

Drake Meets Marcellus: A Review of Pennsylvania Case Law upon the Sesquicentennial of the United States Oil and Gas Industry

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I. Introduction

On August 27, 1859, Colonel Edwin L. Drake drilled the first commercially successful oil well near Titusville, Pennsylvania.¹ With Colonel Drake's accomplishment, Pennsylvania became the birthplace of the oil and gas industry, and Northwestern Pennsylvania experienced a "gold rush" of sorts as speculators and developers moved into the area to capitalize on the potential economic opportunities.² Although exploration activities soon expanded into other states and Pennsylvania's central role in the industry diminished, Pennsylvania courts nonetheless played an important role in the early development of United States oil and gas law into the late nineteenth century. Influential cases from Pennsylvania courts helped to shape

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¹ DANIEL YERGIN, THE PRIZE 10-15 (Simon & Schuster 1991).

² *Id.* This "gold rush" mentality is epitomized by the story of the town of Pithole, which rose from wilderness to a thriving metropolis with 15,000 residents and back to wilderness in a span of a few short years in the 1860s.

fundamental concepts of oil and gas law such as the Pennsylvania Supreme Court's application of the Rule of Capture to the ownership of oil and gas in *Westmoreland & Cambria Natural Gas Co. v. De Witt*.³

Despite early contributions to the national body of oil and gas law, the development of Pennsylvania oil and gas case law slowed considerably throughout the twentieth century, reflecting the relative decline of the industry in the state. As a result, in comparison with other oil and gas producing states, the body of Pennsylvania oil and gas case law remained largely undeveloped upon the 150th anniversary of the Drake well.⁴ Moving beyond this sesquicentennial anniversary, however, the relative dearth of Pennsylvania case law is being remedied, and Pennsylvania is experiencing a renaissance of oil and gas law as a result of expansive natural gas drilling into the Marcellus Shale Formation.

The Marcellus Shale Formation has been described as “one of the most significant opportunities for domestic natural gas development in many years.”⁵ This geologic formation traverses Pennsylvania in a southwesterly to northeasterly direction and underlies all or a portion of approximately fifty-five of the state's sixty-seven counties.⁶ The extraction of natural gas from the Marcellus Shale Formation in Pennsylvania began with the drilling of a well by Range

³ 18 A. 724, 725 (Pa. 1889). See generally Bruce M. Kramer & Owen L. Anderson, *The Rule of Capture – An Oil and Gas Perspective*, 35 ENVTL. L. 899 (2005) (providing an overview of the Rule of Capture from an oil and gas perspective, including a discussion of the leading cases pertaining to the rule).

⁴ RUSSELL L. SCHETROMA, SUMMARY OF SELECTED PRINCIPLES OF PENNSYLVANIA OIL AND GAS LAW 1 (2010), available at <http://www.cwss.com/RLS/AAPL/AAPL.html>.

⁵ George A. Bibikos & Jeffrey C. King, *A Primer on Oil and Gas Law in the Marcellus Shale States*, 4 TEX. J. OIL GAS & ENERGY L. 156, 156 (2009).

⁶ Pennsylvania Dept. of Env'tl. Protection, Bureau of Oil and Gas Mgmt., Marcellus Shale Formation, <http://www.dep.state.pa.us/dep/deputate/minres/oilgas/BOGM%20Website%20Pictures/2010/Marcellus%20Shale%20Formation.jpg>.

Resources – Appalachia, LLC, in 2003.⁷ Although the Marcellus had not been the target formation of this Washington County well, through the use of experimentation and new technologies, Marcellus gas began to be extracted from the well in 2005.⁸ Since that time, the number of Marcellus wells drilled in Pennsylvania has increased at an exponential rate, rising from a total of two in 2005, to thirty-four in 2007, to 763 in 2009.⁹ As a result of this increased activity in natural gas extraction and with the prospects for even further development, large areas of Pennsylvania once again are in the midst of a “gold rush.” As such, the number of legal issues that are being presented to state and federal courts in Pennsylvania is significantly increasing.

This article will address the issues that have been decided by state and federal courts in Pennsylvania during the time period beginning on January 1, 2009, and ending on June 30, 2010. During this time, the Pennsylvania Supreme Court has ruled on the meaning of a statutory minimum royalty provision,¹⁰ the extent to which municipalities can regulate natural gas operations,¹¹ and the ability of a state agency to restrict surface activity necessary for natural gas extraction.¹² Pennsylvania’s intermediate appellate courts and county-level trial courts also have rendered rulings on these and other issues. Similarly, federal courts in Pennsylvania have ruled

⁷ John A. Harper, *The Marcellus Shale – An Old “New” Gas Reservoir in Pennsylvania*, 38 PA. GEOLOGY, at 9 (Spring 2008).

⁸ *Id.*

⁹ Through the first ten months of 2010, a total of 1,177 Marcellus wells had been drilled in Pennsylvania. Pennsylvania Dept. of Env’tl. Protection, *2010 Wells Drilled by County*, <http://www.dep.state.pa.us/dep/deputate/minres/oilgas/2010%20Wells%20Drilled%20by%20County.htm>.

¹⁰ *See* *Kilmer v. Elexco Land Servs., Inc.*, 990 A.2d 1147, 1158 (Pa. 2010).

¹¹ *See* *Huntley & Huntley, Inc. v. Borough of Oakmont*, 964 A.2d 855, 864 (Pa. 2009) (ruling that municipal ordinance had not been preempted by Oil and Gas Act). *See also* *Range Resources – Appalachia, LLC v. Salem Twp.*, 964 A.2d 869, 877 (Pa. 2009) (ruling that municipal ordinance had been preempted by Oil and Gas Act).

¹² *See* *Belden & Blake Corp. v. Commonwealth Dep’t of Conservation and Natural Res.*, 969 A.2d 528, 533 (Pa. 2009).

on a number of issues such as attempts by landowners to invalidate lease agreements¹³ and governmental restrictions upon drilling in the Allegheny National Forest.¹⁴

This article organizes the various court rulings from the subject period into four sections, which each will be addressed in turn: (1) Validity and Duration of Lease Agreement,¹⁵ (2) Municipal Regulation of Oil and Gas Operations,¹⁶ (3) Surface Estate Issues,¹⁷ and (4) Miscellaneous Property Issues.¹⁸

II. Validity and Duration of Lease Agreement

The market for natural gas leases in Pennsylvania experienced tremendous volatility during the 2008 calendar year. Prior to the end of 2007, landowners typically received a very minimal bonus or annual delay rental payment in exchange for executing a natural gas lease. This lease market increased dramatically from late 2007 through the summer of 2008, with typical lease rates rising from approximately twenty-five dollars or less per acre in some parts of the state to thirty-five hundred dollars or more during the span of a few months. Then, in the fall of 2008, as problems in the national credit markets mounted, many gas companies stopped actively engaging in lease negotiations.¹⁹ Many landowners who had been holding out for higher

¹³ See *infra* Sections II.A., II.B., and II.C.

¹⁴ See *infra* Section IV.B.

¹⁵ See *infra* Section II.

¹⁶ See *infra* Section III.

¹⁷ See *infra* Section IV.

¹⁸ See *infra* Section V.

¹⁹ See, e.g., *Valentino v. Range Res. – Appalachia, LLC*, 2010 WL 2034550, at *3 (W.D. Pa. May 21, 2010) (denying motion to dismiss in breach of contract case where lessee failed to pay bonus. Defendant lessee noted “the drastic drop in oil and gas prices, the downturn of the U.S. economy and the resulting effects on the credit markets” as reasons why it no longer wished to execute the lease agreement).

lease payments were unable to execute a lease even at the previously offered lower terms. This dramatic increase and subsequent collapse of the lease market provided the factual background for several court opinions where the validity of lease agreements was at issue. In most of these cases, landowners who signed lease agreements during a low point in the lease market sought to have their leases invalidated.²⁰ In other cases, however, landowners who signed lease agreements during a high point in the lease market sought to compel the gas companies to comply with the agreements.²¹

A. Violation of Guaranteed Minimum Royalty Act

In light of the dramatic rise in lease rates, some landowners who received comparatively low bonus payments sought a legal way to get out of their lease agreements so that they could take advantage of the higher lease market.²² While these landowners asserted a variety of claims, the predominant legal theory through which landowners challenged the validity of their leases was that the lease agreements violated the statutory minimum royalty protections provided under Pennsylvania law.²³

²⁰ See *infra* Sections II.A., II.B., and II.C.

²¹ See *infra* Section II.D.

²² See, e.g., *Kilmer v. Elexco Land Servs., Inc.*, 990 A.2d 1147, 1150 (Pa. 2010).

²³ See *id.*; *Julia v. Elexco Land Servs., Inc.*, 2010 U.S. Dist. LEXIS 45821 (M.D. Pa. May 11, 2010); *Puza v. Elexco Land Servs., Inc.*, 2010 U.S. Dist. LEXIS 43346 at *5 (M.D. Pa. May 3, 2010); *Carey v. New Penn Exploration, LLC*, 2010 U.S. Dist. LEXIS 52199 at *5 (M.D. Pa. Apr. 28, 2010); *Eisenberger v. Chesapeake Appalachia, LLC*, 2010 WL 457139 at *5 (M.D. Pa. Feb. 4, 2010); *Price v. Elexco Land Servs., Inc.*, 2009 WL 2045135 at *6 (M.D. Pa. July 9, 2009); *Stone v. Elexco Land Servs., Inc.*, 2009 WL 1515251, at *2 (M.D. Pa. June 1, 2009); *Kropa v. Cabot Oil & Gas Corp.*, 609 F.Supp.2d 372, 379-382 (M.D. Pa. 2009); *Belcher v. The Keeton Group*, No. 3:09-cv-506, slip op. (May 8, 2009) (declining to exercise jurisdiction over Guaranteed Minimum Royalty Act claim).

