APPLYING AGED PENNSYLVANIA PRECEDENT IN THE TIME OF THE MARCELLUS SHALE: THE POSSIBLE OUTCOME AND IMPLICATION OF THE INTERSECTION OF *DUNHAM*, *HENDLER* AND *HOGE* IN *BUTLER v. CHARLES POWERS ESTATE*

BY: DANIEL F. MCGRAW

MAY 2012

INDEPENDENT STUDY

PROFESSOR ROSS PIFER

SPRING 2012

I. INTRODUCTION

Pennsylvania has a long and storied history in the oil and natural gas industries.[1] However, after giving birth to the industry the Commonwealth had largely seen activity within the industry slow down.[2] With the discovery of the Marcellus Shale under a large amount of land in Pennsylvania, the Commonwealth has seen a rebirth of the oil and natural gas industry with a boom in leasing and drilling activities to tap into this newly discovered energy resource.[3] With this boom in activity has come increased legal activity related to the industry.[4] While the Pennsylvania Legislature has updated the statutory law governing the oil and natural gas industry[5], the Pennsylvania courts are left applying aged precedent, some over a century old, to the legal issues arising from the Marcellus Shale.[6] Now the Pennsylvania courts must apply this ancient precedent in a new age where production methods are vastly changed from the methods employed when the precedent was decided. Enter *Butler v. Charles Powers Estate*.[7]

This paper examines the possible implications of a decision in the *Butler v. Charles Powers Estate* case.[8] The *Butler* case presents a unique situation that involves

---

[1] Ross H. Pifer, *Drake Meets Marcellus: A Review of Pennsylvania Case Law upon the Sesquicentennial of the United States Oil and Gas Industry*, 6 Tex. J. OIL, GAS & ENERGY L. 47, 48 (2010-11)

[2] *Id.*

[3] *Id.* at 48-49.

[4] *Id.* at 49.

[5] On February 13, 2012, Pennsylvania's Oil and Gas Act, 58 P.S. §§ 601.101 – 601.607, which remained largely unchanged since it was enacted in 1985 was replaced with Pennsylvania's new oil and gas law, 58 Pa.C.S.A. §§ 3201 - 3274.

[6] Pifer at 48.

[7] Butler v. Charles Powers Estate, 29 A.3d 35, (Pa. Super. 2011).

[8] *Id.*

the intersection of dated Pennsylvania precedent concerning oil, gas, and mineral interests and reservations.[9] Specifically, the case concerns how the unique nature of gas trapped within the Marcellus Shale should be treated and who should be the rightful owner of the Marcellus Shale gas.[10] This case originated in the Susquehanna County Court of Common Pleas.[11] Following the Court of Common Pleas decision the case was appealed to the Pennsylvania Superior Court which remanded the case for further consideration of nature of the gas contained within the Marcellus Shale.[12] Following the Superior Court decision the Pennsylvania Supreme Court granted the petition for allowance of appeal.[13] Depending upon the outcome of the case, it has the potential to have an enormous effect on oil, gas and mineral ownership interests in Pennsylvania. The implications are magnified to an even greater extent given the current increase in natural gas exploration and development in Pennsylvania related to the Marcellus Shale.

Part II of this paper will present the facts and procedural history of the *Butler v. Charles Powers Estate* case. This part will focus on how the Superior Court applied Pennsylvania precedent to the facts of the *Butler* case. Part III of this paper will present the facts and rule that was established in the case of *Dunham v. Kirkpatrick*. This section of the paper will also present how Pennsylvania courts have applied the *Dunham* Rule since the case was decided. Part IV of this paper will present the facts and outcome of the *Hendler v. Lehigh Valley R. R. Co.* case concerning the meaning of a mineral

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

reservation. Part IV will also present the application of the rule from the *Hendler* case. Part V of this paper will present the facts and outcome of the *U.S. Steel Corp. v. Hoge* along with how the rule established in the case have been applied by the Pennsylvania courts. Part VI will discuss the possible outcomes of the *Butler* case after applying *Dunham*, *Hendler*, *Hoge*, and related precedent. This part of the paper will also discuss the possible implications of each outcome on the ownership and reservation of oil, gas and mineral interests. Finally, Part VII of this paper will provide a summary of the paper and suggest the analysis and decision that should occur in the *Butler* case.

II. *Butler v. Charles Powers Estate*

The *Butler v. Charles Powers Estate* case presented the issue of construing a reservation for minerals and oil in a deed and whether that reservation included the natural gas contained within the Marcellus Shale.[14] The following details the factual and procedural history of the case as well as the opinions of the Pennsylvania courts related to the case.

a. Factual History

The factual history of the *Butler v. Charles Powers Estate* case are as follows. The Butlers were the fee simple owners of two-hundred and forty-four acres of land in Susquehanna County.[15] The deed to the property at issue contained the following reservation dating back to 1881:

> [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

[14] *Id.* at 37.

[15] *Id.*

> 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…[16]

b. Procedural History

The procedural history of *Butler v. Charles Powers Estate* is as follows. In July 2009, the Butlers filed a quiet title action claiming ownership in fee simple of the surface and ownership over the minerals and petroleum oils based upon a theory of adverse possession.[17] The Butlers filed a motion for notice by publication, which was granted by the Court of Common Pleas, claiming that the heirs of the Charles Powers estate could not be located.[18] Following publication the heirs of the Powers estate surfaced and filed a number of continuances before filing a motion for declaratory judgment.[19] The heirs of the Powers estate disputed the Butlers claim of ownership of the oil and mineral estate by adverse possession and claimed the deed reservation included natural gas found in the Marcellus Shale.[20] The Court of Common Pleas dismissed with prejudice the heirs' motion for declaratory judgment that the deed reservation included natural gas.[21]

After the Court of Common Pleas denied a motion for reconsideration, the heirs of the Powers estate filed a notice of appeal.[22] After a number of procedural steps concerning standing and a remand to the Court of Common Pleas which found standing,

---

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 38.

[22] *Id.*

the heirs of the Powers estate again filed a notice of appeal.[23] On appeal the only issue for the Pennsylvania Superior Court to address was stated as:

> WHETHER … [THE TRIAL COURT] ERRED IN DETERMINING THAT THE … RESERVATION IN THE CHAIN OF TITLE TO THE SURFACE LAND CURRENTLY OWNED BY … APPELLEES DID NOT INCLUDE A RESERVATION OF ONE HALF OF SUCH UNCONVENTIONAL MARCELLUS SHALE GAS AS MIGHT BE FOUND UNDER THE LAND[.][24]

On appeal the heirs of the Powers estate argued that reservation for minerals included the Marcellus Shale "because a mineral is any inorganic object that can be removed from soil and used for commercial purposes; and no Pennsylvania decision has decided that mineral rights exclude Marcellus shale."[25] Further, it was argued that Pennsylvania precedent indicating that a reservation of minerals did not include natural gas was inapplicable because it was decided after the deed reservation in question and the general understanding at the time of the 1881 reservation was that a reservation of minerals included natural gas.[26] Additionally, the heirs of the Powers estate asserted that the Pennsylvania precedent was not applicable because it concerned conventional natural gas while the natural gas within the Marcellus Shale is considered unconventional and involves different production methods.[27] Lastly, the Powers estate argued that the natural gas contained within the Marcellus Shale is more analogous to the gas contained within coal which is the property of the coal owner as both are produced using the same

---

[23] *Id.*

[24] *Id.*

[25] *Id.* at 39.

[26] *Id.* at 39-40.

