



The PIOGA press

The monthly newsletter of the Pennsylvania Independent Oil & Gas Association

July 2017

Supreme Court reexamines the Environmental Rights Amendment

The Pennsylvania Supreme Court has rejected the long-standing test for analyzing claims brought under Article I, Section 27 of the Pennsylvania Constitution, commonly known as the Environmental Rights Amendment (ERA). In its June 20, decision in *Pennsylvania Environmental Defense Foundation (PEDF) v. Commonwealth*, the Supreme Court set aside the test from *Payne v. Kassab* that has been used since 1973, and held that the Commonwealth's oil and gas rights are "public natural resources" under the ERA and that any revenues derived from the sale of those resources must be held in trust and expended only to conserve and maintain public natural resources.

The Supreme Court's opinion in *PEDF* is an important step in the ongoing judicial reexamination of the ERA. However, the impact of the court's decision on environmental and land use issues beyond the relatively narrow facts of this case remains unclear.

Factual background

A statutory special fund in Pennsylvania known as the Oil and Gas Lease Fund holds all rents and royalties from oil and gas leases of Commonwealth land. The lease fund was originally required by statute to be used "exclusively used for conservation, recreation, dams, or flood control." In 1995, the Pennsylvania Department of Natural Resources (DCNR) became the entity responsible for making appropriations from the lease fund for projects. Between 2009 and 2015, the Pennsylvania General Assembly made a number of budgetary decisions related to the lease fund, including the enactment of Sections 1602-E and 1603-E of the Fiscal Code, which transferred control over the royalties from oil and gas leases from the DCNR to the General Assembly and required that there could be no expenditures of money in the lease fund from royalties unless that money was transferred to the General Fund by the General Assembly.

PEDF brought claims challenging Sections 1602-E, 1603-E, and the General Assembly's transfer/appropriations from the lease fund, among other things, in the Commonwealth Court. The basis of these claims was the ERA, which provides: "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 held the Fiscal Code provisions or the appropriations by the General Assembly of lease fund money to the General Fund did not violate the ERA, and *PEDF* appealed to the Supreme Court. The Supreme Court heard oral argument on two "overarching issues": (1) the proper standards for judicial review of government action and legislation under the ERA, and (2) the constitutionality of Section 1602-E, Section 1603-E and the General Assembly's transfers/appropriations from the lease fund under the ERA. The Supreme Court reviewed these pure questions of law *de novo*.

Standard of judicial review for challenges under the ERA

In the 1973 decision *Payne v. Kassab*, the Commonwealth Court set out a three-part balancing test to be applied when determining whether a Commonwealth action violates the ERA. While the Pennsylvania Supreme Court affirmed the Commonwealth Court's decision in that case without adopting the *Payne v. Kassab* test, it has been used by courts since 1973 to analyze constitutional challenges brought under the ERA.

In its landmark 2013 decision in *Robinson Township v. Commonwealth (Robinson II)*, the Supreme Court discussed the application of the ERA with respect to a number of challenges to Act 13 of 2012, the updated version of Pennsylvania's Oil and Gas Act, and strongly criticized the three-part *Payne v. Kassab* balancing test. 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*.

In *PEDF*, the Supreme Court, in an opinion authored by Justice Christine Donohue and joined by Justices Debra McClosky Todd, Kevin M. Dougherty and David N. Wecht, rejected the *Payne v. Kassab* test as the standard to be used

Authors:



Kevin J. Garber



Blaine A. Lucas

when analyzing challenges under the ERA, finding that the test “is unrelated to the text of Section 27 and the trust principles animating it” and “strips the constitutional provision of its meaning.” The Supreme Court instead determined that the “the proper standard of judicial review lies in the text of Article I, Section 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, and in doing so frequently relied on the three-justice plurality decision in *Robinson II*. The court found that the text of the ERA grants citizens of the Commonwealth two separate rights: (1) the right to “clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment”, and (2) the right of “common ownership by the people, including future generations, of Pennsylvania’s public natural resources.”

