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

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“[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.”

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. 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. Hartley, like many other Pennsylvania residents, is now realizing the immense value of the natural gas beneath his feet. Signing bonuses and royalty

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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.\textsuperscript{5} However, these payments would not be possible without the ability of private individuals like Hartley to profit from their mineral right ownership.\textsuperscript{6}

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

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\item 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, \textit{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).
\item 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], \textit{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.” \textit{Id.} (citations omitted). \textit{See generally} Kristin M. Carter et al., \textit{Unconventional Natural Gas Resources in Pennsylvania: The Backstory of the Modern Marcellus Shale Play}, 18 ENVTL. GEO SCI-
Shale, a rock formation approximately one mile beneath the Earth’s surface, naturally contains large deposits of natural gas. However, drilling for Marcellus shale gas has only recently become both commercially and technologically practical. 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. Supporters of drilling note that commercial production of natural gas yields massive economic benefits for the state. Yet, drilling critics point to environmental concerns relating to the use of certain natural gas drilling techniques, especially hydraulic fracturing (fracking).

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 (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 (listing geographic areas of Marcellus shale gas development and major natural gas companies operating within Pennsylvania).


Natural gas companies have historically bought, sold, and leased the mineral rights of Pennsylvania lands for traditional natural gas drilling. 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. 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. 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. This effort on the part of natural gas companies has been met with mixed reactions from both environmentalists and landowners.


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

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

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).


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. Broadly drafted mineral conveyances routinely give rise to disputes regarding ownership of certain minerals. States vary as to their presumptive inclusion of natural gas in the blanket term mineral. Butler v. Charles Powers Estate ex rel. Warren provides an example of a dispute over ownership of rights in natural gas. 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. The Pennsylvania Supreme Court held that natural gas trapped in the Marcellus Shale was not presumptively included in a conveyance of all minerals. In doing so, the Supreme Court reaffirmed the Dunham Rule, which it considered a longstanding rule of property in the state.

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. 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. Part II explains the conceptual background of mineral rights and the two approaches to mineral right presumptions in the United States. 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-


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).


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. 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. Finally, Part V explains how Pennsylvania citizens and practitioners can navigate the Butler decision in past and future land transactions.

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. Yet, over time, states began to move toward a more comprehensive understanding of property rights in real estate. 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. Each of these estates is separable, and an

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 coelom 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.”).

The owner may sell or lease the interest in an individual estate, independent of the other estates.\(^40\)

Pennsylvania common law broadly defines the general term “mineral.”\(^41\) 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.\(^42\) Especially problematic are conveyances that simply transfer the blanket term “minerals.”\(^43\) 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.\(^44\) Absent specific language contemplating a difference, courts treat oil and natural gas similarly due to their similar nature and properties.\(^45\) 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.\(^46\) The minority approach, generally

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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)).


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).

termed the “Pennsylvania Approach,” presumptively excludes natural gas from the term “minerals.” Conversely, the majority approach presumptively includes natural gas in the term “minerals.”

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. Courts routinely recognize *Dunham v. Kirkpatrick* as the seminal case regarding the presumptive exclusion of natural gas in a conveyance of minerals. In *Dunham*, the Pennsylvania Supreme Court addressed whether reservation of “all minerals” included oil. 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. Subsequent courts applied the *Dunham* Rule to natural gas as well, noting the similarities between oil and natural gas. Modern courts applying the minority rule generally point to the rule’s objective of interpreting contracts as intended at the time of the conveyance. However, critics of the

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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).


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 (“Certain, 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.\(^{56}\)

**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.\(^{57}\) Initially, many courts throughout the country applied the *Dunham* Rule to mineral disputes.\(^{58}\) However, as the oil and gas industry developed, states quickly moved away from applying the *Dunham* Rule.\(^{59}\) 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.\(^{60}\)

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.\(^{61}\) 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 N ANCY S AINT-PAUL, S UMMERS O IL & G AS § 7:16 (3d ed. 2012))).  

\(^{57}\) See SUMMERS O IL & G AS, 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. Second, other courts suggested a more scientific approach to defining the word minerals that would also include oil and natural gas. In either case, courts generally adopted a definition of mineral that includes any inorganic substance for which mining or drilling is commercially profitable. 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.

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. Based on the Dunham decision in 1882, Pennsylvania common law has developed the Dunham Rule. The Dunham Rule interprets a general conveyance of all minerals to presumptively exclude oil and natural gas, unless contradicted by parol evidence. However, through the years,

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”); Sull 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.69

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.70 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.71 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.72 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.73

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

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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 Schuylkill 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.74 Further, following the Dunham decision, Pennsylvania courts continued to recognize oil as a mineral.75 This interpretation quickly extended to natural gas as well.76 Consistent with the majority approach, courts justified natural gas and oil as minerals because of their nature as inorganic, commercially viable substances.77 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.78

The landmark decision, U.S. Steel Corp. v. Hoge,79 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. Haldeman, 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).


