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Pennsylvania Supreme Court Reaffirms *Dunham* Rule, Confirms that Marcellus Shale Natural Gas is not a "Mineral"

By Levi Jones

On April 24, 2013, the Pennsylvania Supreme Court in *Butler v. Powers* held that Marcellus shale "natural gas is presumptively not a mineral for purposes of private deeds." The Court reaffirmed the "*Dunham* Rule," which applies the common, layperson understanding of what is and is not a mineral. The "rule in Pennsylvania is that natural gas and oil simply are not minerals because they are not of a metallic nature, as the common person would understand minerals." That rule is a rebuttable presumption, and a party asserting rights in natural gas based on a reservation of "mineral" rights must show by clear and convincing evidence that the parties intended, at the time the deed was signed, that the reservation include natural gas. Absent such evidence, a deed reserving "mineral" rights does not encompass natural gas and oil.

The *Butler* decision involved a deed executed in 1881 that reserved to the grantor "one half the minerals and Petroleum Oils." The descendants of the grantor ("Grantor") argued that, based on that provision, the grantor reserved to himself one half of the rights to the natural gas extracted from the Marcellus shale under the property. Citing the *Dunham* Rule, the trial court denied the Grantor's request for declaratory relief because the deed reservation referred only to mineral rights. The Superior Court reversed, citing a Supreme Court case that the Superior Court viewed as countering the *Dunham* Rule in the context of trapped underground coalbed gas. *United States Steel Corporation v. Hoge*, 468 A.2d 1380 (Pa. 1983) ("*Hoge II*"). In *Hoge II*, the Pennsylvania Supreme Court held that coalbed gas that is trapped within seams of coal "must necessarily belong to the owner of the coal, so long as it remains within his property and subject to his exclusive dominion and control." Analogizing the coalbed gas in *Hoge II* to the Marcellus shale natural gas in the case before it, the Superior Court ordered that the case be remanded to the trial court for an evidentiary hearing in which expert, scientific testimony would be heard on the issues of whether the Marcellus shale natural gas is "conventional natural gas," whether Marcellus shale is a mineral, and whether the entity that owns the rights to the shale also owns the rights to the gas trapped within it.

The Supreme Court in *Butler* rejected the Grantor's argument that *Hoge II* applied here and, in particular, rejected the argument that classifying Marcellus shale natural gas separate from the shale itself (which contains minerals), as something other than a mineral, is akin to trying to classify the "fizz" in Coca-Cola as something separate from the cola itself. The Court held that under the *Dunham* Rule, the focus is on "the common understanding of the substance itself, not the means used to bring those substances to the surface." The fact that the Marcellus shale natural gas is trapped within shale has no bearing on whether it is a mineral. The Court therefore concluded that there was no need for expert testimony concerning the nature of Marcellus shale natural gas. As for the *Hoge II* decision, the Court held that it did not overturn the *Dunham* Rule, and that there are important distinctions between the nature of coalbed gas and Marcellus shale natural gas such that *Hoge II* does not control in this case.

In reaffirming the validity of the *Dunham* Rule and reinstating the trial court's decision, the Supreme Court explained that "the *Dunham* Rule has now been an unaltered, unwavering rule of property law for 131 years," with its origin actually dating back 177 years. In *Gibson v. Tyson*, a case from 1836, the Pennsylvania Supreme Court first held that when interpreting the language of a deed and related reservations of rights, the first and only consideration for the court is the intent of the parties to the transaction. Therefore, the common understanding of laypersons as to what words such as "minerals" mean should control, rather than more technical, scientific definitions. In 1883, the Court clarified and reaffirmed this rule in *Dunham & Shortt v. Kirkpatrick* (the case giving rise to the *Dunham* Rule), with the Court hold-

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ing that the common understanding of the word "minerals" denoted a substance metallic in nature, such as copper or lead, even though many non-metallic substances also are technically classified as minerals. In the 1960 case of *Highland v. Commonwealth*, the Court applied the *Dunham* Rule to oil and gas rights: courts will presume that "if, in connection with a conveyance of land, there is a reservation or an exception of 'minerals' without any specific mention of natural gas or oil, … the word 'minerals' was not intended by the parties to include natural gas or oil." 161 A.2d 390, 398 (Pa. 1960). This presumption can be rebutted, the Court noted, through clear and convincing evidence that the parties intended at the time of conveyance to include natural gas or oil in the reservation.

Notably, Justice Saylor entered a concurring opinion, stating that "the original, nineteenth-century rationale for the *Dunham* Rule [is] cryptic, conclusory, and highly debatable." Nevertheless, Justice Saylor agreed that the *Dunham* Rule should remain in force because of its longstanding history in Pennsylvania. He further noted that parties drafting modern conveyances have the ability to "negate the impact of the *Dunham* decision by making their intentions clear on the face of the written instrumentation." This ability to draft around the *Dunham* Rule, he concluded, lessens the need for the Court to create a new rule to replace the one we have.

After 131 years the *Dunham* Rule survives. In drafting deeds, parties should carefully define the specific rights being granted and not rely simply on a catch-all for "minerals," which, as *Butler* shows, is not a catch-all at all. ◆

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