The trust doctrine

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

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 has duty to act “with prudence, loyalty and impartiality” toward the corpus of the trust. The court found that the trust imposes “two basic duties on the Commonwealth as the trustee”: (1) a “duty to prohibit the degradation, diminution, and depletion” of public natural resources, and (2) a duty to “act affirmatively via legislation to protect the environment.”

Appropriations from the lease fund

Pursuant to these duties imposed on the Commonwealth by the ERA, the court found that trust assets may be used “only for purposes authorized by the trust or necessary for the preservation of the trust,” and further held that the assets of the trust created by the ERA “are to be used for conservation and maintenance purposes.” The court further held that the General Assembly has discretion to determine how the revenue generated from the sale of the trust assets is directed when used for those purposes.

Regarding the use of royalties from leased oil and gas on Commonwealth property, the Supreme Court reversed the Commonwealth Court and held that Sections 1602-E and 1603-E of the Fiscal Code, both of which relate exclusively to royalties, were unconstitutional because they permit the trustee to use the trust for “non-trust purposes.” The court further found unconstitutional any further Fiscal Code amendments which transfer the “proceeds from the sale of trust assets to the General Fund.” The Supreme Court remanded the case to the Commonwealth Court to determine whether up-front bonus payments (and other revenue streams) are also part of the corpus of the trust, because the record was insufficiently developed

regarding the purpose of these payments. The court indicated that the Commonwealth Court must first determine whether these other revenue streams belong in the corpus of the ERA trust under “Pennsylvania trust principles.”

Justice Max Baer issued a concurring and dissenting opinion, joined in the dissenting portion by Justice Thomas G. Saylor. Justice Baer would have found that the ERA does not impose private trust duties on the Commonwealth, but rather creates a public trust which would not require money from the sale of natural resources to remain in an environmental trust, but could be used “for the general benefit of the public.” He asserted that the focus of ERA is “on the natural resources themselves, not the money gained from those resources.” The dissent argued that although proceeds from the sale of natural resources may be used for public purposes other than conservation, “the Commonwealth must act in a trustee-like capacity” in regard to natural resources.

Is the ERA self-executing?

The court majority opinion briefly addressed whether the ERA is self-executing or whether it requires implementing legislation to be effective. Citing *Robinson II*, the court confirmed that the public trust provisions of the ERA are self-executing. That is, “the second and third sentences of Section 27 do not require legislative action in order to be enforced against the Commonwealth in regard to public property.” The Supreme Court did not address whether the ERA is self-executing for purposes of enforcement against private property.

What’s next?

By rejecting the *Payne v. Kassab* test for matters involving constitutional challenges arising under the ERA, the Pennsylvania Supreme Court has discarded a test that has been used for more than 40 years and replaced it with a standard based on the “text of Article I, Section 27” and “the underlying principles of Pennsylvania trust law.” The Supreme Court’s decision in *PEDF* deals with governmental owned assets, and it is unclear how this new standard will be applied to state and local regulation of private natural resources, including oil and gas development, which is not addressed in the opinion. Some of these issues may be resolved in *Gorsline v. Bd. of Supervisors of Fairfield Twp.*, which is currently pending before the Pennsylvania Supreme Court. ■

Babst Calland will continue tracking developments related to the ERA and the new standard set out by the Supreme Court. For more information regarding issues relating to land use and municipal implications of the Supreme Court’s ruling, contact Blaine A. Lucas (412-394-5657 or blucas@babstcalland.com) or Krista M. Staley (412-394-5406, kstaley@babstcalland.com). For more information regarding impact of the court’s ruling on environmental regulatory matters, contact Kevin J. Garber (412-394-5404, kgarber@babstcalland.com) or Jean M. Mosites (412-394-6468, jmosites@babstcalland.com).