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Pennsylvania Oil and Gas Update

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PENNSYLVANIA OIL AND GAS UPDATE

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I. ACT 13 AND *ROBINSON V. COMMONWEALTH*

Act 13 of 2012 repealed the Oil and Gas Act, former 58 P.S. § 601.101 *et seq.*, and added six new chapters to title 58 of the Pennsylvania Consolidated Statutes including, *inter alia*, chapter 23 ("Unconventional Gas Well Fee"); chapter 32 ("Development"); chapter 33 ("Local Ordinances Relating to Oil and Gas Operations"); and chapter 35 ("Responsibility for Fee").[2]

Chapter 23 provides for county-imposed unconventional well fees.[3] The fees are remitted to a state fund and are distributed to local coun-

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2. Act of Feb. 14, 2012, Pub. L. 87, No. 2012-13, 2012 Pa. Legis. Serv. 2012-13 (West) (codified at 58 PA. CONS. STAT. ANN. §§ 2301–3504 (West, Westlaw through 2012 Legis. Sess.), *available at* http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/2012/0/0013..HTM.

3. 58 PA. CONS. STAT. ANN. § 2302(a) (West, Westlaw through 2012 Legis. Sess.).

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ties, municipalities, conservation districts, the State Conservation Commission, the Fish and Boat Commission, the Department of Environmental Protection ("DEP"), the Public Utility Commission ("PUC"), the Pennsylvania Emergency Management Agency, the Office of State Fire Commissioner, the Department of Transportation, and the Housing Affordability and Rehabilitation Enhancement Fund.[4] Part of the fees are also distributed to the Marcellus Legacy Fund, which distributes the funds statewide for various environmental and infrastructure projects.[5] Counties that do not impose fees are ineligible to receive any fee funds.[6] Payment of fees is regulated by the PUC.[7] According to chapter 35, it is against public policy and prohibited by statute for operators to pass on the costs of the fees to mineral owners by agreement.[8]

Changes to the Oil and Gas Act under the new chapter 32 on Development include increased setbacks for unconventional wells from buildings and water sources,[9] increased bonding requirements,[10] well reporting requirements,[11] disclosure of hydraulic fracturing chemicals (with trade secret confidentiality provisions),[12] additional party permit notifications,[13] and increasing the area where there is a presumption of water contamination by an operator.[14]

Chapter 33 provides for preemption on local regulation of oil and gas operations[15] and environmental regulation of oil and gas operations.[16] Section 3304 ("Uniformity of Local Ordinances") provides that permitted local ordinances (such as zoning ordinances pursuant to the Municipalities Planning Code, 53 P.S. § 10101 *et seq.*) must provide for reasonable development of oil and gas resources, and section 3304 only permits local ordinances that (1) permit location assessment operations, including seismic operations; (2) impose conditions on oil and gas development no more stringent than those imposed on other uses in a district; (3) authorize oil and gas operations as permitted uses in all districts (excepting impoundment, processing, and compressor

4. 58 PA. CONS. STAT. ANN. § 2314 (West, Westlaw through 2012 Legis. Sess.).
5. 58 PA. CONS. STAT. ANN. § 2315(a.1) (West, Westlaw through 2012 Legis. Sess.).
6. 58 PA. CONS. STAT. ANN. § 2302(a.3).
7. 58 PA. CONS. STAT. ANN. § 2307(a) (West, Westlaw through 2012 Legis. Sess.).
8. 58 PA. CONS. STAT. ANN. § 3502 (West, Westlaw through 2012 Legis. Sess.).
9. 58 PA. CONS. STAT. ANN. § 3215 (West, Westlaw through 2012 Legis. Sess.).
10. 58 PA. CONS. STAT. ANN. § 3225 (West, Westlaw through 2012 Legis. Sess.). Bonding requirements for conventional wells were subsequently restored to their former levels by the Act of July 2, 2012, Pub. L. 823, No. 87, § 9, 2012 Pa. Sess. law 2012-87 (West). 72 PA. STAT. ANN. § 1606-E (West, Westlaw through 2012 Legis. Sess.).
11. 58 PA. CONS. STAT. ANN. § 3222 (West, Westlaw through 2012 Legis. Sess.).
12. 58 PA. CONS. STAT. ANN. § 3222.1 (West, Westlaw through 2012 Legis. Sess.).
13. 58 PA. CONS. STAT. ANN. § 3211(b.1) (West, Westlaw through 2012 Legis. Sess.).
14. 58 PA. CONS. STAT. ANN. § 3218(c) (West, Westlaw through 2012 Legis. Sess.).
15. 58 PA. CONS. STAT. ANN. § 3302 (West, Westlaw through 2012 Legis. Sess.).
16. 58 PA. CONS. STAT. ANN. § 3303 (West, Westlaw through 2012 Legis. Sess.).

operations), except that operations in residential districts may be required to meet additional setback requirements; (4) authorize impoundments, compressor stations, and processing plants as permitted uses in certain districts, subject to additional setback and noise restrictions; and (5) do not impose hours of operation restrictions, additional road use restrictions, or additional setback requirements more stringent than those in industrial districts in the municipality.[17]

Section 3305 provides for advisory local ordinance reviews by the PUC as well as challenges by interested parties, subject to *de novo* appellate court review.[18] Alternatively, parties may bring an initial challenge directly with the commonwealth court.[19] Attorney fees may be imposed on municipalities that imposed ordinances with reckless disregard for the requirements of this chapter enumerated, *supra*, as well as upon challengers for frivolous challenges.[20] After an order has been declared invalid by the PUC or a court, the municipality is ineligible to receive any well fees.[21]

