



4-1-2014

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## Recommended Citation

Mark T. Wilhelm, *"All" Is Not Everything: The Pennsylvania Supreme Court's Restriction of Natural Gas Conveyances in Butler v. Charles Powers Estate Ex Rel. Warren*, 59 Vill. L. Rev. 375 (2014).

Available at: <http://digitalcommons.law.villanova.edu/vlr/vol59/iss2/5>

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“ALL” IS NOT EVERYTHING: THE PENNSYLVANIA SUPREME COURT’S RESTRICTION OF NATURAL GAS CONVEYANCES IN *BUTLER v. CHARLES POWERS ESTATE EX REL. WARREN*

MARK T. WILHELM\*

“[Pennsylvanians] have been plagued with the ‘Dunham problem’ when drafting attorneys . . . were not aware of the *Dunham* decision and proceeded under the nearly universal assumption that a reservation of mineral rights *included* reservation of oil and gas interest in the land.”<sup>1</sup>

I. EXCAVATING THE TRUE MEANING OF MINERALS: AN INTRODUCTION TO MINERAL RIGHT CONVEYANCES

In late 2008, Bill Hartley leased the mineral rights below his family farm in rural southwestern Pennsylvania to Range Resources, a natural gas production company.<sup>2</sup> The Amwell Township resident received a six-figure cash payment and a royalty percentage for the right to drill for the natural gas trapped deep under his property in Marcellus shale.<sup>3</sup> Hartley, like many other Pennsylvania residents, is now realizing the immense value of the natural gas beneath his feet.<sup>4</sup> Signing bonuses and royalty

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1. *Broughton v. Nw. Natural Gas Co.*, 2 Pa. D. & C.4th 226, 228 (Ct. Com. Pl. 1988) (applying *Dunham* Rule to Pennsylvania mineral conveyance).

2. See Eliza Griswold, *The Fracturing of Pennsylvania*, N.Y. TIMES (Nov. 17, 2011), <http://www.nytimes.com/2011/11/20/magazine/fracking-amwell-township.html?pagewanted=all> (describing how Texas company, Range Resources, sought mineral rights in Amwell Township for purpose of drilling for natural gas trapped in Marcellus Shale).

3. See *id.* (noting while Hartley was unwilling to disclose specific amount he has received from natural gas well on his property, his cash bonus for signing lease totaled over \$110,000); see also ANTHONY ANDREWS ET AL., CONG. RESEARCH SERV., UNCONVENTIONAL GAS SHALES: DEVELOPMENT, TECHNOLOGY, AND POLICY ISSUES 1, 28 (2009), available at <http://energy.wilkes.edu/PDFFiles/Library/CRS%20Report%20on%20Shale%20Gas%20Issues.pdf> (stating that in Pennsylvania, signing bonuses for natural gas leases have skyrocketed from highs of \$35 per acre in 2002 to \$2,900 per acre in 2008).

4. See Griswold, *supra* note 2 (explaining Hartley is proponent of drilling for Marcellus shale gas). But see James Loewenstein, *Ward: Gas Company Financing Is Preventing Residents from Getting Mortgages*, DAILY REVIEW (Aug. 1, 2011), <http://thedailyreview.com/news/ward-gas-company-financing-is-preventing-residents-from-getting-mortgages-1.1182565> (explaining mortgage recording confusion that prevents some landowners from receiving mortgages on surface estate because natural gas companies have mortgaged mineral estate); Andrew Maykuth, *Drilling and*

payments from natural gas companies are helping everyday Pennsylvanians to make ends meet.<sup>5</sup> However, these payments would not be possible without the ability of private individuals like Hartley to profit from their mineral right ownership.<sup>6</sup>

Pennsylvania has a long, rich history of commercial drilling for oil and natural gas.<sup>7</sup> The state today maintains a unique position in the drilling industry as it sits atop the Marcellus Shale Formation.<sup>8</sup> The Marcellus

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*History Intersect in the Marcellus Shale*, PHILA. INQUIRER (Sept. 17, 2013), [http://articles.philly.com/2013-09-17/news/42151966\\_1\\_marcellus-shale-153-acre-farm-dennis-farm](http://articles.philly.com/2013-09-17/news/42151966_1_marcellus-shale-153-acre-farm-dennis-farm) (discussing landowners that have leased their mineral rights but are not receiving royalty payments because natural gas companies have decided not to drill); Ian Urbina, *Rush to Drill for Natural Gas Creates Conflicts with Mortgages*, N.Y. TIMES (Oct. 19, 2011), <http://www.nytimes.com/2011/10/20/us/rush-to-drill-for-gas-creates-mortgage-conflicts.html?pagewanted=all> (discussing situations where banks refuse to provide mortgages to landowners because of natural gas drilling practices on land that may devalue land as collateral). See generally *Documents: Mortgages and Gas Leases*, N.Y. TIMES (Oct. 7, 2011), <http://www.nytimes.com/interactive/us/drilling-down-documents-8.html#document/p67/a33452> (providing documents revealing position of bankers, credit union officials, and insurers on subject of natural gas lease relationship to mortgages).

5. See, e.g., Griswold, *supra* note 2 (discussing how Hartley used cash payment to reroof two of his barns, to purchase farm machinery, and to build addition for his ninety-two year old mother's house); Clifford Krauss & Tom Zeller, Jr., *When a Rig Moves in Next Door*, N.Y. TIMES (Nov. 6, 2010), [http://www.nytimes.com/2010/11/07/business/energy-environment/07frack.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2010/11/07/business/energy-environment/07frack.html?pagewanted=all&_r=1&) (reporting on one Pennsylvania woman who leased mineral rights to survive while going through divorce). But see Jacqueline Feldman & Rebecca Droke, *Shale Affecting Sales*, PHILA. INQUIRER (Sept. 3, 2011), [http://articles.philly.com/2011-09-03/news/30109265\\_1\\_mineral-rights-marcellus-shale-surface-estate](http://articles.philly.com/2011-09-03/news/30109265_1_mineral-rights-marcellus-shale-surface-estate) (discussing landowners that do not want to sell mineral rights and instead want to preserve land).

6. See *Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 598 (Pa. 1893) ("Mining rights are peculiar, and exist from necessity, and the necessity must be recognized . . ."); see also Erich Schwartzel, *Pennsylvania Landowners Can Get Cash for Mineral Rights*, PITTSBURGH POST-GAZETTE (May 19, 2013, 12:05 AM), <http://www.post-gazette.com/stories/local/marcellusshale/pennsylvania-landowners-can-get-cash-on-spot-for-mineral-rights-688190/> (explaining how some landowners who have leased mineral rights and already received signing bonuses are also selling their rights to royalty payments in exchange for upfront, lump sum payments).

7. See Daniel Yergin, *The Pennsylvania Start-up that Changed the World*, FORBES (Sept. 3, 2009, 4:29 PM), <http://www.forbes.com/2009/09/03/oil-daniel-yergin-business-energy-oil.html> (detailing early history of Pennsylvania oil drilling, including first commercial oil well in United States). Pennsylvania began producing oil commercially in 1859. See *Traditional Oil & Gas Industry*, PA. INDEP. OIL & GAS ASS'N, [http://www.pioga.org/publication\\_files/pioga-traditional-industry-fact-sheet.pdf](http://www.pioga.org/publication_files/pioga-traditional-industry-fact-sheet.pdf) (last visited Jan. 22, 2014) (providing basic overview of historical and current oil drilling in Pennsylvania).

8. See U.S. DEP'T OF ENERGY, OFFICE OF FOSSIL ENERGY & NAT'L ENERGY TECH. LAB., *MODERN SHALE GAS DEVELOPMENT IN THE UNITED STATES: A PRIMER* 21 (2009) [hereinafter U.S. DEP'T OF ENERGY, MODERN SHALE GAS], available at <http://www.gwpc.org/sites/default/files/Shale%20Gas%20Primer%202009.pdf> (detailing Marcellus Shale Formation that stretches from New York to northern Tennessee and includes significant portions of Pennsylvania). The Formation "covers an area of 95,000 square miles at an average thickness of 50 ft to 200 ft." *Id.* (citations omitted). See generally Kristin M. Carter et al., *Unconventional Natural Gas Resources in Pennsylvania: The Backstory of the Modern Marcellus Shale Play*, 18 ENVTL. GEOSCI.

Shale, a rock formation approximately one mile beneath the Earth's surface, naturally contains large deposits of natural gas.<sup>9</sup> However, drilling for Marcellus shale gas has only recently become both commercially and technologically practical.<sup>10</sup> This new abundance of harvestable energy resources, in the form of Marcellus shale gas, has led to the development of widespread commercial drilling for natural gas throughout Pennsylvania.<sup>11</sup> Supporters of drilling note that commercial production of natural gas yields massive economic benefits for the state.<sup>12</sup> Yet, drilling critics point to environmental concerns relating to the use of certain natural gas drilling techniques, especially hydraulic fracturing (fracking).<sup>13</sup>

ENCES 217 (2011), available at <http://deg.aapg.org/Portals/0/documents/EG11008.pdf> (highlighting "critical issues" regarding history and commercial production of Marcellus Shale Formation).

9. See Kevin Colosimo, *Natural Gas Boom a Blessing for Pa.*, PHILA. INQUIRER (Aug. 5, 2013, 1:08 AM), [http://www.philly.com/philly/news/local/20130805\\_Natural\\_gas\\_boom\\_a\\_blessing\\_for\\_Pa\\_.html](http://www.philly.com/philly/news/local/20130805_Natural_gas_boom_a_blessing_for_Pa_.html) (stating Marcellus Shale Formation is second largest natural gas reserve in world). To the extent this Note discusses the formation at large, it refers to it as the "Marcellus Shale." To the extent this Note discusses the sedimentary rock and the gas therein, it refers to it as "Marcellus shale" or "Marcellus shale gas." See *Butler v. Charles Powers Estate ex rel. Warren*, 65 A.3d 885, 898 (Pa. 2013) (clarifying terminology used by court).

10. See U.S. DEP'T OF ENERGY, *MODERN SHALE GAS*, *supra* note 8, at 21 (explaining first commercially viable drilling in Marcellus Shale Formation occurred in Pennsylvania in 2003, employing both horizontal drilling and hydraulic fracturing techniques).

11. See *Traditional Oil & Gas Industry*, *supra* note 7 (stating Pennsylvania lands contain over 350,000 oil and gas wells, with at least 70,000 active wells); see also Andrew Maykuth, *Pa.'s Natural Gas Rush*, PHILA. INQUIRER (Apr. 3, 2011), [http://articles.philly.com/2011-04-03/business/29377352\\_1\\_marcellus-formation-marcellus-shale-coalition-drilling](http://articles.philly.com/2011-04-03/business/29377352_1_marcellus-formation-marcellus-shale-coalition-drilling) (listing geographic areas of Marcellus shale gas development and major natural gas companies operating within Pennsylvania).

12. Compare Colosimo, *supra* note 9 (noting Pennsylvania oil and gas industry employs over 250,000 people and generates over \$11 billion in economic activity), with PA. ECON. LEAGUE OF SW. PA., LLC, ALLEGHENY CONFERENCE ON CMTY. DEV., *THE ECONOMIC IMPACT OF THE COAL INDUSTRY IN PENNSYLVANIA* 31 (2010), <http://www.alleghenyconference.org/PennsylvaniaEconomyLeague/PDFs/EconomicImpactAnalyses/EconomicImpactOfCoalIndustryInPa0410.pdf> (studying economic impact of coal industry in Pennsylvania and finding contribution of over 41,500 jobs and \$7.5 billion in economic activity). But see Kevin Begosby, *Billions in Pa. Gas Drilling Royalties Transform Lives*, SCRANTON TIMES-TRIBUNE (Jan. 28, 2013), <http://thetimes-tribune.com/news/business/billions-in-pa-gas-drilling-royalties-transform-lives-1.1435941> (noting that billions in royalty payments likely have larger individual impact than impact on Pennsylvania's overall economy). See generally Timothy Considine, Robert Watson, Rebecca Entler & Jeffrey Sparks, *An Emerging Giant: Prospects and Economic Impacts of Developing the Marcellus Shale Natural Gas Play*, INTERSTATE OIL & GAS COMPACT COMM'N I (2009), <http://groundwork.ioGCC.org/sites/default/files/EconomicImpactsofDevelopingMarcellus.pdf> (studying future economic viability and impact of Marcellus shale gas in Pennsylvania).

13. See Stephen G. Osborn, Aver Vengosh, Nathaniel R. Warner & Robert B. Jackson, *Methane Contamination of Drinking Water Accompanying Gas-Well Drilling and Hydraulic Fracturing*, 108 PROC. NAT'L ACAD. SCI. U.S.A. 8172, 8172 (2011), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3100993/> (arguing that fracking is responsible for, among other things, flammable tap water due to increased methane levels); see also Will Bunch, *Money, Politics and Pollution in Fracking Country*, PHILA.

Natural gas companies have historically bought, sold, and leased the mineral rights of Pennsylvania lands for traditional natural gas drilling.<sup>14</sup> With the recent technological availability of Marcellus shale gas, these natural gas companies have increased their efforts to secure the rights to Pennsylvania's subsurface minerals.<sup>15</sup> Landowners who still own their mineral rights have the option to sever mineral rights from the surface by splitting ownership of the surface estate and mineral estate.<sup>16</sup> Given the commercial desirability of natural gas, in recent years, natural gas companies have executed thousands of deeds and leases with landowners that convey the landowners' mineral rights.<sup>17</sup> This effort on the part of natural

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INQUIRER (Jan. 16, 2013), [http://articles.philly.com/2013-01-16/news/36355296\\_1\\_corbett-administration-marcellus-shale-pennfuture](http://articles.philly.com/2013-01-16/news/36355296_1_corbett-administration-marcellus-shale-pennfuture) (discussing questionable permitting processes for natural gas producers). *But see* Samuel C. Schon, *Hydraulic Fracturing Not Responsible for Methane Migration*, 108 PROC. NAT'L ACAD. SCI. U.S.A. E664, E664 (2011), <http://www.pnas.org/content/108/37/E664.full.pdf+html> (arguing that methane migration is natural and not caused by fracking). *See generally* Joseph A. Dammel, Note, *Notes from Underground: Hydraulic Fracturing in the Marcellus Shale*, 12 MINN. J.L. SCI. & TECH. 773 (2011) (examining legal issues and concerns regarding fracking in Pennsylvania); U.S. DEP'T OF ENERGY, MODERN SHALE GAS, *supra* note 8, at 56–63 (describing scientific and technological processes of fracking).

14. *See, e.g.*, Ian Urbina, Jeremy Ashkenas & Jo Craven McGinty, *Drilling Down: Oil and Gas Leases*, N.Y. TIMES (Dec. 2, 2011), <http://www.nytimes.com/interactive/2011/12/02/us/oil-and-gas-leases.html> (providing interactive database of over 111,000 oil and gas leases from across United States collected through open records requests). *See generally Unconventional Infrastructure Development in Pennsylvania*, KEYSTONE ENERGY, <http://www.keystoneenergyforum.com/uploads/files/28/KEF%20Infrastructure.pdf> (last visited Jan. 22, 2014) (overviewing, briefly, production process of unconventional natural gas).

