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Pa. Stance On Dunham Rule Confounds Pa. Mining Industry

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The Pennsylvania Supreme Court's recent ruling in Butler v. Charles Powers Estate confirms that Pennsylvania's so-called Dunham Rule, which says that oil and gas are not "minerals" for private deed purposes, is alive and well. This means that thousands of titles to Marcellus shale gas will not be impacted by any change in the law.

At the same time, however, the decision raises the question of whether the court has gone too far and issued a ruling that will have an impact on the mining industry and those who own "minerals" in Pennsylvania. The reason for this is that Butler also says that for private deeds, minerals include only metallic minerals.

This is contrary to the understanding of the mining industry and mining professionals, contrary to other Pennsylvania Supreme Court decisions and likely a surprise to anyone who owns or has sold mineral rights. Only time will tell how much disruption will be caused by the court's decision.

Butler v. Charles Powers Estate —The Dunham Rule

On April 24, 2013, the Pennsylvania Supreme Court issued its much anticipated opinion in Butler v. Charles Powers Estate,[1] reversing the decision of the Pennsylvania Superior Court[2] and upholding Pennsylvania's ancient property law. For owners of Marcellus shale gas, the Butler decision slammed the door on arguments that might have resulted in a re-examination of thousands of titles.

The Superior Court appeared to have opened the door to a change or modification of Pennsylvania's unique rule-of-property law.[3] In 1882, the Pennsylvania Supreme Court in Dunham ruled that in a real property transaction, a sale or reservation of "minerals" did not convey or reserve the oil. The court based this determination on "the common understanding of mankind … that oil is not a mineral."[4]

A later decision expanded the rule to include natural gas.[5] Had the Superior Court's determination stood, owners of property may have been able to argue that neither Marcellus shale nor the gas it contained were conveyed in certain deeds.

Dunham relied on Gibson v. Tyson, a Supreme Court decision from 1836.[6] The Gibson court attempted to ascertain the intent of the parties regarding whether the reservation of "minerals" included chrome. In determining the parties' intent, as quoted in Butler, the court stated that "to people 'entirely destitute of scientific knowledge in regard to such things ... to the bulk of mankind, ... nothing is thought by minerals to be such unless it be of a metallic nature, such as gold, silver, iron, copper, lead, etc.'"[7]

While the Dunham Rule has been the subject of a number of Pennsylvania Supreme Court rulings over the ensuing 130 years, the court has consistently abided by the rule.[8]

Unintended Consequences?

The current concern arises from the Butler court's statement that "anything of a non-metallic nature would not be considered a mineral for private deed purposes."[9] Thus, the court heavily relies on its ruling in Gibson.

On its face, this suggests that other minerals, such as coal, limestone and shale, are not considered minerals for deed purposes because they are nonmetallic. If the court said this only in passing, it might not have created much of an issue. The court, however, repeatedly asserted that the definition of minerals is limited to "metallic" minerals, which raised the specter of litigation over the rights of those owning or claiming rights to nonmetallic minerals.

In fact, very few Pennsylvania decisions mention at all that minerals in Pennsylvania are limited to metallic substances.[10] Nevertheless, the Supreme Court in Butler seems to have gone out of its way to splice onto the Dunham Rule that minerals are those substances which are metallic:

- "As far back as Gibson, minerals have been defined in the law for private deed reservation purposes as those substances which are metallic in nature. Appellants note that the metallic character of the subject material constituted the common understanding of minerals to laypersons in the 1830s, when Gibson was decided, and that presumption has never been questioned or overruled by this court."[11]

- "Under Gibson, Pennsylvania law was clear that minerals only encompassed, for private deed purposes, metallic substances."[12]

- "Notwithstanding different interpretations proffered by other jurisdictions, 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."[13]

While the court in Dunham, Silver and Highland (and many others) understood that in the technical sense oil and gas were minerals,[14] it needed a mechanism to distinguish between "animals, minerals and vegetables" and lit upon the so-called "common man" understanding.

The Butler court does more than perpetuate the myth that in Pennsylvania, minerals are only metallic minerals because this is how the common man allegedly viewed such substances in 1836. In fact, it reasserts a concept that had been largely forgotten for over a century.

To reach its result, the Butler court seems to assume (as did the court in Gibson) that the mass of Pennsylvanians today are uneducated louts, perhaps just in from polling a barge down a canal, reaping wheat with a scythe or shooting passenger pigeons with a musket. This assumption is unnecessary.

The best supposition as to why the court did what it did was that it was attempting to protect original deeds of severance that dated from before Dunham (but after Gibson) from being overturned as not being subject to the Dunham Rule. As most deeds of severance of oil and gas would date from 1859 and later (1859 was the year of Colonel Drake's well and the beginning of Pennsylvania's oil rush), by extending the Dunham Rule back to 1836 (the year of the Gibson decision), the court probably covers all but a small handful of oil and gas titles.