In 1979, the Pennsylvania General Assembly enacted legislation to mandate that lessors receive a minimum royalty of 12.5% of all oil and gas removed from the property.²⁴ This so-called “Guaranteed Minimum Royalty Act”²⁵ states that a lease “shall not be valid if such lease does not guarantee” the statutorily mandated minimum royalty.²⁶ The statute does not, however, define at which point in the production and distribution cycle the royalty shall be calculated. The statute likewise does not state what, if any, deductions may be taken from a landowner’s royalty check. This lack of statutory clarity provided the legal basis for more than seventy lawsuits filed by landowners seeking to invalidate their lease agreements.²⁷

The specific legal issue in many of these cases involved post-production costs or costs incurred after the gas has been extracted from the ground. Generally, most plaintiffs argued that the specific lease agreement in question was not in compliance with Pennsylvania law because the lease provided that the landowners’ royalties could be reduced to pay for a portion of the post-production costs. According to this argument, if the royalties could be reduced for some unknown amount of post-production costs, then the leases did not guarantee the lessors a royalty in excess of the statutorily mandated one-eighth minimum. As such, the plaintiffs asserted that these lease agreements were not valid and that they were free to negotiate new lease agreements.

²⁴ 58 PA. STAT. ANN. § 33 (West 2010).

²⁵ Although the statute has no official name, it is commonly referred to as the Guaranteed Minimum Royalty Act. *See* Kilmer, 990 A.2d at 1149.

²⁶ The full text of statute is as follows: “A lease or other such agreement conveying the right to remove or recover oil, natural gas or gas of any other designation from lessor to lessee shall not be valid if such lease does not guarantee the lessor at least one-eighth royalty of all oil, natural gas or gas of other designations removed or recovered from the subject real property.” 58 PA. STAT. ANN. § 33 (West 2010).

²⁷ *See* Kilmer, 990 A.2d at 1151. Many of these suits have multiple landowner-plaintiffs – some with more than one hundred – so the total number of leases directly at issue in this group of litigation may well number into the thousands.

The first substantive ruling on this issue was rendered by the Susquehanna County Court of Common Pleas on March 3, 2009, in *Kilmer v. Elexco Land Services*.²⁸ In addressing the parties' cross-motions for summary judgment, the court upheld the validity of a lease agreement that deducted post-production costs prior to the calculation of the landowners' royalties.²⁹ The court found that the parties were free to determine how royalties were to be calculated.³⁰ The lease in question, therefore, did not violate Pennsylvania's minimum one-eighth royalty requirement.³¹

Approximately six weeks after the *Kilmer* order was issued by the Court of Common Pleas, the United States District Court for the Middle District of Pennsylvania reached a different result on this same issue in *Kropa v. Cabot Oil and Gas Corporation*.³² There, the court refused to grant a gas company's motion to dismiss a Guaranteed Minimum Royalty Act claim.³³ While the *Kilmer* court had eschewed an analysis of the meaning of the term "royalty," the *Kropa* court opined that ascertaining the meaning of this term was critical to a resolution of the motion.³⁴ After consideration of whether the term "royalty" should be construed according to its common usage or to its peculiar meaning within the industry, the court concluded that neither party had

²⁸ *Kilmer v. Elexco Land Servs., Inc.*, No. 2008-57, Order of Court (Susquehanna County Ct. Com. Pl. Mar. 3, 2009), *aff'd* 990 A.2d 1147, 1151 (Pa. 2010).

²⁹ *Id.* The court did not issue an opinion at that time. After the landowner appealed the case to the Pennsylvania Superior Court, the court issued a written opinion. *Kilmer v. Elexco Land Servs., Inc.*, No. 2008-57, slip op. (Susquehanna County Ct. Com. Pl. Mar. 16, 2009).

³⁰ *Kilmer v. Elexco Land Servs., Inc.*, No. 2008-57, Order of Court.

³¹ *Id.*

³² 609 F.Supp.2d 372, 382 (M.D. Pa. 2009). Landowner John Kropa sought to terminate his natural gas lease based upon noncompliance with 58 PA. STAT. § 33, which requires that a natural gas lease guarantee payment of at least a one-eighth royalty. 609 F.Supp.2d at 379. Kropa argued that this statutory minimum royalty provision had been violated because his lease authorized post-production expenses to be deducted from his one-eighth royalty. *Id.* Cabot Oil & Gas Corporation filed a motion to dismiss. *Id.* at 374.

³³ *Id.* at 382.

³⁴ *Id.* at 380, n. 7. The court indicated that it "respectfully disagree[d]" with the analysis of the Court of Common Pleas in the *Kilmer* decision. *Id.*

established the meaning of the term.³⁵ To determine its proper meaning, the court stated that it would be necessary to review additional documents as the case moved forward.³⁶ Accordingly, the motion to dismiss was denied.³⁷

The plaintiffs in *Kilmer* appealed the ruling of the Court of Common Pleas to the Pennsylvania Superior Court.³⁸ On June 16, 2009, in response to an unopposed defense request, the Pennsylvania Supreme Court granted a Petition for Exercise of Extraordinary Jurisdiction.³⁹ Thus, the order of the Court of Common Pleas in *Kilmer* bypassed normal intermediate appellate review and was reviewed directly by the Pennsylvania Supreme Court.⁴⁰

The Supreme Court rendered an opinion on March 24, 2010, ruling in favor of the gas company with regard to the deduction of post-production costs from landowner royalties.⁴¹ The court found that although the Guaranteed Minimum Royalty Act does not define royalty or the method of calculation, the Act “should be read to permit the calculation of royalties at the wellhead, as provided by the net-back method used in the Lease.”⁴² Thus, the court affirmed the

³⁵ *Id.* at 380-82.

³⁶ *Id.*

³⁷ *Id.* The analysis of the Kropa court was utilized in other federal cases decided shortly thereafter. *See Price v. Elexco Lands Servs., Inc.*, 2009 WL 2045135 (M.D. Pa. July 9, 2009); *Stone v. Elexco Land Servs., Inc.*, 2009 WL 1515251 (M.D. Pa. June 1, 2009).

³⁸ *Kilmer v. Elexco Land Servs., Inc.*, 990 A.2d 1147, 1151 (Pa. 2010).

³⁹ *Id.*

⁴⁰ The issue reviewed by the Supreme Court was “whether the GMRA precludes parties from contracting to use the net-back method to determine royalties payable under an oil or natural gas lease.” *Id.*

⁴¹ *Id.* at 1149.

⁴² *Id.* at 1157-58.

grant of summary judgment to the gas company,⁴³ and the plaintiffs could not rely upon the Guaranteed Minimum Royalty Act to terminate their natural gas lease.⁴⁴

B. Fraudulent Inducement to Execute Lease Agreement

In addition to seeking lease termination through a violation of the Guaranteed Minimum Royalty Act, some landowners also sought relief based a claim that the gas company had procured the lease agreement through fraudulent inducement.⁴⁵ In one such case, John Kropa (Kropa), the owner of fifty-one acres in Susquehanna County, claimed that he had been fraudulently induced into executing a gas lease based upon Cabot's false claims regarding his land's lease value.⁴⁶ Kropa alleged that he was told by Cabot's agent that Cabot would never pay a lease bonus greater than the twenty-five dollars per acre that was offered to Kropa.⁴⁷ In ruling on a motion to dismiss, the United States District Court for the Middle District of Pennsylvania permitted Kropa's fraudulent inducement claim to proceed.⁴⁸ Cabot had argued that the parol evidence rule precluded Kropa from submitting evidence of fraud as this evidence was beyond the written terms of the lease agreement.⁴⁹ The court disagreed and held that a valid contract

⁴³ *Id.* at 1158.

⁴⁴ *See* Kropa v. Cabot Oil & Gas Corp., 2010 WL 2346587, at *2 (June 8, 2010) (dismissing landowners claim under Guaranteed Minimum Royalty Act).

⁴⁵ *See* Kropa v. Cabot Oil & Gas Corp., 2010 WL 2346587; Julia v. Elexco Land Servs., Inc., 2010 WL 1904245, at *3 (M.D. Pa. May 11, 2010); Puza v. Elexco Land Servs., Inc., 2010 WL 1791150, at *2 (M.D. Pa. May 3, 2010); Carey v. New Penn Exploration, LLC, 2010 WL 1754440, at *2 (M.D. Pa. Apr. 28, 2010); Cabot Oil & Gas Corp. v. Jordan, 698 F.Supp.2d 474 (M.D. Pa. 2010); Price v. Elexco Land Servs., Inc., 2009 WL 2045135, at *2 (M.D. Pa. July 9, 2009); Stone v. Elexco Land Servs., Inc, 2009 WL 1515251, at *4 (M.D. Pa. June 1, 2009).

⁴⁶ *Kropa*, 2010 WL 2346587 at *1.

⁴⁷ *Id.*

⁴⁸ *Id.* at *4.