15. *See* Hannah Wiseman, *Regulatory Adaptation in Fractured Appalachia*, 21 VILL. ENVTL. L.J. 229, 240 (2010) ("Between 2008 and 2009, the number of Marcellus wells drilled in Pennsylvania more than quadrupled."). States surrounding Pennsylvania have joined the drilling activity as natural gas trapped in Marcellus shale becomes technologically accessible and commercially viable. *See id.* *But see* Will Bunch, *Pa. Fracking Boom Goes Bust*, PHILA. INQUIRER (Sept. 12, 2013), [http://articles.philly.com/2013-09-12/news/41974274\\_1\\_fracking-boom-penn-state-marcellus-center-marcellus-shale](http://articles.philly.com/2013-09-12/news/41974274_1_fracking-boom-penn-state-marcellus-center-marcellus-shale) (discussing recent decline in natural gas drilling likely caused by drop in natural gas prices).

16. *See* JOHN BORDEAU, 6 SUMM. PA. JUR.2D PROPERTY § 5:2 (2d ed. 2014) (noting Pennsylvania's acceptance of severable estates). *See generally* 2 TIFFANY REAL PROPERTY § 587 (3d ed. 2014) (detailing individual ownership of strata beneath given property); Carlos B. Masterson, *Adverse Possession and the Severed Mineral Estate*, 25 TEX. L. REV. 139 (1946) (discussing severance of mineral estates and approaches to adverse possession of individual estates).

17. *See* Barnsdall v. Bradford Gas Co., 74 A. 207, 208 (Pa. 1909) (explaining that in Pennsylvania mineral lease conveys "no permanent interest, property, or estate in the land itself, but only in the [mineral] proceeds, and in such proceeds not as realty, but as personal property, and his possession is the possession of the owner"). *But see* Sandy Bauers, *2 Companies Pull out of Pa. Natural Gas Leases*, PHILA. INQUIRER (Jul. 17, 2013), [http://articles.philly.com/2013-07-17/news/40614767\\_1\\_property-owners-alliance-newfield-appalachia-pa-l-c-michele-siekerka](http://articles.philly.com/2013-07-17/news/40614767_1_property-owners-alliance-newfield-appalachia-pa-l-c-michele-siekerka) (reporting two major natural gas companies in Pennsylvania recently pulled out of contracts with landowners citing business reasons and low market price of natural gas).

gas companies to increase their rights to Marcellus shale gas has resulted in lucrative lease and royalty payments to Pennsylvania landowners.<sup>18</sup>

Of course, the promise of economic gains has revived disputes regarding newly valuable mineral rights across Pennsylvania.<sup>19</sup> The recent economic opportunity in natural gas has generated competition within the state's energy industry.<sup>20</sup> Further, the lure of drilling for natural gas may cause conflict between the surface owner and the owner of the mineral estate.<sup>21</sup> These disputes are often complicated by historical title defects to the rights in question.<sup>22</sup>

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18. See Frank Gamrat, Policy Brief, *Marcellus Royalty Payments Rising Rapidly*, ALLEGHENY INST. FOR PUB. POLICY (May 30, 2013), <http://www.alleghenyinstitute.org/marcellus-royalty-payments-rising-rapidly/> (estimating massive 6,600% royalty income increase to Pennsylvania mineral rights owners as result of natural gas drilling in Marcellus Shale Formation during 2012, totaling approximately \$731 million). For a natural gas contract to be valid in Pennsylvania, companies are required to provide the owner of the mineral rights at least one-eighth royalty on any natural gas produced. See 58 PA. CONS. STAT. § 33.3 (2013) (outlining minimum royalty requirement).

19. See Kevin C. Abbott & Nicolle R. Snyder Bagnell, *Recent Decisions Affecting the Development of the Marcellus Shale in Pennsylvania*, 72 U. PITT. L. REV. 661, 678 (2011) (discussing how increased drilling for oil and natural gas causes larger number of disputes between surface and subsurface owners).

20. See Tracie Mauriello, *Battle Between Coal and Gas a Hot Issue in Pennsylvania*, PITTSBURGH POST-GAZETTE (Aug. 11, 2013, 4:00 AM), <http://www.post-gazette.com/stories/local/marcellusshale/battle-between-coal-gas-hot-issue-in-pennsylvania-698915/> (explaining that natural gas companies are lobbying state governments for advantages compared to coal industry based on relatively clean image of natural gas compared to coal). See generally Craig R. McCoy & Joseph Tanfani, *'Us vs. Them' in Pa. Gaslands*, PHILA. INQUIRER (Dec. 12, 2011, 11:13 PM), [http://www.philly.com/philly/news/special\\_packages/inquirer/marcellus-shale/20111212\\_Us\\_vs\\_Them\\_in\\_Pa\\_Gaslands.html](http://www.philly.com/philly/news/special_packages/inquirer/marcellus-shale/20111212_Us_vs_Them_in_Pa_Gaslands.html) (detailing local political battles regarding drilling for Marcellus shale gas and effect of commercial lobbying on disputes); Nicolle R. Snyder Bagnell, *Environmental Regulation Impacting Marcellus Shale Development*, 19 PENN ST. ENVTL. L. REV. 177, 188–91 (discussing dispute resolution between coal producers and natural gas producers).

21. See, e.g., *Belden & Blake Corp. v. Commw. Dep't of Conservation & Natural Res.*, 969 A.2d 528, 529–30 (Pa. 2009) (examining whether Department of Conservation can legally place conditions or restrictions on commercial development of mineral estates located below state owned land); David Falchek, *PPL Battles Homeowners over Drilling Royalty Checks on Forgotten Land*, SCRANTON TIMES-TRIBUNE (Apr. 28, 2013), <http://prod-admin1.scranton.atex.cniweb.net:8080/preview/www/2.1188/2.612/1.1480554> (discussing dispute between electric corporation and landowners over mineral rights related to abandoned rail line property). See Stephen W. Saunders, *Weighing the Risks and Rewards*, PA. LAW. 18, 20 (Mar.–Apr. 2012) (explaining common law access to minerals that can create conflict between owner of surface estate and owner of mineral estate if owners have divergent plans for drilling).

22. See, e.g., Michael K. Vennum & Grant H. Hackley, *Recognizing New Issues Arising out of the Marcellus Shale Development—Avoiding Pitfalls—A Primer for Diligent Oil and Gas Title Attorneys*, 84 PA. B. ASS'N Q. 25, 31–33 (2013) (discussing process of title washing where surface estate and mineral estate have been recombined after being initially separated that can spur disputes to good title).

One of the main concerns regarding a transfer of mineral rights is identifying which minerals are contemplated by the conveyance.<sup>23</sup> Broadly drafted mineral conveyances routinely give rise to disputes regarding ownership of certain minerals.<sup>24</sup> States vary as to their presumptive inclusion of natural gas in the blanket term mineral.<sup>25</sup> *Butler v. Charles Powers Estate ex rel. Warren*<sup>26</sup> provides an example of a dispute over ownership of rights in natural gas.<sup>27</sup> In *Butler*, the legal question was whether a deed conveying the blanket term minerals, absent any evidence as to the intent of the parties, presumptively included natural gas.<sup>28</sup> The Pennsylvania Supreme Court held that natural gas trapped in the Marcellus Shale was not presumptively included in a conveyance of all minerals.<sup>29</sup> In doing so, the Supreme Court reaffirmed the *Dunham* Rule, which it considered a longstanding rule of property in the state.<sup>30</sup>

This Note examines the Pennsylvania Supreme Court's opinion in *Butler* and argues that the court examined the incorrect line of cases in its analysis.<sup>31</sup> Further, this Note argues that the Commonwealth should now adopt a new definition of minerals that is more in line with the vast majority of jurisdictions.<sup>32</sup> Part II explains the conceptual background of mineral rights and the two approaches to mineral right presumptions in the United States.<sup>33</sup> Part III addresses how the Supreme Court of Pennsylvania arrived at its decision in *Butler* and explains how the state supreme court misapplied past precedent in favor of a traditional scheme that sup-

23. See generally Ronald W. Polston, *Mineral Ownership Theory: Doctrine in Disarray*, 70 N.D. L. REV. 541 (1994) (detailing theories of mineral ownership and arguing for reclassification of mineral interests as incorporeal interests).

24. See generally K.A.D., Annotation, *Severance of Title or Rights to Oil and Gas in Place from Title to Surface*, 146 A.L.R. 880 (1943) (detailing numerous cases involving disputes related to separating surface estate from mineral estate across United States).

25. See generally A.S.M., Annotation, *What Are "Minerals" Within Deed, Lease, or License*, 17 A.L.R. 156 (1922) (detailing case law regarding presumptive inclusion and exclusion of certain substances in conveyance across jurisdictions in United States).

26. 65 A.3d 885 (Pa. 2013).

27. See *id.* at 886 (stating allowance of appeal for question of whether reservation of one-half minerals includes natural gas).

28. See *id.* at 887 (acknowledging mineral rights were conveyed in 1881 with no evidence to parties' intent except for actual reservation).

29. See *id.*

30. See *id.* (upholding longstanding *Dunham* Rule, which presumptively excludes natural gas from broad conveyance of minerals).

31. For a discussion of a line of Pennsylvania cases calling the *Dunham* Rule into question, see *infra* notes 140–50 and accompanying text.

32. For a discussion of the need to adopt the majority approach to presumptive conveyances of natural gas, see *infra* notes 151–60 and accompanying text.

33. For a further discussion of mineral rights and the different jurisdictional approaches to the presumptive inclusion of natural gas in a conveyance of minerals, see *infra* notes 37–84 and accompanying text.

ports natural gas companies.<sup>34</sup> Part IV examines the questionable status of the *Dunham* Rule as a rule of property in Pennsylvania and the need for departing from the Rule.<sup>35</sup> Finally, Part V explains how Pennsylvania citizens and practitioners can navigate the *Butler* decision in past and future land transactions.<sup>36</sup>

## II. UNCOVERING A RULE FOR CONVEYANCES: THE ROLE OF NATURAL GAS AS A PRESUMPTIVE MINERAL

Traditionally, by virtue of owning the surface of a parcel of land, a landowner had an interest in a section of the Earth extending directly from the surface of the property to the core.<sup>37</sup> Yet, over time, states began to move toward a more comprehensive understanding of property rights in real estate.<sup>38</sup> Pennsylvania, for example, now recognizes three different estates in a given parcel of land: a surface estate, a mineral estate, and a right to subjacent support.<sup>39</sup> Each of these estates is separable, and an

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34. For a further discussion of the facts, holding, and rationale of *Butler*, see *infra* notes 85–116 and accompanying text.

35. For a discussion of precedent calling into question the *Dunham* Rule and an argument for departure from the Rule, see *infra* notes 138–60 and accompanying text.

36. For a discussion of the means to navigate the impact of *Butler*, see *infra* notes 161–85 and accompanying text.

37. See *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.*, 171 U.S. 55, 60 (1898) (“The general rule of the common law was that whoever had the fee of the soil owned all below the surface, and this common law is the general law of the states and territories of the United States . . .”); John G. Sprankling, *Owning the Center of the Earth*, 55 UCLA L. REV. 979, 980–81 (2008) (discussing role of *ad coelum et ad inferos* doctrine, concept of owning to heavens and to core of earth, in developing theories of land ownership in United States). Individual ownership of minerals located beneath the surface is somewhat unique to the United States’ law. See EUGENE KUNTZ, LAW OF OIL & GAS § 2.1 (2013) (explaining that under civil law concepts, sovereign retained rights to subsurface minerals). However, federal statutes granting individuals actual ownership of mineral rights developed relatively slowly. See *Del Monte Mining*, 171 U.S. at 61 (“For nearly a century there was practically no legislation on the part of congress for the disposal of mines or mineral lands.”).

38. See *Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 598 (Pa. 1893) (“Formerly a man who owned the surface owned it to the center of the earth. Now the surface of the land may be separated from the different *strata* underneath it, and there may be as many different owners as there are *strata*.”).

39. See *Gioia v. Gioia*, 555 A.2d 1330, 1335 n.4 (Pa. Super. Ct. 1989) (citing *Smith v. Glen Alden Coal Co.*, 32 A.2d 227, 234–35 (Pa. 1943)) (noting, generally, Pennsylvania’s recognition of separate estates in single parcel of land). In Pennsylvania, oil and natural gas are “a part of the land while they are in place,” but “can be severed from the ownership of the surface by grant or exception as separate corporeal rights.” See *Pa. Bank & Trust Co., Youngsville Branch v. Dickey*, 335 A.2d 483, 485 (Pa. Super. Ct. 1975) (citing *Duquesne Natural Gas Co. v. Fefolt*, 198 A.2d 608 (Pa. Super. Ct. 1964)).



owner may sell or lease the interest in an individual estate, independent of the other estates.<sup>40</sup>

Pennsylvania common law broadly defines the general term “mineral.”<sup>41</sup> Consequently, while parties may intend to transfer rights to a certain estate, ambiguity regarding which substances are contained in a given estate routinely gives rise to disputes.<sup>42</sup> Especially problematic are conveyances that simply transfer the blanket term “minerals.”<sup>43</sup> Given the rapidly increasing interest in Marcellus shale natural gas as a commercially viable substance, parties are now scrutinizing vague deeds executed decades ago to determine rights to natural gas.<sup>44</sup> Absent specific language contemplating a difference, courts treat oil and natural gas similarly due to their similar nature and properties.<sup>45</sup> But courts in different jurisdictions have come to conflicting opinions regarding how to approach the question of whether natural gas and oil are presumptively included in a broad conveyance of mineral rights.<sup>46</sup> The minority approach, generally

40. See *Lillibridge v. Lackawanna Coal Co.*, 22 A. 1035, 1036 (Pa. 1891) (noting that different strata beneath earth create different estates and each estate may have separate owner); *Hetrick v. Apollo Gas Co.*, 608 A.2d 1074, 1078 (Pa. Super. Ct. 1992) (“As with any estate in land, the owner of the mineral estate may convey his entire bundle of rights in fee or may grant a mere portion thereof via leasehold.”). See generally Hallie Seegal, *In North Carolina, Fracking Rights Rise to Surface*, REUTERS (Feb. 8, 2013), <http://blogs.reuters.com/events/2013/02/08/in-north-carolina-fracking-rights-rise-to-surface/> (stating concept of split estate was based on sixteenth century English law that preserved monarch’s right to gold and silver deposits beneath all land in kingdom).

41. See *Griffin v. Fellows*, 81 1/2 Pa. 114, 124 (1873) (“The term ‘minerals’ embraces everything not of the mere surface, which is used for agricultural purposes; the granite of the mountain as well as metallic ores and fossils, are comprehended within it.” (citations omitted)).

