No. _____

# In the Supreme Court of the United States

HARRY KELLER AND ANNA KELLER, *et al.*,
*Petitioners*,

v.

HERDER SPRINGS HUNTING CLUB,
*Respondent*.

HOYT ROYALTY LLC, *et al.*,
*Petitioners*,

v.

DAVID C. BAILEY, *et al.*,
*Respondents*.

*Petition for Writ of Certiorari to the Supreme Court of Pennsylvania*

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

According to the Pennsylvania Supreme Court, the record owner of oil, gas and other subsurface interests can later be stripped of his or her property through an *in rem* tax sale directed solely at the surface estate, with advance notice given only by publication, a form of notice this Court has termed little more than a "feint." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). This interpretation of a state's tax statutes countenances a violation of the Fifth and Fourteenth Amendments to the United States Constitution. Under similar circumstances, this Court has struck down state statutes which, as interpreted and applied, fundamentally depart from the due process principles that underpin the founding of this Republic. This Court should do the same here.

The Pennsylvania Supreme Court's ruling perpetuates a clear and widely acknowledged split among state courts of last resort over whether this Court's decisions in *Mullane* and *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), apply to published *in rem* tax sales that predate those decisions. Also, there is a split among the courts over whether recorded subsurface estate owners are entitled to actual rather than constructive notice of real estate tax sales that occur after their reservations are recorded, an issue which this Court had noted probable jurisdiction in *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100 (1973). Here, the Pennsylvania Supreme Court sided with those courts which have applied *Mennonite* and *Mullane* retroactively, but then failed to give these precedents full effect. Instead, Pennsylvania's highest court ruled that published

notice was sufficient, even though the subsurface owners' identities would have been known based on their ownership of and payment of taxes on the unseated land prior to their recorded severance.

The presented questions are:

1. Whether Pennsylvania's unseated land tax statues as recently interpreted by its highest court and under which the tax sales were made and title is claimed violate the Due Process Clause of the Fifth and Fourteenth Amendments as applied to owners of recorded nonproducing oil, gas and other subsurface interests?

2. Whether notices of *in rem* tax sales by publication issued by the taxing authorities under Pennsylvania's unseated land tax statutes violate the due process standards identified in *Mullane* and *Mennonite* for owners of recorded nonproducing oil, gas and other subsurface interests?

## PARTIES TO THE PROCEEDING

This proceeding involves a Pennsylvania Supreme Court opinion and two Pennsylvania Superior Court opinions which decided two separate proceedings involving the same federal due process concerns.

In *Herder*, Petitioners, the heirs of the late Honorable Harry Keller of the Centre County Court of Common Pleas and his wife Anna Keller (the "Kellers"), were defendants in the trial court, appellees in the Superior Court and appellants in the Supreme Court. Respondent Herder Spring Hunting Club ("Herder") was the plaintiff in the trial court, appellant in the Superior Court and appellee in the Supreme Court.

In *Bailey*, Petitioner Hoyt Royalty, LLC, on behalf of itself and all other heirs, successors and assigns of the late William, Mark, Edward, Theodore, and George Hoyt, trading and doing business as Hoyt Brothers, and their wives (the "Hoyts"), was a defendant in the trial court, an appellant in the Superior Court and a petitioner in the Supreme Court. Respondents David C. Bailey, and David C. Bailey and Cecelia Bailey, trustees of David C. Bailey Trusts (the "Baileys"), were plaintiffs in the trial court and appellees in the Superior Court.

## CORPORATE DISCLOSURE STATEMENT

Hoyt Royalty, LLC is a privately held Colorado limited liability company which has no parent or publicly held company owning 10% or more of its membership interest.

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## OPINIONS BELOW

In *Herder,* the Pennsylvania Supreme Court's opinion is reported at 143 A.3d 358 and the Superior Court's opinion is at 93 A.3d 465. (App.1-47; App.49-69.) The Superior Court's unpublished opinion in *Bailey* is reported at 134 A.3d 484. (App.97-116.) The trial court's opinions are unreported. (App.70-74; App.117-132.)

## JURISDICTION

Judgment in *Herder* was entered on July 19, 2016, and Hoyt Royalty's allocatur petition in *Bailey* was denied on September 7, 2016. (App.1-47; App.95-96.) This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution provide:

> No person shall . . . be deprived of life, liberty or property, without due process of law; . . . .
>
> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

The relevant portions of the Act of 1806, March 28, 4 Sm. L. 346, P.L. 644, *repealed and restated by* 72 P.S. § 5020-409 ("1806 Act"), are reproduced at App.238-239. The relevant portions of the Act of 1804, April 3,

P.L. 517, 4 Sm. L. 201 ("1804 Act"), *amended by* the Act of 1815, March 13, 6 Sm. L. 299, P.L. 177 ("1815 Act"), *amended by* the Act of 1847, March 9, P.L. 278 ("1847 Act"), are reproduced at App.240-254. The Acts of 1804, 1806, 1815 and 1847 are referred to collectively as the "Statutes."

## STATEMENT OF THE CASE

These cases involve the unconstitutional taking of private property in violation of the Due Process Clause of the Fifth and Fourteenth Amendments. The underlying facts are relatively undisputed and concern the ownership of nonproducing oil and natural gas beneath two tracts of unimproved real estate in Pennsylvania known in *Herder* as "433 acres, 153 perches of the Eleanor Siddons Warrant" in Centre County (Siddons Warrant) and in *Bailey* as "168 acres of Warrant No. 4350" in Lycoming County (Hoyt Property).

### A. The Proceedings' Material Facts.

#### 1. The *Herder* Case.

The Kellers acquired the Siddons Warrant when they purchased it at an 1894 tax sale. (App.3-4.) In 1899, the Kellers sold the surface and reserved the Siddon Warrant's nonproducing oil, gas and other subsurface interests by recording a deed that contained their written reservation. (App.4.) Thereafter, through several conveyances made subject to the Kellers' 1899 reservation, Herder acquired title to the Siddons Warrant in 1959 subject to all prior reservations. (App.6.)

In 2008, without engaging in any oil or gas production during its 49 years of ownership, Herder filed a quiet title action[1] against the Keller Heirs, contending a 1935 treasurer's sale for the collection of $79.42 in unseated land taxes assessed in the name of the then-surface estate owner, Ralph Smith, extinguished the Kellers' 1899 reservation and rendered Herder the owner of the Siddons Warrant's oil and gas. (App.7.) Herder premised its quiet title tax claim on the Kellers' purported non-compliance with the 1806 Act. (App.7, 51, 76.) In response, the Keller Heirs denied Herder's tax title claim and asserted they held sole title to the Siddon Warrant's oil and gas. (App.8, 79-87, 90-93.)

### 2. The *Bailey* Case.

The Hoyt Property was one of several owned by the Hoyts in Lycoming County when they recorded their April 22, 1893 deed reservation of the nonproducing oil, gas and other subsurface interests in such properties.[2]

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[1] In Pennsylvania, a quiet title action is the means by which a tax claimant or its successors can obtain a judicial determination of the relative and respective rights of all potential titleholders and possession of what it purportedly purchased. *See* Pa. R. Civ. Proc. 1061(b)(2) & (4).

[2] The Hoyts operated a 19th century leather company in New York City. In 1893, the Hoyts sold their tanneries and timber assets consisting of approximately 55,000 acres to United States Leather Company and its subsidiaries and subsequently served as their executive officers and directors. As part of this transaction, the Hoyts reserved all oil, gas, minerals and mineral rights of the lands they transferred, many of which are located in the Marcellus and Utica shale regions of Pennsylvania and New York. *See* https://hoytroyalty.com/history/.

(App.78-79.) Prior to their 1893 deed reservation, the Hoyts were identified by the taxing authorities as the Hoyt Property's owner. (App.99.) Through subsequent transactions, including a 1910 treasurer's sale, the Baileys acquired title to the Hoyt Property in 2001. (App.99.)

After a default judgment was stricken, the Baileys filed a quiet title complaint in 2013 claiming to own the Hoyt Property's oil and gas, asserting that the 1910 treasurer's sale for the collection of $10.90 in unseated land taxes assessed in the name of the then-surface estate owner extinguished the Hoyts' 1893 reservation. (App.99-100, 134-141.) Like in *Herder*, the Baileys premised their quiet title tax claim on the Hoyts' purported non-compliance with the 1806 Act, rather than adverse possession. (App.100-101, 134.)

In their pleadings, Hoyt Royalty pled the Hoyts had no duty to give any further notice of their reserved subsurface estate based on a strict statutory construction of the Statutes. (App.101, 173.) Hoyt Royalty also asserted federal due process dictates that notice and opportunity to be heard must be provided for all tax sales and the Hoyts and their heirs and assigns were never notified that taxes were assessed against their nonproducing oil and gas estate or that Lycoming County intended to take and sell their property as part of the 1910 tax sale. (App.101, 173.) Additionally, Hoyt Royalty argued that the 1910 tax sale's published notice was contrary to the dictates of *Mennonite* and *Mullane* for recorded subsurface estate owners. (App.101, 176-190, 192-202.)

### B. Lower Court Decisions.

#### 1. The *Herder* Case.

On cross-summary judgment motions, the trial court rejected Herder's quiet title tax claim and ruled the Keller Heirs owned the Siddons Warrant's oil and gas. (App.8-10.) In awarding the Keller Heirs summary judgment, the trial court held that absent oil and gas production, the Kellers' reserved estate was not subject to assessment and could not have been sold at the 1935 tax sale. (App.10.) The court rejected the theory that the Statutes supported the taxation of nonproducing oil and gas interests. (App.10.) The court further ruled that Herder's title claim based on the 1806 Act legally failed because no evidence existed whether the Kellers or anyone else ever reported their reserved subsurface estates for taxation and any such records had been not kept, lost or destroyed. (App.10.) The court explained that because the property was unseated and not under production, the 1935 tax sale could not have conveyed the subsurface rights as the surface estate owner at the time of the tax sale did not possess them. (App.10.) Accordingly, the trial court ruled Herder never had title to the Siddons Warrant's oil and gas. (App.10.)

On May 9, 2014, the Pennsylvania Superior Court vacated the trial court's judgment. (App.50.) The Superior Court held that the 1935 tax sale extinguished the Kellers' 1899 reservation because they had presumably violated the 1806 Act by not reporting their reservation. (App.66-68.)

In reaching its determination, the Superior Court acknowledged that the 1806 Act "d[oes] not specifically

address the situation presented in this case," *i.e.*, the taxation of nonproducing oil and gas interests severed from the unseated surface by the then-reported fee owner. (App.58.) Nonetheless, the Superior Court ruled that a "person who severed rights to unseated land was under an affirmative duty imposed by statute to inform the county commissioners or appropriate tax board of that severance, thereby allowing both portions of the property to be independently valued." (App.64.) The Superior Court further noted that a deed's recording is not sufficient notice to the assessor or the commissioners "as they were not bound to search or examine the records." (App.63.) Consequently, the Superior Court held that absent evidence that the Kellers gave the county commissioners written notice of their 1899 reservation, the Siddons Warrant was assessed as a whole and "[i]f a parcel of unseated land was valued as a whole, and the taxes on that land were not paid, thereby subjecting that property to seizure and tax sale, then all that was valued, surface and subsurface rights, were sold pursuant to any tax sale, absent proof within two years, of the severance of rights." (App.65-66.)

Significantly, the Superior Court acknowledged that its "resolution of this matter is at odds with modern legal concepts" and "may be seen as being unduly harsh." (App.68.) Yet, the Superior Court concluded: "We do not believe it proper to reach back, more than three score years, to apply a modern sensibility and thereby undo that which was legally done." (App.68.)

On May 23, 2014, the Keller Heirs requested reargument and/or reconsideration, which the Superior Court denied on July 11, 2014. (App.48.)

### 2. The *Bailey* Case.

On September 9, 2014, the Baileys moved for summary judgment. (App.119.) The Baileys argued that the 1910 unseated land tax sale divested the Hoyts and their heirs and assigns of their nonproducing oil and gas rights based on the lack of affirmative proof of their compliance with the 1806 Act. (App.120.) The Baileys supported their motion with the Superior Court's *Herder* decision. (App.120.)

In response, Hoyt Royalty asserted summary judgment was inappropriate for several reasons, including that the Statutes do not divest those whose estates or interests were severed and recorded prior to the assessment even if not separately taxed. (App.120-123, 205-222, 225-233.) Hoyt Royalty argued that to hold otherwise violated federal due process, and that had the 1910 tax sale been intended to divest the Hoyts of their subsurface estate, it violated the dictates of *Mullane* and *Mennonite*. (App.126-129, 205-209, 214-218, 221-222, 233-236.)

On December 10, 2014, the trial court granted the Bailey's summary judgment motion, relying on the Superior Court's *Herder* decision. (App.121-132.) The trial court also rejected Hoyt Royalty's due process arguments because "by failing to report the severance to the taxing authorities as required by the [1806 Act], the Hoyts no longer had a legally protected interest ... ." (App.128.) Accordingly, the court ruled the Hoyts' reserved interest was "abandoned" and "not entitled to the legal protection of actual notice of its proposed sale for non-payment of taxes." (App.129.)

On November 9, 2015, the Pennsylvania Superior Court affirmed the trial court's summary judgment order. (App.97-116). The *Bailey* court found the facts before it to be identical to those in *Herder* and believed it was compelled to follow its earlier decision. (App.108-109).

### C. Pennsylvania Supreme Court Proceedings.

#### 1. The *Herder* Case.

The Keller Heirs petitioned for allowance of appeal which the Pennsylvania Supreme Court granted on January 27, 2015. (App.29). The Supreme Court then affirmed, but on a more novel and problematic theory than was embraced by the Superior Court. (App.29-44.)

The Supreme Court first rejected the Superior Court's holding that the 1806 Act imposed upon the Kellers an affirmative duty to report their severance. (App.30.) The *Herder* Court instead adopted the Keller Heirs' position that the 1806 Act imposed a reporting duty only on a party "becoming a holder of unseated land," and that, given their prior ownership of the entire Siddons Warrant, "the Kellers did not 'become' a holder of unseated land by selling the surface estate and reserving the mineral estate." (App.30.)

Nevertheless, the Supreme Court determined that the Kellers' reserved non-producing subsurface interests fell within the Statutes' scope. (App.31.) It reasoned that if the purchaser of the surface rights in 1899 did not report the transfer, then the Centre County commissioners assessed and taxed the Siddons Warrant in its entirety (*i.e.*, the surface *and* the Kellers' reserved subsurface interest), although the

Siddons Warrant no longer legally included the reserved subsurface estate. (App.31.) The practical effect of the *Herder* Court's holding as applied to the Keller Heirs, therefore, was that, through no fault of their own, they lost their property interest in the reserved oil and gas at the 1935 tax sale because of either the default of their successors-in-title or the failure of the tax assessors to note "surface only" in the assessment records. (App.31.)

After rendering several rulings on questions of State law, the Supreme Court then addressed the Keller Heirs' federal due process arguments. Although it recognized that the 1935 tax sale was constrained to comply with due process, including *Mullane* and *Mennonite*, the Supreme Court determined that the tax sale's published notice satisfied due process. (App.37-43.) The Court reached this conclusion because it viewed the notice through the lens of "the constraints of the era" in which the 1935 tax sale took place to determine whether due process *at that time* required personal or constructive notice of the tax sale. (App.40.) In effect, the Pennsylvania Supreme Court did not retroactively apply the due process framework announced in *Mullane* or *Mennonite*, but rather relied upon decisions from the 1800s to reach the conclusion that published notice was sufficient, a position which Justice Todd in her concurrence regarded as "problematic." (App.46.)

**2. The *Bailey* Case.**

On January 29, 2016, the Pennsylvania Supreme Court reserved Hoyt Royalty's allocatur petition pending its decision in *Herder*. (App.95-96.) On

September 7, 2016, the Court denied allocator in *Bailey*. (App.95-96.)

## REASONS FOR GRANTING THE PETITION

The Pennsylvania Supreme Court's groundbreaking interpretation of the Statutes as applied to owners of reserved nonproducing oil and gas interests cannot be squared with this Court's due process precedents. The Commonwealth's highest court has now declared that under the Statutes, when an owner of unseated land has sold the surface but reserved the nonproducing oil, gas and other subsurface interests to himself and his heirs via a duly recorded deed, that owner had no duty to report that ownership interest to the taxing authorities. Yet, if a subsequent owner of the unseated surface failed to properly report his surface only interest or pay the assessed taxes, or if the taxing authorities failed to note in their records the taxation of just the "surface," the entire unseated property (surface and subsurface) will be deemed to have been assessed, taxed and later sold at a published *in rem* tax sale, even though no personal notice has been given to the subsurface estate owner known to the taxing authorities prior to the severance. Such an interpretation of Pennsylvania's tax statutes offends the Due Process Clause of the Fifth and Fourteenth Amendments.

In addition, the published notices of the unseated land tax sales in *Herder* and *Bailey*, which was the only notice given, plainly fail to satisfy the due process requirements of *Mullane* and *Mennonite*. The state courts below refused to analyze whether reasonable efforts could have been made to notify the Kellers and the Hoyts personally of the tax sales and instead looked

to the standards "of the era" to determine that published notice was enough to satisfy due process. The Pennsylvania courts have not applied retroactively the standards of *Mullane* and *Mennonite* in reaching their holding. If they had done so, as this Court requires in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), they would have reached the conclusion that the published notices in *Herder* and *Bailey* violate the due process rights of recorded subsurface estate owners like Petitioners.

Years ago, where recorded subsurface owners in Oklahoma had challenged whether their titles had been divested through tax sales of the surface estate when only published notice was given, this Court was poised to address these constitutional issues. However, a jurisdictional issue not present in these two cases caused this Court to decline to decide them. *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100 (1973).

Now is the time for this Court to resolve the substantive and procedural due process issues that recorded subsurface owners are facing based on real estate tax sales that occur after their property interests are recorded and for which only published notice is given. Accordingly, this Court should exercise its judicial discretion and grant this petition under its Rule 10(b) and (c).

## I. Pennsylvania's Interpretation Of Its Unseated Land Tax Statutes Sanctions An Unconstitutional Taking Of Private Property And Squarely Conflicts With This Court's Due Process Precedents, Warranting Review Under Rule 10(c).

Pennsylvania's novel interpretation of its Statutes isolates the Petitioners from the process by which their property has been determined to have been taken in a manner irreconcilable with this Court's precedent. The Statutes are not abandoned or dormant property statutes but instead tax legislation that addresses the collection of *ad valorem* taxes assessed against "unseated lands." *See* 72 P.S. §§ 5981, 5020-409. The 1815 Act provided county commissioners with a means to collect unpaid taxes by putting tracts of "land" up for sale that, after a tax assessment, were deemed to have unpaid taxes for at least one year. 72 P.S. § 5981. According to *Herder*, it was not the responsibility of the commissioners to determine the legal ownership of the "land" for assessment and taxation purposes. (App.31.) Instead, the 1806 Act placed an affirmative duty on "any person becoming a holder of unseated lands" to inform the commissioners of their newly acquired interest. (App.30.) The notice from the grantee allowed the commissioners to assess the "lands" and impose a tax. 72 P.S. § 5020-409 (emphasis added); *see also* (App.31.) At a tax sale of the "unseated land" where taxes went unpaid for at least two years, the "land" would be sold in fee simple to the highest bidder. 72 P.S. § 5984.

The Court's decision in *Herder* has created a novel dilemma for any successor in interest to a property

owner of unseated land that conveyed the surface to another party, while expressly reserving an interest in the oil, gas and other subsurface interests and duly recording that reservation (the "Grantor"). Under *Herder's* new reading of the Statutes, the Grantor was under *no duty* to report the severance to the county commissioners for tax assessment purposes because the Grantor did not "become" a holder of that which they already owned. (App.30.) Instead, the duty to report rests solely on the shoulders of the subsequent grantee surface owner. (App.30.) According to the *Herder* Court, if the subsequent grantee duly reported his newly acquired surface interest to the county commissioners and the commissioners or tax assessors then made a notation in their records to this "surface" interest, then only the unseated surface property would be assessed and subject to taxation. (App.44.) If, however, the grantee surface owner failed to report or misstated his newly acquired interest, or the commissioners failed to make a notation in their records to this "surface" only interest, both the surface and subsurface estates would be deemed to have been assessed and sold as a whole at any subsequent tax sale because the commissioners would be theoretically unaware of the Grantor's reserved interest (regardless whether the reservation was recorded with the local recorder's office in the same courthouse.) (App.31.) Thus, under *Herder*'s reading of the Statutes, although a Grantor has no affirmative duty to do anything, the Grantor is at risk into perpetuity of losing his duly recorded subsurface property interest through no fault of his own, but rather due to the actions or inactions of others over whom the Grantor has no control.

Furthermore, the *Herder* Court has declared the county commissioners were under no obligation to provide a process by which the Grantor had a legitimate opportunity to protect his or her property interest *before* the reserved subsurface estate was included in the tax sale. Instead, the Grantor must diligently comb through the tax sale records every two years to redeem its recorded subsurface interest assuming he or she can discern that the tax sale in the name of the then surface estate owner involved the "lands" over which his or her reserved interests lie. (App.21-23, 30-31.) The practical application of this statutory scheme as announced in *Herder* sanctions an illegitimate exercise of state power in violation of due process.

### A. Certiorari Is Appropriate When A State's Tax Statute As Interpreted By Its Highest Court Is Constitutionally Infirm.

Certiorari is appropriate of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had ... where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution." 28 U.S.C. § 1257(a). In deciding whether review should be granted, "[t]he construction so given to the statute by the highest court of the State must be accepted by this court in judging whether the statute conforms to the Constitution of the United States." *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403, 414 (1896).

The United States Constitution provides, via the Fifth and Fourteenth Amendments, that no person will be deprived of "life, liberty, or property, without due

process of law." Due process of law requires that "an individual be given an opportunity for a hearing ***before*** he is deprived of any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis added). The right to a meaningful opportunity to be heard "must be protected against denial by particular laws which operate to jeopardize it for particular individuals." *Id.* at 379-80. For states to fulfill their obligations under the Due Process Clause, they must "afford to all individuals a meaningful opportunity to be heard." *Id.* at 379.

Justice Harlan was mindful to point out in *Boddie* that even when a state statute can by its terms serve as a legitimate exercise of state power, it may be held "constitutionally invalid as applied, when it operates to deprive an individual of a protected right." *Id.* Consequently, when a state law is challenged on due process grounds, the ultimate question is "whether the State has deprived the claimant of a protected property interest, and whether the State's procedures comport with due process." *Lujan v. G & G Fire Sprinklers*, 532 U.S. 189, 195 (2001). This Court views the effect of a statute "in the light of its ***practical application*** to the affairs of men as they are ordinarily conducted." *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925) (emphasis added).

The right to acquire, own, and dispose of real property is within the protective scope of the Fourteenth Amendment. *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888). This Court has routinely overturned decisions because a state statute, as interpreted, infringes upon an individuals' property interest without providing due process. *See, e.g., Jones*

*v. Flowers*, 547 U.S. 220, 225 (2006) (state failed to satisfy due process requirements when, after receiving notice that a certified letter was returned unclaimed, did not try to notify the owner of an impending tax sale); *Connecticut v. Doehr*, 501 U.S. 1, 24 (1991) (holding unconstitutional a state statute authorizing prejudgment attachment of real estate without prior notice or a hearing); *Mennonite*, 462 U.S. at 800 (statute providing notice by publication of impending tax sale violated due process requirements because the mortgagee had a legally protected property interest and was entitled to notice reasonably calculated to apprise him of the pending tax sale); *North Georgia Finishing, Inc. v. Di-Chem*, Inc., 419 U.S. 601, 606 (1975) (invalidating state statute authorizing prehearing garnishment of property as violative of due process); *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972) (state statutes failed to provide prior notice and a hearing before the property was taken).

A state's statutory scheme that works to take a person's property for the private use of another without notice and a hearing is an unconstitutional taking that violates the Due Process Clause of the Fifth and Fourteenth Amendments. In *Missouri*, this Court recognized this principle central to protecting the right of a private individual to own property in the United States, and held that "[t]he taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States." *Missouri*, 164 U.S. at 417*; see also Chicago, S. P. M. & O. R. Co. v. Holmberg,* 282 U.S. 162 (1930); *O'Neill v. Leamer,* 239 U.S. 244,

249 (1915); *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 424 (1914) *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 202-03 (1905); *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 235-36 (1897). Hence, when a state's statutory framework affects a taking of private property without providing the property owner an opportunity to engage in the process by which his property is taken, this Court has struck down those statutes as unconstitutional.

For example, in *Loan Association v. Topeka*, 87 U.S. 655 (1875), Justice Miller emphasized that no court would hesitate to adjudge void any statute declaring that "the homestead now owned by A should no longer be his, but should henceforth be the property of B." *Topeka*, 87 U.S. at 663. Consistent with that principle, this Court ruled that the property of the citizen could not be taken, under the power of taxation, for private purposes. *Id.* at 667. The *Topeka* Court held that a statute authorizing a town to issue bonds in aid of a manufacturing enterprise of individuals was void. *Id.*

In *Missouri*, this Court held that a Nebraska statute, as construed by its highest court, operated to take the private property away from one individual and give it to another. *Missouri*, 164 U.S. at 414. The statute permitted a board of transportation to require a railroad corporation that previously allowed a private party to erect elevators on its right of way to grant upon "like terms and condition a location upon that right of way to other private persons in the neighborhood." *Id.* at 415. On review, the *Missouri* Court unanimously held that the statute had the practical effect of countenancing a "taking of private property of the railroad corporation, for the private use

of petitioners." *Id.* at 417. This Court held that taking private property from one person for another was "not due process of law," and violates the Fourteenth Amendment of United States Constitution. *Id.*

Finally, this Court has recognized that "a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment." *Coolidge v. Long*, 282 U.S. 582, 596 (1931) (citing *Barclay & Co. v. Edwards*, 267 U.S. 442, 450 (1924)); *see also Brushaber v. Union Pacific R. R.*, 240 U.S. 1, 24 (1916). Accordingly, this Court has ruled that "the sovereign is bound to express its intention to tax in clear and unambiguous language." *Eidman v. Martinez*, 184 U.S. 578, 583 (1902). Also, "in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used[,] [and] [i]f the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer." *United States v. Merriam*, 263 U.S. 179 (1923). Further, tax statutes must be "applied with a view of avoiding, as far as possible, unjust and oppressive consequences." *Farmers Loan & Trust Co. v. Minnesota,* 280 U.S. 204, 212 (1930).[3]

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[3] Pennsylvania espouses similar standards. *See* 1 Pa.C.S. § 1928(b) (tax statutes "shall be strictly construed"); *Tech One Assocs. v. Bd. of Prop. Assessment, Appeals & Review*, 53 A.3d 685, 696 (Pa. 2012) ("taxing statutes ... must be strictly construed against the government, and any doubt or ambiguity in the interpretation of their terms must, therefore, be resolved in favor of the taxpayer"); *Breitinger v. City of Phila.*, 70 A.2d 640, 642 (Pa. 1950) ("[T]he grant of [the power to tax] is to be strictly construed, and not

### B. *Herder* Endorses A Statutory Scheme Whereby The State Takes Private Property For Another's Use In Violation Of The Due Process Rights Of Recorded Subsurface Owners.

When viewed through the prism of the Pennsylvania Supreme Court's most recent interpretation, the Statutes as applied to recorded subsurface owners are simply nonsensical and violate due process. Writing for the *Herder* Court, Justice Baer surveyed several Pennsylvania state court decisions addressing tax sales of unseated property, albeit on facts not entirely on point with the *Herder* and *Bailey* cases, and then concluded based on that case law that a failure to report or note a severance of unseated land between its surface and subsurface "had the practical effect of having the property assessed and taxed as a whole, given that the assessors were not required to determine the sometimes elusive current ownership." (App.25-26.) Yet, Justice Baer refused to adopt the theory advanced by Herder in the trial court and adopted by the Superior Court that the Kellers had an "affirmative duty" under the 1806 Act to inform the county commissioners of their severance to allow the separate assessment of the surface and subsurface estates for future tax years. Instead, Justice Baer agreed with the Kellers they were under no duty to

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extended by implication."); *Central Pa. Lumber Co.'s Appeal*, 81 A. 204, 205 (Pa. 1911) ("We have said that there is no such thing as taxation by implication and that all authorities having to do with the valuation and assessment of land and the levy and collection of taxes must look to the statutes for their authority to act[.] This is settled law and needs no further discussion.").

report their severance. (App.30.) However, without pause, Justice Baer then concluded that "[n]evertheless, ... we agree with the Superior Court's conclusion that if neither the Kellers nor the purchaser of the surface rights in 1899 reported the transfer, then the Centre County Commissioners would have assessed and taxed the [Siddons] Warrant in its entirety." (App.31.)

The practical impact of the *Herder* Court's ruling is that any subsurface owner who followed long-standing principles of property law when he or she sold the surface of unseated land but reserved the subsurface oil and gas and recorded the reservation could at some future time lose his or her property because either (1) the subsequent surface owner (a stranger) failed to pay property taxes assessed against the surface and the surface was sold at a tax sale; or (2) the county commissioners or the tax assessors failed to note in their records that the assessment made in the name of the surface estate owner was for just the "surface." Consider, for instance, a couple that has purchased several hundred acres of Pennsylvania woodland in their county of residence at an unseated tax sale and pays the assessed ad valorem taxes while they are the owner. Several years later, the couple sells their plot of unseated land to a purchaser who intends to convert the property into farmland. As part of the sale, the couple and the expected farmer agree that the couple may retain for themselves and their heirs the property's oil, gas and other subsurface interests. A deed containing the couple's subsurface reservation is duly recorded, and the couple passes their severed property interest to their children and grandchildren. Neither the couple nor their heirs ever receive a tax bill

from the county for payment of taxes due on their nonproducing oil and gas reservation. The couple and their heirs have done everything required of them under the law, and the *Herder* Court would similarly approve of their actions.

The expected farmer reports his surface estate ownership to the county commissioners and they identify him as the property's "owner" but fail to note in the assessment records his ownership of just the surface. The farmer receives tax bills and dutifully pays the tax on his unimproved surface estate for ten years. His tax rate is the same whether an unseated surface has been duly severed from the nonproducing oil, gas and other subsurface interests because the county does not tax reserved nonproducing oil and gas estates. He anticipates building a farmhouse and barn, but faces financial difficulties and defaults on his tax payments. The county commissioners, according to *Herder*, review the tax rolls, which reveal that the unimproved property has been taxed as a single unseated warrant in the farmer's name, and so when the property is sold at the tax sale to satisfy the tax lien, the farmer's surface interest is sold to the highest bidder. But, according to *Herder*, so is the couple's duly recorded nontaxable oil and gas reservation.[4]

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[4] A more reasonable and constitutionally sound interpretation of the Statutes is that they apply only to purchasers of an unimproved surface estate, and failing to report under the 1806 Act leads to the confiscation of only that estate if taxes against the surface go unpaid. Such an interpretation is warranted by the Statutes' use of the term "lands" which, in common parlance, refers to only the surface and not fugacious interests such as oil and gas. *See* Webster's American Dictionary of the English Language

At no point in this process as envisioned (or not) by the *Herder* Court does the couple or their heirs have an opportunity to protect their property interest – they are estranged from the Statutes' mechanics. According to *Herder*, they have no duty to report their recorded subsurface ownership, and therefore they receive no tax bill and miss no tax payment. The *Herder* Court, however, claims that the couple can protect their interests by checking the tax records and redeeming their interests within two or five years of a sale. (App.16-17, 42). Yet, the couple and their heirs would never have a clue whether a stranger who owns an entirely separate and distinct piece of property failed to meet the purported requirements of the Statutes. How often does one return to a home they once owned many years ago to make sure the present owner is abiding by the tax laws? How often still does the current owner's failure to abide by the tax laws impact the property rights of the prior owner?

That is the extreme level of vigilance and resulting hardship the *Herder* Court has imposed upon owners of recorded subsurface estates in interpreting the Statutes. This unachievable level of vigilance is underscored because at the time of the tax sales, the mere reservation in a recorded deed of nonproducing oil and gas and other subsurface interests created no

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(online ed. 1828) ("land" means "the solid matter which constitutes the fixed part of the surface of the globe, in distinction from the sea or other waters"). *See also Coolspring Stone Supply, Inc. v. Cnty. of Fayette,* 929 A.2d 1150, 1155-56 (Pa. 2007) (oil and gas do not constitute "land" because "neither oil nor gas is a solid structure on the earth's surface."). That, unfortunately, is not the interpretation the *Herder* Court adopted.

taxable estate under the Statutes. *See F.H. Rockwell & Co. v. Warren County*, 77 A. 665 (Pa. 1910). *See also New York State Natural Gas Corp. v. Swan-Finch Gas Dev. Corp.,* 278 F.2d 577, 579-80 (3d Cir. 1960) (general mineral assessments which led to tax sales did not include title to nontaxable gas). Accordingly, owners of recorded nonproducing oil and gas estates had no indication or notice they were duty-bound to continually check the local newspapers and tax records in Pennsylvania for public notices regarding tax sales of unseated surface estates.

The couple in our scenario never receives a tax bill or misses a tax payment, because they own nothing that is taxable. And yet, unbeknownst to them, through the actions and/or inactions of a stranger who *does not own legal title to the subsurface*, their property rights can be snuffed out at a tax sale. This cannot be due process as envisioned by the founders of this country. This result renders meaningless fee simple reservations of interests in real property.

The *Herder* Court's interpretation of the Statutes perpetuates an unworkable and unconstitutional statutory scheme whereby subsurface owners are singled out and left with no recourse to protect their reserved (and valuable but nontaxable) property rights. Moreover, this statutory scheme, as interpreted by *Herder*, works *in secret* to take the property of an individual at a tax sale and deliver it to another with no semblance of customary due process to those like Petitioners who have given proper notice to the whole world of their title and right to quiet enjoyment of their property. *Herder*'s interpretation of the Statutes is not only an abomination to fundamental property concepts

but also conflicts with this Court's long line of precedents protecting property owners from such obvious and capricious violations of due process. Such a framework is unmoored from this Court's basic constitutional precepts and compels this Court's intervention.

## II. *Herder* Violates Federal Due Process By Depriving Petitioners Of Their Recorded Property Interests Without Sufficient Notice; Therefore, Review Should Be Granted Under Rule 10(b) and (c).

Besides the substantive due process concerns, the Pennsylvania Supreme Court's decision in *Herder* fails to genuinely apply this Court's rulings in *Mullane* and *Mennonite* and hold the published notices to the same constitutional standards applicable in those decisions. There is a conflict among the state courts of last resort regarding whether the principles in *Mullane* and *Mennonite* should be retroactively applied to events that predate those decisions where a final adjudication on the merits has not yet materialized. Also, the courts are split over whether duly recorded subsurface estate owners are entitled to actual rather than constructive notice of tax sales that occur after their reservations are recorded. Accordingly, this Court should exercise its judicial discretion and resolve these conflicts.

### A. *Herder* Conflicts With This Court's Decisions In *Mullane* And *Mennonite*.

In its opinion, the *Herder* Court ruled that the 1935 tax sale divested the Kellers and their heirs of their duly recorded title to the subsurface oil and gas estate despite the lack of any evidence of actual notice being

provided to them that their property rights were subject to seizure and sale for failure to pay taxes. By doing so, the Court sanctioned a deprivation of the Petitioners' federal due process rights.

Before the state may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the state to provide the owner "notice and opportunity for hearing appropriate to the nature of the case." *Mullane*, 339 U.S. at 313. The notice required to comply with the Due Process Clause must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mennonite*, 462 U.S. at 795.

It is a well-established principle of this Court that notice by publication alone is forbidden regarding persons whose identities are known or easily ascertainable. *Mullane,* 339 U.S. at 318. *See also Robinson v. Hanrahan,* 409 U.S. 38, 40 (1972) (published notice of an *in rem* vehicle sale is insufficient when state knows that owner is jailed). Rather, notice by publication is permissible only where the names, interests and addresses of persons are unknown and cannot reasonably be ascertained. *Mullane*, 339 U.S. at 315-17.

Nor can this constitutional deficiency be saved by the legal fiction that taxes for unseated land are assessed solely against the property *in rem. Mullane* itself clarified this point, holding that the distinction is irrelevant to due process. As the *Mullane* Court explained:

> [W]e think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis.

*Id.* at 312-13. Therefore, "whatever the technical definition of its chosen procedure," a State still must "accord[] full opportunity to appear and be heard." *Id.* at 313.

Here, Petitioners' reservations were undisputedly recorded in the county recorder's office. (App.4 & 39.) Nevertheless, Respondents proffered no evidence in the proceedings below that actual notice of either the tax sales or their underlying assessments were given to the Kellers, the Hoyts or their respective heirs and assigns. (App.37.) Despite the lack of actual notice, the Pennsylvania courts have ruled that the tax sales divested Petitioners of their duly reserved oil and gas rights. By so ruling, the courts violated Petitioners' due process rights. *Mennonite*, 462 U.S. at 795.

The *Herder* Court supported its decision in part by relying upon the theory it was not the duty of the tax officers to review the records in the county recorder's office (likely located across the hall in a rural county

building in the 1900s) to determine ownership interests in the property subject to a tax sale. (App.21-23, 30-31.) This Court rejected such reasoning in *Mennonite* and ruled that due process mandates where a taxing authority conducts a sale, the authority must check the public records, including those held by the county recorder, and send actual notice to all persons disclosed by such records. *Mennonite*, 462 U.S. at 795. *See also Schroeder v. New York City,* 371 U.S. 208, 211-213 (1962) (publication and posted notices are inadequate to apprise a property owner of condemnation proceedings when his identity is readily ascertainable from both deed records and tax rolls). The Pennsylvania courts departed from this controlling precedent in holding that the county assessors and commissioners were not bound to look for Petitioners' recorded deed reservations.

The *Herder* Court also justified its decision by noting that the Statutes had "ample provision for notice to the owner" through its survey procedures, yearly assessment procedure, 60-day published notice in daily papers, its mandatory tax sale date and its redemption provisions. (App.41-42.) However, this Court in *Mullane* and its other precedents have rejected the notion that due process is satisfied by requiring a property owner to constantly examine the legal notices in newspapers or other public records to determine whether his property is in jeopardy, especially when the property owner is not aware that he should examine the published notices in the first place. *See Mullane,* 339 U.S. at 315-317; *New York v. New York, New Haven & Hartford R.R. Co.,* 344 U.S. 293, 297 (1953). *See also Bourne Valley Court Trust v. Wells Fargo Bank, N.A.,* No. 15-15233, 2016 U.S. App.