[27] *Id.* at 40.

methods.[28] Therefore, the heirs of the Powers estate averred that "whoever owns the shale, owns the gas."[29]

c. Court of Common Pleas Opinion

The Susquehanna County Court of Common Pleas ruled in favor of the Butlers finding that the reservation did not include the natural gas found in the Marcellus Shale.[30] The trial court reasoned that the precedent of *Dunham v. Kirkpatrick*[31] and cases subsequently decided under the rule from *Dunham* controlled the situation.[32] Therefore, under the *Dunham* rule since the reservation did not include a direct reservation of natural gas that the reservation did not include natural gas based on the language of the reservation.[33] Additionally, the court pointed out that the heirs of Charles Powers had not asserted an ownership claim over the natural gas for over one hundred years.[34] Therefore, the court inferred that there was no intent to reserve the natural gas under the reservation contained in the deed.[35]

d. Superior Court Opinion

The Pennsylvania Superior Court reversed and remanded the trial court's decision for further proceedings.[36] The court stated that the rule laid out in *Dunham* was not the

---

[28] *Id.*

[29] *Id.*

[30] *Id.* at 43.

[31] Dunham v. Kirkpatrick, 101 Pa. 36, (Pa. 1882).

[32] Butler at 43.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

end of the analysis and further information was needed concerning the natural gas contained in the Marcellus Shale. Specifically the Superior Court stated that it needed a:

> … more sufficient understanding of whether, … (1) Marcellus shale constitutes a "mineral"; (2) Marcellus shale constitutes the type of conventional natural gas contemplated in *Dunham* and *Highland*; and (3) Marcellus shale is similar to coal to the extent that whoever owns the shale, owns the shale gas.[37]

The last consideration stemmed from the courts discussion of *U.S. Steel Corp. v. Hoge*[38] in which the Pennsylvania Supreme Court found that gas that is contained within coal belongs to the owner of the coal.[39]

e. Supreme Court Grant of Appeal

On April 3, the Pennsylvania Supreme Court granted the petition for allowance of appeal.[40] The issue before the Supreme Court is:

> 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 shale 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' can rebut the presumption to include non-metallic substances.[41]

III. *Dunham v. Kirkpatrick*

The *Dunham v. Kirkpatrick* case presented the issue of construing a reservation for minerals in a deed and whether that reservation included oil and natural gas.[42] The following details the factual and procedural history of the case as well as the opinion of

---

[37] *Id.*

[38] U.S. Steel Corp. v. Hoge, 503 Pa. 140, (Pa. 1983).

[39] Butler at 43.

[40] Butler v. Charles Powers Estate, 2012 WL 1087928, --- A.3d ---- (Pa. 2012).

[41] *Id.*

[42] Dunham v. Kirkpatrick, 101 Pa. 36, (Pa. 1882).

the Pennsylvania Supreme Court in the case. Lastly, other cases discussing the rule laid out in *Dunham* are discussed.

a. Factual History

The facts of the *Dunham v. Kirkpatrick* case are as follows. Kirkpatrick purchased one hundred and ten acres of land in 1870.[43] The deed contained the following reservation: "Excepting and reserving all the timber suitable for sawing; also, all minerals; also the right of way to take off such timber and minerals." In 1881, Dunham entered upon the land under the terms of an oil lease and drilled a well that began to produce oil.[44] Whether Dunham had the right under the lease to drill for oil depended upon the meaning of the term "all minerals" contained within the reservation.[45]

b. Procedural History

The procedural history of *Dunham v. Kirkpatrick* is as follows. The Warren County Court of Common Pleas found that the reservation did not include oil and therefore awarded damages to Kirkpatrick. Dunham appealed this decision arguing that the trial court erred in construing the term "all minerals" as not including oil.[46] The Pennsylvania Supreme Court affirmed the decision of the Warren County Court of Common Pleas.[47]

---

[43] *Id.* at 37.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 43.

[47] *Id.* at 44.

c. Supreme Court Opinion

The Pennsylvania Supreme Court issued its opinion on October 2, 1882.[48] First, the court admitted that petroleum is a mineral under the technical meaning of the word.[49] However, the court stated that nearly everything is a mineral and therefore to use the technical meaning of the term "minerals" would void the reservation because it would reserve everything included in the grant.[50] The court stated that the proper way to construe a reservation of minerals within a deed is to view it as it would normally be understood by people and thus the parties when they drafted the reservation.[51] Under this view, the Supreme Court stated that the popular meaning of minerals did not include petroleum.[52] Additionally, the court stated that the parties did not intend to include oil in the reservation "otherwise that intention would have been expressed in no doubtful terms."[53] Therefore, the Pennsylvania Supreme Court affirmed the decision of the Court of Common Pleas in finding that the reservation in question did not include petroleum.[54]

d. Application of *Dunham*

The *Dunham* case has been applied in a number of Pennsylvania cases for the proposition that a reservation of minerals does not include a reservation for oil and natural gas. One such case is *Silver v. Bush*.[55] In *Silver*, a deed conveying land

---

[48] *Id.* at 43

[49] *Id.*

[50] *Id.*

[51] *Id.* at 43-44.

[52] *Id.* at 44.

[53] *Id.*

[54] *Id.*

[55] Silver v. Bush, 213 Pa. 195 (Pa. 1906).

contained a reservation that stated "to have an to hold the said piece or parcel of land except the mineral underlying the same, and the right of way to and from said mineral, which the first party reserves."[56] The dispute in the case centered around defining mineral and whether natural gas was considered a mineral for purposes of the reservation.[57] The Pennsylvania Supreme Court, relying on its decision in *Dunham,* ruled that the reservation did not include natural gas.[58]

In the case of *Preston v. South Penn Oil Co.*, the Pennsylvania Supreme Court applied the *Dunham* Rule when interpreting a reservation that read: "Together with the appurtenances, under and subject, however, to existing leases thereof, and excepting and reserving thereout, unto the Aetna Oil Company, all mineral and mining rights and the incidents thereto whatever."[59] The Supreme Court held that *Dunham* applied and that the reservation did not include oil and natural gas because there was no evidence that the parties to the reservation intended it "to include petroleum or gas, or that the word had acquired a meaning in conveyancing which would include them.[60] The court went on to state that "Dunham v. Kirkpatrick has been the law of this state for 30 years, and very many titles to land rest upon it. It has become a rule of property, and it will not be disturbed."[61]

---

[56] *Id.* at 197.

[57] *Id.*

[58] *Id.* at 199.

[59] Preston v. South Penn Oil Co., 238 Pa. 301, 302 (Pa. 1913).

[60] *Id.*

[61] *Id.* at 304.

The Pennsylvania Supreme Court again addressed the *Dunham* Rule in 1953 in the case of *Bundy v. Myers*.[62] In *Bundy*, an 1884 deed contained a reservation that read: "Excepting and reserving, out of this land, the oil, coal, fire clay and minerals of every kind and character with rights of entry for the purpose of removal of the same."[63] The reserved rights were leased and subsequently the lessee drilled a well and recovered natural gas.[64] The surface owner brought an action for ejectment to take possession of the well by arguing that natural gas was not included in the reservation.[65] The Clearfield County Court of Common Pleas concluded that natural gas was reserved because it was known at the time of the reservation that oil and natural gas were often discovered together so the parties must have intended to reserve both.[66] The Pennsylvania Supreme Court reversed again noting that the *Dunham* rule had become a rule of property in Pennsylvania that would not be disturbed lightly.[67] The court stated that evidence would have to be introduced to prove the intention of the parties was to include natural gas within the reservation.[68]

The case of *Highland v. Commonwealth of Pennsylvania* presented the situation of applying the *Dunham* Rule to a grant of minerals as opposed to a reservation of

[62] Bundy v. Myers, 372 Pa. 583, (Pa. 1953).

[63] *Id.* at 584 – 85.

[64] *Id.* at 585.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 587.