42. See, e.g., *In re Blue Coal Corp.*, Nos. 5–76–bk–01311, 5–78–bk–00604, Adv. No. 5–10–ap–00149, 2010 WL 2754453, at \*1 (Bankr. M.D. Pa. July 10, 2010) (examining whether to apply *Dunham* Rule analysis to previously decided bankruptcy matter where mineral rights were sold as part of liquidated bankruptcy estate). The question of whether the *Dunham* Rule applied was not ministerial and therefore the underlying case was closed. See *Earth Conservancy v. Blue Coal Corp.*, No. 10cv1748, 2011 WL 662685, at \*2 (Bankr. M.D. Pa. Feb. 14, 2011). See generally C.V.V., Annotation, *What Are “Minerals” Within Deed, Lease, or License*, 86 A.L.R. 983 (1933) (listing substances that may give rise to debate regarding their status as minerals in given conveyance).

43. See C.V.V., *supra* note 42 (discussing rules for interpreting “a conveyance or exception of ‘minerals’ in a deed, lease, or license”).

44. See generally Leo N. Smith et al., *Title Examination of Mineral Interests in Fee Lands*, 5C ROCKY MTN. MIN. L. INST. 13 (1977) (detailing terms, processes, and instruments involved in mineral conveyances in United States).

45. See, e.g., *Silver v. Bush*, 62 A. 832, 833 (Pa. 1906) (relying on absence of petroleum in mineral conveyance to demonstrate absence of natural gas); KUNTZ, *supra* note 37, § 13.3 (grouping oil and natural gas for purposes of analyzing mineral conveyances).

46. See generally Daniel B. Kostrub & Roger S. Christenson II, *Canons of Construction for the Interpretation of Mineral Conveyances, Severances, Exceptions, and Reservations in Producing States*, 88 N.D. L. REV. 649, 659–64 (2012) (summarizing six basic methods for courts to interpret vague references to minerals in conveyance).

termed the "Pennsylvania Approach," presumptively excludes natural gas from the term "minerals."<sup>47</sup> Conversely, the majority approach presumptively includes natural gas in the term "minerals."<sup>48</sup>

A. *Minority (Pennsylvania) Approach to a Conveyance of "Minerals"*

The minority approach to the presumptive contents of a mineral estate is that the estate does not contain natural gas absent clear evidence that the contracting parties intended to convey natural gas.<sup>49</sup> Courts routinely recognize *Dunham v. Kirkpatrick*<sup>50</sup> as the seminal case regarding the presumptive exclusion of natural gas in a conveyance of minerals.<sup>51</sup> In *Dunham*, the Pennsylvania Supreme Court addressed whether reservation of "all minerals" included oil.<sup>52</sup> The court held that oil was presumptively excluded from a reservation of all minerals because oil was not found in the popular usage of the term minerals at the time of the conveyance.<sup>53</sup> Subsequent courts applied the *Dunham* Rule to natural gas as well, noting the similarities between oil and natural gas.<sup>54</sup> Modern courts applying the minority rule generally point to the rule's objective of interpreting contracts as intended at the time of the conveyance.<sup>55</sup> However, critics of the

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47. See Millard F. Ingraham, Comment, *Meaning of Minerals in Grants and Reservations*, 30 ROCKY MTN. MIN. L. INST. 343, 345–46 (1957) (listing numerous jurisdictions rejecting *Dunham* Rule and stating "[t]he *Dunham* Rule has found little support in other jurisdictions").

48. See William L. Powers, *Mines and Minerals—Mineral Reservation—Surface Ownership Includes at Surface Substances and Those Near Surface Substances Whose Removal Involves Destruction of Surface by Any Reasonable Method Known at Time Extraction Is Planned*, 12 ST. MARY'S L.J. 580, 585 (1980) (describing majority and minority rules for interpreting ambiguous language in mineral conveyance).

49. See generally A.S.M., *supra* note 25 (treating Pennsylvania separately for purposes of natural gas and oil due to its unique opinion regarding presumptive exclusion of natural gas and oil in vague mineral conveyance).

50. 101 Pa. 36 (1882).

51. See Robert J. Burnett, *The Status Quo Restored*, 35 PA. LAW. 38, 38 (2013) (discussing importance of consistent application of *Dunham* Rule to Pennsylvania).

52. See *Dunham*, 101 Pa. at 37 ("In the article of agreement, and also in the deed, was inserted . . . '[e]xcepting and reserving all the timber suitable for sawing; also, all minerals; also, the right of way to take off such timber and minerals.'").

53. See *id.* at 44 ("Certainly, in popular estimation petroleum is not regarded as a mineral substance any more than is animal or vegetable oil, and it can, indeed, only be so classified in the most general or scientific sense."). The *Dunham* court further suggested that the drafters of the conveyance "should have known that they were using that word [minerals] in a manner not sanctioned by the common understanding of mankind." *Id.*

54. See, e.g., *Silver v. Bush*, 62 A. 832, 833 (Pa. 1906) (relying on absence of petroleum in mineral conveyance to demonstrate absence of natural gas); KUNTZ, *supra* note 37, § 13.3 (grouping oil and natural gas for purposes of analyzing mineral conveyances).

55. See *Butler v. Charles Powers Estate ex rel. Warren*, 65 A.3d 885, 898 (Pa. 2013) (citing *Schuylkill Nav. Co. v. Moore*, 2 Whart. 477, 493 (Pa. 1837)) ("[W]hen interpreting private deeds and contracts, the 'question is to be determined not by principles of science, but by common experience directed to the discovery of intention.'").

minority approach point to courts reaffirming the *Dunham* Rule as simply reinforcing the Rule's status as an outdated rule of property.<sup>56</sup>

### B. *Majority Approach to a Conveyance of "Minerals"*

The vast majority of jurisdictions consider a transfer of all minerals presumptively to include natural gas, unless the conveying instrument as a whole produces ambiguity.<sup>57</sup> Initially, many courts throughout the country applied the *Dunham* Rule to mineral disputes.<sup>58</sup> However, as the oil and gas industry developed, states quickly moved away from applying the *Dunham* Rule.<sup>59</sup> Over sixty-five years ago, courts began to note the vast rejection of the *Dunham* Rule in favor of a more inclusive view of minerals.<sup>60</sup>

These later courts generally adopted one of two approaches to support the notion that natural gas and oil are included in the meaning of the word minerals.<sup>61</sup> First, some courts applied a standard referring to the

56. *See id.* at 900 n.1 (Saylor, J., concurring) ("Pennsylvania post-*Dunham* decisions have 'adhered to that view, not so much because the court was sure that in its ordinary sense the term 'minerals' did not include oil and gas, but because the previous decision had become a rule of law on which land titles in that state were based.'" (quoting 1A NANCY SAINT-PAUL, SUMMERS OIL & GAS § 7:16 (3d ed. 2012))).

57. *See* SUMMERS OIL & GAS, *supra* note 56, § 7:16 (explaining whether grant or exception of minerals includes oil and gas); C. C. Marvel, Annotation, *Oil and Gas as "Minerals" Within Deed, Lease, or License*, 37 A.L.R.2d 1440 (1954) (surveying acceptance of oil and gas as minerals within different jurisdictions throughout United States).

58. *See, e.g.,* McKinney's Heirs v. Cent. Ky. Nat. Gas. Co., 120 S.W. 314, 315–16 (Ky. 1909) (citing *Dunham v. Kirkpatrick*, 101 Pa. 36, 47 (1882)) (holding natural gas not presumptively included in conveyance of minerals); *Huie Hodge Lumber Co. v. R.R. Lands Co.*, 91 So. 676, 678 (La. 1922) (applying *Dunham* Rule and holding, due to circumstances of conveyance, natural gas and oil were not included in conveyance); *Detlor v. Holland*, 49 N.E. 690, 692–93 (Ohio 1898) (applying *Dunham* Rule and holding natural gas and oil were not presumptively included in conveyance).

59. *See, e.g.,* *Scott v. Laws*, 215 S.W. 81, 82 (Ky. 1919) (recognizing "all minerals" as "all inorganic substances which can be taken from the land"), *overruling McKinney's Heirs*, 120 S.W. 314; *Warren v. Clinchfield Coal Corp.*, 186 S.E. 20, 21 (Va. 1936) ("The weight of authority is to the effect that petroleum, oil and gas are minerals, though there is respectable authority upholding what is known as the 'Pennsylvania Doctrine,' which lays down a contrary rule."); *Williamson v. Jones*, 19 S.E. 436, 441 (W. Va. 1894) ("[A]uthorities now very generally—universally . . . hold petroleum to be a mineral, and as much a part of the realty as timber, coal, or iron ore, except that in proper cases its mobility as a subterranean liquid must be taken into consideration . . .").

60. *See Branham v. Minear*, 199 S.W.2d 841, 846 (Tex. Civ. App. 1947) ("[T]hat the term 'minerals' includes oil and gas is so well settled as to need no citation of authorities . . .").

61. *See, e.g.,* *Lovelace v. Sw. Petroleum Co.*, 267 F. 513 (6th Cir. 1920) (interpreting Kentucky law and holding that natural gas and oil are presumptively included in conveyance of minerals unless language of grant indicated anything less than transfer of all minerals); *Nephi Plaster & Mfg. Co. v. Juab Cnty.*, 93 P. 53, 55 (Utah 1907) ("[M]inerals, prima facie at least, are not confined to the metals.").

ordinary meaning of the word, which can be derived from readily available resources such as dictionaries.<sup>62</sup> Second, other courts suggested a more scientific approach to defining the word minerals that would also include oil and natural gas.<sup>63</sup> In either case, courts generally adopted a definition of mineral that includes any inorganic substance for which mining or drilling is commercially profitable.<sup>64</sup> Critics of the majority approach generally claim courts applying the majority rule are contravening the intent of the contracting parties because if the parties intended to include natural gas, the conveyance would have specifically contemplated the substance.<sup>65</sup>

### C. *Pennsylvania's Application of Mineral Rules*

Given Pennsylvania's status as the birthplace of commercial oil and gas drilling, its courts decided some of the earliest mineral disputes.<sup>66</sup> Based on the *Dunham* decision in 1882, Pennsylvania common law has developed the *Dunham* Rule.<sup>67</sup> The *Dunham* Rule interprets a general conveyance of all minerals to presumptively exclude oil and natural gas, unless contradicted by parol evidence.<sup>68</sup> However, through the years,

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62. See *Murray v. Allard*, 43 S.W. 355, 359 (Tenn. 1897) (suggesting that definition of minerals is most appropriate when taken from dictionaries and other similar authorities, and finding that "bulk of mankind" does not view "minerals" as only including metals).

63. See, e.g., *Matthews v. Dep't of Conservation*, 96 N.W.2d 160, 164 (Mich. 1959) (considering definition of minerals based on division of all matter into "animal, mineral, and vegetable kingdoms"); *Sult v. Hochstetter Oil Co.*, 61 S.E. 307, 311 (W. Va. 1908) ("Legally and scientifically oil and gas are universally held to be minerals."); cf. *Armstrong v. Lake Champlain Granite Co.*, 42 N.E. 186, 187 (N.Y. 1895) (considering whether granite is mineral ore for purposes of conveyance and noting that, scientifically, granite is not mineral ore).

64. See, e.g., *Robinson v. Wheeling Steel & Iron Co.*, 129 S.E. 311, 312 (W. Va. 1925) ("'Minerals,' when used in a deed, may include every inorganic substance which can be extracted from the earth for profit."); accord *Horse Creek Land & Mining Co. v. Midkiff*, 95 S.E. 26, 27 (W. Va. 1918) ("The term 'mineral,' when employed in conveyancing in this state, is understood to include every inorganic substance which can be extracted from the earth for profit . . .").

65. See, e.g., *Dunham v. Kirkpatrick*, 101 Pa. 36, 44 (1882) ("[W]e may be very sure that when [the parties] made their contract . . . they did not intend to reserve the mineral oil that might afterward be found in the land, otherwise that intention would have been expressed in no doubtful terms.").

66. See *Abbott & Bagnell*, *supra* note 19, at 661 (stating that Pennsylvania courts have some of "oldest jurisprudence" in United States relating to oil and gas).

67. For a discussion of the development of the *Dunham* Rule, see *supra* notes 50–54 and accompanying text. Some courts note that the historical origin of the *Dunham* Rule may actually stretch as far back as 1836. See *Butler v. Charles Powers Estate ex rel. Warren*, 65 A.3d 885, 889 (Pa. 2013) (noting that *Dunham* line of cases began in *Gibson v. Tyson*, 5 Watts 34 (Pa. 1836)).

68. See *Highland v. Commonwealth*, 161 A.2d 390, 398 (Pa. 1960) (citing *Dunham*, 101 Pa. at 44) ("[I]f, 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 as oil.").

Pennsylvania courts have not always applied the *Dunham* Rule consistently and have instead regularly utilized the majority approach to conveyance interpretations.<sup>69</sup>

### 1. *Applying the Dunham Rule: The Minority Approach*

The line of Pennsylvania cases spawned by the *Dunham* decision relies on the transfer of minerals as a common law interpretation of a contract.<sup>70</sup> Courts begin their analyses with the notion that the term “minerals” should be read according to the understanding of the parties at the time of the agreement.<sup>71</sup> Therefore, to understand the parties’ intent, the specific language used in the conveyance should be interpreted in light of the everyday usage of its terms.<sup>72</sup> If the parties’ intent or understanding is unclear from the language of the conveyance, parol evidence may be used to overcome the presumption that natural gas is not included in the transfer of mineral rights.<sup>73</sup>

### 2. *An Inconsistent Application: The Majority Approach*

Pennsylvania courts have not always been consistent in refusing to recognize natural gas as a mineral. Before the *Dunham* decision, Pennsylvania courts found that oil was a mineral based on the common

69. See Scott M. Farnsworth, Comment, *Including Geothermal Resources Within the Mineral Estate: The Need for a Statutory Rule of Presumption*, 1978 BYU L. REV. 593, 593 n.1 (1978). For a discussion of Pennsylvania courts applying the majority approach to oil and natural gas, see *infra* notes 74–84 and accompanying text.

70. See Brant M. Laue, *Interpretation of ‘Other Minerals’ in a Grant or Reservation of a Mineral Interest*, 71 CORNELL L. REV. 618, 629 (1986) (citing *Dunham v. Kirkpatrick*, 101 Pa. 36 (1882)) (explaining some courts attempt to determine intent of parties when deciding whether natural gas is mineral).

71. See *Schuykill Nav. Co. v. Moore*, 2 Whart. 477, 491 (Pa. 1837) (“The best construction is that which is made by viewing the subject of the contract, as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it.”). Interestingly, when examining real property conveyances generally, Pennsylvania does not look to the intent of the parties, but to the meaning of the words in the conveyance. See *Lawson v. Simonsen*, 417 A.2d 155, 158 (Pa. 1980) (“[W]e seek to ascertain not what the parties may have intended by the language but what is the meaning of the words . . .” (quoting *Brookbank v. Bendum-Trees Oil Co.*, 131 A.2d 103, 107 (Pa. 1957))). *Contra* *Commonwealth v. Fitzmartin*, 102 A.2d 893, 894 (Pa. 1954) (“Where a deed or agreement or reservation therein is obscure or ambiguous, the intention of the parties is to be ascertained in each instance not only from the language of the entire written instrument . . . but also from a consideration of the subject matter and of the surrounding circumstances.” (citing *Price v. Confair*, 79 A.2d 224, 226 (Pa. 1951))).