In *Robinson Township v. Pennsylvania*, municipalities, environmental advocates, local officials, and a physician brought a petition against the commonwealth and assorted state agencies and employees to declare a number of provisions in Act 13 unconstitutional under the federal and Pennsylvania constitutions for a variety of reasons.[22] The respondents filed preliminary objections, and cross-motions for summary relief, challenging petitioners' standing and arguing that petitioners' claims were legally insufficient.[23]

The commonwealth court cited the general standing rule that "a party has standing to sue if he or she has a 'substantial, direct, and immediate interest' in the subject matter of the litigation."[24] The court noted an exception to this doctrine:

> [A] party can challenge the legality and constitutionality of a statute on the putative rights of other persons or entities when '(1) the relationship of the litigant to the third party is such that the enjoyment of the right by the third party is inextricably bound with the activity the litigant seeks to pursue; *and* (2) there is some obstacle to the third party's assertion of his own right.'[25]

17. 58 PA. CONS. STAT. ANN. § 3304(b)(1)–(5) (West, Westlaw through 2012 Legis. Sess.).
18. 58 PA. CONS. STAT. ANN. § 3305(a)–(c) (West, Westlaw through 2012 Legis. Sess.).
19. 58 PA. CONS. STAT. ANN. § 3306 (West, Westlaw through 2012 Legis. Sess.).
20. 58 PA. CONS. STAT. ANN. § 3307 (West, Westlaw through 2012 Legis. Sess.).
21. 58 PA. CONS. STAT. ANN. § 3308 (West, Westlaw through 2012 Legis. Sess.).
22. Robinson Twp. v. Commonwealth, 52 A.3d 463, 468–71 (Pa. Commw. Ct. 2012).
23. *Id.* at 471.
24. *Id.* at 472 (citing William Penn Parking Garage, Inc. v. Pittsburg, 346 A.2d 269, 281 (Pa. 1975)).
25. *Id.* at 473 (quoting Phila. Facilities Mgmt. Corp. v. Biester, 431 A.2d 1123, 1131–32 (Pa. Commw. Ct. 1981)) (emphasis added).

The commonwealth court held that the municipalities had standing:

> Specifically, 58 Pa. C.S. § 3304 requires *uniformity of local ordinances* to allow for the reasonable development of oil and gas resources. That will require each municipality to take specific action and ensure its ordinance complies with Act 13 so that an owner or operator of an oil or gas operation can utilize the area permitted in the zoning district. If the municipalities do not take action to enact what they contend are unconstitutional amendments to their zoning ordinances, they will not be entitled to any impact fees to which they may otherwise be entitled and could be subject to actions brought by the gas operators.[26]

The commonwealth court similarly held that the municipal officials had standing because they would be required to vote for what they believe to be unconstitutional zoning amendments.[27] The commonwealth court dismissed the environmental advocates and the physician for lack of standing.[28] The commonwealth court also preliminarily ruled that the dispute was justiciable, as it did not involve a political issue.[29]

The commonwealth court then considered petitioners' claims that the conditions on local zoning in section 3304 violated substantive due process and exceeded the commonwealth's police power.[30] The commonwealth court first noted that "[z]oning is an extension of the concept of a public nuisance which protects property owners from activities that interfere with the use and enjoyment of their property," and that "[s]o there is not a 'pig in the parlor instead of the barnyard,' zoning classifications contained in the zoning ordinance are based on a process of planning with public input and hearings that implement a rational plan of development."[31] The commonwealth court then stated that to be constitutional under article 1, section 1 of the Pennsylvania Constitution and Fourteenth Amendment to the United States Constitution, zoning "must be directed toward the community as a whole, concerned with the public interest generally, and justified by a *balancing* of community costs and benefits. These considerations have been summarized as requiring that *zoning be in conformance with a comprehensive plan* for growth and development of the community."[32]

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26. *Id.* at 476 (emphasis in original). The court also stated in dicta that the municipalities would have standing to assert the rights of property owners under *Biester*. *Id.*

27. *Id.* at 475–76.

28. *Id.* at 476–78.

29. *Id.* at 478–79.

30. *Id.* at 480–85.

31. *Id.* at 481–82 (quoting City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 732–33 (1995)).

32. *Id.* at 483 (emphasis added) (quoting *In re* Realen Valley Forge Greenes Assocs., 838 A.2d 718, 728 (2003)).

The commonwealth court then concluded that section 3304 violated substantive due process:

> In this case, by requiring municipalities to violate their comprehensive plans for growth and development, 58 Pa. C.S. § 3304 violates substantive due process because it does not protect the interests of neighboring property owners from harm, alters the character of neighborhoods and makes irrational classifications—irrational because it requires municipalities to allow all zones, drilling operations and impoundments, gas compressor stations, storage and use of explosives in all zoning districts, and applies industrial criteria to restrictions on height of structures, screening and fencing, lighting and noise. Succinctly, 58 Pa.C.S. § 3304 is a requirement that zoning ordinances be amended in violation of the basic precept that 'Land-use restrictions designate districts in which only compatible uses are allowed and incompatible uses are excluded.'[33]

The commonwealth court granted the commonwealth's preliminary objections to the petitioners' claims that Act 13 was an unconstitutional special law, permitted unconstitutional takings, violated article 1, section 27 of the Pennsylvania Constitution,[34] violated the separation of powers under the Pennsylvania Constitution, and was unconstitutional. The commonwealth court granted summary judgment in favor of the petitioners' claim that section 3215(b)(4)[35] violated the non-delegation doctrine because it permits the DEP to waive drill-site water source setback rules without providing any guidance as to when the setbacks may be waived.

In its dissent, the minority contended that the restrictions on local zoning ordinances did not violate substantive due process because the restrictions on ordinances under section 3304 struck a permissible balance between the need to harvest natural resources and imposing restrictions on operations based on type, location, and noise level.

