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## Pennsylvania Supreme Court holds that Marcellus gas is not a mineral

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On April 24, 2013, the Pennsylvania Supreme Court issued a decision in *Butler v. Powers*, Case No. 27 MAP 2012, confirming the century-old “Dunham Rule” – namely that “[i]f, 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” then there is a rebuttable presumption that the word “minerals” was not intended to include oil or natural gas.<sup>1</sup>

The issue in the case arose out of an 1881 deed that conveyed 244 acres of land and reserved “one-half of the minerals and Petroleum Oils on the property” for Charles Powers and his heirs. John and Mary Josephine Butler own the 244 acres today and they filed an action to quiet title in the Susquehanna County Court of Common Pleas on July 20, 2009.

The Butlers claimed ownership of all of the gas beneath their land despite the language in the deed reservation. The heirs to the Powers estate filed a declaratory judgment action seeking a holding that the reservation of mineral rights granted them certain rights to the Marcellus shale gas found beneath the property. The trial court agreed with the Butlers, and denied the estate’s request for declaratory relief based on the “Dunham Rule,” as the Butler deed did not specifically provide for a

reservation of the rights to natural gas.

On appeal, the heirs to the Powers estate argued that the “Dunham Rule” is limited to natural gas and does not apply to gas produced from the Marcellus shale. The estate also asked the court to apply the precedent established in *United States Steel Corporation v. Hoge*, 468 A.2d 1380 (Pa. 1983) (Hoge II), which held that the owner of the coal also owns the gas stored or trapped in the coal. The heirs argued by analogy that they owned the shale and thus the shale gas trapped within the shale. The Superior Court reversed the trial court’s decision and remanded the case for an evidentiary hearing to determine whether shale is a mineral.

The Pennsylvania Supreme Court reaffirmed the “Dunham Rule” on appeal and held in favor of the Butlers. The Court reached its conclusion based on the fact that the terms “oil” and “natural gas” do not appear in the reservation of rights clause in the 1881 deed, and the heirs to the Powers’ estate failed to provide clear and convincing evidence that the parties intended for the reservation of rights clause to apply to natural gas.

The rule of law in Pennsylvania remains that oil and natural gas are not, for purposes of private deed transfers, considered minerals absent specific language to the contrary. This decision is consistent with longstanding Pennsylvania law and it should not create confusion within the Pennsylvania oil and gas industry. The court was likely cognizant of the impact of a ruling to the contrary on the oil and gas industry in the state.

Pennsylvania is unique in its reliance on the Dunham Rule to interpret land transfers of subsurface rights. For example, in Ohio, the general rule is that oil and gas are minerals and that deeds that reserve rights to “all mineral rights” include oil and gas unless the other language in the granting instrument suggests the parties intended otherwise. *Moore v. Indian Camp Coal Co.*, 75 Ohio St. 493, 499 (1907); see also *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317 (1897) (recognizing that “[p]etroleum oil is a mineral”); *Wiseman v. Cambria Products*, 61 Ohio App. 3d 294, 299 (4th Dist. Lawrence County 1989), quoting *Hardesty v. Harrison*, 6 Ohio L. Abs. 445, 446 (Ohio Ct. App. 1928); *Jividen v. New Pittsburg Coal Co.*, 45 Ohio App. 294 (4th Dist. Meigs County 1933) (explaining that while the authorities at that time were in conflict as to whether the term “minerals” included oil and natural gas, the rule in Ohio was that the term, “taken in its broadest sense includes such oil”).

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Footnote

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  - o Many years later, in *Highland v. Commonwealth*, 400 Pa. 261 (1960),

the Pennsylvania Supreme Court held that the presumption could only be rebutted by clear and convincing evidence that the parties intended to include natural gas or oil within the term “mineral.