72. See *Preston v. S. Penn Oil Co.*, 86 A. 203, 204 (Pa. 1913) (holding that mineral is “not per se a term of art or trade, but of general language,” and, presumably, should therefore be interpreted in “the ordinary, popular sense”).

73. See *Highland*, 161 A.2d at 399 (requiring “clear and convincing” evidence to overcome presumption).

understanding of the substance.<sup>74</sup> Further, following the *Dunham* decision, Pennsylvania courts continued to recognize oil as a mineral.<sup>75</sup> This interpretation quickly extended to natural gas as well.<sup>76</sup> Consistent with the majority approach, courts justified natural gas and oil as minerals because of their nature as inorganic, commercially viable substances.<sup>77</sup> This line of cases carried such weight that the Supreme Court of the United States even cited these Pennsylvania decisions as support for the concept that oil and natural gas were minerals.<sup>78</sup>

The landmark decision, *U.S. Steel Corp. v. Hoge*,<sup>79</sup> also nudged Pennsylvania toward the majority interpretation of natural gas as a mineral

74. See, e.g., *Appeal of Stoughton*, 88 Pa. 198, 201 (1879) (citing *Funk v. Halldeman*, 53 Pa. 229, 248–49 (1866) (declaring, in certain terms, mineral includes oil)); *Funk*, 53 Pa. at 248–49 (noting that until science advanced, oil was considered mineral as future courts would likely agree).

75. See, e.g., *Hamilton v. Foster*, 116 A. 50, 52 (Pa. 1922) (discussing how parties did not dispute characterization of oil and gas as minerals); *Marshall v. Mellon*, 36 A. 201, 201 (Pa. 1897) (citing *Stoughton*, 88 Pa. at 198) (noting status of oil as mineral); *Blakley v. Marshall*, 34 A. 564, 565 (Pa. 1896) (citing *Stoughton*, 88 Pa. at 201) (recognizing oil as mineral while situated beneath ground); *Gill v. Weston*, 1 A. 921, 923 (Pa. 1885) (discussing petroleum as mineral).

76. See *Westmoreland & Cambria Natural Gas Co. v. DeWitt*, 18 A. 724, 725 (Pa. 1889) (recognizing validity of natural gas as mineral based on master's finding). The *Westmoreland* court qualified the classification of natural gas as a mineral because natural gas, like oil, is a mineral "*feroe natureoe*." See *id.* A landowner therefore only had an interest in natural gas and oil as long as it remained under the landowner's property. See *id.* (noting when property owner had interest in natural gas and oil); accord *Hamilton*, 116 A. at 52; see also *Barnard v. Monongahela Natural Gas Co.*, 65 A. 801, 802 (Pa. 1907) (discussing analogy between ownership of wild animals and ownership of oil and gas, stating, "[t]his may not be the best rule; but neither the Legislature nor our highest court has given us any better").

77. See *Gill*, 1 A. at 923 ("[Petroleum] is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may, with propriety, be called mining lands."); cf. *Hendler v. Lehigh Valley R.R. Co.*, 58 A. 486, 487 (Pa. 1904) (examining whether word mineral includes sand, explaining, "[a mineral] may be defined as any inorganic substance found in nature, having sufficient value, separated from its situs as part of the earth, to be mined, quarried, or dug for its own sake or its own specific uses"), *rev'd on other grounds by* *Hall v. Del., Lackawanna & W. R.R. Co.*, 113 A. 669 (Pa. 1921); see also *PAPCO, Inc. v. United States*, 814 F. Supp. 2d 477, 494 (W.D. Pa. 2011) (interpreting Pennsylvania law regarding whether mineral includes sandstone, stating, "[w]hen the parties intend to define minerals by its commercial sense, substances included within this definition have their own value that is apart from the rest of the land").

78. See *Burke v. S. Pac. R.R. Co.*, 234 U.S. 669, 677 (1914) (citing *Gill*, 1 A. at 923; *Funk*, 53 Pa. at 248–49). The Court subsequently held that "[p]etroleum lands are mineral lands within the meaning of that term" as it relates to railroad land grants. *Id.* at 711; see also *Luse v. Boatman*, 217 S.W. 1096, 1099–1101 (Tex. Civ. App. 1919) (discussing history of Pennsylvania's mineral rights decisions, including *Dunham*, and noting that Pennsylvania now recognizes natural gas and oil as minerals before holding both substances are minerals).

79. 468 A.2d 1380 (Pa. 1983). Several courts have referred to this *Hoge* decision as "*Hoge II*." See *Butler v. Charles Powers Estate ex rel. Warren*, 65 A.3d 885, 888 (Pa. 2013) (referring to *Hoge* as *Hoge II*). For the purposes of this Note, the decision will be referred to as the *Hoge* decision.

through the court's analysis of the ownership of natural gas trapped in a stream of coal.<sup>80</sup> In *Hoge*, the Pennsylvania Supreme Court held that the owner of a stream of coal also owned the coalbed gas situated inside of the coal stream, despite the fact that ownership of the coal stream had been separated from the immediately adjacent strata.<sup>81</sup> The court reasoned that because coal was unequivocally a mineral, substances trapped within the conveyed mineral were also conveyed by the mineral grant.<sup>82</sup> The owner of any other strata had no right to access the coalbed gas, and therefore, the coalbed gas belonged to the owner of the coal.<sup>83</sup> This ownership theory applies even if the owner of the coal did not explicitly receive a conveyance of the coalbed gas trapped inside of the coal.<sup>84</sup>

### III. *BUTLER V. CHARLES POWERS ESTATE EX REL. WARREN*: BURYING THE QUESTION TO PRESERVE TRADITION

The Pennsylvania Supreme Court in *Butler* decided that the *Dunham* Rule is still the law of Pennsylvania and, consequently, that natural gas is presumptively not a mineral for the purpose of private conveyances.<sup>85</sup> The court was asked to decide whether a deed executed in 1881 conveying

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80. See *Hoge*, 468 A.2d at 1384–85 (holding, generally, that coalbed gas was conveyed through deed conveying all minerals). The *Hoge* decision was the first major court case involving ownership of coalbed gas in the United States. See Sarah Kathryn Farnell, *Methane Gas Ownership: A Proposed Solution for Alabama*, 33 ALA. L. REV. 521, 525–26 (1982) (discussing court's decision in *Hoge* that “coalbed methane is a separate substance from coal”). One commentator argues that the *Hoge* holding may have been largely based on public policy concerns rather than some underlying legal framework. See Nancy P. Regelin, Comment, *Coalbed Gas Ownership in Pennsylvania—A Tenuous First Step with U.S. Steel v. Hoge*, 23 DUQ. L. REV. 735, 736 (1985) (examining, in-depth, *Hoge* decision and its possible underlying motives).

81. See *Hoge*, 468 A.2d at 1383 (holding owner of individual strata also has right to minerals located inside of particular strata). The court also explained that coalbed gas was scientifically similar to natural gas, with the main difference between the two substances being the different strata in which they were located. See *id.* at 1382 (“The gas which has commonly been referred to as ‘natural gas’ is generally found in strata deeper than coal veins, though it shares many of the characteristics of coalbed gas.”). *Contra* Amoco Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865, 880 (1999) (holding, for federal lands, coalbed gas is not included in conveyance of coal in which coalbed gas is located).

82. See *Hoge*, 468 A.2d at 1383 (citing *Kier v. Peterson*, 41 Pa. 357 (1861)) (“[A]s a general rule, subterranean gas is owned by whoever has title to the property in which the gas is resting.”).

83. See *id.* (“[S]uch gas as is present in coal must necessarily belong to the owner of the coal, so long as it remains within his property and subject to his exclusive dominion and control.”).

84. See *id.* at 1382 (providing text of coal severance deed at issue, which did not contemplate coalbed gas). The *Hoge* decision proves to have a significant impact on Pennsylvania landowners today. See Jason P. Webb, *Pennsylvania & Coalbed Methane: Reviving the Traditional Willingness to Protect Surface Owners*, 27 TEMP. ENVTL. L. & TECH. J. 35, 43–45 (2008) (discussing aftermath of *Hoge* decision).

85. For a discussion of the reasoning of the *Butler* court, see *infra* notes 99–116 and accompanying text.

the broad term "minerals" contemplated or included natural gas trapped in Marcellus shale.<sup>86</sup> The court's decision rested on a centuries-old tradition of recognizing the *Dunham* Rule's application to mineral estates and continued the Commonwealth's support of commercial gas production.<sup>87</sup>

#### A. *Facts and Procedure*

John and Mary Butler owned a 244-acre parcel of land in Susquehanna County.<sup>88</sup> A predecessor in title to the property took title from Charles Powers by deed in 1881.<sup>89</sup> The deed in question contained a reservation of one half of "the minerals and Petroleum Oils" to Charles Powers, but the language of the reservation did not specifically contemplate natural gas.<sup>90</sup>

The Butlers filed a complaint in quiet title alleging ownership of all minerals beneath the property, including natural gas, through adverse possession.<sup>91</sup> In response, William and Craig Pritchard, the rightful heirs to Charles Powers's estate, sought a declaratory judgment that the original reservation included one-half of the natural gas trapped in Marcellus shale beneath the property.<sup>92</sup> The Butlers filed a preliminary objection, in the form of a demurrer, to the request for a declaratory judgment, arguing that in Pennsylvania a deed reserving the general term "minerals" does not

86. For a discussion of the facts of the *Butler* case, see *infra* notes 88–98 and accompanying text.

87. For a discussion of Pennsylvania's judicial and legislative preference for mineral laws and rulings favoring commercial producers over landowners, see *infra* notes 117–36 and accompanying text.

88. *See Butler v. Charles Powers Estate ex rel. Warren*, 65 A.3d 885, 887 (Pa. 2013) (discussing appellants in case).

89. *See id.* (discussing history of deed).

90. *See id.* The language of the deed read as follows:

[O]ne-half the minerals and Petroleum Oils to said Charles Powers his heirs and assigns forever together with all and singular the buildings, water courses, ways, waters, water courses, rights, liberties, privileges, hereditaments, and appurtenances, whatsoever there unto belonging or in any wise appertaining and the reversions and remainders rents issues and profits thereof; And also all the estate right, title interest property claimed and demand whatsoever there unto belonging or in any wise appertaining in law equity or otherwise however of in to or out of the same.

*Id.* (alteration in original).

91. *See id.* (claiming full ownership of mineral rights as opposed to ownership of one-half of mineral rights as conveyed by deed). The Butlers originally filed their claim in the Susquehanna Court of Common Pleas. *See id.* (discussing procedural history of case).

92. *See id.* at 887–88 (discussing appellee's response to appellant's complaint). At first, there was some difficulty in locating the heirs of Charles Powers Estate. *See id.* at 887 (noting Pritchards came forward as heirs to Charles Powers Estate on September 21, 2009). It is not unusual for the owner of the surface estate and the owner of the mineral estate to be complete strangers. *See Christopher S. Kulander, Common Law Aspects of Shale Oil and Gas Development*, 49 IDAHO L. REV. 367, 369 (2013) ("Over time, in many places . . . the mineral estate owner and the surface estate owner would be completely unknown to one another.").



presumptively include natural gas.<sup>93</sup> The trial court sustained the demurrer and denied the Pritchards' request for declaratory relief.<sup>94</sup> The Pritchards appealed to the Superior Court of Pennsylvania.<sup>95</sup>

The Superior Court overturned the trial court's decision and remanded several evidentiary issues to the trial court including whether natural gas trapped in Marcellus shale can be considered a mineral.<sup>96</sup> The Butlers appealed to the Supreme Court of Pennsylvania for a review of whether the remand for an evidentiary hearing was proper.<sup>97</sup> The Supreme Court held that the *Dunham* Rule continued to be the valid rule in Pennsylvania, that natural gas trapped in Marcellus shale is presumptively not a mineral, and that a remand for an evidentiary hearing was unnecessary.<sup>98</sup>

### B. *Burying Unfavorable Precedent in Favor of an Archaic Rule*

In *Butler*, the Pennsylvania Supreme Court began its analysis by quickly deciding that the *Dunham* Rule continues to govern mineral conveyances in Pennsylvania.<sup>99</sup> The court reasoned that the *Dunham* Rule has never been explicitly questioned, and therefore it continues to be a long-standing rule of property in the state.<sup>100</sup> Since no party offered justifica-

93. See *Butler*, 65 A.3d at 888 (relying on holding from *Highland v. Commonwealth*, 161 A.2d 390 (Pa. 1960)).

94. See *id.* (explaining trial court sustained demurrer because of *Dunham* Rule, Pennsylvania's longstanding rebuttable presumption that natural gas is not presumptively included in conveyance of "minerals").

95. See generally Brief & Reproduced Record of Appellants, *Butler v. Charles Powers Estate*, 29 A.3d 35 (Pa. Super. Ct. 2011) (No. 1795 MDA 2010), 2010 WL 7141068 (briefing appeal regarding Preliminary Objections to Pennsylvania Superior Court).

96. See *Butler*, 65 A.3d at 888 (explaining that Superior Court remanded issues of (1) whether *Dunham* Rule applies to Marcellus shale gas, (2) whether Marcellus shale is mineral, and (3) whether Marcellus shale is similar enough to coal that *Hoge* applies).

97. See *id.* at 888–89 (discussing appellant's appeal after adverse decision in Pennsylvania Superior Court). The Pennsylvania Supreme Court was asked to decide:

In interpreting a deed reservation for 'minerals,' whether the Superior Court erred in remanding the case for the introduction of scientific and historic evidence about the Marcellus [S]hale and the natural gas contained therein, despite the fact that the Supreme Court of Pennsylvania has held (1) a rebuttable presumption exists that parties intend the term 'minerals' to include only metallic substances, and (2) only the parties' intent can rebut the presumption to include non-metallic substances. *Butler v. Charles Powers Estate ex rel. Warren*, 41 A.3d 854, 854 (Pa. 2012) (per curiam) (alteration in original) (granting allowance of appeal).

98. See *Butler*, 65 A.3d at 887 ("[W]e respectfully hold that the Superior Court erred in ordering the remand for an evidentiary hearing and reinstate the order of the trial court.").