[68] *Id.* at 588.

minerals.[69] In ruling that the *Dunham* Rule applies in equal force to either a grant or a reservation, the Pennsylvania Supreme Court stated that:

> As a rule of property long recognized and relied upon, the Dunham rule binds and controls this situation: that the word 'minerals' appears in a grant, rather than an exception or reservation, in nowise alters the rule. To rebut the presumption established in Dunham, supra, that natural gas or oil is not included within the word 'minerals' there must be clear and convincing evidence that the parties to the conveyance intended to include natural gas or oil within such word.[70]

The case concerned the ownership of natural gas rights under 3,748 acres in Clearfield County.[71] There were a series of complicated grants which began with a deed from Richey to Arnold.[72] In this deed the following language was used:

> It is the intention of [Richey et al.] to convey * * * all the land, coal, coal oil, fire clay, *natural gas*, and other minerals and all rights vested in [Richey et al.] [under a certain prior deed] * * * Together with the right and privilege of entering upon such lands as are not conveyed * * * and taking away said coal, coal oil, *natural gas*, fire clay and other minerals of every kind and character * * * and to do * * * such things thereon in such manner as may be necessary in the judgment of [Arnold] to successfully mine and take away said coal, coal oil, *natural gas*, fire clay and other minerals, * * *. (Emphasis supplied)[73]

It was conceded by all of the parties that this language conveyed the entire interest in the natural gas to Arnold.[74] On the same day Arnold conveyed the mineral estate using the following language in the deed: "All the coal, fire clay, limestone, iron ore and other minerals."[75] Through a series of transactions Arnold's interest eventually was transferred

---

[69] Highland v. Com., 400 Pa. 261 (Pa. 1960).

[70] *Id.* at 276-77.

[71] *Id.* at 264-65.

[72] *Id.* at 265.

[73] *Id.*

[74] *Id.* at 265-66.

[75] *Id.* at 266.

to the Commonwealth of Pennsylvania.[76] The court distinguished the above two quoted conveyances by indicating that the second conveyance lacked a specific mention of the natural gas like the first conveyance.[77] Therefore, the second conveyance from Arnold was not intended to include an interest in the natural gas.[78] Thus, the Commonwealth was the true owner of the natural gas interest at issue.[79]

In 1972, the Pennsylvania Supreme Court again addressed the application of the *Dunham* Rule in the case of *Bannard v. New York State Natural Gas Corp.*[80] The *Bannard* case concerned the application of the *Dunham* Rule in the context of a tax sale of the mineral estate.[81] In the case there was a conveyance of the surface with a reservation of the "coal, fire-clay, oil, gas and other mineral rights."[82] Following this conveyance the surface and mineral estate were separately assessed.[83] The mineral estate was subsequently sold at tax sale for unpaid taxes.[84] Both the tax sale deed and the assessment records referred only to the minerals and did not make a specific reference to the oil and gas interest.[85] Therefore, it was argued that the tax sale did not convey the oil and gas interest.[86] The Pennsylvania Supreme Court held that the tax sale and resulting

---

[76] *Id.* at 268-73.

[77] *Id.* at 277-78.

[78] *Id.*

[79] *Id.* at 287.

[80] Bannard v. New York State Natural Gas Corp., 448 Pa. 239 (Pa. 1972).

[81] *Id.*

[82] *Id.* at 242.

[83] *Id.* at 243-44.

[84] *Id.* at 244.

[85] *Id.* at 249.

deed did convey the rights in the oil and gas interest.[87] The court then went on to explain why the *Dunham* Rule was not applicable to the case at hand as follows:

> In a normal conveyance between private parties, whether use of the term 'minerals' includes or excludes oil and natural gas depends upon application of the rule laid down in Dunham & Short v. Kirkpatrick…
>
> In a tax sale, however, the presumption does not obtain: the deed is based on the assessment and conveys the interests in land which are properly included within the assessment.[88]

Therefore, while the *Dunham* Rule would normally result in the oil and gas interest not passing in a conveyance that only uses the term "minerals," a tax sale for minerals when the reservation included minerals, oil and gas is an exception to the *Dunham* Rule.

IV. *Hendler v. Lehigh Valley R. R. Co.*

The *Hendler v. Lehigh Valley R. R. Co.* case presented the issue of construing a reservation for minerals in a deed and what constitutes a mineral for purposes of the reservation.[89] The following details the factual and procedural history of the case as well as the opinion of the Pennsylvania Supreme Court in the case. Lastly, other cases discussing the rule laid out in *Hendler* are discussed.

a. Factual History

The facts of the *Hendler v. Lehigh Valley R. R. Co.* case are as follows. The deed in question contained a reservation of "all coal and other minerals, in, under and upon said land."[90] In a later conveyance of the property, the deed contained the following

---

[86] *Id.*

[87] *Id.* at 250.

[88] *Id.*

[89] Hendler v. Lehigh Valley R. Co., 209 Pa. 256 (1904).

[90] *Id.* at 259

reservation: "excepting and reserving as fully and entirely as in the said [preceding] indenture is excepted and reserved, and further excepting and reserving all the gravel necessary for any fill or ballast for the railroad."[91]

The controversy in this case concerned the use of sand as a fill material for the construction of a railroad was within this reservation.[92] Hendler and the railroad had an agreement whereby the railroad was granted a fifty foot right of way over Hendler's property; however, the sand used in the construction was obtained from outside of the right of way.[93]

b. Procedural History

The procedural history of *Hendler v. Lehigh Valley R. R. Co.* is as follows. The Luzerne County Court of Common Pleas found that the sand was not included as a mineral in the reservation.[94] The trial court awarded damages to the surface owner in the amount of $1,859.90 for compensation for the removal of the sand.[95] The Pennsylvania Supreme Court affirmed the judgment of the Court of Common Pleas.[96]

c. Supreme Court Opinion

The Pennsylvania Supreme Court issued its opinion on May 23, 1904.[97] First, the court recognized that sand would be considered a mineral in the broadest sense of the

---

[91] *Id.*

[92] *Id.* at 260.

[93] *Id.* at 256.

[94] *Id.* at 263.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 256.

word.[98] However, the court indicated that such an interpretation of mineral would be too broad and could not have been what the parties intended when the reservation was executed.[99] Therefore, the court rejected the technical, scientific definition of mineral when interpreting the term as used in deeds and reservations.[100]

The Supreme Court then indicated that another way to interpret the term mineral would be in the "commercial sense."[101] The court indicated that this was the manner in which parties to leases are most likely to intend to use the word "minerals."[102] The court then stated the rule concerning the use of the term "minerals" in instruments related to the conveyance of property as follows:

> But there is another, and what may be called the commercial, sense, in which the word 'mineral' is used, and in which, having reference to its supposed etymology of anything mined, it may be defined as any inorganic substance found in nature, having sufficient value, separated from its situs as part of the earth, to be mined, quarried, or dug for its own sake or its own specific uses. That is the sense in which it is most commonly used in conveyances and leases of land, and in which it must be presumed that it was used by these parties in the deed in question.[103]

Therefore, based upon the above state rule, the Pennsylvania Supreme Court determined that the sand did not fall within the reservation of minerals because it did not have any commercial value on its own.[104]

---

[98] *Id.* at 259.

[99] *Id.*

[100] *Id.* at 259-60.

[101] *Id.* at 260.

[102] *Id.*

[103] *Id.*

[104] *Id.*

d. Application of *Hendler*

The *Hendler* case has been applied in a number of other Pennsylvania cases for the proposition that a reservation of minerals only covers minerals that had commercial value on its own at the time of the execution of the deed containing the reservation. One such case is *Silver v. Bush*.[105] In *Silver*, the Pennsylvania Supreme Court addressed the concept of defining minerals in a commercial sense within the context of applying the *Dunham* Rule.[106] The court restated the commercial sense rule for minerals from *Hendler* along with a limitation upon the rule as:

> In that sense it may include any inorganic substance found in nature having sufficient value separated from its situs as part of the earth to be mined, quarried, or dug for its own sake or its own specific uses. But, though it may include all such substances, it does not necessarily do so.[107]

Thus, applying the commercial sense of "minerals" in conjunction with the *Dunham* Rule to a reservation for minerals and no mention of natural gas, the Pennsylvania Supreme Court found that the reservation did not include natural gas.[108] Therefore, it would appear from the *Silver* case that in situations where the conveyance uses the word "minerals" the *Dunham* Rule will apply despite the Pennsylvania courts' interpretation of "minerals" to include a commercial sense.

