department would insist that any lease entered into include a provision that the mining company be responsible for any damage to the highway caused by subsidence due to the mining, if that should occur. Moreover, it is my understanding that the granting of the mining lease will not result in any obstruction of or interference with the rights of the public to the full and free use of the highway, or otherwise interfere with the surface rights to the land, which are not subject to the lease agreement. Because only a limited amount of coal will be mined under the agreement, the Department is not authorizing the depletion of a State asset, nor is it authorizing the use of public property for private purposes.

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Having the statutory authority to lease an interest in State property, the Department must exercise that power in strict accordance with the limitations imposed by statute. Consequently, the Department has only the power to lease land or property. Because coal under the soil and mineral rights are interests in real estate capable of being conveyed (Fowler v. Marion and Pittsburg Coal Co. (1924), 315 Ill. 312, 314-15; Decatur Coal Co. v. Clokey (1928), 332 Ill. 253, 262-63), it is clear that, based upon the language of the statute, the Department may enter into an agreement with the corporation for the lease of that interest. Moreover, it has been held that right to use underground passages for mining purposes after coal has been removed may be a part of the leasehold agreement and, as such, is a valid incident of a mining right in land. Big Creek Coal Co. v. Tanner (1922), 303 Ill. 297, 303; Atteberry v. Blair (1910), 244 Ill. 363, 372-73.

Finally, as is true with contracts generally, the provisions of the lease must be supported by sufficient and valid consideration. It is my understanding that the State, in exchange for granting the mining rights, is to receive royalty payments, which payments, under certain circumstances, may constitute adequate consideration. Davis v. Nokomis Quarry Inc. (1979), 77 Ill. App. 3d 1011, 1013.

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Therefore, it is my opinion that the Department of Transportation may, so long as the consideration is adequate, enter into a coal mining lease in accordance with the terms outlined in your letter.

Very truly yours,

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