99. See *id.* at 897 ("[W]e reaffirm that the [*Dunham* R]ule continues to be the law of Pennsylvania.").

100. See *id.* ("[W]e recognize that the *Dunham* Rule has now been an unaltered, unwavering rule of property law for 131 years; indeed its origins actually

tions for overturning the *Dunham* Rule, the supreme court simply reaffirmed it.<sup>101</sup>

Next, the court turned to whether the *Dunham* Rule applies to natural gas trapped inside of the Marcellus Shale Formation.<sup>102</sup> The court held that the application of the *Dunham* Rule properly applies to Marcellus shale gas.<sup>103</sup> Additionally, the supreme court held that under the *Dunham* Rule, it is not possible for Marcellus shale gas to be classified as a mineral, offering two principles upon which it made this decision.<sup>104</sup> First, in Pennsylvania, only substances of a metallic nature constitute a mineral for the purpose of a private deed.<sup>105</sup> Second, private deeds are contracts that must be interpreted based on the intent of the parties to the contract.<sup>106</sup> Therefore, the court held that the remand for an evidentiary hearing was unnecessary because evidence of whether Marcellus shale is a mineral could not possibly aid in ascertaining the parties' initial intent in the conveyance.<sup>107</sup>

The *Butler* court next reversed the Superior Court's decision regarding *Hoge* and held that *Hoge* was not controlling in regards to natural gas trapped within the Marcellus Shale.<sup>108</sup> The supreme court began by noting that *Hoge* in no way limited or overruled the *Dunham* Rule, despite

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date back to the *Gibson* decision, placing the rule's age at 177 years."). The *Butler* court further noted that "[a] rule of property long acquiesced in should not be overturned except for compelling reasons of public policy or the imperative demands of justice." *See id.* (quoting *Highland v. Commonwealth*, 161 A.2d 390, 399 n.5 (Pa. 1960)).

101. *See id.* ("We see no reason, nor has any party or court provided us with one, to depart from this entrenched rule.")

102. *See id.* (determining that it must "next examine whether the *Dunham* Rule applies to this appeal").

103. *See id.* (stating that court "readily hold[s]" that *Dunham* Rule applies).

104. *See id.* at 897–98 ("We hold that the Superior Court erred in ordering the remand and further that Marcellus shale natural gas cannot, consistent with the *Dunham* Rule, be considered a mineral for private deed purposes.")

105. *See id.* at 898 (citing *Gibson v. Tyson*, 5 Watts 34, 41–42 (Pa. 1836)) ("[A]nything of a non-metallic nature would not be considered a mineral for private deed purposes . . .").

106. *See id.* ("[W]hen interpreting private deeds and contracts, the 'question is to be determined not by principles of science, but by common experience directed to the discovery of intention.'" (quoting *Schuylkill Nav. Co. v. Moore*, 2 Whart. 477, 493 (Pa. 1837))).

107. *See id.* ("[T]o the extent the Superior Court ordered an evidentiary hearing with expert testimony concerning Marcellus shale natural gas, and the scientific nature thereof, such an order violated the *Dunham* jurisprudence."). According to the Pennsylvania Supreme Court, the *Dunham* Rule certainly applies to some private deeds executed prior to the *Dunham* decision. *See id.* at 898 n.9 (rejecting argument that because deed in question was executed in 1881, prior to creation of *Dunham* Rule in 1882, *Dunham* Rule is inapplicable). It is not entirely clear whether the *Dunham* Rule applies to deeds executed prior to 1870. *See id.* (noting *Dunham* Rule was created based on deed executed in 1870).

108. *See id.* at 898 ("[W]e disagree with the Superior Court that because the natural gas at issue in this case is contained within the Marcellus Shale, the *Hoge II* decision . . . become[s] relevant or controlling.")

*Hoge's* holding that coalbed natural gas is a mineral.<sup>109</sup> The *Butler* court put forth two reasons why the *Hoge* decision only concerned the right to coal and the right to ventilation of natural gas trapped in the coal.<sup>110</sup> First, the *Hoge* decision concerned the right to ventilate coal, which naturally only applies to coal.<sup>111</sup> Second, the *Hoge* court inherently distinguished coalbed gas from natural gas because the *Hoge* court upheld a landowner's right to drill through coal to obtain non-coalbed natural gas.<sup>112</sup> Because no party advanced an argument that suggested natural gas trapped in Marcellus shale was different from natural gas contemplated by the *Dunham* Rule, the *Butler* court held that the *Dunham* Rule applies to Marcellus shale gas and that Marcellus shale gas is not a mineral.<sup>113</sup>

Finally, the *Butler* court explained that even though the methods used to extract Marcellus shale gas are exactly the same as those used to extract coalbed gas, this fact had no impact on the court's *Dunham* Rule analysis.<sup>114</sup> To the Pennsylvania Supreme Court, regardless of whether

109. See *id.* (noting *Hoge* court held natural gas as mineral "without discussing the *Dunham* Rule"). Therefore, the supreme court found "no merit to any averment that *Hoge II sub silentio* abrogated the *Dunham* Rule." See *id.* However, the *Hoge* court was aware of the *Dunham* Rule as the court cited the *Dunham* decision "for a general pronouncement of the rules of deed and contract construction." See *id.* at 898 n.10 (suggesting that had *Hoge* court intended to overrule *Dunham* Rule, it would not have cited to *Dunham* to support its holding).

110. See *id.* at 898 (noting distinction is critical for two reasons: safety and inherent legal distinction between substances). Until the 1970s, coalbed gas was a dangerous waste product from coal mining that was not commercially or technologically viable. See generally Romeo M. Flores, *Coalbed Methane: From Hazard to Resource*, 35 INT'L J. COAL GEOLOGY 3 (1998) (discussing history of coalbed gas and its transition from waste product to valuable resource).

111. See *Butler*, 65 A.3d at 898–99 (explaining reversion only applies to right of ventilation due to "extremely dangerous and volatile nature" of coalbed gas). *Contra* U.S. Steel Corp. v. Hoge, 468 A.2d 1380, 1384 (Pa. 1983) ("The potential for reversion of the situs, however, does not diminish the character of the coal as property of its grantee, or of the gas contained therein as a mineral *ferae naturae* resting inside the coal owner's property and falling within the dominion and control of the coal estate."). See generally Wendy B. Davis, *Coalbed Methane: Degassification, Not Ventilation, Should Be Required*, 2 APPALACHIAN J.L. 25 (2003) (arguing against ventilation of coalbed gas due to gas's environmental impact and commercial potential).

112. See *Butler*, 65 A.3d at 899 (noting also that *Hoge* court recognized scientific, chemical similarities between coalbed gas and natural gas). See generally E.T. Slonecker et al., *Landscape Consequences of Natural Gas Extraction in Allegheny and Susquehanna Counties, Pennsylvania, 2004-2010*, U.S. GEOLOGICAL SURVEY (2013), available at [http://pubs.usgs.gov/of/2013/1025/OFR2013\\_1025.pdf](http://pubs.usgs.gov/of/2013/1025/OFR2013_1025.pdf) (explaining both Marcellus shale gas and coalbed gas are scientifically methane gas).

113. See *Butler*, 65 A.3d at 899 ("Appellants . . . explicitly note that Marcellus shale natural gas is merely natural gas that has become trapped within the Marcellus Shale . . .").

114. See *id.* (citing *Gibson v. Tyson*, 5 Watts 34, 41 (Pa. 1836)) (recognizing fracking is used to "obtain both coalbed gas and Marcellus shale natural gas," and explaining that *Dunham* Rule addresses "the common understanding of the substance itself, not the means used to bring those substances to the surface"). In other contexts, courts have considered whether a deed allows certain types of min-

Marcellus shale is a mineral, and regardless of whether natural gas is trapped within Marcellus shale, natural gas remains a non-mineral.<sup>115</sup> Because the *Dunham* Rule was controlling and the *Hoge* analysis did not apply, the supreme court reinstated the order of the trial court and sustained the Butlers' preliminary objections regarding the reservation to Charles Powers.<sup>116</sup>

### C. *Maintaining an Old Rule to Protect Commercial Producers*

The *Butler* court's holding reinforced two consistent themes regarding Pennsylvania oil and gas litigation. First, the *Butler* court followed Pennsylvania tradition in upholding the *Dunham* Rule as a longstanding rule of property.<sup>117</sup> Second, the *Butler* decision continued the more modern Pennsylvania tradition of tailoring oil and gas law to the benefit of commercial producers.<sup>118</sup>

#### 1. *Butler Upholds Outdated Tradition*

The *Butler* decision was largely based on upholding a nineteenth-century tradition rather than upholding the logic underlying the *Dunham* Rule.<sup>119</sup> Pennsylvania courts that have examined the *Dunham* Rule consistently highlight the fact that it is a longstanding rule of property within the state.<sup>120</sup> This trend continued with the *Butler* court, which emphasized

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ing. *See, e.g.*, *Heidt v. Aughenbaugh Coal Co.*, 176 A.2d 400, 400 (Pa. 1962) (“[W]e are called upon to determine an issue oft recurring in recent years: whether under the terms and provisions of a lease of mineral rights strip or open mining of such minerals is permissible.”); *Amerikohl Mining Co., Inc. v. Peoples Natural Gas Co.*, 860 A.2d 547, 553 (Pa. Super. Ct. 2004) (holding, in light of circumstances, deed did not contemplate surface mining).

115. *See Butler*, 65 A.3d at 899 (finding “no merit” to argument that natural gas trapped in Marcellus shale is any more mineral than traditional natural gas).

116. *See id.* (“[W]e find no reason to apply *Hoge II* to this appeal, and, thus, no need to remand this case for fact-finding.”).

117. For a discussion of the *Butler* court's analysis of the *Dunham* Rule focusing on the traditional acceptance of the rule, see *infra* notes 119–23 and accompanying text.

118. For a discussion of Pennsylvania's preferential treatment of commercial oil and gas producers, see *infra* notes 124–36 and accompanying text. *See generally* Symposium, ‘Shale’ We Drill? *The Legal and Environmental Impacts of Extracting Natural Gas from Marcellus Shale*, 22 VILL. ENVTL. L.J. 189, 204–23 (2011) (discussing state and federal regulations regarding commercial Marcellus Shale drilling).

119. For a discussion of Pennsylvania's pattern of extending the *Dunham* Rule, see *infra* notes 120–23 and accompanying text.

120. *See, e.g.*, *Highland v. Commonwealth*, 161 A.2d 390, 398–99 (Pa. 1960) (noting, impliedly, that *Dunham* Rule had been law of Pennsylvania for seventy-seven years); *Bundy v. Myers*, 94 A.2d 724, 726 (Pa. 1953) (citing *Silver v. Bush*, 62 A. 832, 833 (Pa. 1906)) (“[*Dunham* Rule] has now been the law of this State for seventy years and is still no less a rule of property which is not to be disturbed.”); *Preston v. S. Penn Oil Co.*, 86 A. 203, 204 (Pa. 1913) (“[*Dunham* Rule] has been the law of this state for 30 years, and very many titles to land rest upon it.”); *Silver*, 62 A. at 833–34 (“[*Dunham* Rule] was part of the law of the state when the deeds in question were made, and to some extent at least, as was said by the learned judge

the longstanding tradition of the *Dunham* Rule.<sup>121</sup> The *Butler* court's analysis of whether the *Dunham* Rule remained viable in Pennsylvania focused entirely on the continuous use of the Rule since the nineteenth century.<sup>122</sup> It appears that the *Butler* court's reaffirmation of the *Dunham* Rule was heavily influenced by the age of the Rule as opposed to its logic, its practical application, or the general understanding of the word "mineral" today.<sup>123</sup>

## 2. *Butler Favors Commercial Producers*

Traditionally, common law understandings of mineral rights have placed Pennsylvania landowners at a disadvantage as compared to commercial producers of natural gas.<sup>124</sup> Further, the Pennsylvania legislature has historically adopted statutes that support commercial production.<sup>125</sup>

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below, it had become a rule of property on which many titles in Western Pennsylvania rested.”).

121. For a discussion of the *Butler* court's determination that the *Dunham* Rule is a longstanding rule of property, see *supra* notes 99–101 and accompanying text.

122. See *Butler v. Charles Powers Estate ex rel. Warren*, 65 A.3d 885, 897 (Pa. 2013) (reasoning for viability of *Dunham* Rule in modern application). The court held that “neither the Superior Court nor Appellees have provided any justification for overruling or limiting the *Dunham* Rule and its longstanding progeny that have formed the bedrock for innumerable private, real property transactions for nearly two centuries.” *Id.*

123. See *id.* at 899 (Saylor, J., concurring) (“[S]ince *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.”). Even Justice Saylor found the rationale for the original *Dunham* decision questionable when examined in a modern light. See *id.* (“I find the original, nineteenth-century rationale for the *Dunham* Rule to be cryptic, conclusory, and highly debatable.”).

124. See Thomas A. Mitchell, *The Future of Oil and Gas Conservation Jurisprudence: Past as Prologue*, 49 WASHBURN L.J. 379, 417 (2010) (“[T]he Pennsylvania courts have largely sided with producers in holding that the Oil and Gas Act preempts local land-use regulation which could be used to address the impacts to roads and community infrastructure from development and production.”); Webb, *supra* note 84, at 35 (noting negative impact of *Hoge* decision on Pennsylvania landowners).

125. See Jivaji Moré, Comment, *Come Shale Away: Navigating the “Business Friendliness” of Regulatory Environments in the Marcellus Shale and Albertan Oil Sands*, 33 Nw. J. INT'L L. & BUS. 393, 431–37 (2013) (examining recent developments in Pennsylvania oil and gas law and comparing oil and gas regulatory schemes of Pennsylvania and Alberta, Canada); Michael Wood, *A Look at Other States Shows Marcellus Impact Fee Shortchanges Pennsylvanians*, PA. BUDGET & POLICY CTR. (Aug. 8, 2013), <https://pennbpc.org/sites/pennbpc.org/files/PA-Impact-Fee-Compared-to-TX-WV-8-8-2013-final.pdf> (comparing Pennsylvania's Impact Fee to other states' taxes on natural gas production and finding Pennsylvania maintains near lowest tax rates in country). But see Susan Phillips, *Legislative Proposal Aims to Re-unite Landowners with Mineral Rights*, NPR STATE IMPACT (Mar. 26, 2013, 5:45 PM), <http://stateimpact.npr.org/pennsylvania/2013/03/26/legislative-proposal-aims-to-re-unite-landowners-with-mineral-rights/> (detailing Senate Bill 258 which would allow certain landowners to file quiet title action to reunite mineral estate with surface estate). Critics of the Bill claim it would destabilize property interests across the

In recent years, as natural gas drilling and production have increased, Pennsylvania's courts have become more actively involved in mineral disputes, consistently favoring commercial producers over landowners.<sup>126</sup>

Recently, Pennsylvania appellate courts have increased profits for natural gas companies at the expense of landowners and upheld a grant of power to commercial producers.<sup>127</sup> In one decision, the Pennsylvania Supreme Court shifted the burden of production costs associated with the development of natural gas to landowners by charging the costs against the landowners' contractual royalty.<sup>128</sup> This decision effectively under-

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state and significantly decrease drilling operations. *See id.* (offering criticism of Bill). Many states have successfully implemented similar dormant mineral statutes. *See, e.g.*, CAL. CIV. CODE § 883.220 (West 2013) (allowing reclamation of mineral rights after twenty year period without production); MICH. COMP. LAWS ANN. § 554.291 (West 2013) (declaring mineral rights abandoned after twenty years of inactivity and allowing reclamation by surface owner); NEB. REV. STAT. ANN. § 57-229 (West 2013) (declaring mineral abandoned after twenty three years without public expression of ownership); OKLA. STAT. ANN. tit. 84, § 271.1 (West 2013) (providing for judicial sale of minerals abandoned for period of fifteen years). *See generally* John M. Smith, *The Prodigal Son Returns: Oil and Gas Drillers Return to Pennsylvania with a Vengeance Are Municipalities Prepared?*, 49 DUQ. L. REV. 1 (2011) (analyzing regulatory scheme of Pennsylvania and its relationship to return of commercial drilling to state).