LEXIS 14857, at *9-12 (9th Cir. Aug. 12, 2016) (concluding an "opt-in" notice scheme violates due process under *Mennonite* and *Mullane*).

This Court noted in 1912:

> The principle, known to the common law before Magna Charta, was embodied in that charter (Coke, 2 Inst. 45, 50) and has been recognized since the Revolution as among the safest foundations of our constitutions. Whatever else may be uncertain about the definition of the term 'due process of law' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing[.]

*Ochoa v. Hernandez y Morales*, 230 U.S. 139, 161 (1912).

The courts' rulings in *Herder* and *Bailey* that the tax sales divested Petitioners of their duly recorded oil and gas reservations has sanctioned violations of their due process rights. *See Ochoa*, 230 U.S. at 153 ("their property has been taken from them and given to appellants, without notice to them or an opportunity for a hearing; and that the proceedings in court for converting the possessory into a dominion title, while bearing the semblance of judicial proceedings, departed therefrom in the essentials"). Accordingly, this Court must grant the petition to reject the rulings below that conflict with *Mullane* and *Mennonite*.

### B. *Herder* Fails To Apply Retroactively The Principles Of *Mullane* And *Mennonite* To Petitioners Whose Property Interests Were Duly Recorded And Whose Identities Were Known To The Taxing Authorities Based On Their Status As Previous Owners.

The *Herder* Court was bound by this Court's decision in *Harper* to apply the principles of *Mullane* and *Mennonite* retroactively to the 1935 tax sale. While Justice Baer explained that he intended to apply those principles retroactively, he declined to take the additional step of actually analyzing whether the efforts taken by the taxing authority were reasonably calculated, under all the circumstances, to apprise the Kellers of the pendency of the tax sale and afford them an opportunity to present their objections. Consequently, *Herder* did not truly apply those principles retroactively to determine that the published notice of the 1935 tax sale violated due process. The *Herder* Court's refusal to do so violates due process.

*Harper* instructs this Court's decision on federal law "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper*, 509 U.S. at 97. Several of the nation's highest state courts have addressed whether the notice principles announced in *Mullane* and *Mennonite* should be applied retroactively to confiscations of property that predate those decisions. As the *Herder* Court noted, the authorities

are split on this issue.[5] (App.40.) This Court should grant the petition to resolve this conflict.

Moreover, as Justice Todd succinctly pointed out in her concurrence, what the *Herder* Court did when applying *Mullane* and *Mennonite* was look to decisions "from the relevant time," the time of the tax sale, to assess whether the notice by publication authorized by the 1815 Act comported with *Mullane's* standard of "reasonably possible or practicable to give more adequate warning." (App.46.) That is not what *Mullane* and *Mennonite* demand. Instead, this Court has held that state procedures which seek to deprive one of his property must provide "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action." *Mullane*, 339 U.S. at 314.

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[5] As of this petition's filing, Pennsylvania, Indiana, Mississippi and New York have recognized that *Mullane* and *Mennonite* are to be applied retroactively. *See, e.g., In re Upset Sale*, 479 A.2d 940, 942 (Pa. 1984) (applied *Mullane* and *Mennonite* to invalidate a 1979 tax sale); *First Pennsylvania Bank, N.A. v. Lancaster County Tax Claim Bureau*, 470 A.2d 938, 941 (Pa. 1983) (same as to a 1974 tax sale); *Fields v. Evans*, 484 N.E.2d 36, 39 (Ind. Ct. App.1985) (applied *Mullane* and *Mennonite* to a 1976 tax sale); *Aarco Oil & Gas Co. v. EOG Resources, Inc.*, 20 So. 3d 662, 668-69 (Miss. 2009) (applied *Mullane* and *Mennonite* to a 1942 tax sale); *McCann v. Scaduto,* 71 N.Y.2d 164, 519 N.E.2d 309, 314 n.3 (1987) (applied *Mennonite* retroactively to invalidate published only real estate tax sales). Louisiana and West Virginia have ruled otherwise. *See, e.g., Quantum Res. Mgmt., L.L.C. v. Pirate Lake Oil Corp*., 112 So. 3d 209 (La. 2013) (refusing to apply *Mullane* and *Mennonite* to a 1925 tax sale); *Geibel v. Clark*, 408 S.E.2d 84 (W. Va. 1991) (same as to a 1965 tax sale). *See also Verba v. Ohio Cas. Ins. Co.,* 851 F.2d 811, 816-17 (6th Cir. 1988) (applying *Mennonite* retroactively to invalidate a 1982 IRS sale).

The bottom line is that at the time of the tax sales, Petitioners had a legally protectable interest in the subsurface oil and gas that entitled them to something more than published notice. *If* the Statutes intended to deprive property owners of their duly recorded subsurface estates, the county commissioners were required under *Mullane* and *Mennonite* to reasonably try to provide those owners with actual notice. There is no evidence in the record that the county commissioners tried to discover the identities of the Kellers and the Hoyts or their respective heirs before they purportedly deprived them of their property rights.

Any reasonable effort to effectuate actual notice would have been sufficient. Petitioners would have been easily identifiable to the county commissioners. The Kellers and the Hoyts had publicly recorded their property interests, paid taxes on the very surface properties subject to the tax sales, and were well known business and legal figures in the community. Despite all of these obvious avenues, the county commissioners took no effort to provide them or their heirs with actual notice. Instead, they published notices in the local papers which, as this Court in *Mullane* properly observed, was nothing more than a "feint." *Mullane*, 339 U.S. at 315. Their failure to provide actual notice violates *Mullane* and *Mennonite* when those decisions are properly applied retroactively to the tax sales upon which the underlying quiet title actions rely. *See, e.g., Walker v. City of Hutchinson,* 352 U.S. 112, 116 (1956) (published notice was constitutionally insufficient when landowner's name "was known to the city and was on the official records," such that "even a letter would have apprised him that

his property was about to be taken and that he must appear if he wanted to be heard as to its value.").

Petitioners know there is a split among the circuits over whether *Mullane* and *Mennonite* require actual rather than constructive notice to a party who has a publicly recorded interest in the property purportedly subject to a tax sale.[6] However, in *Herder* and *Bailey*, not only did the Kellers and the Hoyts duly record their subsurface severance with the local recorder of deeds, giving constructive notice to the world of their ownership interests, but also they were known by the taxing authorities based on their role as the properties' prior owners and law-abiding taxpayers. *See Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U.S. 319, 327 (1916) (law "presumes that every man, in his private and official character, does his duty, until the contrary is proved"). The Kellers and the Hoyts and their heirs were entitled to actual rather than constructive notice of the unseated land tax sales that purportedly involved their reserved property interests.

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[6] Compare *Verba*, 851 F.2d at 816 (holder of publicly recorded lien entitled to more than constructive notice of tax sale); and *Harris v. Gaul*, 572 F. Supp. 1554, 1561 (N.D. Ohio 1983) (holder of property interest that is both "legally protected" and "publicly recorded" must be given actual notice of a pending sale), with *Davis Oil Co. v. Mills*, 873 F.2d 774, 790-91 (5th Cir. 1989) (a recorded mineral leaseholder is not entitled to actual notice of a mortgage foreclosure sale); *Bender v. Rochester*, 765 F.2d 7, 12 (2d Cir. 1985) (distributees of estate were not entitled to actual notice because estate's administrator had a duty to receive the decedent's mail and inform them of proceedings); and *Aarco*, 20 So. 3d at 669 (constructive notice of a 1942 tax sale sufficient for recorded mineral deed owners).

Any other holding constitutes a violation of due process and the dictates of *Mullane* and *Mennonite*.

## III. Petitioners' Due Process Questions Are Extremely Important, Frequently Reoccurring And Should Be Decided By This Court.

Even before the *Herder* Court issued its opinion, commentators recognized the due process concerns that exist to duly recorded oil and gas estate owners if the Statutes were interpreted how the Pennsylvania Supreme Court ultimately ruled. Mark Prokopchak, Article, *Renewing Respect For Record Notice: Cleaning Up The Pennsylvania Title Wash*, 2 TEXAS A&M JOUR. OF PROP. LAW 533 (2015). *See also* Martha Hardwick, *Tax Sales, Due Proces and Severed Mineral Interests in Oklahoma*, 11 TULSA L. J. 615 (1975) (discussing the *Paschall* case). Moreover, Pennsylvania is not alone in recently divesting recorded subsurface owners of their property through tax sales that occured after their reservations were recorded and in which only published notice was given. *See, e.g., Aarco*, 20 So. 3d at 669.

One might ask: "Why didn't anyone give actual notice to the subsurface owners back when the tax sales happened?" The answer, of course, is that no one thought that the Statutes applied to the reserved nonproducing subsurface – not the government, the new surface owners, the subsurface owners, or the tax purchasers. That is why no one raised any title issue until modern times when new surface owners attempted to take the oil and gas by first going for default judgments in quiet title actions served only by publication hoping the subsurface owners were long gone or not paying attention. When that almost

succeeded but then failed, the new surface owners then found and twisted the Statutes to get what Pennsylvania's 2006 Dormant Oil and Gas Act fails to provide. *See* 58 P.S. § 701.2 (2016) ("... It is not the purpose of this act to vest the surface owner with title to oil and gas interests that have been severed from the surface estate.").

The impact of *Herder* goes beyond the 600+ acres involved in these two cases. Hoyt Royalty is involved in several pending lawsuits where *Herder* is asserted as the basis for divesting it and the Hoyts' other heirs and assigns of their recorded oil and gas interests. Also, other families throughout the Commonwealth who have recorded similar deed reservations involving over at least 130,000 acres of nonproducing oil, gas and other subsurface interests are in litigation and/or at risk of having their recorded property interests taken away from them.

Now is the time for this Court to step in and protect the due process rights of Pennsylvania's duly recorded oil and gas estate owners from such unconstitutional state action.[7]

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[7] Because *Herder* decided the federal due process issue, this Court can review it. *Leigh v. Green*, 193 U.S. 79 (1904).

## CONCLUSION

This Court should grant this petition for writ of certiorari.

Respectfully submitted,

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October 17, 2016

# APPENDIX

# APPENDIX

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## APPENDIX A

**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

**SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, JJ.**

**[J-8-2016]**

**[Filed July 9, 2016]**

| | |
|---|---|
| HERDER SPRING HUNTING CLUB, | ) |
| | ) |
| Appellee | ) |
| | ) |
| v. | ) |
| | ) |
| HARRY KELLER AND ANNA KELLER, HIS WIFE; J. ORVIS KELLER; ELLIS O. KELLER; HENRY HARRY KELLER; WILLIAM H. KELLER; MARY EGOLF; JOHN KELLER; HARRY KELLER; ANNA BULLOCK; ALLEN EGOLF; MARTIN EGOLF; MARY LYNN COX; ROBERT EGOLF; NATHAN EGOLF; ROBERT S. KELLER; BETTY BUNNELL; ANN K. BUTLER; MARGUERITE TOSE; HENRY PARKER KELLER; PENNY ARCHIBALD; HEIDI SUE HUTCHISON; REBECCA SMITH; ALEXANDRA NILES CALABRESE; CORRINE GRAHAM FISHERMAN; JENNIFER LAYTON MANRIQUE; DAVID KELLER; STEPHEN | ) |

RICHARD KELLER; MICHAEL EGOLF, THEIR HEIRS, SUCCESSORS, EXECUTORS, ADMINISTRATORS, AND ASSIGNS, AS WELL AS ANY OTHER PERSON, PARTY OR ENTITY,

Appellants

No. 5 MAP 2015

Appeal from the Order of the Superior Court at No. 718 MDA 2013 dated May 9, 2014, reconsideration denied July 11, 2014, vacating the Judgment of the Centre County Court of Common Pleas, Civil Division, entered on July 12, 2011 at No. 2008-3434 and remanding.

ARGUED: October 7, 2015
SUBMITTED: January 20, 2016

**OPINION**

**JUSTICE BAER**[1] **DECIDED: July 19, 2016**

This case concerns the ownership of subsurface rights to a tract of land in Centre County. The parties' claims rise or fall based upon whether a 1935 tax sale resulted in the transfer of the entire property or merely the surface rights. After extensive review of the historical law regarding tax sales of unseated land in Pennsylvania, we conclude that the tax sale related to the entire property at issue, including both the surface

[1] This case was reassigned following submission.

and subsurface estates.[2] Accordingly, we affirm the Superior Court's order vacating the grant of summary judgment in favor of the Appellants and remanding to the trial court for the grant of summary judgment to the Appellee.

I. Factual and Procedural History

The facts of this case are largely undisputed. The property at issue is the Eleanor Siddons Warrant, located in Rush Township, Centre County. The warrant was issued in 1793 as containing 460 acres, strict measure, and was assessed as 433 acres, 153 perches after taking into account roads and waterways.[3] As

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[2] An extensive discussion of seated and unseated land is set forth *infra* at 9. For now, it suffices to explain that "seated land" is developed or improved land where as "unseated land" is "wild" and undeveloped.

[3] As explained in the Historical Society of Pennsylvania's Land Records Guide, Pennsylvania's early land law developed from policies instituted by William Penn's sons in an attempt to encourage organized settlement and payment for the land. Generally, a person seeking to purchase land would submit an application to the Land Office. The secretary would issue a warrant, which described the land, the property adjoining the land, the purchaser, the purchase price, and the terms of sale. The issuance of the warrant triggered the surveyor general's responsibility for surveying the land, which would produce a survey map that identified important features on the land and adjoining properties and town and county boundaries, which helped to create cohesive maps of the area. Upon completion of the survey by the deputy surveyor, the surveyor general would verify the acreage, which included a six percent allowance for roads. After the survey was returned, a patent would be issued providing clear title from the state or the proprietor (such as the Penn Family) to the original purchaser of the property. Historical

relevant to the dispute in this case, Appellants' ancestors, Harry and Anna Keller, bought the Eleanor Siddons Warrant at a tax sale in 1894. In 1899, the Kellers sold the surface rights to Isaac Beck, Isaiah Beck, and James Fisher (Becks), reserving the subsurface rights to themselves through an extensive reservation that indisputably covered the natural gas at issue herein.[4]

There is no evidence in the record that the Becks complied with the Act of 1806, discussed further *infra*, which required anyone becoming a holder of unseated land to provide notice to the county commissioners of the transfer of ownership. Moreover, the record contains no evidence that the Kellers informed the commissioners of their reservation of rights. As discussed below, the Kellers were not required to report their reservation of rights under the reporting requirements of the Act of 1806. The lack of reporting, however, is relevant to this case because the county

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Society of Pennsylvania, Land Records Guide (2013) available at https://hsp.org/collections/catalogs-research-tools/subject-guides/land-records-guide; see generally Donna Bingham Munger, Pennsylvania Land Records: A History and Guide for Research, Section IV, (1991).

[4] In relevant part, the reservation provides:

> Excepting and reserving unto the said parties of the first part, their heirs and assigns forever all the coal, stone, fire clay, iron ore and other minerals of whatever kind, oil and natural gas lying or being, or which may now or hereafter be formed or contained in or upon the said above mentioned or described tract of land . . . .

Deed of June 20, 1899, Reproduced Record (R.R.) at 62a.

commissioners were tasked with assessing unseated property for taxation purposes based on what was reported by the owners.

Following transfers not relevant to the issues in the case at bar, Ralph Smith acquired the surface rights to the Eleanor Siddons Warrant in 1922. Thereafter, the Centre County Commissioners acquired the property via a treasurer's sale in November 1935 as a result of unpaid taxes and the lack of a bidder offering the upset price at a public tax sale. Documenting the November 1935 sale from the Centre County Treasurer to the County Commissioners is a deed dated June 1936 using sparse language dictated by Section 9 of the Act of 1815, as set forth at 72 P.S. § 6136, describing the property as "a tract of unseated land containing 433-153 per acres situate in the Rush Twp. in the County of Centre, surveyed to Ralph Smith." Deed of June 10, 1936, R.R. at 65a.

Following the tax sale, the Commissioners held the property, in accordance with statute, until 1941 when the land was sold to Max Herr. The 1941 Deed memorialized the details of the 1935 tax sale:

> Whereas, the Treasurer of Centre County, having given due and public notice of the time and place of sale of the hereinafter mentioned tract of land, did on the 29th day of November, 1935, expose the same to public sale for nonpayment of taxes and no person bidding, therefore, a sum equal to the amount of taxes due and costs of sale, it, therefore, became the duty of the Commissioners of Centre County to buy the same, which they accordingly did.

Deed of June 3, 1941, R.R. at 64a. The 1941 Deed further recounted that the sale occurred "according to the form of the several Acts of Assembly providing the mode of selling Unseated lands for taxes" and described the property as follows:

> a certain tract of Unseated land in Rush Township, in said County of Centre, bounded and described as follows: in the Warrantee name of Eleanor Siddon[s] containing 433 acres and 153 perches; of which land the former owner or reputed owner was Ralph Smith, and the said tract of land hath remained unredeemed for the period designated by law.

Id. As will be evaluated after discussion of the relevant law, the critical question in this case is whether the 1935 and 1941 sales involved the entire Eleanor Siddons Warrant or merely the surface rights.

In 1959, Appellee Herder Spring Hunting Club (Herder Spring) purchased the property from Herr's widow. During the title search, Herder Spring's attorney became aware of the Kellers' prior subsurface reservation and suggested that language be added to the deed to reflect the reservation. The deed, describing the property again as the "Eleanor Siddons [W]arrant," generically provided, "[t]his conveyance is subject to all exceptions and reservations as are contained in the chain of title," without specifying the Keller reservation. Deed of Nov. 13, 1959, R.R. at 26a.

Since 1959, Herder Spring has entered into several oil and gas leases, which were recorded with the Centre County Recorder of Deeds. In contrast, Herder Spring observes that, since the 1899 reservation, the Keller

family has never referenced ownership of the subsurface rights through any document, such as an inventory filed in connection with an estate or divorce.

In August 2008, Herder Spring filed a complaint to quiet title, presumably as a result of the discovery of Marcellus Shale on the property. Herder Spring asserted that the 1935 tax sale extinguished the Kellers' 1899 reservation of subsurface rights. The basis of the argument is that because the County Commissioners had not been alerted to the Kellers' reservation of rights, the taxes were assessed against the entire Eleanor Siddons Warrant, and the sale of the property for delinquent taxes resulted in a sale of both the surface and subsurface rights. The tax sale of the fee simple estate, according to Herder Spring, extinguished any prior reserved estates in concurrence with the longstanding policy of "title-washing."[5] In furtherance of its argument, Herder Spring observed that the deed from the Centre County Commissioners to Herr did not reference only the "surface estate" but rather the "Eleanor Siddons Warrant."[6]

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[5] The term "title-washing" is explained *infra* at 15.

[6] Herder Spring also asserted a claim of adverse possession of the subsurface rights based upon their leases. The trial court ultimately rejected this claim, finding that the leases did not establish the necessary twenty-one years of continuous possession. The Superior Court did not address the claim, as it ultimately found in favor of Herder Spring on the issue before this Court. Herder Spring Hunting Club v. Keller, 93 A.3d 465, 473 n.13. (Pa. Super. 2014). As no challenge has been raised in regard to the adverse possession claim to this Court, it will not be discussed further.

Additionally, the Appellants, the heirs of the Kellers, filed an

Both Herder Spring and Appellants, the heirs of the Kellers (Keller Heirs) filed motions for summary judgment, which form the basis of the issues before this Court. The Keller Heirs maintained their claim that the 1935 tax sale resulted only in the transfer of the surface rights to the Eleanor Siddons Warrant, despite acknowledging that "Centre County did not separately assess the Property's oil and gas interests prior to the Tax Sale of 1935." Brief in Opposition to Plaintiff's Motion for Summary Judgment at 4. They asserted that Herder Spring's claim "fails as a matter of law because (1) only subsurface rights under operation and production have value which is assessable and taxable, and (2) only assessed property can be acquired by a tax sale purchaser." Keller's Answer to Herder Spring's Motion for Summary Judgment at 3, R.R. at 146. They emphasized that in a quiet title action, the burden of proof is on the plaintiff, here Herder Spring, to demonstrate reason to quiet title based upon the strength of their own title.

The Keller Heirs further invoked the doctrine of estoppel by deed based upon the 1959 Deed to Herder Spring, which contains an acknowledgement that the "conveyance is subject to all exceptions and reservations as are contained in the chain of title." They contend that this statement reinvigorates the Keller's 1899 reservation of subsurface rights, as suggested by letters between the attorneys negotiating the 1959 transfer. They observe that this Court has

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answer and new matter asserting a claim of conversion, relating to the rental payments and royalty fees on the leases received by Herder Spring since 1973, and asserted a claim sounding in ejectment based upon the 1899 reservation.

held that "one claiming under a deed is bound by any recognition it contains of the title in another." Brief in Support of Defendant's Motion for Summary Judgment at 6 (quoting Elliott v. Moffett, 74 A.2d, 164, 167 (Pa. 1950)).

In turn, Herder Spring filed a motion for summary judgment. Herder Spring, *inter alia*, contended that the 1935 tax sale resulted in the conveyance of the entire Eleanor Siddons Warrant and not merely the surface rights as alleged by the Keller Heirs. Relying on the pre-1947 statues and caselaw relating to taxation of unseated land discussed *infra*, Herder Spring contended that the failure of the Kellers to notify the County Commissioners of the reservation of subsurface rights following the 1899 sale of the surface rights to the Becks, "result[ed] in the tax assessment of the fee interest [e.g. the surface and subsurface rights] to continue, and when the taxes went unpaid, it was this fee interest which was sold to [Herder Spring's] predecessor in title Max Herr." Herder Spring Summary Judgment Motion at 3, R.R. 119a. It argued that owners of unseated land were required to notify the county commissioners of their interest to allow for proper assessment and taxation and that the commissioners were not required to search deeds to determine ownership for taxation purposes. While acknowledging that a reservation of mineral rights may create an estate separate from the surface, Herder Spring contended that the 1935 tax sale involved assessment, taxation, and conveyance of the entire Eleanor Siddons Warrant because the Kellers did not report the severance of their subsurface rights from the surface rights or pay the tax assessed on the entire Warrant.

In September 2010, the trial court denied Herder Spring's motion for summary judgment and granted the Keller Heirs' motion for summary judgment. After setting forth the history of the deeds and the proper standard for a grant of summary judgment, the trial court held that because the subsurface had not been in production for the reserved minerals it did not have any ascertainable value that could have been assessed and taxed in 1935, and therefore, could not have been sold for delinquent taxes. Accordingly, the trial court concluded that Herder Spring's predecessor only purchased the assessed surface estate at the tax sale.

The trial court further concluded that Herder Spring's "claim of ownership based on the purported failure of Harry Keller to report his reservation of subsurface rights" failed because there were was "no evidence one way or another whether the Kellers ever reported their ownership interest for assessment purposes." Tr. Ct. Op., Sept. 29, 2010, at 7. In fact, the court emphasized, there was no evidence of records of any reserved mineral interests in Centre County. Id.

While the court seemingly agreed with the Keller Heirs that Herder Spring was aware of the reservation of subsurface rights in the 1899 Deed, the court did not base its holding unequivocally on the concept of estoppel by deed. Ultimately, the trial court denied summary judgment to Herder Spring and granted it as to the Keller Heirs.

Herder Spring filed a motion for reconsideration that the trial court denied. It then appealed to the Superior Court, challenging, *inter alia*, whether the trial court erred in "failing to recognize that a prior sale of the land for non-payment of real estate taxes

effectively rejoined the subsurface and surface rights." Herder Spring Hunting Club v. Keller, 93 A.3d 465, 465 (Pa. Super. 2014). A unanimous Superior Court panel reversed the trial court and remanded for entry of summary judgment and the award of subsurface rights in favor of Herder Spring.

II. Historical Review of Taxation of Unseated Land in Pennsylvania.

Prior to summarizing the Superior Court's decision, we first review the principles of unseated land ownership and taxation between 1894 and 1941 necessary to the Superior Court's analysis.

A. Seated vs. Unseated Land

The critical distinction between the legal analysis in the case at bar and current property law is the concept of unseated land. Prior to 1947, Pennsylvania's land was categorized as either seated or unseated land.[7] Seated land was property that had been developed with residential structures, had personal property upon it that could be "levied upon for the tax due", or was producing regular profit through cultivation, lumbering, or mining. Robert Grey Bushong, Pennsylvania Land Law, Vol 1, § 469(II) at 500-501 (1938). Unseated land is best understood as "wild" land but included any land that did not meet the requirements of being seated. Id. § 469(IV) at 501. The determination of whether land was seated or unseated

[7] In 1947, the legislature repealed some of the acts underlying the concept of unseated land taxation and, instead, defined "property" for purposes of the Real Estate Tax Sale Law as including both seated and unseated land. See 72 P.S. §§ 5860.102; 5860.801.

land was entirely based upon the "eye of the assessor," who would traverse the county determining whether land was being developed and then "return" the land to the county commissioners to assess the property for taxation. Stoetzel v. Jackson et al, 105 Pa. 562, 567 (Pa. 1884).

Between the Revolution and the early 1800s, large tracts of wilderness in the interior of Pennsylvania were owned by speculators who lived on the coast in hopes that the land would increase in value as the population increased. Bushong, § 470 at 502. Many of these landowners neither developed nor paid the taxes on the land. Id. Notably, the owners of unseated lands were not always known by the county authorities such that personal notice could not be given. Long v. Phillips, 88 A. 437, 438 (Pa. 1913) (observing that for unseated land "it frequently occurs that the owner's deed is not recorded, his name is not registered, he is not known, no one is in actual possession, and there is no apparent owner or reputed owner in the neighborhood of the property."). The Commonwealth developed different sets of land tax laws to address the difficulties regrading collecting tax on unseated land. Bushong, § 472 at 503.

If the assessor determined that the land was seated, the land was taxed to the land owner, who was personally responsible for the payment of the taxes which could be collected against his or her personal property. Id., 469(II) at 501. The owner of unseated land, however, was not personally responsible for the payment of taxes, which were instead imposed on the land itself, in the name of the person to whom the original warrant had been issued. See Proctor v.

Sagamore Big Game Club, 166 F. Supp. 465, 475 (W.D. Pa. 1958), aff'd, 265 F.2d 196 (3d Cir. 1959). The current owner's name would be used "only for the purpose of description." F.H. Rockwell & Co. v. Warren County, et al, 77 A. 665, 665-666 (Pa. 1910). As explained by this Court in 1841,

> [T]he land itself, and not the owner of it, is debtor for the public charge; and it is therefore immaterial, at the moment of sale, what may be the state of the ownership, or how many derivative interests may have been carved out of it. With these the public has no concern. They are sold with the land, just as a remainder would be sold with the particular estate.

Strauch v. Shoemaker, 1 Watts & Serg. 166, 175 (Pa. 1841) (quotation marks omitted); see also Bannard v. New York State Natural Gas Corp., 293 A.2d 41, 49 (Pa. 1972) (holding that "it is immaterial that the name of the owner as given in the assessment is inaccurate, since no personal liability is involved; the land, not the owner, is looked to for payment of delinquent taxes").

As was true for seated land, this Court concluded that unseated land could be severed into surface and subsurface estates, which could be separately assessed, taxed, and, if necessary, sold at tax sale. Rockwell, 77 A. at 666. There is ample evidence in our caselaw citing to the tax books of various counties indicating the assessment and sale of mineral estates separate from the surface. See e.g. Bannard, 293 A.2d at 45; Wilson v. A. Cook Sons Co., 148 A. 63, 64 (Pa. 1929) ("where there is divided ownership of the land there ought to be a divided taxation").

The parties do not dispute that the Eleanor Siddons Warrant was unseated land at the time of the 1935 tax sale. Accordingly, we consider the taxation system on unseated property which we have noted is "separate and distinct from that enacted for the collection of taxes on other subjects." Long, 88 A. at 438.

B. Act of 1815

The arguments in this case focus substantially on the Acts of 1806 and 1815,[8] which we address in reverse chronological order as it provides better insight into the taxation of unseated property.

Prior to 1815, courts required a purchaser of unseated land at a tax sale to demonstrate "an exact and literal compliance with every direction of the law" related to the sale, including even the election returns of the relevant county officers. Morton, 9 Watts at 322; see generally Bushong § 472(V) at 505. As it was nearly impossible for a purchaser to prove these details, tax sales were rarely upheld, such that "few owners of unseated lands would pay taxes." Morton, 9 Watts at 322. Additionally, the laws discouraged tax sale

[8] The Acts of 1806 and 1815, which amended the Act of 1804, have been repealed in large part. See e.g. 1947, July 7, P.L. 1368, No. 542, 72 P.S. § 5860.801 (repealing the Act of 1804 and 1815 as to certain taxing districts). Nevertheless, the Acts were in force during the tax sale at issue in this case. The Act of 1804, April 3, P.L. 517, 4 Sm. L. 201, was entitled "An act directing the mode of selling unseated lands for taxes." The Act of 1806, March 28, P.L. 644, 4 Sm. L. 346, was entitled "A supplement to the act entitled 'An act enjoining certain duties on the holders of warrants not executed, and on the holders of unseated lands.'" The Act of 1815, March 13, P.L. 177, 6 Sm. L. 299, amended the Act of 1804, and was itself amended by the Act of 1847, March 9, P.L. 278.

purchasers from improving the land because "some friendly neighbor or prowling speculator" would seek out the owner and dispossess the purchaser." Id. at 322-23.

The legislature attempted to correct this situation to encourage the development of the interior unsettled lands. See Strauch, 1 Watts & Serg at 176-77; Williston v. Colkett, 9 Pa. 38, 39 (Pa. 1848). The purpose of the Act of 1815 was to change the burden of proof "to substitute the presumption that everything was rightly done, for the proof that it was rightly done." Morton, 9 Watts at 323; see also William W. Hall, A Manual on Title Searches and Passing Titles in Pennsylvania, § 148 at 90-91 (1934). The purchaser need merely prove that "the land was unseated, and that a tax was charged by the commissioners, regularly or irregularly[, and] that the tax was unpaid and the land sold and not redeemed within two years." Morton v. Harris, 9 Watts at 324. The Court noted, however, that, while the Act presumed compliance with the requirements of a proper tax sale, an owner could rebut the presumption with direct evidence that the elements were not met. Id.

The Act of 1815 provided specific instructions regarding the process of selling unseated land to collect unpaid taxes. It dictated that county treasurers hold a public sale on the second Monday of June 1816, and every two years thereafter for the sale of tracts of unseated land upon which the taxes had been unpaid for at least a year. Act of 1815, § 1, set forth at 72 P.S. § 5981. The act further directed the notice of the sale by publication in specified newspapers. Id., set forth at

72 P.S. §§ 6001, 6002.[9] The sales would result in "a deed or deeds, in fee simple." Id.

This Court explained that taxing and advertising land solely in the name of the warrant rather than the owner was sufficient because "[t]he assessors and commissioners cannot know of all the transfers of title which take place." Morton, 9 Watts at 325. In contrast, for seated land, notice of the pending tax sale had to be provided to the owner given that seated property was taxed in the name of the owner, unlike unseated property, subjecting the owner to personal liability for the taxes. Luther v. Pennsylvania Game Commission, 113 A.2d 314, 315 (Pa. 1955).

To protect the delinquent owner while also providing finality for the purchaser, the legislature provided a two year redemption period. Act of 1815, § 4, set forth at 72 P.S. § 6091; see generally Bushong, § 473(V) at 507. If the owner paid the taxes and costs plus twenty-five percent (later reduced to fifteen percent), then the "owner or owners shall be entitled to recover the [lands sold] by due course of law." Id. The Act of 1815, however, specified that after the two-year period:

> in no other case and on no other plea, shall an action be sustained . . . [and] no alleged irregularity in the assessment, or in the process or otherwise, shall be construed or taken to

[9] The provisions regarding the details of publication in newspaper have been revised various times and are not relevant to the issues before this Court.

> affect the title of the purchaser, but the same shall be declared to be good and legal.

Id.; Bushong, § 473(V) at 507.

If no purchaser bid a price sufficient to pay the outstanding taxes, the Act of 1815 required the county commissioners to purchase the property, as occurred in regard to the Eleanor Siddons Warrant. Act of 1815, § 5, set forth at 72 P.S. § 6131; see also Bushong, § 473(V) at 507-08. In the event of a purchase by the county commissioner, the owner had a period of five years (rather than two years) to redeem the property upon payment of all taxes and interest. Act of 1815, § 6, set forth at 72 P.S. § 6132; see also Bushong, § 473(V) at 507-09. If the property was not redeemed by the owner during the five years, the commissioners could sell the land. Act of 1815, § 7, set forth at 72 P.S. §§ 6134, 6135. Section 9 of the Act of 1815 further specified the wording of the deed from the treasurer to the commissioners, which was used in the case at bar. 72 P.S. § 6136.

While this Court noted that "some of the enactments in the law of 1815 would appear harsh and severe on the original owner," the act was considered necessary to address the evil that existed prior to it where "[t]he purchaser at a sale for taxes dare not spend money or labor on the land he bought." Morton, 9 Watts at 323. We further opined,

> A vigilant owner has nothing to fear. All he has to do is to pay his taxes, and this he is bound to do upon every principle of equality and justice. Nay, more, when this has been omitted by him, the legislature has allowed him to redeem his

> land within two [or five] years, terms by no means onerous.

Strauch, 1 Watts & Serg. at 176. We have repeatedly noted that any contests to the tax assessment must be brought within the statutory period and "cannot be collaterally attacked fifty years later." Bannard, 293 A.2d at 49; see also Wilson, 148 A. at 65.

C. Title-washing

An offshoot of the Act of 1815, and the Act of 1804 which it supplemented, is the concept of "title-washing." Section 5 of the Act of 1804 provided:

> [S]ales of unseated land, for taxes that are now due . . . shall be in law and equity valid and effectual, to all intents and purposes, to vest in the purchaser or purchasers of lands sold as aforesaid, all the estate and interest therein, that the real owner or owners thereof had at the time of such sale, although the land may not have been taxed or sold in the name of the real owner."

This Court explained that "a tax sale extinguishes all previous titles," Reinboth v. The Zerb Run Improvement Co., 29 Pa. 139, 145 (Pa. 1858), and excludes "all other claimants to the land of a prior date." Caul v. Spring, 2 Watts 390, 396 (Pa. 1834).

In Powell v. Lantzy, 34 A. 450 (Pa. 1896), this Court explained the rationale underlying title-washing, although it did not use the term. The Court addressed a tract of unseated land which had been assessed and taxed as an undivided piece of property in 1882 and 1883. Despite the pending delinquent taxes, the owner

of the property sold the surface rights and reserved the coal and mineral rights in 1883. In 1884, a tax sale purported to encompass the entire property based upon the 1882 and 1883 pre-division assessment and taxation. In the case, the individual who had purchased the surface rights from the owner in 1883 then purchased the entire property via the 1884 tax sale, thus gaining the subsurface rights.

The Court in Powell questioned whether there was an equitable reason for forbidding the surface owner from purchasing the entire property at tax sale. This Court recognized that, as to unseated land where the tax was imposed on the land and therefore not the landowner's personal responsibility, nothing prevented "the holder of a defective title from purchasing a better one at a tax sale." Id. at 548 (quoting Coxe v. Gibson, 27 Pa. 160 (Pa. 1856)).

As relevant to the case at bar, the court explained the duty, or lack thereof, of landowners to pay taxes: "The whole was subject to a claim for taxes which existed before they acquired title, and which neither [the surface nor the subsurface owner] was under any obligation to the state to pay. If either [the surface or subsurface owner] had paid it, he could not have recovered of the other his proportionate share." Id. at 549. Moreover, it opined that there was no way to apportion the tax. "Any moral obligation to agree and jointly pay the tax, each contributing his just share, rested equally upon the owners of the different parts; but there was no legal duty on either to do this. It was their separate, not their joint, interests which were in peril." Id. at 550. The Court thus affirmed the purchase of the entire tract by means of a tax sale based upon

the taxes assessed and unpaid on the property prior to the division. See also Hutchinson v. Kline, 49 A. 312 (Pa. 1901).

In Proctor v. Sagamore Big Game Club, the federal courts addressed a tax sale of unseated land in the late 1800s for purposes of land transactions in the 1950s, which mirrors the timeframe of the case at bar. Proctor, 166 F. Supp. at 470, aff'd, 265 F.2d at 200-01. In 1893, Thomas Proctor (Proctor) purchased an unseated property from the then-owner at a time when the prior year's taxes had not been paid. After purchasing the property, Proctor apparently did not pay the delinquent 1892 taxes. Accordingly, the property was subjected to a tax sale in 1894 and was purchased in fee simple by G.W. Childs (Childs). Months later, Proctor, despite the tax sale, purported to sell the property to Elk Tanning Company but reserve the mineral interests to himself. Childs, who was also president of Elk Tanning Company, later assigned his interest in the mineral rights from the tax sale to the company.[10] Proctor, 265 F.2d at 200.

In the 1950s, Proctor's heir attempted to invalidate the tax sale to Childs by claiming that the deed from the tax sale had not been property acknowledged or that there were fraudulent aspects of Childs' dealings with his company. After rejecting the claim that the

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[10] As an interesting historical note, the parties involved in this transaction were also involved in other similar transactions covering a substantial portion of several counties in a purported attempt to consolidate bark lands into the United States Leather Company, arguably with the land owners reserving mineral rights. Proctor, 265 F.2d at 201-02. Proctor and Childs were both tannery owners. Id.

deed was not properly acknowledged, the court observed that the tax sale had divested the prior owner of the ability to sell the property and reserve any mineral rights as all the owner's rights had been extinguished via the tax sale. Proctor, 166 F. Supp. at 470, aff'd, 265 F.2d at 200-01. Moreover, the court held, that "[w]hen there is no separate assessment of the minerals, a purchase of the whole by the owner of the surface divests the title of the owner of the minerals." Proctor, 166 F. Supp. at 475. As in the case at bar, it appears that the property had been divided into separate mineral and surfaces estates, but had nonetheless been sold as a united whole property for the failure to pay taxes on the property, which was assessed as a unit. See also Powell, 34 A. at 451.

Accordingly, courts interpreting Pennsylvania law have a long history of accepting the concept of a tax sale reuniting severed estates of unseated property and perfecting previously defective titles.

