Oil and Gas, Natural Resources, and Energy Journal

Volume 6
Number 2 *The 2020 Survey on Oil & Gas*

October 2020

Pennsylvania

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Oil and Gas, Natural Resources, and Energy Journal

VOLUME 6 NUMBER 2

PENNSYLVANIA

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A. Introduction

There have been a number of significant oil and gas decisions this past year, although there were fewer decisions in the spring and summer of 2020 due to the covid-19 pandemic. In *Briggs v. Southwestern Energy Production Co.*, the year's most prominent case, the Pennsylvania Supreme Court held that the traditional "rule of capture" applies to horizontal unconventional oil and gas wells. In *SLT Holdings, LLC v. Mitch-Well Energy, Inc.*, the Pennsylvania Superior Court held that abandonment of a leasehold negated retained acreage provisions in a lease, permitting conversion claims against lessee for oil removed from storage tanks. In another case, *Wilson v. Snyder Bros., Inc.,* the Superior Court held that a lessor's ratification of lease waived any prior defects in lessee's performance under the lease. The Commonwealth Court upheld a zoning plan that permitted oil and gas development in rural low-density residential districts against a challenge under the Pennsylvania Constitution's Environmental Rights Amendment (*Protect PT v. Penn Twp. Zoning Hearing Bd.*). The Commonwealth Court also rejected late fees and penalties imposed on an oil and gas operator after the operator had challenged (*Snyder Bros., Inc. v. Com. Of Pa. Public Utilities Comm'n*).

With respect to federal courts, in *UGI Sunbury LLC v. A Permanent Easement for 1.7575 Acres*, the Third Circuit Court of Appeals excluded expert testimony as to "stigma" damages in the condemnation of a gas pipeline that did not meet the standards under the *Daubert* case. A district court denied a lessor's claims that a lessee breached the implied covenant to develop by failing to drill additional wells once two producing wells were drilled (*Diehl v. SWN Prod. Co., LLC*). In another case, the district court

concluded that lessors raised an issue of fact whether lessees had conducted sufficient activities to hold leases under an operations clause (*Butters v. SWN Prod. Co., LLC*). In a third case, a district court held that an alleged agency relationship between a tax sale purchaser and the surface owner could preclude a "title wash" of unassessed oil and gas interests under the tax parcels (*Pennsylvania Game Comm'n v. Thomas E. Proctor Heirs Tr.*).

In *B&R Resources, LLC v. Dep't of Envtl. Protection*, the Environmental Hearing Board held the owner and operator of an oil and gas company personally liable under the participation theory for well plugging costs after the company was ordered to plug the well by the Pennsylvania Department of Environmental Protection, but only as to those costs that the company was able to pay at the time of the order. Lastly, on the regulatory front, the cost of an unconventional well permit was increased 150% to $12,500 per permit.

B. Pennsylvania Supreme Court

1. Briggs v. Sw. Energy Prod. Co., 224 A.3d 334 (Pa. Jan. 22, 2020)

- The Pennsylvania Supreme Court reversed the judgment of the Superior Court, holding that the rule of capture applied to unconventional, hydraulically fractured natural gas wells. The Court remanded the decision to the lower court to consider if landowners sufficiently alleged a trespass claim based on a physical invasion of landowners' tract.

Plaintiff landowners, the Briggs, filed trespass and conversion claims in the Court of Common Pleas of Susquehanna County against Southwestern Energy Production Company ("Southwestern"), the operator of an unconventional natural gas well on an adjacent tract, alleging that Southwestern was extracting natural gas from under their undeveloped parcel.[1] The Briggs did not expressly allege that Southwestern had caused a physical intrusion into their property. Southwestern filed an answer denying that it had drilled under the Briggs' land and pled a new matter alleging that the Briggs' claim was barred by the rule of capture.[2] At the end of discovery, Southwestern filed a motion for summary judgment. The Court of Common Pleas granted Southwestern's motion and the Briggs appealed.[3]

1. *Briggs v. Sw. Energy Prod. Co.*, 224 A.3d 334, 339 (Pa. Jan. 22, 2020).
2. *Id.* at 340.
3. *Id.* at 340-341.

The Superior Court reversed the decision of the Court of Common Pleas.[4] The Superior Court acknowledged that the Briggs did not allege a physical intrusion, but inconsistently characterized the issue as whether a trespass occurs when the defendant uses hydraulic fracturing in a manner "which *extends into* an adjoining landowner's property and results in the withdrawal of natural gas from beneath that property[.]"[5] The Superior Court held that hydraulic fracturing may give rise to trespass liability, particularly if subsurface fractures, fluid or proppants cross boundary lines.[6] The Superior Court reasoned that hydraulically fracturing is distinguishable from conventional drilling because (1) it uses artificial means to stimulate the flow of gas from shale formations; (2) the self-help remedy of drilling a neighboring well is unfeasible for small landowners due to the cost of unconventional wells; and (3) the rule of capture would permit an operator to drain an adjacent tract by drilling a well near a lease boundary.[7] The Superior Court cited the dissent in the Texas Supreme Court case *Coastal Oil & Gas Corp. v. Garza*[8] and a vacated West Virginia federal district court opinion in the case *Stone v. Chesapeake Appalachia, LLC*.[9] However, the record contained no evidence that Southwestern's operations had resulted in a subsurface intrusion. Therefore, the Superior Court remanded the case to the court of common pleas for additional factual development. The Supreme Court summarized the Superior Court's analysis as follows: "first, that whenever 'artificial means,' such as hydraulic fracturing, are used to stimulate the flow of underground resources, the rule of capture does not apply because drainage does not occur through the operation of 'natural agencies,' and second, that in this particular case summary judgment was premature in light of certain unspecified allegations relating to cross-boundary intrusions into Plaintiffs' land."[10]

On appeal Southwestern framed the following issue for review:

> Does the rule of capture apply to oil and gas produced from wells that were completed using hydraulic fracturing and preclude trespass liability for allegedly draining oil or gas from under nearby property, where the well is drilled solely on and

4. *Briggs v. Sw. Energy Prod. Co.*, 184 A.3d 153 (Pa. Super. Ct. 2018).
5. *Briggs*, 224 A.3d at 342 (quoting *Briggs*, 184 A.3d at 158) (emphasis in original).
6. *Id.* at 343.
7. *Id.*
8. *Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1, 42 (Tex. 2008).
9. *Stone v. Chesapeake Appalachia, LLC*, No. 5:12-CV-102, 2013 WL 2097397 (N.D.W. Va. Apr. 10, 2013).
10. *Briggs*, 224 A.3d at 343.

> beneath the driller's own property *and the hydraulic fracturing fluids are injected solely on or beneath the driller's own property*?[11]

The Supreme Court concluded that the parties did not disagree as to this question: they both responded in the affirmative. However, the parties disagreed as to whether a physical intrusion took place, an issue that was not properly before the Supreme Court.[12] The Supreme Court nonetheless decided it was proper to resolve the stated issue because the Superior Court opinion set forth a *per se* ruling foreclosing application of the rule of capture to hydraulically fractured wells.