The *Hendler* case was most recently applied in the United States District Court for the Western District of Pennsylvania in the case of *PAPCO, Inc. v. U.S.*[109] The *PAPCO* case presented the issue of whether sandstone was included as a mineral under a

[105] Silver v. Bush, 213 Pa. 195 (Pa. 1906).

[106] *Id.* at 198-99.

[107] *Id.* at 198.

[108] *Id.* at 199.

[109] PAPCO, Inc. v. U.S., 814 F.Supp.2d 477 (W.D. Pa. 2011).

prior mineral reservation.[110] The deed reservation at issue stated that it reserved "all the oil, natural gas, glass sand and minerals of every kind and description whatsoever."[111] The court indicated that the selection of specific resources indicated that the parties intended the reservation to include minerals in a commercial sense.[112] Thus, the court stated that "the critical question is whether 'sandstone' has commercial value and is included within the mineral reservation of the Deed."[113] The court found that sandstone "was regarded as a commercially valuable mineral at the time of the conveyance"; and therefore, the reservation of "minerals" included the sandstone.[114]

V. *U.S. Steel Corp. v. Hoge*

The *U.S. Steel Corp. v. Hoge* case presented the issue of construing a reservation for oil and gas in a severance deed for coal and whether that reservation included the coalbed gas contained within the coal.[115] The following details the factual and procedural history of the case as well as the opinion of the Pennsylvania Supreme Court in the case. Lastly, other cases discussing the rule laid out in *Hoge* are discussed.

a. Factual History

The facts of the *U.S. Steel Corp. v. Hoge* case are as follows. U.S. Steel acquired title to a certain vein of coal through a severance deed executed in 1920.[116] Within the

---

[110] *Id.* at 480.

[111] *Id.* at 481.

[112] *Id.* at 495.

[113] *Id.*

[114] *Id.*

[115] U.S. Steel Corp. v. Hoge, 503 Pa. 140 (1983).

[116] *Id.* at 144.

severance deed the right to drill through the coal to produce oil and gas was reserved.[117] The relevant language of the severance deed conveyed the following:

> *All the coal* of the Pittsburgh or River Vein underlying all that certain tract of land…
>
> *Together with all the rights and privileges necessary and useful in the mining and removing of said coal, including* the right of mining without leaving any support…, *the right of ventilation* and drainage and of access to the mines for men and materials…
>
> The parties of the first part [surface owners] hereby *reserve the right to drill and operate through said coal for oil and gas* without being held liable for any damages.
>
> Together with all and singular the improvements, ways, waters, water courses, right, liberties, privileges, hereditaments and appurtenances… (Emphasis added)[118]

The surface owners then executed oil and gas leases in 1976 and 1977.[119] In 1978, the lessee began to drilling into the Pittsburgh Vein of coal for the purpose of extracting the coalbed gas contained within the coal.[120] The lessee intended to use the process of hydrofracturing to stimulate the coal and enhance recovery of the coalbed gas.[121]

b. Procedural History

The procedural history of *U.S. Steel Corp. v. Hoge* is as follows. U.S. Steel began an action in equity to stop the drilling operations into the Pittsburgh Vein of coal which it owned and to determine the proper ownership and right to develop the coalbed gas

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

contained within the Pittsburgh Vein.[122] The trial court determined that the lessee under the oil and gas lease executed by the surface owners had the right to develop the coalbed gas but prohibited the use of hydrofracturing to enhance recovery efforts.[123] The Pennsylvania Superior Court affirmed.[124] On appeal, the Pennsylvania Supreme Court reversed and remanded the case to the Greene County Court of Common Pleas to enter a judgment quieting title to the coalbed gas in favor of U.S. Steel.[125]

c. Supreme Court Opinion

The Pennsylvania Supreme Court issued its opinion on December 22, 1983.[126] The court began by discussing the history and nature of coalbed gas.[127] The court pointed out that the gas contained within coal is known to be a dangerous byproduct of the production of the coal and that the coal industry has a long history of taking measures to deal with decreasing the amount of danger from the coalbed gas.[128] Next, the court discussed the similarities and differences between coalbed gas and natural gas.[129] The court indicated that while both natural and coalbed gas are fugacious in nature, that fact does not prevent the gases from being owned prior to being possessed through recovery operations.[130] The court indicated that "as a general rule, subterranean gas is owned by

---

[122] *Id.*

[123] *Id.* at 144-45.

[124] *Id.* at 145.

[125] *Id. at* 150.

[126] *Id.* at 140.

[127] *Id.* at 145-50.

[128] *Id.* at 149.

[129] *Id.* at 146.

[130] *Id.* at 145-47.

whoever has title to the property in which the gas is resting."[131] The court then set down the rule that resulted from the *Hoge* case as follows:

> When a landowner conveys a portion of his property, in this instance coal, to another, it cannot thereafter be said that the property conveyed remains as part of the former's land, since title to the severed property rests solely in the grantee. In accordance with the foregoing principles governing gas ownership, therefore, *such 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. The landowner, of course, has title to the property surrounding the coal, and owns such of the coalbed gas as migrates into the surrounding property.[132]

Following the court's determination that the coalbed gas is owned by the owner of the coal, the Supreme Court next construed the interest that was reserved in the severance deed as it related to the coalbed gas.[133] The reservation in the severance deed to the coal retained the "right to drill and operate through said coal for oil and gas without being held liable for any damage" to the surface owner of the land.[134] The court stated that in construing the reservation, the governing principle is to give effect to the intentions of the parties.[135] The intention of the parties is to be determined at the time the reservation is executed.[136] The court then cited *Dunham* for the proposition that the plain meaning of the language of the reservation should be controlling if it can be assumed that the parties to the reservation had the same understanding as to the plain meaning of the language.[137]

---

[131] *Id.* at 147.

[132] *Id.*

[133] *Id.* at 148.

[134] *Id.*

[135] *Id.* at 148-49.

[136] *Id.* at 149.

[137] *Id.*

First, the court noted that at the time of the reservation commercial operations aimed at extracted coalbed methane "were very limited and sporadic."[138] Next, the court again reiterated the dangerous character of the coalbed gas and pointed out that the common practice in severance deeds for coal is to include a "right of ventilation" for the coal operator to extract and dispose of the gas in a safe manner.[139] Lastly, the court stated that the reservation of gas was done in a general nature that must be adjudged "in light of the conditions existing at the time of its execution."[140] The court stated that at the time of the reservation the coalbed gas was known to be a dangerous substance that was largely considered to be a waste product of the process of extracting the coal.[141] Therefore, the Pennsylvania Supreme Court determined that the reservation of gas in the severance deed related to the right to drill through the coal to extract conventional reserves of natural gas which had been commercially exploited before and did not include the right to extract the coalbed gas from the coal seam.[142]

d. Application of *Hoge*

The *Hoge* case has been applied in a number of cases; however, the only Pennsylvania state court case citing *Hoge* for the proposition of "whoever owns the coal owns the gas" is *Butler v. Charles Powers Estate*.[143] While there is a dearth of Pennsylvania state courts applying *Hoge*, there is one recent Pennsylvania federal court

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.* at 150.

