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Pennsylvania Ruling Brings Ambiguity

HARRISBURG, PA.–The Pennsylvania Supreme Court's decision in *Pennsylvania Environmental Defense Foundation (PEDF) v. Commonwealth* has upended a longstanding interpretation of an environmental provision in the state's constitution, but oil and gas representatives indicate no one is certain yet of the implications of the June 20 ruling, particularly regarding development of privately-held oil and gas resources.

The Pennsylvania Independent Oil & Gas Association reports that another pending Supreme Court case, *Gorsline v. Board of Supervisors of Fairfield Township*, ultimately may give a clearer sense of the court's intentions.

In the meantime, though, the new construal of the constitution already is being employed to challenge oil and gas activity, PIOGA warns.

ERA Interpretation

At issue in the *PEDF* case was Pennsylvania's Oil and Gas Lease Fund, which holds all rents and royalties from oil and gas leases on state-owned land. By law, the fund is to be used by the Department of Conservation and Natural Resources exclusively for conservation, recreation, dams or flood control, Babst Calland attorneys Kevin Garber and Blaine Lucas explain in PIOGA's newsletter. Beginning in 2009 as part of the state budget process, the Pennsylvania General Assembly made changes to Sections 1602-E and 1603-E of the Pennsylvania Fiscal Code, transferring control over royalties from oil and gas leases from DCNR to the legislature and requiring that there could be no expenditures of royalties from the lease fund unless the general assembly transferred that money to the general fund.

In 2012, the attorneys recount, PEDF filed a challenge in Pennsylvania Commonwealth Court to § 1602-E and 1603-E and the appropriation of money from the leases, among other things. The basis of the legal action was the Pennsylvania Supreme Court's December 2013 plurality opinion in *Robinson Township v. Commonwealth,* particularly its reading of Article I, § 27 of the Pennsylvania Constitution, commonly known as the Environmental Rights Amendment (ERA), which states: "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the commonwealth shall conserve and maintain them for the benefit of all the people."

The Commonwealth Court determined that the plurality opinion was not controlling and found that neither the fiscal code provisions nor the appropriations by the general assembly violated the ERA, and PEDF appealed to the Pennsylvania Supreme Court. The high court heard oral arguments on two issues: the proper standards for judicial review of government action and legislation under the ERA; and the constitutionality of § 1602-E and 1063-E and the general assembly's transfers and appropriations from the lease fund under the ERA.

According to the Babst Calland authors, since 1973, courts have used a three-part balancing test, set out by the Commonwealth Court in *Payne v. Kassab,* to analyze constitutional challenges brought under the ERA. That view began to change with the challenge to Pennsylvania's updated oil and gas law, Act 13 of 2012, in *Robinson Township*.

In the 2013 decision commonly referred to as *Robinson II,* three Supreme Court justices "strongly criticized the three-part *Payne v. Kassab* balancing test," Garber and Lucas explain. "However, the *Robinson II* opinion was a plurality, and courts have subsequently treated the plurality opinion as persuasive only, including the Commonwealth Court in PEDF."

Commonwealth Duties

A majority opinion in *PEDF* adopted the *Robinson II* plurality view and rejected the *Payne v. Kassab* test as the standard for analyzing challenges under the ERA, finding that "the proper standard of judicial review lies in the text of Article I, § 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment."

The Supreme Court went on to more fully develop a new standard in the context of PEDF's challenge to legislative action, Garber and Lucas explain, and in doing so relied on the three-justice plurality decision in *Robinson II.* A new majority of the court this time found that the text of the ERA grants citizens of the commonwealth two separate rights:

- "Clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment;" and
- "Common ownership by the people, including future generations, of Pennsylvania's public natural resources."

In its discussion of the second right granted under the ERA, the Supreme Court also found that the ERA established a public trust, with Pennsylvania's natural resources as the corpus of that trust and the commonwealth as the trustee. The

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trustee obligation is vested in "all agencies and entities of commonwealth government, both statewide and local," and the people are the named beneficiaries of the trust.