D. Reporting Duties of Owners vs. County Commissioners under the Act of 1806

Factually, the issues in this case turn on whether the taxes assessed and not paid in 1935 were assessed on the Eleanor Siddons Warrant as a whole or merely upon the surface estate. In addressing this issue, many of the arguments in this case have focused on whether the Kellers had a duty to report the 1899 subdivision of the estate into surface and mineral estates to the Centre County Commissioners, which would have triggered a separate assessment and taxation of the Keller's mineral estate (or no taxation if it had no value). This question requires our review of the Act of 1806, as well as its predecessor, the Act of 1804.

In regard to unseated property, the Act of 1804 initially required the deputy surveyors to report to the commissioners regarding all the lands surveyed in the county with a list including the acreage and the surnames on the original warrant, *e.g.* the Eleanor Siddons Warrant. Act of 1804, § 1. The commissioners, in turn, were required to keep a book listing each tract with the acreage and the name of the original owner. Id.

The Legislature enacted the Act of 1806 to provide that "it shall be the duty of every holder of unseated lands" to provide the county commissioners with a signed statement describing the tract of land and "the name of the person or persons to whom the original title from the commonwealth passed, and the nature, number, and date of such original title." Act of 1806 Section 1. To address future transfers, the Act provided:

> [I]t shall be the duty of every person hereafter becoming a holder of unseated land, by gift, grant, or other conveyance to furnish a like statement, together with the date of the conveyance to such holder, and the name of the grantor, with in one year, from and after such conveyance.

Id., set forth in substantial part at 72 P.S. § 5020-409. The penalty for failing to provide this information was "four times the amount of tax to which such tract or tracts of land would have been otherwise liable." Id. Notably, the penalty was purely for failure to report and did not address the penalty for failure to pay the tax, which is at issue in the case at bar.

The Acts did not impose any duty on the county commissioners to obtain information regarding the unseated land or to search through deed books to discover whether lands had changed hands. See Stoetzel v. Jackson, 105 Pa. 562, 567 (Pa. 1884). Instead, the obligation was initially on the surveyors to return the surveys and then on the original and subsequent owners to inform the commissioners of the land owned to allow the commissioners to impose an appropriate tax. In Heft v. Gephart, 65 Pa. 510, 516 (Pa. 1870), this Court opined that the tax system treated unseated lands "entirely in reference to the original warrants when not otherwise directed by the owners." The courts of Pennsylvania have considered the consequences of tax sales of unseated lands in connection with an owner's duty to report under the Acts of 1806 and 1815. We will review several of these cases.

In a case specifically considering the ability to tax a subsurface estate, this Court emphasized the distinction between the right of owners to sever and the taxing authorities assessment of taxes: "The authority to tax and the manner of its exercise has nothing to do with the right of the owner either to hold his tract of land entire or to sever it by the grant of different estates therein." Rockwell, 77 A. at 666. In reaffirming that unseated, as well as seated, landholders could sever their subsurface estates, we recognized that the method for assessing taxes on unseated estates differed from that of seated estates based upon "the difficulties of ascertaining the owners, and other like considerations." Id.

In Williston, this Court faulted an owner's failure to report to the County Commissioners an error in the tax assessment of his property, which resulted in his paying taxes for several years upon only a third of the acreage of the warrant he owned. After the landowner failed to pay taxes and a tax sale occurred, this Court concluded that the tax sale covered the acres identified in the original warrant despite the significantly smaller acreage listed on the assessment, because the assessment was based on land as "identified by the number of the warrant, the name of the warrantee and the name of the owner from whom [the current landowner] had purchased." Williston, 9 Pa. at 39. The number of acres in the assessment, which the owner failed to correct, was merely a descriptive term. Accordingly, the Court concluded that the details in the warrant controlled, absent correction by the owner.

In McCoy v. Michew, 7 Watts & Serg. 386, 1844 WL 5025 (Pa. 1844), this Court recognized that the commissioners were not responsible for determining land ownership for purpose of taxation and instead that the burden was on the landowners pursuant to the legislative enactments culminating in the Act of 1815. In that case, this Court addressed the contested ownership of a tract of land that apparently was covered by different warrants. The Court faulted the owner who had failed to report or pay tax on the land for thirty years, and then sought to establish ownership when the land had appreciated in value, long after the statutory redemption period. The Court noted, "If there be hardship, it is one which can easily be avoided by performing the duty which the law imposes upon [the owner], to return the land and pay his taxes." Id. at 391, 1844 WL 5025, at *5.

In Hutchinson v. Kline, this Court affirmed *per curiam* a decision of the Elk County Court of Common Pleas. While this Court did not provide binding analysis, the trial court's opinion gives insight into the judiciary's view of tax law at that time in a case analogous to the case at bar.[11] In Hutchinson, as in this case, unseated land had been divided into a surface and subsurface estate by deed, but there was no indication that the surface and subsurface had been assessed separately, prior to a tax sale of the lands for delinquent taxes on the entire property. The trial court opined that it was the duty of the holder of unseated lands under the Act of 1806 to give notice of the severance to the commissioners or the assessors. Hutchinson, 49 A. 312 (citing Williston, 9 Pa. 38). The court observed that assessors would treat unseated lands "entirely in reference to the original warrants, when not otherwise directed by the owners." Id. The court additionally noted that that it was not "the business of the assessor to inquire what is the nature of the owner's title." Id. (citing Stoetzel, 105 Pa. 567). After noting that the subsurface owners had neither paid tax nor reported their ownership interest as set forth in the Act of 1806, the court opined, "[t]he record of the deed creating a separate estate in the minerals would not be notice to the assessor or the commissioners, as they were not bound to search or examine the records." Id.

Accordingly, under caselaw applying the Act of 1806, the failure to report a severance of unseated land

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[11] At the heart of the case in Hutchinson was a question regarding whether the land was seated or unseated that is not relevant in the case now before this Court.

could result not only in a four-fold statutory penalty, but also had the practical effect of having the property assessed and taxed as a whole, given that the assessors were not required to determine the sometimes elusive current ownership.

III. Superior Court Decision

As discussed in the procedural history section of this opinion, Herder Spring appealed to the Superior Court challenging the trial court's order denying its summary judgment motion and granting summary judgment in favor of the Keller Heirs. As relevant to the issues before this Court, Herder Spring contended that the trial court erred in concluding that the 1935 tax sale to the County Commissioners and the 1941 Deed to Herr involved only the surface estate, such that the mineral rights remained with the Keller Heirs. Instead, Herder Spring asserted that the transfers involved the entire Eleanor Siddons Warrant based upon the absence of notice to the County Commissioners of the Kellers' 1899 severance of the surface and subsurface estates. Herder Spring appealed relying heavily upon the law discussed above.

The Keller Heirs responded that the Kellers were not required to report the severance under the Act of 1806, and that even if they were required to report the severance, the penalty for failure to report was the four-fold tax penalty rather than the loss of their property at a tax sale. Alternatively, the Kellers argued that Herder Spring was estopped from asserting their claim based upon the acknowledgement in their 1959 Deed that the deed was subject to any reservations in the chain of title.

After discussing the extensive deed history, the Superior Court concluded that because the 1899 severance had never been reported to the County Commissioners, the Eleanor Siddons Warrant was assessed and taxed as a whole and thus was sold in its entirety in the 1935 tax sale. Herder Spring, 93 A.3d at 472. The court observed "that the tax deeds do not reflect that any interest in the land less than a fee simple was ever assessed," such that the court could presume that the sale to Herder Spring's predecessor encompassed the full Eleanor Siddons Warrant including both the surface and subsurface rights. Id. at 473.

In reaching its conclusion, the Superior Court opined that it was the Kellers "affirmative duty" under the Act of 1806 to inform the County Commissioners of the severance to allow the separate assessment of the surface and subsurface estates. Id. at 473. The court opined that, absent proof to the contrary, it could presume that the severance was never reported which resulted in the continued assessment, taxation, and sale of the entire Eleanor Siddons Warrant for the failure to pay taxes. The court recognized that the commissioners were not obligated to determine the ownership of unseated land. Id. at 470-72.

The Superior Court rejected the Keller's challenge to the sale of the entire estate. The court noted that the Act of 1815 required the presumption that the tax sale was proper absent a challenge within the initial two-year redemption period. Id. at 473. Therefore, when the initial redemption period passed without a challenge to the sale or the deed, no party could challenge the process of the tax sale, which the Superior Court had

concluded related to the entire Eleanor Siddons Warrant.

The court additionally rejected the Keller Heirs' claim that the Kellers' mineral estate could not have been taxed or sold for delinquent taxes because it had no value given that it was non-producing and that the value of the minerals was unknown. The Superior Court opined that the valuation argument should have been asserted during the redemption period and could not be raised now. Absent a contemporaneous assessment of the value of a mineral estate, the court additionally recognized this Court's caselaw noting the confusion that would be caused by "[a]ttempts to prove that accessors [sic] did or did not know of the presence of oil or gas when they assessed 'minerals' at some point in the past." Id. at 473 n.11 (quoting Bannard, 293 A.2d at 49). Confusion, the court noted, would result from not knowing what had been sold based on whether the specific mineral had been known to exist at a specific time, which was an unworkable system.

The Superior Court additionally dismissed an *amicus curiae*'s argument that the statutory penalty for an owner not reporting ownership to the commissioners was a penalty of four-fold the tax, rather than forfeiture at a tax sale. Id. at 471 n.10. The court also rejected any reliance on the 1959 Deed's reference to "being subject to all exceptions and reservations as are contained in the chain of title," concluding that the chain of title in 1959 did not contain any "active exceptions or reservations." Id. at 473.

In concluding, the court suggested that the "resolution of this matter is at odds with modern legal concepts." Id. at 473. Nonetheless, the Court opined

that it was not "proper to reach back, more than three score years, to apply a modern sensibility and thereby undo that which was legally done." Id.

IV. Analysis

After the Superior Court denied their petition for reargument *en banc* or reconsideration, the Keller Heirs filed a petition for allowance of appeal which this Court granted.[12] Herder Spring Hunting Club v. Keller, 108 A.3d 1279 (Pa. 2015).

Initially, we observe that this case involves competing summary judgment motions. Accordingly, while our scope of review of the trial court's determination is plenary, we will only reverse if the court committed an error of law or abused its discretion. *Atcovitz v. Gulph Mills Tennis Club,* 812 A.2d 1218, 1221 - 22 (Pa. 2002). "Summary judgment is appropriate only in those cases where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Id. (citing, *inter alia*, Pa. R. Civ. P. 1035.2). Moreover, courts review the facts at summary judgment stage in a light most favorable to the nonmoving party. Id. We additionally recognize that Herder Spring, as the plaintiff bringing a quiet title action, has the burden of proof and must recover on the

[12] The Keller Heirs are supported in their arguments addressed below by their *amicus curiae* the Trustees of the Thomas E. Proctor Heirs, et al. Our analysis is further informed by the arguments supplied by Herder Spring and its *amici curiae* the Pennsylvania Department of Conservation and Natural Resources, Range Resources, SWN Production Co., LLC, and Seneca Resources Corp.

strength of its own title. Albert v. Lehigh Coal & Nav. Co., 246 A.2d 840, 843 (Pa. 1968).

A. Extent and Legal Consequences of 1935 Tax Sale

The Keller Heirs' first issue addresses the overarching question in this case: whether the 1935 tax sale to the County Commissioner resulted in the sale of only the surface estate or the entire Eleanor Siddons Warrant. They essentially claim that the Kellers' proper filing of their 1899 deed conveying the surface estate, but reserving the subsurface estate, placed Centre County on notice of the severance of the property, such that the 1935 tax sale solely conveyed the surface property. They emphasize that the 1936 Deed referenced the land "surveyed to Ralph Smith," the surface owner of the property at the time. This first issue contains several sub-issues, addressed *seriatim*.

Initially, the Keller Heirs fault the Superior Court for imposing an affirmative duty on the Kellers to report the severance under the Act of 1806. We conclude that the Keller Heirs are correct that the relevant portion of the Act of 1806 imposed a reporting duty only on a party "becoming a holder of unseated land," and that, given their prior ownership of the entire Warrant, the Kellers did not "become" a holder of unseated land by selling the surface estate and reserving the mineral estate.[13]

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[13] As a separate issue, the Keller Heirs assert that the Superior Court exceeded its fact-finding authority in determining that the Kellers did provide notice of the severance for purposes of compliance with the Act of 1806. As we conclude that compliance with this aspect of the Act of 1806 is not definitive, we will not discuss this issue.

Nevertheless, based upon the case law discussed at length above, we agree with the Superior Court's conclusion that if neither the Kellers nor the purchaser of the surface rights in 1899 reported the transfer, then the Centre County Commissioners would have assessed and taxed the Eleanor Siddons Warrant in its entirely. We unequivocally stated in Heft that the tax system relating to unseated land, including the Acts of 1806 and 1815, treated unseated land "entirely in reference to the original warrants when not otherwise directed by the owners. Heft, 65 Pa. at 516; see also Hutchinson, 49 A. 312; Williston, 9 Pa. at 39; McCoy, 7 Watts & Serg. at 390. As ownership of unseated land was not easily ascertainable, the County Commissioners were not tasked with searching deed records to determine the present ownership of unseated land. See Rockwell, 77 A. at 666; Stoetzel, 105 Pa. at 567.

Next, we reject the Keller Heirs' claim that the reference to the "land surveyed to Ralph Smith" in the 1936 Deed from the Treasurer to the County Commissioners indicated that the deed was limited to the surface estate. Instead, we recognize that unseated land was assessed and taxed in the name of the Warrant, and any reference to the presumed-current owner, such as Ralph Smith, was merely used for descriptive purposes. See Bannard, 293 A.2d at 49 (holding that "it is immaterial that the name of the owner as given in the assessment is inaccurate, since no personal liability is involved; the land, not the owner, is looked to for payment of delinquent taxes"); Rockwell, 77 A. at 666; Strauch, 1 Watts & Serg. at 175.

We additionally find unpersuasive the Keller Heirs' argument that the Act of 1806's four-fold tax penalty would apply to this case. The Keller Heirs properly recognize that the penalty for failing to report under the Act of 1806 was four times the relevant tax. The 1935 tax sale at the heart of this case, however, was not triggered by the failure to report ownership but instead by the failure of the owner or owners of the taxed property to pay the assessed tax.[14]

The Keller Heirs next contend that the 1935 tax sale should not be deemed to encompass the reserved mineral rights because those rights did not have taxable value in 1935.[15] The Keller Heirs rely upon

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[14] In support, the Keller Heirs rely upon this Court's decision in City of Philadelphia v. Miller, 49 Pa. 440, 450-52, (Pa. 1865), where the Court used language emphasizing that the seizure of property should not be substituted for the four-fold penalty to report. That case, however, involved an unusual situation where the tax assessment listed a warrantee name completely unrelated to the name connected to the unseated land at issue due to a transcription error.

[15] The Keller Heirs suggest that the gas rights, included in the reservation of subsurface rights, should be deemed conclusively to be non-taxable given our recent holding that oil and gas should not be subject to *ad valorem* taxes because those substances are not "land." Independent Oil and Gas Assoc. of Pa. v. Board of Assessment Appeals of Fayette Co., 814 A.2d 180 (Pa. 2002) (IOGA). We reject this argument as we have held that IOGA only applies prospectively. Oz Gas, Ltd. v. Warren Area School District, 938 A.2d 274 (Pa. 2007). In applying IOGA prospectively, this Court specifically emphasized the need to protect taxing authorities' reliance on prior oil and gas taxes. Id. at 284. We also noted that the trial court in that case additionally observed that "[r]etroactive application of IOGA would, in effect, invalidate each of those tax sales, perhaps leading prior owners to seek return of

language in Rockwell acknowledging that a subsurface estate can only be subject to tax if it is demonstrated that mineral or other rights have actual value either through current production or an evaluation of neighboring properties. Rockwell, 77 A. at 665. They claim that the reserved rights in this case had no value as of the tax sale in 1935. The Keller Heirs, however, fail to recognize that the potential assessable value of the minerals is irrelevant to whether the 1935 assessment addressed the Warrant as a whole or merely the surface estate. Indeed, their theory could lead to a windfall for fee simple owners, who years after the tax sale of the entire property could claim that the prior tax sale should be deemed to have exempted specific mineral rights that at the time of the sale had no value, but today are coveted, with Marcellus Shale being an obvious example. Such a theory would result in chaos whereby courts today would be required to determine whether certain minerals or other subsurface rights would have had taxable value in the late 1800s. See Bannard, 293 A.2d at 49.

Moreover, as set forth above, if the Kellers disputed the County Commissioners' failure to assess their subsurface estate separately from the surface estate, they should have contested the assessment and tax sale within the initial two-year redemption period. After the expiration of that redemption period, a challenge to the propriety of the tax sale would not be heard under Section 4 of the Act of 1815: "no alleged irregularity in the assessment, or in the process or otherwise, shall be

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the properties lost to those tax sales." Id. at 279. The trial court and this Court both concluded that such consequences weighed in favor of applying IOGA prospectively only.

construed or taken to affect the title of the purchaser, but the same shall be declared to be good and legal." 72 P.S. § 6091; see also Bannard, 293 A.2d at 49; Strauch, 1 Watts v. Serg at 176; Bushong, § 473(V) at 507-10.

Finally, the Keller Heirs attempt to distinguish the caselaw relating to title-washing by emphasizing that the cited cases, such as Powell v. Lantzy, address situations where the severance occurred after the imposition of taxes, whereas the severance of the Eleanor Siddons Warrant occurred in 1899, years prior to the assessment and taxation that lead to the 1935 tax sale. They also minimize the significance of Hutchinson, which involved a pre-taxation severance, as this Court merely affirmed *per curiam*. Instead, the Keller Heirs rely upon this Court's decision in Tide-Water Pipe Co. v. Bell, 124 A. 351 (Pa. 1924), to support their claim that "title-washing" does not apply to duly recorded prior estates or interests because the tax sale under Section 5 of the Act of 1804 only conveys the interest "of the real owner or owners."

In Tide-Water Pipe Co., this Court addressed the effect of a tax sale on a right-of-way granted nearly forty years earlier by the prior owner to Tide-Water Pipe for the construction of above-ground petroleum-carrying pipes, which traversed the entire Commonwealth. The Court reiterated the well-established principle that a right of way which is open, notorious, permanent, and continuous is not affected by either a private or public sale of the property over which it passes. Id. at 353. The Court found no reason why this long established rule would not also apply to a treasurer's sale of unseated land for delinquent taxes. The Court held that the purchaser at a tax sale takes

the land subject to an easement, servitude, or interest in the nature of an easement. Id. The Court also opined that an easement or right of way was distinct from the fee, and thus did not pass with the tax sale.

We conclude that this Court's holding in Tide-Water Pipe, relating to easements and rights of way, is not controlling in regard to a subsurface estate if the estate has been assessed and taxed as a whole. Unlike the open and notorious above-ground pipes which made all aware of the right-of-way, a severance of a subsurface estate could not be viewed by the assessor. Thus, if the warrant had been assessed as a whole, the tax sale would have divested "all the estate and interest therein, that the real owner or owners had at the time of such sale." Act of 1804, § 5. In contrast, the easement or right of way in Tide-Water Pipe was not an "estate [or] interest" of the property owner and, thus, was not affected by the tax sale under the Act of 1804. Tide-Water Pipe, 124 A. at 355.

Additionally, in light of our caselaw recognizing the difficulty assessors had in ascertaining the then-current ownership of unseated land and providing for the assessment to be based on the entire warrant in the absence of direction from the owners, we reject the Keller Heirs distinction based on the timing of the assessment versus the severance. See Hept, 65 Pa. at 516. As discussed, tax on unseated land was the liability of the land rather than the owners. Therefore, if the property was assessed as a whole property and none of the owners paid the tax, then the property would be sold as a whole to satisfy that tax. As cogently set forth in Powell v. Lantzy, "[a]ny moral obligation to agree and jointly pay the tax, each contributing his just

share, rested equally upon the owners of the different parts; but there was no legal duty on either to do this. It was their separate, not their joint, interests which were in peril." Id. at 550; see also Proctor, 166 F.Supp. at 475 ("[w]hen there is no separate assessment of the minerals, a purchase of the whole by the owner of the surface divests the title of the owner of the minerals"); Hutchinson, 49 A. 312. We find no distinction based upon the timing of the severance.

After rejecting the Keller Heirs' various arguments regarding the effect of the 1935 tax sale, we next consider whether the documents in the record demonstrate the 1935 tax sale was imposed on the Eleanor Siddons Warrant as a whole. We reiterate that the caselaw counsels that unseated land should be assessed according to the original warrant, absent direction from the owners, and that a tax sale conveys the property covered by the assessment. See New York State Natural Gas Corp. v. Swan-Finch Gas Development Corp., 278 F.2d 577, 579 (3d Cir. 1960) (recognizing "the well established rule that a tax deed conveys only such interest as was actually assessed to the defaulting taxpayer," citing Brundred v. Egbert, 30 A. 503, 505 (Pa. 1894)). Moreover, Section 5 of the Act of 1804 provided that a tax sale of unseated land conveys "all the estate and interest" "that the real owner or owners thereof had at the time of such sale," such that the tax on the entire estate would convey all rights held by the owners of the assessed property.

In this case, the documents relating to the 1935 tax sale provide no indication that the assessment and taxation occurred on anything other than the entire Eleanor Siddons Warrant, as they provide no reference

to the surface estate or a reserved subsurface estate. Therefore, we conclude that the 1935 tax sale to the Centre County Commissioners conveyed the entire Eleanor Siddons Warrant including both the surface and subsurface estates. Accordingly, when neither the Kellers nor the surface owners challenged the assessment or tax sale and failed to redeem the property within the relevant redemption period, their title was extinguished, allowing the entire Eleanor Siddons Warrant to be purchased in 1941 by Herr, from whom Herder Spring derives its title. See Reinboth, 29 Pa. at 145 (observing that "[a] tax sale extinguishes all previous titles"); Proctor, 166 F.Supp. at 476-77 (indicating that in the absence of a separate assessment of the minerals, the entire property is subject to the tax sale).

B. Due Process

Assuming *arguendo* that the 1941 Deed to Herr encompassed the Kellers' mineral estate under the relevant law, the Keller Heirs seize upon the Superior Court's *apologia* regarding the "unduly harsh" aspect of this case that is not in line with "modern sensibility." Herder Spring, 93 A.3d at 473. They assert that the Kellers and their heirs were deprived of due process because of the lack of actual notice prior to the tax sale.[16]

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[16] In response to Herder Spring and its *amici*'s argument that the Keller Heirs waived their due process claim by failing to raise the issue below, we will assume for the purpose of argument that the Keller Heirs sufficiently preserved this issue through their challenge to the applicability of the 1935 tax sale, given that we ultimately conclude that the Keller Heirs' argument fails on the merits. We do not address whether the Keller Heirs should have

The Keller Heirs rely upon well-established precedent regarding due process. As the United States Supreme Court has explained

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (citations omitted). In Mullane, the High Court broke with past precedent allowing notice by publication for *in rem* cases, as distinguished from *in personam* cases, and instead opined that due process requirements are not altered by whether an action is deemed *in rem* or *in personam*. Id. at 312-13.

The Court recognized the perils of notice by publication and deemed notice by publication unconstitutional in cases where the parties' identity and place of residence is known to the entity. Id. at 318. The Court, however, allowed notice by publication where the entity was unaware of the relevant parties' interest or addresses, observing that it "has not hesitated to approve of resort to publication as a

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raised their due process issue as an affirmative defense, as suggested by the dissent, given that no party has presented that argument to this Court.

customary substitute . . . where it is not reasonably possible or practicable to give more adequate warning." Id. at 317.

The High Court specifically addressed the provision of notice of a tax sale to a delinquent property's mortgagee. It opined that "unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of Mullane." Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 (1983) (citation omitted). The Court, however, instructed that a government body was not "required to undertake extraordinary efforts to discover the identity and whereabouts of a mortgagee whose identity is not in the public record." Id. at n.4; see also First Pennsylvania Bank, N.A. v. Lancaster County Tax Claim Bureau, 470 A.2d 938 (Pa. 1983). Likewise, this Court opined that due process in relation to the collection of taxes "requires at a minimum that an owner of land be actually notified by government, if reasonably possible, before his land is forfeited by the state." Tracy v. Chester County, Tax Claim Bureau, 489 A.2d 1334, 1339 (Pa. 1985).

The Keller Heirs emphasize that the Kellers' reservation of subsurface rights in the 1899 deed was duly recorded in the Centre County recorder of deed's office, which they suggest would have allowed the county officials to provide the Kellers or their heirs actual notice of the 1935 tax sale. They argue that notice by publication did not provide sufficient notice that their reserved interest was subject to tax sale.

At the time of the 1935 tax sale, prior to Mullane and Mennonite, constructive notice through publication was sanctioned for *in rem* actions. As noted above,

following the cited decisions of the United States Supreme Court and subsequent decisions of this Court, notice by publication for *in rem* cases was subject to the same due process analysis as for *in personam* actions and was generally disfavored.[17] Nevertheless, the courts approved of "resort to publication as a customary substitute . . . where it is not reasonably possible or practicable to give more adequate warning." Mullane, 339 U.S. at 317. In such situations, the government is not required to make extraordinary efforts. We conclude that what is "reasonably possible or practicable" and what would constitute an "extraordinary effort" requires consideration of the constraints of the era. Accordingly, we look to decisions from the relevant time to guide our determination of whether due process required personal or constructive notice for a 1935 tax sale of unseated land.

Interestingly, this Court has already opined regarding the reasonableness of the notice provided for tax sales of unseated land pursuant to the Act of 1815 in City of Philadelphia v. Miller, 49 Pa. 440, 450-52 (Pa. 1865) and other cases. In City of Philadelphia, we

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[17] We recognize that a dispute exists whether Mullane and Mennonite should be applied retroactively to tax sales occurring decades ago, especially in cases involving provisions similar to the two-year period in the Act of 1815 for challenging procedural aspects of tax sales. See Quantum Resources Management, L.L.C. v. Pirate Lake Oil Corp., 112 So.3d 209, 215-217 (La. 2013) (recognizing a "divergence of opinion" regarding the retroactive application of Mennonite). As we find the notice by publication was proper in this case even under the due process standards set forth by Mullane and Mennonite, we need not address these contentious questions and instead assume *arguendo* that the cases apply retroactively.

concluded that a party did not receive proper notice of a tax sale where the assessment was made in a name entirely unrelated to the unseated land due to a transcription error, specifically, land warranted to James Trembel was assessed in the name John Turnbull, without any other identifying information. Thus, if the owner of the land had attempted to pay his tax, he would not have found an entry in the assessment list that could be logically linked to his land. Id. at 449-50. Nevertheless, in criticizing the notice in that specific case, this Court explained why notice by publication was proper notice in most cases involving unseated land.

Initially, the Court opined that the law had "ample provision for notice to the owner" through the procedures of creating and compiling the surveys describing the land, allowing the owner a year to pay the taxes assessed, and providing and requiring sixty days' notice of the sale in daily papers both in the relevant county and Philadelphia, in which the property was described by reference to the warrantee or owner. Id. at 450; 72 P.S. § 6001. Indeed, while not mentioned in City of Philadelphia, tax sales under the Act of 1815 only occurred in even-numbered years on the second Monday in June, which limited the potential for surprise. Peters v. Healey, 10 Watts 208, 210 (Pa. 1840). The Court in City of Philadelphia also approved of notice even if the land was not assessed and taxed in the name of the "real owner" so long as the assessment was made "in the name of one connected by some title with the land," which would allow the owner to identity the property subject to tax. Id. at 451. Compare Humphrey v. Clark, 58 A.2d 836, 839 (Pa. 1948) (considering factors, such as the listing of neighboring

properties, allowing for sufficient identification of property when the assessment is made in a name other than the owner) and Wilson, 298 Pa. at 92 (finding assessment of mineral rights in prior owner's name sufficient identification) with Hunter v. McKlveen, 65 A.2d 366, 367-68 (Pa. 1949) (concluding that assessment of property which combined fifty-four tracts into four without other useful information did not provide proper identification of the land subject to tax).

In City of Philadelphia, the Court recognized that ownership of unseated land was often contested, such that it was "not the duty of the tax officers to decide between them." City of Philadelphia, 49 Pa. at 451. Indeed, this Court subsequently opined that "[i]t is common knowledge with those familiar with the subject that it frequently occurs that the owner's deed is not recorded, his name is not registered, he is not known, no one is in actual possession, and there is no apparent owner or reputed owner in the neighborhood of the property." Long, 88 A. at 438. Moreover, referencing the statutory two-year redemption period for tax sales of unseated land, the Court held that even if the owner "received no notice of sale, it required of him no great measure of diligence to look after his interests within two years." City of Philadelphia, 49 Pa. at 451. As this Court has found the notice provision of the Act of 1815 to be reasonable given the difficulties of ascertaining ownership information relating to unseated landowners and the protection provided by the redemption period, we will not upset that conclusion based on preconceived notions of what is reasonable in the age of the Internet. Accordingly, assuming that Mullane and Mennonite apply retroactively, we conclude that the process of providing

notice under the Act of 1815 complies with the dictates of those cases, which recognize that a government entity is not "required to undertake extraordinary efforts" in providing notice. Mennonite, 462 U.S. at 798.

C. Estoppel by Deed

Lastly, the Keller Heirs assert that Herder Spring should be estopped from asserting a claim to the subsurface rights due to the acknowledgement in their 1959 Deed providing that "[t]his conveyance is subject to all exceptions and reservations as are contained in the chain of title," without specifying the Keller reservation. R.R. at 26a. The Keller Heirs reject the Superior Court's conclusion that the acknowledgement was only subject to "active reservations," as they claim that it is subject to "all exceptions and reservations."

As the Keller Heirs recognize, "[i]t is a well established principle that one claiming under a deed is bound by any recognition it contains of title in another." Elliot, 365 Pa. at 252. However, in that case, the deed specifically mentioned the name of the person who had a claim upon the land, in contrast to the deed in the case at bar which generically stated that the deed was subject to any reservations "contained in the chain of title." Elliot, 365 Pa. at 252-53.

We conclude that at the time of the 1959 Deed to Herder Spring, there was no reservation "contained in the title" because the 1935 tax sale extinguished the prior reservation of the subsurface estate. Notably, a manual from the time of the 1935 tax sale, remarked that because "the land itself is responsible for the taxes regardless of who is the owner, a purchaser at a tax sale becomes the first link in a new chain of title and

he need not prove the title back of the same." William W. Hall, A Manual on Title Searches and Passing Titles in Pennsylvania, § 138 (1934). Accordingly, we find this issue meritless.

V. Conclusion

We observe that the holding in this case applies to a very limited subset of cases involving quiet title actions for formerly unseated land sold at a tax sale prior to 1947. Indeed, within this subset of cases, the decision would not govern those tax sales which specified whether the assessment involved the surface or the mineral rights. Additionally, the Keller Heirs contend that it would not apply to tax sales where the severance occurred after the tax assessment, as our prior cases address such scenarios. Furthermore, it would not apply where owners can meet the adverse possession standard, which the trial court found Herder Spring missed. Therefore, this case has limited application, though substantial significance to those to which it applies.

In conclusion, we affirm the Superior Court's order vacating the grant of summary judgment in favor of the Keller Heirs and remanding for the grant of summary judgment to Herder Spring Hunting Club.

Chief Justice Saylor and Justices Dougherty and Wecht join the opinion.

Justice Todd files a concurring opinion.

Justice Donohue did not participate in the consideration or decision of this case.

**CONCURRING OPINION**

**JUSTICE TODD** **DECIDED: July 19, 2016**

I join the comprehensive and scholarly Majority Opinion of Justice Baer in all respects save one: the disposition of the Keller Heirs' claim that the method of notice of the 1935 tax sale — publication — violated the due process guarantees afforded them by the United States Constitution. On that issue, the majority assumes, *arguendo*, the retroactive applicability of Mullane v. Central Hanover Bank and Trust, 339 U.S. 306 (1950), and Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), as suggested by the Keller Heirs, to the resolution of this claim. I would not entertain this argument, as, in my view, this issue has been waived for purposes of this appeal.

As the majority discusses, the decisions of the United States Supreme Court in Mullane and Mennonite recognized, for the first time, that the Due Process Clause of the Fourteenth Amendment of the United States Constitution prescribes the manner of notice that governmental bodies are required to provide to parties affected by a judicial decree involving their property rights, or the pending tax sale of their property. The majority acknowledges that the retroactive application of these cases remains currently unresolved, as the high Court has not spoken to this question and there remains a substantial split of authority among state courts which have considered it. See Majority Opinion at 33 n.17. However, the majority accepts, for purposes of argument, the retroactive application of Mullane and Mennonite and engages in a substantive analysis of the Keller Heirs' due process claim, which rests primarily on their assertion that

these decisions govern the 1935 tax sale, see Brief of Appellants at 42-45, and it does so, in part, utilizing the standards of those cases. See Majority Opinion at 33 n.17 ("As we find the notice by publication was proper in this case even under the due process standards set forth by Mullane and Mennonite, we need not address these contentious questions and instead assume *arguendo* that the cases apply retroactively.").[1] I would not address this claim, however, since I consider it to have been waived as Appellee contends.

The Keller Heirs' claim that notice by publication of the 1935 tax sale did not satisfy due process was raised for the first time in their petition for allowance of appeal to our Court. Yet, for an issue to be preserved for appeal, a party must raise it at the first possible opportunity to do so. Cf. Cagnoli v. Bonnell, 611 A.2d 1194, 1196 (Pa. 1992) (issue not waived when counsel raised it at the earliest possible time in the court below). This particular civil proceeding — an action to quiet title — conforms to our rules of civil procedure, and, thus, all provisions of those rules are applicable. See Pa.R.C.P. 1061 ("[T]he procedure in the action to quiet title from the commencement to the entry of judgment shall be in accordance with the rules relating

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[1] I find the majority's analysis in this regard to be problematic as it analyzes whether notice by publication in this matter afforded the Keller Heirs adequate due process by using the Mullane standard — i.e., whether it was "reasonably possible or practicable to give more adequate warning," Majority Opinion at 34 (quoting Mullane, 339 U.S. at 317) — but then looks to decisions "from the relevant time," the time of the tax sale, to assess whether the notice by publication authorized by the Act of 1815 comported with this standard. Majority Opinion at 34-36.

to a civil action."). The Keller Heirs' challenge to the tax sale, distilled to its essence, is a claim that the sale was illegal because it violated their constitutional due process rights. Consequently, in my view, the Keller Heirs were required by Pa.R.C.P. 1030(a) to plead the alleged illegality of the tax sale in the trial court as an affirmative defense in response to Appellee's complaint to quiet title. See Pa.R.C.P. 1030(a) ("[A]ll affirmative defenses including but not limited to . . . illegality . . . shall be pleaded in a responsive pleading under the heading 'New Matter'".). In that complaint, Appellee alleged that it acquired a fee simple interest to both the surface and subsurface estates under the Act of 1806 as a result of the 1935 tax sale, which it further contended was done in accordance with the law then in existence and with the Keller Heirs' full knowledge. See First Amended Complaint in Action to Quiet Title (R.R. 12a-23a) at ¶ 10, 16, 19. As the Keller Heirs did not raise any issue of a due process impediment to the legal validity of the sale in a responsive pleading to this complaint, despite that being the first opportunity for them to raise such a claim, I would deem it waived for purposes of the present appeal under Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").[2]

Accordingly, as to this issue only, I concur in the result reached by the majority, but not in its rationale.

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[2] As noted above, Appellee has specifically raised in its brief the issue that the Keller Heirs' due process claim was waived by their failure to raise it in the trial court, and, thus, in my view, the question of whether the failure to raise it in the manner arguably required by Pa.R.C.P. 1030(a) constitutes waiver is fairly subsumed therein.

## APPENDIX B

J-A32021-13

**IN THE SUPERIOR COURT OF PENNSYLVANIA**

**No. 718 MDA 2013**

**[Filed July 11, 2014]**

HERDER SPRING HUNTING CLUB,

Appellant

v.

HARRY AND ANNA KELLER,

Appellee

**ORDER**

AND NOW, this 11th day of July, 2014, IT IS HEREBY ORDERED:

THAT the application filed May 23, 2014, requesting reconsideration/reargument of the decision dated May 9, 2014, is DENIED.

PER CURIAM

## APPENDIX C

J-A32021-13

**IN THE SUPERIOR COURT OF PENNSYLVANIA**

**2014 PA Super 100**

**[Filed May 9, 2014]**

HERDER SPRING HUNTING CLUB,

Appellant

v.

HARRY AND ANNA KELLER,

Appellee

Appellee No. 718 MDA 2013

Appeal from the Judgment Entered July 12, 2011
In the Court of Common Pleas of Centre County
Civil Division at No(s): 2008-3434

BEFORE: DONOHUE, J., OTT, J., and PLATT, J.*

OPINION BY OTT, J.: **FILED MAY 09, 2014**

* Retired Senior Judge assigned to the Superior Court.

Herder Spring Hunting Club (Herder) appeals from the judgment entered July 12, 2011, in the Court of Common Pleas of Centre County, on the orders of September 29, 2010 and June 20, 2011, denying its motions for summary judgment and granting the heirs of Harry and Anna Keller ("Keller heirs") cross motions for summary judgment and awarding the Keller heirs fee simple ownership of the subsurface rights of the Eleanor Siddons Warrant.[1] Herder claims the trial court erred in: (1) failing to recognize that a prior sale of the land for non-payment of real estate taxes effectively rejoined the subsurface and surface rights, and (2) failing to recognize that it had obtained subsurface rights through adverse possession. After a thorough review of the submissions by the parties and *amicus curiae* briefs filed on behalf of each party, the certified record, and relevant law, we agree with Herder's first argument. Therefore, we vacate the judgment entered July 12, 2011, on the orders of September 29, 2010 and June 20, 2011, and remand for entry of an order consistent with this decision.

---

[1] Two sets of cross-motions for summary judgment were filed and decided in this matter. The first addressed the issue of the tax sale of unseated land and the applicability of the Act of 1806. These motions were decided in favor of the Keller heirs on September 29, 2010. The second set of cross-motions, addressing the issue of adverse possession, were decided in favor of the Keller heirs on June 20, 2011. The Keller heirs entered judgment on July 12, 2012. Herder's appeal from that judgment was premature, as the Keller heirs' counter-claims remained open. ***See Herder Spring Hunting Club v. Keller***, 60 A.3d 556 (Pa. Super. 2012) (memorandum). Therefore, the appeal was quashed due to the unresolved counterclaims. On March 25, 2013, the Keller heirs withdrew their counterclaims, and this appeal was timely filed on April 23, 2013.