⁴⁹ *Id.* at *3.

must exist before the parol evidence rule applies.⁵⁰ Thus, Kropa was permitted to introduce evidence of fraud to contest the validity of the lease agreement.⁵¹

C. Untimely Tender of Lease Bonus Payment

In *Sylvester v. Southwestern Energy Production*, the landowners also sought to terminate the lease agreement, but used a legal theory differing from fraudulent inducement or a violation of the Guaranteed Minimum Royalty Act.⁵² In this case, two Lackawanna County landowners signed a ten-year lease agreement in December 2007 that provided for a total bonus payment in the amount of \$15,665.⁵³ The bonus payment was to be received by the landowners within sixty days of the date of the lease agreement.⁵⁴ This payment, however, was received by the landowners twenty-three days after the required due date.⁵⁵ The landowners marked the check as void and returned it to the gas company presumably due to the dramatic increase in the lease market in the time during which the landowners were awaiting payment.⁵⁶ The landowners then filed suit seeking a declaration that the lease was unenforceable, and the defendant responded by filing a motion to dismiss.⁵⁷

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Sylvester v. Sw. Energy Prod. Co.*, 2009 WL 3633835, at *1 (M.D. Pa. Nov. 2, 2009).

⁵³ *Id.* at *1.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

The court granted the motion to dismiss, ruling that the twenty-three day delay in providing payment did not constitute a material breach of the lease terms.⁵⁸ In reaching this conclusion, the court considered several factors. The court opined that the plaintiffs still could receive their benefit of the bargain by accepting a reissued payment from the defendant.⁵⁹ Additionally, the lease provided that ninety days notice of default was to be provided by the landowners prior to filing suit.⁶⁰ Although notice of default was not given, the landowners would have received the lease payment well within this cure period had notice been provided.⁶¹ Finally, the lease did not contain a provision stating that “time was of the essence.”⁶² Since time was not of the essence, the court determined that a brief delay in payment did not give rise to a breach of the lease agreement.⁶³ As such, the landowners were not able to establish a claim to void the lease agreement.

D. Failure to Obtain Management Approval of Lease Agreement

Most of the cases addressing the validity of leases involved landowners who sought to terminate leases that had been executed when the lease market provided landowners with relatively low payment terms. When problems in the national credit markets adversely impacted the market for natural gas leases in fall of 2008, a new type of litigation resulted.⁶⁴ Landowners

⁵⁸ *Sylvester v. Sw. Energy Prod. Co.*, 2009 WL 3633835, at *3-4 (M.D. Pa. Nov. 2, 2009).

⁵⁹ *Id.* at *3.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *See, e.g., Valentino v. Range Res. – Appalachia, LLC*, 2010 WL 2034550, at *3 (W.D. Pa. May 21, 2010).

who believed that they had executed lease agreements under favorable payment terms filed suit to compel enforcement of the lease agreements.⁶⁵ Court decisions have provided these landowners with mixed results.⁶⁶

Landowners were unsuccessful in their attempt to compel enforcement of a lease agreement in *Hollingsworth v. Range Resources – Appalachia, LLC*.⁶⁷ These landowners filed suit alleging that Range Resources (Range) failed to make a bonus payment as provided by a five-year lease agreement executed by the landowners and submitted to Range.⁶⁸ The relationship between the parties was initiated on or about June 8, 2008, when Range sent a “Dear Property Owner” letter and a lease agreement to the landowners.⁶⁹ The letter stated that Range would pay the landowners the sum of \$165,000 (\$2,500 per acre) within ninety days after execution of the lease agreement.⁷⁰ The letter thanked the landowners for “entering into an oil and gas lease,” but also contained language stating that payment of the lease bonus was “subject to approval of title and management lease review.”⁷¹ The landowners executed the lease agreement and submitted it to Range on August 13, 2008.⁷² Range, however, failed to make any

⁶⁵ See, e.g., *id.* at *1; *Pigeon Creek Presbyterian Church v. Range Res. – Appalachia, LLC*, 2010 WL 256580 (W.D. Pa. Jan. 19, 2010); *Hollingsworth v. Range Res. – Appalachia, LLC*, 2009 WL 3601586, at *1 (M.D. Pa. Oct. 28, 2009); *Lycobetter Homes, Inc. v. Range Res. – Appalachia, LLC*, 2009 U.S. Dist. LEXIS 110425 (M.D. Pa. May 21, 2009).

⁶⁶ Compare *Hollingsworth*, 2009 WL 3601586, at *13 (motion to dismiss granted) with *Valentino*, 2010 WL 2034550, at *7 (motion to dismiss denied).

⁶⁷ 2009 WL 3601586, at *5, *13.

⁶⁸ *Hollingsworth*, 2009 WL 3601586, at *1.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Hollingsworth v. Range Res. – Appalachia, LLC*, 2009 WL 3601586, at *1 (M.D. Pa. Oct. 28, 2009).

⁷² *Id.*

payment to the landowners, and on December 16, 2008, sent a letter notifying the landowners that the lease had not been approved by management.⁷³ The landowners filed suit, seeking a declaration that the lease agreement was valid and that Range was required to make the bonus payment as specified in the agreement.⁷⁴ Range filed a motion to dismiss asserting that a valid contract had not been formed.⁷⁵

The court agreed with Range that a valid contract did not exist and granted the motion to dismiss.⁷⁶ According to the court, the “Dear Property Owner” letter did not constitute an offer as Range “did not sign the lease and stated that plaintiffs’ signed lease would be subject to review.”⁷⁷ By executing the lease agreement and submitting it to Range, the court found that the landowners were the party extending the offer – an offer that was rejected by Range.⁷⁸ Because a contract did not exist, the landowners obviously could not prevail on a claim for breach of contract.⁷⁹

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at *8-*9.

⁷⁶ *Id.* at *4-5.

⁷⁷ *Hollingsworth v. Range Res. – Appalachia, LLC*, 2009 WL 3601586, at *4 (M.D. Pa. Oct. 28, 2009). *Cf. Lyco Better Homes, Inc. v. Range Res. – Appalachia, LLC*, 2009 U.S. Dist. LEXIS 110425, at *6 (M.D. Pa. May 21, 2009) (lease agreement alleged to have been signed by Range’s Vice-President-Land prior to its disapproval by Range’s senior management).

⁷⁸ *Id.* at *3-4.

⁷⁹ *Id.* at *4. Furthermore, the court determined that the issue in question was to be resolved using contract law rather than real property law. As such, it was irrelevant whether the landowners had delivered the lease agreement to Range. *Id.*

In contrast with the *Hollingsworth* decision, the United States District Court for the Western District of Pennsylvania ruled on a similar motion to dismiss with a different result.⁸⁰ In *Valentino v. Range Resources – Appalachia*, landowners alleged that they had executed a natural gas lease together with a side agreement that provided for a bonus payment of \$456,800.⁸¹ When Range failed to pay the bonus as stated in the side agreement, the landowners filed a breach of contract action seeking to compel Range to make the payment.⁸² The side agreement in question included language thanking the Valentinos for entering into a natural gas lease as well as providing that the lease would not be valid until approved by Range management.⁸³ The Valentinos argued that this writing constituted Range’s acceptance of the lease.⁸⁴ Range filed a motion to dismiss, asserting that the lease was unenforceable because it had not been approved by company management.⁸⁵ The court found that the relevant documents did not define the term “management approval” at any point.⁸⁶ Thus, the breach of contract claim was “facially plausible” because the Valentinos had alleged facts that could demonstrate management approval of the lease.⁸⁷ Accordingly, the motion to dismiss was denied.⁸⁸

⁸⁰ See *Valentino v. Range Res. – Appalachia, LLC*, 2010 WL 2034550, at *1 (W.D. Pa. May 21, 2010). *But see* *Pigeon Creek Presbyterian Church v. Range Res. – Appalachia, LLC*, 2010 WL 256580, at *1 (W.D. Pa. Jan. 19, 2010) (deferring to rule on motion to dismiss).

⁸¹ *Id.* at *1.

⁸² *Id.*

⁸³ *Id.* at *2. The side agreement also stated that the bonus payment was “consideration for executing the lease.” *Id.*

⁸⁴ *Id.* at *3.

⁸⁵ *Id.* at *1, 5.

⁸⁶ *Valentino v. Range Res. – Appalachia, LLC*, 2010 WL 2034550, at *6 (W.D. Pa. May 21, 2010).

⁸⁷ *Id.* at *6-7.

⁸⁸ *Id.* at *7.

E. Enforcement of Arbitration Clause in Lease Agreement

In addition to the substantive legal issues raised in the various lease termination lawsuits, federal courts also have addressed the enforcement of arbitration clauses in these leases.⁸⁹ In one such case, *Eisenberger v. Chesapeake Appalachia, LLC*, the court denied a motion to compel arbitration where the validity of a natural gas lease was disputed.⁹⁰ The plaintiffs, Dean and Theresa Eisenberger, were the co-owners of a tract of land comprising approximately 58.1 acres.⁹¹ After realizing that Dean, but not Theresa, Eisenberger had signed a lease agreement with Chesapeake Appalachia (Chesapeake), the Eisenbergers sought to void the lease.⁹² Chesapeake contended that the lease was valid and disregarded subsequent attempts by the Eisenbergers to revoke the lease.⁹³ The Eisenbergers filed suit, seeking a declaratory judgment that the lease was invalid.⁹⁴ In response, Chesapeake filed a motion to compel arbitration of the claims pursuant to the terms of an arbitration clause in the lease agreement.⁹⁵

The court found a genuine issue of material fact existed as to whether there was an agreement to arbitrate claims because the Eisenbergers disputed that a contract had been formed.⁹⁶ The court distinguished these facts from those in cases where a landowner had

⁸⁹ See, e.g., *Eisenberger v. Chesapeake Appalachia, LLC*, 2010 WL 457139 (M.D. Pa. Feb. 4, 2010); *Hayes v. Chesapeake Appalachia, LLC*, No. 3:09-cv-619, slip op. (M.D. Pa. May 15, 2009); *Ulmer v. Chesapeake Appalachia, LLC*, No. 4:08-cv-2062, slip op. (M.D. Pa. Jan. 16, 2009).

