Marcellus Shale Natural Gas: Is It Or Is It Not A Mineral?

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On April 24, 2013, the Supreme Court of Pennsylvania issued its much anticipated opinion in Butler v. Charles Powers Estate, et. al [1] holding that the term “minerals” in a deed reservation pertaining to a property in Pennsylvania’s Marcellus Shale region does not include the natural gas contained in the shale below the surface of the property. Owners of rights to the Marcellus Shale natural gas stand to reap significant economic benefits as the extraction of this resource continues. This opinion has a profound effect on determining the ownership of those rights by clarifying how to interpret existing documents which conveyed or reserved mineral rights, as well as how to draft future documents intended to convey or reserve the rights to natural gas in the Marcellus Shale Formation in Pennsylvania.

In reaching its result, the Supreme Court of Pennsylvania in Butler reaffirmed the “vitality and the absoluteness” of the longstanding “Dunham Rule” in Pennsylvania[2]. The “Dunham Rule”, which has been continuously upheld in Pennsylvania courts for 131 years, is a “well established and relied upon rule of property that binds all situations in which a deed reservation does not expressly include oil or gas with the reservation”[3]. In 1960, the Supreme Court of Pennsylvania in Highland v. Commonwealth, 161 A.2d 390 (Pa. 1960) summarized in “plain and simple terms what over one hundred years of case law had combined to say:

If, in connection with a conveyance of land, there is a reservation or an exception of ‘minerals’ without any specific mention of natural gas or oil, a presumption, rebuttable in nature, arises that the word ‘minerals’ was not intended by the parties to include natural gas or oil. [...] To rebut the presumption [...] there must be clear and convincing evidence that the parties intended to include natural gas or oil within [minerals].”

In the recent dispute before the Supreme Court, a deed from 1881 reserved to the grantor the subsurface and removal rights of “one-half [of] the minerals and Petroleum Oils” contained beneath the subject property. Nowhere were the words “gas” or “natural gas” used. The current owners of the subject property, whose title was derived from the 1881 grantee, brought an action to quiet title in order to establish ownership of all of the minerals and petroleum oils, including the Marcellus Shale gas.

The Pennsylvania Supreme Court’s decision in Butler provides those involved in buying, selling, leasing, financing or insuring title to property in the Marcellus Shale region located in Pennsylvania with clarity that the rights to the natural gas within the Marcellus Shale Formation, and its resultant economic benefits, will continue to be decided on the common understanding of the meaning of the word “minerals” to laypersons in the 1830’s (i.e. a metallic substance), as opposed to on a current scientific basis. Absent clear and convincing evidence to the contrary, a general reservation in a deed using the word “minerals” will not suffice to include a reservation of natural gas which can be extracted from the Marcellus Shale, regardless of any scientific evidence, and despite the Pennsylvania Municipalities Planning Code which
categorizes natural gas as a “mineral”. To drill down further on language nuances, the Court in Butler indicated that had the appellee’s raised the argument at the trial court level about the use of the words “…and appurtenances” in the 1881 deed reservation, there may have been some merit to their argument.

The practical effect of the Butler decision validates the importance of a granular and detailed analysis of deed reservations and conveyances involved in transactions involving the Marcellus Shale Formation, keeping in mind the “Dunham Rule”.

[1]2013 WL 1749828 (Pa.)


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