[143] Butler v. Charles Powers Estate, 2011 PA Super 198, 29 A.3d 35 (2011).

case, *Hoffman v. Arcelormittal Pristine Resources*, which discusses the application of *Hoge*.[144]

In *Hoffman v. Arcelormittal Pristine Resources*, the United States District Court for the Western District of Pennsylvania was presented with the issue of construing whether a reservation of oil and natural gas included the natural gas contained within the Marcellus Shale.[145] The original reservation from 1928 contained the following language:

> EXCEPTING AND RESERVING, ALSO, to the Company, its successors and assigns, all gas and oil within and underlying said premises, with the right to enter thereon at any and all times for the purpose of drilling for and extracting the same, with the right to enter thereon at any and all time for the purpose of drilling for and extracting the same, with the right to erect and construct thereon and removing therefore such derricks, drills, pipelines and other structures … as may be deemed by the company, its successors and assigns, to be either necessary or convenient in such drilling or extraction or in the transporting of any oil or gas recovered therefrom … [146]

In a subsequent deed to the plaintiffs, the reservation read as follows: "EXCEPTING AND RESERVING coal, oil and gas, and other minerals and mining and drilling rights, etc. as conveyed in prior instruments of record in the chain of title."[147]

The plaintiff surface owners in *Hoffman* argued that despite the clear reservation of natural gas, the natural gas in the Marcellus Shale was not reserved.[148] Specifically, the surface owners argued that the reservation only reserved the natural gas "'contained

---

[144] Hoffman v. Arcelormittal Pristine Resources, 2011 WL 1791709 (Slip Copy W.D. Pa. May 10, 2011).

[145] *Id.* at *3.

[146] *Id.* at *2.

[147] *Id.* at *3.

[148] *Id.*

within the sandstone strata underlying the subject land.'"[149] Further, the land owners argued that

> … because 'shale formation such as Marcellus and others in this area were not recognized as economically viable sources for natural gas,' at the time the 1928 Deed was created, defendants predecessor-in-title could not have intended to reserve rights to 'natural gas contained within the Marcellus shale or other deep shales,' because it was not 'commercially exploitable' at that time.[150]

The court rejected these arguments and granted summary judgment for the defendant owners of the severed mineral, oil and gas interest.[151] First, the court stated that the original reservation used the word "all" which "means what it states – 'all'".[152] Second, the court indicated that the present case was distinguishable from *Hoge.*[153] The court indicated that *Hoge* was distinguishable first because the mineral estate, including the oil and gas interest, at issue was "not subdivided" with "multiple parties with different and potentially conflicting interests in the same mineral estate" while in *Hoge* there were different owners of the coal and oil and gas interest.[154] Additionally, the court stated that *Hoge* was distinguishable because the language of the reservation at issue was "clear and unambiguous."[155] Thus, the "language of the deed must be given effect and when language of the deed is clear and unambiguous the intent of the parties must be gleaned solely from its language."[156]

---

[149] *Id.*

[150] *Id.*

[151] *Id.* at *8.

[152] *Id.* at *4.

[153] *Id.* at *4-*5.

[154] *Id.* at *5.

[155] *Id.*

[156] *Id.* at *6.

VI. Possible Outcomes and Implications of *Butler v. Charles Powers Estate*

There are a number of possible outcomes of the *Butler v. Charles Powers Estate* each with their own separate implications on oil, gas and mineral ownership rights and reservations. Initially, there appears to be three separate but interrelated issues that the court must address based upon the Pennsylvania precedent discussed earlier. First, does the reservation at issue include a reservation for natural gas from the Marcellus Shale? This issue applies the *Dunham* Rule. Second, is the Marcellus Shale a mineral for purposes of the reservation in the deed? This issue applies the rule from *Hendler*. Lastly, does the natural gas contained within the Marcellus belong to the owner of the oil and gas interest or the owner of the Marcellus Shale? This issue applies the concept concerning coalbed gas in *Hoge*. The following discussion will address all of these issues in turn by examining each of the possible outcomes and the implications of each outcome through the application of the Pennsylvania precedent discussed earlier with a focus on the three seminal cases of *Dunham*, *Hendler* and *Hoge*. Lastly, this part will discuss the recommended application of these precedents and answer to the issues presented by the *Butler* case.

For reference sake the 1881 reservation at issue reads 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…[157]

[157] *Id.*

a. Does the Reservation Include Marcellus Shale Natural Gas?

The reservation specifically reserves "minerals and Petroleum Oils."[158] This language appears to be clear and unambiguous on its face.[159] Therefore, under the *Dunham* Rule it does not appear that the reservation contained in the 1881 deed reserved any natural gas, including the natural gas within the Marcellus Shale.[160] The decision that the reservation does not include natural gas would maintain the status quo of the *Dunham* Rule. This would be consistent with the Pennsylvania courts' adherence to the rule and recognizing the *Dunham* Rule as an established property rule in Pennsylvania.[161]

---

[158] *Id.*

[159] See Hoffman v. Arcelormittal Pristine Resources, Inc., 2011 WL 1791709, *6 (Slip Copy W.D. Pa. May 10, 2011) (stating "The Court reiterates the long standing principle that '[a]ll of the language of the deed must be given effect and when the language of the deed is clear and unambiguous the intent of the parties must be gleaned solely from its language.'") (citing In re Conveyance of Land Belonging to City of DuBois, 335 A.2d 252 358 (Pa. 1975), citing Teacher, Exrx. Et al. v. Kijurina, 365 Pa. 480, 76 A.2d 197 (Pa. 1950).

[160] See Dunham v. Kirkpatrick, 101 Pa. 36 (Pa. 1882) (reservation of "all minerals" does not include oil); Silver v. Bush, 213 Pa. 195 (Pa. 1906) (reservation of "minerals" does not include natural gas); Preston v. South Penn Oil Co., 238 Pa. 301, 302 (Pa. 1913) (reservation of minerals does not include oil or natural gas); Bundy v. Myers, 372 Pa. 583, (Pa. 1953) (reservation of "oil, coal, fire clay and minerals of every kind and character" does not include natural gas); Highland v. Com., 400 Pa. 261 (Pa. 1960) (reservation of "coal, fire clay, limestone, iron ore and other minerals" does not include natural gas). But see Bannard v. New York State Natural Gas Corp., 448 Pa. 239 (Pa. 1972) (indicating the Dunham Rule is not applicable and oil and natural gas are include in "minerals" where treasurers deed from tax sale and underlying assessment refers only to "minerals").

[161] See Preston v. South Penn Oil Co., 238 Pa. 301, 302 (Pa. 1913) (stating "Twenty-three years after the decision in Dunham v. Kirkpatrick, the same question was raised in Silver v. Bush, 213 Pa. 195, 62 Atl. 832, and the earlier decision was approved and followed." and "Dunham v. Kirkpatrick has been the law of this state for 30 years, and very many titles to land rest upon it. It has become a rule of property, and it will not be disturbed."); Bundy v. Myers, 372 Pa. 583, (Pa. 1953) (stating "Dunham v. Kirkpatrick 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."); Highland v. Com., 400 Pa. 261 (Pa. 1960) (stating "As a rule of property long recognized and relied upon, the Dunham rule binds and controls this situation: that the word 'minerals' appears in a grant, rather than an exception or a reservation, in nowise alters the rule." and "'A rule of property long acquiesced in should not be overthrown except for compelling reasons of public policy or the imperative demands of justice.'" (internal citations omitted))

The heirs of the Charles Powers estate argued that the *Dunham* Rule should not apply because the deed reservation predated the decision in *Dunham v. Kirkpatrick*.[162] However, this argument is unappealing as the Pennsylvania Supreme Court has applied the *Dunham* Rule to cases where the reservation predated its decision in *Dunham* and where the reservation predated the reservation in the *Butler* case.[163] Additionally, the heirs of the Charles Powers Estate have not introduced any evidence to show that the parties to the reservation intended the term "minerals" to include natural gas when it was executed. This showing would be required to overcome the presumption imposed by the *Dunham* Rule that the parties did not intend the term "minerals" to include oil or natural gas.[164]

Lastly, if the court were to find that the reservation included natural gas, it would essentially have to overrule *Dunham* and all of the proceeding cases that have followed the *Dunham* Rule. It is highly unlikely that the Pennsylvania courts would be willing to take this step given their adherence to the *Dunham* Rule.[165] Additionally, to overrule *Dunham* as it approaches the one hundred and thirtieth anniversary of the decision has the potential to overthrow the certainty and that the rule provided for titles throughout Pennsylvania. Therefore, the court in *Butler* should find that the *Dunham* Rule applies to

---

[162] Butler v. Charles Powers Estate, 2011 PA Super 198, 29 A.3d 35, 40 (Pa. Super. 2011).