The Supreme Court first noted that the rule of capture traditionally applies even if the driller uses artificial methods to stimulate the flow of oil or gas; drilling itself constitutes an artificial stimulation method.[13] There is no reason why the rule should apply any differently to hydraulic fracturing conducted solely on the driller's property. The judiciary lacks institutional tools necessary to determine their continuing feasibility regarding self-help measures.[14]

Furthermore, the present record did not support the Superior Court's implicit assumption that drainage can only occur if there is a physical invasion of the neighboring property. The Supreme Court noted that drainage might occur without a physical intrusion:

We cannot rule out, for example, that a fissure created through the injection of hydraulic fluid entirely within the developer's property may create a sufficient pressure gradient to induce the drainage of hydrocarbons from the relevant stratum of rock underneath an adjacent parcel even absent physical intrusion. Nor can we discount the possibility that a fissure created within the developer's property may communicate with other, pre-existing fissures that reach across property lines. Whether these, or any other non-invasive means of drainage occasioned by hydraulic fracturing, are physically possible in a given case is a factual question to be established through expert evidence.[15]

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11. *Id* (emphasis in original).
12. *Id.* at 346.
13. *Id.* at 348.
14. *Id*.
15. *Id.* at 349 (citing Brief for *Amicus* Prof. Terry Engelder, at 18 (indicating gas located in unconventional reservoirs exists within a network of cracks and fissures, and the gas may move across property lines when hydraulic fracturing "tap[s] into" that network)).

The Supreme Court held that expert evidence is required by the plaintiff to establish whether a physical intrusion occured.[16] The Supreme Court declined to consider Southwestern's argument that physical trespass concepts should be relaxed for activities that take place miles below the surface, because that argument was beyond the scope of the issue on appeal.[17] The Supreme Court vacated the order of the Superior Court and remanded the case to the Superior Court for reconsideration.[18]

Justice Dougherty authored a concurring and dissenting opinion joined by Justice Donahue, which dissented from the majority as to the remand to the Superior Court and would instead remand to the trial court.[19] The opinion also disagreed with the majority's conclusion that the plaintiffs did not sufficiently allege a physical trespass.[20]

C. Pennsylvania Superior Court

1. SLT Holdings, LLC v. Mitch-Well Energy, Inc., 217 A.3d 1258 (August 13, 2019), petition for allowance of appeal granted, 229 A.3d 570

- Lessee abandoned leases by failing to produce oil and gas and removal and sale of oil in tanks after abandonment constituted conversion, as abandonment nullified retained acreage language in leases.

Plaintiff landowners, SLT Holdings, LLC, ("SLT"), owned two tracts subject to decades-old leases that were currently held by lessee-operator, Mitch-Well Energy, Inc. ("Mitch-Well"). SLT filed a complaint in the Court of Common Pleas of Warren County in 2013 seeking an injunction, declaratory judgment, an accounting, ejectment, conversion, and tortious interference with contract.[21] In 2017, plaintiff filed a motion for summary judgment on the injunction, declaratory judgment and conversion counts

16. *Id.* ("Thus, to the extent this lawsuit goes forward on Plaintiffs' new, physical-intrusion theory, Plaintiffs will bear the burden of demonstrating that such an intrusion took place.").

17. *Id.* at 350 (citing Pa.R.A.P. 1115(a)(3); *Commonwealth v. Metz*, 534 Pa. 341, 347 n.4, 633 A.2d 125, 127 n.4 (1993) (citing *Commonwealth v. Milyak*, 508 Pa. 2, 5 n.3, 493 A.2d 1346, 1348 n.3 (1985)).

18. *Id.* at 351.

19. *Id.* at 353.

20. *Id.* at 353-354.

21. *SLT Holdings, LLC v. Mitch-Well Energy, Inc.*, 217 A.3d 1258, 1262 (Pa. Super. Ct. 2019).

which was granted by the trial court. Plaintiff voluntarily dismissed its remaining counts and Mitch-Well appealed.[22]

The habendum clauses in the leases provided that that the primary term would be extended "for as long thereafter as oil or gas or other substances covered hereby are or can be produced in paying quantities…." The leases also contained delay rental provisions, operations clauses and shut-in clauses. The leases contained drilling commitment provisions that required lessee to drill multiple wells. If lessee failed to meet this requirement, the lease would terminate except as to twenty acres around each producing well already drilled (which was later amended to only five acres).[23] One well was drilled on each lease in 1986 and no other well was drilled until Utica Resources, Inc., (lessee) under a new lease, drilled a well in 2011. The record established that no shut-in payments were tendered and no oil and gas were produced for twenty-five years.[24] The Department of Environmental Protection records indicated the wells were deemed abandoned as early as 1990.[25]

The trial court held that Mitch-Well had abandoned the leases by failing to develop the leases as required by the implied covenant to develop.[26] The Superior Court affirmed the trial court.[27] The Superior Court also rejected Mitch-Well's argument that it had the right to remove the oil in the tanks under the retained acreage provision of the leases' drilling commitment provisions. The Superior Court accepted the trial court's conclusion that because the leases were abandoned, the retained acreage language in the leases was nullified.[28]

2. Wilson v. Snyder Bros., Inc., No. 734 WDA 2019, --- A.3d ---, 2020 WL 2313813 (Pa. Super. Ct. May 11, 2020)

- Lessor's ratification of lease and acceptance of royalty payments waived prior defects in performance

The Superior Court held that an oil and gas lease that required the lessee to drill a well within 180-days or pay a delay rental did not terminate for failure to drill because the lessors expressly ratified the lease six and half

22. *Id.*
23. *Id* at 1265.
24. *Id.*
25. *Id.* at 1266.
26. *Id.* at 1266-1267 (citing Jacobs v. *CNG Transmission Corp.* 332 F.Supp.2d 759 (W.D. Pa. 2004); Aye v. Philadelphia Co., 193 Pa. 451, 44 A. 555 (1899)).
27. *Id.* at 1267.
28. *Id.* at 1268.

years later.[29] Affirming the trial court, the Superior Court found that the lessors' ratification of the leases and acceptance of royalty payments waived any prior defect.

Lessors, Donald Wilson, Shirley Wilson, James Wilson, Marie Wilson and Lara S. Wilson Shields ("the Wilsons"), entered into a lease in 2003.[30] The lease provided that lessee, Snyder Brothers, Inc., had the right to drill a well within 180-days of the date of the lease or pay a delay rental to extend the term of the lease. Snyder Brothers paid delay rentals from 2003 to 2010.[31] In 2010, Snyder Brothers obtained a permit to drill a well and also obtained ratifications of the leases from the Wilsons and drilled a well before the end of 2010.[32] Snyder Brothers unitized the well and paid royalties to all lessors included in the drilling unit.[33]

Snyder Brothers assigned the leases to Winfield Resources, LLC ("Winfield").[34] Winfield then assigned an interest to PennEnergy Resources, LLC ("PennEnergy").[35,36] PennEnergy approached the Wilsons in 2017 to amend and ratify the previously amended lease from 2010.[37] The Wilsons refused, stating that they believed the lease had already terminated.[38] The Wilsons refused royalty payments since 2017.[39]

The Wilsons filed a complaint in 2018 challenging the validity of the leases.[40] The Wilsons alleged that the lease terminated due to the lessee's failure to drill within 180-days.[41] Relying on the Superior Court's decision in *Hite v. Falcon Partners*,[42] the Wilsons claimed that the lease could not be extended beyond the primary term through the indefinite payment of delay rentals.[43] The Wilsons also argued that the lease terminated after Snyder Brothers drilled due to the well being impermissibly shut-in.[44]

