

# “What keeps you up at night?”

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## *Butler v. Charles Powers Estate*: Recent Pennsylvania court decision could upset 130 years of oil and gas conveyances

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### SUMMARY:

**A recent Pennsylvania Superior Court decision may have a substantial impact on deeds and leases derived from transfers of “all minerals” and will likely affect who owns the rights to the valuable natural gas locked inside Pennsylvania’s Marcellus shale formation.**

A recent decision of the Pennsylvania Superior Court has thrown into turmoil oil and gas ownership in Pennsylvania. *Butler v. Charles Powers Estate*, \_\_ A.3d \_\_, 2011 WestLaw 3906897 (Pa. Super., Sept. 7, 2011). Interpreting nearly 130 years of Pennsylvania law, a three-judge panel of Pennsylvania’s intermediate appellate court has questioned who owns the rights to millions, if not billions of dollars of natural gas locked in Pennsylvania’s Marcellus shale formation. In turn, this issue likely will affect whether natural gas production and exploration companies now holding leases have the right to remove all of the gas that they intend to remove or now are producing. If nothing else, the decision introduces significant uncertainty into ownership of natural gas and oil.

Because of the technical nature of the language of the case and the rule it interprets, it should be noted that the *Butler* decision should not affect those deeds and leases for “oil and gas,” rather, the decision may impact deeds and leases derived from transfers of “all minerals.”

### **BUTLER V. CHARLES POWERS ESTATE**

In 1881, Charles Powers sold 244 acres of land in Susquehanna County, Pennsylvania to the current surface owners’ predecessors, reserving to himself, and his heirs and assigns “one half

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<sup>1</sup> The views expressed in this article are not necessarily of those of Saul Ewing LLP or its clients.

the minerals and Petroleum Oils.” In 2009, hoping to lease or sell their stake in the natural gas on their property, the current surface owners filed a complaint to quiet title. Responding to that complaint, Charles Powers’ heirs filed for a declaratory judgment seeking a court decision that Charles Powers’ 1881 deed reservation included the Marcellus shale formation and its gas, and therefore, the surface owners had no claim to the gas.

The Court of Common Pleas of Susquehanna County ruled that Powers’ heirs have *no interest in the Marcellus Shale gas* based on the 1882 “Rule in Dunham’s Case.” In *Dunham v. Kirkpatrick*, 101 Pa. 36 (1882), the Pennsylvania Supreme Court ruled that the word “minerals,” when used in a conveyance or reservation of property, did not include oil and natural gas. As applied in *Butler* this would mean that while Charles Powers may have retained for himself the “minerals and Petroleum Oils,” he did not reserve the natural gas. The surface owner therefore would own the gas and the right to lease it for production.

On appeal, the Superior Court remanded the case for further hearings. Evaluating *Dunham* and other related cases, and relying heavily on the Pennsylvania Supreme Court’s decision in *United States Steel v. Hoge*, 468 A.2d 1380 (Pa. 1983) [which ruled that coal bed methane gas that is present in a coal seam belongs to the owner of the coal seam], the Superior Court reversed the lower court and sent the parties back to the Court of Common Pleas to make the following determinations:

Whether, *inter-alia* (1) Marcellus shale constitutes a “mineral”; (2) Marcellus shale gas constitutes the type of conventional natural gas contemplated in *Dunham* and *Highland [v. Commonwealth]*, 161 A.2d 390 (Pa. 1960)]; and (3) Marcellus Shale is similar to coal to the extent that whoever owns the shale, owns the shale gas.

The court decided that “the parties should have the opportunity to obtain appropriate experts on whether Marcellus shale constitutes a type of mineral such that the gas in it falls within the deed’s reservation.”

To understand the Superior Court’s ruling in *Butler*, a short description of its legal underpinnings is necessary.

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### THE DUNHAM RULE (1882):

In *Dunham*, the Pennsylvania Supreme Court evaluated a mineral deed from 1881, in which the defendants reserved “all minerals.” The plaintiffs were claiming ownership of the petroleum under the parcel as a part of the reservation of the “mineral” estate. The court evaluated the intent of the parties when using the term “all minerals” in the reservation: Did the reservation include or not include the petroleum? The court explicitly stated, “it is true that petroleum is a mineral; no discussion is needed to prove this fact.” However, the court was concerned that use of the term “minerals” in deeds, without further explanation, not be too expansive. It stated that “all inorganic substances are classified under the general name for minerals...But if the reservation embraces all these things, it is as extensive as the grant, and therefore void.” In other words, the use of the term “minerals” potentially was so broad that reserving minerals in a deed would swallow the entire parcel. The court said the parties could not have intended to reserve the petroleum, “otherwise that intention would have been expressed in no doubtful terms.” Ultimately, the court went on to determine that when used in a deed or lease, the word “minerals” should be narrowly construed and did not include the petroleum.