⁹⁰ *Eisenberger*, 2010 WL 457139, at *1-*2.

⁹¹ *Id.* at *1.

⁹² *Id.*

⁹³ *Id.* The plaintiffs alleged that Chesapeake offered to increase the lease bonus payment during these discussions.

⁹⁴ *Id.* at *2.

⁹⁵ *Eisenberger v. Chesapeake Appalachia, LLC*, 2010 WL 457139 at *2 (M.D. Pa. Feb. 4, 2010).

⁹⁶ *Id.* at *4. Though federal law normally is applied to questions of arbitrability, the court applied Pennsylvania law since this case involved an oil and gas lease on land within Pennsylvania. *Id.* at *2 (citing *Ulmer v. Chesapeake*

challenged the validity of the lease agreement based on a violation of the Guaranteed Minimum Royalty Act.⁹⁷ In those challenges, the parties had reached otherwise valid agreements, but a contractual defense was at issue.⁹⁸ The Eisenbergers, on the other hand, alleged that their offer had been revoked prior to acceptance.⁹⁹ Since it was not clear that the Eisenbergers had agreed to the arbitration clause, the court ruled that the underlying claims would not be decided by an arbitrator.¹⁰⁰

F. Expiration of the Secondary Term – Meaning of “Produced in Paying Quantities”

Since oil and gas have been produced in Pennsylvania for the past 150 years, the oil and gas rights for many parcels are held by production pursuant to leases executed long ago. With the recent interest in leasing gas rights for exploration of the Marcellus Shale Formation, mineral owners stand to reap financial rewards upon the expiration of the secondary terms in these old leases. Subject to the specific language in each lease, the continuation of the secondary term

Appalachia, LLC, slip op. (M.D. Pa. Jan. 16, 2009). *See also* Eisenberger v. Chesapeake Appalachia, LLC, 2010 U.S. Dist. LEXIS 44017 at *8-*9 (May 5, 2010) (denying renewed motion to compel arbitration).

⁹⁷ *Id.* at *3. *See* Hayes v. Chesapeake Appalachia, LLC, No. 3:09-cv-619, slip op. (M.D. Pa. May 15, 2009); Ulmer, No. 4:08-cv-2062, slip op.

⁹⁸ Eisenberger, 2010 WL 457139 at *4. Claims involving the defenses of fraud, duress, unconscionability, and illegality would be appropriate to submit to an arbitrator as they would not dispute the validity of an arbitration clause. *See* Ulmer, No. 4:08-cv-2062, slip op. at 7.

⁹⁹ Eisenberger, 2010 WL 457139 at *4.

¹⁰⁰ *Id.* In a subsequent opinion, the court granted Chesapeake’s motion for an interlocutory appeal on the issue of “whether the arbitration provided for in a document which the Defendants say is a contract between them and Plaintiffs, but Plaintiffs claim is not a contract, is the proper forum to determine the issue of contract formation, rather than federal court.” Eisenberger v. Chesapeake Appalachia, LLC, 2010 U.S. Dist. LEXIS 44017 at *14 (M.D. Pa. May 5, 2010).

generally is dependent upon the extent to which a well on the leased property remains productive.

In *T.W. Phillips Gas and Oil Company v. Jedlicka*, the Pennsylvania Superior Court upheld the right of a lessee to determine whether a gas lease remained productive.¹⁰¹ The plaintiff gas company filed suit seeking a declaratory judgment as to the rights of the parties under an oil and gas lease that was executed in 1928.¹⁰² The lease was to last for a primary term of two years and a secondary term “as long thereafter as oil or gas [was] produced in paying quantities.”¹⁰³ The gas company drilled its first wells under the lease in 1929 and subsequently drilled wells in 1986, 2004, and 2005.¹⁰⁴ The defendant landowner, a successor in title to the original lessor, argued that the lease terminated in 1959 because the lease was not profitable in that year.¹⁰⁵ Since that time, defendant argued, the lease had operated as a tenancy at will.¹⁰⁶

Relying upon 1899 precedent from the Pennsylvania Supreme Court, the trial court ruled that the phrase “produced in paying quantities” was to be determined by the lessee so long as this determination was made in good faith and not for the purpose of “holding the land for purely speculative purposes.”¹⁰⁷ The Superior Court affirmed the application of a subjective standard and ruled that the landowner, as the party seeking lease forfeiture, had not sustained her burden

¹⁰¹ *T.W. Phillips Gas & Oil Co. v. Jedlicka*, 964 A.2d 13, 16-17 (Pa. Super. Ct. 2008), *appeal docketed*, 978 A.2d 347 (Pa. July 29, 2009) (citing *Young v. Forest Oil Co.*, 45 A. 121 (Pa. 1899)).

¹⁰² *Id.* at 14-15.

¹⁰³ *Id.* at 15.

¹⁰⁴ *Id.* at 14-15.

¹⁰⁵ *Id.* at 16. In 1959, the lessee lost approximately forty dollars on the lease.

¹⁰⁶ *Id.* at 17.

¹⁰⁷ *Jedlicka*, 964 A.2d at 16-17.

to prove that the gas company had acted in bad faith.¹⁰⁸ On July 29, 2009, the Pennsylvania Supreme Court granted the landowner's Petition for Allowance of Appeal, accepting for review the issue of the appropriateness of this subjective standard.¹⁰⁹

III. Municipal Regulation of Oil and Gas Operations

Local government has a strong heritage in Pennsylvania with the state ranking third nationally in the number of municipalities.¹¹⁰ Because of the important role that local government plays in the lives of all Pennsylvanians, citizens often look to their municipalities as the primary regulator to remedy any real or perceived problems. As such, many municipalities seek to regulate the increased activity surrounding natural gas extraction to the fullest extent possible. Certainly, municipalities have an interest in ensuring that natural gas operations are performed in a manner so as to minimize the impacts upon the municipalities' citizens and resources. On the other side of this issue, there is a need for some uniformity in regulation throughout Pennsylvania as natural gas companies and all of the corresponding service providers

¹⁰⁸ *Id.* at 19.

¹⁰⁹ *T. W. Phillips Gas and Oil Co. v. Jedlicka*, 978 A.2d 347 (Pa. 2009). The specific issue accepted for appeal was stated by the Supreme Court as follows: "Did the Superior Court misapply the decision of this Court in *Young v. Forest Oil Co.*, 194 Pa. 243, 45 A. 121 (1899), by holding that Pennsylvania employs a purely subjective test to determine whether an oil or gas lease has produced 'in paying quantities.'" *Id.*

¹¹⁰ Pennsylvania has a total of 2562 municipalities at the subcounty level, including 56 cities, 958 boroughs, 1 town, 93 first class townships, and 1454 second class townships. Governor's Ctr. For Local Gov't Servs., Dep't of Cmty. & Econ. Dev., Pennsylvania Local Government Fact Sheet (Oct. 2009), <http://www.newpa.com/get-local-gov-support/municipal-statistics/download.aspx?id=218>. In the national ranking of subcounty municipal governments, Pennsylvania trails only Illinois, with 2731, and Minnesota, with 2642. U.S. CENSUS BUREAU, LOCAL GOVERNMENTS AND PUBLIC SCHOOL SYSTEMS BY TYPE AND STATE: 2007 (2008), <http://www.census.gov/govs/cog/GovOrgTab03ss.html>.

cannot be expected to comply with nearly two thousand different regulatory schemes in order to conduct natural gas extraction activities within the Commonwealth.¹¹¹

The extent to which a municipality can regulate natural gas activities in Pennsylvania is governed by the Pennsylvania Oil and Gas Act.¹¹² Section 602 of this Act contains specific authorization for some municipal regulation, but it also provides for strict limitations upon that authorization.¹¹³ Specifically, a municipality can enact an ordinance regulating natural gas operations only through its authority under the Municipalities Planning Code¹¹⁴ or the Flood Plain Management Act.¹¹⁵ A municipality is prohibited completely from regulating natural gas operations except through these two statutes.¹¹⁶ Even where the municipality is acting through one of the two permitted statutes, however, there are limitations on its authority.¹¹⁷

A. Oil and Gas Act – Limited Preemption of Municipal Regulation

The extent of the Oil and Gas Act’s limited preemption was addressed by the Pennsylvania Supreme Court in two companion cases decided on February 19, 2009.¹¹⁸ In these

¹¹¹ See *Range Resources – Appalachia, LLC v. Salem Twp.*, 964 A.2d 869, 874 (Pa. 2009) (describing the argument for “statewide uniformity in the regulation of the oil and gas industry” put forth by litigants attempting to preempt local legislation).

¹¹² 58 PA. STAT. ANN. §§ 601.101 – 601.605 (West 1996).

¹¹³ *Id.* § 601.602.

¹¹⁴ 53 PA. STAT. ANN. §§ 10101 – 11202 (West 1997 & Supp. 2010).