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29. *Wilson v. Snyder Bros., Inc.*, No. 734 WDA 2019, --- A.3d ---, 2020 WL 2313813 (Pa. Super. Ct. May 11, 2020).
30. *Id.* at *1.
31. *Id.*
32. *Id.* at *2.
33. *Id.*
34. *Id.*
35. *Id.*
36. Snyder Brothers, Winfield and PennEnergy, collectively, the "Lessees".
37. *Id*.
38. *Id.*
39. *Id.*
40. *Id.* at *3.
41. *Id.*
42. 13 A.3d 942 (Pa. Super. 2011).
43. *Wilson,* 2020 WL 2313813, at *3.
44. *Id.*

Lessees filed a demurrer for failure to state a claim upon which relief could be granted based on the Lessors' delay rental argument.[45] The Wilsons pled that they ratified the leases in 2010 and accepted royalty payments after drilling commenced. The Wilsons then waited seven years after ratifying the lease and after Snyder Brothers drilled on the property before challenging the validity.[46] The trial court sustained the demurrer concluding that the Wilsons failed to allege facts showing the original leases terminated.[47]

Lessees filed a preliminary objection that the claims related to impermissible shut-ins lacked sufficient specificity.[48] The Wilsons alleged that the leases terminated due to impermissible "shut-in" periods. The pleading stated "[u]pon information and belief, the . . . Well has intermittently produced gas for approximately seven (7) years and has never continuously produced gas for any consecutive calendar year since production began in or around June 2011."[49] The Wilsons alleged that the breach occurred "at various times."[50] The trial court sustained the preliminary objection for lack of specificity and gave Lessors the opportunity to re-plead to provide specific dates of the shut-ins. Lessors did not take that opportunity.[51] The trial court dismissed the complaint.

The Superior Court affirmed the trial court. The ratification and acceptance of annual delay rental payments waived any potential prior defect presented by the payment of delay rentals.[52] *Hite* had no effect on the facts before the court. In *Hite,* the Superior Court held that delay rental payments alone do not extend the primary term of an oil and gas lease if drilling had not begun.[53] The Superior Court reasoned that allowing a lessee to pay delay rental and postpone development indefinitely is "inconsistent with the established rulings grounded in public policy."[54] Here, in contrast to *Hite*, the Wilsons ratified their original leases beyond the primary term and did not seek to void their amended leases until years after drilling had

45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at *4.
49. *Id.* at *3.
50. *Id.*
51. *Id.* at *4.
52. *Id.*
53. *Id.*
54. *Id.* (citing *Hite*, 13 A.3d at 948) (citations omitted).

already begun.[55] Under settled contract law, the Wilsons waived any claim they may have had to dispute the validity of the subject leases that accrued prior to the 2010 ratification in their amended agreements.[56]

The Superior Court also affirmed the trial court's dismissal of the declaratory action for lack of specificity in the pleadings.[57] The Wilsons did not identify "the length of the alleged shut-ins or why they believe they occurred; nor did they attempt to gather pre-complaint discovery as to those missing pieces of their allegations."[58] The Lessees were without enough information to adequately prepare a defense to the Wilson's breach of contract claims.

This case demonstrates the application of general contract principles to the relationship between lessee and lessor. Here, lessors, both expressly and through their actions, ratified the underlying lease. As such, the lessors waived defects in performance that might have occurred prior to the ratification.

D. Pennsylvania Commonwealth Court

1. Protect PT v. Penn Twp. Zoning Hearing Bd., 220 A.3d 1174 (Pa. Commw. Ct. Nov. 14, 2019)

- Zoning ordinance allowing unconventional oil and gas development in low-density residential zoning district did not violative residents' rights

The Commonwealth Court affirmed a trial court order denying a constitutional challenge to a local zoning ordinance that allowed unconventional oil and gas development in zoning districts with low-density residential properties.[59] Protect PT challenged the ordinance's constitutionality on grounds that it violated the Township residents' substantive due process rights and the Environmental Rights Amendment ("ERA") in Article I, Section 27 of the Pennsylvania Constitution.[60] Relying on its recent decisions in *Frederick v. Allegheny Township Zoning Hearing Board* [61] and *Delaware Riverkeeper Network v. Middlesex*

55. *Id.*
56. *Id.*
57. *Id.* at *5.
58. *Id.*
59. *Protect PT v. Penn Twp. Zoning Hearing Bd.*, 220 A.3d 1174 (Pa. Commw. Ct. Nov. 14, 2019).
60. *Id.*
61. 196 A.3d 677 (Pa. Commw. Ct. 2018) (*en banc*).

Township Zoning Hearing Board,[62] the Commonwealth Court upheld the trial court's conclusion that the zoning ordinance did not violate either the substantive due process rights of the Township's residents or their rights under the ERA.

The Penn Township Board of Commissioners enacted a zoning ordinance ("Ordinance") that allowed oil and gas extraction in a zoning district called the "Rural Resource District," which permitted low-density residential properties.[63] The Ordinance described the purpose of the Rural Resource District as "providing land for continuing agricultural operations, resource management, timber harvesting, outdoor recreation, public and private conservation areas, low density single family residential, and compatible support uses."[64] The Ordinance established a Mineral Extraction Overlay ("MEO") District that permitted unconventional natural gas development in the Rural Resource District.[65] Protect PT challenged the constitutionality of the MEO District on grounds that it permits unconventional natural gas development in the Rural Resources District, arguing that unconventional natural gas development is a heavy industrial activity incompatible with residential use and the resident's rights under the ERA. The Zoning Hearing Board did not schedule a public hearing on the challenge, deeming it denied under the Municipalities Planning Code.[66]

The trial court held a four-day *de novo* trial on the challenge, ultimately finding that Protect PT did not carry its burden of establishing the invalidity of the Ordinance. Critical to its holding, the court noted that unconventional drilling is a special exception, subject to numerous standards "including general development standards in the [Ordinance] and particular standards pertaining to MEO District."[67] Under the Ordinance, the Zoning Hearing Board could impose additional conditions to promote the health and safety of the Township's residents. Furthermore, the developer is required to "demonstrate that the drill site operations will not violate the [Township citizens'] right to clean air and pure water as set forth in the [ERA] through

62. No. 2609 C.D. 2015, 2019 WL 2605850 (Pa. Commw. Ct. June 26, 2019).

63. *Protect PT*, 220 A.3d at 1177.

64. *Id.* at 1179.

65. *Id.* 1177.

66. *Id.* at 1178; *see* 53 P.S. § 10961.1(f)(1) (validity challenge deemed denied when the zoning hearing board fails to commence hearing within time limits).