126. *Cf.* *Backwater Props., LLC v. Range Resources-Appalachia, LLC*, No. 1:10CV103, 2011 WL 1706521, at \*1–2 (N.D. W. Va. May 5, 2011) (discussing procedural issues regarding alleged mineral right "Bid Rigging Plan" by natural gas company). The lawsuit was terminated by a stipulation dated March 28, 2013. *See* Stipulation of Voluntary Dismissal of All Claims by Plaintiffs, *Backwater Props., LLC v. Range Resources-Appalachia, LLC*, No. 1:10-CV-00103-IMK, 2011 WL 1706521 (N.D. W. Va. May 5, 2011). *See generally* Nathaniel I. Holland, *Pennsylvania Oil and Gas Update*, 19 TEX. WESLEYAN L. REV. 539 (2013) (discussing recent statutes and court decisions regarding Pennsylvania oil and gas law).

127. *See* *Huntley & Huntley v. Borough Council*, 964 A.2d 855, 865 (Pa. 2009) ("The state's interest in oil and gas development is centered primarily on the efficient production and utilization of the natural resources in the state." (quoting *Bd. of Cnty. Comm'rs v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1057 (Colo. 1992) (en banc))).

128. *See* *Kilmer v. Elexco Land Servs.*, 990 A.2d 1147, 1158 (Pa. 2010) (holding that royalty owners are responsible for proportional production costs); *see also* Michael Morris, Note, *Buyer's Remorse over Your Pennsylvania Gas Lease? The Pennsylvania Supreme Court Upholds Meager Royalty Payments and Protects the Profitability of Marcellus Gas Drilling in Kilmer v. Elexco Land Services, Inc.*, 23 VILL. ENVTL. L.J. 25, 37–47 (2012) (examining *Kilmer* decision in detail); Marie Cusick, *Pa. Landowners Feel Cheated by Royalty Payments from Fracking*, NPR (July 29, 2013, 4:47 PM), <http://www.npr.org/templates/story/story.php?storyId=206728504> (discussing effect of *Kilmer* and lack of royalty payments to Pennsylvania residents); *Landowners Concerned About Disappearing Royalties* (WENY News Broadcast May 29, 2013), available at <http://youtu.be/s4fbpORf8Zc> (profiling diminishing oil and gas lease royalty payments to Bradford County landowners). *Contra* *Kropa v. Cabot Oil & Gas Corp.*, 609 F. Supp. 2d 372, 379–80 (M.D. Pa. 2009) (interpreting 58 PA. STAT. ANN. § 33 (West 2013)) ("Although the lease technically does provide for a one-eighth royalty, it then proceeds to explain that costs will be deducted from that amount. The royalty then becomes less than one-eighth and a violation of the plain language of the statute."). *See generally* Abrahm Lustgarten, *How Oil and Gas Drillers Avoid Paying Royalties to Landowners*, PAC. STANDARD (Aug. 30, 2013), <http://>

mines the statutory provision granting landowners a minimum royalty percentage from natural gas recovered from their mineral estate.<sup>129</sup> The supreme court has also recently affirmed natural gas companies' right to continue drilling by permitting these companies to retain their rights to minerals in certain leases so long as a well is producing any profit, regardless of how small.<sup>130</sup> Finally, the intermediate appellate court upheld a Pennsylvania law that gave certain natural gas companies the power of eminent domain.<sup>131</sup>

The *Butler* decision was an extension of Pennsylvania's tendency to favor the commercial production of oil and natural gas.<sup>132</sup> Pennsylvania's natural gas companies overwhelmingly expressed their interest in main-

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[www.psmag.com/environment/oil-gas-drillers-avoid-paying-royalties-landowners-65236/](http://www.psmag.com/environment/oil-gas-drillers-avoid-paying-royalties-landowners-65236/) (discussing alleged reductions of royalty payments to landowners through underpayments and leases that limit landowners' rights to audit payments). The *Kilmer* court emphasized, however, that as a check on potentially fraudulent practices, landowners "can seek a court ordered accounting." *Kilmer*, 990 A.2d at 1158.

129. See Press Release, State Reps. Matthew Baker, Garth D. Everett, Sandra Major & Tina Prickett, Area Lawmakers Drafting Measure to Clarify Minimum Royalty Payments (June 29, 2013), available at <http://www.reppickett.com/NewsItem.aspx?NewsID=17889> ("Long before the Marcellus Shale was discovered as a major natural gas deposit, a 1979 state law guaranteed a minimum royalty payment of one-eighth for oil, natural gas, or gas of any other designation. This was enacted to ensure fairness and protect landowners from deceptive leases.").

130. See *T.W. Phillips Gas & Oil Co. v. Jedlicka*, 42 A.3d 261, 277–78 (Pa. 2012) (holding that if natural gas well pays profit, however small, profit will be considered producing in paying quantities and continue certain gas leases); see also *Caldwell v. Kriebel Res. Co.*, 72 A.3d 611, 615–16 (Pa. Super. Ct. 2013) (holding oil and gas leases impose no duty to produce paying quantities unless explicitly contemplated by lease). Recently, whether natural gas companies have a right to extend oil and gas leases has been the subject of frequent litigation. See, e.g., *Stewart v. SWEPI, LP*, 918 F. Supp. 2d 333, 340–41 (M.D. Pa. 2013) (finding installation of well immediately prior to natural termination of lease may be for speculation as opposed to profit); *Heasley v. KSM Energy, Inc.*, 52 A.3d 341, 343, 345 (Pa. Super. Ct. 2012) (holding "oil and gas lease calling for a flat rental as opposed to a percentage royalty" after initial term constitutes tenancy at will).

131. See *Robinson Twp. v. Commonwealth*, 52 A.3d 463, 487–88 (Pa. Commw. Ct. 2012) (upholding 58 PA. CON. STAT. ANN. § 3241, which grants certain corporations limited power of eminent domain in conjunction with drilling operations). However, the *Robinson* court also declared several legislative actions granting natural gas companies special treatment unconstitutional. See, e.g., *id.* at 480–85 (overturning 58 PA. CON. STAT. ANN. § 3304, which mandated certain zoning requirements in accordance with statute).

132. See e.g., 4 PA. CODE § 6.432(1)(ii) (2013) (stating Governor's Marcellus Shale Advisory Commission shall recommend policies regarding "[e]fforts necessary to promote the efficient, environmentally sound and cost-effective development of Marcellus Shale and other unconventional natural gas resources"); cf. W. VA. CODE ANN. § 5B-2H-2(b) (West 2013) ("The Legislature declares that facilitating the development of business activity directly and indirectly related to development of the Marcellus shale serves the public interest of the citizens of this state by promoting economic development and improving economic opportunities for the citizens of this state.").

taining the *Dunham* Rule as the law of Pennsylvania.<sup>133</sup> These companies claimed that thousands of oil and gas leases across the Commonwealth could be in jeopardy if the *Dunham* Rule was overturned.<sup>134</sup> Specifically, they claimed that in conjunction with the purchase and lease of oil and gas rights, natural gas companies routinely conduct extensive title searches with the *Dunham* Rule in mind.<sup>135</sup> Natural gas companies claimed that if the supreme court overturned the *Dunham* Rule, their right to certain mineral estates might be in jeopardy and would certainly become the subject of litigation.<sup>136</sup> Therefore, in upholding the *Dunham* Rule, the Pennsylvania Supreme Court maintained the strong position of commercial gas producers and denied landowners the potential opportunity to reclaim their rights to Marcellus shale gas.<sup>137</sup>

#### IV. THE CANARY IN THE MINE: UNDERSTANDING THE IMPACT OF *BUTLER*

The Pennsylvania Supreme Court's decision in *Butler* continues the longstanding tradition of upholding the *Dunham* Rule, despite a line of Pennsylvania cases that find oil and natural gas to be minerals.<sup>138</sup> In order for Pennsylvania to return property rights to landowners, it should adopt the majority approach and declare natural gas a mineral.<sup>139</sup>

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133. See, e.g., Brief of Amicus Curiae Am. Ass'n of Prof'l Landmen in Support of Appellants at 13, *Butler v. Charles Powers Estate ex rel. Warren*, 65 A.3d 885 (Pa. 2013) (No. 27 MAP 2012), 2012 WL 8681648 (“[*Dunham* Rule] provides a clearer and superior resolution of ownership issues than alternative approaches.”); Brief of Amici Curiae Chief Oil & Gas LLC et al. in Support of Reversal at 13–16, *Butler v. Charles Powers Estate ex rel. Warren*, 65 A.3d 885 (Pa. 2013) (No. 27 MAP 2012), 2012 WL 8681643 (arguing that large number of conveyances would be impacted by any change to *Dunham* Rule); Brief of Amicus Curiae Marcellus Shale Coal. at 21–23, *Butler v. Charles Powers Estate ex rel. Warren*, 65 A.3d 885 (Pa. 2013) (No. 27 MAP 2012), 2012 WL 8681642 (arguing that departure from *Dunham* Rule would create massive wave of litigation in Pennsylvania); Brief for Amici Curiae Pa. Indep. Oil & Gas Ass'n et al. in Support of Appellants at 23, *Butler v. Charles Powers Estate ex rel. Warren*, 65 A.3d 885 (Pa. 2013) (No. 27 MAP 2012), 2012 WL 8681644 (“The reliance placed on the principles underlying the *Dunham* rule as a rule of property for the last 175 years compels its reaffirmance.”). No amici curiae briefs were filed in support of the Appellees. See Docket, *Butler v. Charles Powers Estate ex rel. Warren*, 65 A.3d 885 (Pa. 2013) (No. 27 MAP 2012).

134. See *supra* note 133.

135. See *id.*

136. See Zack Needles, ‘Mineral’ Rights Could Apply to Shale, PITTSBURGH POST-GAZETTE (Oct. 3, 2011, 12:00 AM), <http://www.post-gazette.com/stories/business/legal/mineral-rights-could-apply-to-shale-317353/> (discussing impact of potentially overturning *Dunham* Rule in identifying rightful owners of natural gas for purpose of royalty payments).

137. See *supra* note 133.

138. For a discussion of precedent that calls into question the *Butler* decision and the validity of the *Dunham* Rule, see *infra* notes 140–50 and accompanying text.

139. For a further discussion of why Pennsylvania should disregard the *Dunham* Rule, see *infra* notes 151–60 and accompanying text.



### A. *The Pennsylvania Supreme Court Adopts the Wrong Precedent*

The Pennsylvania Supreme Court decided *Butler* incorrectly on two grounds. First, the *Dunham* Rule should be overruled because of subsequent Pennsylvania decisions.<sup>140</sup> Second, even if the *Dunham* Rule is alive and well, the *Butler* court incorrectly dismissed the *Hoge* decision in its analysis.<sup>141</sup>

#### 1. *Pennsylvania Courts Recognize Natural Gas as a Mineral*

Pennsylvania courts have consistently reiterated their commitment to upholding longstanding rules of property to maintain legal predictability.<sup>142</sup> However, even after the *Dunham* decision in 1882, numerous Pennsylvania courts have concluded that oil and natural gas are in fact minerals.<sup>143</sup> Further, courts outside of Pennsylvania have long considered

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140. For a discussion of a line of Pennsylvania cases discussing oil and natural gas as minerals, see *infra* notes 142–46 and accompanying text.

141. For a discussion of *Hoge's* application to Marcellus Shale, see *infra* notes 147–50 and accompanying text.

142. See *Smith v. Glen Alden Coal Co.*, 32 A.2d 227, 233–34 (Pa. 1943) (“A rule of property long acquiesced in should not be overthrown except for compelling reasons of public policy or the imperative demands of justice.”); see also *In re Borsch's Estate*, 67 A.2d 119, 122–23 (Pa. 1949) (noting “right of property” had become “firmly imbedded in our law”); *Madden v. Gosztonyi Savings & Trust Co.*, 200 A. 624, 631–32 (Pa. 1938) (refusing to change understanding of tenants by the entireties due to concept being “fixed rule of property”).

143. See, e.g., *White v. N.Y. State Natural Gas Corp.*, 190 F. Supp. 342, 346–48 (W.D. Pa. 1960) (“Once severed from the realty, however, gas and oil, like other minerals, become personal property.”); *In re Bruner's Will*, 70 A.2d 222, 224 (Pa. 1950) (“Oil in place, being a mineral, is part of the realty, and it is like coal or any other natural product which in situ forms part of the land.” (citing *In re Stoughton*, 88 Pa. 198 (1878))); *McIntosh v. Ropp*, 82 A. 949, 955 (Pa. 1912) (“[I]t is settled in this state that oil and gas contained in or obtainable through the land are minerals.” (citing *Marshall v. Mellon*, 36 A. 201 (Pa. 1897); *Westmoreland & Cambria Natural Gas Co. v. DeWitt*, 18 A. 724 (Pa. 1889); *Gill v. Weston*, 1 A. 921 (Pa. 1885); *Stoughton*, 88 Pa. 198)); *Kelly v. Keys*, 62 A. 911, 913 (Pa. 1906) (referencing oil as mineral); *Blakley v. Marshall*, 34 A. 564, 565 (Pa. 1896) (“[O]il in place is a mineral, and, being a mineral, it is part of the realty.”); *Guthrie v. Guthrie*, 7 A.2d 137, 139 (Pa. Super. Ct. 1939) (“[O]il in place is a mineral. . . .” (citing *Stoughton*, 88 Pa. at 201)); *Rockwell v. Keefer*, 39 Pa. Super. Ct. 468, 476 (1909) (“[W]e have established the proposition that oil and gas are minerals. . . .”); *In re McLean's Estate*, 85 Pa. D. & C. 129, 132 (Orphans' Ct. Wash. Cnty. 1952) (“Oil in place, being a mineral, is part of the realty, and it is like coal or any other natural product which in situ forms part of the land.” (citing *Stoughton*, 88 Pa. 198)); *McManus v. Acklin*, 62 Pa. D. & C. 527, 530 (Ct. Com. Pl. 1947) (“It is well settled in this State that oil and gas contained in or obtained through the land are minerals. This mineral is confined in certain underlying strata and is a part of the land in the same manner as underlying coal or other minerals.” (citations omitted) (citing *Marshall*, 36 A. 201; *Westmoreland*, 18 A. 724; *Gill*, 1 A. 921; *Stoughton* 88 Pa. 198)); *Thornbury v. Forbes*, 7 Pa. D. & C. 184, 185 (Ct. Com. Pl. 1925) (“In *Stoughton's Appeal*, following the well-known case of *Funk v. Haldeman*, it is held that oil is a mineral. . . .” (citations omitted)); *In re Forestry Reservation Commission*, 28 Pa. C.C. 145 (Pa. Att'y Gen. 1903) (stating definition of minerals which implicitly includes petroleum “was expressly approved by the [Pennsylvania] Supreme Court” (citing *Griffin v. Fellows*,

the *Dunham* decision overruled based on subsequent Pennsylvania decisions.<sup>144</sup> Interestingly, even the court in *Butler* noted that several Pennsylvania statutes included natural gas in their definition of minerals.<sup>145</sup>

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81 1/2 Pa. 114 (1873)); Appeal of Moore, 4 Pa. D. 703, 705 (Ct. Com. Pl. 1895) ("Oil is a mineral." (citations omitted) (citing *Gill*, 1 A. 921; *Dunham v. Kirkpatrick*, 101 Pa. 36, 43 (1882); *Stoughton*, 88 Pa. at 201; *Funk v. Haldeman*, 53 Pa. 229 (1866))). For further discussion of Pennsylvania cases finding that oil and natural gas are minerals, see *supra* notes 74–84 and accompanying text.