We quote the factual background as stated by the trial court in its opinion and order dated September 29, 2010.

> On August 14, 2008, [Herder] initiated this action by filing a Complaint in the nature of an Action to Quiet Title. [Herder] subsequently filed a First Amended Complaint on October 27, 2008. [Herder] contends a 1935 tax sale extinguished the 1899 reservation of subsurface rights by Harry and Anna Keller and conveyed fee simple title to the tax sale purchaser, Max Herr. [Herder] argues Defendants failed to report their reservation of subsurface rights as required under the Act of March 28, 1806. [Herder] also asserts it has adversely possessed the mineral rights for a period in excess of twenty-one (21) years. The adverse possession claim has not been addressed by either party in the Motions for Summary Judgment.[2]
>
> This suit arises out of a dispute over subsurface rights. In 1894, Defendant Harry and Anna Keller[1] acquired a tract of "unseated[2]" real estate containing 460 acres strict measure, known as the Eleanor Siddons Warrant[3] (hereinafter also referred to as the "property" at a tax sale. On June 20, 1899, the Kellers

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[2] As noted, cross-motions for summary judgment regarding Herder's adverse possession claim were subsequently filed and decided in favor of the Keller heirs.

[3] "Warrant" appears to refer to the warrant the property is as described.

transferred the surface rights of the property to Isaac Beck, Isaiah Beck and James Fisher by deed but reserved unto themselves, their heirs and assigns all subsurface rights therein:

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[1] Harry Keller served as a Court of Common Pleas Judge in Centre County, Pennsylvania. Judge Keller served from 1926 to 1927.

[2] The distinction of seated and unseated land was part of Pennsylvania tax assessment law prior to 1961. Unseated land was unoccupied and unimproved whereas seated land contained permanent improvements as indicate a personal responsibility for taxes. ***See Hutchinson v. Kline***, 199 Pa. 564 (1901).

---

> [e]xcepting and reserving unto the said parties of the first part, their heirs and assigns forever all the coal, stone, fire clay, iron ore and other minerals of whatever kind, oil and natural gas lying or being, or which may now or hereafter be formed or contained in or upon the said above mentioned or hereafter be formed or contained in or upon the said above mentioned or described tract of land; together with the sole and exclusive right liberty and privilege of ingress and egress unto, upon and from the said land for the purpose of examining, digging and searching for, and of mining and manufacturing any minerals oil, or natural gas found therein or thereon for

market, and the transportation and removal of the same without hindrance or molestation from the said parties of the second part, there [sic] heirs executors administrators, lessees or assigns, or any of them; together with the right and privilege onto the said parties of the first part, their heirs or assigns, to take from said land such timber as may be necessary for the purposes aforesaid, and for the said purposes to build, construct or dig common roads, railroads, tramways, or monkey drifts and make all and every other improvement that may be necessary either upon or under the surface of said land, on and over which may be transported or manufactured all mineral, oil and natural gas formed in or on said land, and to erect such buildings structures and other necessary improvement thereon as the parties of the first part hereto their heirs or assigns, may deem necessary for the convenient use of working of said mines mills or works, and the manufacturing and preparing of the out put [sic] of the same for market with the right to deposit the dirt and waste from said mines, mills and works upon the surface of said land as may be necessary for convenient and for all of said foregoing uses and purposes to take and appropriate such land for their exclusive use as the said parties of the first part, their heirs or assigns may deem necessary.

The deed was recorded on August 8, 1899 in Centre County Deed Book 80, Page 878. The property was subsequently transferred on various occasions.

In February 1910, the Becks sold the property to Arthur Baird. In August of 1910, Mr. Baird sold the property to Robert Jackson and Thomas Litz. In 1922, Ralph Smith acquired the property via deed from Jackson and Litz. In November of 1935, the Centre County Commissioners acquired title to the property via Treasurers Sale. The property was offered for sale by the Treasurer for unpaid real estate taxes. No bidder bid the upset price and the Commissioners purchased the property. At the time the land was unseated. By deed dated June 3, 1941, the Centre County Commissioners sold the property to Max Herr. Max Herr died intestate on February 2, 1944.

In 1959, [Herder was] interested in purchasing the property from Mr. Herr's widow. A title search was performed and [Herder] became aware of the reservation. [Herder'] attorney, Richard Sharp, Esquire,[3] suggested to grantor's attorney, Roy Wilkinson, Jr., Esquire,[4] that Mr. Wilkinson "cover the exception by a specific clause making the conveyance subject to all exceptions and reservations as are contained in the chain of title." (Defendant's Motion for Summary Judgment 3/11/2010 Exhibit E) [Herder'] deed dated November 30, 1959 reflected "this conveyance is subject to all exceptions and reservations as are contained in

> the chain of title." [Herder's] deed was recorded on April 12, 1960 at Deed Book 253, page 107.
>
> ---
>
> [3] Richard Sharpe served as a Court of Common Pleas Judge in Centre County, Pennsylvania from 1978 to 1980.
>
> [4] Roy Wilkinson, Jr. was one of the seven original judges nominated by Governor Raymond Shafer to the Commonwealth Court and confirmed by the Senate in 1971. Wilkinson served on the Court until 1981 when he was appointed a Justice of the Pennsylvania Supreme Court by Governor Richard Thornburgh.
>
> ---
>
> Recently it was discovered that the property contains "a deep stratum of shale which contains natural gas." Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment, 4/8/2010, at 2.

Trial Court Opinion, 9/29/2010, at 2-4.

After relevant motions for summary judgment were filed and briefed, the trial court determined that Harry and Anna Keller's reservation of subsurface rights was recorded, Herder was aware of the reservation of rights, and therefore, the Keller heirs were entitled to those rights. The trial court also rejected Herder's adverse possession claim. Accordingly, the Keller heirs were awarded fee simple subsurface rights to the property originally known as the Eleanor Siddons Warrant.

Our scope and standard of review for summary judgment are well known:

> Our scope of review of a trial court's order granting or denying summary judgment is plenary, and our standard of review is clear: the trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion.
>
> Summary judgment is appropriate only when the record clearly shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The reviewing court must view the record in the light most favorable to the nonmoving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Only when the facts are so clear that reasonable minds could not differ can a trial court properly enter summary judgment.

***Shamis v. Moon***, 81 A.3d 962, 968-69 (Pa. Super. 2013) (citation omitted).

The relevant transactions herein are: (1) the 1899 horizontal severance of rights and transfer of surface rights to Beck and Fisher, (2) the acquisition of the property by the county commissioners for failure to pay taxes in 1935, (3) the sale from the commissioners to Herr in 1941, and (4) the purchase of the land in 1959 by Herder. Because of the age of these transfers, the resolution of this matter turns upon an arcane point of law, involving the interpretation of § 1 of Act of 1806, March 28, P.L. 644, 4 Sm.L. 346, retitled as 72 P.S. § 5020-409 (the Act).

72 P.S. § 5020-409 states:

It shall be the duty of every person hereafter becoming a holder of unseated lands, by gift, grant or other conveyance, to furnish to the county commissioners, or board for the assessment and revision of taxes, as the case may be, a statement signed by such holder, or his, her, or their agent, containing a description of each tract so acquired, the name of the person or persons to whom the original title from the Commonwealth passed, and the nature, number and date of such original title, together with the date of the conveyance to such holder, and the name of the grantor, within one year from and after such conveyance, and on failure of any holder of unseated lands to comply with the injunctions of this act, it shall be the duty of the county commissioners to assess on every tract of land, respecting which such default shall be made when discovered, four times the amount of the tax to which such tract or tracts of land would have been otherwise liable, and to enforce the collection thereof, in the same manner that taxes due on unseated lands are or may be assessed and collected: Provided, That nothing in this section shall be construed as giving greater validity to unexecuted land warrants than they are now entitled to, nor to the detriment of persons under legal disabilities, provided such person or persons comply with the foregoing requisitions within the time or times limited, respectively, after such disability shall be removed.

1933, May 22, P.L. 853, art. IV, § 409.[4]

The Act required persons who acquired unseated land to furnish a statement describing that land to the county commissioners, or the board for the assessment and revision of taxes, so that a proper tax assessment could be levied.

However, the Section did not specifically address the situation presented in this case, where the subsurface rights to a specific parcel of land were horizontally severed[5] from the surface rights, thereby creating two estates in the same parcel of land. To understand how this severance affected the subsequent transfers of title, we must examine the state of the law, as it existed at the relevant periods.

We begin by reviewing ***Morton v. Harris***, 9 Watts 319 (Pa. 1840). It appears that prior to 1815, tax sales of unseated land were, originally, a suspect proposition, requiring specific proof that each and every step taken in the foreclosure and sale of the property were in "exact and literal compliance with every direction of the law or laws," ***id***. at *4, including proof that all relevant tax assessors had been properly elected. These strict requirements allowed original owners to reclaim land from tax purchasers even after the purchaser had

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[4] In 2010, effective January 1, 2011, this title was repealed as it relates to counties of the second class A, third, fourth, fifth, sixth, seventh and eighth class counties. ***See*** 53 Pa.C.S. § 8801, *Historical and Statutory Notes.* (Centre County is a county of the fourth class. ***See*** 16 P.S. § 210(4)).

[5] Horizontally severed land separates surface from subsurface rights; vertically severed land subdivides an estate into lots.

improved the land. The Act of 1815 disposed of this strict requirement of proof, substituting the "presumption that everything was rightly done, for the proof that it was rightly done." ***Id***. The original owner was prevented from offering specific proof of irregularity of process, after a "lapse of two years from the time of sale." ***Id***.

Seated lands, that is land which has been improved by permanent structures, were treated differently from unseated lands, land which was unimproved, because "seated lands are assessed in the name of the owners while unseated lands are assessed by survey or warrant numbers, regardless of the owners whose names if used at all are only for the purpose of description."[6] ***F.H. Rockwell & Co. v. Warren County, et al.***, 77 A. 665-66 (Pa. 1910) (superseded by statute as stated in ***Coolspring Stone Supply, Inc. v. County of Fayette***, 929 A.2d 1150 (Pa. 2007)). This statement of the law, which was applicable to the severance of rights and initial transaction in 1899,[7] highlights the necessity for informing the county commissioners of any changes to the real estate, because the commissioners, in assessing tax values to a particular warrant, are not concerned with names of

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[6] For example, the property at issue instantly is the Eleanor Siddons Warrant, although Eleanor Siddons is a stranger to these proceedings.

[7] ***Rockwell*** affirmed the Superior Court decision in ***Rockwell v. Keefer***, 39 Pa. Super. 468 (Pa. Super. 1909). The case addressed unseated tax assessments from 1904 through 1907 but relied upon case law such as ***Lillibridge v. Lackawanna Coal Co., Limited***, 22 A. 1035 (Pa. 1891) and ***Neill v. Lacy***, 1 A. 325 (Pa. 1885), which predate the 1899 transaction involved herein.

the owners, only the property itself. Therefore, if the county commissioners have not been informed of the severance of surface and subsurface rights, the tax assessment is levied against the property as a whole.

The annotations to the Act (current Section 5020-409) reveal only three cases that address the issue of a tax sale of severed, unseated lands: ***Hutchinson v. Kline***, 49 A. 312 (Pa. 1901); ***Williston v. Colkett***, 9 Pa. 38 (1848); and ***Roaring Creek Water Co., v. Northumberland County Commissioners***, 1 Northumb. 181 (1889).

In ***Williston***, the property had been vertically, not horizontally, severed. The original warrant was for 999 acres, parts had been sold, leaving the property at 600 acres. However, the property was assessed at 200 acres and taxes were paid at the improper, lower value. When a treasurer's sale took place, ostensibly for the 200 acres, it was realized that the warrant correctly listed the properly at 600 acres, and the entire tract was deemed sold. The Supreme Court noted,

> It is of some consequence in this case that Asa Mann, the owner of the 600 acres unseated, had for two years previously paid the tax assessed in the same way, and for the same number of acres, on the same tract, without informing the officers that the true number of acres unseated was 600. By the act of Assembly of 8th March, 1806, it was the duty of the holder to give the commissioners a description of the unseated land held by him; but Asa Mann did not choose to comply with the law, but rather elected to profit by a mistake in the number of acres which was to his own advantage; and he now complains with an

> awkward grace of injustice done. He was silent for his own advantage, when truth and the interest of the public required him to speak.
>
> No man who reads the assessment, can doubt the intent of the officer to assess all the land which was unseated on the warrant 4483, in the name of Wilson. Such is the obvious meaning and import of the assessment – the 200 acres were mentioned as description. But the land was identified by the number of the warrant, the name of the warrantee, and the name of the owner from who, Mann had purchased.

***Williston***, at 9 Pa. at *2. The warrant listed the property at 600 acres,[8] and Mann was on notice of that fact, and had the responsibility to notify the assessors, yet he failed to do so. Because he failed to fulfill his duty under the Act, he could not take refuge in the faulty listing of the assessment. As such, he lost the entire 600 acres at the treasurer's sale, rather than the 200 acres listed on the tax assessment.[9] Even though ***Williston*** involves vertically severed lands, the result emphasizes the requirement that it is the owner's responsibility to provide an accurate report to the commissioners, and the failure to do so can have dire consequences.

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[8] It is unclear if this refers to 600 additional acres (800 total acres) or 600 total acres.

[9] The ***Williston*** decision also noted the import of the Act of 1815, regarding the presumption, absent proof to the contrary, that the commissioners had acted in conformance with the law.

In ***Roaring Creek***, the Roaring Creek Water Company, which owned the surface rights to certain tracts of lands near its dam, sought to enjoin the treasurer's sale of that property. As a public utility, Roaring Creek contended that its land, whether used for the public benefit or not, was exempt from taxation. The trial court determined that excess lands were subject to taxation, and so four of six tracts of lands at issue were both subject to taxation and treasurer's sale. In relevant part, the trial court noted:

> All these tracts of land have been valued and assessed in the usual way as unseated lands, and, doubtless, a treasurer's sale will pass the whole title, both as to the surface and all that is beneath. I refer to this matter only to suggest, both to the county and the owners, that hereafter it might be well to value and assess the respective interests of the several owners separately. One man may have a distinct title to the surface, and another to that which is beneath: Brooms Legal maxims, 297, 298. I do not, however, decide that it is incumbent on the taxing officers to notice the titles of parties, but doubtless it would be convenient and just to them.

***Roaring Creek Water, Co. v. Northumberland Co. Commissioners***, 1 Northumb.L.J. at *3.

Finally, in ***Hutchinson v. Kline***, 49 A. 312 (Pa. 1901), our Supreme Court affirmed the trial court's decision that had awarded both surface and subsurface rights to a tax purchaser even though those rights had been previously severed. The commissioners had never been informed of the severance and the property had

been taxed as a whole, therefore, the property was sold as a whole. The trial court stated:

> By the act of the 28th of March, 1806, it is made the duty of the holder of lands to give the commissioners a description of the unseated lands held by him. ***Williston v. Colkett***, 9 Pa. 38. And when the mineral rights were severed from the surface rights the plaintiffs should have given notice of this fact to the commissioners or to the assessor. It was also their duty to give the county commissioners a description of their lands as conveyed by courses and distances, if they desired to have them assessed as a whole. The tax laws as to unseated lands treat them entirely in reference to the original warrants, when not otherwise directed by the owners. Parts of distinct warrants, united in fact by purchase, may be returned and assessed by whatever designation the owner may choose, and be held and taxed as a unit. But in order to accomplish this, it would be the duty of the owner to furnish the taxing officers with a proper description, in order that they may be assessed and taxed as a unit. ***Heft v. Gephart***, 65 Pa. 510 [1870].

***Hutchinson***, 49 A. 312. The decision goes on to state, "The record of the deed creating a separate estate in the minerals would not be notice to the assessor or the commissioners, as they were not bound to search or examine the records." ***Id***.[10]

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[10] An *amicus curiae* filed in support of the Keller heirs has claimed that the Act provides a remedy for the failure to inform the

In addition to those three cases annotated to the Act, in ***Heft v. Gephart***, 65 Pa. 510 (1870), our Supreme Court confirmed that under the tax system, in place then and also relevant to the instant matter, treated unseated land "in reference to the original warrants when not otherwise directed by the owners." ***Id***. at *6.

The relevant case law established that the acts taken by the commissioners regarding the tax sale were presumed to comport with applicable statutes and regulations, subject to contrary proof produced within two years of the foreclosure. The person who severed rights to unseated land was under an affirmative duty imposed by statute to inform the county commissioners or appropriate tax board of that severance, thereby allowing both portions of the property to be independently valued.[11] If information regarding the

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commissioners of the severance of rights, that being a four-fold increase in the tax assessment. This penalty appears to be applied in those instances where the land was not sold at a Treasurer's sale. The four-fold penalty was in place when ***Hutchinson*** and ***Roaring Creek*** were decided. We have no reason to believe that either our Supreme Court or the Northumberland County Court were unaware of the four-fold statutory provision. Although not explained in either of those decisions, that penalty was not applied. We will not retroactively apply that provision where the courts of that era did not see fit to utilize the penalty in this circumstance. It appears that the four-fold penalty was to be imposed in those situations where no tax sale had taken place.

[11] Appellees have argued that because there is no showing that the subsurface rights were ever independently valued, they cannot have been subject to taxation and therefore cannot be part of tax sale. This argument is unavailing. First, the import of the Act is that it allows the tax assessors the opportunity to independently

severance of rights to unseated property is not given to the commissioners, then any tax assessment for that unseated property must logically be based upon the property as a whole.

If a parcel of unseated land was valued as a whole, and the taxes on that land were not paid, thereby subjecting that property to seizure and tax sale, then all that was valued, surface and subsurface rights,

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assess a value to severed rights. That opportunity was never given to Centre County. One cannot say the mineral rights were never valued when the commissioners were not given the opportunity to independently value them. Next, that argument has been rejected by our Supreme Court, which stated:

> Appellant further argues that even though a taxing body purports to assess an entire mineral estate, only minerals known to exist at the time and place are actually valued by the assessors, taxed and later sold if taxes become delinquent. Acceptance of this proposition would undoubtedly lead to confusion and speculation, for no one would know what had actually been sold. Attempts to prove that accessors [sic] did or did not know of the presence of oil or gas when they assessed 'minerals' at some point in the past would lead to protracted collateral investigation and litigation. It is true, of course, that an assessor can tax only that which had value. ***Rockwell v. Warren County***, 228 Pa. 430, 77 A. 665 (1910); if no gas or oil exists, the mineral rights should not be taxed as if they did. Nevertheless, an assessment or sale believed to be improper because of overvaluation cannot be collaterally attacked fifty years later. The owner must petition immediately for exoneration. ***Wilson v. A. Cook Sons Co.***, ***Supra***, 298 Pa. 85, at 92, 148 A. 63 [(1929)].

***Bannard v. New York State Natural Gas Corporation***, 293 A.2d 41 (Pa. 1972). We note that ***Bannard*** also recognizes the requirement to promptly challenge a tax sale. ***See Morton***, ***supra***.

were sold pursuant to any tax sale, absent proof within two years, of the severance of rights.

We apply the law to the instant facts. Because the Kellers originally obtained the property through an 1894 tax sale, they obtained the rights to the property as a whole, and the tax assessors would continue to value the property as a whole unless otherwise informed. ***See Hutchinson***, ***supra***; ***Heft***, ***supra***. When the property was horizontally severed in 1899, the Kellers never informed the county commissioners of their retention of the subsurface rights to the land after selling the surface rights. Pursuant to the Act, it was their affirmative duty to do so. In 1935, the treasurer obtained the rights to the property pursuant to a treasurer's sale. Because the horizontal severance had never been reported to the commissioners, the property continued to be taxed as a whole, just as it had been when the Kellers obtained the property at tax sale. Therefore, the treasurer obtained the property as a whole and transferred it to the commissioners as a whole.

The trial court credited the Keller heirs' averment in their pleadings that the records of the severed subsurface rights were not kept by the Recorder of Deeds or were lost or destroyed. ***See*** Trial Court Opinion, 9/29/2010, at 7. Notwithstanding the lack of proof of notice of severance, it remains that the tax deeds do not reflect that any interest in the land less than a fee simple was ever assessed. There is nothing in the certified record to suggest that the records of Centre County were ever subject to flood, fire, or some other calamity or negligence such that it might be presumed that relevant records were lost or destroyed.

Absent such proof, we cannot presume such extraordinary events and the loss or destruction of records. The Act of 1806 placed the affirmative duty on the party who severed the rights to unseated land to report that action to the tax authorities. The law further requires we presume that all actions, such as recording and assessing severed rights, that were required to be taken were taken. Therefore, the proper assumption on the record before us is that failing any affirmative proof to the contrary, the severance of surface and subsurface rights in 1899 was never reported to the Centre County Commissioners. Therefore, when the commissioners finally sold the property in 1941 to Max Herr, they sold what had been taken, the entire property. ***See Hutchinson***, ***supra***. We note that neither the 1936 deed[12] transferring title from the County Treasurer to the County Commissioners, nor the 1941 deed transferring title from the Commissioners to Herr make reference to any reservation of subsurface rights.

Pursuant to ***Morton v. Harris***, ***supra***, the Keller heirs who ostensibly took possession of the subsurface rights, had two years from the delivery of the title to Herr, the purchaser at tax sale, to make known their claim. They did not. After the two years had passed, without any challenge or amendment to the deed, any subsequent transfer of the title of the property was allowed to rely on the deed containing no reservation of subsurface rights.

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[12] While the Treasurer obtained the rights to the land in November 1935, the Treasurer's Office did not formally transfer the property to the County until June, 1936.

Although the 1959 deed (from the Herr estate to Herder) made mention of the "conveyance being subject to all exceptions and reservations as are contained in the chain of title," there were no active exceptions or reservations in the chain of title, the horizontal severance having been extinguished more than one decade earlier. Neither the Act of 1806 nor any case law interpreting the Act allow for the preservation of a reservation of land rights through the deed only after a tax sale. We do not believe, and the Keller heirs have provided no authority for, the proposition that such general language acknowledging the possibility of exceptions or reservation serves to re-sever that which had been united.

Finally, we are aware that our resolution of this matter is at odds with modern legal concepts. This resolution may be seen as being unduly harsh. However, at the time of the relevant transactions – the seizure of the property for failure to pay tax and the subsequent Treasurer's sale – this was the appropriate answer. We do not believe it proper to reach back, more than three score years, to apply a modern sensibility and thereby undo that which was legally done.[13]

Judgment orders granting summary judgment and awarding subsurface rights in favor of appellees is vacated. This matter is remanded to the trial court to

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[13] Because of our resolution of this matter, we need not address Herder's claim of adverse possession. However, we note from our review of the certified record, it appears that this claim would fail, as there was a two-month gap from November 16, 1983 to January 11, 1984 in the leases.

enter summary judgment and award subsurface rights in favor of appellant, Herder. Jurisdiction relinquished.

Judgment Entered.

/s/Joseph D. Seletyn

Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/9/2014

## APPENDIX D

**IN THE COURT OF COMMON PLEAS**
**CENTRE COUNTY, PENNSYLVANIA**

**ACTION TO QUIET TITLE**
**NO. 08-3434**

**[Filed July 12, 2011]**

| | |
|---|---|
| HERDER SPRING HUNTING CLUB<br>Plaintiff | ) |
| VS. | ) |
| HARRY KELLER and ANNA KELLER ET.AL.,<br>Defendants | ) |

**PRAECIPE FOR ENTRY OF JUDGMENT**

TO THE PROTHONOTARY:

Please enter judgment in favor of Defendants and against Plaintiff Herder Spring Hunting Club pursuant to the Court's Orders filed of record on September 29, 2010 and June 20, 2011, granting Defendants' Motions for Summary Judgment, and in adherence with *Pa.R.C.P. 227.4.*

A copy of this Praecipe for Entry of Judgment was mailed by first class mail, postage pre-paid to Plaintiff as required by *Pa.R. C.P. 237* and as evidenced by the

Certificate of Service attached hereto and incorporated by reference hereat.

/s/Rebecca L. Warren
Rebecca L. Warren Esquire
I.D. #63669
WARREN LAW OFFICES
105 E. Market Street
Danville PA 17821
570-275-9100
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*Nathan Egolf Penny Archibald, Rebecca Keller Smith and Stephen Richard Keller*

* * *

[Certificate of Service Omitted in the Printing of this Appendix]

**IN THE COURT OF COMMON PLEAS**
**CENTRE COUNTY, PENNSYLVANIA**

**ACTION TO QUIET TITLE**
**NO. 08-3434**

**[Filed July 12, 2011]**

| | |
|---|---|
| HERDER SPRING HUNTING CLUB<br>Plaintiff | ) |
| VS. | ) |
| HARRY KELLER and ANNA KELLER ET.AL.,<br>Defendants | ) |

**NOTICE OF ENTRY OF JUDGMENT**

TO: Herder Springs Hunting Club
c/o David C. Mason, Esquire
Mason Law Office
PO Box 28
Philipsburg, PA 16866

Pursuant to *Pennsylvania Rule of Civil Procedure, Rule 236*, you are hereby notified that a judgment has been entered against you in the above-captioned lawsuit. A copy of the Entry of Judgment is enclosed.

DATED: July 12, 2011 /s/
PROTHONOTARY

**IN THE COURT OF COMMON PLEAS**
**CENTRE COUNTY, PENNSYLVANIA**

**ACTION TO QUIET TITLE**
**NO. 08-3434**

**[Filed July 12, 2011]**

| | |
|---|---|
| HERDER SPRING HUNTING CLUB | ) |
| Plaintiff | ) |
| | ) |
| VS. | ) |
| | ) |
| HARRY KELLER and ANNA | ) |
| KELLER ET.AL., | ) |
| Defendants | ) |
| | ) |

**ENTRY OF JUDGMENT**

TO: Herder Springs Hunting Club
c/o David C. Mason, Esquire
Mason Law Office
PO Box 28
Philipsburg, PA 16866

AND NOW, this 12 day of July, 2011, judgment has been entered against you as in accordance with the Judge's Orders granting Defendants' Motions for Summary Judgment and filed of record on September 29, 2010 and June 20, 2011.

/s/
PROTHONOTARY

## APPENDIX E

**IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PA.**

**CIVIL ACTION – LAW**

**No. 2008-3434**

**[Filed October 27, 2008]**

HERDER SPRING HUNTING CLUB,

Plaintiff

vs.

HARRY KELLER and ANNA KELLER, his wife; J. ORVIS KELLER; ELLIS O. KELLER; HENRY HARRY KELLER; WILLIAM H. KELLER; MARY EGOLF JOHN KELLER; HARRY KELLER; ANNA BULLOCK; ALLEN EGOLF; MARTIN EGOLF; MICHAEL EGOLF; MARY LYNN COX; ROBERT EGOLF; NATHAN EGOLF; ROBERT S. KELLER; BETTY BUNNELL; ANN K. BUTLER; MARGUERITE TOSE; HENRY PARKER KELLER; KENNETH PARKER KELLER; PENNY ARCHIBALD; HEIDI SUE HUTCHINSON; REBECCA SMITH;

ALEXANDRA NILES CALABRESE; )
CORRINE GRAHAM FISHERMAN; )
JENNIFER LAYTON MANRIQUE; )
DAVID KELLER; STEPHEN )
RICHARD KELLER; their heirs, )
successors, executors, administrators, )
and assigns, as well as ANY OTHER )
PERSON, PARTY, or ENTITY, )
)
Defendants )
_____ )

**FIRST-AMENDED COMPLAINT IN ACTION TO QUIET TITLE PURSUANT TO PA. R.C.P. §1061**

**AND NOW,** comes the Plaintiff, by and through its attorney, DAVID C. MASON, ESQUIRE, and sets forth a claim against the Defendants named herein and represents as follows:

* * *

16. Plaintiff avers that these premises, having been unseated lands and assessed and sold in 1935 for non-payment of real estate taxes as unseated land are owned in fee simple by the Plaintiff by virtue of the deeds and conveyances above recited, and by the Act of March 28, 1806. Hutchinson v. Kline, 199 pa. 564, 49 A. 312 (1901). Powell v. Lantzy, 173 Pa. 543. Williston v. Colkett, 9 PA. 38 (1848).

* * *

MASON LAW OFFICE

By: /s/David C. Mason
David C. Mason
Attorney for Plaintiff

* * *

## APPENDIX F

**IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA**

**CIVIL ACTION – LAW**

**No. 2008-3434**

**[Filed January 23, 2009]**

| | |
|---|---|
| HERDER SPRINGS HUNTING CLUB, Plaintiff | ) |
| vs. | ) |
| HARRY KELLER and ANNA KELLER, his wife; J. ORVIS KELLER; ELLIS O. KELLER; HENRY HARRY KELLER; WILLIAM H. KELLER; MARY EGOLF; JOHN KELLER; HARRY KELLER; ANNA BULLOCK; ALLEN EGOLF; MARTIN EGOLF; MICHAEL EGOLF; MARY LYNN COX; ROBERT EGOLF; NATHAN EGOLF; ROBERT S. KELLER; BETTY BUNNELL; ANN K. BUTLER; MARGUERITE TOSE; HENRY PARKER KELLER; PENNY ARCHIBALD; HEIDI SUE HUTCHINSON; REBECCA SMITH; ALEXANDRA NILES CALABRESE; CORRINE GRAHAM FISHERMAN; JENNIFER LAYTON MANRIQUE; | ) |

DAVID KELLER; STEPHEN )
RICHARD KELLER; their heirs, )
successors, executors, administrators, )
and assigns, as well as ANY OTHER )
PERSON, PARTY, or ENTITY, )
Defendants )
_____ )

**ANSWER, NEW MATTER AND COUNTERCLAIM TO FIRST AMENDED COMPLAINT IN ACTION TO QUIET TITLE**

NOW COME the Defendants, Alan Egolf, Alexandra Keller Calabrese, Corrine Keller, David Keller, Heidi Hutchison, Henry Keller, Jennifer Keller, Martin Egolf, Mary Lynn Cox, Michael Egolf, Nathan Egolf, Penny Archibald, Rebecca Keller Smith and Stephen Richard Keller, by and through their attorneys, Brian K. Marshall, Esquire and Miller, Kistler & Campbell, and Defendant Robert Keller, by and through his attorneys, Timothy A Schoonover, Esquire and Babst, Calland, Clements & Zomnir, and hereby file the following Answer, New Matter and Counterclaim as follows:

* * *

**NEW MATTER**

32. Defendants' answers to paragraphs 1 through 31 of Plaintiff's First Amended Complaint are Incorporated herein by reference as the same set forth at length.

33. Plaintiff's deed dated November 30, 1959 and recorded on Apri1 12, 1960, in Deed Book 253 at page 107 in the Office of the Recorder of Deeds of Centre County, a true and correct copy of which is attached

hereto as Exhibit "B", and incorporated herein by reference as though the same were set forth in full, contains the following language on the second page of the deed: "THIS CONVEYANCE IS SUBJECT TO ALL EXCEPTIONS AND RESERVATIONS AS ARE CONTAINED IN THE CHAIN OF TITLE."

34. If the reserved interests at issue in this proceeding, including mineral, gas and oil interests, were extinguished for any reason in the prior chain of title, which Defendants expressly deny, the said interests were revived by Plaintiff's accepting and recording of its deed containing the aforesaid language.

35. The records of the Centre County, Pennsylvania government during the timeframe in question in this case were kept in a haphazard manner, and as such, are inherently unreliable.

36. Harry Keller was a highly educated individual, a trained lawyer and Judge of the Court of Common Pleas of Centre County, Pennsylvania. The awareness of the said Harry Keller of the requirements for excepting, reserving and preserving the retained interests in question in this proceeding are evidenced by the extensive recitation of the reservation of the interests in the deed dated June 20, 1899 and recorded August 8, 1899 in Deed Book 80, page 878 in the Office of the Recorder of Deeds of Centre County, Pennsylvania.

37. The answering Defendants have been unable to locate evidence of <u>any</u> reserved mineral interest having been reported to the County for taxation purposes consistent with the act of March 28, 1806, and as such, the answering Defendants aver that such

records were not kept by the Recorder of Deeds of Centre County, Pennsylvania, or the same have been lost or destroyed with the passage of time.

**COUNTERCLAIM**

NOW COME the Counterclaim-Plaintiffs, Alan Egolf, Alexandra Keller Calabrese, Corinne Keller, David Keller, Heidi Hutchison, Henry Keller, Jennifer Keller, Martin Egolf, Mary Lynn Cox, Michael Egolf, Nathan Egolf, Penny Archibald, Rebecca Keller Smith and Stephen Richard Keller, by and through their attorneys, Brian K. Marshall, Esquire and Miller, Kistler & Campbell, and Counterclaim-Plaintiff Robert Keller, by and through his attorneys, Timothy A. Schoonover, Esquire and Babst, Calland, Clements & Zomnir, and hereby file the following Counterclaim, and in support thereof aver as follows:

38. Counterclaim-Plaintiffs' answers to paragraphs 1 through 31 of Plaintiff's First Amended Complaint, as well as paragraph 32 through 37 of the New Matter are incorporated herein by reference to the extent the same are not inconsistent with information set forth hereinafter.

39. The Counterclaim-Plaintiffs in this action are the heirs or purported heirs of the late Harry Keller and Anna Orvis Keller, his wife.

40. Harry Keller purchased a parcel of real estate in Rush Township, Centre County, Pennsylvania (hereinafter "the premises") known as the Eleanor Siddens (also referred to as the Eleanor Siddon) warrant at a tax sale in 1894. A true and correct copy of the deed for the premises is attached hereto as

Exhibit "C" and is incorporated herein by reference as though the same were set forth at length.

41. The premises purchased by Harry Keller consisted of 433 acres, 153 perches, plus allowances.

42. By deed dated June 20, 1899 and recorded August 8, 1899, in Centre County Deed Book 80 at page 878, Harry Keller and Anna Orvis Keller, his wife, sold the premises to Isaac Beck, Isaiah Beck and James J. Fisher. A true and correct of the deed for the said sale is attached hereto as Exhlbit "A" and incorporated herein by reference as though the same were set forth at length.

43. The deed of June 20, 1899 from Harry Keller and Anna Orvis Keller to Isaac Beck, Isaiah Beck and James J. Fisher contained an exception and reservation reserving the mineral interests, as well as gas and oil interests, located in, on or under the premises to Harry Keller and Anna Orvis Keller, their heirs and assigns.

44. Counterclaim-Defendant, Herder Spring Hunting Club, purportedly obtained an ownership interest in the premises by deed of Kate Herr, et ux. dated November 30, 1959 and recorded on April 12, 1960 in Centre County Deed Book 253 at page 107. A true and correct copy of said deed is attached hereto as Exhibit "B" and incorporated herein by reference as though set forth at length.

45. Counterclaim-Plaintiffs' chain of title derives from the sale of the premises from Harry Keller and Anna Orvis Keller to Isaac Beck, Isaiah Beck and James J. Fisher on June 20, 1899.

46. All deeds conveying the premises after the 1899 sale from Harry Keller and Anna Orvis Keller to Isaac Beck, Isaiah Beck and James J. Fisher specifically or generally reference the exceptions and reservations set forth in the 1899 Keller deed, with the exception of the deed resulting from the 1935 tax sale to Max Herr.

47. The deed dated November 13, 1959 and recorded on April 12, 1960 in Centre County Deed Book 253 at page 107, which deed is attached hereto as Exhibit "B" specifically states: "THIS CONVEYANCE IS SUBJECT TO ALL EXCEPTIONS AND RESERVATIONS AS ARE CONTAINED IN THE CHAIN OF TITLE."

**CONVERSION**

48. Counterclaim-Plaintiffs' answers to paragraphs 1 through 31 of Plaintiff's First Amended Complaint, paragraphs 32 through 37 of the New Matter, and Paragraphs 38 through 47 of the Counterclaim are incorporated herein by reference to the extent the same are not inconsistent with information set forth hereinafter.

49. Counterclaim-Defendant knew or should have known of Counterclaim Plaintiffs' reserved interests at the time of its purchase of the premises, as the reservation was recorded as a public record in the Office of the Recorder of Deeds of Centre County, Pennsylvania.

50. Despite the fact that Counterclaim-Defendant knew or should have known of Counterclaim-Plaintiffs' reservation, Counterclaim Plaintiffs believe, and therefore aver, that Counterclaim-Defendant leased or

purported to lease Counterclaim-Plaintiffs' natural gas rights as follows:

(a) Lease dated November 15, 1973 to C.E. Beck;

(b) Lease dated March 17, 1978 to C.E. Beck;

(c) Lease dated January 11, 1984 to Atlantic Richfield Company;

(d) Lease dated March 31, 1987 to Douglas Exploration, Inc.;

(e) Lease dated April 13, 1990 to Eastern States Exploration Company; and

(f) Lease dated June 12, 1993 to Phillips Production Company.

51. Counterclaim-Plaintiffs believe, and therefore aver, that Counterclaim-Defendant received rental payments or royalty payments pursuant to each of the above-referenced agreements.

52. Counterclaim-Plaintiffs are the rightful, legal owners, as heirs of Harry Keller and Anna Orvis Keller, of their proportionate shares of any and all mineral interests, including oil and natural gas, in, on or under the premises as a result of the exception and reservation contained in the deed of June 20, 1899, which deed is attached hereto as Exhibit "A," and incorporated herein by reference as though the same were set forth in full.

53. Counterclaim-Defendant has no right, title or equitable claim to the ownership or possession of the minerals, oil and natural gas, that may be situate in, on or under the premises.

54. The above-described agreements entered into by Counterclaim-Defendant were entered into without the consent of the Counterclaim-Plaintiffs, or any other heirs of Harry Keller and Anna Orvis Keller, as the rightful owners of the mineral, natural gas and oil in, on or under the land.

55. Counterclaim-Plaintiffs believe, and therefore aver, that Counterclaim-Defendant has no intent of relinquishing to Counterclaim-Plaintiffs the rental and/or royalty monies received from the agreements to Counterclaim-Plaintiffs as the rightful owners of the natural gas, oil and minerals associated with the premises.

WHEREFORE, Counterclaim-Plaintiffs, Alan Egolf, Alexandra Keller Calabrese, Corinne Keller, David Keller, Heidi Hutchison, Henry Keller, Jennifer Keller, Martin Egolf, Mary Lynn Cox, Michael Egolf, Nathan Egolf, Penny Archibald, Rebecca Keller Smith, Stephen Richard Keller and Robert S. Keller respectfully request this Honorable Court enter judgment in their favor and against Counterclaim-Defendant Herder Springs Hunting Club for the value of those monies received pursuant to the above-referenced agreements, including, but not limited to, rental payments and royalties, together with interest thereon at the statutory rate, attorney fees and costs of suit, and for other such relief as the Court may deem just and proper.