67. *Protect PT*, 220 A.3d at 1179.

the submission of reports from 'qualified environmental individuals' stating that the proposed drilling will not negatively impact these rights."[68]

The Commonwealth Court, relying upon the trial court's judgment of the credibility of the witnesses, found the trial court did not abuse its discretion by finding unconventional oil and gas development compatible with the purpose of the Rural Resource District. The industrial impact of a well pad occurs during the development and construction of the well pad. That industrial impact curtails once the wells are producing. Because any industrial type impacts are short-lived and relate to development and construction, the use of the land is not incompatible.[69]

A second notable piece of the decision relates to the ERA. Protect PT argued that the Ordinance and the trial court's decision fail to protect the Township residents' right to a healthy environment under the ERA.[70] Protect PT argued that there is no evidence in the record that the Township "actually identified or evaluated the environmental impacts of its decision-making in creating the MEO District."[71] The Commonwealth Court disagreed, pointing to a section of the Ordinance that specifically related to an unconventional oil and gas developer's obligation to meet the requirements of the ERA.[72] That sections states in relevant part:[73]

> The applicant shall demonstrate that the drill site operations will not violate the citizens of Penn Township's right to clean air and pure water as set forth in [Article I, Section 27] of the Pennsylvania Constitution (the Environmental Rights Amendment). The applicant shall have the burden to demonstrate that its operations will not affect the health, safety and welfare of the citizens of Penn Township or any other potentially affected land owner.

The Commonwealth Court concluded that the Township considered its residents' rights under the ERA.

Finally, the Commonwealth Court agreed with the trial court that Protect PT failed to carry its burden to prove its substantive validity challenge by

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68. *Id.* (citing Ordinance § 190-641(D)).

69. *Id.* at 1184 (citing *Frederick*, 196 A.3d at 689 (zoning regulates the *use* of land and not the particulars of development and construction) (emphasis original) (citations and quotations omitted)).

70. *Id.* at 1196.

71. *Id.* at 1197.

72. *Id.*

73. Ordinance § 190-641(D).

showing that the Zoning Ordinance is arbitrary and unreasonable and bears no substantial relationship to promoting the public health, safety and welfare.[74] The Ordinance provides "an extensive regulatory scheme far beyond that imposed on any other use" to protect the general public.[75] The Court determined that the Ordinance properly balances the rights of the citizens to benefit from unconventional oil and gas development (which is historically rooted in the community) with the interests of the general public.[76] Relying upon its recent decisions in *Frederick* and *Delaware Riverkeeper Network (Middlesex)*, the Commonwealth Court upheld the Ordinance.

2. Snyder Bros., Inc. v. Pa. Public Utilities Comm'n., No. 1043 CD 2015, 2020 WL 587012 (Pa. Commw. Ct. Feb. 6, 2020)

- Exploration and production company not liable for penalties and fines assessed for non-payment of impact fees after challenging the assessment of those fees

In an unreported panel decision, the Commonwealth Court held that Snyder Brothers, Inc. was not liable for fees and penalties assessed by the Pennsylvania Public Utility Commission ("PA PUC") for Snyder Brothers' failure to pay certain impact fees on natural gas production.[77] Pennsylvania's Oil and Gas Act, commonly known as "Act 13," requires oil and gas producers to pay impact fees based on yearly production.[78] Snyder Brothers challenged to the imposition of impact fees on forty-five conventional wells producing less than 90,000 cubic feet of gas per day during any month of the calendar year.[79] Snyder Brothers argued that wells falling below that threshold were "stripper wells" outside the scope of the impact fee.

Snyder Brothers challenged the impact fees before the PA PUC. The PA PUC held that Snyder Brothers had to pay fees on those wells it considered "stripper wells." Snyder Brothers appealed the PA PUC and won the impact fee challenge before the Commonwealth Court. The case went up to the Supreme Court of Pennsylvania, which interpreted the definition of stripper

74. *Protect PT*, 220 A.3d at 1199.

75. *Id.*

76. *Id.*

77. *Snyder Bros., Inc. v. Pa. Pub. Util. Comm'n.*, No. 1043 CD 2015, 2020 WL 587012 (Pa. Commw. Ct. Feb. 6, 2020).

78. 58 Pa. Cons. Stat. ch. 23.

79. *Snyder Bros., Inc.*, 2020 WL 587012, at *1.

well differently and reversed the Commonwealth Court.[80] The Supreme Court remanded all issues remaining from the PA PUC adjudication back to the Commonwealth Court.

The Commonwealth Court, on remand, considered whether Snyder Brothers was required to pay fines and penalties on the impact fees that it challenged.[81] The Commonwealth Court held that Synder Brothers was not required to pay those fines and penalties assessed during its good faith challenge because Snyder Brothers lacked a method to challenge the original impact fee assessment. The Court cited PA PUC's observation that:[82]

> There is no mechanism in Act 13 whereby [Snyder Brothers] could have paid under protect the amount of any impact or spud fees that it disputed. Similarly, Act 13 contains no mechanism by which the [PA PUC] could refund any impact or spud fees that were paid and disbursed to a municipality, but thereafter determined not to be due and owing or otherwise to have been erroneously paid.

Snyder Brothers had to wait until it was under an enforcement action to argue its case against the imposition of the fees.

The Court concluded that Act 13 lacked a meaningful hearing or opportunity to adequately protect property interests against unreasonable deprivation.[83] Act 13 does not provide an opportunity to obtain a clear and certain remedy in the event of a successful challenge to the imposition of impact fees.[84] There is no refund. "Under the federal constitution, and necessarily the charter of this Commonwealth, the ability of a producer to obtain an actual and complete remedy is indispensable to meet due process concerns."[85] The Court continued, "[b]y employing a procedure that deprives [Snyder Brothers] of its property without affording [Snyder Brothers] the opportunity to meaningfully challenge that deprivation and attain full relief, Act 13 effectuates a violation of [Snyder Brothers]'s due process rights under the Fourteenth Amendment to the United States Constitution."[86]

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80. *See Snyder Bros., Inc. v. Pa. Pub. Utils. Comm'n*, 198 A.3d 1056 (Pa. 2018).
81. *Id.* at *2.
82. *Id.* at *4.
83. *Id.* at *5.
84. *Id.*
85. *Id.* at *6.
86. *Id.*

Additionally, the Court held that PA PUC's imposition of fees and penalties amounted to a due process violation because Snyder Brothers did not have adequate notice of the sanctions.[87] Snyder Brothers argued, and the Court agreed, that PA PUC gave inconsistent advice at the outset of the appeal regarding the possibility of any sanction.[88] Snyder Brothers claimed it was "sanctioned for actually following the precise appeal procedures recommended" by PA PUC.[89]

The Commonwealth Court began with the premise that "the requirement of clear and adequate notice is not satisfied where the administrative agency offers baffling and inconsistent advice, and due process prohibits a person from being penalized for acting in conformance with prior agency guidance."[90] The Court continued:[91]

> Put simply, the Commission provided SBI with "baffling and inconsistent" advice and made affirmative representations. In essence, the Commission punished SBI when it acted in conformity—or at least substantially complied—with the advice and guidance that it provided to the public and entities regulated under Act 13. . . . [B]ased on the ambiguities in Act 13, SBI, under a reasonable person standard, could not identify with ascertainable certainty, whether or not, or in what circumstances, it could challenge the impact fee statements without facing the threat of interest and a penalty.

As such, the company had no due process right to challenge the validity of the assessment or seek a refund for the disputed amounts. Furthermore, because Snyder Brothers did not have adequate notice of the possible sanctions it faced for not paying the impact fees, it amounted to an unconstitutional deprivation of due process. The Commonwealth Court held that Snyder Brothers was not required to pay the penalties.

87. *Id.* at *9.
88. *Id.*
89. *Id.*
90. *Id.* at *10 (internal citations and quotations omitted).
91. *Id.* at *13.