144. See, e.g., *N. Pac. R.R. v. Soderberg*, 188 U.S. 526, 534–35 (1903) (discussing petroleum as mineral, stating, "[t]he cases are far too numerous for citation, and there is practically no conflict in them" (citing *Westmoreland*, 18 A. 724; *Gill*, 1 A. 921; *Funk*, 53 Pa. 229; *Gibson v. Tyson*, 5 Watts 34 (Pa. 1836))); *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 203–04 (1900) (noting Pennsylvania's acceptance of petroleum as mineral (citing *Westmoreland*, 18 A. 724)); *Lovelace v. Sw. Petroleum Co.*, 267 F. 504, 509 (E.D. Ky. 1919) ("[A]ccording to the popular sense of the word, 'minerals' includes petroleum . . . . [T]he cases are unanimous that it does [include petroleum], except the case of *Dunham v. Kirkpatrick* . . . ."), *aff'd*, 267 F. 513 (6th Cir. 1920); see also *McCombs v. Stephenson*, 44 So. 867, 868–69 (Ala. 1907) (noting Pennsylvania courts have deviated from *Dunham* Rule (citing *Hendler v. Lehigh Valley R.R. Co.*, 58 A. 486, 487 (Pa. 1904); *Gill*, 1 A. 921; *Murray v. Alled*, 43 S.W. 355, 359 (Tenn. 1897))); *Mo. Pac. R.R. Co. v. Strohacker*, 152 S.W.2d 557, 562 (Ark. 1941) (discussing *Dunham* Rule, stating, "[s]ubsequent [ ] Pennsylvania courts treated gas and oil as minerals"); *People ex rel. Carrell v. Bell*, 86 N.E. 593, 594 (Ill. 1908) ("In some of the states petroleum forms a very valuable part of the natural wealth and has been given careful consideration by the courts, and they have uniformly held, so far as the authorities we have examined show, that it should be classed as a mineral." (citing *Stoughton*, 88 Pa. 198)); *Crain v. West*, 229 S.W. 51, 52 (Ky. 1921) ("Oil in place in the land is a mineral and part of the land itself, and, so far as it relates to the questions to be considered, is similar to coal, iron, lead, or other solid mineral substances which may be in lands." (citing *Funk*, 53 Pa. at 249; *Stoughton*, 88 Pa. 198)); *Barker v. Campbell-Ratcliff Land Co.*, 167 P. 468, 469 (Okla. 1917) (noting that Pennsylvania recognizes natural gas as mineral and stating that *Dunham* Rule had been overruled in Pennsylvania by later Pennsylvania decisions (citing *Gill*, 1 A. 921)); *Texas Co. v. Daugherty*, 176 S.W. 717, 719 (Tex. 1915) ("It is no longer doubted that oil and gas within the ground are minerals."); *Carothers v. Mills*, 233 S.W. 155, 157 (Tex. Civ. App. 1921) (stating "the more recent Pennsylvania cases" have held oil and natural gas presumptive minerals); *Nephi Plaster & Mfg. v. Juab Cnty.*, 93 P. 53, 55 (Utah 1907) (listing numerous cases for proposition that term minerals is not limited to metallic ores (citing *Gill*, 1 A. 921; *Griffin*, 81 1/2 Pa. 114)); *State ex rel. Atkinson v. Evans*, 89 P. 565, 568 (Wash. 1907) (noting Pennsylvania's acceptance of oil and gas as minerals (citing *Gill*, 1 A. 921; *Funk*, 53 Pa. 229)).

145. See *Butler v. Charles Powers Estate ex rel. Warren*, 65 A.3d 885, 897 (Pa. 2013) (refusing to recognize statutes defining natural gas as mineral, such as Municipalities Planning Code, as sufficient authority to overrule *Dunham* Rule). The Municipalities Planning Code, adopted by the Pennsylvania legislature, defines minerals as:

[A]ny aggregate or mass of mineral matter, whether or not coherent. The term includes, but is not limited to, limestone and dolomite, sand and gravel, rock and stone, earth, fill, slag, iron ore, zinc ore, vermiculite and clay, anthracite and bituminous coal, coal refuse, peat and *crude oil and natural gas*.

53 PA. CONS. STAT. § 10107 (2013) (emphasis added).

Yet, the *Butler* decision itself failed to cite, consider, or reject a single Pennsylvania case that recognized oil and natural gas as minerals.<sup>146</sup>

## 2. *Hoge Analysis Applies to the Marcellus Shale*

Even if the line of Pennsylvania cases finding natural gas to be a mineral fails, the logic of the *Hoge* court should still apply to Marcellus shale gas. According to the *Hoge* court, for natural gas to be presumptively included in a conveyance of minerals, it does not need to be explicitly contemplated in the conveyance as long as it is trapped inside of a mineral that is conveyed.<sup>147</sup> Assuming Marcellus shale is a mineral, under the *Hoge* analysis, when Marcellus shale is conveyed, it logically follows that the natural gas trapped in the shale should also be conveyed.<sup>148</sup>

The *Butler* court stated that it was examining the question of whether the *Hoge* decision would apply to natural gas trapped inside of Marcellus shale.<sup>149</sup> Yet, the court dismissed this argument by simply stating that natural gas trapped inside of Marcellus shale is scientifically no different than traditional natural gas.<sup>150</sup> Consequently, the court incorrectly shifted the issue from whether Marcellus shale is a mineral itself to whether natural gas trapped inside of Marcellus shale is a mineral. As a result of this shift, the supreme court failed to actually answer the question of whether Marcellus shale itself is a mineral, which would implicate a *Hoge* analysis.

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146. See *Butler*, 65 A.3d at 897 (claiming that no reason has been provided to justify departing from *Dunham* Rule). The *Butler* court additionally stated, “neither the Superior Court nor Appellees have provided any justification for overruling or limiting the *Dunham* Rule and its longstanding progeny that have formed the bedrock for innumerable private, real property transactions for nearly two centuries.” *Id.* But see *Coolspring Stone Supply Inc. v. Cnty. of Fayette*, 929 A.2d 1150, 1157 n.9 (Pa. 2007) (noting Pennsylvania cases cited in support of argument that oil is mineral).

147. For a discussion of the *Hoge* decision and its reasoning, see *supra* notes 79–84 and accompanying text; cf. *Consolidation Coal Co. v. White*, 875 A.2d 318, 327 (Pa. Super. Ct. 2005) (“It is the owner of the coal who owns the chamber or space enclosing that coal.” (citing *Westerman v. Pa. Salt Mfg. Co.*, 103 A. 539, 541 (Pa. 1918))).

148. For a discussion of the *Hoge* decision and its reasoning, see *supra* notes 79–84 and accompanying text. But see Joel Burcat & Andrew Bockis, *Pa. Stance on Dunham Rule Confounds Pa. Mining Industry*, LAW360 (May 30, 2013, 1:52 PM), [http://www.saul.com/media/article/3569\\_PHILA-1471184%20-%20Burcat360article%20-%201.pdf](http://www.saul.com/media/article/3569_PHILA-1471184%20-%20Burcat360article%20-%201.pdf) (questioning whether *Butler* holding limiting minerals to metallic substances puts mineral status of substances such as coal, limestone, and shale in limbo).

149. See *Butler*, 65 A.3d at 896 (claiming *Hoge* “is distinguishable and inapplicable”). For a further discussion of *Hoge*, see *supra* notes 79–84 and accompanying text.

150. See *Butler*, 65 A.3d at 896. Ironically, the *Butler* court explained that Marcellus shale gas is scientifically similar to ordinary natural gas for purposes of discrediting *Hoge*, yet earlier in the opinion rejected the argument that whether natural gas is a mineral should be determined by science.



portunity to correct its misapplication of common law decisions through the *Dunham* Rule, and presumptively declare natural gas a mineral.

Critics of the change argue that rejecting the *Dunham* Rule would destabilize oil and gas law across the state.<sup>157</sup> But, in instances where the law has been misapplied, Pennsylvania courts have questioned whether the misapplication should continue, despite their strong commitment to *stare decisis*.<sup>158</sup> Furthermore, in some cases, departures from longstanding property laws are necessary to adapt to a dynamic world and economy.<sup>159</sup> In support of the change, at least one author has noted that overruling the *Dunham* Rule would not have a significant negative impact on the Commonwealth or its property owners.<sup>160</sup>

#### V. NAVIGATING THE *DUNHAM* RULE: A GUIDE FOR PRACTICING ATTORNEYS

For the foreseeable future, Pennsylvania attorneys will undoubtedly face challenges associated with the *Dunham* Rule.<sup>161</sup> To address *Dunham* Rule litigation regarding past conveyances, attorneys should either raise or anticipate the issue of Pennsylvania's *second line* of *Dunham* Rule cases and be prepared to clarify whether the application of the *Hoge* decision to

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157. See PA Supreme Court Upholds *Dunham* Rule on Mineral Rights, ERG ENERGY RES. GROUP (May 28, 2013), <http://pa-erg.com/2013/05/28/pa-supreme-court-upholds-dunham-rule-on-mineral-rights/> ("Removing the *Dunham* rule from the books would have caused chaos in the state's drilling industry and been disastrous to the thousands of leases and royalty agreements already in place.").

158. See *Schrivner v. Meyer*, 19 Pa. 87, 93 (1852) ("If the law was totally misapplied in that case . . . must we therefore continue to misapply it as often as the other shares come up for discussion? Because we or our predecessors have wronged one man by our blunders, must we therefore wrong forty-three others for the sake of our own consistency?"). But see *AG Serv., Inc. v. T.W. Phillips Gas & Oil Co.*, No. CIV.A. 91-0650, 1994 WL 762150, at \*13 (W.D. Pa. Jan. 19, 1994) ("Even if a state court ruling appears to be outdated and obsolete, a federal court must follow that ruling unless the court has sufficient evidence for believing that the state's highest court would no longer adhere to that rule.").

159. See Troy A. Rule, *Property Rights and Modern Energy*, 20 GEO. MASON L. REV. 803, 803 (2013) (detailing current topics in property rights and explaining need for development and adaptation of property laws to keep pace). Pennsylvania courts have also recognized a need to develop common law regarding mineral rights as new disputes arise. See, e.g., *Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 598 (Pa. 1893) ("It is the crowning merit of the common law, however, that it is not composed of ironclad rules, but may be modified to a reasonable extent to meet new questions as they arise.").

160. See Dale A. Tice, *Opening Pandora's Box? Calling Shale Gas Rights into Question*, 34 PA. LAW. 24, 27 (Mar.-Apr. 2012) ("Various commentators have expressed opinions as to the ultimate outcome of *Butler v. Powers*, generally suggesting that concerns about the potential for this case to upset well-settled property law have been exaggerated.").

161. See generally Ian Urbina & Jo Craven McGinty, *Drilling Down: Learning Too Late of the Perils in Gas Well Leases*, N.Y. TIMES (Dec. 1, 2011), [http://www.nytimes.com/2011/12/02/us/drilling-down-fighting-over-oil-and-gas-well-leases.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/12/02/us/drilling-down-fighting-over-oil-and-gas-well-leases.html?pagewanted=all&_r=0) (reporting that Pennsylvania landowners that have leased their mineral rights were frequently uninformed and uncounseled regarding their rights before signing leases).

Marcellus shale is appropriate.<sup>162</sup> To prevent disputes that may invoke the *Dunham* Rule, when drafting mineral conveyances today, Pennsylvania attorneys should consider including meticulously specific language in the conveying instrument to clarify the exact intent of the parties involved.<sup>163</sup>

### A. Past Conveyances

The *Butler* decision, while arguably intending to avoid litigation, may actually bring to light more issues to be litigated in Pennsylvania courts.<sup>164</sup> Litigation as a result of the *Butler* decision will likely continue to focus on the definition of all minerals in a past conveyance.<sup>165</sup> Further, the *Butler* decision calls into question whether natural gas trapped in different strata may be subject to different conveyance rules based on its location.<sup>166</sup>

#### 1. Deeds Conveying "All Minerals"

In Pennsylvania, a deed conveying some derivative of the term "all minerals" is currently subject to the *Dunham* Rule.<sup>167</sup> However, in reaffirming the *Dunham* Rule, the Pennsylvania Supreme Court failed to recognize, discuss, or distinguish a line of Pennsylvania cases that considered natural gas a mineral.<sup>168</sup> These cases both provide a potentially viable alternative to the *Dunham* Rule and meet the *Butler* court's requirement that the court would not disturb a longstanding rule of property.<sup>169</sup>

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162. For a discussion of approaching litigation regarding the *Dunham* Rule post-*Butler*, see *infra* notes 164–81 and accompanying text.

163. For a discussion of drafting considerations in a future mineral conveyance, see *infra* notes 182–85 and accompanying text.

164. See, e.g., Burcat & Bockis, *supra* note 148 (discussing potential questions raised by *Butler* decision). Federal courts are also likely to decline jurisdiction over mineral rights issues. See, e.g., *Shychuck v. Chesapeake Appalachia, LLC*, No. 13-373, 2013 WL 2558161, at \*1–3 (W.D. Pa. June 11, 2013) (declining jurisdiction over action seeking declaratory judgment regarding rights under oil and gas lease); *Cabot Oil & Gas Corp. v. Jordan*, 698 F. Supp. 2d 474, 479 (M.D. Pa. 2010) (declining jurisdiction over action seeking declaratory judgment regarding validity of oil and gas lease, recognizing "broader context in which the dispute at issue arises," and recommending adjudication in state court).

165. For a discussion of how to approach litigation regarding a conveyance of all minerals, see *infra* notes 167–77 and accompanying text.

166. For a discussion of the types of natural gas contemplated by a conveyance of natural gas, see *infra* notes 178–81 and accompanying text.

167. See *Butler v. Charles Powers Estate ex rel. Warren*, 65 A.3d 885, 897 (Pa. 2013) ("[T]he [*Dunham*] rule continues to be the law of Pennsylvania.").

168. For a list of Pennsylvania cases finding that natural gas is a mineral, see *supra* note 143 and accompanying text. For a list of non-Pennsylvania cases referencing Pennsylvania courts finding that natural gas is a mineral, see *supra* note 144 and accompanying text.