[163] See Preston v. South Penn Oil Co., 238 Pa. 301, 302 (Pa. 1913) (applying the Dunham Rule to a reservation dated 1876, six years prior to the decision in Dunham v. Kirkpatrick).

[164] See Bundy v. Myers, 372 Pa. 583, (Pa. 1953) (stating "If the actual intent of the parties was otherwise, it is incumbent upon the defendants to so aver which necessarily call for an answer raising the issue.") and Highland v. Com., 400 Pa. 261 (Pa. 1960) (stating "To rebut the presumption established in Dunham, supra, that natural gas or oil is not included within the word 'minerals' there must be clear and convincing evidence that the parties to the conveyance intended to include natural gas or oil within such word.").

[165] See Preston v. South Penn Oil Co., 238 Pa. 301, 302 (Pa. 1913); Bundy v. Myers, 372 Pa. 583, (Pa. 1953); Highland v. Com., 400 Pa. 261 (Pa. 1960), *supra* note 160.

the reservation at issue and because the reservation does not specifically include natural gas that the reservation of minerals did not include natural gas. Thus, the surface owners, the Butlers, are the rightful owners of all of the natural gas underlying their property based upon the *Dunham* Rule.

b. Is the Marcellus Shale a Mineral?

The next issue is whether the Marcellus Shale itself should be considered a mineral for purpose of the reservation. Under *Hendler*, this determination should be based upon whether shale was commercially valuable at the time of the reservation.[166] The answer to this issue has the potential to have far ranging implications on the development of the Marcellus Shale for natural gas. Essentially, the answer to this question in conjunction to the answer to the third issue discussed below has the potential to change the ownership interest in the natural gas contained within the Marcellus Shale depending on the language of the deed at issue.

The heirs of the Charles Powers Estate argued that the Marcellus Shale is a mineral for purposes of the reservation "because a mineral is any inorganic object that can be removed from soil and used for commercial purpose; and no Pennsylvania decision has decided that mineral rights exclude Marcellus shale."[167] This argument is not availing given the "commercial sense" view that the Pennsylvania courts take

[166] See Hendler v. Lehigh Valley R. Co., 209 Pa. 256 (1904) (stating "In that sense it may include any inorganic substance found in nature having sufficient value separated from its situs as part of the earth to be mined, quarried, or dug for its own sake or its own specific uses. But, though it may include all such substances, it does not necessarily do so."); Silver v. Bush, 213 Pa. 195 (Pa. 1906) (stating "In that sense it may include any inorganic substance found in nature having sufficient value separated from its situs as part of the earth to be mined, quarried, or dug for its own sake or its own specific uses. But, though it may include all such substances, it does not necessarily do so."); and PAPCO, Inc. v. U.S., 814 F.Supp.2d 477 (W.D. Pa. 2011) (stating that whether something is a mineral for purposes of a mineral reservation depends upon whether it was "regarded as a commercially valuable mineral at the time of the conveyance.").

[167] Butler v. Charles Powers Estate, 2011 PA Super 198, 29 A.3d 35, 39 (Pa. Super. 2011).

concerning a conveyance involving the mineral estate.[168] Further, this argument has been dispatched of by the Pennsylvania courts because such a broad definition of mineral would make a reservation of minerals void because it would leave nothing to grant.[169]

In order for the Marcellus Shale to be considered a "mineral" the heirs of the Charles Powers Estate would have to show that it actually had commercial value in and of itself[170] and not simply assert that it "can be removed from soil and used for commercial purposes."[171] There does not appear to be any evidence in the record to show that shale of any kind, let alone the Marcellus Shale, was commercially produced at the time of the reservation at issue. Therefore, it follows that the Marcellus Shale is not a "mineral" for purposes of the reservation in *Butler*. By making a finding that the Marcellus Shale is not a mineral the court would be maintaining the status quo as it has been widely understood as the leasing and drilling boom for the Marcellus Shale has progressed. Thus, any negative implications on the further development and validity of oil and gas leases in place would be avoided.

If the court were to find that the Marcellus Shale was in fact a mineral, then there could be major implications on the current state of the oil and gas industry in Pennsylvania. First, for any property where there are separate owners of the mineral estate and the oil and gas interest, the ownership of the Marcellus Shale would shift from the oil and gas owner to the owner of the mineral estate. Additionally, where reservations

---

[168] See Hendler v. Lehigh Valley R. Co., 209 Pa. 256 (1904); Silver v. Bush, 213 Pa. 195 (Pa. 1906); and PAPCO, Inc. v. U.S., 814 F.Supp.2d 477 (W.D. Pa. 2011), *supra* note 165.

[169] See Dunham v. Kirkpatrick, 101 Pa. 36, 43 (Pa. 1882) (Explaining how "all inorganic substances are classed under the general name or minerals" and stating that "if the reservation embraces all these things, it is as extensive as the grant, and therefore void.").

[170] See Hendler v. Lehigh Valley R. Co., 209 Pa. 256 (1904) and Silver v. Bush, 213 Pa. 195 (Pa. 1906).

[171] Butler v. Charles Powers Estate, 2011 PA Super 198, 29 A.3d 35, 39 (Pa. Super. 2011).

only included minerals the ownership interest would shift from the surface owner to the mineral estate owner. For reservations that only include the oil and gas interest, then the ownership interest in the Marcellus Shale would shift from the owner of the oil and gas rights to the owner of the surface that also owns the mineral rights. The above shifts in ownership could have great impacts upon the validity of the leases for the natural gas in the Marcellus Shale when there is anything other than a fee simple ownership of the entire property at issue. The ultimate implications of a decision that the Marcellus Shale does constitute a mineral in Pennsylvania purposes is solely dependent upon the final issue of whether the natural gas within the Marcellus Shale belongs to the owner of the shale. When Marcellus Shale is considered a mineral, the owner of the natural gas contained within the Marcellus Shale will be determined by whether the owner of the Marcellus Shale owns the gas contained within it.

c. Who Owns the Natural Gas Within the Marcellus Shale?

The final issue concerns whether the owner of the Marcellus Shale also owns the natural gas contained within it. In *Butler v. Charles Powers Estate*, the heirs of the Estate argued that "whoever owns the shale, owns the gas."[172] This argument was based upon the *Hoge* case.[173] The heirs of Charles Powers argued that because the natural gas within both coal and the Marcellus Shale can only be produced through the use of hydrofracturing that the gas should be treated under similar rules.[174] While this argument is creative, the gas contained within coal at issue in *Hoge* can be quickly distinguished from the natural gas contained within the Marcellus Shale.

---

[172] *Id.* at 40.

[173] *Id.*

[174] *Id.*

First, coal is a mineral that is mined in itself while shale is not. There is not a ready commercial market for the Marcellus Shale itself. Plus, it would be cost prohibitive to mine the deep shale formation. The only thing that makes the Marcellus Shale valuable is the natural gas contained within its pores. On a related note, while the extraction of both gases does require hydrofracturing, the hydrofracturing process in coal damages the valuable coal while the process in the Marcellus Shale does not damage another mineral that is commercially valuable. The two gases are also distinguishable because of the danger they present. The court in *Hoge* spent a great deal of time discussing the dangers of the coalbed gas and the need for coal owners to have control over it to safely mine the coal by minimizing the dangers associated with the gas.[175] There are no such dangers associated with the natural gas contained within the Marcellus Shale since the shale itself will never be mined. Therefore, given the great differences between the coalbed gas at issue in *Hoge*, and the natural gas contained within the Marcellus Shale, the natural gas contained within the Marcellus Shale should not be considered to be owned by the owner of the Marcellus Shale. Rather, the natural gas contained within the Marcellus Shale should be considered to be owned by the owner of the natural gas.