E. Third Circuit Court of Appeals

1. UGI Sunbury LLC v. A Permanent Easement for 1.7575 Acres, 949 F.3d 825 (3d Cir. 2020)

- Expert opinion that property value decreased due to "stigma" of the presence of a natural gas pipeline must be adhere to the reliability standards set forth in *Daubert*

A panel of the Third Circuit Court of Appeals unanimously vacated awards of just compensation under the Natural Gas Act holding that the district court abused its discretion by accepting an expert's opinion that the stigma of a natural gas pipeline decreased the value of the property under which the pipeline crossed.[92] The appeals arose from a natural gas pipeline condemnation action commenced in the United States District Court for the Middle District of Pennsylvania. UGI Sunbury, LLC ("UGI"), sought to condemn easements for a natural gas pipeline facility. The district court granted UGI the right to condemn the easements and then held non-jury trials to determine the just compensation owed to the landowners.[93]

Both UGI and the owners of the affected tracts of land submitted evidence of the value of the property. The common measure of compensation for a partial taking—such as the condemnation of an easement—is the difference in the value of the tract burdened by the easement before the taking and after the taking.[94] In other words, the court will award any diminution of value to the affected tract as a result of the pipeline. The landowners engaged Don Paul Shearer, a real estate appraiser, to provide expert opinion testimony of the valuation of the tracts.[95] Mr. Shearer used a "damaged goods" theory to opine that the mere presence of the pipeline negatively impacted the market value due to the stigma associated with natural gas pipelines.[96] UGI moved *in limine* to exclude Mr. Shearer's testimony for failure to meet the standards required by Federal Rule of Evidence 702.[97] The district court relied upon Mr. Shearer's testimony to the decreased value due to the stigma of the pipeline and awarded just compensation based in-part on that testimony.

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92. *UGI Sunbury LLC v. A Permanent Easement for 1.7575 Acres*, 949 F.3d 825 (3d Cir. 2020).

93. *Id.* at 829-30.

94. 26 Pa. Cons. Stat. § 702(a); *see Rover Pipeline LLC v. Rover Tract No. PA-WA-HL-004.500T*, No. 19-1613, --- Fed.Appx. ---, 2020 WL 2214132 (3d Cir. May 7, 2020).

95. *UGI Sunbury LLC*, 949 F.3d at 829.

96. *Id.* at 830.

97. *Id*.

UGI appealed to the Third Circuit, arguing that the "damaged goods" theory and stigma damages were improper. Applying Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), the Third Circuit held that the expert's opinion was unreliable, lacked "fit" and would not assist the trier of fact.[98] Mr. Shearer largely based his opinion on anecdotes from his past employment and experience in an appliance shop..[99]

Under his "damaged goods" theory, Mr. Shearer opined that property a pipeline crosses under has a lower value because people perceive it as damaged. Applying the factors of reliability, the panel held that the expert's methodology was incapable of testing, had not been peer reviewed, was not generally accepted, and did not provide for a rate of error. Under its precedent, an expert's opinion does not have to meet all, or even most, of those factors. The fact that this expert's opinion met none, left his opinion unreliable.[100] Notably, the expert agreed that his report contained elements of subjectivity and speculation.[101]

The Third Circuit also held that the expert opinion did not "fit" and could not assist the trier of fact.[102] The Third Circuit noted that some parts of the expert's opinion compared the value of properties impacted by oil spills and radiation emitted from the Three-Mile Island nuclear disaster.[103] Those properties were distinguishable from the subject properties and incapable of assisting the trier of fact in concluding the impact to the value of property under which a natural gas pipeline crosses. Mr. Shearer's testimony simply did not fit the action.

Finally, the Third Circuit held that Rule 702 applies to bench trials in the same way that it applies to jury trials.[104] The district court must act as "gatekeeper" and ensure that expert opinions are based on reliable science. The Third Circuit did provide that district courts have "leeway" to decide how to analyze an opinion under Rule 702, such as conditionally hearing the testimony. The opinion demonstrates, however, that even with leeway, the district courts must analyze the reliability and fit of the proffered expert's testimony.

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98. *Id.* at 836.
99. *Id.* at 834.
100. *Id.*
101. *Id.* at 831, 835.
102. *Id.*
103. *Id.* at 831, 836.
104. *Id.* at 832.

F. Federal District Court

1. Diehl v. SWN Prod. Co., LLC, No. 3:19-CV-1303, 2020 WL 1663342 (M.D. Pa. Apr. 3, 2020)

- The district court granted defendant oil and gas lessee's motion to dismiss lessor's claim for breach of the implied covenant to develop an oil and gas lease for failing to drill additional unit wells while denying motion as to additional claims based on an implied duty to market gas.

Plaintiff landowners, Robert W. Diehl, Jr., and Melanie L. Diehl, executed an oil and gas lease in 2007 on 160.94 acres in Susquehanna County. Before the end of the extended primary term in 2017, lessee-assignee SWN Production Company, LLC ("SWN") unitized the lease into two units, each with one unconventional gas well producing from the Marcellus Shale formation.[105]

The Diehls filed a claim against SWN in federal court based on diversity jurisdiction with multiple counts relating to alleged breaches of the implied covenant to market and the implied covenant to develop the lease. SWN filed a motion to dismiss all of the claims for failing to state a claim for which relief could be granted under Federal Rule of Civil Procedure 12(b)(6).[106]

The district court first considered the first three counts related to the implied duty to market. The district court noted that prior federal cases in Pennsylvania had recognized this duty, although the Pennsylvania Supreme Court had not recognized an implied duty to market.[107] In particular, prior cases relied upon Texas cases to conclude that where the lease is silent, the lessee has a duty to market the oil and gas reasonably, and in a proceeds lease, a lessee has a duty to obtain the best price reasonably available.[108] The district court cited Texas law to conclude that "the duty to reasonably market 'is two-pronged: (1) 'the lessee must market the production with due diligence,' and (2) must 'obtain the best price reasonably possible.'"[109]

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105. *Diehl v. SWN Prod. Co.*, No. 3:19-CV-1303, 2020 WL 1663342, at *1 (M.D. Pa. Apr. 3, 2020).

106. *Id.*

107. *Id.* at *3 (citing *Chambers v. Chesapeake Appalachia, L.L.C.*, 359 F. Supp. 3d 268, 278 (M.D. Pa. 2019)).

108. *Id.* at *4 (citing *Canfield v. Statoil USA Onshore Properties Inc.*, No. CV 3:16-0085, 2017 WL 1078184 (M.D. Pa. Mar. 22, 2017)).

109. *Id.* (quoting *Flanagan v. Chesapeake Expl., LLC*, No. 3:15-CV-0222-B, 2015 WL 6736648, at *2 (N.D. Tex. Nov. 4, 2015)).