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 naturae.” 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 situ 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.\textsuperscript{80} In \textit{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.\textsuperscript{81} The court reasoned that because coal was unequivocally a mineral, substances trapped within the conveyed mineral were also conveyed by the mineral grant.\textsuperscript{82} 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.\textsuperscript{83} 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.\textsuperscript{84}

III. \textit{BUTLER v. CHARLES POWERS ESTATE EX REL. WARREN: BURYING THE QUESTION TO PRESERVE TRADITION}

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

\textsuperscript{80} See \textit{Hoge}, 468 A.2d at 1384–85 (holding, generally, that coalbed gas was conveyed through deed conveying all minerals). The \textit{Hoge} decision was the first major court case involving ownership of coalbed gas in the United States. See Sarah Kathryn Farnell, \textit{Methane Gas Ownership: A Proposed Solution for Alabama}, 33 ALA. L. REV. 521, 525–26 (1982) (discussing court’s decision in \textit{Hoge} that “coalbed methane is a separate substance from coal”). One commentator argues that the \textit{Hoge} holding may have been largely based on public policy concerns rather than some underlying legal framework. See Nancy P. Regelin, Comment, \textit{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, \textit{Hoge} decision and its possible underlying motives).

\textsuperscript{81} See \textit{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 \textit{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.”). \textit{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).

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

\textsuperscript{83} See \textit{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.”).

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

\textsuperscript{85} For a discussion of the reasoning of the \textit{Butler} court, see \textit{infra} notes 99–116 and accompanying text.
the broad term “minerals” contemplated or included natural gas trapped in Marcellus shale.86 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.87

A. Facts and Procedure

John and Mary Butler owned a 244-acre parcel of land in Susquehanna County.88 A predecessor in title to the property took title from Charles Powers by deed in 1881.89 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.90

The Butlers filed a complaint in quiet title alleging ownership of all minerals beneath the property, including natural gas, through adverse possession.91 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.92 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.
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.93 The trial court sustained the demurrer and denied the Pritchards’ request for declaratory relief.94 The Pritchards appealed to the Superior Court of Pennsylvania.95

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.96 The Butlers appealed to the Supreme Court of Pennsylvania for a review of whether the remand for an evidentiary hearing was proper.97 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.98

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.99 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.100 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”).
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.

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 Rule] 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.\(^{101}\)

Next, the court turned to whether the *Dunham* Rule applies to natural gas trapped inside of the Marcellus Shale Formation.\(^{102}\) The court held that the application of the *Dunham* Rule properly applies to Marcellus shale gas.\(^{103}\) 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.\(^{104}\) First, in Pennsylvania, only substances of a metallic nature constitute a mineral for the purpose of a private deed.\(^{105}\) Second, private deeds are contracts that must be interpreted based on the intent of the parties to the contract.\(^{106}\) 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.\(^{107}\)

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.\(^{108}\) The supreme court began by noting that *Hoge* in no way limited or overruled the *Dunham* Rule, despite 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 overthrown 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. 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. First, the Hoge decision concerned the right to ventilate coal, which naturally only applies to coal. 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. 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.

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. 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 granter, 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: Degasification, 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).


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.\footnote{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).} 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.\footnote{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.”).}

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.\footnote{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.} Second, the Butler decision continued the more modern Pennsylvania tradition of tailoring oil and gas law to the benefit of commercial producers.\footnote{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).}

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.\footnote{For a discussion of Pennsylvania’s pattern of extending the Dunham Rule, see infra notes 120–23 and accompanying text.} Pennsylvania courts that have examined the Dunham Rule consistently highlight the fact that it is a longstanding rule of property within the state.\footnote{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] 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. 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. 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.

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. Further, the Pennsylvania legislature has historically adopted statutes that support commercial production.

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).


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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.126

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.127 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.128 This decision effectively understate 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).


mines the statutory provision granting landowners a minimum royalty percentage from natural gas recovered from their mineral estate. 129 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. 130 Finally, the intermediate appellate court upheld a Pennsylvania law that gave certain natural gas companies the power of eminent domain. 131

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

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.133 These companies claimed that thousands of oil and gas leases across the Commonwealth could be in jeopardy if the Dunham Rule was overturned.134 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.135 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.136 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.137

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.138 In order for Pennsylvania to return property rights to landowners, it should adopt the majority approach and declare natural gas a mineral.139


134. See supra note 133.

135. See id.


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.140 Second, even if the Dunham Rule is alive and well, the Butler court incorrectly dismissed the Hoge decision in its analysis.141

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.142 However, even after the Dunham decision in 1882, numerous Pennsylvania courts have concluded that oil and natural gas are in fact minerals.143 Further, courts outside of Pennsylvania have long considered

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.
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 reality, 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 reality, 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) (“It 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) (“Oil in place, being a mineral, is part of the reality.”); Guthrie v. Guthrie, 7 A.2d 137, 139 (Pa. Super. Ct. 1939) (“Oil in place is a mineral. . . .” (citing Stoughton, 88 Pa. at 201)); Rockwell v. Keefer, 39 Pa. Super. Ct. 468, 476 (1909) (“We have established the proposition that oil and gas are minerals. . . .”); In re McLean’s Estate, 85 Pa. D. & C. 129, 132 (Orphans’ Ct. Wash. Ctty. 1952) (“Oil in place, being a mineral, is part of the reality, 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, 24 A. 564, 565 (Pa. 1896)) (emphasis added)); In re指定's Estate, 67 A.2d 119, 122 (Pa. 1949) (noting “right of property” had become “firmly imbedded in our law”).
the *Dunham* decision overruled based on subsequent Pennsylvania decisions.144 Interestingly, even the court in *Butler* noted that several Pennsylvania statutes included natural gas in their definition of minerals.145

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. Allred*, 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.