Both petitioners and respondents have filed cross-appeals to the Pennsylvania Supreme Court, but the Court has not yet issued an order granting or denying the appeal.

II. *BUTLER V. CHARLES POWERS ESTATE* AND THE DUNHAM RULE

In *Butler v. Charles Powers Estate*, on July 20, 2009, plaintiffs John E. Butler and Mary Josephine Butler filed a complaint to quiet title to

33. *Id.* at 484–85 (quoting *City of Edmonds*, 514 U.S. at 732 (internal quotation omitted)).

34. PA. CONST. art. 1, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.").

35. 58 PA. CONS. STAT. ANN. § 3215 (West, Westlaw through 2012 Legis. Sess.).

a 244-acre tract against the estate of Charles Powers (the "Estate").[36] The Butlers "alleged ownership of the land in fee simple and ownership of all 'minerals and petroleum oils' based on adverse possession."[37] After notice by publication was given, representatives of the Estate appeared and filed a motion for a declaratory judgment that they owned half the gas in the Marcellus Shale in and under the tract based on reservation of "one half the minerals and Petroleum Oils" in a deed recorded in 1881.[38] The Butlers filed preliminary objections claiming that the representatives of the estate "(1) lacked standing; (2) failed to conform to rule or law by filing a motion for declaratory judgment instead of a separate declaratory judgment action; and (3) failed to state a claim upon which relief can be granted."[39] The court of common pleas of Susquehanna County granted the objection in the nature of demurrer, holding that the reservation did not reserve the gas in the Marcellus Shale as a matter of law, relying upon the rule of *Dunham v. Kirkpatrick,* (the "Dunham Rule").[40] The trial court stayed the objection as to standing and dismissed the motion for declaratory judgment.[41]

After an initial appeal was remanded to determine the standing issue, which was resolved in favor of the estate's standing, the Estate appealed the issue of whether a reservation of one half of the minerals reserved one half of the oil and gas in the Marcellus Shale. The Estate argued that the Pennsylvania Supreme Court's prior decisions that a reservation of minerals did not reserve oil and gas in *Dunham, supra,*[42] and *Highland v. Commonwealth,*[43] were not controlling on the basis that the 1881 reservation preceded the *Dunham* decision and that gas from the Marcellus Shale was different from conventional gas.[44] The Estate also cited *U.S. Steel Corp. v. Hoge*[45] for the proposition that "whoever owns the shale, owns the gas."[46]

First, the superior court reviewed the *Dunham* decision, which held that a reservation of minerals did not include the oil under the popular meaning of the term "minerals." Next, the court reviewed the *Highland* decision, which restated the Dunham Rule as follows:

36. Butler v. Charles Powers Estate, 29 A.3d 35, 37 (Pa. Super. Ct. 2011), *appeal granted sub nom.* Butler v. Powers Estate *ex rel.* Warren, 41 A.3d 854 (Pa. 2012).

37. *Id.* at 37.

38. *Id.*

39. *Id.*

40. *Id.* at 41–43 (citing Dunham and Shortt v. Kirkpatrick, 101 Pa. 36, 41–43 (Pa. 1882)).

41. *Id.* at 37–38.

42. *Dunham,* 101 Pa. at 41–43.

43. Highland v. Commonwealth, 161 A.2d 390, 398–99 (Pa. 1960).

44. *Butler,* 29 A.3d at 40.

45. U.S. Steel Corp. v. Hoge, 468 A.2d 1380, 1385 (Pa. 1983) (holding that a coal owner owns the coalbed methane).

46. *Butler,* 29 A.3d at 40.

> The rule may be briefly stated: 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. . . . 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. 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.[47]

The superior court also examined the *Hoge* case's holding that "such gas as is present in coal must necessarily belong to the owner of the coal."[48] The superior court then reversed and remanded the trial court's holding:

> The *Dunham* and *Highland* decisions do not end the analysis, absent a more sufficient understanding of whether, *inter alia* (1) Marcellus shale constitutes a 'mineral;' (2) Marcellus shale gas 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. On this record, we are unable to say with certainty that Appellants have no cognizable claim based on the facts averred. Consequently, the parties should have the opportunity to obtain appropriate experts on whether Marcellus shale constitutes a type of mineral such that the gas in it falls within the deed's reservation.[49]

The Butlers appealed this decision to the Pennsylvania Supreme Court, and allocator was granted on April 3, 2012, as to the following issue:

> 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' intent can rebut the presumption to include non-metallic substances.[50]

As of February 20, 2013, the parties have filed briefs, and arguments were held on October 17, 2012, but no decision has been issued.

47. *Id.* at 41–42 (quoting *Highland*, 161 A.2d at 398–99).
48. *Id.* at 42 (quoting *U.S. Steel Corp.*, 468 A.2d at 1383).
49. *Id.* (quoting *U.S. Steel Corp.*, 468 A.2d at 1383).
50. Butler v. Powers Estate *ex rel.* Warren, 41 A.3d 854 (Pa. 2012).

III. *T.W. PHILLIPS GAS & OIL CO. V. JEDLICKA*

T.W. Phillips Gas & Oil Co. v. Jedlicka involved a dispute between a lessor successor ("Lessor") and a lessee assignee ("Lessee") as to whether a 1928 oil and gas lease in its secondary term was producing in "paying quantities."[51] Lessee brought a declaratory judgment action in 2005 seeking an order that the lease was still held by production.[52] Lessors defended on the grounds that the lease had terminated because of periods during which operating costs exceeded operating revenues. The court of common pleas entered judgment in favor of Lessee, relying on the Pennsylvania Supreme Court's ruling in *Young v. Forest Oil Co.*[53] The trial court rejected the application of an objective test, as urged by Lessor.[54] This decision was affirmed by the superior court in *T.W. Phillips Gas & Oil Co. v. Jedlicka.*[55] The superior court held that *Young* remained good law and that Lessor failed to prove the bad faith of Lessee.[56]

The Court began its review by noting that the lease's *habendum* clause provided that it would continue past the end of the primary term "as long thereafter as oil or gas is produced in paying quantities, or operations for oil or gas are being conducted thereon," and that the term "paying quantities" was not defined in the lease.