169. See generally *New Shawmut Mining Co. v. Gordon*, 43 Pa. D. & C.2d 477, 483–96 (Ct. Com. Pl. 1963) (discussing parol evidence under *Dunham* Rule), *aff'd*, 234 A.2d 426 (Pa. 1967) (per curiam). A practicing attorney should also consider whether a landowner entering into a conveyance with a company that is widely known to commercially produce natural gas is sufficient evidence of a landowner's intent to include natural gas in the conveyance. The *Gordon* court found that a

The *Hoge* decision provides a second argument for departing from the *Dunham* Rule in the case of Marcellus shale gas.<sup>170</sup> Instead of arguing that a conveyance includes Marcellus shale gas, an attorney should argue that the conveyance includes Marcellus shale itself and then prove that Marcellus shale is a mineral.<sup>171</sup> While this argument was raised in *Butler*, the Pennsylvania Supreme Court did not actually address the issue.<sup>172</sup> However, if Marcellus shale is a mineral, it follows by analogy that the *Hoge* analysis should apply to Marcellus shale: i.e., *whoever owns the shale owns the gas*.<sup>173</sup>

Finally, Pennsylvania law is concerned with understanding the intent of the parties in a mineral conveyance.<sup>174</sup> Nevertheless, the nature of most conveyances is not centered on a list of specific minerals.<sup>175</sup> Instead, conveyances are meant to preserve and realize the value of substances trapped beneath the ground.<sup>176</sup> If Pennsylvania courts are attempting to discern the intent of parties to a conveyance, they should examine what value the parties understood was being exchanged instead of what detailed list of minerals was potentially conveyed.<sup>177</sup>

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mining company's mere inclusion of the words "boring for" and "crude" in its charter was insufficient to demonstrate intent to transfer oil or natural gas in a conveyance. *See id.* at 483. However, the court implied that if the company's charter specifically contemplated the commercial production of oil or natural gas, the substances likely would have been conveyed. *See id.* at 483–84.

170. For a discussion of the *Hoge* decision, see *supra* notes 79–84 and accompanying text.

171. *Cf.* *Andrus v. Shell Oil Co.*, 446 U.S. 657, 672–73 (1980) (holding oil shale discovered prior to 1920 Mineral Lands Leasing Act to be valuable mineral pursuant to Title 30, Section 22 of the United States Code). *But see* *Elkhorn City Land Co. v. Elkhorn City*, 459 S.W.2d 762, 765 (Ky. 1970) (holding sandy shale not mineral due to its abundance and proximity to surface). *See* Brief of Appellees at 22–24, *Butler v. Charles Powers Estate ex rel. Warren*, 65 A.3d 885 (Pa. 2013) (No. 27 MAP 2012), 2012 WL 8681646 (arguing for Marcellus shale as mineral); *see generally* Debra Dobray, *Oil, Shale, Tar Sands, and the Definition of a Mineral: An Old Problem in a New Context*, 22 TULSA L.J. 1 (1986) (surveying characterization of certain substances as minerals across varying jurisdictions).

172. For a discussion of the *Butler* court's analysis of whether Marcellus shale is a mineral, in which it actually analyzed whether Marcellus shale gas is a mineral, see *supra* notes 108–13 and accompanying text.

173. *Cf.* *U.S. Steel Corp. v. Hoge*, 468 A.2d 1380, 1383 (Pa. 1983) (“[S]uch gas as is present in coal must necessarily belong to the owner of the coal . . .”).

174. *Cf.* *Brookbank v. Benedum-Trees Oil Co.*, 131 A.2d 103, 107 n.6 (Pa. 1957) (detailing general process of contract interpretation in Pennsylvania).

175. For a discussion of the analysis of the intent of parties in a mineral conveyance in Pennsylvania, see *supra* notes 70–73 and accompanying text.

176. *See* *Stewart Title Guar. Co. v. Owlett & Lewis, P.C.*, No. 4:12–CV–00770, 2013 WL 3784126, at \*2 (M.D. Pa. July 18, 2013) (“[D]uring the last half of the Nineteenth Century and first half of the Twentieth Century, it was common and customary practice for property owners in this region to reserve all, or a portion, of the oil, gas, and mineral rights when conveying property . . .”).

177. *See In re Conveyance of Land Belonging to City of DuBois*, 335 A.2d 352, 357 (Pa. 1975) (“A deed is to be interpreted in light of the conditions existing when it was executed. The entirety of the language is to be considered.”); *see also* *Trout Run Hunting & Fishing Club v. Hochberg*, No. 10–02400, 2012 WL 7659263

## 2. *Deeds Conveying "Natural Gas"*

The *Butler* court clearly stated that the origin of natural gas, and its method of extraction, was immaterial to natural gas's classification as a non-mineral.<sup>178</sup> If landowners have conveyed their mineral rights and expressly included natural gas, the conveyance could include one of three currently commercially viable forms of natural gas: traditional natural gas, coalbed gas, and Marcellus shale gas.<sup>179</sup> Therefore, a blanket conveyance of natural gas includes all forms of natural gas.<sup>180</sup> This interpretation is consistent with a recent Pennsylvania statute that allows natural gas com-

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(Pa. Ct. Com. Pl. Nov. 25, 2012) (holding conveyance including "all our right, title and interest in and to the mineral rights," but not specifically including natural gas, did convey natural gas because previous deed included explicit reference to natural gas). There is a high standard for proving through parol evidence that the parties to a conveyance intended to include natural gas. See *Day v. Meyer*, No. 10-02455, 2011 WL 7758320, \*6-7 (Pa. Ct. Com. Pl. Dec. 30, 2011) (examining standard of evidence required to prove inclusion of natural gas in mineral conveyance).

178. See *Butler v. Charles Powers Estate ex rel. Warren*, 65 A.3d 885, 899 (Pa. 2013) ("[T]he basis of the *Dunham* Rule lies in the common understanding of the substance itself, not the means used to bring those substances to the surface.").

179. See *Unconventional Natural Gas Formations*, U.S. DEP'T OF TRANSP., PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., <http://primis.phmsa.dot.gov/comm/UnconventionalNGFormations.htm> (last visited Jan. 26, 2014) (describing six basic categories of natural gas found in United States: deep gas, tight gas, gas-containing shales, coalbed methane, geopressurized zones, and Arctic and sub-sea hydrates). See generally MICHAEL RATNER & MARY TIEMANN, CONG. RESEARCH SERV., R 43148, AN OVERVIEW OF UNCONVENTIONAL NATURAL GAS: RESOURCES AND FEDERAL ACTION (2013), available at <http://www.fas.org/sgp/crs/misc/R43148.pdf> (overviewing unconventional natural gas and its commercial production).

180. See *Hoffman v. Arcelormittal Pristine Res., Inc.*, No. 11CV0322, 2011 WL 1791709, at \*5-6 (W.D. Pa. May 10, 2011) (rejecting argument that deed conveying natural gas, executed decades prior to viable commercial production of Marcellus shale gas, should not be included in grant because Marcellus shale gas was unknown and therefore could not have been contemplated by drafting parties). The *Hoffman* court further stated that all the words in the deed should be interpreted to understand the full meaning of the conveyance. See *id.* at \*5 ("The fact remains that the language of the Deed is clear and unambiguous and it reserves the rights to all oil and gas . . ."). Some authors have suggested that the *Hoffman* decision is contrary to the *Dunham* Rule in that *Hoffman* does not expressly seek to interpret the intention of the parties to the conveyance. See Joel R. Burcat & George Asimos, "What Keeps You up at Night?", SAUL EWING LLP: OIL & GAS PRACT. GROUP (Sept. 2011), [http://www.saul.com/media/alert/2593\\_pdf\\_3034.pdf](http://www.saul.com/media/alert/2593_pdf_3034.pdf) (discussing potential application of *Hoffman* decision to *Dunham* Rule); see also Brief for Appellant at 10-13, *Kowcheck v. Pittsburgh Terminal Realization Corp.*, 64 A.3d 34 (table) (Pa. Super. Ct. 2012) (No. 1936 WDA 2011), 2012 WL 6059216 (arguing Marcellus shale gas could not be conveyed under intent analysis). The lower court rejected this argument, stating, the "deed clearly reserves 'all oil and gas under said tracts of land' in the grantor." *Kowcheck v. Pittsburgh Terminal Realization Corp.*, No. 2009-4328, 2011 WL 9753960 (Pa. Ct. Com. Pl. Nov. 14, 2011).



panies to extract Marcellus shale gas when the conveyance only contemplates natural gas.<sup>181</sup>

### B. Future Conveyances

For the foreseeable future, the *Dunham* Rule will continue to reflect the law of natural gas conveyances in Pennsylvania.<sup>182</sup> Fortunately, parties to an oil and gas conveyance have the opportunity to limit the impact of the *Dunham* Rule and *Butler* decision.<sup>183</sup> To avoid future *Dunham* Rule implications, parties should explain, in detail, the minerals included in the written conveyance.<sup>184</sup> Parties should also consider including limiting language in the conveyance to reinforce the specific intention of the parties as to which minerals are to be conveyed. Additionally, as the final step of any natural gas conveyance, the conveyance should be properly recorded to avoid any subsequent title disputes.<sup>185</sup>

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181. See 58 PA. CONS. STAT. § 34.1 (2013) (“Where an operator has the right to develop multiple contiguous leases separately, the operator may develop those leases jointly by horizontal drilling unless expressly prohibited by a lease.”). The statute was intended “to enhance the efficient development of oil and natural gas while safeguarding the rights and protections of landowners and leaseholders.” Letter from Tom Corbett, Governor, Pa., to the Gen. Assemb. of Pa. (July 9, 2013); see also Marie Cusick, *Corbett Signs Controversial Bill Giving Drillers Power to Pool Leases*, NPR STATE IMPACT (July 9, 2013), <http://stateimpact.npr.org/pennsylvania/2013/07/09/corbett-signs-controversial-bill-giving-drillers-power-to-pool-leases/>. But see Marc Levy, *Corbett OKs Bill Strengthening Driller Rights*, PHILA. INQUIRER (July 10, 2013, 3:24 PM), [http://www.philly.com/philly/business/homepage/20130710\\_ap\\_9d6719539cad49b08e2c11b8ecb2ffcb.html](http://www.philly.com/philly/business/homepage/20130710_ap_9d6719539cad49b08e2c11b8ecb2ffcb.html) (discussing new Pennsylvania legislation that “undermines some landowners’ negotiating rights when dealing with Marcellus Shale drilling companies”). Critics argue that the new legislation limits landowners’ ability to negotiate for additional consideration to drill for Marcellus shale gas. See *id.* (criticizing new legislation). See generally Joseph Iole, *May Two Laws Occupy the Same Space at the Same Time? Understanding Pennsylvania Preemption Law in the Marcellus Shale Context*, 6 APPALACHIAN NAT. RESOURCES L.J. 39 (2011) (analyzing potential implications of Pennsylvania’s recent oil and gas legislation).

182. See *Butler*, 65 A.3d at 900 (Saylor, J., concurring) (“[T]oo many settled expectations rest upon [the *Dunham* Rule] for the courts to upset it retroactively.”).

183. See *id.* (“[P]arties certainly have the ability to negate the impact of the *Dunham* decision by making their intentions clear on the face of the written instrumentation.”). See generally Krista Weidner, *Natural Gas Exploration: A Landowners Guide to Financial Management*, PENN. ST. EXTENSION (2009), available at <http://pubs.cas.psu.edu/FreePubs/pdfs/ui394.pdf> (explaining, for landowners, important considerations before signing natural gas lease).

184. See *Higbee Corp. v. Kennedy*, 428 A.2d 592, 597 (Pa. Super. Ct. 1981) (“[T]he grantor, as draftsman of the deed, bears the heavy burden of using clear and unambiguous language to make explicit his intent to create this type of onerous limitation to an estate in land.”); see also 21 PA. CONS. STAT. § 3 (2013) (stating statutory requirements for proper conveying instrument).

185. See 21 PA. CONS. STAT. § 356 (requiring recordation of “[a]ll agreements in writing relating to real property situate in this Commonwealth”). Landowners severing the mineral estate from the surface estate must also report the severance to local taxing authorities. See 72 PA. CONS. STAT. § 5020-409 (codifying common law land ownership reporting requirements); *Hutchinson v. Kline*, 49 A. 312,

## VI. CONCLUSION

For landowners like Bill Hartley, mineral rights provide a viable means to maintain their standard of living.<sup>186</sup> However, in order to preserve landowners' interest in their properties, Pennsylvania needs to reject the *Dunham* Rule in favor of a more comprehensive understanding of a conveyance of minerals.<sup>187</sup> The purpose of the *Dunham* Rule is to interpret a conveyance in accordance with the understanding between the parties, which the Rule, due to changing times, fails to do. Instead, the decisions perpetuating the *Dunham* Rule rely on years of outdated tradition.<sup>188</sup> Today, Pennsylvania landowners and attorneys must structure conveyances to avoid the pitfalls of this outdated rule of property.<sup>189</sup>

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317–18 (Pa. 1901) (requiring reporting of mineral severance to local assessor); *Heft v. Gephart*, 65 Pa. 510, 517 (1870) (explaining owners of unseated land have duty to report ownership to local taxing authority). Also, as with any business transaction, parties should be mindful of the tax implications that may impact total profits from a mineral right conveyance. See generally I.R.S. Oil and Gas Handbook, IRM 4.41.1 (Dec. 13, 2013), available at [http://www.irs.gov/irm/part4/irm\\_04-041-001.html#d0e10](http://www.irs.gov/irm/part4/irm_04-041-001.html#d0e10) (explaining federal examination methods for oil and gas revenue); *Marcellus Education Fact Sheet: Tax Treatment of Natural Gas*, PENN ST. EXTENSION (2011), available at <http://pubs.cas.psu.edu/FreePubs/PDFs/uh190.pdf> (summarizing tax implications of natural gas conveyance in Pennsylvania including federal income tax and property tax).

186. See, e.g., Erich Schwartzel, *Amish Riding Wave of Gas-Drilling Boom*, TOLEDO BLADE (Feb. 3, 2013), <http://www.toledoblade.com/local/2013/02/03/Natural-gas-leases-could-help-Amish-sustain-agrarian-tradition-experts-say.html> (explaining some Amish communities in eastern Ohio and western Pennsylvania have embraced natural gas drilling because of drilling's economic opportunities); Anne Kates Smith, *Cash in on the Natural Gas Shale Boom*, KIPLINGER (Nov. 2011), <http://www.kiplinger.com/article/business/T019-C000-S002-cash-in-on-the-natural-gas-shale-boom.html> (describing Pennsylvania family that leased mineral rights to pay bills, buy farm machinery, and invest balance for future).

187. For a discussion of why Pennsylvania should depart from the *Dunham* Rule, see *supra* notes 142–60 and accompanying text.

188. For a discussion of the *Butler* court's role in Pennsylvania's tradition of perpetuating the *Dunham* Rule, see *supra* notes 119–37 and accompanying text.

189. For a discussion of how to navigate the *Dunham* Rule after the *Butler* decision, see *supra* notes 161–85 and accompanying text.

