

Court Revisits PEDF on Remand: Limits on Environmental Rights Amendment

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Has the Commonwealth Court now held that Pennsylvania may allow temporary use of public natural resources and distribute the income as it pleases?

By David G. Mandelbaum | August 13, 2019 | The Legal Intelligencer

On July 29, the Pennsylvania Commonwealth Court returned to *Pennsylvania Environmental Defense Foundation v. Commonwealth*, a leading case on the Environmental Rights Amendment to the Pennsylvania Constitution. The court appears to have decided that the commonwealth is free to allow use of Pennsylvania's public natural resources and to apply the income however it chooses. Only proceeds from the sale of public natural resources must be returned to the public trust corpus.

As is by now familiar, the Pennsylvania Supreme Court plurality in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), opined that the second and third sentences of the Environmental Rights Amendment create a trust. The corpus of the trust is all the public natural resources of Pennsylvania. The trustee is the commonwealth. The beneficiary is "all the people, including generations yet to come." The full text of the amendment is: "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."

Robinson Township involved, among other things, the provisions of the Oil and Gas Act amendments (Act 13) that sought to impose uniform land use controls on oil and gas activities and to preempt local zoning that limited new oil and gas development. The Supreme Court plurality would have held that by depriving municipalities of their ability to establish locally appropriate setbacks and other limits, and to exclude new wells from some zones, Act 13 precluded those municipalities from fulfilling their trustee responsibilities.

PEDF presented a more straightforward application of trust issues. There, the plaintiff challenged diversion to the general fund of proceeds from leasing oil and gas rights under state forests and parks from a fund set aside for the use of the Department of Conservation and Natural Resources to benefit those parks and forests. A Supreme Court majority endorsed the analysis of the *Robinson Township* plurality, see *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017). The Supreme Court held that diversion of proceeds from the disposition of oil and gas would be a violation of the commonwealth's trustee obligations, and remanded for a determination whether all the funds diverted were in fact compensation for the diversion of the public natural resource (that is, the oil and gas).

The July 29, decision from the Commonwealth Court addresses that question. The commonwealth had received bonus payments upon entry into the primary term of leases, rents, fees and royalties. Of those, the Commonwealth Court had to determine which were payments for the sale of a trust asset, and which were not.

The Commonwealth Court considered the issue to be grounded in both oil and gas law, particularly the meaning of common lease terms and in trust law. One should note that neither area of law comes to the Commonwealth Court in the ordinary course. Appeals from actions under mineral leases and appeals from trust matters in the Orphans' Court would ordinarily be heard by the Superior Court. Nevertheless, the *PEDF* opinion contains a review of common provisions of a natural gas lease, common principles of trust law, and specific issues of the division of property between income beneficiaries and remaindermen. These discussions warrant review just because some may cite them as authoritative, perhaps more authoritative than the Commonwealth Court intended.

Conventional oil and gas leases contain certain payments for the exclusive right to explore for hydrocarbons. When structured as an upfront bonus, those payments can be large. Once it discovers oil or gas that it can produce economically, the lessee has an obligation to develop them reasonably, but the exclusive right to do so. If there is an impediment to prompt severance and sale of the oil and gas, the lessee may have to pay a rent for the period in which it holds the right to develop the hydrocarbons, but is not doing so. It may also pay fees for certain surface access or other payments like rents that are, for whatever reason, called fees in the lease. The primary consideration paid by the lessee to the lessor are royalties—a percentage of the value of the oil and gas produced.

Money is fungible. Parties can structure transactions to convert royalties into bonus payments into rents, and vice versa. Thus, if it mattered whether the payment were for the sale of the asset, one could increase or decrease the total amount called a royalty, even if the economics of the transaction did not change. As the Commonwealth Court noted, that issue comes up when one person holds an income interest and another holds the remainder. Money paid to rent a house for one year is, presumably, income. However, money paid to buy the house in fee is payment for the asset. While the income on those proceeds may properly go to an income beneficiary, the proceeds themselves have to remain intact for the remainderman.

The Commonwealth Court opined that the rules governing disposition of payments for mineral interests as between income and remainder beneficiaries of a trust ought to govern resolution of *PEDF*. Because by statute one-third of the amounts received are income and the remainder payment for the asset, so long as two-thirds of the amounts received by the commonwealth remained in the conservation fund, the Commonwealth Court reasoned that the commonwealth had not violated the Environmental Rights Amendment.

That reasoning has some important implications. First, the Commonwealth Court confirms that the Environmental Rights Amendment does not impose an absolute obligation of conservation on the commonwealth. Public natural resources can be used. The use merely has to be reasonable, in light of the

right of later generations also to use the same resources. That is, the court confirms that the environmental permitting programs and all other governmental decision-making does not have to leave Pennsylvania in exactly its present state. If the air is a public natural resource, one can emit to the air, so long as that emission falls within reasonable limits.

Second, it appears that whatever the use of the resource produces as income can be spent currently without being impressed with the public trust. That is, if the bonus payment is a payment for the right to explore for oil and gas, then the commonwealth may put that amount into the general fund and spend it on roads, schools or whatever the political process decides.

Now, the Commonwealth Court does not make this second point explicitly, but it is the natural way to understand the court's opinion. Otherwise, it would not make a difference whether a payment on account of a trust asset would be accounted to income or principal. All amounts would be impressed with the trust, and all amounts would have to be used to conserve the public natural resources of the commonwealth.

One way to provide a rationale for that approach is to treat it as a corollary to the first. If the public natural resources may be used to benefit Pennsylvanians now, then ordinary political and administrative processes can make appropriate balances between use and preservation. The Constitution—on this view—constrains the present political process from disposing of the trust corpus to the advantage of the current generation at the expense of the future.

But that might also be too contrived and not at all what the Environmental Rights Amendment means. It may not even be what the Commonwealth Court meant. The court may have just found itself wrapped around an analysis that did not help with the question. As I keep ending the columns about the Environmental Rights Amendment, we will have to see what the courts do with the amendment; what they have done so far is less than clear.

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