

PENNSYLVANIA STATE



The Dickinson
School of Law

Agricultural Law Resource and Reference Center
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Marcellus Shale in the Courts: Oil and Gas Case Law Update

Marcellus Summit 2011

State College, Pennsylvania
November 17, 2011





History of the Agricultural Law Center

- **Established through enactment of the Agricultural Law Resource and Reference Center Act on January 29, 1998**
 - **House Bill 1345 (Act 11 of 1998)**
 - **Codified at 3 Pa. Stat. 2201 to 2209**



Act 11 of 1998 Legislative Findings

- “The legal issues affecting agriculture . . . are becoming increasingly complex”
- “At present there exists no central and effective system for compiling agricultural law materials . . . and disseminating this information to affected parties . . .”
- “The alliance between [DSL and PSU CAS] . . . creates a unique opportunity.”



Purpose of Agricultural Law Center

- **Section 2205**
 - “to serve as a resource on agricultural law and related issues for farmers and agribusinesses, attorneys, officials at all levels of government, community groups, and the public.”



Dissemination of Information

- Presentations
- Educational Programs
- Publications
- The Agricultural Law Brief
- Website
- Blogs



Web-based Resources

- Marcellus Shale Resource Area
 - www.law.psu.edu/marcellus
- Marcellus Shale
 - www.pennstatelawmarcellusblog.com



Minimum Royalty Act litigation

- **Hundreds, possibly thousands, of landowners sought to terminate their lease agreements in various state and federal litigation.**
- **General issue: Did reduction of royalty to pay for post-production costs violate GMRA?**



58 P.S. 33 –

Guarantee of Minimum Royalties

- **A lease or other such agreement conveying the right to remove or recover oil, natural gas or gas of 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.**



Kilmer v. Elexco Land Services

- **Supreme Court opinion issued on March 24, 2010.**
 - **GMRA “should be read to permit the calculation of royalties at the wellhead, as provided by the net-back method used in the lease.”**



Kilmer progeny

- ***Ulmer v. Chesapeake*** (M.D. Pa. Apr. 8, 2011)
 - Argument that *Kilmer* was not applicable because post-production language in lease was different than that in *Kilmer*
 - “[I]t is our considered view that *Kilmer* was not meant to be read narrowly.”



Kilmer progeny

- ***Pollock v. Energy Corp. of America*** (W.D. Pa. June 27, 2011)
 - Claim that ECA failed to pay royalties on gas lost or unaccounted for before point of sale
 - “Kilmer is properly read in light of the fact that the Pennsylvania Supreme Court granted extraordinary jurisdiction to resolve the purely legal question . . .”



Kilmer progeny

- ***Pollock v. Energy Corp. of America*** (W.D. Pa. June 27, 2011)
 - Court denied motion to dismiss fraudulent concealment claim and demand for accounting arising from alleged underpayment of royalty.



Kilmer progeny

- ***Rodriguez v. Anadarko*** (M.D. Pa. Dec. 1, 2010)
 - 2006 / 2007 leases paying \$5/acre
 - GMRA claim resolved by *Kilmer*
 - Motion to dismiss denied; parole evidence allowed for claims of fraudulent inducement, misrepresentation, undue influence, and tortious interference with contractual relationship.



Kilmer progeny

- ***Lauchle v. The Keeton Group***
(M.D. Pa. March 8, 2011)
 - Denied claim for equitable extension of lease following litigation of GMRA claim.



Kilmer progeny

- ***Frederick v. Range Resources***
(W.D. Pa. March 17, 2011)
 - **Complaint amended post-Kilmer to challenge amounts deducted from royalties:**
 - **Using point-of-sale volume**
 - **Adjusting volumes using temperature and pressure**
 - **Deducting marketing costs**
 - **Withholding a management fee**
 - **Failing to pay royalty on liquid hydrocarbons**



Kilmer progeny

- ***Frederick v. Range Resources***
(W.D. Pa. March 17, 2011)
 - Court approved settlement providing for 14% of disputed amounts
 - Initial payment of \$1.7 million
 - Amended lease to address manner of future payments = approximate value of > \$20 million



Other Leasing Issues

- ***Standefer v. Dudley Land Co.***
 - **Delayed payment of bonus**
 - **Not a basis for forfeiture of lease**
 - **Equity does not favor forfeiture**
 - **Not a material breach**



Other Leasing Issues

- ***Standefer v. Dudley Land Co.***
 - **Fraudulent inducement**
 - Told there was a deadline to sign
 - Told \$100/acre bonus was highest anyone was receiving
 - BUT – attorney told her there were higher bonuses being paid
 - Court ruled there was no justifiable reliance