¹¹⁵ 32 PA. STAT. ANN. §§ 679.101 – 679.601 (West 1997).

¹¹⁶ 58 PA. STAT. ANN. § 601.602 (West 1996).

¹¹⁷ *Id.*

¹¹⁸ See *Huntley & Huntley, Inc. v. Borough of Oakmont*, 964 A.2d 855, 856 (Pa. 2009) (ruling that municipal ordinance had not been preempted by Oil and Gas Act). See also *Range Resources – Appalachia, LLC v. Salem Twp.*, 964 A.2d 869, 870 (Pa. 2009) (ruling that municipal ordinance had been preempted by Oil and Gas Act).

cases, the Supreme Court ruled that an ordinance imposing zoning restrictions upon drilling activities in a residential district was not preempted by the Oil and Gas Act,¹¹⁹ while also striking down a subdivision and land development ordinance that imposed a “comprehensive regulatory scheme.”¹²⁰ These two opinions provide a framework for analyzing whether a municipal ordinance enacted pursuant to the Municipalities Planning Code has been preempted by the Oil and Gas Act. An ordinance so enacted cannot violate either of the two prongs of Oil and Gas Act preemption: (1) features and (2) purposes.¹²¹ Municipalities cannot regulate *features* of oil and gas operations that are addressed in the Oil and Gas Act, and they cannot regulate oil and gas operations to accomplish the same *purposes* as stated in the Oil and Gas Act.¹²²

In *Huntley & Huntley, Inc. v. Borough of Oakmont*, a gas company sought to drill a well in order to extract natural gas from two parcels comprising a total of ten acres.¹²³ Both of these properties were located in the R-1 restrictive residential zoning district.¹²⁴ The Pennsylvania Department of Environmental Protection granted a permit for the drilling operation at the desired location, but the borough ordered that drilling operations cease until a conditional use application had been considered.¹²⁵ The borough council ultimately denied the conditional use.¹²⁶

¹¹⁹ *Huntley*, 964 A.2d at 859.

¹²⁰ *Salem Twp.*, 964 A.2d at 875.

¹²¹ *See* 58 PA. STAT. ANN. § 601.602 (West 1996) (stating that any ordinances adopted cannot impose regulations on the features of oil or gas wells addressed in the Act or regulations that accomplish the same purposes set forth in the Act).

¹²² *Id.*

¹²³ *Huntley*, 964 A.2d at 857.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ The basis for the borough council’s denial of the conditional use application was that the proposed use did not constitute the “extraction of minerals” under the ordinance, reasoning that “extraction of *natural gas* does not

The issue presented to the Supreme Court was whether the borough could regulate the location of gas wells through its zoning ordinance or whether such a municipal restriction had been preempted by the Oil and Gas Act.¹²⁷ The court analyzed both prongs of section 602 preemption—features and purposes—and found that neither had been violated.¹²⁸ With respect to the location of a well being a prohibited feature, the court ruled that “features of oil and gas well operations regulated by this act pertains to technical aspects of well functioning and matters ancillary thereto, . . . rather than the well’s location.”¹²⁹ With regard to the purposes prong, the court found that the “most salient” purposes of the zoning ordinance were different than the stated purposes of the Oil and Gas Act.¹³⁰ The court noted the goals of zoning were to authorize uses that considered “the community’s development objectives, its character, and the ‘suitabilities and special nature of particular parts of the community.’”¹³¹

In concluding, the court stated that the ordinance’s “overall restriction on oil and gas wells in R-1 districts [was] not preempted” by the Oil and Gas Act.¹³² While the court made specific reference to the restrictions being in a highly protected residential zoning district, the opinion certainly establishes the proposition that municipalities do have some ability to regulate

constitute a mining process and that *natural gas* is not a mineral.” *Id.* at 858 (emphasis added). This reasoning was rejected by the Supreme Court, which ruled that the conditional use approval had been improperly denied. *Id.* at 868.

¹²⁷ *Id.* at 860.

¹²⁸ *Id.* at 859-60.

¹²⁹ *Id.* at 864. The court provided some examples of these preempted ancillary matters including “registration, bonding, and well site restoration.” *Id.*

¹³⁰ *Id.* at 865.

¹³¹ *Id.* at 866.

¹³² *Id.*

oil and gas operations within their borders through the use of zoning ordinances. The extent of that zoning authority undoubtedly will be the subject of future litigation.

*Range Resources – Appalachia, LLC v. Salem Township*¹³³ serves as a counterbalance to *Huntley* in demonstrating the limitations on the ability of a municipality to regulate oil and gas operations. In this case, Salem Township enacted a subdivision and land development ordinance that contained a number of requirements regulating oil and gas drilling activities.¹³⁴ In reviewing the two prongs of Oil and Gas Act preemption, the court found that the ordinance duplicated both the features and purposes of the Act.¹³⁵ Salem Township’s ordinance was characterized by the court as a “comprehensive regulatory scheme” that regulated features of oil and gas operations through various requirements that overlapped with – and in some instances were more restrictive than – Oil and Gas Act requirements.¹³⁶ The court also found that the ordinance’s purpose of “enabling continuing oil and gas drilling operations . . . while ensuring the orderly development of property” was duplicative of the Oil and Gas Act’s purposes.¹³⁷ As such, the ordinance violated the preemption provisions of the Oil and Gas Act.

Viewed together, these cases provide one example of permissible regulation and one example of impermissible regulation. *Huntley* opened the door for some regulation of natural gas

¹³³ 964 A.2d 869, 877 (Pa. 2009).

¹³⁴ *Id.* at 870. The ordinance contained provisions relating to permitting, bonding, location of facilities, groundwater protection, restoration of well sites, and plugging. *Id.* at 875.

¹³⁵ *Id.* at 876-77.

¹³⁶ *Id.* at 870.

¹³⁷ *Id.* at 876-77. The court summarized its ruling by stating, “[n]ot only does the Ordinance purport to police many of the same aspects of oil and gas extraction activities that are addressed by the Act, but the comprehensive and restrictive nature of its regulatory scheme represents an obstacle to the legislative purposes underlying the Act.” The court went on to conclude, “Furthermore, [the ordinance’s] stated purposes overlap substantially with the goals as set forth in the Oil and Gas Act, thus implicating the second statutory basis for express preemption of MPC-enabled local ordinances.” *Id.* at 877.

activities through municipal zoning powers while *Salem Township* provides an illustration of an ordinance that violated principles of preemption by substantially overlapping with both the features and purposes of the Oil and Gas Act.

B. Oil and Gas Act – Complete Preemption of Municipal Regulation

The Oil and Gas Act expressly preempts all municipal ordinances purporting to regulate oil and gas well operations that are not enacted under the authority of the Municipalities Planning Code or the Flood Plain Management Act.¹³⁸ In *Range Resources – Appalachia, LLC v. Blaine Township*,¹³⁹ a township attempted to regulate oil and gas operations through the enactment of certain ordinances, including a Corporate Disclosure Ordinance, that restricted corporate activities within the township.¹⁴⁰ Range Resources (Range) challenged the constitutionality of the ordinances and also argued that they were preempted by various Pennsylvania statutes including the Oil and Gas Act.¹⁴¹

The township argued that Oil and Gas Act preemption was not applicable to a review of the Corporate Disclosure Ordinance because the ordinance did not “purport” to regulate oil and

¹³⁸ 58 PA. STAT. ANN. §§ 601.602 (West 1996).

¹³⁹ 649 F.Supp.2d 412, 418 (W.D. Pa. 2009) (denying Motion to Dismiss filed by Blaine Township); *see also* Blaine Twp. v. Range Res. – Appalachia, LLC., 2009 WL 3515845 at *11 (W.D. Pa. Oct. 29, 2009) (granting Motion for Summary Judgment filed by Range Resources).

¹⁴⁰ Blaine Twp., 649 F.Supp.2d at 413-15. *See* Blaine Township, Ordinance O-002-2008 (April 21, 2008) (Blaine Township Corporate Disclosure and Environmental Protection Ordinance). *See also* Blaine Township, Ordinance O-007-2008 (July 21, 2008) (An Ordinance by the Second Class Township of Blaine Township, Washington County, Pennsylvania, Eliminating Legal Powers and Privileges from Corporations Doing Business Within Blaine Township to Vindicate the Right to Democratic Self-Governance). The township also imposed requirements upon the use of temporary structures. Blaine Twp., 649 F.Supp.2d at 415-16. *See* Blaine Township, Resolution R-001-2008 (March 17, 2008) (A Resolution of the Blaine Township Board of Supervisors to Enact a \$300.00 Permit Fee for Each Temporary Structure, Storage or Office Trailer Used at All Work Sites).

¹⁴¹ Range Resources – Appalachia, LLC v. Blaine Township, 2009 WL 3515845 at *5 (W.D. Pa. Oct. 29, 2009).

gas operations; but rather, it was regulating all activity by corporate entities.¹⁴² The court did not accept this argument and found that the township's Disclosure Ordinance had been preempted by the Oil and Gas Act.¹⁴³ Accordingly, the court granted Range's motion for judgment on the pleadings after ruling that none of the challenged ordinances were valid.¹⁴⁴

C. Municipal Regulation of Oil and Gas Operations – Procedural Issues

Before the substantive issue of Oil and Gas Act preemption can be addressed in a municipal ordinance challenge, the threshold inquiry of the appropriate forum to hear said challenge must be resolved. In *Arbor Resources LLC v. Nockamixon Township*, four gas companies sought a declaration that the Oil and Gas Act precluded Nockamixon Township from applying its zoning ordinance to regulate drilling operations.¹⁴⁵ In response, the township filed preliminary objections, arguing that the matter was not properly before the court because the gas companies had not presented the matter to the township's Zoning Hearing Board prior to filing suit.¹⁴⁶ The Bucks County Court of Common Pleas granted these preliminary objections, concluding that it could not reach the question of whether the township ordinance had been preempted because the gas companies had failed to utilize available statutory remedies.¹⁴⁷

¹⁴² *Id.* at *8.