**EJECTMENT**

56. Counterclaim-Plaintiffs' answers to paragraphs 1 through 31 of Plaintiff's First Amended Complaint, paragraphs 32 through 37 of the New

Matter, and Paragraphs 38 through 55 of the Counterclaim are incorporated herein by reference to the extent the same are not inconsistent with information set forth hereinafter.

57. Pursuant to a reservation in a dated June 20, 1899 from Harry Keller and Anna Orvis Keller to Isaac Beck, Isaiah Beck and James J. Fisher, which deed was recorded August 8, 1899 in Deed Book 80, page 878 in the Office of the Recorder of Deeds of Centre County, Pennsylvania, Counterclaim-Plaintiffs are the owners of their proportionate share of all of the coal, stone, fire clay, iron ore and other minerals of whatever kind, oil and natural gas lying or being under the premises described as follows:

> BEGINNING at a maple which is the common corner of the Joseph J. Miller, Joseph J. Wallis, William Wilson and Eleanor Siddens warrants; thence along the southern line of the Joseph J. Wallis warrant North 50 degrees East a distance of 320 perches to an ash; thence along the Western line of the Thomas Hamilton warrant South 40 degrees East a distance of 230 perches to an ash; thence along the Northern line of the David Lewis warrant, also being the Northern boundary line of the lands of the Pennsylvania State Game Commission South 50 degrees West a distance of 320 perches to a point; thence North along the Easterly line of the William Wilson warrant North 40 degrees West a distance of 230 perches to a maple and place of beginning. CONTAINING 433 acres, 153 perches and known as the Eleanor Siddens warrant.

58. Since on or about November 13, 1959, Counterclaim-Defendant has purported to exercise, and continues to purport to exercise exclusive possession and control over the reserved interests of Counterclaim-Plaintiffs described heretofore.

59. Counterclaim-Plaintiffs aver that Counterclaim-Defendant refuses to acknowledge that the reserved interest is vested in Counterclaim-Plaintiffs.

* * *

Respectfully submitted,

/s/Brian K. Marshall
Brian K. Marshall, Esquire
I.D. No. PA87331

MILLER, KISTLER & CAMPBELL
720 S. Atherton Street
State College, PA 16801
814-234-1500

Counsel for Defendants Alan Egolf, Alexandra Keller Calabrese, Corinne Keller, David Keller, Heidi Hutchison, Henry Keller, Jennifer Keller, Martin Egolf, Mary Lynn Cox, Michael Egolf, Nathan Egolf, Penny Archibald, Rebecca Keller Smith and Stephen Richard Keller

/s/Timothy A. Schoonover
Timothy A. Schoonover, Esq.
I.D. No. PA76260

BABST, CALLAND, CLEMENTS & ZOMNIR, P.C.
330 Innovation Boulevard, Suite 302
State College, PA 16803
814-867-8055

Counsel for Defendant Robert S. Keller

Date: 1/23/09

* * *

## APPENDIX G

**IN THE COURT OF COMMON PLEAS**
**CENTRE COUNTY, PENNSYLVANIA**

**ACTION TO QUIET TITLE**

**NO. 08-3434**

**[Filed February 11, 2009]**

| | |
|---|---|
| HERDER SPRING HUNTING CLUB<br>Plaintiff | ) |
| VS. | ) |
| HARRY KELLER and ANNA KELLER ET.AL.,<br>Defendants | ) |

### ANSWER AND COUNTERCLAIM TO FIRST AMENDED COMPLAINT

Defendants Betty Bunnell, Anna Bullock, Marguerite Tose *[sic]* and J. Michael Keller, ("Answering Defendants"), by and through their attorneys, Warren Law Offices, files the following Answer and Counterclaim to Plaintiff's First Amended Complaint:

* * *

**COUNTERCLAIM**

32. Betty Bunnell, Anna Bullock, Marguerite Tose *[sic]* and J. Michael Keller are Answering Defendants and Counterclaim Plaintiffs.

33. Counterclaim Defendant is Herder Spring Hunting Club.

34. Counterclaim Plaintiffs' ancestors, Harry Keller and Anna Orvis Keller, husband and wife, ("Kellers"), were the fee simple owners of four hundred thirty-three acres and one hundred fifty-three perches (433 acres, 153 perches) of land located in Rush Township, Centre County, Pennsylvania, and known as the "Eleanor Siddons Warrant", pursuant to Deed dated August 29, 1894 and recorded in Deed Book 79, page 169.

35. On or about June 20, 1899, the Kellers sold the surface rights to the Siddons Warrant to Isaac Beck, Isaiah Beck and James J. Fisher pursuant to a Deed recorded in Book 80, page 87. A true and correct copy of that Deed is attached hereto as Exhibit A and incorporated by reference hereat.

36. In the Deed from Kellers to Beck, *et.al.,* Kellers specifically retained the subsurface, mineral, oil and gas rights for the Siddons Warrant to themselves, their heirs and assigns forever, in their "Excepting and Reserving" clause.

37. In 1910, Becks transferred the surface rights of the Siddons Warrant to Arthur W. Baird pursuant to a Deed recorded in Deed Book 108, page 443. A true and correct copy of said Deed is attached hereto as Exhibit F and incorporated by reference hereat.

38. In the Beck to Baird Deed, the Kellers' "excepting and reserving" of the subsurface, mineral, oil and gas rights is noted.

39. In 1910, Baird transferred the surface rights of the Siddons Warrant to Robert Jackson *et.al.,* pursuant to a Deed recorded in Deed Book 108, page 651. A true and correct copy of said Deed is attached hereto as Exhibit E and incorporated by reference here at.

40. In the Baird to Jackson Deed, the Kellers' "excepting and reserving" of the subsurface, mineral, oil and gas rights is noted.

41. In 1921, Jackson, *et.al.,* transferred the surface rights of the Siddons Warrant to Ralph Smith pursuant to a Deed recorded in Deed Book 127, page 621. A true and correct copy of said Deed is attached hereto as Exhibit D and incorporated by reference hereat.

42. In the Jackson to Smith Deed, the Kellers' "excepting and reserving" of the subsurface, mineral, oil and gas rights is noted.

43. In or about 1935, Smith lost his property rights in the Siddons Warrant to the Centre County Treasurer at tax sale for alleged non-payment of taxes.

44. The Kellers' subsurface, mineral, oil and gas rights in the Siddons Warrant were not the subject of a tax sale for non-payment of taxes in or about 1935 or since.

45. The Kellers' subsurface, mineral, oil and gas rights in the Siddons Warrant were not transferred to

the Centre County Treasurer for non-payment of taxes in or about 1935 or since.

46. In or about 1941, Max Herr purported to buy the surface rights in the Siddons Warrant -- lost by Smith in the tax sale of 1935 -- from the Centre County Commissioners. A true and correct copy of the Deed, Book 171, page 7, purporting to transfer the surface rights to Herr is attached hereto as Exhibit B and incorporated by reference hereat.

47. The Herr Deed mentions the previous Deed in the chain of title as a Deed from the Treasurer of Centre County to the Centre County Commissioners dated the 29th day of November, 1935.

48. No such Deed dated November 29, 1935 from the Centre County Treasurer to the Centre County Commissioners is found of record in Centre County.

49. A Deed dated June 10, 1936 and filed subsequent to the Herr Deed in Book 171, page 256, purports to transfer the Ralph Smith property from the Centre County Treasurer to the Centre County Commissioners. A true and correct copy of said Deed is attached hereto as Exhibit C and incorporated by reference hereat.

50. In or about 1959, Max Herr's heirs transferred the surface rights of the Siddons Warrant to Counterclaim Defendant pursuant to a Deed recorded in Deed Book 253, page 107. A true and correct copy of said Deed is attached hereto as Exhibit G and incorporated by reference hereat.

51. In the Herr to Counterclaim Defendant Deed, "all exceptions and reservations as are contained in the

chain of title" are specifically excluded from transfer to Counterclaim Defendant.

52. The Kellers' "excepting and reserving" of the subsurface, mineral, oil and gas rights is in the chain of title for the Siddons Warrant.

53. For the reasons set forth above, the Kellers' "excepting and reserving" of the subsurface, mineral, oil and gas rights is excluded from the transfer to the Counterclaim Defendant.

54. In the Herr to Counterclaim Defendant Deed, the subsurface coal and right of support is specifically excluded from transfer to the Counterclaim Defendant.

55. On August 14, 2008, Counterclaim Defendant filed an Action to Quiet Title, asserting alleged ownership of the subsurface, mineral, oil and gas rights owned by the Kellers, their heirs and assigns forever.

56. As heirs of the Kellers, Counterclaim Plaintiffs assert their ownership interest in the subsurface, mineral, oil and gas rights as specified in the Kellers' Deed dated June 20, 1899 Deed Book 80, page 87.

57. Notwithstanding the Kellers' heirs' ownership interest as set forth above, Counterclaim Defendant is in unlawful possession of the subsurface, mineral, oil and gas rights and is improperly withholding the same from Counterclaim Plaintiffs for the reasons set forth above.

58. As a result of Counterclaim Defendant's improper possession of the Counterclaim Plaintiffs' subsurface, mineral, oil and gas rights as set forth

above, Counterclaim Plaintiffs assert a claim for rent, profits and/or any damages which have arisen, arise during the pendency of this action, or may arise from the Counterclaim Defendant's possession of the same, pursuant to *Pa.R.C.P. 1055.*

* * *

/s/Rebecca L. Warren
Rebecca L. Warren, Esquire
105 E. Market Street
Danville, PA 17821
(570)275-9100
Attorney ID #63669

* * *

## APPENDIX H

**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

**No. 945 MAL 2015**

**[Filed September 7, 2016]**

| | |
|---|---|
| DAVID C. BAILEY, DAVID C. BAILEY AND CECELIA BAILEY, TRUSTEES OF DAVID C. BAILEY TRUSTS, ANADARKO E&P COMPANY, LP, CHESAPEAKE APPALACHIA, LLC, MITSUI E&P USA, LLC AND STATOIL USA ONSHORE PROPERTIES, INC. | ) |
| v. | ) |
| GEORGE A. ELDER A/K/A G.A. ELDER, WILLIAM HOYT AND MARY HOYT, MARK HOYT AND ANNA HOYT, EDWARD C. HOYT AND CORDELIA IDA HOYT, THEODORE R. HOYT, GEORGE S. HOYT, ELK TANNING COMPANY, CENTRAL PENNSYLVANIA LUMBER COMPANY, THEIR SUCCESSORS, HEIRS, ADMINISTRATORS AND ASSIGNS OR ANYONE CLAIMING BY, THROUGH OR UNDER THEM | ) |
| v. | ) |

HOYT ROYALTY, LLC )
)
PETITION OF: HOYT ROYALTY, LLC )
_____ )

Petition for Allowance of Appeal from
the Order of the Superior Court

**ORDER**

**PER CURIAM**

**AND NOW**, this 7th day of September, 2016, the Petition for Allowance of Appeal is **DENIED**.

## APPENDIX I

J-A22018-15

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

**IN THE SUPERIOR COURT OF PENNSYLVANIA**

**No. 79 MDA 2015**

**[Filed November 9, 2015]**

| | |
|---|---|
| DAVID C. BAILEY | ) |
| | ) |
| Appellee | ) |
| | ) |
| v. | ) |
| | ) |
| GEORGE A. ELDER, ET AL | ) |
| | ) |
| APPEAL OF: HOYT ROYALTY, LLC | ) |
| | ) |
| Appellant | ) |
| | ) |

Appeal from the Order Entered December 10, 2014 in the Court of Common Pleas of Lycoming County Civil Division at No(s): CV-2008-002327-QT

BEFORE: BOWES, J., JENKINS, J., and PLATT, J.*

* Retired Senior Judge assigned to the Superior Court.

MEMORANDUM BY JENKINS, J.: **FILED NOVEMBER 09, 2015**

Appellant Hoyt Royalty, LLC ("Hoyt Royalty" or "Hoyt", or collectively with the other defendants/appellants[1] "the Hoyts") appeals the December 10, 2014 order of the Lycoming County Court of Common Pleas granting Appellees David C. Bailey, individually, and David C. Bailey and Cecelia Bailey as trustees of the David C. Bailey Trusts (collectively, "Appellees" or "the Baileys") summary judgment in their quiet title action. We affirm.[2]

This matter concerns the subsurface mineral rights to a 168-acre tract of land in Lycoming County ("the Property"). In 1893, rights to the Property's subsurface gas and oil were severed from the surface estate by means of the Hoyt/Elk Tanning Deed, which was duly recorded in the office of the Lycoming County Recorder

---

[1] Hoyt Royalty is the defendant in the underlying action, together with George A. Elder, William Hoyt, Mary Hoyt, Mark Hoyt, Anna Hoyt, Edward Hoyt, Cordelia Ida Hoyt, Theodore Hoyt, George Hoyt, Elk Tanning Company, and Central Pennsylvania Lumber Company.

[2] We note that, in addition to briefs from Hoyt Royalty and the Baileys, this Court received, reviewed, and considered briefs from Appellees International Development Corporation and Andarko E&P Onshore LLC, f/k/a Andarko E&P Company LP, as well as an *amicus curiae* brief from SWN Production Company, LLC. We further note that Chesapeake Appalachia, LLC, Statoil USA Onshore Properties, Bonnell Run Hunting & Fishing Corporation, and Mitsui E&P USA LLC elected not to file formal appellate briefs in this matter.

of Deeds.[3] Following this 1893 severance, the Hoyts maintained the oil and gas rights ("the subsurface estate or rights" or "the oil and gas estate or rights"). The reservation of subsurface rights appeared in subsequent deeds preceding 1910. However, the Hoyts did not file a proof of the reservation or otherwise alert the county commissioners or the board of taxation of the reservation.

In 1910, the Property was sold at a tax sale, and there was no attempt by any party to redeem the Property following the tax sale. The Baileys subsequently purchased the Property in 2001.

On October 7, 2008, David Bailey filed an action to quiet title of the Property in an effort to seek a judicial determination of the ownership status of the Property's previously severed oil and gas estate. Bailey obtained a default judgment by way of praecipe on January 21, 2009.

Over 4 years later, Hoyt Royalty filed a petition to strike and/or open the default judgment. The trial court granted Hoyt's petition and entered an order opening Bailey's default judgment on May 30, 2013.

---

[3] Over the years, the Property has been granted and conveyed by recorded deed multiple times, most recently on April 13, 2012 to David C. Bailey, Sr. and Cecelia J. Bailey, Trustees of the David C. Bailey, Sr. Trust, plaintiffs in the underlying matter.

In the Second Amended Complaint,[4] filed July 19, 2013, the Baileys alleged fee simple ownership of the Property's previously-severed oil and gas estate by abandonment (Count I), cleansing by a tax sale that occurred in 1910 (Count II),[5] and cleansing by a tax sale that occurred in 1940 (Count III). The Baileys further alleged Hoyt lacked standing to challenge their title because it cannot establish itself as a successor to the title of the subsurface estate (Count IV). Hoyt filed an answer alleging that it was the owner of the Property's subsurface estate.[6]

On September 9, 2014, the Baileys filed a motion for summary judgment that alleged the Hoyts were divested of their subsurface rights following the Property's 1910 tax sale because the Hoyts failed to

---

[4] The Second Amended Complaint identified David C. Bailey and David C. Bailey and Cecelia Bailey, trustees of the David C. Bailey Trust, as plaintiffs, and Anadarko E&P Co., LP, Chesapeake Appalachia, LLC, Mitsui E&P USA, LLC, and Statoil USA Onshore Properties, Inc. as involuntary plaintiffs. Hoyt Royalty's December 21, 2013 Complaint to Join Additional Defendants joined International Development Corporation and Bonnell Run Hunting and Fishing Corp. as additional defendants.

[5] Specifically, Count II alleged that (1) the Property was sold at a June 10, 1910 tax sale, (2) there was no separate assessment of the subsurface taxes at the time of the sale, (3) the owner of the subsurface estate failed to notify the tax Commissioner of the prior severance of the subsurface estate at any time prior to the tax sale, (4) the taxes assessed at the tax sale represented the assessed value of the entire unseated estate, and (5) neither the surface nor the subsurface estates were redeemed following the 1910 tax sale.

[6] The Baileys claim Hoyt Royalty's Answer admitted or failed to deny the material allegations of the Complaint.

report the oil and gas estate to the county commissioners or tax authorities as required by the Act of 1806. The Hoyts filed responses to the motion for summary judgment that alleged that (1) the Property's oil and gas estate was never assessed for or subject to taxation, (2) the Hoyts were not required to report their interest in the severed subsurface estate to the county commissioners for the purpose of tax assessment, and (3) the tax sale did not comply with notice and due process requirements.

On November 26, 2014, involuntary plaintiff Anadarko E&P Company, LP ("Anadarko") filed a motion to strike Hoyt's second supplemental response to the motion for summary judgment because, Anadarko claimed, the supplemental response raised issues not previously raised in the pleadings. The Baileys joined the motion to strike. On December 8, 2014, the trial court granted Anadarko's motion to strike Hoyt's second supplemental response.

On December 10, 2014, the trial court granted the Baileys' motion for summary judgment, declaring them owners of the Property's subsurface estate as well as the surface estate. This appeal followed.

Appellant Hoyt Royalty raises the following three (3) claims for review:

> 1. Whether the trial court erred when it applied summary judgment standards to the [Baileys' motion, which in reality, was a motion for judgment on the pleadings that was governed by Pa.R.C.P. 1034?
>
> 2. Whether the trial court erred in granting judgment in favor of the Baileys and concluding

> that Hoyt Royalty and its predecessors-in-interest were divested of their duly recorded, nontaxable oil and gas estate even though disputed issues of fact and law exist as to whether further notice of the Hoyts' recorded severance was required to be given under the Act of 1806 and whether notice of the 1910 tax assessment and sale as statutorily proper or in violation of the Hoyts' federal and state due process rights?
>
> 3. Whether the trial court erred in striking Hoyt Royalty's November 21, 2014 response to the [Baileys'] September 9, 2014 motion without affording Hoyt Royalty an opportunity to respond to the motion to strike or amend its pleadings to address the claimed issue of whether the *allegata* and the *probate* agree?

Hoyt Royalty's Brief, p. 7.

This Court's scope and standard of review on an appeal from the grant of a motion for summary judgment is well settled:

> Our scope of review of a trial court's order granting or denying summary judgment is plenary, and our standard of review is clear: the trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion.
>
> Summary judgment is appropriate only when the record clearly shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The reviewing court must view the record in the light

> most favorable to the nonmoving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Only when the facts are so clear that reasonable minds could not differ can a trial court properly enter summary judgment.

***Herder Spring Hunting Club v. Keller***, 93 A.3d 465, 468 (Pa.Super.2014), *reargument denied* (July 11, 2014), *appeal granted*, 108 A.3d 1279 (Pa.2015) (quoting ***Shamis v. Moon,*** 81 A.3d 962, 968–69 (Pa.Super.2013)).

***A. The 1910 tax sale extinguished the subsurface estate.***

We first turn to Hoyt's second claim in which they allege that the trial court erred in determining that their predecessors-in-interest were divested of the subsurface estate as a result of the 1910 tax sale. ***See*** Hoyt Royalty's Brief, pp. 19-51. They are incorrect.

The substantive aspects of Hoyt's claims that the 1910 tax sale did not extinguish the subsurface estate are controlled by ***Herder Spring Hunting Club v. Keller***, 93 A.3d 465, 468 (Pa.Super.2014), a factually and legally indistinguishable case which Hoyt argues this Court incorrectly decided.

In ***Herder Spring***, a landowner – Keller – sought to quiet title and moved for summary judgment on his rights to surface and subsurface rights. In 1894, Keller acquired the property at a tax sale. In 1899, he transferred the surface rights of the property to others

by deed but horizontally severed[7] the property, reserving the subsurface rights for himself and his heirs in a recorded deed. Keller did not notify the county commissioners or the board of tax assessment of this horizontal severance. The property was then transferred on numerous occasions. Significantly, the Centre County Commissioners acquired the property in 1935 via a Treasurer's sale at which the property had been offered for unpaid taxes. In 1941, the Centre County Commissioners sold the property to Max Herr, who died intestate in 1944. Herr's widow sold the property to the Herder Spring Hunting Club in 1959, "subject to all exceptions and reservations as are contained in the chain of title."

The trial court found Keller's subsurface rights were recorded, and that the Herder Spring Hunting Club was aware of the reservation of rights, so Keller's heirs/successors were entitled to the subsurface estate. This Court disagreed.

The Superior Court determined that, "[b]ecause of the age of these transfers, the resolution of this matter turns upon an arcane point of law, involving the interpretation of § 1 of Act of 1806, March 28, P.L. 644, 4 Sm.L. 346, retitled as 72 P.S. § 5020-409 []." ***Herder Spring***, 93 A.3d at 468.

The Act of 1806 provided:

> It shall be the duty of every person hereafter becoming a holder of unseated lands, by gift,

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[7] "Horizontally severed land separates surface from subsurface rights; vertically severed land subdivides an estate into lots." ***Herder Spring***, 93 A.3d at 469 n.5.

> grant or other conveyance, to furnish to the county commissioners, or board for the assessment and revision of taxes, as the case may be, a statement signed by such holder, or his, her, or their agent, containing a description of each tract so acquired, the name of the person or persons to whom the original title from the Commonwealth passed, and the nature, number and date of such original title, together with the date of the conveyance to such holder, and the name of the grantor, within one year from and after such conveyance, and on failure of any holder of unseated lands to comply with the injunctions of this act, it shall be the duty of the county commissioners to assess on every tract of land, respecting which such default shall be made when discovered, four times the amount of the tax to which such tract or tracts of land would have been otherwise liable, and to enforce the collection thereof, in the same manner that taxes due on unseated lands are or may be assessed and collected: Provided, That nothing in this section shall be construed as giving greater validity to unexecuted land warrants than they are now entitled to, nor to the detriment of persons under legal disabilities, provided such person or persons comply with the foregoing requisitions within the time or times limited, respectively, after such disability shall be removed.

1933, May 22, P.L. 853, art. IV, § 409. The ***Herder Spring*** Court explained:

> The Act required persons who acquired unseated land[8] to furnish a statement describing that land to the county commissioners, or the board for the assessment and revision of taxes, so that a proper tax assessment could be levied.

***Herder Spring***, 93 A.3d at 468-69.

The ***Herder Spring*** Court then reviewed the state of the law as it existed at the relevant time periods. The Court summarized the law as follows:

> The relevant case law established that the acts taken by the commissioners regarding the tax sale were presumed to comport with applicable statutes and regulations, subject to contrary proof produced within two years of the foreclosure. The person who severed rights to unseated land was under an affirmative duty imposed by statute to inform the county commissioners or appropriate tax board of that severance, thereby allowing both portions of the property to be independently valued. If information regarding the severance of rights to unseated property is not given to the commissioners, then any tax assessment for that

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[8] "The distinction of seated and unseated land was part of Pennsylvania tax assessment law prior to 1961. Unseated land was unoccupied and unimproved whereas seated land contained permanent improvements as indicate a personal responsibility for taxes." ***Herder Spring***, 93 A.3d at 466. The Act of 1806 "treated [seated lands] differently from unseated lands . . . because seated lands are assessed by survey or warrant numbers, regardless of the owners whose names if used at all are only for the purpose of description." ***Id.*** at 469 (internal quotations and citation omitted).

> unseated property must logically be based upon the property as a whole.
>
> If a parcel of unseated land was valued as a whole, and the taxes on that land were not paid, thereby subjecting that property to seizure and tax sale, then all that was valued, surface and subsurface rights, were sold pursuant to any tax sale, absent proof within two years, of the severance of rights.

***Herder Spring***, 93 A.3d at 471-72 (footnote omitted).

Applying this law to the facts, the ***Herder Spring*** Court determined:

> Because the Kellers originally obtained the property through an 1894 tax sale, they obtained the rights to the property as a whole, and the tax assessors would continue to value the property as a whole unless otherwise informed. When the property was horizontally severed in 1899, the Kellers never informed the county commissioners of their retention of the subsurface rights to the land after selling the surface rights. Pursuant to the Act, it was their affirmative duty to do so. In 1935, the treasurer obtained the rights to the property pursuant to a treasurer's sale. Because the horizontal severance had never been reported to the commissioners, the property continued to be taxed as a whole, just as it had been when the Kellers obtained the property at tax sale. Therefore, the treasurer obtained the property as a whole and transferred it to the commissioners as a whole.

***Herder Spring***, 93 A.3d at 472 (internal citations omitted).[9] The Court then determined the trial court erred in granting the Kellers the subsurface rights, vacated the trial court's order, and remanded the case for the trial court to award the subsurface rights to Herder Spring Hunting Club.[10]

The instant matter presents the same factual and legal scenario as ***Herder Springs***: a recorded horizontal severance, governed by the Act of 1806, which was not reported to the county commissioners or tax authorities, followed by a tax sale. Accordingly, ***Herder Spring*** controls.[11] Accordingly, because the

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[9] The ***Herder Spring*** Court also noted the Act's provided remedy – a four-fold increase in the tax assessment for the failure to inform the commissioners of the severance rights – did not apply in situations where there was a Treasurer's or tax sale. ***Herder Spring***, 93 A.3d at 471 n.10.

[10] The ***Herder Spring*** Court recognized this result would likely not occur under modern law as follows:

> [W]e are aware that our resolution of this matter is at odds with modern legal concepts. This resolution may be seen as being unduly harsh. However, at the time of the relevant transactions—the seizure of the property for failure to pay tax and the subsequent Treasurer's sale—this was the appropriate answer. We do not believe it proper to reach back, more than three score years, to apply a modern sensibility and thereby undo that which was legally done.

***Herder Spring***, 93 A.3d at 473.

[11] Regardless of Hoyt's suggestion that ***Herder Spring*** was incorrectly decided, we are bound by the case. ***See Commonwealth v. Beck***, 78 A.3d 656, 659 (Pa.Super.2013) (a panel of this Court cannot overrule another panel). The fact that

subsurface estate was extinguished by the 1910 tax sale and failure to redeem the severance rights within the allotted two years, the Baileys own the entire property, both the surface and subsurface rights. Therefore, the trial court did not err in granting the Baileys summary judgment.

### *B. The trial court correctly applied the summary judgment standard to the Bailey's motion.*

Hoyt also argues that the Baileys' summary judgment motion was actually a motion for judgment on the pleadings, and therefore the trial court erred in applying summary judgment standards. ***See*** Hoyt Royalty's Brief, pp. 17-18. This claim affords Hoyt no relief.

Pennsylvania Rule of Civil Procedure 1035.2 governs motions for summary judgment and provides, in relative part:

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
>
> > (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense

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our Supreme Court has granted review of ***Herder Spring*** does not alter its precedential value unless and until the Supreme Court overrules this Court's determination. ***See Marks v. Nationwide Ins. Co.***, 762 A.2d 1098, 1101 (Pa.Super.2000) (noting that, despite having been granted a petition for allowance of appeal, a decision remains precedential unless and until it is overturned by the Pennsylvania Supreme Court).

> which could be established by additional discovery or expert report . . .

Pa.R.C.P. 1035.2. For summary judgment purposes, "[a] material fact is one that directly affects the outcome of the case." ***Kuney v. Benjamin Franklin Clinic***, 751 A.2d 662, 664 (Pa.Super.2000).

> The Note to Pa.R.C.P. 1035.2 explains:
>
> Rule 1035.2 sets forth the general principle that a motion for summary judgment is based on an evidentiary record which entitles the moving party to judgment as a matter of law.
>
> The evidentiary record may be one of two types. Under subparagraph (1), the record shows that the material facts are undisputed and, therefore, there is no issue to be submitted to a jury.
>
> An example of a motion under subparagraph (1) is a motion supported by a record containing an admission. By virtue of the admission, no issue of fact could be established by further discovery or expert report.
>
> . . .
>
> Only the pleadings between the parties to the motion for summary judgment must be closed prior to filing the motion.

Pa.R.C.P. No. 1035.2, *Note*. Further, "[t]he timing of the motion is important. Under Rule 1035.2(1), the motion is brought when there is no genuine issue of any material fact . . . which could be established by additional discovery or expert report." Pa.R.C.P.

1035.2, *1996 Explanatory Comment* (internal quotations omitted).

Here, Appellees properly moved for summary judgment. The trial court correctly determined that summary judgment is appropriate in this matter because Hoyt's pleadings and discovery responses do not dispute any material facts and no additional discovery will bolster Hoyt's defenses. Hoyt effectively claims first, that they were never informed of Lycoming County's assessment of taxes against the oil subsurface estate and the county's intention to sell the estate for failure to pay taxes. This argument is irrelevant, however, because Hoyt admits it never placed the county commissioners on notice of their severed estate rights and did not redeem their interest within two years of the tax sale. ***See Herder Springs***, ***supra***. Next, Hoyt argues that, absent a formal tax assessment, the Hoyts were under no obligation to redeem following the 1910 tax sale. This argument is a legal conclusion, not a material fact, and therefore does not create a factual jury question.[12] Likewise, Hoyt's

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[12] Further, the ***Herder Spring*** Court addressed this argument and found it unconvincing. As the Court explained:

> This argument is unavailing. First, the import of the Act is that it allows the tax assessors the opportunity to independently assess a value of severed rights. That opportunity was never given to Centre County. One cannot say that the mineral rights were never valued when the commissioners were not given the opportunity to independently value them. Next, that argument has been rejected by our Supreme Court, which stated:
>
> > Appellant further argues that even though a taxing body purports to assess an entire mineral

third argument, that the 1910 tax sale violated the Hoyts' federal and state due process rights is also a legal conclusion, not a matter of material fact, and therefore does not prevent summary judgment.

The pertinent facts of this matter are not in dispute. Rather, Hoyt debates (1) whether they were required to give the county commissioners notice of the horizontal severance, which they admit they did not provide, (2) whether the tax sale was proper, although there is no dispute that no taxes were paid on the property, and

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> estate, only minerals known to exist at the time and place are actually valued by the assessors, taxed and later sold if taxes become delinquent. Acceptance of this proposition would undoubtedly lead to confusion and speculation, for no one would know what had actually been sold. Attempts to prove that accessors [sic] did or did not know of the presence of oil or gas when they assessed 'minerals' at some point in the past would lead to protracted collateral investigation and litigation. It is true, of course, that an assessor can tax only that which had value. ***Rockwell v. Warren County***, [] 77 A. 665 ([Pa.]1910); if no gas or oil exists, the mineral rights should not be taxed as if they did. Nevertheless, an assessment or sale believed to be improper because of overvaluation cannot be collaterally attacked fifty years later. The owner must petition immediately for exoneration. ***Wilson v. A. Cook Sons, Co.,*** ***[s]upra***, [] 148 A. 63[, 65] [([Pa.]1929)].
>
> ***Bannard v. New York State Natural Gas Corporation***, [] 293 A.2d 41 ([Pa.]1971). We note that Bannard also recognizes the requirement to promptly challenge a tax sale. ***See Morton, supra***.

***Herder Spring***, 93 A.3d at 472 n.11.

(3) whether notice of the tax sale was adequately/properly given, although there is no dispute that notice through publication was actually given.

Because Hoyt does not raise any disputed issues of material fact, the trial court properly granted the Baileys' summary judgment motion.[13]

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[13] Hoyt challenges the correct application of relevant law, but not material facts. Therefore, the Baileys would have been entitled to judgment under the standard for a motion for judgment on the pleadings as well.

Pennsylvania Rule of Civil Procedure 1034 provides:

> **Rule 1034. Motion for Judgment on the Pleadings**
>
> (a) After the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings.
>
> (b) The court shall enter such judgment or order as shall be proper on the pleadings.

Pa.R.C.P. 1034. "A motion for judgment on the pleadings will be granted where, on the facts averred, the law says with certainty that no recovery is possible." ***Metcalf v. Pesock***, 885 A.2d 539, 540 (Pa.Super.2005).

> Entry of judgment on the pleadings is appropriate when there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. Our scope of review is plenary and we will reverse only if the trial court committed a clear error of law or if the pleadings disclose facts that should be submitted to a trier of fact. We accept as true all well-pleaded allegations in the complaint.

***Sisson v. Stanley***, 109 A.3d 265, 274 (Pa.Super.2015) (internal quotations and citation omitted).

### *C. The trial court properly struck Hoyt Royalty's November 21, 2014 second response to the motion for summary judgment.*

Finally, Hoyt claims the trial court improperly granted Anadarko's motion to strike Hoyt's Second Supplemental Response to the Baileys' Motion for Summary Judgment. ***See*** Hoyt Royalty's Brief, pp. 51-57. Specifically, Hoyt claims (1) Anadarko lacked standing to strike Hoyt's response, (2) Hoyt raised the issue of improper notice in its pleadings, and (3) the trial court should have allowed Hoyt to amend the pleadings if it felt notice was not properly raised. ***Id.*** This claim does not afford Hoyt relief.

First, a determination of whether or not Anadarko had standing is irrelevant. The Baileys filed a motion to strike for identical reasons. Therefore, even if the trial court ruled Anadarko had no standing, it could have simply struck the response based on the Baileys' motion, whose standing Hoyt does not challenge.

Second, Hoyt's claim that the trial court erred by not allowing Hoyt to amend the pleadings to include an allegation that Hoyt did not receive the mandated 60-day notice of the tax sale is unconvincing.

This Court has explained the legal principles underlying the review of a grant or denial of leave to amend the pleadings as follows:

> [Pennsylvania] Rule [of Civil Procedure] 1033 allows a party to amend his or her pleadings with either the consent of the adverse party or leave of the court. Leave to amend lies within the sound discretion of the trial court and the right to amend should be liberally granted at

> any stage of the proceedings unless there is an error of law or resulting prejudice to an adverse party.
>
> The policy underlying this rule of liberal leave to amend is to insure that parties get to have their cases decided on the substantive case presented, and not on legal formalities. Moreover, we have held:
>
> > Even where a trial court sustains preliminary objections on their merits, it is generally an abuse of discretion to dismiss a complaint without leave to amend. There may, of course, be cases where it is clear that amendment is impossible and where to extend leave to amend would be futile. However, the right to amend should not be withheld where there is **some reasonable possibility** that amendment can be accomplished successfully. In the event a demurrer is sustained because a complaint is defective in stating a cause of action, if it is evident that the pleading can be cured by amendment, a court may not enter a final judgment, but must give the pleader an opportunity to file an amended pleading.

***Hill v. Ofalt***, 85 A.3d 540, 557 (Pa.Super.2014) (emphasis in original) (internal quotations and citation omitted).

Although Pa.R.C.P. 1033 permits liberal granting of pleading amendments, the requested amendment to

add the tax sale 60-day notice claim would have been futile. As the trial court explained:

> [Hoyt] also contends in its Second Supplemental Response, that the 60-day notice period was not observed. While the Second Supplemental Response has been stricken, the court wishes to note that this objection is also barred by the two-year redemption period.

Trial Court Opinion, p. 8 n.10.

Because the proposed amendment would not have raised a viable argument for Hoyt, the trial court's refusal to allow the amendment was does not represent error.

For the preceding reasons, we affirm the trial court's December 10, 2014 order granting the Baileys' summary judgment motion.

Order affirmed.

Judgment Entered.

/s/Joseph D. Seletyn
Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/9/2015

## APPENDIX J

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**NO. 08 – 02,327**

**CIVIL ACTION - LAW**

**[Filed December 10, 2014]**

| | |
|---|---|
| DAVID C. BAILEY,<br>Plaintiff | ) |
| DAVID C. BAILEY and CECELIA BAILEY, Trustees of David C. Bailey Trusts,<br>Additional Plaintiffs | ) |
| ANADARKO E&P COMPANY, LP, CHESAPEAKE APPALACHIA, LLC, MITSUI E&P USA, LLC and STATOIL USA ONSHORE PROPERTIES, INC.,<br>Involuntary Plaintiffs | ) |
| vs. | ) |
| GEORGE A. ELDER a/k/a G.A. ELDER, WILLIAM HOYT and MARY HOYT, MARK HOYT and ANNA HOYT, EDWARD C. HOYT and CORDELIA IDA HOYT, THEODORE R. HOYT, GEORGE S. HOYT, ELK TANNING | ) |

COMPANY, CENTRAL )
PENNSYLVANIA LUMBER )
COMPANY, their successors, heirs, )
administrators and assigns or anyone )
claiming by, through or under them, )
Defendants )
)
vs. )
)
HOYT ROYALTY, LLC, )
Additional Defendant )
_____ )
HOYT ROYALTY, LLC, TRUSTEES OF )
THE MARGARET E. HAIGHT TRUST, )
KAROL TARNOWSKI, THOMAS )
PEDDER BISPHAM, SYDNEY )
WYNNE WOODWARD, GERTRUDE )
WEBER, JOHN WEDEL, MATT )
WEDEL, JAY WEDEL, KAREN )
ELITHIA WEDEL, ANN HOYT WEBER, )
CAROLINE HOKE WEBER, HELEN )
HOYT WEBER, )
VIRGINIA FOOTE HAGGERTY, )
NATHAN CLARK SWEET, JOHN )
WEBER SWEET, and all other unknown )
heirs, successors and assigns of William )
Hoyt, Mark Hoyt Edward C. Hoyt, )
Theodore R. Hoyt and George S. Hoyt, )
Individually, jointly and/or t/a "Hoyt )
Brothers", )
Counterclaim Plaintiffs )
)
vs. )
)
DAVID C. BAILEY, DAVID C. BAILEY )

| | |
|---|---|
| and CECELIA BAILEY, Trustees of David C. Bailey Trusts, ANADARKO E&P COMPANY, LP, CHESAPEAKE APPALACHIA, LLC, MITSUI E&P USA, LLC, STATOIL USA ONSHORE PROPERTIES, INC., ELK TANNING COMPANY and CENTRAL PENNSYLVANIA LUMBER COMPANY, Cross-claim and Counterclaim Defendants | ) |
| vs. | ) |
| INTERNATIONAL DEVELOPMENT CORPORATION and BONNELL RUN HUNTING AND FISHING CORPORATION, Additional Counterclaim Defendants | ) |

Motion for Summary Judgment

***OPINION AND ORDER***

Before the court is Additional Plaintiffs' Motion for Summary Judgment, filed September 9, 2014. Argument on the motion was heard November 4, 2014.