The Court then quoted its holding in *Young*:

> But if a well, being down, pays a profit,—even a small one, over the operating expenses,—it is producing in 'paying quantities,' though it may never repay its cost, and the operation as a whole may result in a loss. Few wells, except the very largest, repay cost under a considerable time; many never do; but that is no reason why the first loss should not be reduced by profits, however small, in continuing to operate. The phrase 'paying quantities,' therefore, is to be construed with reference to the operator, and by his judgment when exercised in good faith.[57]

The Pennsylvania Supreme Court rejected Lessor's argument that it adopt an objective test, first on the grounds that it misconstrued *Young*, which clearly requires consideration of a lessee's good faith, but also was problematic in that any objective test would need to choose an arbitrary length of time to determine whether production was in paying quantities.[58] The Court instead concluded that under

51. T.W. Phillips Gas & Oil Co. v. Jedlicka, 42 A.3d 261, 263–64 (Pa. 2012).
52. *Id.* at 264.
53. *Id.* at 265–66 (relying on Young v. Forest Oil Co., 45 A. 121 (Pa. 1899) (holding that consideration should be given to a lessee's good faith judgment when determining whether oil was produced in paying quantities)).
54. *Id.* at 266.
55. T.W. Phillips Gas & Oil Co. v. Jedlicka, 964 A.2d 13, 19 (Pa. Super. Ct. 2008), *aff'g* No. 10362-CD-2005 (Pa. Ct. Com. Pl. 2005).
56. *T.W. Phillips Gas & Oil Co.*, 42 A.3d at 266.
57. *Id.* at 270.
58. *Id.* at 272.

Young, "even the determination of what constitutes a 'reasonable time period' by which to evaluate whether a well has produced in paying quantities must be based on the unique circumstances of each individual case, and be driven by consideration of the good faith judgment of the operator."[59]

Looking to the law in other jurisdictions, the Court determined that "a majority of jurisdictions apply a subjective approach and will look to a number of factors and relevant circumstances to determine whether or not a prudent lessee would continue to operate the lease for profit and not for speculation."[60]

The Pennsylvania Supreme Court stated the test for whether a lease is producing in "paying quantities" as follows:

> [I]f a well consistently pays a profit, however small, over operating expenses, it will be deemed to have produced in paying quantities. Where, however, production on a well has been marginal or sporadic, such that, over some period, the well's profits do not exceed its operating expenses, a determination of whether the well has produced in paying quantities requires consideration of the operator's good faith judgment in maintaining operation of the well. In assessing whether an operator has exercised his judgment in good faith in this regard, a court must consider the reasonableness of the time period during which the operator has continued his operation of the well in an effort to reestablish the well's profitability.[61]

The Court concluded that Lessor's evidence of a single-year loss over a period of more than forty years was insufficient evidence of bad faith and noted that even Lessor's own expert testified that he would have continued to operate the wells.[62] The Pennsylvania Supreme Court affirmed the order of the superior court. Justice Eakin filed a concurring judgment, and Justice Saylor filed a dissenting opinion, in which he argued that the court should adopt a hybrid test, in which the first prong is whether profits exceed ongoing expenses, and only if this first prong is met, consider under the second prong whether Lessor can overcome the presumption of Lessee's good faith.[63]

IV. *MINARD RUN OIL CO. V. UNITED STATES FOREST SERVICE*

Minard Run Oil Co. v. United States Forest Service, as amended on March 7, 2012, involved a dispute between severed oil and gas owners in the Allegheny National Forest ("ANF") and the United States Forest Service ("USFS"), as well as agency officials and environmental

59. *Id.* at 276.
60. *Id.* at 274 (quoting RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS 298 (3d ed. 1991)).
61. *Id.* at 276–77.
62. *Id.* at 277.
63. *Id.* at 278–79.

advocates.[64] Under established, cooperative practices dating from 1980, mineral owners would give sixty-day notice of their drilling plans to USFS officials, and the USFS would issue Notices to Proceed ("NTP") with operations.[65] However, in 2008, environmental advocates brought a lawsuit seeking a declaration that the USFS was required by the National Environmental Policy Act of 1969 ("NEPA"), under U.S.C. § 4321, to conduct an environmental impact study ("EIS") before issuing NTP.[66] During the pendency of the litigation, the USFS issued a moratorium on new NTP while a forest-wide EIS could be conducted. The USFS eventually settled with the environmental advocates, despite the objections of the Pennsylvania Independent Oil and Gas Association and the Allegheny Forest Alliance. The settlement agreement provided, *inter alia,* that

> [the Service] agrees that it shall undertake appropriate NEPA analysis prior to issuing Notices to Proceed, or any other instrument authorizing access to and surface occupancy of the Forest for oil and gas projects on split estates including both reserved and outstanding mineral interests. Appropriate NEPA analysis shall consist of the use of a categorical exclusion or the preparation of an Environmental Assessment or an Environmental Impact Assessment.[67]

ANF Forest Supervisor Leanne Marten then issued a statement that there would be a moratorium on approval of new drilling until a forest-wide environmental assessment was completed ("Marten Statement"). The USFS also took the position that its consent was necessary for any timber removal and that any attempt to conduct new drilling without a NTP would be met with a civil enforcement action or criminal penalties.[68]