¹⁴³ The court found that the Disclosure Ordinance, as applied, directly conflicted with the provisions of the Oil and Gas Act. *Id.* at *9.

¹⁴⁴ *Id.* at *10. *See also* Range Resources – Appalachia, LLC v. Blaine Township, 649 F.Supp.2d 412, 418 (W.D. Pa. 2009) (denying Motion to Dismiss filed by Blaine Township).

¹⁴⁵ 973 A.2d 1036, 1038-39 (Pa. Commw. Ct. May 12, 2009),

¹⁴⁶ *Id.* at 1038, 1041.

¹⁴⁷ *Id.* at 1042.

On appeal, the Commonwealth Court affirmed the ruling of the Court of Common Pleas.¹⁴⁸ The Commonwealth Court analyzed the distinction between general zoning ordinance provisions, which must be challenged initially before a zoning hearing board, and operational provisions, which can be presented directly to the Court of Common Pleas.¹⁴⁹ After reviewing relevant case precedent, the court concluded that the ordinance in question did not contain operational requirements.¹⁵⁰ As such, the trial court did not have subject matter jurisdiction to rule on this zoning question because the Municipalities Planning Code had vested original jurisdiction in the township's Zoning Hearing Board.¹⁵¹

In a separate proceeding in federal court, the procedural manner in which a township enforced ordinances regulating oil and gas operations was at issue. The plaintiffs in *Whiteford v. Penn Hills Municipality* had been cited on multiple occasions for a continuing violation of a municipal ordinance regulating the grading of well sites.¹⁵² The plaintiffs filed a civil rights lawsuit challenging the municipality's ability to enforce the ordinance against them based, in part, on the constitutional protections against double jeopardy.¹⁵³ The Court of Appeals found this argument to be "without merit" as the ordinance expressly deemed "each day of non-compliance after a notice of violation" to be a separate offense.¹⁵⁴

¹⁴⁸ *Id.* at 1047.

¹⁴⁹ *Id.* at 1043.

¹⁵⁰ *Id.* at 1043-1045.

¹⁵¹ *Id.* at 1047.

¹⁵² 323 F. App'x 163, 164 (3rd Cir. 2009).

¹⁵³ *Id.* at 165.

¹⁵⁴ *Id.* at 167.

IV. Surface Estate Issues

Natural gas extraction necessarily will have some impact on the surface of land. Through the leasing process, some landowners have the ability to exercise control over the extent of surface use and to define the appropriate measure of damages for adverse impacts to the surface estate. Not all surface estate owners, however, own the rights to oil and natural gas beneath their land. In many instances, these subsurface property interests were severed from the surface estate long before the current surface owner acquired title. By owning the surface estate, but not the corresponding oil and gas interests, these surface owners are limited in their ability to restrict drilling activities upon the surface estate.

The Pennsylvania Department of Conservation and Natural Resources (DCNR) and the United States Forest Service (Forest Service) are in the position of being an owner of the surface estate, but not the underlying oil and gas interests, within Oil Creek State Park and the Allegheny National Forest, respectively.¹⁵⁵ Despite the existence of split estate ownership, both of these governmental agencies have attempted to impose restrictions upon drilling operations in an effort to minimize the surface estate impacts. These restrictions have been the subject of legal challenges by the holders of affected oil and gas interests.¹⁵⁶

¹⁵⁵ See *Belden & Blake Corp. v. Commonwealth Dep't of Conservation and Natural Res.*, 969 A.2d 528, 529 (Pa. 2009); see also *Minard Run Oil Co. v. United States Forest Serv.*, 2009 WL 4937785, *3 (W.D. Pa. Dec. 15, 2009) (Private landowners own more than 93% of the mineral interests within the Allegheny National Forest.).

¹⁵⁶ See, e.g., *Belden & Blake*, 969 A.2d 528, 529 (challenging required compliance with coordination agreement); see also *Minard Run*, 2009 WL 4937785 at *1 (challenging performance of environmental analysis before issuance of Notice to Proceed); see also *Duhring Res. Co. v. United States Forest Serv.*, 2009 WL 586429 at *2 (W.D. Pa. Mar. 6, 2009) (challenging requirement to obtain Notice to Proceed before exercising mineral rights); see also *Duhring Res. Co. v. United States Forest Serv.*, 2009 WL 2951932 at *1 (W.D. Pa. Sept. 13, 2009) (requesting supplementation of administrative record in challenge of Forest Service requirements).

A. Restrictions upon Use of Surface Estate in State Park

Belden & Blake Corporation (Belden) held oil and natural gas leases on parcels within Oil Creek State Park and sought to develop gas wells on the parcels.¹⁵⁷ DCNR, however, would not permit surface access unless Belden complied with a “coordination agreement” that provided for a performance bond and double stumpage fees for removed timber.¹⁵⁸ DCNR cited its status as a trustee for the Commonwealth’s public natural resources as a basis for imposing conditions on the use of the surface estate.¹⁵⁹ Belden filed suit, seeking to enjoin DCNR from interfering with its implied easement to enter upon the parcels to exercise its ownership of the natural gas rights.¹⁶⁰ The Commonwealth Court ruled in Belden’s favor on a motion for summary judgment, and DCNR appealed to the Pennsylvania Supreme Court.¹⁶¹

The Supreme Court, in a 4-2 opinion, affirmed the ruling of the Commonwealth Court in holding that DCNR could not require that Belden comply with a “coordination agreement.”¹⁶² In its opinion, the court first addressed the relationship between the owners of the surface estate and the subsurface estate.¹⁶³ The court reaffirmed Pennsylvania precedent from 1893 for the overriding principle that the subsurface estate is dominant over the surface estate.¹⁶⁴ The court

¹⁵⁷ Belden & Blake, 969 A.2d at 529.

¹⁵⁸ *Id.*

¹⁵⁹ DCNR relied upon Article I, § 27, of the Pennsylvania Constitution for its trustee status. *Id.* at 530. As alternative theories justifying its imposition of conditions upon the use of the surface estate, DCNR relied upon the statutory duties imposed by section 303 of the Conservation and Natural Resources Act, 71 Pa. Stat. Ann. §1340.303(a)(1) (West Supp. 2010), and the common law public trust doctrine. Belden & Blake, 969 A.2d at 531.

¹⁶⁰ *Id.* at 529-30.

¹⁶¹ *Id.* at 530-31.

¹⁶² *Id.* at 533.

¹⁶³ *Id.* at 532.

¹⁶⁴ *See id.* (citing *Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 598 (Pa. 1893)).

relied upon *Chartiers Block Coal Company v. Mellon* for the proposition that “an owner of an underlying estate, such as Belden & Blake here, has the right to go upon the surface in order to reach the estate below, ‘as might be necessary to operate his estate[.]’”¹⁶⁵ The owner of the subsurface rights is constrained by the fact that the surface use must be reasonable, but the court found that *Chartiers* places the burden on the surface owner, not the subsurface owner, to file a legal action challenging the reasonableness of the surface use.¹⁶⁶

After finding that Belden’s use of the surface estate would be reasonable, the court addressed the impact of DCNR’s statutory duties to preserve and maintain natural resources.¹⁶⁷ On this issue, the court ruled that “[a] subsurface owner’s rights cannot be diminished because the surface comes to be owned by the government. . . .”¹⁶⁸ The court opined that DCNR could negotiate a surface use agreement with the energy company in the same manner as could a private landowner.¹⁶⁹ If a voluntary agreement was not reached, however, DCNR could impose conditions only through the exercise of eminent domain, and payment of just compensation would then be required for the diminution of the subsurface owner’s rights.¹⁷⁰

¹⁶⁵ Belden & Blake, 969 A.2d at 532.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 533.

¹⁷⁰ *Id.* The dissenting opinion, authored by Justice Saylor, opined that DCNR’s status as a custodian and trustee of the Commonwealth’s natural resources was a relevant factor in the application of *Chartiers*. See *id.* at 533-34. As such, Justice Saylor opined that the proper inquiry should have been whether the conditions required by DCNR were reasonable. *Id.* at 534.