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

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. 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.

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. 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. 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.

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).


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.
B. Pennsylvania Should Adopt the Majority Approach

In its decision, the Butler court implicitly rejected a holding that would end the Dunham Rule for any future conveyance, but maintain the Rule for any conveyance prior to the change.151 The court simply reasoned that the Dunham Rule is a longstanding rule of property, and therefore many conveyances have been based on this Rule.152 This reasoning is in accordance with Pennsylvania’s legal tradition that longstanding rules of property should not be disturbed.153

Nevertheless, departing from the Dunham Rule would benefit the state of Pennsylvania.154 Application of the Hoge standard to Marcellus shale would be best for Pennsylvania citizens because it would allow them to claim the financial benefits associated with the natural gas beneath the land.155 Additionally, a change in the Dunham Rule would benefit practicing attorneys by making the natural gas presumption consistent with the popular understanding of minerals.156 Pennsylvania should take this op-


152. For a discussion of the Butler court’s reasoning, see supra notes 99–116 and accompanying text.

153. For a discussion of Pennsylvania’s strict stare decisis commitment regarding rules of property, see supra note 119–23 and accompanying text.


We note that this anachronistic presumption has come before the courts of this county in recent decades for interpretation. We presume that other counties where oil and gas drillings have sprung into existence after about 1950 have been plagued with the “Dunham problem” when drafting attorneys or individuals entering into agreements, leases or conveyances which reserved mineral rights 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.

Id. at 228. When examining a reservation of minerals, the Broughton court suggested that “the parties and the court are again plagued by the ancient case” of Dunham v. Kirkpatrick. See id. at 227–28.
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. 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. Furthermore, in some cases, departures from longstanding property laws are necessary to adapt to a dynamic world and economy. 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.

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. 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...

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 Schriver 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.”).

Marcellus shale is appropriate. 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.

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. Litigation as a result of the Butler decision will likely continue to focus on the definition of all minerals in a past conveyance. 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.

1. Deeds Conveying “All Minerals”

In Pennsylvania, a deed conveying some derivative of the term “all minerals” is currently subject to the Dunham Rule. 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. 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.

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.


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.


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. 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. While this argument was raised in Butler, the Pennsylvania Supreme Court did not actually address the issue. 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.

Finally, Pennsylvania law is concerned with understanding the intent of the parties in a mineral conveyance. Nevertheless, the nature of most conveyances is not centered on a list of specific minerals. Instead, conveyances are meant to preserve and realize the value of substances trapped beneath the ground. 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.

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.

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 70–73 and accompanying text.


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


173. 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 . . . .”).

174. 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.\(^{178}\) 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.\(^{179}\) Therefore, a blanket conveyance of natural gas includes all forms of natural gas.\(^{180}\) This interpretation is consistent with a recent Pennsylvania statute that allows natural gas com-

\(^{178}\) 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.”).


\(^{180}\) 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/2595_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., No. 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. 2009-4228, 2011 WL 9753960 (Pa. Ct. Com. Pl. Nov. 14, 2011).
panies to extract Marcellus shale gas when the conveyance only contemplates natural gas.\textsuperscript{181}

B. Future Conveyances

For the foreseeable future, the \textit{Dunham} Rule will continue to reflect the law of natural gas conveyances in Pennsylvania.\textsuperscript{182} Fortunately, parties to an oil and gas conveyance have the opportunity to limit the impact of the \textit{Dunham} Rule and \textit{Butler} decision.\textsuperscript{183} To avoid future \textit{Dunham} Rule implications, parties should explain, in detail, the minerals included in the written conveyance.\textsuperscript{184} 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.\textsuperscript{185}


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

\textsuperscript{183} \textit{See id.} (“[P]arties certainly have the ability to negate the impact of the \textit{Dunham} decision by making their intentions clear on the face of the written instrumentation.”). \textit{See generally} Krista Weidner, \textit{Natural Gas Exploration: A Landowners Guide to Financial Management}, PENN ST. EXTENSION (2009), available at http://pubs.cas.psu.edu/FreePubs/pdfs/uj994.pdf (explaining, for landowners, important considerations before signing natural gas lease).

\textsuperscript{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.”); \textit{see also} 21 PA. CONS. STAT. § 3 (2013) (stating statutory requirements for proper conveying instrument).

\textsuperscript{185} \textit{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. \textit{See} 72 PA. CONS. STAT. § 5020-409 (codifying common law 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. 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. 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. Today, Pennsylvania landowners and attorneys must structure conveyances to avoid the pitfalls of this outdated rule of property.


187. 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.

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