Subsequently, an oil and gas operator, numerous industry groups, and the County of Warren brought an action to enjoin the settlement agreement. The action challenged the ban on drilling in the ANF as exceeding the USFS authority and to be in violation of both NEPA and the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* ("APA").[69] After holding a hearing on a preliminary injunction, the district court issued an order granting the preliminary injunction on the settlement agreement. The district court held that the drilling ban was "final agency action" subject to review under the APA and that it was instituted without complying with the APA's notice and comment procedures. The district court also held that the issuing of NTP was not a major federal action subject to review under NEPA.[70]

64. Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236, 241–42 (3d Cir. 2011).
65. *Id.* at 244.
66. *See* FSEEE v. U.S. Forest Serv., No. 08–323, 2009 WL 1324154, at *1 (W.D. Pa. May 12, 2009).
67. *Minard Run Oil Co.*, 670 F.3d at 245.
68. *Id.* at 245–46.
69. *Id.* at 246.
70. *Id.* at 246–47.

The Third Circuit review began its analysis by restating the standards for "final agency action" under the APA: "First, the action must mark the 'consummation' of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[71] The Third Circuit concluded that the Marten Statement represented the consummation of the agency's decision-making process because there was no claim by the USFS that it would revisit the moratorium until the EIS was completed and the ban ended.[72] The Third Circuit also concluded that the moratorium had significant legal consequences for mineral owners, who would be unable to conduct any new drilling without facing criminal penalties.[73] Therefore, the Third Circuit concluded that the moratorium was "final agency action" subject to review under the APA and that the APA's notice and comment requirements had not been met.[74]

Next, the Third Circuit considered whether the issuance of NTP was a "major federal action" triggering review under NEPA. After reviewing the Weeks Act, the statute creating the authority for the government purchase of the land in the Allegheny National Forest, the court concluded that the only rules and regulations applying to the reserved and outstanding mineral interests severed prior to the government's purchase must be expressed in the instrument creating the reserved interest.[75] The Third Circuit also noted that this conclusion is consistent with Pennsylvania law, under which "a surface owner has no right to determine what constitutes reasonable use in the first instance, and a mineral rights owner is under no obligation to obtain the surface owner's approval prior to accessing the surface to extract mineral rights."[76] The court therefore concluded that the plaintiffs were likely to succeed on the merits of their challenge.

The Third Circuit additionally held that the plaintiffs had shown a likelihood of irreparable injury because oil and gas may be lost under the rule of capture[77] and because of the risk of business threatening economic losses.[78] Finally, the court held that the USFS had failed to show that current development was greater than that in earlier drilling cycles and affirmed the preliminary injunction.[79]

71. *Id.* at 247 (quoting TSG Inc. v. EPA, 538 F.3d 264, 267 (3d Cir. 2008)).
72. *Id.* at 247–48.
73. *Id.* at 248.
74. *Id.* at 249, 255.
75. *Id.* at 252 (citing United States v. Srnsky, 271 F.3d 595, 602 (4th Cir. 2001)).
76. *Id.* at 253 (citing Belden & Blake Corp. v. Commonwealth, 969 A.2d 528, 532 (Pa. 2009)).
77. *Id.* at 256 (citing Barnard v. Monongahela Natural Gas Co., 65 A. 801, 802 (Pa. 1907)).
78. *Id.* at 255 (citing Vaqueria Tres Monjitas, Inc. v. Irizarry, 587 F.3d 464, 485 (1st Cir. 2009)).
79. *Id.*

V. *CHESAPEAKE APPALACHIA, LLC v. GOLDEN* AND THE PENNSYLVANIA RECORDING ACT

In *Chesapeake Appalachia, LLC v. Golden*, plaintiff operator brought an action against the recorder of deeds of Wayne County, Pennsylvania, seeking a declaratory judgment and an injunction relating to the recorder's refusal to record oil and gas lease assignments assigning multiple leases.[80] The court of common pleas of Wayne County granted judgment in favor of the plaintiff, ordering the recorder to accept multiple lease assignments for recording.[81] The recorder appealed, and the commonwealth court affirmed.[82] The commonwealth court began its analysis by noting that the Recording Act requires that the recorder record properly acknowledged instruments upon submission.[83] The court cited a decision from the Middle District of Pennsylvania stating that the recorder's role is purely ministerial in nature:

> The only situations in which a Recorder may refuse to record a document presented to him are where the appropriate fee is not paid, where the document is not of the type that is statutorily entitled to recording . . . and where the document on its face lacks a proper acknowledgment. The Recorder is truly just a 'custodian' of documents.[84]

The recorder contended that multiple lease assignments would not permit her to record the property owners of the relevant parcels as direct parties and that indexing each assignment with the property owner was required for the record to constitute constructive notice under title 21, section 358(2) of the Pennsylvania Statutes, which requires, *inter alia*, that an instrument be "indexed properly as to the party in all alphabetical indices."[85] The commonwealth court rejected this assertion:

> The Recorder has not here asserted any legal authority for the proposition that anyone other than the assignor and the assignee should properly be considered "the party" for purposes of indexing an assignment of a lease. Therefore, the Recorder's argument that she properly exercised her discretion in rejecting Chesapeake's multiple lease assignments for recording also lacks merit.[86]

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80. Chesapeake Appalachia, LLC v. Golden, 35 A.3d 1277, 1279 (Pa. Commw. Ct. 2012).

81. *Id.* at 1280.

82. *Id.* at 1280, 1283.

83. *Id.* at 1281–82 (stating that conveyances and agreements concerning real property "shall be recorded") (citations omitted).