B. Restrictions upon Use of Surface Estate in National Forest

In *Forest Service Employees for Environmental Ethics v. United States Forest Service*, a number of environmental advocacy organizations, including the Allegheny Defense Project and the Sierra Club, filed suit alleging that the Forest Service had violated the National Environmental Policy Act (NEPA) by failing to conduct Environmental Impact Statements or Environmental Assessments prior to issuing Notices to Proceed (NTP) for natural gas exploration and development activities within the Allegheny National Forest.¹⁷¹ The plaintiffs sought a declaration that the Forest Service had failed to comply with NEPA as well as an injunction barring the Forest Service from issuing any NTPs until it complied with these statutory requirements.¹⁷²

The Pennsylvania Oil and Gas Association (POGAM) and the Allegheny Forest Alliance (AFA) filed a motion for leave to intervene in the action.¹⁷³ The court reviewed the analytical framework established by the United States Court of Appeals for the Third Circuit and concluded that POGAM and AFA met the requirements for intervention, including that they had significant direct interests in the litigation.¹⁷⁴ Thus, the court approved intervention.¹⁷⁵

¹⁷¹ *Forest Serv. Employees for Env'tl. Ethics v. United States Forest Serv.*, 2009 WL 1324154 at *1 (W.D. Pa. May 12, 2009). The general process followed by the Forest Service in addressing oil and gas drilling operations on split estates within the Allegheny National Forest was to review the proposed drilling plan, conduct a brief surface impact analysis, coordinate with the well operator to minimize any potential problems, and then to issue a Notice to Proceed. *Minard Run Oil Co. v. United States Forest Serv.*, 2009 WL 4937785, at *8 (W.D. Pa. Dec. 15, 2009).

¹⁷² *Forest Serv. Employees for Env'tl. Ethics v. United States Forest Serv.*, 2009 WL 960244, at *1 (W.D. Pa. Apr. 7, 2009).

¹⁷³ *Id.* POGAM was a trade association representing oil and gas producers within the Commonwealth and AFA is a coalition of public and private entities who are directly impacted by activities within the Allegheny National Forest. *Id.* In April 2010, POGAM merged with the Independent Oil and Gas Association of Pennsylvania to form the Pennsylvania Independent Oil and Gas Association. Pennsylvania Indep. Oil and Gas Ass'n, Ass'n History, <http://www.pioga.org/ourhistory.html>.

¹⁷⁴ *Id.* at *3. In granting the motion for leave to intervene as to both proposed intervenors, the court relied upon *Kleissler v. United States Forest Service*, 157 F.3d 964 (3rd Cir. 1998). *Id.* According to these cases, the four

On April 9, 2009, two days after the order granting intervention was issued, the environmental groups and the Forest Service filed a stipulation of dismissal with an attached settlement agreement to resolve the underlying litigation.¹⁷⁶ Under the terms of the settlement agreement, the parties recognized that the Forest Service had legal authority to establish reasonable conditions upon the use of the surface estate within the Allegheny National Forest.¹⁷⁷ The Forest Service agreed to undertake a forest-wide NEPA analysis prior to issuing NTPs in the future, and the environmental groups agreed not to challenge NTPs previously issued for specified projects.¹⁷⁸ Neither POGAM nor AFA were parties to the proposed settlement, and both filed a motion to stay the entry of the settlement.¹⁷⁹ The court, however, denied this motion and upheld the settlement agreement.¹⁸⁰

Less than three weeks after this court ruling, the propriety of the terms of the settlement agreement again was at issue with the filing of a complaint in *Minard Run Oil Company v. United States Forest Service*.¹⁸¹ In *Minard Run*, the industry plaintiffs sought to enjoin the Forest

elements that must be established by a proposed intervenor are “first, a timely application for leave to intervene; second, a sufficient interest in the litigation; third, a threat that the interest will be impaired or affected, as a practical matter, by the disposition of the action; and fourth, inadequate representation of the prospective intervenor’s interest by the existing parties to the litigation.” *Id.* at *2 (quoting *Kleissler*, 157 F.3d at 969). Of these elements, Plaintiffs challenged whether the proposed intervenors had a sufficient direct interest that would be affected by the litigation. *Id.*

¹⁷⁵ *Id.* at *4.

¹⁷⁶ *Forest Serv. Employees for Envtl. Ethics v. United States Forest Serv.*, 2009 WL 1324154, at *1 (W.D. Pa. May 12, 2009).

¹⁷⁷ *See Minard Run Oil Co. v. United States Forest Serv.*, 2009 WL 4937785, at *11 (W.D. Pa. Dec. 15, 2009).

¹⁷⁸ *Id.*

¹⁷⁹ *Forest Serv. Employees for Envtl. Ethics*, 2009 WL 1324154 at *1.

¹⁸⁰ The basis for the court’s denial of the motion was that POGAM and AFA had “failed to demonstrate that they will suffer legal prejudice by the dismissal. . .” *Id.* at *5.

¹⁸¹ *Minard Run Oil Co.*, 2009 WL 4937785, at *1.

Service from implementing the terms of the settlement agreement, arguing that the agreement and its implementation were contrary to established federal and Pennsylvania law.¹⁸² The district court agreed, finding that the Forest Service did not possess sufficient regulatory authority over gas drilling in the Allegheny National Forest to impose the conditions prescribed in the settlement agreement.¹⁸³ After considering all of the applicable requirements, the court granted the industry plaintiffs' request for a preliminary injunction. Thus, the temporary moratorium on new drilling in the Allegheny National Forest that had been in place during the pendency of the original litigation and following the entry of the settlement was lifted.¹⁸⁴

C. Reunification of Natural Gas Rights with Surface Estate

Many surface estate owners who do not own the underlying natural gas rights seek a valid legal theory through which these split estates can be reunited. Such an owner filed suit to acquire title to the oil and gas rights underlying his 19.516-acre tract through a theory of partial abandonment of a prior oil and gas lease in *Catalano v. Dominion*.¹⁸⁵ The subject parcel originally was part of a larger 170-acre tract that was encumbered by a 1909 oil and gas lease.¹⁸⁶ The court dismissed the surface owner's complaint due to a lack of standing and a failure to join

¹⁸² *Id.* at *1.

¹⁸³ *Id.* at *31.

¹⁸⁴ *Id.* at *34. The final resolution of this case will resolve additional litigation. See *Duhring Res. Co. v. United States Forest Serv.*, 2010 U.S. Dist. LEXIS 7873 at *2 (W.D. Pa. Feb. 1, 2010) (closing case pending final judgment in *Minard Run Oil Co. v. United States Forest Service*).

¹⁸⁵ No. 11479 of 2008, 2009 Pa. Dist. & Cnty. Dec. LEXIS 262, at *1 (Westmoreland Co. Ct. Com. Pl. Apr. 6, 2009).

¹⁸⁶ *Id.*

all necessary parties.¹⁸⁷ The court did, however, leave open the viability of this theory of recovery by overruling defendant's preliminary objections challenging the use of partial lease abandonment as a "recognized cause of action."¹⁸⁸

D. Liability for Damages to Surface Estate Following Pipeline Installation

The legal issues pertaining to the impact of drilling upon the surface estate are not limited to those cases involving split estates. In *Gates v. Exco Resources, Inc.*, Ronald and Catherine Gates executed an oil and gas lease with Exco Resources and subsequently granted pipeline rights of way on the property.¹⁸⁹ Thereafter, three gas wells were drilled on the property.¹⁹⁰ Pipelines then were installed to service the three wells on the property along with sixty-seven wells located elsewhere.¹⁹¹ Among the many claims asserted in the lawsuit, the plaintiffs sought damages for a devaluation of their property due to improper reclamation of the property following the installation of pipelines.¹⁹² The court agreed with the plaintiffs that twenty acres of land had been "rendered almost unable to be used again" due to damaged drainage tiles and the

¹⁸⁷ The court ruled that Plaintiffs lacked standing because their interest was "at most, . . . a contingent future interest in royalties." *Id.* at *3. The court also ruled that all of the landowners who held title to portions of the original 170-acre tract were necessary parties to this litigation due to their potential loss of royalty income that would result from a successful suit. *Id.* at *4.

¹⁸⁸ *Id.* at *4-5.

¹⁸⁹ No. 07-104, 2010 WL 1416740, at *2-3 (W.D. Pa. Apr. 8, 2010).

¹⁹⁰ *Id.* at *3.

¹⁹¹ *Id.* at *5.

¹⁹² *Id.* at *1. The court rejected a claim that the Gates were entitled to royalties on gas from their wells that was utilized in the operation of the compressor station located on their property. *Id.* at *11. Pursuant to the lease agreement, the Gates were entitled to royalties "for gas marketed and used off the premises." *Id.* As the gas to operate the compressor station was neither marketed nor was it used off the premises, the court denied the requested relief. *Id.*

presence of rocks near the transmission lines.¹⁹³ As a result, the court awarded the plaintiffs \$16,000 for the diminution in value to their land.¹⁹⁴

Although the plaintiffs had executed a lease agreement and pipeline rights of way, the court did not base its award on a contractual theory. Rather, the court relied upon the gas company's obligation, as expressed in the Restatement (Third) of Property, "to repair and maintain the portions of the servient estate and the improvements used in the enjoyment of the servitude that are under the beneficiary's control, to the extent necessary to . . . prevent unreasonable interference with the enjoyment of the servient estate."¹⁹⁵ The plaintiffs' appraiser had opined that the amount of damage caused to the devalued land was typical of gas production activities.¹⁹⁶ While Exco argued that this meant that recovery was not permissible, the court found "that his opinion lends credence to the accuracy of plaintiff's loss computation."¹⁹⁷

E. Termination of Right of Way Agreement

The right to perpetual use of the surface estate was at issue in *Coffin v. Medina Resource Company, LLC*, where a landowner, who owned both the surface and mineral estate, sought to terminate a right of way agreement that had been granted to a gas company in 1985.¹⁹⁸ The right of way agreement had been executed by the landowner six days following the execution of a

¹⁹³ *Id.* at *12.

¹⁹⁴ *Gates v. Exco Res., Inc.*, 2010 WL 1416740, at *12 (W.D. Pa. Apr. 8, 2010). The court, however, rejected a claim that poor drainage on an additional 25 to 30 acres was attributable to drilling activities. *Id.* at *13.

