

# ADMINISTRATIVE WATCH

ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



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## **Butler v. Powers Estate Appealed to Pennsylvania Supreme Court: What is the Potential Resolution of the Future of the Dunham Rule as it Applies to Shale Gas?**

The future of Pennsylvania's Dunham Rule as it applies to shale gas could be resolved following a recently-filed appeal to the Pennsylvania Supreme Court of the Superior Court's ruling in the case of *Butler v. Powers Estate*.

On September 7, 2011, the Superior Court of Pennsylvania issued an opinion and order in the case of *John E. and Mary Josephine Butler v. Charles Powers Estate et al., William H. Pritchard and Craig L. Pritchard* (No. 1795 MDA 2010, 2011 PA Super 198) that raises questions about Pennsylvania's longstanding "Dunham Rule" as it applies to shale gas. Under the Dunham Rule, a long-standing judicially-recognized rule of property in Pennsylvania, there is a rebuttable presumption that the exception and reservation or conveyance of "minerals" in a deed does not include oil and gas. See *Dunham and Shortt v. Kirkpatrick*, 101 Pa. 36 (Supreme Court of Pennsylvania, 1882) and *Highland v. Commonwealth of Pennsylvania*, 400 Pa. 261 (Supreme Court of Pennsylvania, 1960).

The *Butler* case started as a quiet title action initiated in the Court of Common Pleas of Susquehanna County by John and Mary Butler, the owners of a 244 acre tract of land in Susquehanna County, Pennsylvania, asserting ownership of all minerals and petroleum oils by adverse possession. The Butlers' property is subject to an 1881 deed reservation by Charles Powers, a prior owner in the chain of title, of "one half the minerals and Petroleum Oils." Among Powers' heirs are William H. Pritchard and Craig L. Pritchard. The Pritchards asserted their interests in the Butlers' quiet title action and took the position that they, as the heirs of Charles Powers, are the current owners of his one-half interest in the minerals underlying the land; that the Marcellus Shale underlying the land is a mineral; and that they therefore are the rightful owners of the gas within the Marcellus Shale. The Pritchards based their arguments in part upon the theory that because coal is considered a mineral, and in Pennsylvania the owner of the coal generally also owns the coalbed methane contained in the coal,<sup>1</sup> then by extension, the owner of the Marcellus Shale should own the gas contained within it because (as the Pritchards asserted) the Marcellus Shale, like coal, is a mineral.

The Butlers filed a preliminary objection that the Pritchards' claim that Marcellus Shale gas is included in a reservation of minerals was not a claim on which the court could grant relief. The Court of Common Pleas granted the Butlers' preliminary objection, and the Pritchards appealed that decision to the Superior Court of Pennsylvania. The Superior Court disagreed with the Court of Common Pleas and remanded the case back to the Court of Common Pleas for further proceedings. In its opinion and order remanding the case, the Superior Court indicated that the evaluation of the Pritchards' claim is not limited to a *Dunham/Highland* analysis, but should also include additional considerations, including whether Marcellus Shale

<sup>1</sup>See *U.S. Steel Corp. vs. Hoge*, 503 PA. 140, 468 A. 2d 1380 (1983).

is a mineral, whether Marcellus Shale gas is conventional natural gas as “contemplated in *Dunham* and *Highland*,” and whether Marcellus Shale is analogous to coal in terms of gas found within these formations.

It is important to note that the Superior Court did not rule on the merits of the Pritchards’ claim of ownership of Marcellus Shale gas. The only issue on appeal in *Butler* was whether the Court of Common Pleas had erred in sustaining the preliminary objections (in the nature of a demurrer) of the Butlers. A preliminary objection in demurrer should only be granted by a trial court where, even if all of the assertions of a litigant’s complaint are assumed to be true, the litigant cannot make out a claim on which the court can grant relief.

So, the Superior Court’s ruling is essentially a statement that it is not impossible as a matter of law that the Pritchards have set forth a valid cause of action based on their claim to the Marcellus Shale and the gas within it. The Superior Court’s remand in the *Butler* case should not be mistaken as a statement by the Superior Court that the Pritchards are likely to succeed on the merits of their argument. Accordingly, the *Butler* case currently has no precedential value as to the central question of ownership of shale and the gas within it. Assuming that the *Butler* case is not settled, and on remand is litigated through trial and judgment in the Court of Common Pleas, any opinion of the Court of Common Pleas still would have little precedential value as to other courts of the Commonwealth.

However, for producers and property owners, the *Butler* case has created strong concern because of where it may lead. If the Court of Common Pleas returns an opinion or a verdict in favor of the mineral owners with respect to the Marcellus Shale gas, such a determination would encourage other mineral owners to bring similar claims in those circumstances in which there is a mineral severance prior to a gas severance, or no gas severance. Further, if such an opinion or verdict of the trial court is appealed to the Superior Court (which has already demonstrated a willingness to entertain theoretical arguments about the nature of a mineral without strong consideration of the policy implications), the Superior Court could issue an opinion in favor of the mineral owners that could have binding precedential effect.

By a Petition for Allowance of Appeal filed with the Supreme Court of Pennsylvania on October 7, 2011 at Docket No. 760 MAL 2011, John and Mary Butler have sought immediate Supreme Court review of the opinion and order of the Superior Court. If the Supreme Court accepts and hears the Butlers’ appeal, the issues raised in *Butler* definitively will be decided by the Supreme Court. If the Supreme Court declines to hear the appeal, the case will proceed in the Court of Common Pleas in accordance with the opinion and order of the Superior Court.

Pennsylvania producers may wish to delay production (and possibly suspend ongoing production) on lands with mineral reservations like the one at issue in the *Butler* case until the case has made its way to a final, precedential, appellate outcome, hopefully an outcome that honors the longstanding Dunham Rule. However, if a delay in commencement of operations on a given tract could result in the expiration of the primary lease term, then (depending on the language of the lease) the leasehold could be lost. If operations on an already-producing leasehold (*i.e.*, outside the primary term and held by production) are halted, the lease could be lost absent a shut-in provision (or other comparable language) in the lease and payment of shut-in rental. Further, once production has begun, the halting of production cannot undo any trespass that has already occurred. A producer might choose to continue to operate the leasehold and hope for the best. Whether to delay planned operations or suspend active operations is a matter of assessment of business risk.

Unfortunately for Pennsylvania producers, this is unlikely to be the last instance of litigation that threatens the legal stability of the Marcellus Shale play, as the value of Marcellus Shale gas incentivizes those with a potential claim to gas to assert it, even if on novel legal grounds.

For more information regarding the Dunham Rule and issues relating to oil and gas leases, please contact contact Kevin E. Feigel at 412-394-6810 or [kfeigel@babstcalland.com](mailto:kfeigel@babstcalland.com) or Matthew I. Moses at 412-394-5624 or [mmoses@babstcalland.com](mailto:mmoses@babstcalland.com).