84. *Id.* at 1281 (quoting Woodward v. Bowers, 630 F. Supp. 1205, 1207 (M.D. Pa. 1986)).

85. *Id.* at 1282 (quoting 21 PA. STAT. ANN. § 358(2) (West 2011)).

86. *Id.*

The commonwealth court rejected the recorder's additional arguments, holding that the plaintiff's ability to record separate lease assignments was not an "adequate remedy" because the plaintiff had the right to file multiple assignments and that requiring the recorder to accept multiple lease assignments would contravene public policy.[87]

VI. Other Lease Termination Cases

In *Heasley v. KSM Energy, Inc.*, plaintiff successor lessor brought an action to have two 1942 flat-rate royalty leases[88] declared to have terminated for lack of production of oil and gas.[89] The parties agreed that there was no current production of oil or gas.[90] The trial court granted judgment on the pleadings to the lessor.[91] The defendants appealed, arguing that the lease was held by annual flat-rate gas well payments, citing *T.W. Philips Gas and Oil Co. v. Komar*.[92] The lease's *habendum* clause provided that "[i]t is agreed that this lease shall remain in force for the term of twenty years from this date, and **as long thereafter as oil or gas, or either of them, is produced therefrom by the party of the second part**."[93] The superior court affirmed the judgment in favor of the lessor, holding that the secondary term of the lease required production and that the flat-rate payments were only to be made "while the gas from said well is used" (so production was a condition of the flat-rate payments). The superior court distinguished *Komar* on the basis that the royalty provision in that lease provided for flat-rate gas well payments regardless of whether there was any actual production.

In *Burkett ex rel. Burkett v. Exco Res. (PA), LLC*, plaintiff successor lessors brought an action for a declaratory judgment for cancellation of the 1916 lease as to 130 acres of the 180 acres in the leasehold, and all deep rights, for breaches of the surrender clause of the lease and of the implied covenant to develop the lease.[94] The lease was held by two producing wells, drilled during the ten-year primary term of the lease.[95] Defendant lessee–assignee operators brought a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), claiming

87. *Id.* at 1283.

88. Patrick H. Martin & Bruce M. Kramer, Williams & Meyers, Oil and Gas Law § 8-F (2011) (stating that a "flat-rate royalty lease" is defined as "[a] lease providing for payment of a fixed (frequently small, by contemporary standards) sum of money as royalty").

89. Heasley v. KSM Energy, Inc., 52 A.3d 341, 342 (Pa. 2012).

90. *Id.* at 342–43.

91. *Id.* at 343.

92. *Id.* at 343 (citing T.W. Phillips Gas & Oil Co. v. Komar, 227 A.2d 163 (Pa. 1967)).

93. *Id.* at 345 (emphasis in original).

94. Burkett *ex rel.* Burkett v. Exco Res. (PA), LLC, No. 2:11-cv-1394, 2012 WL 1019025, at *1 (W.D. Pa. Mar. 26, 2012).

95. *Id.* at *1.

that the plaintiffs' claims failed to assert a claim as a matter of law.[96] Plaintiffs conceded that the drilling of four wells satisfied the express development clause of the lease and instead argued that the lessee-assignees violated the surrender clause of the lease.[97] The district court held that the plaintiffs' allegations of a breach of the lease were sufficient to survive a motion for dismissal.[98] The district court also denied the motion for dismissal as to an implied covenant to develop.[99] The district court held that as the only payments being made to the plaintiffs were production royalties from the two existing wells, the implied covenant to develop applied to the remaining acreage of the lease.[100] The district court distinguished *Stoddard v. Emery* on the grounds that the lease did not specify a maximum number of wells, but only a minimum.[101]

In *Good Will Hunting Club, Inc. v. Range Resources, Inc.*, lessor brought an action for declaratory judgment that its oil and gas lease had terminated at the end of its primary term, as well as claims for ejectment and trespass.[102] Prior to the expiration of the primary term, lessee had staked out a drillsite, obtained rights-of-ways and leases on adjoining properties, unitized the property, obtained permits, constructed access roads, and began constructing the well-site on the last day of the primary term.[103] The court held that the lease was ambiguous because while the secondary term indicated that the lease would only be held by (1) paying production; (2) a dry hole and the drilling of a second well; or (3) the plugging of a well, an additional clause provided that the lease would terminate if lessee did not commence a well before the end of the primary term.[104] The court denied the plaintiff's motion for summary judgment, holding that because the lease was ambiguous, extrinsic evidence of the parties' intent was necessary.[105]

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96. *Id.*

97. *Id.* at *4 ("[T]he Plaintiffs argue that the Court should determine and declare that EXCO's persistent lack of use, investigation, or development of the untouched portion of the Premises (for nearly a century) necessarily amounts to its determination that such segment of the Premises will not be "further" investigated or developed. Therefore, according to the Plaintiffs, such inaction triggers EXCO's duty under the Lease to surrender and release the unused portion of the Premises.").

98. *Id.* at *5.

99. *Id.* at *8.

100. *Id.* at *6 (citing Jacobs v. CNG Transmission Corp., 772 A.2d 445, 452 (Pa. 2001)).

101. *Id.* at *7 (distinguishing Stoddard v. Emery, 18 A. 339 (Pa. 1889) (holding that "where the number of wells to be drilled is specified by the lease, that number controls and no implied covenant to develop further can be read into the lease")).

102. Good Will Hunting Club, Inc. v. Range Res., Inc., No. 4:11-cv-1152, 2012 WL 722614, at *1 (M.D. Pa. Mar. 1, 2012).

103. *Id.* at *1.

104. *Id.* at *3–4.

105. *Id.* at *4–5.