According to Garber and Lucas, relying again on the *Robinson II* plurality, the court reiterated that this trust requires the government to "conserve and maintain the corpus of the trust" and that as trustee, the commonwealth–that is, through "all agencies and entities of commonwealth government, both statewide and local,"–has duty to act "with prudence, loyalty and impartiality" toward the corpus of the trust. The court found that the trust places on basic duties on the commonwealth, to:

- "Prohibit the degradation, diminution, and depletion" of public natural resources; and
- "Act affirmatively via legislation to protect the environment."

What Happens Now?

According to PIOGA Vice President & General Counsel Kevin Moody, the Supreme Court held that any revenues–specifically royalties–derived from the sale of public natural resources, such as the natural gas underlying state-owned lands leased for production, are held in trust and may be expended only to conserve and maintain Pennsylvania's public natural resources. The court held that §1602-E and 1603-E of the 2009 fiscal code amendments and the general assembly's transfers/appropriations from the Oil and Gas Lease Fund were unconstitutional.

The court also remanded the case to the Commonwealth Court for a determination whether the rental and bonus payments constitute revenues from the sale of the Pennsylvania's natural gas and thus remain part of the so-called public trust.

"That determination will, in my opinion, be secondary to what the Commonwealth Court determines constitutes 'conserving and maintaining Pennsylvania's public natural resources,'" Moody continues, "because about two weeks after the decision, PEDF asked the Commonwealth Court to determine that the $65 million appropriations in the 2017-18 budget bill the governor allowed to become effective without his signature from the lease fund to DCNR for state park and forest are unconstitutional by reason of the *PEDF* decision."

Moody opines that the full consequences of the decision "will be uncertain and unknown for quite some time, but one thing is certain–the consequences will be far-reaching."

Already, he observes, the decision is being used in a variety of circumstances. For example, the ERA was cited in an appeal filed with the Pennsylvania Environmental Hearing Board of the routine issuance of a permit by the Department of Environmental Protection for spreading brine from conventional wells as a dust suppressant on municipal dirt roads.

Additionally, published reports indicate, the environmental group PennFuture has asked Allegheny County how it intends to spend the estimated $450 million in royalties expected to be paid over two decades for leasing natural gas rights under Pittsburgh International Airport and Allegheny County Airport and the more than $50 million anticipated from leasing beneath a county park. Officials previously have indicated the money will be used to promote economic development, reducing airline fees, upgrading park facilities and funding capital projects, but PennFuture wants assurances the funds will go only toward protecting public natural resources.

Private Resources

Although *PEDF* is ostensibly about the use of money from publicly owned natural resources, Moody expresses concern about what may be in store for the development of private oil and gas reserves. He observes that the majority opinion included a discussion of the ERA's legislative history, and despite the limitation of the text of the ERA to "public" natural resources, the court noted that the principal drafter of the amendment "opined that the trust nevertheless applied to 'resources owned by the commonwealth and also to those resources not owned by the commonwealth, which involve a public interest.'"

"We can only wait and see what 'all agencies and entities of commonwealth government, both statewide and local," will do with this expanded, nontextual scope of the ERA and how courts will analyze state and local regulation of private property under this approach," Moody acknowledges.

Garber and Lucas write that some of the issues surrounding application of the ERA may be resolved, or at least clarified, in *Gorsline v. Board of Supervisors of Fairfield Township,* which is pending before the Pennsylvania Supreme Court.

A local zoning board in *Gorsline* granted a conditional-use permit for a well in a residential-agricultural district, but a Lycoming County judge reversed that decision, relying on the *Robinson Township* case, published reports indicate. In September 2015, the Commonwealth Court reversed that ruling and determined that the record did not support the trial court's conclusion that the proposed use was incompatible with uses in an R-A district or that such uses would cause environmental harm. The Commonwealth Court noted that the operator's evidence before the board showing compatibility was uncontradicted. The Supreme Court heard oral arguments in March. ❐