If the court were to agree with the arguments of the heirs of the Charles Powers Estate and determine that the owner of the Marcellus Shale owns the natural gas contained within the shale, there could be a number of negative implications. First, where there are different owners of the surface, mineral estate, and oil and natural gas interest, the ownership could shift between the different owners. This again is dependent

[175] U.S. Steel Corp. v. Hoge, 503 Pa. 140, 149 (1983).

upon the second issue of whether the Marcellus Shale is a mineral as discussed previously. Second, as an outshoot from this shift in ownership of the natural gas within the Marcellus Shale, the validity of current leases for the natural gas in the Marcellus Shale could be challenged. This could create a wave of litigation to determine the validity of leases. Further, even if the leases were found to be valid, the question of payment of royalties moving forward would be very murky. With the large amount of money that could be at risk further litigation would be almost guaranteed.

d. Possible Outcomes for *Butler v. Charles Powers Estate*

The following table depicts the possible ownership interests of the natural gas contained within the Marcellus Shale in the *Butler v. Charles Powers Estate* case depending upon the decision the court makes concerning the three issues discussed above. Since the reservation in question only reserved one half of the oil and minerals, the heirs of the Powers Estate can obtain no more than a one half interest in the natural gas contained within the Marcellus Shale. Likewise, the Butlers can have no less than a one half interest in the natural gas contained within the Marcellus Shale. However, depending upon the interaction of the above discussed issues, the Butlers may have complete ownership over the Marcellus Shale natural gas. The following discussion details all of these possibilities.

	Natural Gas Included in Reservation		
Marcellus Shale is a Mineral	YES	NO	Whomever owns the Marcellus Shale owns the Natural Gas
YES	1/2 Butlers, 1/2 Powers Estate	1/2 Butlers, 1/2 Powers Estate	YES
YES	1/2 Butlers, 1/2 Powers Estate	1 Butlers	NO
NO	1 Butlers	1 Butlers	YES
NO	1/2 Butlers, 1/2 Powers Estate	1 Butlers	NO

Table 1. Possible Ownership Interests in *Butler v. Charles Powers Estate*

As the table above depicts, if the court determines that the parties to the reservation in question intended to reserve natural gas then the most likely outcome is that the Butlers and heirs of the Powers Estate each own one half of the natural gas within the Marcellus Shale. However, if the court additionally determines that the Marcellus Shale is not a mineral and that whoever owns the Marcellus Shale owns the natural gas contained within it then the Butlers will own the entire interest in the natural gas contained in the Marcellus Shale. This is because while the Powers Estate would have a one half interest in both the minerals and the natural gas, if the Marcellus Shale is not considered a mineral then it belongs to the surface owner, the Butlers in this case. It then follows that if whoever owns the Marcellus Shale also owns the natural gas captured within it, then the Butlers as the surface owners of the Marcellus Shale would own the entire interest in the natural gas within the Marcellus Shale despite only having a one half interest in all other natural gas.

If the court determines that the parties did not intend to reserve natural gas, then the Butlers will own all of the rights to the natural gas in the Marcellus Shale in all situations except one. The one exception is if the court additionally determines that the

Marcellus Shale is a mineral and that whoever owns the Marcellus Shale owns the natural gas contained within the shale. This results in the heirs of the Powers Estate owning one half of the natural gas in the Marcellus Shale despite not having an ownership interest in any of the other natural gas under the property. This result is because the Powers Estate reserved a one half interest in the minerals; thus, if the Marcellus Shale is considered a mineral and the owner of the Marcellus Shale owns the gas contained within it, then the Powers Estate is the rightful owner of one half of the natural gas rights in the Marcellus Shale.

If the court determines that the Marcellus Shale is a mineral then the most likely ownership structure is that the Butlers and Powers Estate each own one half of the natural gas within the Marcellus Shale. This result does not follow if in addition the court determines that natural gas was not included in the reservation and that the owner of the Marcellus Shale is not entitled to the natural gas within the shale. This series of decisions will result in the Butlers owning the entire interest of the natural gas in the Marcellus Shale. This outcome is dictated by the fact that despite owning one half of the minerals and the Marcellus Shale being deemed to be in the mineral estate, if the natural gas in the Marcellus Shale does not belong to the owner of the shale then it belongs to the owner of the natural gas interest which is the Butlers in this scenario.

If the court determines that the Marcellus Shale is not a mineral then the Butlers will own the entire natural gas interest associated with the Marcellus Shale with one exception. The exception is when the court additionally determines that there was a reservation of the natural gas and that the natural gas within the Marcellus Shale does not belong to the owner of the Marcellus. Under this exception the two parties will each own

a one half interest in the Marcellus Shale natural gas. This result follows from the fact that the natural gas in the Marcellus Shale would belong to the owner of the natural gas interest and the Powers Estate would have a one half interest in all of the natural gas given a decision that the parties intended to reserve natural gas when they executed the deed.

If the court determines that the owner of the Marcellus Shale also owns the natural gas within, then there are two possible outcomes with equal chances depending upon how the court decides the remaining two issues. First, the Butlers and Powers Estate could both be entitled to one half of the Marcellus Shale natural gas interest. This will occur if the court also determines that: (1) that the Marcellus Shale is a mineral for purposes of the reservation and that natural gas was included in the reservation; or (2) that the Marcellus Shale is a mineral for purposes of the reservation but natural gas was not included in the reservation. Second, the Butlers will own the entire interest in the natural gas contained within the Marcellus Shale in either of the two following scenarios: (1) the court also determines that the Marcellus Shale is not a mineral and the reservation did not include natural gas; or (2) the court determines that the reservation included natural gas but the Marcellus Shale is not considered to be a mineral.

The last set of scenarios occurs if the court determines that the owner of the Marcellus Shale does not own the natural gas contained in the shale. Therefore, under these scenarios the owner of the natural gas interest owns the gas associated with the Marcellus Shale. Thus, the decision concerning whether the Marcellus Shale is a mineral does not change the outcome. Rather, the determination of whether the reservation contained in the deed included natural gas is determinative of the ownership of the

natural gas within the Marcellus Shale. If the court determines that natural gas was included in the reservation then the Butlers and Powers Estate would each be equal owners of the natural gas contained in the Marcellus Shale. On the other hand, if the court determines that the deed reservation does not include natural gas then the Butlers will be the sole owners of the natural gas associated with the Marcellus Shale.

e. Possible Outcomes for Property with Separate Surface, Mineral and Oil & Gas Owners

For a more general depiction, the following table illustrates the ownership of the natural gas within the Marcellus Shale in a situation where there are separate owners of the surface, minerals and oil and gas interest depending upon the decision of the court in *Butler v. Charles Powers Estate* for the issues of whether the Marcellus Shale is a mineral and if whomever owns the Marcellus Shale, owns the gas within the shale. This table assumes that there is a reservation that included natural gas; thus, creating separate owners of the natural gas and the mineral estate. The following discussion explains and details the outcomes of the different decisions.