### SILVER V. BUSH (1906)

In 1906, the Pennsylvania Supreme Court again ruled on the meaning of the term “minerals” in a deed reservation. *Silver v. Bush*, 62 A.2d 832 (Pa. 1906). In *Silver*, the issue was whether the deed, which reserved “the mineral underlying the [parcel of land],” also reserved the natural gas. The court clarified that natural gas and petroleum were so similar that they would be evaluated the same way. It acknowledged that gas and petroleum were minerals in the strictest sense. The court noted there were different ways of construing the term “mineral:” (1) the common classification of all matter “into the three classes of animal, vegetable, and mineral;” and (2) the more limited scientific meaning.

The court noted the standard mechanism of judicial interpretation of a contract or deed: “The crucial question here, as in all contracts, is, what was the sense in which the parties used the word?” The court went on to say: “The cardinal test of the meaning of any word in any particular case is the intent of the parties using it.” Relying on *Dunham*, the court noted that under Pennsylvania law, the term “minerals” does not include petroleum or natural gas.

Furthermore, this rule “had become a rule of property on which many titles in Western Pennsylvania rested.” In other words, the intent of the parties must be read in light of their awareness of the Dunham Rule. In order to overcome the presumption that the term “mineral” did not include petroleum or natural gas, the party claiming against the presumption would have to present “evidence [that] should be clear and convincing that the parties used the words in a different sense.” In conclusion, the court held, “if the parties intended to include gas, they would have said so expressly.”

## HIGHLAND V. COMMONWEALTH (1960)

In 1960, the Supreme Court clarified and restated the rule in Dunham. In *Highland v. Commonwealth*, the court evaluated the meaning of the term “mineral,” which was used in a series of complicated land transactions. It evaluated the deeds and set out what it referred to as “The Dunham Rule”:

The rule may be briefly stated: 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, a presumption, rebuttable in nature, arises that the word ‘minerals’ was not intended by the parties to include natural gas and oil...It has become a rule of property and it will not be disturbed...To rebut the presumption established in Dunham, that natural gas is not included within the word ‘minerals’ there must be clear and convincing evidence that the parties to the conveyance intended to include natural gas and oil within such word.

The court evaluated various circumstances and the evidence needed to overcome the presumption that the term “minerals” included oil and natural gas. To guide future courts, the Supreme Court reiterated the rules for construction of deeds, including mineral conveyances:

Among such rules are those providing: (1) that the nature and quantity of the interest conveyed must be ascertained from the instrument itself and cannot be orally shown in the absence of fraud, accident or mistake and we seek to ascertain not what the parties

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may have intended by the language but what is the meaning of the words; (2) effect must be given to *all* the language of the instrument and no part shall be rejected if it can be given a meaning; (3) the language of the deed shall be interpreted in the light of the subject matter, the apparent object or purpose of the parties and the conditions existing when it was executed.

## UNITED STATES STEEL V. HOGE (1983)

The final case evaluated by the Superior Court was the 1983 Supreme Court's decision in *United States Steel v. Hoge*, 468 A.2d 1380 (Pa. 1983). In that case, there was a dispute between the owner of gas and U.S. Steel, the owner of the Pittsburgh seam of coal. The owner of the gas claimed ownership of all of the gas under the parcel, including the methane gas contained in the coal (known as coal bed methane) as a result of a deed reserving to their predecessors “oil and gas.” U.S. Steel claimed ownership of the coal bed methane, arguing that methane gas was considered a dangerous waste product at the time of the conveyance of the gas, so that the original grantor and grantee could not have intended to convey the coal bed methane when the rest of the gas was conveyed. The Supreme Court decided in favor of the owner of the coal, ruling that “such gas as is present in the coal must necessarily belong to the owner of coal.”

## CONCLUSION

Recently, in *Hoffman v. Arcelormittal Pristine Resources, Inc.*, 2011 WestLaw 1791709 (W.D. Pa. 2011), the federal district court interpreted a reservation of “all gas and oil” found in a 1928 deed. There, the court ruled against the plaintiffs’ interpretation that would have differentiated Marcellus shale gas from “all gas and oil” and worked against the Dunham Rule. The court stated as follows:

To rule in plaintiffs’ favor would be tantamount to an eradication of countless oil and gas estates and leases recorded in the history of this Commonwealth, and would profoundly change the landscape of property law as it has developed over hundreds of years.

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The state courts of Pennsylvania are not bound by interpretations of deeds made by the federal courts, however, the federal court's observation and ruling is instructive. *Butler* was returned to the Court of Common Pleas for rulings as stated above. Owing to the confusion and uncertainty raised by the Superior Court panel, it remains to be seen whether the Supreme Court might intercede to clarify the situation. Without any further ruling, gas rights will be left in question until the Supreme Court rules.

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