The first count of the Diehl's complaint alleged that SWN violated the implied covenant to market by selling gas for less than the best price reasonably available. The district court refused to dismiss the claim, finding that the Diehls alleged that SWN had provided insufficient information regarding its downstream gas sales, while acknowledging that the Diehls would eventually need to provide evidence where SWN could have obtained a higher price.[110] The second count and third count alleged that SWN violated the implied covenant by selling the gas to an affiliate and by incurring unreasonably high post-production costs. The district court denied SWN's motion to dismiss these claims as well as related declaratory judgment and quiet title claims (Counts V and VI).[111]

The fourth count alleged that SWN violated the implied covenant to develop the lease by drilling additional wells.[112] In *Jacobs v. CNG Transmission Corp.*, the Pennsylvania Supreme Court has recognized the implied covenant to develop that requires a lessee to produce oil and gas when a lease does not provide any compensation to the lessor other than royalty from production.[113] SWN argued that the implied covenant did not apply because the leases provide payments in the absence of production, including shut-in payments and gas storage rentals. The Diehls argued that the covenant still applied because the only compensation currently being paid was production royalties. The district court noted that the *Jacobs* decision did not consider whether the covenant applied to a lease with production in paying quantities.[114]

In *Caldwell v. Kriebel Resources Co.*, the Pennsylvania Superior Court dismissed a claim that a lessee violated the implied covenant to develop by failing to drill additional wells in the Marcellus Shale formation on a leasehold with producing vertical wells.[115] The district court noted that the Superior Court reached the same conclusion in a subsequent, non-precedential decision.[116]

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110. *Id.* at *5.
111. *Id.* at *6-7, 16.
112. *Id.* at *7.
113. *Jacobs v. CNG Transmission Corp.*, 565 Pa. 228 (2001).
114. *Diehl*, 2020 WL 1663342, at *9.
115. *Caldwell v. Kriebel Res. Co., LLC*, 72 A.3d 611, 613 (Pa. Super. Ct. 2013).
116. *Diehl*, 2020 WL 1663342, at *11 (citing *Norm's, Ltd. v. Atlas Noble, LLC*, No. 1377 WDA 2014, 2015 WL 7112968 (Pa. Super. Ct. May 8, 2015) ("To the extent that Norm's is arguing Atlas has a duty to completely develop and extract all exploitable resources on the leased premises, there is no provision of the Lease that imposes such a duty and we will not imply it for the above reasons.")).

In *Seneca Resources Corp. v. S&T Bank*, the Superior Court affirmed summary judgment against an oil and gas lessor who claimed that the lessee violated the implied covenant to develop all of the acreage covered by a very high acreage lease. The Superior Court concluded that because the lease did not contain a drilling commitment beyond the habendum clause requirement of production in paying quantities, the express language of the lease foreclosed the application of the implied covenant of development.[117]

The district court concluded that the "Superior Court has consistently concluded that an implied duty to develop was not applicable or was not breached when the lessor was not holding the property without developing it—where development had commenced it was the express terms of the lease that controlled."[118] The Diehls failed to distinguish the cases or cite contrary authority and the court further concluded that "during the production phase of operations, absent express development terms in the lease, the terms of the habendum clause represent the only bargain of the parties and no implied duty to develop reasonably can be imposed upon the lessee thereafter."[119] Because SWN produced from two producing wells, SWN did not hold the lease without payment and the lease did not impose any additional requirements.[120]

The district court further rejected the Diehls' alternative claim that they had sufficiently alleged that SWN was not acting in good faith. SWN could rely on its business judgment unless the Diehls could provide additional facts supporting a claim of fraud by SWN.[121] The district court dismissed Count IV of the Diehls' complaint.

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117. *Diehl v. SWN Prod. Co., LLC*, No. 3:19-CV-1303, 2020 WL 1663342, at *12 (M.D. Pa. Apr. 3, 2020) (quoting *Seneca Res. Corp. v. S & T Bank*, 122 A.3d 374, 387 (Pa. Super. Ct. 2015) ("Thus, as the parties have stipulated that the drilling and operating requirements under the Lease are satisfied, the Lease will extend for an indefinite secondary term as long as any portion of the leased premises are being drilled or operated for the production of oil or gas. Indeed, as noted in the above discussion regarding severability, the Lease makes no mention of any duty or mandate to drill or operate the unoperated acreage for the production of gas to continue the Lease as to that acreage in full force and effect. Based upon the foregoing, we conclude that the Lease between the Appellants and Seneca forecloses a finding of a breach of the implied covenant to develop and produce oil and gas on the unoperated acreage.") (internal citations omitted)).

118. *Id.* at *12.

119. *Id.*at *14.

120. *Id.*

121. *Id.* at *16 (citing *Colgan v. Forest Oil Co.*, 194 Pa. 234, 241 (1899)).

2. Butters v. SWN Prod. Co., LLC, No. 4:17-CV-797, 2020 WL 1503657 (M.D. Pa. Mar. 30, 2020)

- The district court denied oil and gas lessee's motion for summary judgment on lessor claims that leases had terminated under habendum clauses, finding that lessors raised an issue of fact as to lessee's due diligence under operations clauses

Plaintiffs Gary R. Butters, Co-Trustee of the Butters Clinton County Gas Protector Trust, David F. Butters, Terry L. Butters, and Glen E. Butters (collectively, "Butters") executed two oil and gas leases in 2005 that were assigned to SWN Production Company, LLC ("SWN"), covering multiple tracts in Tioga County, Pennsylvania.[122] The leases had five year primary terms that could be extended for an additional five years, and lessee extended the terms until 2015. The habendum clauses in the leases provided in part that the leases would be extended beyond the primary term:

> as long thereafter as (1) *drilling operations continue with due diligence*, provided that LESSEE has commenced drilling operations on any portion of the premises or any lands pooled or unitized therewith, within the primary term.[123]

The leases defined "operations" as follows:

> Operations. Whenever used in this lease, the word "operations" (unless specified to the contrary) shall mean operations for and any of the following: dirt work, building of roads and locations, drilling, testing, completing, reworking, recompleting, deepening, plugging back, repairing, abandoning or dewatering (meaning pumping or flowing of water and/or associated hydrocarbons from a well) of a well in search of or in an endeavor to obtain, increase or restore and/or market or render marketable or more valuable production of oil or gas, and/or production, actual or constructive, of oil or gas.[124]

SWN's predecessor drilled a well lateral in 2011, but the well was not connected to a pipeline due to a lack of availability. In 2015, SWN began implementing a "Continuous Operations Schedule" on a wellpad on the unit containing the leases and drilled one additional lateral, but it also was not

122. *Butters v. SWN Prod. Co., LLC*, No. 4:17-CV-797, 2020 WL 1503657, at *1 (M.D. Pa. Mar. 30, 2020).

123. *Id.* at *2.

124. *Id.*

brought into production.[125] Under the Schedule, SWN allegedly performed operations on the wells every 60 to 90 days to ensure that SWN met the requirement of "due diligence" under the continuous operations clause.