On July 19, 2013, Plaintiff and Additional Plaintiffs filed a Second Amended Complaint in Action to Quiet Title, alleging fee simple ownership of a 168 acre tract of land in Pine Township.[1] Plaintiffs allege that

[1] Plaintiff obtained a default judgment in 2009 on the original complaint, but that judgment was stricken by Order of May 29,

although the Hoyt Defendants reserved all oil, gas and mineral rights to themselves when deeding the property to Elk Tanning Company in 1893, those rights were lost through either[2] abandonment (Count 1), a tax sale in 1910 (Count 2), or a second tax sale in 1940 (Count 3), and, in Count 4, Plaintiffs assert that Defendants lack standing to challenge Plaintiffs' title. In the instant motion for summary judgment, Plaintiffs seeks judgment on Counts 2 and/or 3. Because the court finds the tax sale of 1910 extinguished the 1893 reservation, thus terminating any claims by Defendants, Additional Defendants or Counter-claim Plaintiffs, only Count 2 will be addressed.

Plaintiffs' claim stems from a tax sale held June 2, 1910, which they contend reunited the previously severed subsurface estate with the surface estate because the owner of the subsurface estate never reported the severance to the taxing authorities, the property was thus assessed and sold as a whole, and the property was never redeemed. Plaintiffs contend there are no issues of fact and they are entitled to judgment as a matter of law, citing Herder Spring Hunting Club v. Keller, 93 A.3d 465 (Pa. Super. 2014), in support of their position. Defendant objects to entry of summary judgment on various grounds and, in the

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2013. The Complaint was then amended and additional parties joined. For ease of reference in the instant opinion, the court will refer to Additional Plaintiffs as "Plaintiffs". Similarly, as only Defendant Hoyt Royalty, LLC filed a response in opposition to Plaintiffs' motion, Hoyt Royalty will be referred to as "Defendant" even though there are numerous other defendants.

[2] Counts 1, 2 and 3 are pled in the alternative.

process, argues that Herder Spring was wrongly decided. Such an argument to this court must necessarily fall on deaf ears and although Defendant's objections will be addressed seriatim, to the extent an objection requires this court to ignore Herder Spring, it will be addressed no further.

Defendant first argues that the tax deed did not pass title to the subsurface estate because the taxing authorities lacked the statutory authority to assess the subsurface estate as such did not constitute "lands", citing Coolspring Stone Supply v. Fayette County, 929 A.2d 1150 (Pa. 2007), and Independent Oil & Gas Association of Pennsylvania v. Board of Assessment Appeals of Fayette County, 814 A.2d 180 (Pa. 2002). While the Court in Independent Oil & Gas did hold that there is no statutory authority for the assessment of real estate taxes on oil and gas interests, it later announced that such holding would not be applied retroactively. Oz Gas, Ltd. v. Warren Area School District, 938 A.2d 274 (Pa. 2007). Thus, at the time of the sale, the assessment was valid under the law then in effect, and this argument to the contrary is without merit.

Defendant similarly argues that the taxing authorities could not assess the subsurface estate as no production was occurring which would have provided a basis for valuation. This argument was rejected in Herder Spring, which looked to the Pennsylvania Supreme Court's ruling in Bannard v. New York State Natural Gas Corporation, 293 A.2d 41 (Pa. 1972), that although mineral rights should not be taxed as if gas or oil existed if it did not, a tax sale believed to be improper because of overvaluation cannot be

collaterally attacked fifty years later. Herder Spring, *supra*, fn. 11. In this matter, the attack comes over 100 years later and will not be countenanced.

Next Defendant argues that any failure to report the severance cannot serve as a basis for the extinguishment of the subsurface rights through the tax sale as, under a strict construction of the Act of 1806[3], there was no duty to report the severance. The Court in Herder Spring specifically found, however, that "[t]he person who severed rights to unseated land was under an affirmative duty imposed by statute to inform the county commissioners or appropriate tax board of that severance, thereby allowing both portions of the property to be independently valued." Id. at 471. This argument is therefore without merit.

Relatedly, Defendant argues that Plaintiffs have produced no evidence the property was unseated. Such is unnecessary, however, in light of Defendants' admission that it was.[4]

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[3] The Act of 1806 provides, in pertinent part: "It shall be the duty of every person hereafter becoming a holder of unseated lands, by gift, grant or other conveyance, to furnish to the county commissioners, or board for the assessment and revision of taxes, as the case may be, a statement signed by such holder, or his, her, or their agent, containing a description of each tract so acquired, the name of the person or persons to whom the original title from the Commonwealth passed, and the nature, number and date of such original title, together with the date of the conveyance to such holder, and the name of the grantor, within one year from and after such conveyance, ... ." 72 P.S. Section 5020-409.

[4] See Paragraphs 94 and 104 of Hoyt Royalty, LLC's Reply to Anadarko E&P Onshore, LLC's New Matter to Complaint to Join Additional Defendants, filed March 3, 2014.

Defendant next argues that even if there was a duty to report the severed oil and gas estate to the taxing authorities, Plaintiffs have offered no evidence that such notice was not given. Plaintiffs are entitled to a presumption, however, that "all actions, such as recording and assessing severed rights, that were required to be taken were taken." Id. at 473. That is, if the severance had been reported, it would have been recorded and assessed. According to Herder Spring, "failing any affirmative proof to the contrary", the court may conclude the severance was not reported. Id.

Apparently recognizing this burden of proof, Defendant offers evidence that Williamsport has suffered flooding in 1894, 1902, 1904 and 1910, that the courthouse has "flooded on several occasions",[5] and that "the Lycoming County Historical Society does not possess any notices to the Board of Commissioners dating from the late 1800's to the early 1900's that would have been given under the Act of March 28, 1806".[6] Defendant points to language in Herder Spring, that "[t]here is nothing in the certified record to suggest that the records of Centre County were ever subject to flood, fire, or some other calamity or negligence such that it might be presumed that relevant records were lost or destroyed. Absent such proof, we cannot presume such extraordinary events

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[5] Defendants ask this court to take judicial notice of these facts.

[6] Affidavit of Scott Sager, Curator of Collections for the Lycoming County Historical Society, Exhibit 12 of Hoyt Royalty, LLc's Supplemental Appendix, filed November 4, 2014.

and the loss or destruction of records." Id. at 472-73.[7] Defendant contends the proffered evidence in the instant case is sufficient to entitle it to a presumption that the severance was reported but that record of such has been lost or destroyed. The court does not agree, for two reasons. First, Defendant has not alleged anywhere in its pleadings that the severance *was* reported. Second, the court believes there must be evidence that *the records* were subject to a calamity, not merely that there was a calamity in the general location. The evidence offered by Defendant in this matter is not sufficient to give rise to the sought-after presumption. In any event, Herder Spring requires the proof to be offered within the two-year redemption period,[8] which has not been done here.

Defendant next argues that even if the Act of 1806 imposes a duty to report the severance, and even if the court concludes the severance was not reported, the Act provides the specific penalty of four-fold taxation, not the confiscation of the property. The identical argument was rejected by the Court in Herder Spring, however, which concluded that "the four-fold penalty was to be imposed in those situations where no tax sale had taken place." This argument is therefore without merit.

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[7] This statement was made in response to the trial court having "credited the Keller heirs' averment in their pleadings that the records of the severed subsurface rights were not kept by the Recorder of Deeds or were lost or destroyed." Herder Spring at 472.

[8] Id. at 472: "the Keller heirs who ostensibly took possession of the subsurface rights, had two years from the delivery of the title to Herr, the pm-chaser at tax sale, to make known their claim."

Next, Defendant asks the court to consider the holding of Tidewater-Pipe Company v. Bell, 124 A. 351, 355 (Pa. 1924), (wherein it was determined that a right-of-way had not been lost in a tax sale of the property) that the Act of 1804 "divests only those prior claimants to the estate and interest of the real owner of the unseated land that was assessed and sold, and not others whose estates or interests were duly severed and recorded prior to the assessment". Defendant specifically points to the following language:

> It is the "estate and interest . . . [of] the real owner or owners" of the land sold, which passes by the sale, and not some other estate or interest, which the "real owner or owners" did not have. The default of "the real owner or owners" was the failure to pay taxes on the land, which they owned and which was subject to the right-of-way; the title which the purchaser acquired was the title of that "real owner or owners," and not also an interest of some other owner, not taxed or referred to in the statute.

Id. Defendant argues that since the mineral rights had been severed and did not belong to the owner of the surface, and since the reservation of mineral rights had been recorded, that interest did not pass to the purchaser at the tax sale. Defendant fails to note, however, the previous sentence: "We therefore hold that if land is sold for taxes, *an easement, servitude, or interest in the nature of an easement,* is not destroyed, but the purchaser takes subject thereto." Id. (emphasis added). Unlike a subsurface estate, a right-of-way does not make one a "holder of unseated lands" and thus subject to the Act of 1806, and indeed, that Act was not

implicated in the Court's decision. Even the last phrase of the language highlighted by Defendant acknowledges the distinction: "an interest of some other owner, *not taxed or referred to in the statute."* The Act of 1806 does refer to the subsurface estate previously owned by Defendant and makes such taxable. Herder Spring, *supra.* The holding of Tidewater-Pipe is therefore not applicable.

Next, Defendant contends Plaintiffs have produced no evidence of compliance with the required tax sale procedures, including the providing of notice. Plaintiffs do not have such a burden, however, as the Act of 1815 "substitute[ed] the 'presumption that everything was rightly done, for the proof that it was rightly done.'" Herder Spring, *supra,* at 469, quoting Morton v. Harris, 9 Watts 319 (Pa. 1840). Further, Defendant's objection to procedural irregularities[9] is barred by the two-year redemption period. Id. ("The original owner was prevented from offering specific proof of irregularity of process, after a 'lapse of two years from the time of sale.'")[10]

Finally, Defendant argues that the notice provisions of the tax sale laws in effect in 1910, which allowed notice by publication, violated the Hoyts' right to due

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[9] Specifically, Defendant contends there was a discrepancy between the number of acres listed in the assessment and the number of acres noted in the treasurer's deed.

[10] Defendant also contends in its Second Supplemental Response, that the 60-day notice period was not observed. While the Second Supplemental Response has been stricken, the court wishes to note that this objection is also barred by the two-year redemption period.

process of law, citing Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306 (1950), and Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983). Defendant's reliance on these cases is misplaced, however:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. . . .
>
> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance[.] But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." . . .
>
> This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate

> warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights. . . .
>
> Accordingly we overrule appellant's constitutional objections to published notice insofar as they are urged on behalf of any beneficiaries whose interests or addresses are unknown to the trustee.

Mullane, *supra,* at 313-18 (citations omitted).

Similarly, in Mennonite Board of Missions, while the Court held that a mortgagee is entitled to notice reasonably calculated to apprise him of a pending tax sale, and that unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of Mullane, that holding was based on the fact that the mortgagee "clearly has a legally protected property interest". Mennonite Board of Missions, *supra,* at 798.

What Defendant overlooks is the fact that by failing to report the severance to the taxing authorities as required by the Act of 1806, the Hoyts no longer had a legally protected interest and, as far as the taxing authorities were concerned, their interest was unknown.[11] In Texaco, Inc. v. Short, 454 U.S. 516

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[11] Defendant's contention that the recorded deed should have served as notice to the taxing authorities is without merit. In Herder Spring, the Superior Court noted the Supreme Court's admonition that "[t]he record of the deed creating a separate estate

(1982), the United States Supreme Court upheld an Indiana statute which provided for the abandonment of mineral interests unused for twenty years unless certain actions were taken by the holder of such interests.[12] The Court relied on prior cases in which the power of the State, to condition the retention of a property right upon the performance of an act within a limited period of time, was acknowledged. The Court specifically noted that "[i]n each instance, as a result of the failure of the property owner to perform the statutory condition, an interest in fee was deemed as a matter of law to be abandoned and to lapse." Id. at 529. In the instant case, the Act of 1806 required the reporting of severed mineral interests, and the tax assessor's sale of the whole, based on a presumption that no severance had occurred because none had been reported, followed by a failure to redeem the property, could be viewed as a deemed abandonment of the interest. Since it was abandoned, it was not entitled to the legal protection of actual notice of its proposed sale for non-payment of taxes.[13]

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in the minerals would not be notice to the assessor or the commissioners, as they were not bound to search or examine the records." Herder Spring, *supra,* at 471.

[12] The statute (the Dormant Mineral Interests Act, Ind. Code §§ 32-5-11-1 through 32-5-11-8 (1976)) provided that "the unused interest shall be "extinguished" and that its "ownership shall revert to the then owner of the interest out of which it was carved."

[13] "The Court in Mullane itself distinguished the situation in which a State enacted a general rule of law governing the abandonment of property." Texaco, Inc. v. Short, 454 U.S. 516, 535 (1982). While the Act of 1806 did not by its own express terms dictate that the property was to be considered abandoned if not reported, the

In response to Defendant's related argument that the Hoyts had no notice that the Act of 1806 required them to report the severance, the court simply notes that "[i]t is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property." Id. at 532. Further, "[it] has long been established that 'laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly,' but it has never been suggested that each citizen must in some way be given specific notice of the impact of a new statute on his property before that law may affect his property rights." Id. at 535-36 (citation omitted).

Further, Defendant's attempt to distinguish Texaco because it does not involve a tax statute is unavailing. In noting the well-established rule that "persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property", Id. at 532, the Court quoted North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283 (1925), as follows:

> All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it. *This is especially the case with respect to those statutes relating to the*

---

courts' interpretation of that Act must be read in conjunction therewith.

> *taxation* or condemnation of land. Such statutes are universally in force and are general in their application, facts of which the land owner must take account in providing for the management of his property and *safeguarding his interest* in it."

Texaco, *supra,* at 532, fn. 25 (emphasis added). The court reads nothing in Texaco which limits its holding to "property abandonment statutes".[14] Moreover, simply because the current Dormant Oil and Gas Act in this Commonwealth does not authorize an abandonment or confiscation of oil and gas interests for non-use,[15] the court is not required to find that the Act of 1806 also did not intend to lead to a deemed abandonment for non-reporting of severed mineral rights and the consequent non-payment of taxes on those rights. As noted in Texaco, "the fiscal interest in collecting property taxes is manifest". Id. at 529. Since the Act's reporting requirement furthers that interest, this court simply notes Texaco's declaration that "[t]he State surely has the power to condition the ownership of property on compliance with conditions that impose such a slight burden on the owner while providing such clear benefits to the State." Id.

There remain no disputed issues of material fact and application of the law clearly entitles Plaintiffs to the following:

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[14] Hoyt Royalty, LLC's Supplemental Response, filed November 4, 2014, at p. 19.

[15] Defendant argues such, and the court will assume for sake of argument that such is true. Defendant has not cited to the relevant statute.

***ORDER***

AND NOW, this 10th day of December 2014, for the foregoing reasons, the Motion for Summary Judgment is hereby GRANTED with respect to Count 2 of the Second Amended Complaint. The motion is dismissed as moot with respect to Count 3.

BY THE COURT,

/s/Dudley N. Anderson
Dudley N. Anderson, Judge

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Gary Weber, Esq.
Hon. Dudley Anderson

## APPENDIX K

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA**

**CIVIL ACTION - LAW**
**ACTION TO QUIET TITLE AND ACTION DECLARATORY JUDGMENT**

**NO. 08-02327**

**[Filed July 19, 2013]**

DAVID C. BAILEY,
Plaintiff

DAVID C. BAILEY and CECELIA BAILEY, Trustees of David C. Bailey Trusts,
Additional Plaintiffs

ANADARKO E&P COMPANY, LP, CHESAPEAKE APPALACHIA, LLC, MITSUI E&P USA, LLC and STATOIL USA ONSHORE PROPERTIES, INC.,
Involuntary Plaintiffs

vs.

GEORGE A. ELDER a/k/a G.A. ELDER, WILLIAM HOYT and MARY HOYT, his wife, MARK HOYT and ANN A. HOYT, his wife EDWARD C. HOYT and

CORDELIA IDA HOYT, his wife, THEODORE R. HOYT, GEORGE S. HOYT, ELK TANNING COMPANY, CENTRAL PENNSYLVANIA LUMBER COMPANY, their successors, heirs, administrators and assigns or anyone claiming by, through or under them,
Defendants

HOYT ROYALTY, LLC,
Additional Defendant

**SECOND AMENDED COMPLAINT**
**ACTION TO QUIET TITLE**

AND NOW, comes the Plaintiffs, DAVID C. BAILEY, and DAVID C. BAILEY AND CECELIA J. BAILEY, Trustees of David C. Bailey Trust, by and through counsel, SCOTT A. WILLIAMS, ESQUIRE, and CHRISTOPHER M. WILLIAMS, ESQUIRE, to bring this action to quiet title against the above Defendants and makes the following allegations:

1. Plaintiff is DAVID C. BAILEY, who resides at 1569 Marquette Avenue, Napersville, Illinois 60565.

2. Additional Plaintiffs, DAVID C. BAILEY and CECELIA J. BAILEY, Trustees of David C. Bailey, Sr. Trust, reside at 1569 Marquette Avenue, Napersville, Illinois 60565.

3. The Defendants GEORGE A ELDER a/k/a G.A. ELDER, W1LLIAM HOYT and MARY HOYT, his wife, MARK HOYT and ANN A. HOYT, his wife, EDWARD C. HOYT and CORDELIA IDA HOYT, his wife,

THEODORE R. HOYT, GEORGE S. HOYT, ELK TANNING COMPANY, CENTRAL PENNSYLVANIA LUMBER COMPANY are individuals whose whereabouts and addresses are unknown but whose last known address is Pine Township, Lycoming County, Pennsylvania, and the defendants are believed to be deceased.

4. HOYT ROYALTY, LLC, Additional Defendants, claims to have succeeded to interest of name Hoyt Defendants which LLC have filed Preliminary Objections to Plaintiff.

5. At all relevant times material to this action, Plaintiffs have been the owner of a 168 acre tract of real estate situate in Pine Township, Lycoming County, Pennsylvania (a portion of the same lies in Tioga County, Pennsylvania) sometimes herein referred to as "the Premises," and is known as Parcel #47-145-141 in the Lycoming County assessment records and is more particularly described in Lycoming County Deed Book 3716 at page 143.

6. Plaintiff, David C. Bailey, acquired title to said 168 parcel tract of real estate on February 5, 2001, by deed of Margaret C. Bailey (a/k/a Margaret V. Bailey) by deed recorded in Lycoming County Record Book 3716 at page 143. A copy of said deed is attached hereto, made a part hereof and marked Exhibit A. This real estate is hereinafter referred to as "the Premises".

7. Additional Defendants, David C. Bailey and Cecelia J. Bailey, Trustees, acquired title to the Premises by deed recorded in Lycoming County Record Book 7589 at page 233.

8. Plaintiff's chain of title is as set forth on Exhibit B hereof which is attached hereto and made a part hereof.

9. The Defendants, GEORGE A. ELDER a/k/a G.A. ELDER, WILLIAM HOYT and MARY HOYT, his wife, MARK HOYT and ANN A. HOYT, his wife, EDWARD C. HOYT and CORDELIA IDA HOYT, his wife, THEODORE R. HOYT, GEORGE S. HOYT, ELK TANNING COMPANY, CENTRAL PENNSYLVANIA LUMBER COMPANY, are named in this litigation with respect to the Premises due to reservations of mineral rights, including gas, oil and minerals, as follows:

A. All Hoyts reserved all oil, gas and mineral rights in Deed Book 137, page 155, by adding following language in their deed to Elk Tanning Company on 4/22/1893:

"Also excepting and reserving to the parties hereto of the first part, their heirs and assigns forever, all minerals and mineral rights, oil and gas, being in, on or under any of the lands heretofore described and hereby conveyed, with the right to enter, bore for, remove the same and the right of ingress, egress and regress and the right to do such acts and to use and maintain on the premises such pipes, machinery, tools, implements and structures as may be necessary and convenient or usual for the purpose of producing, making available, removing or marketing such minerals, oil and gas." This language creates a cloud on Plaintiff's title.

B. The deed from Elk Tanning Company to Central Pennsylvania Lumber company dated May 25, 1903 and recorded in Lycoming County Deed Book 183 at Page 328, did not contain the provision recited in Paragraph 9A above but did contain the following provision:

> "This deed is made, executed, delivered and accepted for the purpose of vesting in the party of the second part, its successors and assigns, all the right, title and interest in the state but no greater than is now held or owned by the Elk Tanning Company of and in and to the lands heretofore mentioned, the timber, trees and wood therein, subject to the exceptions, reservations, covenants, stipulations, agreements and conditions contained in the several deeds heretofore recited, subject also to all the exceptions, reservations and covenants, stipulations and agreements and conditions heretofore stated." This clause creates a cloud on plaintiff's title

10. The Premises was sold at tax sale for unpaid taxes on June 2, 1910 all laws regarding the notice and procedure for Tax Sales, Treasurer's and Commissioners' deeds were followed.

11. On June 10, 1940, a Treasurer's Sale of the Premises occurred for nonpayment of taxes and a treasurer's deed was recorded in DB 312 at page 8. Thereafter, the commissioners then conveyed the Premises to Margaret V. Clark, mother of the plaintiff. See Lycoming County Deed Book 334, at page 553.

12. At the time of the assessment of taxes for the 1940 tax sale, George A. Elder a/k/a G.A. Elder, was the record owner and the assessment was proper, and the said George Elder received due notice of the tax sale, which came about because of his failure to pay taxes that were owing. Therefore, the Treasurer's Deed to the Lycoming County Commissioners and the deed from the Lycoming County Commissioners to Margaret V. Clark validly and duly conveyed good and marketable title to the Premises. All laws regarding notice and procedures for tax sales, Treasurer's and Commissioner's deeds were followed.

* * *

**COUNT II**
Cleansing by Tax Sale

20. Paragraphs 1 through 19 of the Second Amended Complaint are incorporated by reference as though fully set forth herein at length.

21. The Premises consisting of unseated lands were sold on June 10, 1910 for unpaid taxes by the Treasurer of Lycoming County, George Gamble. See Exhibit C attached hereto and made a part hereof.

22. At the time of the sale of the Premises at the 1910 tax sale there was no separate assessment for taxes for the subsurface estate.

23. At no time prior to the 1910 tax sale did the subsurface owner notify the Commissioners of a severance of the subsurface estate.

24. The Premises, for purposes of the 1910 tax sale, were assessed as a whole entire estate surface and subsurface and were unseated.

25. The purchaser of the Premises at the 1910 tax sale acquired title to both the surface and subsurface estate.

26. Because the Defendants failed to have an assessment of any right to subsurface rights in its 1910 tax sale, failed to pay taxes assessed as a result of the tax sale, all purported exceptions and clauses including those mentioned in Paragraph 9 aforesaid were cleansed, removed and extinguished by said tax sale. See 72 P.S. § 5860.609; 72 P.S. § 5981. See *Proctor v. Sagamore Big Game Club*, 166 F Supp. 465 (WD PA 1958) (interpreting PA Law). See also *Hutchinson v. Kline*, 49 A 312 (PA 1901).

27. The existence of a separate mineral estate at the time of the 1910 tax sale alone was legally insufficient for the subsurface estate to survive the 1910 tax sale.

28. At no time were the surface or subsurface rights conveyed in the 1910 tax sale ever redeemed.

29. The Pennsylvania Supreme Court in the case of *Hutchinson v. Kline*, 49 A 312 (PA 1901) held that where there was a severance from the subsurface, the mineral owner has a duty to notify the Commissioners of this fact, and failing to do so, the lands are assessed as a whole and the entire property as unseated lands and are sold. The purchaser of the property at the sale acquires good title to the subsurface estate including mineral, oil and gas.

30. The result of the June 2, 1910 tax sale was the merger and unity of the surface and subsurface estates.

31. No severance of the subsurface estate from the surface estate occurred from the time of the June 2, 1910 tax sale through the date of the 1940 tax sale.

32. At the time of the 1940 tax sale the surface and subsurface estates were merged and unified as a result of the 1910 tax sale.

33. At the time of the sale of the Premises at the 1940 tax sale there was no separate assessment for taxes for the subsurface estate. Rather, the Premises (both surface and subsurface) were assessed as a whole.

34. At the time of the 1940 tax sale, the premises were unseated.

35. Margaret Bailey, mother of Plaintiff, David C. Bailey, acquired title to the Premises by a Treasurer's Deed as aforesaid, which conveyance included subsurface. See Lycoming County Deed Book 334, at page 553.

36. David C. Bailey conveyed his title to the Premises with acquired subsurface rights to oil, gas and other mineral right to David C. Bailey and Cecelia J. Bailey, Trustees of David C. Bailey, Sr. Trust on April 13, 2012, which was recorded in Lycoming County Deed Book 7589, at page 241.

37. On November 26, 2012, the Trustees of David C. Bailey, Sr. Trust conveyed the surface rights to the Premises to the Bonnell Run Hunting and Fishing Club

but not the subsurface ownership or rights. See Lycoming County Deed Book 7815, at page 317. In said deed, all minerals, gases and oils and lease interest were reserved.

* * *

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* * *

## APPENDIX L

1044853

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**No. 08-02327 (D. Anderson)**

**[Filed September 18, 2013]**

| | |
|---|---|
| DAVID C. BAILEY, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| DAVID C. BAILEY and CECELIA BAILEY, Trustees of David C. Bailey Trusts, | ) |
| | ) |
| Additional Plaintiffs, | ) |
| | ) |
| ANADARKO E&P COMPANY, LP; CHESAPEAKE APPALACHIA, L.L.C.; MITSUI E&P USA, LLC; and STATOIL USA ONSHORE PROPERTIES, INC., | ) |
| | ) |
| Involuntary Plaintiffs, | ) |
| | ) |
| v. | ) |
| | ) |
| GEORGE A. ELDER a/k/a G.A. ELDER, WILLIAM HOYT and MARY HOYT, his wife, MARK HOYT and ANNA HOYT, | ) |

his wife, EDWARD C. HOYT and )
CORDELIA IDA HOYT, his wife, )
THEODORE R. HOYT, GEORGE S. )
HOYT, ELK TANNING COMPANY, )
CENTRAL PENNSYLVANIA LUMBER )
COMPANY, their successors, heirs, )
administrators and assigns or anyone )
claiming by, through or under them, )
)
Defendants, )
)
HOYT ROYALTY, LLC, )
)
Additional Defendant. )
_____ )
HOYT ROYALTY, LLC; TRUSTEES OF )
THE MARGARET E. HAIGHT TRUST; )
KAROL TARNOWSKI; THOMAS )
PEDDER BISPHAM; SYDNEY )
WYNNE WOODWARD; GERTRUDE )
WEBER; JOHN WEDEL; MATT )
WEDEL; JAY WEDEL; KAREN )
ELITHIA WEDEL; ANN HOYT WEBER; )
CAROLINE HOKE WEBER; HELEN )
HOYT WEBER; )
VIRGINIA FOOTE HAGGERTY; )
NATHAN CLARK SWEET; JOHN )
WEBER SWEET; and all other unknown )
heirs, successors and assigns of )
WILLIAM HOYT, MARK HOYT )
EDWARD C. HOYT, THEODORE R. )
HOYT and GEORGE S. HOYT, )
individually, jointly and/or trading as )

| | |
|---|---|
| "HOYT BROTHERS," | ) |
| | ) |
| Cross-Claim and Counterclaim Plaintiffs, | ) |
| | ) |
| v. | ) |
| | ) |
| DAVID C. BAILEY; DAVID C. BAILEY and CECELIA BAILEY, Trustees of David C. Bailey, Sr., Trusts; ANADARKO E&P COMPANY, LP; CHESAPEAKE APPALACHIA, L.L.C.; MITSUI E&P USA, LLC; STATOIL USA ONSHORE PROPERTIES, INC.; ELK TANNING COMPANY and CENTRAL PENNSYLVANIA LUMBER COMPANY, | ) |
| | ) |
| Cross-Claim and Counterclaim Defendants | ) |
| | ) |
| INTERNATIONAL DEVELOPMENT CORPORATION; and BONNELL RUN HUNTING AND FISHING CORPORATION, | ) |
| | ) |
| Additional Counterclaim Defendants | ) |
| _____ | ) |

**ANSWER AND NEW MATTER TO SECOND AMENDED COMPLAINT, AND CROSS-CLAIM AND COUNTERCLAIM**

As a successor and assign of the heirs, administrators and assigns of the named Defendants

William Hoyt and Mary Hoyt, his wife, Mark Hoyt and Ann A. Hoyt, his wife, Edward C. Hoyt and Cordelia Ida Hoyt, his wife, Theodore R. Hoyt and George Hoyt (collectively, the "Hoyts"), Additional Defendant Hoyt Royalty LLC ("Hoyt Royalty"), by its undersigned counsel, hereby states that it has a full, just and complete defense to the claims set forth in the Second Amended Complaint filed on July 19, 2013, and that on behalf of itself and the other involuntary Cross-Claim and Counterclaim Plaintiffs, it is asserting a cross-claim and counterclaim against both the Plaintiff, Additional Plaintiffs and Involuntary Plaintiffs, and the Cross-Claim and Counterclaim Defendants and Additional Counterclaim Defendants, the specifics of which are as follows:

**ANSWER**

As to the specific averments in the Second Amended Complaint, Hoyt Royalty states as follows:

* * *

5. The averments contained in Paragraph 5 of the Second Amended Complaint are legal conclusions to which no responsive pleading is required. To the extent that a responsive pleading is deemed required, after reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 5 of the Second Amended Complaint. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial. By way of further answer, Hoyt Royalty states that at all relevant times material to this action, the Hoyts and their heirs,

successors and assigns, including without limitation, Hoyt Royalty, are and always have been the owners and possessors of all natural gas and oil and other minerals and mineral rights in, on and under the 168 acres of surface estate claimed to be owned by the Plaintiff and Additional Plaintiffs (hereinafter, the 168 acre surface estate is referred to as the "Subject Property").

6. The averments contained in Paragraph 6 of the Second Amended Complaint are legal conclusions to which no responsive pleading is required. To the extent that a responsive pleading is deemed required, the averments contained in Paragraph 6 of the Second Amended Complaint are admitted in part and denied in part. It is admitted that a special warranty deed dated February 5, 2001, between David C. Bailey, attorney-in-fact for Margaret C. Bailey, a widow and single person, as grantor, and David C. Bailey, as grantee, is recorded in the Office of Lycoming County Recorder of Deeds in Deed Book 3716, at page 143 (the "2001 Bailey Deed"). It is specifically denied that the 2001 Bailey Deed conveyed any right, title and/or interest in the natural gas and oil and other minerals and mineral rights in, on and under the Subject Property. To the contrary, the 2001 Bailey Deed was given subject to an exception and reservation of all natural gas and oil and other minerals and mineral rights in, on and under the Subject Property as set forth more fully in the quit claim deed dated April 22, 1893 between the Hoyts, as grantors, and Elk Tanning, as grantees, and recorded on August 3, 1893 in the Office of Lycoming County Recorder of Deeds in Deed Book 137, at Page 155 (The "1893 Hoyt/Elk Tanning Deed"). After reasonable investigation, Hoyt Royalty is

without knowledge or information sufficient to form a belief as to the truth of the remaining averments of Paragraph 6 of the Second Amended Complaint. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial.

7. The averments contained in Paragraph 7 of the Second Amended Complaint are legal conclusions to which no responsive pleading is required. To the extent that a responsive pleading is deemed required, the averments contained in paragraph 7 of the Second Amended Complaint are admitted in part and denied in part. It is admitted that a special warranty deed dated April 13, 2012, between David C. Bailey, Sr., a/k/a David C. Bailey, as grantor, and David C. Bailey Sr. and Cecelia J. Bailey, trustees of the David C. Bailey Sr. Trust, as grantees, is recorded in the Office of Lycoming County Recorder of Deeds in Deed Book 7589, at page 233 (the "2012 Bailey Trust Deed"). It is specifically denied that the 2012 Bailey Trust Deed conveyed any right, title and/or interest in the natural gas and oil and other minerals and mineral rights in, on and under the Subject Property. To the contrary, the 2012 Bailey Trust Deed was given subject to an exception and reservation of all natural gas and oil and other minerals and mineral rights in, on and under the Subject Property as set forth more fully in the 1893 Hoyt/Elk Tanning Deed. After reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of Paragraph 7 of the Second Amended Complaint. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil

Procedure 1029(c) and strict proof thereof is demanded at the time of trial.

8. The averments contained in Paragraph 8 of the Second Amended Complaint are legal conclusions to which no responsive pleading is required. To the extent that a responsive pleading is deemed required, the averments contained in Paragraph 8 of the Second Amended Complaint (which refer to and incorporate by reference Paragraphs 1 through 12 of Exhibit B to the Second Amended Complaint) are admitted in part and denied in part (in reverse date order), as follows:

a. As for Paragraph 12 of Exhibit B, it is admitted that the 1893 Hoyt/Elk Tanning Deed is recorded in the Office of the Recorder of Deeds of Lycoming County in Deed Book 137, at page 155. It is also admitted that the 1893 Hoyt/Elk Tanning Deed excepted and reserved to the Hoyts, their heirs, successors and assigns all minerals, mineral rights, oil and gas being in, on or under the property conveyed by the 1893 Hoyt/Elk Tanning Deed. The remaining averments of Paragraph 12 of Exhibit B state legal conclusions to which no responsive pleading is required. To the extent that a response is required, after reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of such remaining averments. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial.

b. As for Paragraph 11 of Exhibit B, it is admitted that a warranty deed dated May 25, 1903, between Elk Tanning, as grantor, and Central PA Lumber, as grantee, is recorded in the Office of the

Recorder of Deeds of Lycoming County in Deed Book 183, at page 328 (the "1903 Elk Tanning/Central PA Lumber Deed"). It is specifically denied that the 1903 Elk Tanning/Central PA Lumber Deed conveyed any right, title or interest in the minerals, mineral rights, natural gas and/or oil in, on or under the Subject Property. To the contrary, the 1903 Elk Tanning/Central PA Lumber Deed was made subject to the exception and reservation of minerals, mineral rights, natural gas and/or oil in, on or under the Subject Property set forth in the 1893 Hoyt/Elk Tanning Deed. By way of further answer, the Hoyts' exception and reservation of the natural gas and oil and other minerals and mineral rights in, on and under the Subject Property was expressly recognized by the 1903 Elk Tanning/Central PA Lumber Deed, which states that said transfer of the Subject Surface Estate was ***"subject to the exceptions, reservations, covenants, stipulations, agreements and conditions contained in the several deeds heretofore recited,*** subject also to all the exceptions, reservations and covenants, stipulations and agreements and conditions heretofore stated." Among the deeds recited in the 1903 Elk Tanning/Central PA Lumber Deed was the 1893 Hoyt/Elk Tanning Deed. The remaining averments of Paragraph 11 of Exhibit B state legal conclusions to which no responsive pleading is required. To the extent that a response is required, after reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of such remaining averments. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial.

c. As for Paragraphs 6 and 10 of Exhibit B, it is admitted that a warranty deed dated October 21, 1908, between Central PA Lumber, as grantor, and George M. Brown, as grantee, is recorded in the Office of the Recorder of Deeds of Lycoming County in Deed Book 203, at page 110 (the "1908 Central PA Lumber/Brown Deed"). It is specifically denied that the 1908 Central PA Lumber/Brown Deed conveyed any right, title or interest in the natural gas, oil, minerals or other mineral rights in, on or under the Subject Property. To the contrary, the 1908 Central PA Lumber/Brown Deed expressly states that it was made subject to the exception and reservation of minerals, mineral rights, natural gas and/or oil in, on or under the Subject Property set forth in the 1893 Hoyt/Elk Tanning Deed. It is also denied that the 1908 Central PA Lumber/Brown Deed is "recorded in Lycoming County Deed Book 135, Page 395." On the contrary, the 1908 Central PA Lumber/Brown Deed is recorded in the Office of the Recorder of Deeds of Tioga County in Deed Book 135, at page 395. The remaining averments of Paragraphs 6 and 10 of Exhibit B state legal conclusions to which no responsive pleading is required. To the extent that a response is required, after reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of such remaining averments. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial.

d. As for Paragraphs 7 and 8 of Exhibit B, it is admitted that a treasurer's deed dated June 13, 1910, between George A. Gamble, Treasurer of Lycoming County, as grantor, and "Calvin H. M'Cauley, Jr.," as

grantee, is recorded in the Office of the Recorder of Deeds of Lycoming County in Deed Book 225, at page 235 (the "1910 Gamble/M'Cauley Deed"). It is specifically denied that the 1910 Gamble/M'Cauley Deed and/or the underlying 1910 tax sale conveyed any right, title and/or interest in the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the surface of the Subject Property. To the contrary, at the time of the 1910 tax sale, Lycoming County never made a separate tax assessment on the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. Nor could any such assessment of the natural gas and oil interests be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of a subsurface estate in a recorded deed did not create a taxable estate in "lands," and/or because there was no production, removal or development of the natural gas and oil at that time. Accordingly, a tax deed premised on an assessment in the name of the unseated surface estate owner could not convey title to the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. By way of further answer, it is specifically denied that "Calvin H. M'Cauley" is the correct name of a known individual. To the contrary, upon information and belief, the correct name of a known individual is "Calvin H. McCauley, Jr." The remaining averments of Paragraphs 7 and 8 of Exhibit B state legal conclusions to which no responsive pleading is required. To the extent that a response is required, after reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of such remaining averments.

Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial.

e. As for Paragraph 9 of Exhibit B, it is admitted that a document titled an "Assignment of Treasurer's Deed" and dated August 24, 1911, between "Calvin H. M'Cauley, Jr., and Florence M. M'Cauley, his wife," and George M. Brown and Cordie Brown, his wife, is recorded in the Office of the Recorder of Deeds of Lycoming County in Deed Book 225, at page 237 (the "1911 M'Cauley/Brown Assignment"). It is specifically denied that the 1911 M'Cauley/Brown Assignment and/or the 1910 Gamble/Brown Deed conveyed any right, title and/or interest in the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the surface of the Subject Property. To the contrary, at the time of the 1910 tax sale, Lycoming County never made a separate tax assessment on the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. Nor could any such assessment of the natural gas and oil interests be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of a subsurface estate in a recorded deed did not create a taxable estate in "lands," and/or because there was no production, removal or development of the natural gas and oil at that time. Accordingly, a tax deed premised on an assessment in the name of the unseated surface estate owner could not convey title to the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. By way of further answer, it is specifically denied that "Calvin H. M'Cauley" or

"Florence M. M'Cauley" are the correct names of known individuals. To the contrary, upon information and belief, the correct names of known individuals are "Calvin H. McCauley, Jr." and "Florence M. McCauley." The remaining averments of Paragraph 9 of Exhibit B state legal conclusions to which no responsive pleading is required. To the extent that a response is required, after reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of such remaining averments. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial.

f. As for Paragraph 5 of Exhibit B, it is admitted that a warranty deed dated October 6, 1933 between George M. Brown and Cordie Brown, his wife, as grantors, and G. A. Elder, as grantee, is recorded in the Office of the Recorder of Deeds of Lycoming County in Deed Book 294, at page 233 (the "1933 Brown/Elder Deed"). It is specifically denied that the 1933 Brown/Elder Deed conveyed any right, title or interest in the natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. To the contrary, 1933 Brown/Elder Deed was made subject to the exception and reservation of minerals, mineral rights, natural gas and/or oil in, on or under the Subject Property set forth in the 1893 Hoyt/Elk Tanning Deed. By way of further answer, Hoyt Royalty refers to and incorporates by reference the averments in Paragraphs 8.c, 8.d and 8.e of this Answer as though the same were repeated at length herein. Additionally, Hoyt Royalty notes that recorded in the Office of the Recorder of Deeds of Lycoming County in Deed Book 284, at page 9, is an "Adjudication of Bankruptcy" involving "George

Brown, of Muncy, R.D. No. 4, Lycoming County, Penna." The adjudication reflects that upon a petition filed on January 20, 1931, said George Brown was "declared and adjudged bankrupt" and a trustee by the name of Fred W. Tepel of Williamsport, PA, was appointed as the trustee of the bankruptcy estate. To the extent that said George Brown of Muncy is the same person as the grantor George M. Brown of the 1933 Brown/Elder Deed, then said deed may have been made without proper authority and/or otherwise void. Hoyt Royalty's investigation of this issue is ongoing. The remaining averments of Paragraph 5 of Exhibit B state legal conclusions to which no responsive pleading is required. To the extent that a response is required, after reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of such remaining averments. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial.

g. As for Paragraph 4 of Exhibit B, it is admitted that a treasurer's deed dated June 10, 1940, between W. Clyde Harer, Treasurer of Lycoming County, and the then Lycoming County Commissioners is recorded in the Office of the Lycoming County Recorder of Deeds in Deed Book 312, at page 8 (the "1940 Treasurer's Deed"). It is specifically denied that the 1940 Treasurer's Deed and/or the underlying 1940 tax sale conveyed any right, title and/or interest in the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the surface of the Subject Property. To the contrary, at the time of the 1940 tax sale, Lycoming County never made a separate tax assessment on the Hoyts' properly severed natural

gas, oil, minerals and/or mineral rights in, on or under the Subject Property. Nor could any such assessment of the natural gas and oil interests be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of a subsurface estate in a recorded deed did not create a taxable estate in "lands," and/or because there was no production, removal or development of the natural gas and oil at that time. Accordingly, a tax deed premised on an assessment in the name of the unseated surface estate owner could not convey title to the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. The remaining averments of Paragraph 4 of Exhibit B state legal conclusions to which no responsive pleading is required. To the extent that a response is required, after reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of such remaining averments. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial.

h. As for Paragraphs 1, 2 and 3 of Exhibit B, it is admitted that a deed dated November 25, 1942, between the then Lycoming County Commissioners, as grantors, and Margaret V. Clark, as grantees, is recorded in the Office of the Lycoming County Recorder of Deeds in Deed Book 334, at page 553 (the "1942 Commissioners/Clark Deed"). It is specifically denied that the 1942 Commissioners/Clark Deed conveyed any right, title and/or interest in the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the surface of the Subject Property. To

the contrary, at the time of the 1940 tax sale, Lycoming County never made a separate tax assessment on the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. Nor could any such assessment of the natural gas and oil interests be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of a subsurface estate in a recorded deed did not create a taxable estate in "lands," and/or because there was no production, removal or development of the natural gas and oil at that time. Accordingly, a tax deed premised on an assessment in the name of the unseated surface estate owner could not convey title to the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. By way of further answer, it is specifically denied that the date of the 1942 Commissioners/Clark Deed is "November 15, 1942." To the contrary, the 1942 Commissioners/Clark Deed states that it was made on "25th day of November A.D. 1942." The remaining averments of Paragraphs 1, 2 and 3 of Exhibit B state legal conclusions to which no responsive pleading is required. To the extent that a response is required, after reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of such remaining averments. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial.

9. The averments contained in Paragraph 9 of the Second Amended Complaint are legal conclusions to which no responsive pleading is required. To the extent

that a responsive pleading is deemed required, the averments contained in Paragraph 9 of the Second Amended Complaint are admitted in part and denied in part, as follows:

a. It is admitted that the 1893 Hoyt/Elk Tanning Deed excepted and reserved to the Hoyts, their heirs, and assigns forever all natural gas and oil and other minerals and mineral rights in, on or under various properties, including without limitation the Subject Property. It is denied that Paragraph 9.A accurately quotes the language contained in the 1893 Hoyt/Elk Tanning Deed, which is a written document that speaks for itself. It is further denied that any cloud exists on the "Plaintiff's title." To the contrary, the Hoyts and their heirs and assigns, including without limitation Hoyt Royalty, are and have always been the owners of the natural gas and oil and other minerals and mineral rights in, on and under the Subject Property. Neither the Plaintiff nor the Additional Plaintiffs or the Involuntary Plaintiffs have any right, title or interest in the natural gas, oil, minerals or mineral rights in, on or under the Subject Property. Therefore, no cloud on title exists.

b. It is admitted that the 1903 Elk Tanning/Central PA Lumber Deed was given subject to exceptions and reservations set forth in previous deeds, including the 1893 Hoyt/Elk Tanning Deed. It is denied that Paragraph 9.B accurately quotes the language of the 1903 Elk Tanning/Central PA Lumber Deed, which is a written document that speaks for itself. It is further denied that any cloud exists on the "plaintiff's title." To the contrary, the Hoyts and their heirs and assigns, including without limitation Hoyt Royalty, are

and have always been the owners of the natural gas and oil and other minerals and mineral rights in, on and under the Subject Property. Neither the Plaintiff nor the Additional Plaintiffs or the Involuntary Plaintiffs have any right, title or interest in the natural gas, oil, minerals or mineral rights in, on or under the Subject Property. Therefore, no cloud on title exists.

10. After reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 10 of the Second Amended Complaint. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial.

11. The averments contained in paragraph 11 of the Second Amended Complaint are admitted in part and denied in part. It is admitted that the 1940 Treasurer's Deed is recorded in the Office of the Lycoming County Recorder of Deeds in Deed Book 312, at page 8 and that 1942 Commissioners/Clark Deed is recorded in the Office of the Lycoming County Recorder of Deeds in Deed Book 334, at page 553. It is specifically denied that the 1940 Treasurer's Deed and/or the 1942 Commissioners/Clark Deed conveyed any right, title and/or interest in the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the surface of the Subject Property. To the contrary, at the time of the 1940 tax sale, Lycoming County never made a separate tax assessment on the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. Nor could any such assessment of the natural gas and oil interests be legally or validly made because

the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of a subsurface estate in a recorded deed did not create a taxable estate in "lands," and/or because there was no production, removal or development of the natural gas and oil at that time. Accordingly, a tax deed premised on an assessment in the name of the unseated surface estate owner could not convey title to the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. After reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of Paragraph 11 of the Second Amended Complaint. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial.

12. The averments contained in Paragraph 12 of the Second Amended Complaint are legal conclusions to which no responsive pleading is required. To the extent that a responsive pleading is deemed required, the averments are denied. To the contrary, at the time of the 1940 tax sale, Lycoming County never made a separate tax assessment on the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. Nor could any such assessment of the natural gas and oil interests be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so and/or because there was no production, removal or development of the natural gas and oil at that time. Accordingly, a tax deed premised on an assessment in the name of the unseated surface estate owner could

not convey title to the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. By way of further answer, after reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of Paragraph 12 of the Second Amended Complaint. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial.

* * *

20. In response to Paragraph 20 of the Second Amended Complaint, Hoyt Royalty refers to and incorporates by reference Paragraphs 1 through 19 of this Answer as though the same were repeated at length herein.

21. The averments contained in Paragraph 21 of the Second Amended Complaint are legal conclusions to which no responsive pleading is required. To the extent that a responsive pleading is deemed required, the averments in Paragraph 21 are admitted in part and denied in part. It is admitted that Exhibit C purports to be a copy of the 1910 Gamble/M'Cauley Deed and the 1911 M'Cauley/Brown Assignment. It is specifically denied that the 1910 Gamble/M'Cauley Deed, the 1911 M'Cauley/Brown Assignment and/or the underlying 1910 tax sale conveyed any right, title and/or interest in the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the surface of the Subject Property. To the contrary, at the time of the 1910 tax sale, Lycoming County never made a separate tax assessment on the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights

in, on or under the Subject Property. Nor could any such assessment of the natural gas and oil interests be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of a subsurface estate in a recorded deed did not create a taxable estate in "lands," and/or because there was no production, removal or development of the natural gas and oil at that time. Accordingly, a tax deed premised on an assessment in the name of the unseated surface estate owner could not convey title to the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. By way of further answer, Hoyt Royalty refers to and incorporates by reference Paragraphs 8.d and 8.e of its Answer as though the same were repeated at length herein. After reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of any remaining averments. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial.

22. The averments contained in Paragraph 22 of the Second Amended Complaint are admitted.

23. The averments contained in Paragraph 23 of the Second Amended Complaint are legal conclusions to which no responsive pleading is required. To the extent that a responsive pleading is deemed required, after reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 23 of the Second Amended Complaint. Therefore, those averments are denied in accordance with Pennsylvania

Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial. By way of further answer, it is believed and therefore averred that there exists no evidence one way or the other concerning whether the Hoyts, and/or their heirs, successors and assigns sought to have their subsurface rights assessed. However, because taxing authorities lacked the requisite statutory authority to tax natural gas and oil interests as "lands," because the mere exception and reservation of a subsurface estate in a recorded deed did not create a taxable estate in "lands," and/or because there was never any production, removal or development of the natural gas and oil at any time, no legal basis has ever existed upon which to value and tax such interests following the recording of the 1893 Hoyt/Elk Tanning Deed. As a result, because no taxable estate in "lands" existed, no duty to report any such subsurface interests existed, as confirmed by the Pennsylvania Supreme Court in *Rockwell,* which decision was rendered before the 1910 tax sale. By way of further answer, Hoyt Royalty refers to and incorporates by reference Paragraphs 26 and 29 of its Answer as though the same were repeated at length herein.

24. After reasonable investigation, Hoyt Royalty states that it is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 24 of the Second Amended Complaint. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial. By way of further answer, upon information and belief, the assessment that served as the basis for the alleged 1910 tax sale identified either Central PA

Lumber or "George Brown" as the owner of the Subject Property, neither of which had any title ownership beyond the surface estate in the Subject Property. By way of further answer, because taxing authorities lacked the requisite statutory authority to tax natural gas and oil interests as "lands," because the mere exception and reservation of a subsurface estate in a recorded deed did not create a taxable estate in "lands," and/or because there was never any production, removal or development of the natural gas and oil at any time, no legal basis existed upon which to value and tax such interests following the recording of the 1893 Hoyt/Elk Tanning Deed. Accordingly, the only taxable estate that was assessed for purposes of the 1910 tax sale was the Subject Property and not any subsurface interests, including without limitation the oil and natural gas therein.

25. The averments contained in Paragraph 25 of the Second Amended Complaint are legal conclusions to which no responsive pleading is required. To the extent that a responsive pleading is deemed required, the averments are denied. To the contrary, at the time of the 1910 tax sale, Lycoming County never made a separate tax assessment on the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. Nor could any such assessment of the natural gas and oil interests be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of a subsurface estate in a recorded deed did not create a taxable estate in "lands," and/or because there was no production, removal or development of the natural gas and oil at that time. Accordingly, the purchaser at the

1910 tax sale, which was premised on an assessment in the name of only the unseated surface estate owner, did not acquire title to the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. Instead, the estate that was conveyed by the 1910 tax sale was solely the Subject Property and not any subsurface interests, including without limitation the oil and natural gas therein, since the surface estate was the only taxable estate that was and could be validly assessed and sold.

26. The averments contained in Paragraph 26 of the Second Amended Complaint are legal conclusions to which no responsive pleading is required. To the extent that a responsive pleading is deemed required, the averments are denied. To the contrary, before the alleged 1910 tax sale in this case, the Pennsylvania Supreme Court issued its decision in *Rockwell*, wherein it explained that "title washing" is limited to those situations where taxes are specifically assessed against the oil and natural gas rights and those particular rights are sold at a subsequent tax sale. ***Rockwell,* 77 A. at 666.** Further, the Supreme Court in *Rockwell* held that the mere exception and reservation of a subsurface estate in a recorded deed does not create a taxable estate in "lands" and that absent production, removal or development of the natural gas and oil, there exists no legal basis upon which to value and tax natural gas and oil interests following the recording of deed that severed such interests from the surface estate. ***Id.* at 666-667.** Additionally, the Supreme has declared that there exists no statutory basis upon which to assess real estate taxes upon oil and natural gas interests and that oil and natural gas do not constitute "lands" within the plain meaning of that

word. ***Indep. Oil & Gas Ass'n of Pa. v. Bd. of Assessment Appeals ("IOGA"),*** **814 A.2d 180, 184 (Pa. 2002);** ***Coolspring Stone Supply, Inc. v. County of Fayette ("Coolspring Stone Supply"),*** **929 A.2d 1150, 1154 & n. 9 (Pa. 2007).** Because, as the Plaintiffs' admit, there was no assessment of the natural gas and oil and other minerals and mineral rights in, on or under the Subject Property at the time of the alleged 1910 tax sale and because there was no statutory authority or other basis *(i.e.,* production, removal or development) upon which to value the natural gas and oil at the time of the assessment that served as a basis for the 1910 tax sale, that tax sale could not have conveyed title to the Hoyts' properly severed natural gas and oil and other minerals and mineral rights in, on or under the Subject Property and did not cleanse, remove and extinguish the Hoyts' title to such interests. By way of further answer, the *Proctor* decision cited by the Plaintiffs is a federal decision which involved a purported mineral severance that occurred after both the tax assessment and the tax sale at issue in that case. As such, the *Proctor* case is inapposite to this case, as the Court in this matter has previously ruled. ***Bailey, supra.,*** **Slip op. at p. 3, n. 1.** By way of further answer, Hoyt Royalty refers to and incorporates by reference Paragraph 29 of its Answer as though the same were repeated at length herein.

27. The averments contained in Paragraph 27 of the Second Amended Complaint are legal conclusions to which no responsive pleading is required. To the extent that a responsive pleading is deemed required, the averments are denied. To the contrary, Hoyt Royalty refers to and incorporates by reference Paragraphs 22 through 26 of its Answer as though the

same were repeated at length herein. By way of further answer, as a matter of due process and Pennsylvania law, the purpose of tax laws is not to strip owners of their property, but instead only to insure the collection of valid taxes.

28. The averments contained in Paragraph 28 of the Second Amended Complaint are denied. To the contrary, there were no subsurface rights conveyed by the alleged 1910 tax sale; therefore, there were no rights to redeem. After reasonable investigation, Hoyt Royalty states that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of Paragraph 28 of the Second Amended Complaint. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial.

29. The averments contained in Paragraph 29 of the Second Amended Complaint are legal conclusions to which no responsive pleading is required. To the extent that a responsive pleading is deemed required, the averments are denied. To the contrary, the *Hutchinson* decision was an affirmance of a lower court's decision without a formal opinion by the Pennsylvania Supreme Court. *See* ***Hutchinson v. Kline*****, 49 A. 312, 319 (Pa 1901).** Moreover, the facts of that case do not specifically disclose whether or not the natural gas and oil interests involved in *Hutchinson* were under operation. ***Id.*** **at 312-318.** Further, the act addressed by the lower court in *Hutchinson* did not impose as a remedy a title divesture, but instead a four-fold tax penalty which, as a matter of law, is exclusive and cannot be

supplemented by the courts. *See* **Act of March 28, 1806, 4 Sm.L. 346, *repealed and restated by* Act 1933-155, P.L. 853, § 409, 72 P.S. § 5020-409.** Additionally, nine years after *Hutchinson,* and before the alleged 1910 tax sale in this case, the Pennsylvania Supreme Court issued its decision in *Rockwell,* wherein it explained that "title washing" is limited to those situations where taxes are specifically assessed against the oil and gas rights and those particular rights are sold at a subsequent tax sale. ***Rockwell,* 77 A. at 666.** Indeed, in *Rockwell,* the Supreme Court ruled that the tax laws involving seated and unseated lands were not intended to and did not interfere with an owner's right to dispose of his oil and gas rights by severance by virtue of an exception and reservation in a recorded deed. ***Id.*** Further, the Supreme Court in *Rockwell* held that the mere exception and reservation of a subsurface estate in a recorded deed does not create a taxable estate in "lands" and that absent production, removal or development of the natural gas and oil, there exists no legal basis upon which to value and tax natural gas and oil interests following the recording of deed that severed such interests from the surface estate. ***Id.* at 666-667.** Also, the Supreme has declared that there exists no statutory basis upon which to assess real estate taxes upon oil and natural gas interests and that oil and natural gas do not constitute "lands" within the plain meaning of that word. ***IOGA*, 814 A.2d at 184; *Coolspring Stone Supply*, 929 A.2d at 1154 & n. 9.** As a result, under Pennsylvania law, there exists no duty to report any subsurface interest unless it is a taxable estate, and therefore, *Hutchinson* has no applicability to the situation where a non-taxable oil and natural gas estate is created by a deed that is recorded years before there exists an unpaid

assessment against the unseated surface or other taxable mineral estate and a resulting tax sale thereon. *See* ***Meske v. Hull*****, Nos. 2009-CV0117 and 2011-CV-33, Slip op., at 9 (C.C.P. Sullivan C'ty, April 23, 2013);** ***Herder Spring Hunting Club v. Keller*****, No. 2008-3434, Slip op., (C.C.P. Centre C'ty, filed Sept. 29, 2010),** ***appeal quashed*** **60 A.3d 556 (Pa. Super. 2012),** ***appeal pending*** **718 MDA 2013 (Pa. Super., filed Apr. 25, 2013);** ***Day v. Johnson*****, 31 Pa. D. & C. 3d 556 (C.C.P. Warren C'ty 1983);** ***New York State Nat'l Gas Corp. v. Swan-Finch Gas Devel. Corp.*****, 173 F. Supp. 184 (W.D. Pa. 1959),** ***aff'd*** **278 F.2d 577 (3d Cir. 1960).**

30. The averments contained in Paragraph 30 of the Second Amended Complaint are legal conclusions to which no responsive pleading is required. To the extent that a responsive pleading is deemed required, the averments are denied. To the contrary, no merger and unity of the Subject Property and its subsurface estates, and in particular the non-taxable oil and natural gas interests thereunder, occurred as a result of the 1910 tax sale. By way of further answer, Hoyt Royalty refers to and incorporates by reference Paragraphs 22 through 29 of its Answer as though the same were repeated at length herein.

31. The averments contained in Paragraph 31 of the Second Amended Complaint are denied. On the contrary, the 1893 Hoyt/Elk Tanning Deed excepted and reserved to the Hoyts, their heirs, successors and assigns all natural gas and oil and other minerals and mineral rights in, on or under the properties conveyed by the 1893 Hoyt/Elk Tanning Deed, including the Subject Property, and that severance continued to exist

after the 1910 tax sale and through the date of the 1940 tax sale.

32. The averments contained in Paragraph 32 of the Second Amended Complaint are legal conclusions to which no responsive pleading is required. To the extent that a responsive pleading is deemed required, the averments are denied. To the contrary, Hoyt Royalty refers to and incorporates by reference Paragraphs 30 and 31 of its Answer as though the same were repeated at length herein.

33. The averments contained in Paragraph 33 of the Second Amended Complaint are admitted in part and denied in part. It is admitted that at the time of the alleged 1940 tax sale there was no assessment of the natural gas and oil and other minerals and mineral rights in, on or under the Subject Property. The remaining averments contained in Paragraph 33 legal conclusions to which no responsive pleading is required. To the extent that a responsive pleading is deemed required, the averments are denied. To the contrary, the only taxable estate that was assessed for purposes of the 1940 tax sale was the Subject Property. By way of further answer, it is believed and therefore averred that at the time of the 1940 tax sale, Lycoming County never made a separate tax assessment on the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. Nor could any such assessment of the natural gas and oil interests be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of a subsurface estate in a recorded deed did not create a taxable estate in "lands," and/or

because there was no production, removal or development of the natural gas and oil at that time.

34. The averments contained in Paragraph 34 of the Second Amended Complaint are admitted.

35. The averments contained in Paragraph 35 of the Second Amended Complaint are admitted in part and denied in part. It is admitted that the 1942 Commissioners/Clark Deed is recorded in the Office of the Lycoming County Recorder of Deeds in Deed Book 334, at page 553. It is specifically denied that the 1942 Commissioners/Clark Deed conveyed any right, title and/or interest in the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the surface of the Subject Property. To the contrary, at the time of the 1940 tax sale, Lycoming County never made a separate tax assessment on the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. Nor could any such assessment of the natural gas and oil interests be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of a subsurface estate in a recorded deed did not create a taxable estate in "lands," and/or because there was no production, removal or development of the natural gas and oil at that time. Accordingly, a tax deed premised on an assessment in the name of the unseated surface estate owner could not convey title to the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. The remaining averments of Paragraph 35 of the Second Amended Complaint state legal conclusions to which no responsive pleading is required. To the extent

that a response is required, after reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of such remaining averments. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial.

36. The averments contained in Paragraph 36 are admitted in part and denied in part. It is admitted that a special warranty deed dated April 13, 2012 between David C. Bailey, as grantor, and David C. Bailey and Cecelia J. Bailey, Trustees of the David C. Bailey, Sr., Trust, as grantees, is recorded in the Office of the Recorder of Deeds of Lycoming County in Deed Book 7589, at page 233 (the "2012 Bailey/Bailey Deed"). It is specifically denied that the 2012 Bailey/Bailey Deed conveyed any right, title or interest in the natural gas and oil and other minerals and mineral rights in, on or under the Subject Property. To the contrary, the 2012 Bailey/Bailey Deed was made subject to the exception and reservation of natural gas and oil and other minerals and mineral rights set forth in the 1893 Hoyt/Elk Tanning Deed. The remaining averments of Paragraph 36 of the Second Amended Complaint state legal conclusions to which no responsive pleading is required. To the extent that a response is required, after reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of such remaining averments. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial.

37. The averments contained in Paragraph 37 of the Second Amended Complaint are admitted in part and denied in part. It is admitted that a special warranty deed dated November 23, 2012, between David C. Bailey and Cecelia J. Bailey, Trustees of the David C. Bailey, Sr., Trust, as grantors, and Bonnell Run Hunting and Fishing Corporation ("Bonnell Run"), as grantee, is recorded in the Office of the Recorder of Deeds of Lycoming County in Deed Book 7815, at page 317, (the "2012 Bailey/Bonnell Run Deed"). It is specifically denied that the 2012 Bailey/Bonnell Run Deed conveyed any right, title or interest in the natural gas and oil and other minerals and mineral rights in, on or under the Subject Property. To the contrary, the 2012 Bailey/Bonnell Run Deed was made subject to the exception and reservation of natural gas and oil and other minerals and mineral rights set forth in the 1893 Hoyt/Elk Tanning Deed. The remaining averments of Paragraph 36 of the Second Amended Complaint state legal conclusions to which no responsive pleading is required. To the extent that a response is required, after reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of such remaining averments. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial.

* * *

**NEW MATTER**

In further answer to the Second Amended Complaint, Hoyt Royalty pleads the following new matter:

* * *

83. Prior to the alleged 1910 tax sale, neither the Hoyts nor their heirs, successors or assigns were notified that Lycoming County had assessed real estate taxes against their interest in the natural gas and oil or other minerals and mineral rights in, on or under the Subject Property and was intending to take and sell their interest in the natural gas and oil or other minerals and mineral rights in, on or under the Subject Property because of their alleged failure to pay assessed real estate taxes.

* * *

99. Hoyt Royalty refers to and incorporates by reference Paragraphs 51 through 92 and 104 through 106 of Hoyt Royalty's Preliminary Objections to the First Amended Complaint as though the same were repeated at length herein.

* * *

104. Absent a taxable estate, neither the Hoyts nor their heirs, successors and assigns had any duty to give notice to the Commissioners of their severed natural gas and oil interests under the 1893 Hoyt/Elk Tanning Deed.

* * *

Date: September 13, 2013

Respectfully submitted,

/s/Ronald L. Hicks, Jr.
Ronald L. Hicks, Jr.

PA ID No. 49520
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## APPENDIX M

1088784

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**No. 08-02327 (D. Anderson)**

**[Filed January 28, 2014]**

DAVID C. BAILEY, et al.,

Plaintiff.,

v.

GEORGE A. ELDER, et al.,

Defendants.

HOYT ROYALTY, LLC, et al.,

Counterclaim Plaintiffs,

v.

DAVID C. BAILEY, et al.,

Counterclaim Defendants.

**HOYT ROYALTY, LLC'S REPLY TO ANADARKO E&P ONSHORE, LLC'S NEW MATTER, AND ANSWER AND NEW MATTER TO ANADARKO E&P ONSHORE, LLC'S CROSS-CLAIM**

**REPLY TO NEW MATTER**

As a successor and assign of the heirs, administrators and assigns of the named Defendants William Hoyt and Mary Hoyt, his wife, Mark Hoyt and Ann A. Hoyt, his wife, Edward C. Hoyt and Cordelia Ida Hoyt, his wife, Theodore R. Hoyt and George Hoyt (collectively, the "Hoyts"), Additional Defendant and Counterclaim Plaintiff Hoyt Royalty, LLC ("Hoyt Royalty"), by its undersigned counsel, files this Reply to the New Matter of the Counterclaim Defendant Anadarko E&P Onshore, LLC f/k/a Anadarko E&P Company, LP ("Anadarko"), of which the following is a statement:

* * *

195. After reasonable investigation, Hoyt Royalty is without information sufficient to form a belief as to the truth of the averments in Paragraph 195 of Anadarko's New Matter. Therefore, pursuant to Pa.R.Civ.P. 1029(c), those averments are denied and strict proof thereof is demanded at the time of trial. By way of further reply, it is specifically denied that the Hoyts had any duty to separately notify any taxing authority of their severed oil and gas estate contained in the 1893 Hoyt/Elk Tanning Deed. On the contrary, no such duty existed because oil and gas are not "lands" within that statutory term's plain and ordinary meaning as declared by the Pennsylvania Supreme

Court in ***Coolspring Stone Supply v. County of Fayette*, 929 A.2d 1150 (Pa. 2007)** (***"Coolspring Stone Supply"***), and because there was no oil and gas production and thus no taxable estate as declared by the Pennsylvania Supreme Court in ***F.H. Rockwell & Co. v. Warren County*, 228 Pa. 430, 77 A. 665 (1910) *("Rockwell")*.** Moreover, it is denied that any purported failure to notify the applicable taxing authorities of the severed subsurface rights results in the divestiture of those rights through a tax sale. To the contrary, the **Act of March 21, 1806, 4 Sm. 326, P.L. 558, § 13, 46 P.S. § 156, *repealed* 1972, Dec. 6, P.L. 1339, No. 290, § 4** (the "Act of Mar. 28, 1806"), which applied at the time of the 1910 and 1940 tax sales, provides a specific penalty when any holder of unseated lands fails to comply with his or her statutory reporting duty, namely, the assessment of a four-fold penalty. That penalty is exclusive and does not include the divestiture of one's title to unseated lands. ***Philadelphia v. Miller*, 49 Pa. 440, 455-456 (Pa. 1865).**

* * *

197. The averments contained in paragraph 197 of Anadarko's New Matter are admitted. By way of further reply, in Pennsylvania, natural gas and oil are not proper items of taxation because they do not fall within the meaning of the statutory term "lands" as declared by the Pennsylvania Supreme Court in ***Coolspring Stone Supply,*** and the mere reservation of the oil and gas estate in the 1893 Hoyt/Elk Tanning Deed did not create a taxable estate because there was no oil and gas removal, production or development as declared by the Pennsylvania Supreme Court in

***Rockwell.***. Accordingly, no such assessment of the natural gas and oil interests could be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so.

* * *

221. The averments in Paragraph 221 of Anadarko's New Matter are admitted in part and denied in part. It is admitted that a treasurer's deed dated June 13, 1910, between George A. Gamble, Treasurer of Lycoming County, as grantor, and "Calvin H. M'Cauley, Jr.," as grantee, is recorded in the Office of the Recorder of Deeds of Lycoming County in Deed Book 225, at page 235 (the "1910 Gamble/M'Cauley Deed"). It is specifically denied that the 1910 Gamble/M'Cauley Deed and/or the underlying 1910 tax sale conveyed any right, title and/or interest in the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the surface of the Subject Property. To the contrary, at the time of the 1910 tax sale, Lycoming County never made a separate tax assessment on the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. Nor could any such assessment of the natural gas and oil interests be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of a subsurface estate in a recorded deed did not create a taxable estate in "lands," and/or because there was no production, removal or development of the natural gas and oil at that time. Accordingly, a tax deed premised on an assessment in the name of the unseated surface estate owner could not convey title to the Hoyts' properly severed natural

gas, oil, minerals and/or mineral rights in, on or under the Subject Property. Furthermore, at the time of the alleged 1910 tax sale, the Hoyts were not notified that the Hoyt Lycoming County Subsurface Estate was subject to sale for unpaid taxes. Accordingly, any purported sale of the Hoyt Lycoming County Subsurface Estate, without notice to the owners of the Hoyt Lycoming County Subsurface Estate violated the Hoyts' due process rights.

222. The averments in Paragraph 222 of Anadarko's New Matter are legal conclusions to which no responsive pleading is required. To the extent a responsive pleading is deemed required, the averments are denied. On the contrary, the Hoyts had no duty to separately notify any taxing authority of their severed oil and gas estate contained in the 1893 Hoyt/Elk Tanning Deed because oil and gas are not "lands" within that statutory term's plain and ordinary meaning as declared by the Pennsylvania Supreme Court in ***Coolspring Stone Supply*** and because there was no oil and gas production and thus no taxable estate as declared by the Pennsylvania Supreme Court in ***Rockwell.*** Moreover, it is denied that any purported failure to notify the applicable taxing authorities of the severed subsurface rights results in the divestiture of those rights through a tax sale. To the contrary, the Act of Mar. 28, 1806 provides a specific penalty when any holder of unseated lands fails to comply with his or her statutory reporting duty, namely, the assessment of a four-fold penalty. That penalty is exclusive and does not include the divestiture of one's title to unseated lands. ***Philadelphia v. Miller*****, 49 Pa. 440, 455-456 (Pa. 1865)** Further, at the time of the 1910 tax sale, Lycoming County never made a separate tax

assessment on the Hoyts' properly severed natural gas, oil and mineral rights in, on or under the Subject Property. Nor could any such assessment of the natural gas and oil interests be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of a subsurface estate in a recorded deed did not create a taxable estate in "lands," and/or because there was no production, removal or development of the natural gas and oil at that time. Accordingly, the only taxable estate that was assessed and sold for purposes of the 1910 tax sale was the surface of the Subject Property and not any subsurface interests, including without limitation the Hoyt Lycoming County Subsurface Estate. To conclude otherwise would be a violation of due process under the United States and Pennsylvania constitutions.

* * *

224. The averments in Paragraph 224 of Anadarko's New Matter are admitted in part and denied in part. It is admitted that a document titled an "Assignment of Treasurer's Deed" and dated August 24, 1911, between "Calvin H. M'Cauley, Jr., and Florence M. M'Cauley, his wife," and George M. Brown and Cordie Brown, his wife, is recorded in the Office of the Recorder of Deeds of Lycoming County in Deed Book 225, at page 237 (the "1911 M'Cauley/Brown Assignment"). It is specifically denied that the 1911 M'Cauley/Brown Assignment and/or the 1910 Gamble/Brown Deed conveyed any right, title and/or interest in the Hoyts Lycoming County Subsurface Estate. To the contrary, at the time of the 1910 tax sale, Lycoming County never made a separate tax

assessment on the Hoyts Lycoming County Subsurface Estate. Nor could any such assessment of the natural gas and oil interests be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of a subsurface estate in a recorded deed did not create a taxable estate in "lands," and/or because there was no production, removal or development of the natural gas and oil at that time. Accordingly, a tax deed premised on an assessment in the name of the unseated surface estate owner could not convey title to the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. By way of further answer, it is specifically denied that "Calvin H. M'Cauley" or "Florence M. M'Cauley" are the correct names of known individuals. To the contrary, upon information and belief, the correct names of known individuals are "Calvin H. McCauley, Jr." and "Florence M. McCauley." The remaining averments of Paragraph 224 state legal conclusions to which no responsive pleading is required. To the extent that a response is required, after reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of such remaining averments. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial.

* * *

235. The averments in Paragraph 235 of Anadarko's New Matter are legal conclusions to which no responsive pleading is required. To the extent a responsive pleading is deemed required, the averments

are denied. To the contrary, at the time of the 1910 and 1940 tax sales, Lycoming County never made a separate tax assessment on the Hoyt Lycoming County Subsurface Estate. Nor could any such assessment of the natural gas and oil interests be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of a subsurface estate in a recorded deed did not create a taxable estate in "lands," and/or because there was no production, removal or development of the natural gas and oil at that time. Accordingly, a tax deed premised on an assessment in the name of the unseated surface estate owner could not convey title to the Hoyt Lycoming County Subsurface Estate. Moreover, at the time of the 1910 and 1940 tax sales, Lycoming County failed to notify the Hoyts that their property was subject to sale for unpaid taxes. Therefore, any purported sale of the Hoyt Lycoming County Subsurface Estate, without notice and an opportunity to cure any alleged default was a violation of the Hoyts' due process rights.

236. The averments in Paragraph 235 of Anadarko's New Matter are legal conclusions to which no responsive pleading is required. To the extent a responsive pleading is deemed required, the averments are denied. To the contrary, the *Hutchinson* decision was an affirmance of a lower court's decision without a formal opinion by the Pennsylvania Supreme Court. *See* ***Hutchinson v. Kline*****, 49 A. 312, 319 (Pa 1901).** Moreover, the facts of that case do not specifically disclose whether or not the natural gas and oil interests involved in *Hutchinson* were under operation. ***Id.*** **at 312-318**. Further, the act addressed by the lower court in *Hutchinson* did not impose as a remedy a title

divesture, but instead a four-fold tax penalty which, as a matter of law, is exclusive and cannot be supplemented by the courts. *See* **Act of March 28, 1806, 4 Sm.L. 346, *repealed and restated by* Act 1933-155, P.L. 853, § 409, 72 P.S. § 5020-409.** Additionally, nine years after *Hutchinson*, and before the alleged 1910 tax sale in this case, the Pennsylvania Supreme Court issued its decision in ***F.H. Rockwell & Co. v. Warren County ("Rockwell"),* 228 Pa. 430, 77 A. 665 (1910),** wherein it explained that "title washing" is limited to those situations where taxes are specifically assessed against the oil and gas rights and those particular rights are sold at a subsequent tax sale. ***Rockwell*, 77 A. at 666.** Indeed, in *Rockwell,* the Supreme Court ruled that the tax laws involving seated and unseated lands were not intended to and did not interfere with an owner's right to dispose of his oil and gas rights by severance by virtue of an exception and reservation in a recorded deed. ***Id.*** Further, the Supreme Court in *Rockwell* held that the mere exception and reservation of a subsurface estate in a recorded deed does not create a taxable estate in "lands" and that absent production, removal or development of the natural gas and oil, there exists no legal basis upon which to value and tax natural gas and oil interests following the recording of deed that severed such interests from the surface estate. ***Id.* at 666-667.** Also, the Pennsylvania Supreme Court has declared that there exists no statutory basis upon which to assess real estate taxes upon oil and natural gas interests and that oil and natural gas do not constitute "lands" within the plain meaning of that statutory term. ***IOGA,* 814 A.2d at 184; *Coolspring Stone Supply*, 929 A.2d at 1154 & n. 9.** As a result, under Pennsylvania law, there exists no duty to report

any subsurface interest unless it is a taxable estate in unseated lands. Therefore, *Hutchinson* has no applicability to the situation where a non-taxable oil and natural gas estate is created by a deed that is recorded years before there exists an unpaid assessment against the unseated surface or other taxable estate and a resulting tax sale thereon. *See* ***Meske v. Hull,*** **Nos. 2009-CV0117 and 2011-CV-33, Slip op., at 9 (C.C.P. Sullivan C'ty, April 23, 2013);** ***Herder Spring Hunting Club v. Keller,*** **No. 2008-3434, Slip op., (C.C.P. Centre C'ty, filed Sept. 29, 2010),** ***appeal quashed*** **60 A.3d 556 (Pa. Super. 2012),** ***appeal pending*** **718 MDA 2013 (Pa. Super., filed Apr. 25, 2013);** ***Day v. Johnson,*** **31 Pa. D. & C. 3d 556 (C.C.P. Warren C'ty 1983);** ***New York State Nat'l Gas Corp. v. Swan-Finch Gas Devel. Corp.,*** **173 F. Supp. 184 (W.D. Pa. 1959),** ***aff'd*** **278 F.2d 577 (3d Cir. 1960).**

* * *

241. The averments in Paragraph 241 of Anadarko's New Matter are legal conclusions to which no responsive pleading is required. To the extent a responsive pleading is deemed required, the averments are denied. By way of further reply, in ***Mennonite Board of Missions v. Adams*****, 462 U.S. 791 (1983)**, the Supreme Court held that to divest a mortgage holder's interest in a property without notice and an opportunity to present objections to the sale would violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *See also* ***First Pennsylvania Bank, N.A. v. Lancaster County Tax Claim Bureau*****, 504 Pa. 179, 470 A.2d 938, 941 (1983)**; (applying the *Mennonite Board*

decision retroactively to a 1974 tax sale); ***In re Upset Sale, Tax Claim Bureau of Berks County,* 505 Pa. 327, 479 A.2d 940, 943-946 (1984)** (same as to a 1979 tax sale); ***Gay v. Cooper,* 48 Pa. D. & C.3d 512, 515-519 (C.C.P. Phila. C'ty 1988)** (applying the *Mennonite Board* decision retroactively to find that a 1983 tax sale was invalid in a case involving breach of a mortgage agreement, rejecting the claim that retroactive application would cloud the titles of many other tax sales).

