

ENERGY ALERT

OIL & GAS UPDATE: PENNSYLVANIA SUPREME COURT ISSUES LANDMARK DECISION IN *BUTLER V. CHARLES POWERS ESTATE*

The Pennsylvania Supreme Court recently preserved the long-standing presumption in Pennsylvania law that a deed that reserves “minerals” does not convey rights to Marcellus shale gas, absent specific evidence to the contrary. *Butler v. Charles Powers Estate* stems from a Susquehanna County dispute regarding an 1881 deed containing a reservation of “one-half the minerals and Petroleum Oils” to the seller, Charles Powers and his heirs.¹ John and Mary Butler, the surface land owners, filed a complaint to quiet title, to the oil and gas (including Marcellus Shale gas) naming Powers’ heirs as defendants.²

Powers’ heirs requested that the Pennsylvania Supreme Court reject the firmly established *Dunham* Rule. The *Dunham* Rule provides that a reservation of “minerals” in a deed does not include the rights to oil and gas unless there is clear and convincing evidence that the parties intended oil and gas rights to pass. The court in *Dunham* reached this decision by reasoning that the common or average person would not consider the term “mineral” to include oil or natural gas.³ The *Dunham* Rule, a minority approach in the United States, has persevered despite the fact that: (1) a scientific definition of “minerals” includes oil and gas; (2) Pennsylvania statutes, such as the Municipalities Planning Code, categorizes natural gas as a mineral; and (3) some limited case law in other contexts specifically defines natural gas as a mineral.⁴ The Supreme Court reasoned that the common understanding of mankind is that oil and gas are not minerals because they are not metallic in nature.⁵

The Pennsylvania Supreme Court’s recent review of *Butler* was triggered by the Superior Court finding that the case should be remanded to trial court so that expert testimony could be received as to whether natural gas contained in shale rock should be categorized as a mineral.⁶ The Superior Court relied on *United States Steel Corporation v. Hoge (Hoge II)*, which held that the owner of the coal also owns the coalbed methane gas (a form of natural gas) trapped within the coal.⁷ The Supreme Court declined to apply the reasoning of *Hoge II* to Marcellus Shale gas

¹ *Butler v. Charles Powers Estate*, No. 27-MAP-2012, 2013 WL 1749828 (Pa. Apr. 24, 2013).

² *Id.*

³ *Highland v. Commonwealth*, 161 A.2d 390 (Pa. 1960); *Dunham v. Kirkpatrick*, 101 Pa. 36 (Pa. 1882).

⁴ *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 964 A.2d 855, 867 (Pa. 2009).

⁵ *Highland*, 161 A.2d at 398-99.

⁶ *Butler v. Charles Powers Estate*, 29 A.3d 35, 43 (Pa. Super. Ct. 2011) appeal granted, 41 A.3d 854 (Pa. 2012) and rev'd sub nom. *Butler v. Charles Powers Estate ex rel. Warren*, 27 MAP 2012, 2013 WL 1749828 (Pa. Apr. 24, 2013).

⁷ *U.S. Steel Corporation v. Hoge*, 468 A.3d 1380, 1390 (Pa. 1983) (*Hoge II*).

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rights in the instant case, citing the unique nature of coalbed gas that was highlighted by the *Hoge II* Court.⁸

In deciding *Butler*, the Pennsylvania Supreme Court adhered to the principle of stare decisis, reaffirming the *Dunham* Rule.⁹ The high court ruled that the court's 1882 *Dunham* decision continues to be the viable and controlling law of Pennsylvania, and that there is no justification for overruling or limiting the *Dunham* Rule and its progeny. In concurring with the majority opinion, Supreme Court Justice Thomas Saylor reasoned that "too many settled expectations rest upon it [the *Dunham* Rule] for the courts to upset it retroactively."¹⁰ Justice Saylor reminded modern-day parties that they have the ability to negate the impact of the *Dunham* rule by using explicit language to describe the oil and gas rights they intend to reserve.¹¹

It appears that the Pennsylvania Supreme Court decision has averted an onslaught of lease challenges and gas right disputes. Similar to its recent *Jedlicka*¹² and *Kilmer*¹³ decisions which upheld other ancient oil and gas precedents, the Court's decision upholding the *Dunham* rule alleviates the fear of legal uncertainty and offers more predictability. While the *Dunham* rule continues to be viable in Pennsylvania, parties contracting for Marcellus shale gas rights should still have their contracts reviewed by experienced counsel to ensure that natural gas rights are properly conveyed.

To read the opinion, please click on the link below.

(<http://www.pacourts.us/assets/opinions/Supreme/out/J-118-2012mo.pdf>)

The concurrence is available below.

(<http://www.pacourts.us/assets/opinions/Supreme/out/J-118-2012co.pdf>)

This Energy Alert is intended to keep readers current on matters affecting energy, and is not intended to be legal advice. If you have any questions, please contact Jeffrey Norton at 717.327.7192, or contact any one of our other Energy Group attorneys at Eckert Seamans

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⁸ *Id.* at 1384.

⁹ *Butler v. Charles Powers Estate*, No. 27-MAP-2012, 2013 WL 1749828 (Pa. Apr. 24, 2013).

¹⁰ *Butler v. Charles Powers Estate*, No. 27-MAP-2012, 2013 WL 1749828 (Pa. Apr. 24, 2013) (Saylor, T., concurring).

¹¹ *Id.*

¹² *T.W. Phillips Gas & Oil Co. v. Jedlicka*, 42 A.3d 261 (Pa. 2012).

¹³ *Kilmer v. Elexco Land Services*, 605 Pa. 413 (Pa. 2010).