The Butters brought an action to have the leases terminated in state court. SWN removed the action to federal court on diversity grounds.[126] After the district court denied SWN's motion to dismiss, SWN later brought a motion for summary judgment, arguing that there is no issue of material fact as to whether SWN met its contractual obligation to continue operations with due diligence. The district court adopted this general test for due diligence: "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation."[127]

The Butters argued SWN's adoption of the Continuous Operations Schedule was evidence of a lack of due diligence. Further, SWN argued that it was sufficient evidence of due diligence.[128] The district court found that the adoption of the Schedule was not per se evidence of due diligence or evidence of a lack of due diligence.[129] SWN also argued that its completion of the second well demonstrated due diligence, but the district court distinguished the cases cited by SWN as involving whether a lessee had commenced operations on a lease prior to the end of the primary term, rather than addressing proper due diligence in the secondary term.[130] The district court also found that the parties disputed whether SWN had complied with the 60 to 90 day schedule. The Butters alleged a six-month period without operations and argued that SWN's actions were indicative of bad faith. The district court credited the Butter's argument that SWN took longer to complete the well than other operators but also credited SWN's argument that the unavailability of a pipeline should also bear on the reasonableness of any delays, while not ipso facto excusing any delays.[131] The district court denied SWN's motion for summary judgment, concluding that SWN's due diligence was an issue for the factfinder at trial.[132]

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125. *Id.* at *3.
126. *Id.* at *5.
127. *Id.* at *8 (quoting *Diligence*, Black's Law Dictionary (8th ed. 2004)).
128. *Id.* at *9.
129. *Id.* at *10.
130. *Id.* (distinguishing *Roe v. Chief Expl. & Dev. LLC*, No. 4:11-CV-00579, 2013 WL 4083326 (M.D. Pa. Aug. 13, 2013), and *Pemco Gas, Inc. v. Bernardi*, 5 Pa. D. & C.3d 85 (Pa. Com. Pl. 1977)).
131. *Id.* at *11.
132. *Id.* at *11.

3. Pennsylvania Game Comm'n v. Thomas E. Proctor Heirs Tr., No. 1:12-CV-1567, -- F.Supp.F.3d --, 2020 WL 1922628 (M.D. Pa. April 21, 2020)

- On motion for reconsideration, the district court denied partial summary judgment in favor of the Commonwealth of Pennsylvania, holding that genuine issue of fact existed as to whether tax sale purchaser was agent of owner, precluding a "title wash" of severed mineral interest held by predecessor of defendants.

The Commonwealth of Pennsylvania filed a complaint against two trusts holding the interests of Thomas Proctor's heirs (collectively, "Proctor Heirs") claiming ownership of surface and oil and gas rights under numerous tracts in Sullivan and Bradford Counties.[133] The parties eventually brought cross-motions for partial summary judgment. The Chief Magistrate issued a report recommending that both motions be denied. Both parties filed objections with the district court.

The motions specifically addressed ownership of the Josiah Haines Warrant located in LeRoy Township, Bradford County, the Bellwether tract for the litigation. Thomas Proctor and Jonathan A. Hill first conveyed the tract in 1894 to the Union Tanning Company, excepting the oil, gas and minerals. In 1903, Union Tanning Company conveyed the property to the Central Pennsylvania Lumber Company ("CPLC"), excepting certain bark rights on the timber and subject to prior reservations. In 1908, Calvin H. McCauley purchased the property at a tax sale in 1907. The dispute centered on which rights were conveyed in the tax sale deed.[134]

In 1910, McCauley and his wife quitclaimed their interest in numerous warrants, including the Josiah Haines Warrant, back to the CPLC. In 1920, the CPLC conveyed the Warrant to the Pennsylvania Game Commission, expressly subject to the exceptions in the 1894 and 1903 deeds. After 1980, the Proctor Heirs leased the Warrant for oil and gas development.[135]

The parties filed objections relating to four disputes that the Magistrate Report identified as having a genuine issue of material fact precluding summary judgment: 1) whether the Warrant was seated or unseated (meaning developed or undeveloped) at the time of the 1907 tax

133. *Pennsylvania Game Comm'n v. Thomas E. Proctor Heirs Tr.*, No. 1:12-CV-1567, -- F.Supp.F.3d --, 2020 WL 1922628 (M.D. Pa. April 21, 2020).

134. *Id.*

135. *Id.* at *2.

assessment; 2) whether McCauley acted as an agent for the Central Pennsylvania Lumber Company when he purchased the Warrant in 1908; 3) whether the terms of the 1920 deed to the Game Commission prevented the conveyance of the oil, gas and mineral rights, and 4) whether the 1908 tax sale met federal due process requirements.[136]

The Game Commission's ownership claim relied upon the theory that the 1908 tax sale "title-washed" the severed minerals under the Pennsylvania Supreme Court's decision in *Herder Spring Hunting Club v. Keller*.[137] Title-washing in that decision only applies to "unseated," undeveloped land. The County land assessor designated the land as seated or unseated based on an investigation of the property for permanent improvements indicating that the land was seated. The Proctor Heirs introduced evidence that bark-peeling (the bark was used by leather tanneries) and lumbering activities took place on the warrant in 1905, 1906, and 1907.[138] The bark was removed by cutting down the tree, striping off the bark, and leaving the wood to rot. The district court concluded that a reasonable juror could decide that the property should have been designated as seated based on this activity.[139]

However, the district court found that the Proctor Heirs could not use this to attack the validity of the 1908 tax deed. The Act of June 3, 1885, which controlled the tax sales, provided that "[a]ll sales of seated or unseated lands within this commonwealth which shall hereafter be made for arrearages of taxes due thereon, shall be held, deemed and taken to be valid and effective irrespective of the fact whether such lands were seated or unseated at the time of the assessment of such taxes."[140] The Pennsylvania Supreme Court ruled that "[The Act of June 3, 1885] made an important change in the law by validating sales which followed the assessment and it furnished some protection to purchasers at tax sales *by foreclosing litigation as to whether the assessor had erred in determining whether the land was in fact seated or unseated*, a question which was often close and technical."[141]

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136. *Id.*

137. *Herder Spring Hunting Club v. Keller*, 636 Pa. 344 (2016).

138. *Pennsylvania Game Comm'n*, 2020 WL 1922628 at *3-4.

139. *Id.* at *4.

140. *Id.* at 5 (quoting 72 P. S. § 5933).

141. *Scott v. Bell*, 344 Pa. 243, 245–46 (1942) (quoting *Pittsburg Hunting Club v. Snyder*, 51 Pa. Super. 174, 182 (1912)) (emphasis added).

The district court rejected a Third Circuit case cited by the Proctor Heirs,[142] noting that the case failed to cite prior Pennsylvania Supreme Court decisions on the issue and misconstrued an exception in the statute. *Scott* implies that the exception in the section only invalidated a tax sale as seated or unseated when it conflicted with the underlying assessment as to whether the property was seated or unseated, not the correctness of the underlying assessment itself.[143] The district court also cited the legislative history of the Act to support the conclusion that the Act was intended to stop challenges to the underlying assessment of land as seated or unseated.[144] Accordingly, the Proctor Heirs could not challenge the validity of the assessment as unseated.[145]

The second dispute involved whether McCauley was an agent for the CLPC when he purchased the Josiah Haines Warrant at the 1908 tax sale.[146] The Proctor Heirs introduced evidence that McCauley purchased over 100 properties of CPLC's at delinquent tax sales and quitclaimed those tracts back to CPLC. McCauley was identified as CPLC's real estate agent in its articles of incorporation and internal documents. McCauley also made appearances as an attorney for CPLC in court proceedings. CPLC even paid the taxes on the Warrant after McCauley purchased the Warrant. The district court concluded that there was considerable evidence that McCauley was CPLC's agent.[147]

The district court found there was sufficient evidence to raise a dispute of material fact as to whether that the interest sold at tax sale only embraced the surface of the Warrant, based on the assessment in the name of CPLC. The court distinguished this case from the *Herder* case because in *Herder* neither party reported their interest to the county commissioners subsequent to the severance of the Warrant.[148]

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142. *Northumberland City. v. Philadelphia & Reading Coal & Iron Co.*, 131 F.2d 562 (3d Cir. 1942).