In *Burke v. GAPCO Energy LLC*, plaintiff lessors sought a declaratory judgment that their leases with defendant lessees were terminated.[106] The lease contained an operations clause which provided, *inter alia*, that

> [t]he term 'operations' as used in this lease shall include but not be limited to the drilling, testing, completing, (including by horizontal and slant hole well completion techniques) reworking, recompleting, deepening, plugging back, or repairing of a well (and all work preparatory, incident or related to any such operation) in search for or in an endeavor to obtain, restore, maintain, or to increase production of oil, liquid hydrocarbons, or gas, or any of them.[107]

The defendants alleged that they cleared access roads, removed trees, obtained well permits, prepared erosion and sediment plans, conducted surveys, and cleared and leveled the drill pad prior to the end of the primary term.[108] The district court noted that the activities enumerated appeared to satisfy the definition of operations under the lease, but it noted that the plaintiffs contended that as of the end of the primary term, the lessee had only conducted cursory preparatory activities.[109] The district court denied the defendants' motions for summary judgment, finding that there was a genuine issue of material fact.[110]

VII. Other Significant Cases

In *Roman v. Chesapeake Appalachia, L.L.C.*, the Middle District of Pennsylvania granted defendant operator's request to compel arbitration of the plaintiffs' claims for declaratory judgment that the parties' oil and gas lease had terminated, as well as tort claims for slander of title and breach of the covenant of good faith and fair dealing.[111] The court held that the broad arbitration clause contained in the lease, which applied to any disagreement "concerning this lease, performance thereunder, or damages caused by Lessee's operations," applied to the plaintiffs' tort claims because both tort claims concerned the lease and more specifically the defendant's unitization of the lease at the end of the primary term of the lease.[112]

In *Rice v. Chesapeake Energy Corp.*, plaintiff lessors brought an action in the court of common pleas of Greene County for breach of an oil and gas lease against defendant lease assignor and lease as-

106. Burke v. GAPCO Energy LLC, No. 10-1317, 2012 WL 1038849, at *1 (W.D. Pa. Mar. 28, 2012).
107. *Id.*
108. *Id.* at *2.
109. *Id.* at *3.
110. *Id.*
111. Roman v. Chesapeake Appalachia, L.L.C., No. 3:11-cv-1614, 2012 WL 2076846, at *1 (W.D. Pa. Aug. 1, 2012).
112. *Id.* at *4–5.

signee.[113] The defendants removed the action to the federal court for the Western District of Pennsylvania, and the plaintiffs brought a motion to remand.[114] The defendant lease assignor, Dale Property Services Penn, LP ("Dale"), was a Pennsylvania citizen for diversity jurisdiction purposes under 28 U.S.C. § 1332(a)(1).[115] The defendants contended that Dale was fraudulently joined in that there was no basis for any liability of Dale on the facts alleged.[116] Specifically, the defendants argued that an oil and gas lease is a conveyance in fee simple determinable,[117] and after assignment, the plaintiffs could not look to the assignor for any breach of the lease. The district court held that although the defendants' cases supported the evolution of the oil and gas lease, it could not conclude with certainty that Pennsylvania state courts would overrule the doctrine stated in *Washington Natural Gas Co. v. Johnson*,[118] that a lessee retains liability for a breach of the lease after an assignment.[119] The district court remanded the case to the court of common pleas of Greene County.[120]

In *Katzin v. Central Appalachia Petroleum*, a lessor had brought an action to invalidate a lease for violating the Pennsylvania Guaranteed Minimum Royalty Act ("PGMRA").[121] The trial court granted the defendant judgment on the pleadings, holding that the lease provided a minimum one-eighth royalty and that deductions of post-production costs were permissible under the rule of *Kilmer v. Elexco Land Services, Inc.*[122] The plaintiff appealed, arguing that the lease violated the PGMRA because of vagueness in the lease describing post-production costs.[123] The superior court affirmed the judgment in favor of the defendants, holding that there was an implied promise that the lessees would comply with the terms of the PGMRA in their deductions and that the plaintiffs could bring an action for breach of contract if the payments in fact did not comply with the PGMRA.[124]

In *EXCO Resources (PA), LLC v. New Forestry, LLC*, plaintiff lessor brought an action for declaratory relief that (1) as a lessee of the oil and gas owner, it was entitled to use the subsurface for disposal of

113. Rice v. Chesapeake Energy Corp., No. 2:12-cv-00392, 2012 WL 3144318, at *1 (W.D. Pa. Aug. 1, 2012).

114. *Id.*

115. *Id.* ("[T]he parties stipulated in open court at a hearing . . . that Dale is, for diversity purposes, a citizen of Pennsylvania . . . .").

116. *Id.*

117. Snyder Bros., Inc. v. Peoples Natural Gas Co., 676 A.2d 1226, 1230 (Pa. Super. Ct. 1996); T.W. Phillips Gas & Oil Co. v. Jedlicka, 42 A.3d 261, 267 (Pa. 2012).

118. Wash. Natural Gas Co. v. Johnson, 16 A. 799 (Pa. 1889).

119. *Rice*, 2012 WL 3144318, at *4.

120. *Id.*

121. Katzin v. Cent. Appalachia Petroleum, 39 A.3d 307, 308 (Pa. Super. Ct. 2012); 58 PA. STAT. ANN. § 33 (West, Westlaw through 2012 Legis. Sess.).

122. *Katzin*, 39 A.3d at 308–09; Kilmer v. Elexco Land Servs., Inc., 990 A.2d 1147 (Pa. 2010).

123. *Katzin*, 39 A.3d at 309.

