

## ***Who Owns Shale Gas? PA Superior Court Decision Creates Uncertainty***

by *Erik M. Hume*

As many property owners throughout Pennsylvania Marcellus Shale counties have learned in recent years, ownership of the surface does not necessarily include ownership of what lies below. Title to the surface and subsurface can be “severed”; that is, owned by different parties. In fact, it is not uncommon to now find different parties owning the mineral, coal, oil, gas and surface rights to the same property. A recent decision by the Pennsylvania Superior Court raises, but does not resolve, significant questions about that historic ownership model.

For the last 130 years, Pennsylvania lawyers have relied on the Pennsylvania Supreme Court’s decision in *Dunham v. Kirkpatrick*, source of the so-called “*Dunham rule*.” Simply stated, it holds that a conveyance of “mineral rights” is presumed to not include “oil and gas rights.” In other words, a deed conveying mineral rights does not include the right to extract oil and gas. Subsequent decisions further strengthened the *Dunham* rule, holding gas rights as separate and distinct from oil and mineral rights.

The rule in *Dunham*, however, has one significant exception. In *U.S. Steel v. Hoge*, the Pennsylvania Supreme Court ruled on a dispute between owners of the coal and gas rights. In a departure from the *Dunham* rule, the court held that coalbed methane is owned by the owner of the coal, because “subterranean gas is owned by whoever has title to the property in which the gas is resting.” In rendering its decision, the court cited the historical view of coalbed gas as a waste product from coal production, the unconventional methods used to extract the gas and the effect gas extraction would have on the underlying coal.

Most practitioners have relied on the *Dunham* rule in determining ownership of gas in unconventional formations, including the Marcellus Shale. Similarly, they interpreted the *Hoge* decision as applicable only to coalbed methane. Last month the Pennsylvania Superior Court called those beliefs into question with its decision in *Butler v. Powers Estate*. The *Butler* decision raises, but does not answer, crucial questions concerning Marcellus Shale gas rights ownership.

The *Butler* decision arose out of a dispute between the *Butlers*, owners of the property surface as well as a portion of the subsurface rights, and the heirs of Charles Powers, who own a one-half interest in the minerals and petroleum oil underlying the property. Powers’ heirs claimed that their mineral interest includes a one-half interest in the Marcellus Shale underlying the property, and pursuant to *Hoge*, the gas it contains. The trial court, citing *Dunham*, dismissed the heirs’ claims at a preliminary stage of the litigation.

The Superior Court, however, reversed the decision. Based on the limited record before it, the court said the question of whether Marcellus Shale is a “mineral” included in a mineral conveyance remains unsettled, and further questioned whether ownership of Marcellus Shale gas should follow the *Dunham* rule or run with the Shale through the *Hoge* exception. The court instructed the trial court to more comprehensively explore these crucial issues.

The *Butler* case, barring a discretionary appeal to the Pennsylvania Supreme Court, will now return to the trial court for determination of the applicable rule and disposition of ownership rights. That court’s decision will likely then work its way through the appellate courts, over the course of several years. Unfortunately, until the case is finally decided, controversy will surround ownership of some Marcellus Shale gas.

Predictably, the *Butler* decision has spawned confusion and concern throughout the gas industry in Pennsylvania. Ultimately, however, the heirs to Charles Powers have a hard hill to climb. The *Hoge* decision turned, in part, on coal's long history as an extracted mineral in Pennsylvania. Prior to the current gas boom, most people did not know of the Marcellus Shale or any of the Appalachian Shales, let alone opportunities for their commercial development. Furthermore, the rule in question affects only a limited number of properties. Were the *Hoge* exception found to control Marcellus Shale gas, only properties where the mineral and gas rights are owned separately would be affected. Range Resources, a leader in Pennsylvania's natural gas industry, disclosed in a press release that in response to *Butler* it reviewed a portion of its leases in southwestern Pennsylvania and preliminarily found that 15% of those leases would possibly be affected by the decision.

As the debates in Harrisburg have demonstrated, Pennsylvania oil and gas law is still catching up to Marcellus Shale development. While the recent focus has been on legislative initiatives, it is clear that recent and forthcoming Pennsylvania court rulings will wield considerable impact.

© 2011 McNees Wallace & Nurick LLC

*This document* is presented with the understanding that the publisher does not render specific legal, accounting or other professional service to the reader. Due to the rapidly changing nature of the law, information contained in this publication may become outdated. Anyone using this material must always research original sources of authority and update this information to ensure accuracy and applicability to specific legal matters. In no event will the authors, the reviewers or the publisher be liable for any damage, whether direct, indirect or consequential, claimed to result from the use of this material.