Marcellus Shale is a Mineral		
YES	NO	Whomever owns the Marcellus Shale owns the Natural Gas
Mineral Owner	Surface Owner	YES
Oil & Gas Owner	Oil & Gas Owner	NO

Table 2. Possible Ownership Interest in Severed Estates

As the table above shows, the owner of the natural gas within the Marcellus Shale can be greatly affected by the decision in the *Butler v. Charles Powers Estate* case. First, if the court determines that the Marcellus Shale is a mineral, then there are two possible owners depending upon the court's decision of whether the owner of the Marcellus Shale also owns the natural gas trapped within it. If the court decides this issue in the

affirmative, then the owner of the mineral estate will be the owner of the natural gas within the Marcellus Shale. If the court determines that the owners of the Marcellus Shale does not own the natural gas contained within the Marcellus, then the owner of the oil and gas interest will be the rightful owner of the Marcellus Shale natural gas.

Second, if the court determines that the Marcellus Shale is not a mineral, then there are also two possible owners of the natural gas contained within the Marcellus Shale. The surface owner will own the natural gas within the Marcellus Shale if the court also determines that the owner of the Marcellus Shale also owns the gas within the shale. In this case, the surface owner will be given ownership because by default the surface owner would own the Marcellus Shale if it is not considered a mineral. On the other hand, the owner of the oil and gas interest will own the natural gas within the Marcellus Shale if the court determines that the owner of the Marcellus Shale does not also own the natural gas within the Marcellus. This scenario keeps the natural gas interest in the hands of a single owner.

Third, if the court determines that the owner of the Marcellus Shale also owns the natural gas within the shale, then there are again two possible owners of the natural gas within the Marcellus Shale. If the court additionally determines that the Marcellus Shale is a mineral, then the mineral owner will own the natural gas within the Marcellus Shale. This result follows because the mineral owner would be the rightful owner if the Marcellus Shale is considered a mineral. If the court decides that the Marcellus Shale is not a mineral, then the natural gas within the Marcellus Shale would be owned by the surface owner. This is because the Marcellus Shale would be under the ownership of the surface owner if it is not a mineral. Therefore, the surface owner would gain a valuable

ownership interest in a natural resource despite having no ownership interest in either the mineral estate or the oil and natural gas rights underlying the property.

Lastly, if the court determines that the owner of the Marcellus Shale does not also own the gas contained within it, then there is only one possible outcome. Under this scenario, the owner of the oil and natural gas interest will be the owner of the natural gas contained within the Marcellus Shale. This result holds regardless of the court's decision concerning whether the Marcellus Shale is a mineral. This decision would align best with the practice within the industry to obtain leases for exploration of the Marcellus Shale from the record owner of the natural gas rights.

f. Recommended Answer

The recommended answer is aimed to maintain the status quo and minimize any possible negative implications on the current development of the Marcellus Shale. Additionally, this recommended answer remains most faithful to the Pennsylvania precedent that has governed the law concerning mineral, oil and gas ownership for over a century.

First, the court should maintain its adherence to the *Dunham* Rule. Thus, it should find that the reservation of "minerals and Petroleum Oils" does not include natural gas. Especially in light of the fact that there is no evidence in the record to show that the parties to the reservation intended to include natural gas.[176] The parties' specific reference to oil and omission of natural gas in the reservation would be evidence that it

[176] See Bundy v. Myers, 372 Pa. 583, (Pa. 1953) and Highland v. Com., 400 Pa. 261 (Pa. 1960), *supra* note 163.

was not their intention to include natural gas within the reservation.[177] This would align with the decisions following *Dunham* which have found that similar reservations do not include natural gas.[178] Additionally, this would maintain the *Dunham* Rule as an integral property rule in Pennsylvania upon which many parties and titles have relied upon since the decision was made in 1882.[179] Lastly, this decision would align with the assumption that the oil and gas industry has operated under concerning its belief of ownership of oil and natural gas rights for leasing purposes.

Second, the court should find that the Marcellus Shale is not a mineral based upon the teachings of *Hendler*. There is no evidence that at the time of the reservation in question that the Marcellus Shale was a commercially valuable mineral.[180] Common sense dictates that the Marcellus Shale does not have a value in and of itself. The Marcellus Shale is not mined for the shale itself. The only reason that the Marcellus Shale has become well known is because it contains the valuable natural gas that is currently being produced in Pennsylvania. Further, given the depth of the Marcellus Shale it would be commercially infeasible, or at the very least cost prohibitively unwise, to mine the Marcellus Shale for the shale rock in current times. It would have been even less feasible to mine the Marcellus Shale in 1881 when the parties executed the deed that

[177] See Highland v. Com., 400 Pa. 261, 277-78 (Pa. 1960) (indicating that specific reference to a number of other resources by name and lack of mention of natural gas indicates natural gas was not included in the reservation.)

[178] See Dunham v. Kirkpatrick, 101 Pa. 36 (Pa. 1882); Silver v. Bush, 213 Pa. 195 (Pa. 1906); Preston v. South Penn Oil Co., 238 Pa. 301, 302 (Pa. 1913); Bundy v. Myers, 372 Pa. 583, (Pa. 1953); Highland v. Com., 400 Pa. 261 (Pa. 1960), *supra* note 159.

[179] See Preston v. South Penn Oil Co., 238 Pa. 301, 302 (Pa. 1913); Bundy v. Myers, 372 Pa. 583, (Pa. 1953); Highland v. Com., 400 Pa. 261 (Pa. 1960), *supra* note 160.

[180] See Hendler v. Lehigh Valley R. Co., 209 Pa. 256 (1904); Silver v. Bush, 213 Pa. 195 (Pa. 1906); and PAPCO, Inc. v. U.S., 814 F.Supp.2d 477 (W.D. Pa. 2011), *supra* note 165.

contained the reservation at issue. Again, deciding that the Marcellus Shale is not a mineral eliminates the possibility that the owner of the mineral estate without oil and gas rights also owns the natural gas contained within the Marcellus Shale. This aligns with the industry practice of securing oil and gas leases from the owner of the oil and natural gas interest and not the mineral estate owner when these two ownership interests are held by different parties.

Lastly, the court should decide that the owner of the Marcellus Shale does not own the natural gas contained within the Marcellus Shale. The coalbed gas at issue in the *Hoge* case and the natural gas contained within the Marcellus Shale are easily distinguishable as discussed earlier. Additionally, the Federal District Court for the Western District of Pennsylvania has also reached this same conclusion.[181] This decision will insure that all of the natural gas, except the coalbed methane contained within the coal seam, are owned by the owner of the natural gas rights. This avoids complicated proceedings concerning ownership of the Marcellus Shale and potentially problematic evidentiary issues that would occur if proof were required to show that all of the gas being produced is coming from within the Marcellus Shale.

Under this recommended answer, the Butlers are the sole, rightful owner of the natural gas contained within the Marcellus Shale because they are the owners of the natural gas interest. Additionally, this recommended answer would eliminate the need to address the claim that the Butlers are the owners of the Marcellus Shale gas through adverse possession because they would be the owners based upon their title to the property. In a broader perspective, this recommended answer insures that the owner of

[181] See Hoffman v. Arcelormittal Pristine Resources, 2011 WL 1791709, *5 (Slip Copy W.D. Pa. May 10, 2011).

the natural gas is the rightful owner of the natural gas within the Marcellus Shale. This answer not only aligns with current Pennsylvania precedent, but it also aligns with the industry's beliefs and leasing practices associated with the ownership of the Marcellus Shale natural gas. Thus, the negative implications and possibility of litigation resulting from those implications are eliminated.

VII. Summary

In sum, the *Butler v. Charles Powers Estate* case presents an interesting and important intersection of aged Pennsylvania precedent governing the law of the oil and natural gas industry. The Pennsylvania courts have the opportunity to maintain the status quo of the law and avoid potential far reaching negative implications that could result from straying from the current state of the law. Given the relatively early stages of the natural gas development from the Marcellus Shale it is important that the state of the law maintains a level of predictability. Therefore, for all the reasons stated throughout this paper, it is recommended that the Pennsylvania courts continue to follow the precedent of *Dunham, Hendler,* and *Hoge* in deciding the *Butler* case.