124. *Id.*

liquids from fracking operations and (2) it was entitled to operate a disposal facility, pursuant to a separate license from the defendant surface owner.[125] The oil and gas were severed from the surface by a deed that conveyed "rights, titles, and interests in and to all of the oil and gas . . . and the space occupied thereby."[126] The district court concluded that the deed conveyed a fee simple determinable in the oil and gas and did not convey an interest in the bore space once the oil and gas was removed.[127] The district court also held that the parties' course of conduct and the license agreements was consistent with the defendant's ownership of the subsurface bore space.[128] Likewise, the court concluded that the lease did not grant the plaintiff the right to use the surface of the premises for water disposal, holding that it only conveyed the right of access to the oil and gas.[129] Additionally, the court held that the plaintiff failed to properly exercise its renewal of the disposal facility license and therefore granted the defendant's motion for summary judgment.[130]

In *In re Bradford*, a shallow oil and gas operator appealed an order of the zoning board that it remove a compressor station located at a wellhead.[131] The township zoning ordinance provided for "Forest/ Slope Residence Districts" within which structures for oil and gas production, "including equipment necessary to drilling or pumping operations," were permitted uses.[132] The zoning officer brought an enforcement notice, claiming that the compressor station was not "necessary to drilling or pumping operations" and was instead a processing facility, which could only be located in a General Manufacturing District.[133] The Zoning Hearing Board heard the testimony of several expert witnesses as to the technical role of the compressor station, who testified that the station stripped hydrocarbon liquids, including propane and butane, from the gas and pressurized the gas into a liquid to render it marketable into an adjacent pipeline.[134] The Board found that the compressor station was processing gas.[135] On appeal, the trial court affirmed the Board's decision that the compressor station was processing gas.[136]

125. EXCO Res. (PA), LLC v. New Forestry, LLC, No. 1:10-cv-1793, 2012 WL 3043008, at *2 (M.D. Pa. July 25, 2012).

126. *Id.* at *3.

127. *Id.* (citing U.S. Steel Corp. v. Hoge, 468 A.2d 1380, 1384 (Pa. 1983) and Chartiers Block Coal Co. v. Mellon, 25 A. 597, 599 (Pa. 1893)).

128. *Id.* at *4–5.

129. *Id.* at *6 (citing *Chartiers Block Coal Co.*, 25 A. at 599) and Webber v. Vogel, 42 A. 4, 5 (Pa. 1899)).

130. *Id.* at *9.

131. *In re* Bradford, 43 A.3d 544, 545 (Pa. Commw. Ct. 2012).

132. *Id.* at 546.

133. *Id.*

134. *Id.* at 547–48.

135. *Id.* at 548.

136. *Id.*

On appeal to the commonwealth court, the operator argued that the compressor station was a necessary permitted use under the township's ordinance. The commonwealth court noted that dictionaries do not provide a clear distinction between production and processing.[137] The commonwealth court rejected the Board's reliance on *Kilmer v. Elexco Land Services, Inc.*, concluding that *Kilmer* did not control because (1) it determined the line between production and post-production activities for purposes of interpreting an oil and gas lease and (2) stripping was a production activity that took place at the wellhead.[138] The commonwealth court cited section 603.1 of the Municipalities Planning Code,[139] which provides that when there is any doubt in the interpretation of a zoning ordinance, the ordinance must be construed in favor of permitting the use, and the court concluded that the compressor station was necessary production activity.[140] The court therefore, held that the station was a permitted use and reversed the trial court.

In *PAPCO, Inc. v. United States*, an oil and gas operator brought an action against the United States to quiet title to sandstone under a tract of land located in the Allegheny National Forest based on a reservation of "minerals."[141] The Allegheny National Forest was created from tracts of land purchased by the United States pursuant to the Weeks Act.[142] The deed at issue excepted and reserved "all the oil, natural gas, glass sand and minerals of every kind and description whatsoever[.]"[143] The United States brought a motion to dismiss, claiming that the claim was barred by the applicable statute of limitations, or in the alternative, that the reservation did not include sandstone.[144] The district court held that the twelve-year statute of limitations applied under the Quiet Title Act.[145] The United States argued that the plaintiff had notice of the United States pit mining operation in 1991 based upon the opening of the mine in that year and two notices in local papers. The district court held that the legal notices were insufficient to give notice to the mineral owner that the United States was asserting ownership of the sandstone.[146] The district court also held that the plaintiff had no duty to inspect what would have revealed the 1.3-acre mine within the 12,000-acre tract

137. *Id.* at 550.
138. *Id.* at 552 (citing Kilmer v. Elexco Land Servs., Inc., 990 A.2d 1147 (Pa. 2010)).
139. 53 PA. CON. STAT. ANN. § 10603.1 (West 2011).
140. *In re Bradford*, 43 A.3d at 553.
141. PAPCO, Inc. v. United States, 814 F. Supp. 2d 477, 480 (W.D. Pa. 2011).
142. *See* 16 U.S.C. §§ 515–521 (2006).
143. *PAPCO*, 814 F. Supp. 2d at 481.
144. *Id.* at 483.
145. *Id.* at 485.
146. *Id.* at 491.

purchased by the plaintiff, and therefore, the plaintiff's claim only began running in 2007, when it had actual notice of the mine.[147]

In regards to the reservation, the district court found that under Pennsylvania law, "[t]he specific reservation of oil, natural gas, and glass sand indicates that the parties intended that substances that have commercial value are within the scope of the reservation."[148] The district court found that at the time of the reservation, sandstone was known to have economic value and that therefore, the sandstone was included within the reservation. The district court accordingly denied the United States's motion to dismiss and granted the plaintiff's motion for summary judgment.

147. *Id.* at 492.

148. *Id.* at 495 (citing Hendler v. Lehigh Valley R.R., 58 A. 486, 487 (1904), *overruled in part by* Hall v. L. & W. R.R., 113 A. 669, 670–71 (Pa. 1921)).