Other Leasing Issues

- ***Shafer v. Range Resources***
 - **Management approval**
 - **Lease signed by landowners, but not by Range Resources**
 - **Motion to dismiss denied as landowners alleged lease was accepted**
 - **But, “statute of frauds will pose a substantial obstacle” to landowner’s recovery**



Delay Rental Payments

- ***Hite v. Falcon Partners*** (Pa. Super. Jan. 4, 2011)
 - **Term:**
 - **One year and “as long thereafter as oil or gas or either of them is produced from the Property, or as operations continue for the production of oil or gas, or as Lessee shall continue to pay Lessors two dollars per acre as delayed rentals, or until all oil and gas has been removed from the Property, whichever shall last occur.”**
 - **Court looked at “well-settled meaning” of delay rentals rather than plain language of lease.**



Other Leasing Issues

- ***T.W. Phillips v. Jedlicka***
 - **Expiration of secondary term**
 - Lease was executed in 1928
 - Lease extended so long as “oil or gas is produced in paying quantities.”
 - Wells were drilled in 1929, 1986, 2004, and 2005.
 - Jedlicka argued that lease terminated in 1959 because lease was not profitable in that year.



Other Leasing Issues

- ***T.W. Phillips v. Jedlicka***
 - Issue before Supreme Court
 - Did the Superior Court misapply [*Young v. Forest Oil*] by holding that Pennsylvania employs a purely subjective test to determine whether an oil or gas lease has produced “in paying quantities.”
 - Argument was held on April 13, 2010.



Surface Estate Issues

- ***Minard Run Oil Co. v. USFS***
 - Opinion based on PA law regarding severed estates.
 - USFS did not have authority to require environmental review.



Surface Impact Issues

- ***Fiorentino v. Cabot Oil & Gas***
 - **Applicability of strict liability standard**
 - **Underground storage tanks at gas station are not abnormally dangerous**
 - **Petroleum pipeline is not abnormally dangerous**
 - **Record not sufficiently developed to determine whether strict liability applies to gas well drilling activities.**



Butler v. Powers Estate

- **Superior Court opinion – Sept. 7, 2011**
 - **Addressed ownership of Marcellus Shale gas rights where there has been a “mineral reservation”**
 - **Case has been remanded to Susquehanna County Court of Common Pleas for determination of whether Marcellus Shale is a mineral.**



Butler v. Powers Estate

- Dunham's rule v. coal bed methane
- Impact of case
- Supreme Court appeal



PAPCO v. US Forest Service

- Sandstone was regarded as a commercially valuable mineral at time of conveyance and thus is within scope of mineral reservation.



Pennsylvania Public Utility Commission

- **Laser Northeast Gathering Co., LLC**
 - **Jan. 19, 2010 – Application filed for public utility status**
 - **Nov. 22, 2010 – Administrative Law Judge recommendation to deny petition**
 - **June 14, 2011 – PUC refused to adopt ALJ recommendation; remanded case for determination of whether granting application is “necessary or proper for the service, accommodation, convenience, or safety of the public.”**
 - **Aug. 25, 2011 - PUC issues clarification of public utility standard.**
 - **Sept. 8, 2011 – Laser Northeast withdraws application**



Pennsylvania Public Utility Commission

- **Pentex Pipeline Co.**
 - Mar. 8, 2011 – application filed
 - Oct. 7, 2011 – public hearing
- **Peregrine Keystone Pipeline Co.**
 - Sept. 17, 2010 – application filed
 - Oct. 26, 2011 – public hearing



New York case law

- ***Wiser v. Enervest***
 - 1999 and 2000 – leases executed with primary term of ten years
 - July 2008 – NY Governor issues memorandum requiring environmental study – *de facto* moratorium?
 - Issue – application of force majeure clause to delay rental payment obligation



Wiser v. Enervest

- **Delay rental clause**
 - “This lease is made on the condition that it will become null and void and all rights hereunder shall cease and terminate unless [work commences] or unless the Lessee shall pay to the Lessor, in advance, every twelve (12) months until work for the drilling of a well is commenced, the sum of . . .”



Wiser v. Enervest

- **Court ruling**
 - **If force majeure applies, it extends primary terms; it does not convert lease into secondary term**
 - **Failure to make delay rental payments automatically terminated lease**



Ohio case law

- ***Natale v. Everflow***
 - Neighboring landowner claimed oil and gas well and storage tanks constituted a private nuisance.
 - Court affirmed entry of summary judgment in favor of gas company.
 - “[I]n order to maintain a private nuisance claim, appellant would have to prove the well was operating in an unreasonable manner, i.e., outside the normal limits allowed by [law.]”



The Agricultural Law Resource and Reference Center

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Other Resources:

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