

# ADMINISTRATIVE WATCH

ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



**Babst Calland**  
Attorneys at Law

[babstcalland.com](http://babstcalland.com)

**Pittsburgh, PA**

Two Gateway Center  
603 Stanwix Street  
Sixth Floor  
Pittsburgh PA 15222  
412-394-5400  
FAX 412-394-6576

**State College, PA**

Suite 302  
330 Innovation Blvd.  
State College, PA 16803  
814-867-8055  
FAX 814-867-8051

**Charleston, WV**

United Center  
500 Virginia Street East  
Charleston, WV 25301  
681-205-8888  
FAX 681-205-8814

**Sewell, NJ**

380-A Tylers Mill Road  
Sewell, NJ 08080  
856-256-2495  
FAX 412-586-1082

## **Butler v. Powers Estate Appealed to Pennsylvania Supreme Court: What is the Potential Resolution of the Future of the Dunham Rule as it Applies to Shale Gas?**

The future of Pennsylvania's Dunham Rule as it applies to shale gas could be resolved pursuant to a recently-filed appeal to the Pennsylvania Supreme Court of the Superior Court's ruling in the case of *Butler v. Powers Estate*.

On September 7, 2011, the Superior Court of Pennsylvania issued a ruling in the case of *John E. and Mary Josephine Butler v. Charles Powers Estate et al., William H. Pritchard and Craig L. Pritchard* (No. 1795 MDA 2010, 2011 PA Super 198) that raises questions about Pennsylvania's longstanding "Dunham Rule" as it applies to shale gas. Under the Dunham Rule, a long-standing judicially-recognized rule of property in Pennsylvania, there is a rebuttable presumption that the exception and reservation or conveyance of "minerals" in a deed does not include oil and gas.

The *Butler* case started by a complaint filed by John and Mary Butler in the Court of Common Pleas of Susquehanna County. The Butlers asserted ownership of all minerals and petroleum oils, by adverse possession, underlying a 244 acre tract of land in Susquehanna County, Pennsylvania, subject to an 1881 deed reservation by Charles Powers, a prior owner in the chain of title, of "one half the minerals and Petroleum Oils." Among Powers' heirs are William H. Pritchard and Craig L. Pritchard. The Pritchards took the position that they, as the heirs of Charles Powers, are the current owners of his one-half interest in the minerals underlying the land; that the Marcellus Shale underlying the land is a mineral; and that they therefore are the rightful owners of the gas within the Marcellus Shale. The Pritchards premised their arguments in part upon the theory that because coal is considered a mineral, and in Pennsylvania the owner of the coal generally also owns the coalbed methane contained in the coal, then by extension, the owner of the Marcellus Shale should own the gas contained within it because (as the Pritchards asserted) the Marcellus Shale, like coal, is a mineral.

The Butlers argued that the Pritchards had failed to state a claim upon which relief could be granted; that is, that the Pritchards' claim that Marcellus Shale gas is included in a reservation of minerals was not a legally cognizable claim. The Court of Common Pleas agreed with the Butlers, and the Pritchards appealed that decision to the Superior Court of Pennsylvania. The Superior Court disagreed with the Court of Common Pleas and sent the case back to the Court of Common Pleas for further proceedings. The Superior Court indicated that the evaluation of the Pritchards' claim should include considerations such as whether Marcellus Shale is a mineral, whether Marcellus Shale gas is conventional natural gas as traditionally defined in Pennsylvania, and whether Marcellus Shale is analogous to coal in terms of gas found within these formations.

(over)

It is important to note that the Superior Court did not rule on the merits of the Pritchards' claim of ownership of Marcellus Shale gas. The only issue on appeal in *Butler* was whether the Court of Common Pleas was wrong to dismiss the Pritchards' claims without further proceedings. So, the Superior Court's ruling is essentially a statement that it is *not impossible* as a matter of law that the Pritchards have set forth a valid claim to the Marcellus Shale and the gas within it. The Superior Court's ruling in the *Butler* case should not be mistaken as a statement by the Superior Court that the Pritchards are likely to succeed on the merits of their argument. Accordingly, the *Butler* case currently is not binding on courts as to the central question of ownership of shale and the gas within it.

However, for producers and property owners, the *Butler* case has created strong concern because of where it may lead. If the Court of Common Pleas returns an opinion or a verdict in favor of the mineral owners with respect to the Marcellus Shale gas, such a determination would encourage other mineral owners to bring similar claims in those circumstances in which there is a mineral severance prior to a gas severance, or no gas severance. Further, if such an opinion or verdict of the trial court is appealed to the Superior Court (which has already demonstrated a willingness to entertain theoretical arguments about the nature of a mineral without strong consideration of the policy implications), the Superior Court could issue an opinion in favor of the mineral owners that could have binding precedential effect.

John and Mary Butler have sought immediate Supreme Court review of the ruling of the Superior Court. If the Supreme Court accepts and hears the Butlers' appeal, the issues raised in *Butler* will be definitively decided by the Supreme Court. If the Supreme Court declines to hear the appeal, the case will proceed in the Court of Common Pleas in accordance with the opinion and order of the Superior Court.

Pennsylvania producers may wish to delay production (and possibly suspend ongoing production) on lands with mineral reservations like the one at issue in the *Butler* case until the case has made its way to a final, precedential, appellate outcome—hopefully an outcome that honors the longstanding Dunham Rule. However, if a delay in commencement of operations on a given tract could result in the expiration of the primary lease term, then (depending on the language of the lease) the leasehold could be lost. If operations on an already-producing leasehold (*i.e.*, outside the primary term and held by production) are halted, the lease could be lost absent a shut-in provision (or other comparable language) in the lease and payment of shut-in rental. Further, once production has begun, the halting of production cannot undo any trespass that has already occurred. A producer might choose to continue to operate the leasehold and hope for the best. Whether to delay planned operations or suspend active operations is a matter of assessment of business risk.

Unfortunately for Pennsylvania producers, this is unlikely to be the last instance of litigation that threatens the legal stability of the Marcellus Shale play, as the value of Marcellus Shale gas incentivizes those with a potential claim to gas to assert it, even if on novel legal grounds.

For more information regarding the Dunham Rule and issues relating to oil and gas leases, please contact Kevin E. Feigel at 412-394-6810 or [kfeigel@babstcalland.com](mailto:kfeigel@babstcalland.com) or Arnold L. Schulberg at 304-760-2345 or [aschulberg@suddenlink.net](mailto:aschulberg@suddenlink.net).