There was no good reason, however, for the Butler court to fall back on the Gibson understanding of the definition of "minerals" as it could have, indeed should have, simply relied on the principle of stare decisis or precedent — a principle more ancient than the Dunham Rule. As the Supreme Court said in Highland: "A rule of property long acquiesced in should not be overthrown except for compelling reasons of public policy or the imperative demands of justice."[15]

The court asserted, and no one disagrees that there have been "innumerable private, real property transactions for nearly two centuries"[16] that have taken place in Pennsylvania that would have been impacted by a change in the Dunham Rule. Justice Saylor, in his concurring opinion, noted that "since Dunham has effectively served to establish a governing rule of property law in Pennsylvania for over a century, too many settled expectations rest upon it for the courts to upset it retroactively."[17]

The court could have accomplished the same result — affirming the Dunham Rule — simply by ruling that the Dunham Rule is binding precedent. Unfortunately, it did not do this, and the damage is done.

It may be that the court's peculiar characterization of "minerals" can only be applied to natural gas and oil,[18] and that the bulk of the court's 24-page opinion is simply not applicable to an interpretation of minerals in any other private deed context. If that is the case, however, the court certainly does not make it clear, particularly given the fact that Gibson was not an oil and gas case.

Whither Metallic Minerals?

Early in its history through the time of World War II, Pennsylvania had a metallic mineral extraction industry that included a number of metallic minerals including iron, copper, lead, zinc, chromite, nickel, cobalt and even gold and silver.[19] Today, virtually no metallic minerals are mined in the commonwealth or have they been for decades.[20]

Other nonmetallic minerals have always been and continue to be mined in Pennsylvania. Coal and other nonfuel minerals that have been and continue to be extracted from Pennsylvania include dimension stone, aggregate, limestone, dolomite, clay, bluestone, shale, sand, gravel and other noncoal minerals.[21]

The other noncoal (i.e. nonfuel) minerals also are a significant part of the mineral extraction industry and economy of Pennsylvania. According to the U.S. Geologic Survey, the value of the nonfuel minerals produced in Pennsylvania in 2010 was $1.67 billion.

Conclusion

While the Supreme Court has preserved the Dunham Rule for oil and gas, the court has created a serious problem regarding other minerals. It has established (or re-established) an unnecessary definition of “minerals” for the purpose of private deeds. This has serious consequences.

Some descendent of a landowner that conveyed or reserved minerals — that at the time, perhaps intended to convey, e.g., coal, limestone, sand and gravel — will certainly come forward and assert that his ancestor conveyed or reserved only the iron, gold and silver. Considering the large number of mines and quarries in Pennsylvania, this could indeed open the door to litigation.

At some point, in response to quiet title actions, ejectment actions, damages claims and other litigation over ancient mineral rights, the Supreme Court will have to clarify that the definition of "minerals" espoused in Butler is strictly limited to the oil and gas context. Failing that, it may be necessary to seek the assistance of the general assembly to clarify the meaning of “minerals” in private deeds.

[1] ___ A.3d ___, No. 27 MAP 2012 (Pa. Apr. 24, 2013).

[2] 29 A.3d 35 (Pa. Super. 2011).

[3] Dunham and Shortt v. Kirkpatrick, 101 Pa. 36 (Pa. 1882).

[4] Id. at 44. Pennsylvania’s Dunham Rule is unique among states in which oil and gas are found. In other states, oil and natural gas generally are included within a grant of mineral rights. All other states in which oil and gas may be found have rules that essentially hold that oil and gas are minerals and that deeds that convey or reserve “minerals” convey, or reserve the oil and gas unless the deed states otherwise. See, e.g., Murray v, Allard, 43 S.W. 355, 359 (Tenn. 1897); Moore v. Indian Camp Coal Co., 80 N.E. 6, 7 (Oh. 1907); Texas Company v. Daugherty, 107 Tex. 226, 234-35 (1915); Callahan v. Martin, 43 P.2d 788, 791 (Cal. 1935).

[5] Silver v. Bush, 62 A. 832, 833 (Pa. 1906).

[6] 5 Watts 34 (Pa. 1836).

[7] Butler, at 6, quoting Gibson, 5 Watts at 41.

[8] See Highland v. Commonwealth, 161 A.2d 390, 398-99 (Pa. 1960).

[9] Butler, slip op. at 22, citing Gibson v. Tyson, 5 Watts 34, 41-42 (Pa. 1836).

[10] See PAPCO Inc. v. United States, 814 F.Supp.2d 477, 493-497 (W.D. Pa. 2011), and cases cited therein.

[11] Butler, slip op. at 14.

[12] Id. at 18.

[13] Id. at 21.

[14] “It is true that petroleum is a mineral; no discussion is needed to prove this fact.” Dunham, 101 Pa. at 43. “Certainly such gas is a mineral in the broadest sense of the term.” Silver, 62 A. at 833.

[15] Id. at 399 n.5. Indeed, the Butler court quotes this language. Butler, slip op. at 20.

[16] Id. at 20.

[17] Saylor, J., concurring, slip op at 2.

[18] See Butler, slip op. at 12.

[19] Atlas of Pennsylvania's Mineral Resource, Pt. 3, Metal Mines and Occurrences in Pa., Pa. Geological Survey, 4th Series, Bull. M50 (1973).

[20] The Nonfuel Mineral Resources of Pennsylvania, Pa. DCNR, Publ. 12 (Ed. Series, 2001) at 15.

[21] Id. at 4-15.