143. *Pennsylvania Game Comm'n*, 2019 WL 6893205 at *6 ("*Scott* implies that the exception operated to invalidate tax sales in the rare situation where land was regularly assessed as seated or unseated but then sold at a tax sale as the opposite, failing to 'follow' its assessment.").

144. *Id.* at *8-9 (citing LEGIS. REC., S. 110th Assy., 1st Sess., at 2089 (Pa. May 28, 1885)).

145. *Id.* at *9 ("Even if the Bradford County assessor was mistaken about the character of the Josiah Haines warrant in 1907, the Proctor Trusts cannot challenge the validity of the treasurer's sale by proffering evidence that the assessor misclassified the tract.").

146. *Id.* at *10.

147. *Id.* at *11.

148. *Id.* at *12-13 (citing *Herder Spring*, 143 A.3d at 360).

The district court cited the principle that a property owner who had a duty to pay taxes, cannot acquire a better title by purchasing the property at a tax sale for delinquent taxes, citing the Pennsylvania Supreme Court decision in *Powell v. Lanzy*.[149] Again distinguishing *Herder*, the district court concluded that CPLC had a duty to pay taxes on the Warrant:

> We acknowledge that, at several points in the *Herder Spring* decision, the court uses language—albeit in *dicta*—which could be read to infer that there was no duty to pay taxes on unseated land. Nevertheless, when put in proper context, we do not believe that such remarks were meant to contradict longstanding legislation or state court precedent.[150]

The district court concluded that CPLC had a duty to pay the taxes even though they did not have personal liability or responsibility to pay the taxes.[151] If McCauley were CPLC's agent, then under *Powell* CPLC could only be vested with its surface estate.

On the third dispute, whether the oil and gas rights were reserved in the 1920 deed from CPLC to the Game Commission, the district court concluded that the "subject to" clause was insufficient to reserve the oil, gas and mineral rights, finding that this language intended to protect against breach of warranty claims.[152] Lastly, the district court denied the Proctor Heirs' claim that the tax sale law violated due process. The court concluded that the process of constructive notice was constitutionally adequate despite the use of notice by publication:

> For treasurers' sales in the 1800s and early 1900s, it was "not reasonably ... practicable to give more adequate warning" to unseated property owners. Notice by publication was the type of notice required, expected, and relied upon at the time, and for good reason. Such notice was "reasonably calculated to apprise interested" unseated landowners of the pending tax sale and "afford them an opportunity to present their objections." Stated differently, notice by publication was "reasonably certain to inform those affected."[153]

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149. *Id.* at *15 (citing *Powell v. Lantzy*, 173 Pa. 543 (1896).
150. *Id.* at *16.
151. *Id.* at *18.
152. *Id.* at *18.
153. *Id.* at *20 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315, 317 (1950)).

The district court found genuine issues of material fact precluding partial summary judgment as to 1) the scope of the interest conveyed in the 1908 tax sale, and 2) whether McCauley acted as CPLC's agent at the time of the tax sale.[154]

G. Pennsylvania Environmental Hearing Board

1. B&R Res., LLC v. Dep't of Envtl. Protection, EHB Docket No. 2015-095-B, 2020 WL 853729 (Pa.Env.Hrg.Bd. Feb. 14, 2020), appeal pending, 291 CD 2020 (PA. Commw. Ct.)

- Enforcement against individual under participation theory extends only to those violations the company could have addressed.

The Commonwealth of Pennsylvania, Environmental Hearing Board applied the participation theory to find individual liability on a plugging order issued by the Department of Environmental Protection.[155] Under its previous adjudication in 2017, the Board found Richard Campola, the sole member of B&R Resources, LLC, personally liable on all forty-seven wells subject to the plugging order (the "Wells").[156] The Board held Mr. Campola liable under a participation theory of personal liability.[157] After an appeal to the Commonwealth Court and subsequent remand, the Board concluded that Mr. Campola was personally liable for four of the Wells because the company only had the resources to address four of the forty-seven violations.

Generally, the liabilities of a business entity, like B&R Resources, do not extend to the individual corporate officers, directors or shareholders of the corporation, such as Mr. Campola.[158] The participation theory is an exception to that general rule. Under the participation theory, an officer, director or shareholder can be held individually liable for personally participating in the wrongful conduct.[159] Here, B&R Resources owned and operated the Wells. The Department issued an order to both B&R

154. *Id.*

155. *B&R Resources, LLC v. Dep't of Envtl. Protection*, EHB Docket No. 2015-095-B, 2020 WL 853729 (Pa.Env.Hrg.Bd. Feb. 14, 2020), *appeal pending*, 291 CD 2020 (PA. Commw. Ct.).

156. *B&R Resources, LLC v. Dep't of Envtl. Protection*, EHB Docket No. 2015-095-B, 2017 WL 3585535 (Pa.Env.Hrg.Bd. Aug. 9, 2017) ("2017 Adjudication").

157. *Id.* at *14.

158. *Wicks v. Milzoco Builders, Inc.*, 503 Pa. 614, 470 A.2d 86, 90 (1983).

159. *Id.*

Resources and Mr. Campola. The Department argued that Mr. Campola was individually liable because he personally participated in the abandonment of the Wells by failing to address the violations.

Mr. Campola appealed the 2017 adjudication and the Commonwealth Court reversed and remanded the issue back to the Board.[160] The Commonwealth Court concluded that personal liability could only extend to the violations that the company could have addressed.[161] As such, the Commonwealth Court remanded back to the Board to determine "how many, if any, of the Wells could have been plugged if Campola had caused B&R to make reasonable efforts to plug the Wells[.]"[162]

On remand, the Board analyzed B&R Resources' financial records and heard expert opinion testimony submitted by both parties. The Board concluded that B&R Resources could have used approximately $85,278 to address the violations noted in the plugging order.[163] The Board then divided that number by $18,500, to calculate the average cost to plug one of the forty-seven Wells.[164] After conducting its analysis, the Board found Mr. Campola personally liable on the plugging obligations for four of the forty-seven Wells.[165] The Board's application demonstrates that it must determine whether the company responsible for compliance can address the violations before finding personal liability of the company's officers, directors or shareholders.

H. Regulatory Changes

Pennsylvania Regulatory Agency Increases Unconventional Well Permitting Fees 150%

The fees necessary to obtain an unconventional well permit increased on August 1, 2020.[166] The Independent Regulatory Review Commission ("IRRC") approved a final rulemaking that increased the unconventional well permit fee from $5,000 for non-vertical unconventional wells and $4,200 for vertical unconventional wells to $12,500 for all unconventional wells after the Environmental Quality Board approved the rulemaking package on January 21, 2020. Conventional well permitting fees did not

160. *B&R Res., LLC v. Dep't of Envtl. Protection*, 180 A.3d 812 (Pa. Commw. Ct. 2018).
161. *Id.* at 821.
162. *Id.*
163. *B&R Res., LLC*, 2020 WL 853729, at *8.
164. *Id.*
165. *Id.*
166. 50 Pa. Bull. 3854 (Aug. 1, 2020).

change under the rulemaking. The fee increases became effective upon publication in the Pennsylvania Bulletin on August 1, 2020.[167]

167. *Id.*