¹⁹⁵ *Id.* at *12 (quoting RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.13 (2000)).

¹⁹⁶ *Gates v. Exco Res., Inc.*, 2010 WL 1416740 at *12.

¹⁹⁷ *Id.* at *12.

¹⁹⁸ *Coffin v. Medina Revenue Co., LLC.*, 11 Pa. D. & C.5th 368 (Crawford Co. Ct. Com. Pl. 2010).

ratification agreement and resulted in the drilling of a well upon his land.¹⁹⁹ This well was in production from 1986 through 1999.²⁰⁰ The landowner argued that the use of the right of way to install a transmission line was conditioned upon a productive well being located upon the property.²⁰¹ Since the well had been removed from production in 1999, the landowner asserted that the right of way was no longer valid.²⁰² The court rejected this argument, ruling that the parol evidence rule precluded any consideration of the terms of the ratification agreement.²⁰³ The court also relied upon the plain meaning doctrine in concluding that the parties had provided for a perpetual right of way to install a transmission line.²⁰⁴

V. Miscellaneous Property Issues

In addition to the property issues relating to the use of the surface estate for drilling operations, courts also have addressed property issues relating to partnership assets,²⁰⁵ ownership of lease proceeds,²⁰⁶ the transfer of oil and gas interests in a bankruptcy proceeding,²⁰⁷ and the interplay between coal and natural gas rights.²⁰⁸

¹⁹⁹ *Id.* at 372-73.

²⁰⁰ *Id.* at 373.

²⁰¹ *Id.* at 374.

²⁰² *Id.* The landowner also asserted that the ratification agreement was no longer valid, but the motion before the court addressed only the validity of the right of way agreement. *Id.* at 370.

²⁰³ *Id.* at 385.

²⁰⁴ *Coffin v. Medina Revenue Co., LLC.*, 11 Pa. D. & C.5th 368, 383 (Crawford Co. Ct. Com. Pl. 2010).

²⁰⁵ *See Symanowski v. Brace*, 987 A.2d 717 (Pa. Super. Ct. 2009).

²⁰⁶ *See In re Howard*, 422 B.R. 568 (Bankr. W.D. Pa. 2009).

²⁰⁷ *See Earth Conservancy v. Blue Coal Corp.*, 2010 WL 1489987 (M.D. Pa. Apr. 13, 2010).

²⁰⁸ *See Foundation Coal Res. Corp. v. Dept. of Env'tl. Protection*, 993 A.2d 1277 (Pa. Commw. Ct. 2010).

A. Extent of Partnership Operations

The Superior Court addressed the extent of partnership operations in *Szymanowski v. Brace*.²⁰⁹ The parties entered into a partnership agreement to drill a total of two gas wells on two leaseholds held by Brace.²¹⁰ Through an investment of \$15,000 per well, Szymanowski and fellow plaintiff Wheeling each acquired a ten percent net interest in the two wells to be drilled.²¹¹ The two partnership wells were drilled as proposed on the Danylko and Dougherty leaseholds.²¹² Subsequent to the drilling of the partnership wells, in 2004, Brace completed two additional wells on the Danylko leasehold in his individual capacity.²¹³ These wells were located approximately 1,100 and 1,200 feet from the partnership Danylko well.²¹⁴ This partnership Danylko well ceased production in February 2005, yielding a total return of \$454,913.80 to Szymanowski and Wheeling after a mere twenty-eight month productive life.²¹⁵ Szymanowski and Wheeling filed suit against Brace, arguing that these two additional, individually drilled, wells on the Danylko leasehold should have been treated as partnership wells.²¹⁶

²⁰⁹ *Szymanowski*, 987 A.2d 717.

²¹⁰ *Id.* at 719.

²¹¹ *Id.* at 721.

²¹² *Szymanowski v. Brace*, 987 A.2d 717, 719 (Pa. Super. Ct. 2009).

²¹³ *Id.* at 721.

²¹⁴ *Id.*

²¹⁵ *Id.* at 720.

²¹⁶ *Id.*

The Superior Court affirmed the grant of summary judgment in favor of Brace.²¹⁷ According to the court, the governing principle in this case was to “ascertain and effectuate the intention of the parties.”²¹⁸ After reviewing the gas well agreement, the court concluded that the scope of the partnership was focused narrowly on the development of the two specifically identified gas wells, one of which was to be drilled on the Danylko leasehold.²¹⁹ The court opined that the parties had no expressed intention to include additional wells, or the leaseholds themselves, within the partnership operations.²²⁰ The plaintiffs also argued that general partnership principles supported their claim that the two additional wells were partnership assets.²²¹ The court rejected this argument, finding that Brace’s retention of an overriding royalty and the deduction of intangible drilling costs on the partnership tax returns did not support the plaintiffs’ claim.²²² Finally, the court found that there was no evidence supporting the claim that the two additional Danylko wells had impacted production from the partnership well.²²³

B. Bankruptcy Estate Issues

The United States Bankruptcy Court for the Western District of Pennsylvania ruled that the proceeds of a natural gas lease were the property of the bankruptcy estate rather than that of a

²¹⁷ *Id.* at 726.

²¹⁸ *Szymanowski v. Brace*, 987 A.2d 717, 720 (Pa. Super. Ct. 2009) (quoting *Hess v. Jones*, 7 A.2d 299, 300 (Pa. 1939)).

²¹⁹ *Szymanowski*, 987 A.2d 717, 726.

²²⁰ *Id.* at 722.

²²¹ *Id.* at 724.

²²² *Id.* at 724-25.

²²³ *Id.* at 726.

debtor's ex-wife who had executed an oil and gas lease agreement.²²⁴ The debtor acquired the subject mineral estate prior to marriage, but he signed a quit claim deed conveying the mineral estate to his ex-wife during their marriage.²²⁵ This quit claim deed, however, was not recorded by the ex-wife until after debtor's bankruptcy filing.²²⁶ Prior to the recordation of the quit claim deed, but subsequent to the bankruptcy filing, the ex-wife signed an oil and gas lease agreement, which resulted in her receipt of proceeds in excess of \$471,000.²²⁷

The court noted that the conveyance of oil and gas rights is considered to be a transfer of an interest in real estate under Pennsylvania law.²²⁸ In order to gain protection against a bona fide purchaser of these rights, the transferee is required to record the conveyance.²²⁹ Since the transfer of the interest through the quit claim deed at issue here had not been recorded, the bankruptcy trustee stood in the position of a bona fide purchaser.²³⁰ As such, the trustee had the power to invalidate the transfer of the mineral estate to the ex-wife accomplished by the recordation of the quit claim deed.²³¹

²²⁴ *In re Howard*, 422 B.R. 568, 584 (Bankr. W.D. Pa. 2009).

²²⁵ *Id.* at 573-74. In addition to asserting rights to the property through the quit claim deed, the ex-wife also claimed an ownership interest through her marital property rights. *Id.* at 579. The ex-wife, however, executed a marriage settlement agreement conveying all of her interests in real estate, except for one specific parcel, to the debtor. *Id.* at 580.

²²⁶ *Id.* at 574.

²²⁷ *Id.* at 575.

²²⁸ *Id.* at 577.

²²⁹ *Id.*

²³⁰ *In re Howard*, 422 B.R., at 578.

²³¹ *Id.* at 581. The ex-wife was ordered to turn over all proceeds received from the natural gas lease. *Id.* at 584. *See also In re Howard*, 422 B.R. 593 (Bankr. W.D. Pa. 2010) (compelling compliance with order to turn over proceeds).

In a separate bankruptcy matter, the United States District Court for the Middle District of Pennsylvania ruled that it did not have jurisdiction to rule on the ownership of oil, gas, and mineral rights when those interests were the property of a bankruptcy estate.²³² Accordingly, the case was transferred to the Bankruptcy Court.²³³

VI. Conclusion

The oil and gas industry originated in Pennsylvania, and with the developmental prospects for the Marcellus Shale Formation, Pennsylvania once again may become a national – and perhaps international – leader in the development of oil and gas law more than 150 years after Colonel Drake’s initial well. As the play develops, the legal issues presented to state and federal courts in Pennsylvania will continue to evolve along with the industry’s operations. Over the past eighteen months, courts in Pennsylvania have ruled on a variety of legal issues, but the two issues that have dominated the legal landscape involve the validity of lease agreements and the extent to which municipalities can regulate drilling operations. These legal issues reflect the operations of an industry in its infancy – the formation of the relationship between lessor and lessee and the realization that impacts are beginning to occur, or are likely to occur, at the local level. While the issues of lease formation and municipal regulation will garner additional judicial guidance in the years to come, the legal issues over the next eighteen months and beyond likely will demonstrate the continuing maturation of the industry. As drilling activities intensify, new legal issues will arise. While the specific legal issues to be addressed are unknown, the body of

²³² Earth Conservancy v. Blue Coal Corp., 2010 WL 1489987, at *3 (M.D. Pa. Apr. 13, 2010).

²³³ *Id.* See also Earth Conservancy v. Blue Coal Corp., 2010 U.S. Dist. LEXIS 47159 (M.D. Pa. Apr. 13, 2010) (Report and Recommendation of Magistrate Judge subsequently adopted by District Court).

Pennsylvania oil and gas case law will continue to develop at a pace commensurate with the industry's development of the Marcellus Shale Formation.



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