* * *

243. The averments in Paragraph 243 of Anadarko's New Matter are legal conclusions to which no responsive pleading is required. To the extent a responsive pleading is deemed required, the averments are denied. To the contrary, "[i]t is the 'estate and interest . . . [of] the real owner or owners' of the land sold, which passes by the sale, and not some other estate or interest, which the 'real owner or owners' did not have." ***Tide-Water Pipe Co. v. Bell*, 280 Pa. 104, 124 A. 351, 355 (1924)**. In other words, "the default of 'the real owner or owners' was the failure to pay taxes on the land which they owned and which was subject to the [other recorded interests]; the title which the purchaser acquired was the title of that 'real owner or owners,' and not also an interest of some other owner, not taxed or referred to in the statute." ***Id.*** Hence, a sale of unseated land for taxes does not extinguish estates or interests of third persons in such unseated land. ***Western P. R. Co. v. Johnston*, 59 Pa. 290, 294 (1869); *Irwin v. Bank of United States*, 1 Pa. 349, 352-353 (1845)**. By way of further response, Hoyt Royalty incorporates its reply to Paragraphs 236 and

241 of Anadarko's New Matter as if the same were fully set forth at length herein.

244. The averments in Paragraph 244 of Anadarko's New Matter are denied as stated. On the contrary, it is believed and therefore averred that there is currently no available evidence whether the Hoyts did or did not notify the taxing authorities of the severance of the Hoyt Lycoming County Subsurface Estate from the surface of the Subject Property. Moreover, it is specifically denied that the Hoyts had any duty to notify any the taxing authority of their subsurface interests because oil and gas are not "lands" within the plain and ordinary meaning of that statutory term and because there has never been any removal, production or development of the oil and gas. Therefore, as a matter of law, no taxable estate of unseated "lands" exists within the meaning of the Act of Mar. 28, 1806, thereby negating any purported duty to report. Further, the penalty of any purported failure to notify the taxing authorities of the severance of the Hoyt Lycoming County Subsurface Estate from the surface of the Subject Property is only an assessment of a four-fold tax, which because of no production would be zero, and not the divestiture of any rights, title and interest held by Hoyt Royalty and/or its predecessors in the Hoyt Lycoming County Subsurface Estate. By way of further reply, Hoyt Royalty incorporates its reply to Paragraph 236 of Anadarko's New Matter as if the same were fully set forth at length herein.

245. The averments in Paragraph 245 are legal conclusions to which no responsive pleading is required. To the extent a responsive pleading is deemed required, the averments are denied. On the

contrary, the lack of any separate assessment against the Hoyt Lycoming County Subsurface Estate is more likely because, as a matter of law, the severed oil and gas estate was not a reportable, taxable estate of "unseated lands." By way of further reply, Hoyt Royalty incorporates its reply to paragraph 236 of Anadarko's New Matter as though the same were fully set forth at length herein.

* * *

253. The averments in Paragraph 253 of Anadarko's New Matter are legal conclusions to which no responsive pleading is required. To the extent a responsive pleading is deemed required, the averments are denied. To the contrary, before the alleged 1910 tax sale in this case, the Pennsylvania Supreme Court issued its decision in *Rockwell*, wherein it explained that "title washing" is limited to those situations where taxes are specifically assessed against the oil and gas rights and those particular rights are sold at a subsequent tax sale. ***Rockwell*, 77 A. at 666.** Indeed, in *Rockwell*, the Supreme Court ruled that the tax laws involving seated and unseated lands were not intended to and did not interfere with an owner's right to dispose of his oil and gas rights by severance by virtue of an exception and reservation in a recorded deed. ***Id.*** Further, the Supreme Court in *Rockwell* held that the mere exception and reservation of a subsurface estate in a recorded deed does not create a taxable estate in "lands" and that absent production, removal or development of the natural gas and oil, there exists no legal basis upon which to value and tax natural gas and oil interests following the recording of deed that severed such interests from the surface estate. ***Id.* at**

**666-667.** Also, the Supreme Court has declared that there exists no statutory basis upon which to assess real estate taxes upon oil and natural gas interests and that oil and natural gas do not constitute "lands" within the plain meaning of that statutory term. ***IOGA*, 814 A.2d at 184; *Coolspring Stone Supply*, 929 A.2d at 1154 & n. 9.** As a result, under Pennsylvania law, there exists no duty to report any subsurface interest unless it is a taxable estate. In this case, upon information and belief, at the time of the assessment that lead to the 1910 tax sale, there was no production, removal or development of oil and/or gas from the Hoyt Lycoming County Subsurface Estate. Therefore, there was no basis for assessing any legally permissible tax on the Hoyt Lycoming County Subsurface Estate. Accordingly, as a matter of law and fact, the 1910 tax sale could not and did not involve the Hoyt Lycoming County Subsurface Estate. To hold otherwise would be a violation of the Hoyts' due process rights.

* * *

255. The averments in paragraph 255 of Anadarko's New Matter are legal conclusions to which no responsive pleading is required. To the contrary, at the time of the 1910 tax sale, the Hoyt Lycoming County Subsurface Estate was not assessed, and could not legally be assessed, for real estate taxation purposes. Moreover, in *Rockwell*, the Supreme Court ruled that the tax laws involving seated and unseated lands were not intended to and did not interfere with an owner's right to dispose of his oil and gas rights by severance by virtue of an exception and reservation in a recorded deed. ***Id.*** Further, the Supreme Court in

*Rockwell* held that the mere exception and reservation of a subsurface estate in a recorded deed does not create a taxable estate in "lands" and that absent production, removal or development of the natural gas and oil, there exists no legal basis upon which to value and tax natural gas and oil interests following the recording of deed that severed such interests from the surface estate. ***Id.* at 666-667.** Also, the Supreme Court has declared that there exists no statutory basis upon which to assess real estate taxes upon oil and natural gas interests and that oil and natural gas do not constitute "lands" within the plain meaning of that statutory term. ***IOGA*, 814 A.2d at 184; *Coolspring Stone Supply*, 929 A.2d at 1154 & n. 9.** At the time of the assessment that lead to the alleged 1910 tax sale, there was no production, removal or development of oil and/or gas from the Hoyt Lycoming County Subsurface Estate. Therefore, there was no basis for assessing any legally permissible tax on the Hoyt Lycoming County Subsurface Estate. Accordingly, as a matter of law and fact, the 1910 tax sale could not and did not involve the Hoyt Lycoming County Subsurface Estate and Calvin H. McCauley did not acquire any title to or otherwise reunite the Hoyt Lycoming County Subsurface Estate with the Subject Property. To hold otherwise would be a violation of the Hoyts' due process rights.

* * *

**NEW MATTER TO CROSS-CLAIM**

In further answer to Anadarko's Cross-Claim, Hoyt Royalty pleads the following New Matter:

276. Hoyt Royalty incorporates Paragraphs 1 through 192 of its Answer and New Matter to Plaintiffs' Second Amended Complaint and Counterclaim, Paragraphs 1 through 90 of its Complaint to Join Additional Counterclaim Defendants and Paragraphs 193 through 275 of its Reply to Anadarko's New Matter as if the same were fully set forth at length herein.

* * *

Date: January 27, 2014

Respectfully submitted,

/s/Andrew L. Noble
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Attorneys for Defendant Hoyt Royalty, LLC

* * *

## APPENDIX N

1168561

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**No. 08-02327 (D. Anderson)**

**[Filed March 3, 2014]**

DAVID C. BAILEY, et al.,

Plaintiff.,

v.

GEORGE A. ELDER, et al.,

Defendants.

HOYT ROYALTY, LLC, et al.,

Counterclaim Plaintiffs,

v.

DAVID C. BAILEY, et al.,

Counterclaim Defendants.

**HOYT ROYALTY, LLC'S REPLY TO ANADARKO E&P ONSHORE, LLC'S NEW MATTER TO COMPLAINT TO JOIN ADDITIONAL DEFENDANTS AND ANSWER AND NEW MATTER TO ANADARKO E&P ONSHORE, LLC'S CROSS-CLAIM**

**REPLY TO NEW MATTER**

As a successor and assign of the heirs, administrators and assigns of the named Defendants William Hoyt and Mary Hoyt, his wife, Mark Hoyt and Ann A. Hoyt, his wife, Edward C. Hoyt and Cordelia Ida Hoyt, his wife, Theodore R. Hoyt and George Hoyt (collectively, the "Hoyts"), Additional Defendant and Counterclaim Plaintiff Hoyt Royalty, LLC ("Hoyt Royalty"), by its undersigned counsel, files this Reply to the New Matter of the Counterclaim Defendant Anadarko E&P Onshore, LLC f/k/a Anadarko E&P Company, LP ("Anadarko"), of which the following is a statement:

* * *

93. After reasonable investigation, Hoyt Royalty is without information sufficient to form a belief as to the truth of the averments in Paragraph 93 of Anadarko's New Matter. Therefore, pursuant to Pa.R.Civ.P. 1029(c), those averments are denied and strict proof thereof is demanded at the time of trial. By way of further reply, it is specifically denied that the Hoyts had any duty to separately notify any taxing authority of their severed oil and gas estate contained in the 1893 Hoyt/Elk Tanning Deed. On the contrary, no such duty existed because oil and gas are not "lands" within that statutory term's plain and ordinary

meaning as declared by the Pennsylvania Supreme Court in ***Coolspring Stone Supply v. County* of *Fayette,* 929 A.2d 1150 (Pa. 2007) (*"Coolspring Stone Supply"*)**, and because there was no oil and gas production and thus no taxable estate as declared by the Pennsylvania Supreme Court in ***F.H. Rockwell & Co. v. Warren County,* 228 Pa. 430, 77 A. 665 (1910) *("Rockwell")***. Moreover, it is denied that any purported failure to notify the applicable taxing authorities of the severed subsurface rights results in the divestiture of those rights through a tax sale. To the contrary, the **Act of March 21, 1806, 4 Sm. 326, P.L. 558, § 13, 46 P.S. § 156, *repealed* 1972, Dec. 6, P.L. 1339, No. 290, § 4** (the "Act of Mar. 28, 1806"), which applied at the time of the 1910 and 1940 tax sales, provides a specific penalty when any holder of unseated lands fails to comply with his or her statutory reporting duty, namely, the assessment of a four-fold penalty. That penalty is exclusive and does not include the divestiture of one's title to unseated lands. ***Philadelphia v. Miller*, 49 Pa. 440, 455-456 (Pa. 1865).**

* * *

96. The averments contained in paragraph 96 of Anadarko's New Matter are legal conclusions to which no responsive pleading is required. To the extent that a responsive pleading is deemed required, the averments are denied. By way of further reply, Hoyt Royalty incorporates Paragraphs 93 and 95 of this Reply to New Matter as if the same were fully set forth at length herein. By way of further reply, any purported divesture, extinguishment or rendering as a nullity of the Hoyts' duly severed oil and gas estate, as

Anadarko asserts, constitutes a violation of due process that has been guaranteed under both the United States and Pennsylvania constitutions.

* * *

115. The averments in Paragraph 115 of Anadarko's New Matter are admitted in part and denied in part. It is admitted that a deed from Calvin McCauley, et ux. to Central PA Lumber dated August 15, 1908 is recorded in Lycoming County Deed Book 203, at page 269 (the "1908 McCauley/Central PA Lumber Deed"). The remaining averments of Paragraph 115 state legal conclusions to which no responsive pleading is required. To the extent that a response is required, after reasonable investigation, Hoyt Royalty is without knowledge or information sufficient to form a belief as to the truth of such remaining averments. Therefore, those averments are denied in accordance with Pennsylvania Rule of Civil Procedure 1029(c) and strict proof thereof is demanded at the time of trial. By way of further reply, it is specifically denied that the 1908 McCauley/Central PA Lumber Deed conveyed any right, title and/or interest in the Hoyt Lycoming County Subsurface Estate. To the contrary, at the time of the alleged 1906 tax sale, the Hoyt Lycoming County Subsurface Estate had not been, and could not have been, assessed for taxes. Therefore, any purported sale of the Hoyt Lycoming County Subsurface Estate for unpaid taxes was void. Furthermore, at the time of the alleged 1906 tax sale, the Hoyts were not notified that the Hoyt Lycoming County Subsurface Estate was subject to sale for unpaid taxes. Accordingly, any purported sale of the Hoyt Lycoming County Subsurface Estate, without

notice to the owners of the Hoyt Lycoming County Subsurface Estate, violated the Hoyts' clue process rights. Thus, the 1908 McCauley/Central PA Lumber Deed was made subject to the Hoyts exception and reservation of the Hoyt Lycoming County Subsurface Estate set forth in the 1893 Hoyt/Elk Tanning Deed.

* * *

118. The averments in Paragraph 118 of Anadarko's New Matter are admitted in part and denied in part. It is admitted that a treasurer's deed dated June 13, 1910, between George A. Gamble, Treasurer of Lycoming County, as grantor, and "Calvin H. M'Cauley, Jr.," as grantee, is recorded in the Office of the Recorder of Deeds of Lycoming County in Deed Book 225, at page 235 (the "1910 Gamble/M'Cauley Deed"). It is specifically denied that the 1910 Gamble/M'Cauley Deed and/or the underlying 1910 tax sale conveyed any right, title and/or interest in the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the surface of the Subject Property. To the contrary, at the time of the 1910 tax sale, Lycoming County never made a separate tax assessment on the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. Nor could any such assessment of the natural gas and oil interests be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of a subsurface estate in a recorded deed did not create a taxable estate in "lands," and/or because there was no production, removal or development of the natural gas and oil at that time. Accordingly, a tax deed premised on an assessment in

the name of the unseated surface estate owner could not convey title to the Hoyts' properly severed natural gas, oil, minerals and/or mineral rights in, on or under the Subject Property. Furthermore, at the time of the alleged 1910 tax sale, the Hoyts were not notified that the Hoyt Lycoming County Subsurface Estate was subject to sale for unpaid taxes. Accordingly, any purported sale of the Hoyt Lycoming County Subsurface Estate, without notice to the owners of the Hoyt Lycoming County Subsurface Estate violated the Hoyts' due process rights.

119. The averments in Paragraph 119 of Anadarko's New Matter are legal conclusions to which no responsive pleading is required. To the extent a responsive pleading is deemed required, the averments are denied. On the contrary, the Hoyts had no duty to separately notify any taxing authority of their severed oil and gas estate contained in the 1893 Hoyt/Elk Tanning Deed because oil and gas are not "lands" within that statutory term's plain and ordinary meaning as declared by the Pennsylvania Supreme Court in ***Coolspring Stone Supply*** and because there was no oil and gas production and thus no taxable estate as declared by the Pennsylvania Supreme Court in ***Rockwell.*** Moreover, it is denied that any purported failure to notify the applicable taxing authorities of the severed subsurface rights results in the divestiture of those rights through a tax sale. To the contrary, the Act of Mar. 28, 1806 provides a specific penalty when any holder of unseated lands fails to comply with his or her statutory reporting duty, namely, the assessment of a four-fold penalty. That penalty is exclusive and does not include the divestiture of one's title to unseated lands. ***Philadelphia v. Miller*****, 49 Pa. 440, 455-456**

**(Pa. 1865)** Further, at the time of the 1910 tax sale, Lycoming County never made a separate tax assessment on the Hoyts' properly severed natural gas, oil and mineral rights in, on or under the Subject Property. Nor could any such assessment of the natural gas and oil interests be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of a subsurface estate in a recorded deed did not create a taxable estate in "lands," and/or because there was no production, removal or development of the natural gas and oil at that time. Accordingly, the only taxable estate that was assessed and sold for purposes of the 1910 tax sale was the surface of the Subject Property and not any subsurface interests, including without limitation the Hoyt Lycoming County Subsurface Estate. To conclude otherwise would be a violation of due process under the United States and Pennsylvania constitutions.

* * *

132. The averments in Paragraph 132 of Anadarko's New Matter are legal conclusions to which no responsive pleading is required. To the extent a responsive pleading is deemed required, the averments are denied. To the contrary, at the time of the 1910 and 1940 tax sales, Lycoming County never made a separate tax assessment on the Hoyt Lycoming County Subsurface Estate. Nor could any such assessment of the natural gas and oil interests be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of a subsurface estate in a recorded deed did not create a taxable estate in "lands,"

and/or because there was no production, removal or development of the natural gas and oil at that time. Accordingly, a tax deed premised on an assessment in the name of the unseated surface estate owner could not convey title to the Hoyt Lycoming County Subsurface Estate. Moreover, at the time of the 1910 and 1940 tax sales, Lycoming County failed to notify the Hoyts that their property was subject to sale for unpaid taxes. Therefore, any purported sale of the Hoyt Lycoming County Subsurface Estate, without notice and an opportunity to cure any alleged default was a violation of the Hoyts' due process rights.

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138. The averments in Paragraph 138 of Anadarko's New Matter are legal conclusions to which no responsive pleading is required. To the extent a responsive pleading is deemed required, the averments are denied. By way of further reply, in ***Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983)**, the Supreme Court held that to divest a mortgage holder's interest in a property without notice and an opportunity to present objections to the sale would violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *See also* ***First Pennsylvania Bank, N.A. v. Lancaster County Tax Claim Bureau,* 504 Pa. 179, 470 A.2d 938, 941 (1983)**; (applying the *Mennonite Board* decision retroactively to a 1974 tax sale); ***In re Upset Sale, Tax Claim Bureau of Berks County*, 505 Pa. 327, 479 A.2d 940, 943-946 (1984)** (same as to a 1979 tax sale); ***Gay v. Cooper*, 48 Pa. D. & C.3d 512, 515-519 (C.C.P. Phila. C'ty 1988)** (applying the *Mennonite Board* decision retroactively to find that a 1983 tax sale

was invalid in a case involving breach of a mortgage agreement and rejecting the claim that retroactive application would cloud the titles of many other tax sales).

* * *

141. The averments in Paragraph 141 of Anadarko's New Matter are denied as stated. On the contrary, it is believed and therefore averred that there is currently no available evidence whether the Hoyts did or did not notify the taxing authorities of the severance of the Hoyt Lycoming County Subsurface Estate from the surface of the Subject Property. Moreover, it is specifically denied that the Hoyts had any duty to notify any the taxing authority of their subsurface interests because oil and gas are not "lands" within the plain and ordinary meaning of that statutory term and because there has never been any removal, production or development of the oil and gas. Therefore, as a matter of law, no taxable estate of unseated "lands" exists within the meaning of the Act of Mar. 28, 1806, thereby negating any purported duty to report. Further, the penalty of any purported failure to notify the taxing authorities of the severance of the Hoyt Lycoming County Subsurface Estate from the surface of the Subject Property is only an assessment of a four-fold tax, which because of no production would be zero, and not the divestiture of any rights, title and interest held by Hoyt Royalty and/or its predecessors in the Hoyt Lycoming County Subsurface Estate. By way of further reply, Hoyt Royalty incorporates its reply to Paragraph 133 of Anadarko's New Matter as if the same were fully set forth at length herein.

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150. The averments in Paragraph 150 of Anadarko's New Matter are legal conclusions to which no responsive pleading is required. To the extent a responsive pleading is deemed required, the averments are denied. To the contrary, before the alleged 1910 tax sale in this case, the Pennsylvania Supreme Court issued its decision in *Rockwell*, wherein it explained that "title washing" is limited to those situations where taxes are specifically assessed against the oil and gas rights and those particular rights are sold at a subsequent tax sale. ***Rockwell*, 77 A. at 666.** Indeed, in *Rockwell*, the Supreme Court ruled that the tax laws involving seated and unseated lands were not intended to and did not interfere with an owner's right to dispose of his oil and gas rights by severance by virtue of an exception and reservation in a recorded deed. ***Id.*** Further, the Supreme Court in *Rockwell* held that the mere exception and reservation of a subsurface estate in a recorded deed does not create a taxable estate in "lands" and that absent production, removal or development of the natural gas and oil, there exists no legal basis upon which to value and tax natural gas and oil interests following the recording of deed that severed such interests from the surface estate. ***Id.* at 666-667.** Also, the Supreme Court has declared that there exists no statutory basis upon which to assess real estate taxes upon oil and natural gas interests and that oil and natural gas do not constitute "lands" within the plain meaning of that statutory term. ***IOGA*, 814 A.2d at 184; *Coolspring Stone Supply*, 929 A.2d at 1154 & n. 9.** As a result, under Pennsylvania law, there exists no duty to report any subsurface interest unless it is a taxable estate. In this case, upon information and belief, at the time of the assessment that lead to the 1910 tax sale, there was no

production, removal or development of oil and/or gas from the Hoyt Lycoming County Subsurface Estate. Therefore, there was no basis for assessing any legally permissible tax on the Hoyt Lycoming County Subsurface Estate. Accordingly, as a matter of law and fact, the 1910 tax sale could not and did not involve the Hoyt Lycoming County Subsurface Estate. To hold otherwise would be a violation of the Hoyts' due process rights.

* * *

152. The averments in paragraph 152 of Anadarko's New Matter are legal conclusions to which no responsive pleading is required. To the extent that a responsive pleading is deemed required, the averments are denied. To the contrary, at the time of the 1910 tax sale, the Hoyt Lycoming County Subsurface Estate was not assessed, and could not legally be assessed, for real estate taxation purposes. Moreover, in *Rockwell*, the Supreme Court ruled that the tax laws involving seated and unseated lands were not intended to and did not interfere with an owner's right to dispose of his oil and gas rights by severance by virtue of an exception and reservation in a recorded deed. ***Rockwell*, 77 A. at 666**. Further, the Supreme Court in *Rockwell* held that the mere exception and reservation of a subsurface estate in a recorded deed does not create a taxable estate in "lands" and that absent production, removal or development of the natural gas and oil, there exists no legal basis upon which to value and tax natural gas and oil interests following the recording of deed that severed such interests from the surface estate. ***Id.* at 666-667.** Also, the Supreme Court has declared that there exists no

statutory basis upon which to assess real estate taxes upon oil and natural gas interests and that oil and natural gas do not constitute "lands" within the plain meaning of that statutory term. ***IOGA*, 814 A.2d at 184; *Coolspring Stone Supply*, 929 A.2d at 1154 & n. 9.** At the time of the assessment that lead to the alleged 1910 tax sale, there was no production, removal or development of oil and/or gas from the Hoyt Lycoming County Subsurface Estate. Therefore, there was no basis for assessing any legally permissible tax on the Hoyt Lycoming County Subsurface Estate. Accordingly, as a matter of law and fact, the 1910 tax sale could not and did not involve the Hoyt Lycoming County Subsurface Estate and Calvin H. McCauley did not acquire any title to or otherwise reunite the Hoyt Lycoming County Subsurface Estate with the Subject Property. To hold otherwise would be a violation of the Hoyts' due process rights.

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**NEW MATTER TO CROSS-CLAIM**

In further answer to Anadarko's Cross-Claim, Hoyt Royalty pleads the following New Matter:

179. Hoyt Royalty incorporates Paragraphs 1 through 192 of its Answer and New Matter to Plaintiffs' Second Amended Complaint and Counterclaim, Paragraphs 1 through 90 of its Complaint to Join Additional Counterclaim Defendants and Paragraphs 91 through 159 of its Reply to Anadarko's New Matter as if the same were fully set forth at length herein.

* * *

Date: February 28, 2014

Respectfully submitted,

/s/Ronald L. Hicks, Jr.
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* * *

## APPENDIX O

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**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**No. 08-02327 (D. Anderson)**

**[Filed October 10, 2014]**

DAVID C. BAILEY, et al.,

Plaintiffs,

v.

GEORGE A. ELDER, et al.,

Defendants.

HOYT ROYALTY, LLC, et al.,

Counterclaim Plaintiffs,

v. )
)
DAVID C. BAILEY, et al., )
)
Counterclaim Defendants. )
_____ )

**HOYT ROYALTY, LLC'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND NEW MATTER**

* * *

**RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

* * *

7. The averments in Paragraph 7 of the plaintiffs' Motion constitute legal conclusions and/or inadmissible hearsay and are not supported by any admissible evidence of record. Therefore, Hoyt Royalty neither admits nor denies those averments and demands proof of same. On a motion for summary judgment, the moving party has the burden of proving the absence of any genuine issue of material fact. **Pa. R.C.P. No. 1035.2(1);*Kuney v. Benjamin Franklin Clinic*, 751 A.2d 662, 664 (Pa. Super. 2000)**. The moving party may not rely on bald assertions or unsupported allegations to support its motion for summary judgment. ***Id.*** To the extent that a Response is deemed required and the averments are otherwise admissible for summary judgment purposes, the averments contained in Paragraph 7 of the plaintiffs' Motion (which refer to and incorporate by reference Paragraphs 1 through 12 of Exhibit A to the plaintiffs'

Motion) are admitted in part and denied in part (in reverse date order), as follows:

* * *

d. As for Paragraphs 7 and 8 of Exhibit A of the plaintiffs' Motion, it is admitted that a treasurer's deed dated June 13, 1910, between George A. Gamble, Treasurer of Lycoming County, as grantor, and "Calvin H. M'Cauley, Jr.," as grantee, is recorded in the Office of the Recorder of Deeds of Lycoming County in Deed Book 225, at page 235 (the "1910 Gamble/M'Cauley Deed"). It is denied that the 1910 Gamble/M'Cauley Deed and/or the underlying 1910 tax sale conveyed any right, title and/or interest in the Hoyts' Oil and Gas Estate. To the contrary, at the time of the 1910 tax sale, Lycoming County never made a separate tax assessment on the Hoyts' properly severed and recorded Oil and Gas Estate. (Sec. Am. Cmp. [App. Exh. 1], ¶ 22). Nor could any such assessment of the natural gas and oil interests be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of an oil and gas estate in a recorded deed did not create a taxable estate in "lands" which by definition refers to only the surface estate, and/or because there was no production, removal or development of the natural gas and oil at that time. ***Coolspring Stone Supply v. Fayette County,* 593 Pa. 338, 348, 929 A.2d 1150, 1155-56 (Pa. 2007); *Indep. Oil & Gas Ass'n of Pa. v. Bd. of Assessment Appeals* ("IOGA"), 572 Pa. 240, 246-47, 814 A.2d 180, 184 (2002); *F.H. Rockwell & Co. v. Warren County*, 228 Pa. 430, 432, 77 A. 655, 666 (1910).** Accordingly, a tax deed premised on an assessment in

the name of the unseated surface estate owner could not and did not convey title to the Hoyts' Oil and Gas Estate. To hold otherwise abrogates the rule of property that a deed with an exception and reservation of the underlying oil, gas or other subsurface interest "works a severance of the estate so conveyed from the surface, and if the deed be recorded it is constructive notice to all the world of the fact of severance." ***Delaware & Hudson Canal Co. v. Hughes*, 183 Pa. 66, 69-70, 38 A. 568, 569 (1897)**. See also ***First Citizens Nat'l Bank v. Sherwood,* 583 Pa. 466, 471, 879 A.2d 178, 181 (2005)** (as a matter of law, a party has constructive notice of deeds and other written agreements affecting real estate which are properly recorded, even if defectively indexed); ***Tide-Water Pipe Co. v. Bell*, 280 Pa. 104, 113, 124 A. 351, 354 (1924)** (courts must strictly adhere to rules of property unless specifically altered by legislation). Furthermore, at no time prior to either the 1910 Tax sale or the 1940 Tax sale were the Hoyts or their heirs, successors and/or assigns notified that their interest in the Hoyts' Oil and Gas Estate was subject to sale for failure to pay delinquent taxes. Therefore, any purported sale of those interests violated the due process rights of the Hoyts and their heirs, successors and assigns under the United States and Pennsylvania Constitutions. ***Mennonite Bd. of Missions v. Adams,* 462 U.S. 791, 795 (1983); *Walker v. City of Hutchinson,* 352 U.S. 112 (1956); *Schroeder v. New York City,* 371 U.S. 208 (1962); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950); *First Penn. Bank, N.A. v. Lancaster C'ty Tax Claim Bureau,* 504 Pa. 179, 470 A.2d 938 (1983).**

* * *

g. As for Paragraph 4 of Exhibit A of the plaintiffs' Motion, it is admitted that a treasurer's deed dated June 10, 1940, between W. Clyde Harer, Treasurer of Lycoming County, and the then Lycoming County Commissioners is recorded in the Office of the Lycoming County Recorder of Deeds in Deed Book 312, at page 8 (the "1940 Treasurer's Deed"). It is denied that the 1940 Treasurer's Deed and/or the underlying 1940 tax sale conveyed any right, title and/or interest in the Hoyts' Oil and Gas Estate. To the contrary, at the time of the 1940 tax sale, Lycoming County never made a separate tax assessment on the Hoyts' properly severed and recorded Oil and Gas Estate. (Sec. Am. Cmp. [App. Exh. 1], ¶ 33). Nor could any such assessment of the natural gas and oil interests be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of a oil and gas estate in a recorded deed did not create a taxable estate in "lands" which by definition refers to only the surface estate, and/or because there was no production, removal or development of the natural gas and oil at that time. ***Coolspring Stone Supply v. Fayette County,* 593 Pa. 338, 348, 929 A.2d 1150, 1155-56 (Pa. 2007); *Indep. Oil & Gas Ass'n of Pa. v. Bd. of Assessment Appeals* ("IOGA"), 572 Pa. 240, 246-47, 814 A.2d 180, 184 (2002); *F.H. Rockwell & Co. v. Warren County,* 228 Pa. 430, 432, 77 A. 655, 666 (1910).** Accordingly, a tax deed premised on an assessment in the name of the unseated surface estate owner could not and did not convey title to the Hoyts' Oil and Gas Estate. To hold otherwise abrogates the rule of property that a deed with an exception and

reservation of the underlying oil, gas or other subsurface interest "works a severance of the estate so conveyed from the surface, and if the deed be recorded it is constructive notice to all the world of the fact of severance." ***Delaware & Hudson Canal Co. v. Hughes*, 183 Pa. 66, 69-70, 38 A. 568, 569 (1897)**. See also ***First Citizens Nat'l Bank v. Sherwood*, 583 Pa. 466, 471, 879 A.2d 178, 181 (2005)** (as a matter of law, a party has constructive notice of deeds and other written agreements affecting real estate which are properly recorded, even if defectively indexed); ***Tide-Water Pipe Co. v. Bell*, 280 Pa. 104, 113, 124 A. 351, 354 (1924)** (courts must strictly adhere to rules of property unless specifically altered by legislation). Furthermore, at no time prior to either the 1910 Tax sale or the 1940 Tax sale were the Hoyts or their heirs, successors and/or assigns notified that their interest in the Hoyts' Oil and Gas Estate was subject to sale for failure to pay delinquent taxes. Therefore, any purported sale of those interests violated the due process rights of the Hoyts and their heirs, successors and assigns under the United States and Pennsylvania Constitutions. ***Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956); *Schroeder v. New York City*, 371 U.S. 208 (1962); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *First Penn. Bank, N.A. v. Lancaster C'ty Tax Claim Bureau*, 504 Pa. 179, 470 A.2d 938 (1983)**.

* * *

12. The averments in paragraph 12 of the plaintiffs' Motion are admitted. By way of further

response, Hoyt Royalty states that no separate assessment of the natural gas and oil interests could legally or validly be made because the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of a oil and gas estate in a recorded deed did not create a taxable estate in "lands" which by definition refers to only the surface estate, and/or because there was no production, removal or development of the natural gas and oil at that time. ***Coolspring Stone Supply*, 593 Pa. 338, 348, 929 A.2d 1150, 1155-56 (Pa. 2007); *Indep. Oil & Gas Ass'n of Pa. v. Bd. of Assessment Appeals* ("IOGA"), 572 Pa. 240, 246-47, 814 A.2d 180, 184 (2002); *F.H. Rockwell & Co. v. Warren County*, 228 Pa. 430, 432, 77 A. 655, 666 (1910).**

* * *

22. The averments in Paragraph 22 of the plaintiffs' Motion are legal conclusions and not material facts upon which the plaintiffs' Motion is based. Therefore, no Response is required to those averments. To the extent that a Response is required, the averments are denied. On the contrary, the Pennsylvania Supreme Court expressly ruled in ***Tide-Water Pipe*,** that under the Act of April 3, 1804, "a sale of unseated land for taxes . . . vests the title, when regularly made, in the vendee, to the exclusion of all claimants to the land of a prior date." However, as written, the act divests only those prior claimants to the estate and interest of the real owner of the unseated land that was assessed and sold, and not others whose estates or interests were duly severed and recorded prior to the assessment, regardless of whether those estates or interests were separately

taxed. ***Tide-Water Pipe*, 280 Pa. at 115, 124 A. at 355.** As the Pennsylvania Supreme Court succinctly stated:

> It is the "estate and interest . . . [of] the real owner or owners" of the land sold, which passes by the sale, and not some other estate or interest, which the "real owner or owners" did not have. The default of "the real owner or owners" was the failure to pay taxes on the [unseated] land, which they owned and which was subject to the right-of-way; the title which the purchaser acquired was the title of that "real owner or owners," and not also an interest of some other owner, not taxed or referred to in the statute.

***Id.***

* * *

28. The averments in Paragraph 28 of the plaintiffs' Motion are admitted in part and denied in part. It is admitted that the plaintiffs' Second Amended Complaint alleges the existence of two tax sales. The remaining averments are legal conclusions to which no Response is required. To the extent that a Response is deemed required, the averments are denied. It is denied that there is or was any requirement that the Hoyts provide any further notice of their interest in their duly recorded Oil and Gas Estate. To the contrary, at the time of the 1910 tax sale and the 1940 tax sale, the Hoyts' mere reservation of their Oil and Gas Estate did not constitute a taxable estate as a matter of law. ***F.H. Rockwell & Co. v. Warren County*, 228 Pa. 430, 432, 77 A. 655, 666 (1910)**.

Therefore, there was no requirement under the Act of 1806 to report the Hoyts' duly severed and recorded Oil and Gas Estate until there was production or other basis upon which an assessment of the oil and gas estate could be made. As the Third Circuit Court of Appeals has noted, natural gas could not be valued "until after the process of hydraulic fracturing was invented in 1949 [when] it became possible to ascertain the presence of natural gas in commercially significant quantities in [Pennsylvania]." ***New York State Nat'l Gas Corp. v. Swan-Finch Gas Devel. Corp.*, 278 F.2d 577, 580 (3d Cir. 1960)**. As such, at the time of the 1910 and 1940 tax sales, no valuation evidence existed with respect to the Hoyts' duly severed and reserved Oil and Gas Estate because, as Bailey has conceded, there was never any production or other similar tax assessments. (Countercl. [App. Exh. 3], ¶ 64; Plaintiffs' Reply to Hoyt Royalty's New Matter [App. Exh. 4], ¶ 64). Therefore, the Hoyts had no obligation to report their severed Oil and Gas Estate to the County Commissioners. Even if there was an obligation to report the Hoyts' Oil and Gas Estate, the plaintiffs have offered no evidence that such notice was not given. It is well known that Susquehanna River, which runs through Williamsport, the county seat of Lycoming County, has produced several substantial flooding events, including major floods in 1894, 1902, 1904, 1910, 1936, 1946 and 1972. [App. Exh. 8]. Indeed, the Lycoming County Courthouse has flooded on several occasions.[1] Thus, based on the evidence

[1] Pursuant to the Pennsylvania Rules of Evidence, this Court may take judicial notice of these facts, which are generally known within this Court's territorial jurisdiction. **Pa.R.Evid. 201.**

presented by the plaintiff, or lack thereof, an issue of fact exists as to whether the Hoyts gave notice of the severance and the records of that notice were lost or destroyed. Finally, even if there was an obligation to report the severed Oil and Gas Estate and evidence existed to show that obligation was not fulfilled, the failure to report the Oil and Gas Estate does not result in the confiscation and sale of the estate for unpaid taxes. To the contrary, the exclusive remedy for the failure to report under the Act of 1806 is the imposition of a four-fold tax penalty. ***Philadelphia v. Miller*, 49 Pa. 440, 451 (1865).** Under Pennsylvania law, the remedies provided for in the taxing statutes for the collection of taxes are exclusive remedies and "no other remedy than that afforded by the statute can be used." ***Derry Tp. School Dist. v. Barnett Coal Co.*, 332 Pa. 174, 177, 2 A.2d 758, 760 (1938).** Indeed, Section 13 of the Act of March 21, 1806 provides that: "In all cases where a remedy is provided or duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of said acts shall be strictly pursued. ..." **Act of March 21, 1806, 4 Sm. 326, P.L. 558, § 13, 46 P.S. § 156, *repealed* 1972, Dec. 6, P.L. 1339, No. 290, § 4, imd. effective.** By way of further Response, Hoyt Royalty incorporates Paragraphs 55 through 76, inclusive, of its New Matter to the plaintiffs' Motion for Summary Judgment as if the same were fully set forth at length herein.

* * *

**ADDITIONAL RESPONSE TO THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

* * *

33. The plaintiffs' Motion should be denied because:

a. The sole basis for the plaintiffs' Motion is the Hoyts' alleged failure to notify the Lycoming County Commissioners of their severance of the Oil and Gas Estate from the surface estate. (Motion, ¶ 28). However, the plaintiffs have presented absolutely no evidence that notice was not given. The plaintiffs have offered no evidence that Lycoming County was taxing non-producing oil and gas estates at the time of either the 1910 tax sale or the 1940 tax sale. Nor have plaintiffs proffered any admissible evidence that the Hoyts' duly severed and reserved Oil and Gas Estate was capable of being valued despite its admittedly non-producing status. Absent admissible evidence being proffered by the plaintiffs that the Hoyts' Oil and Gas Estate could be valued, there exists no duty to report under the **Act of March 28, 1806, 4 Sm.L. 346, *repealed and restated by* 72 P.S. § 5020-409** ("Act of 1806").

b. The plaintiffs' have misconstrued the Act of 1806 to impose a reporting duty on the owner of a non-producing and non-taxable oil and gas estate. However, the Act of 1806 does not specifically address the situation where a single parcel of land has been severed horizontally. ***Herder Spring Hunt Club v. Keller*, 93 A.3d 465, 469 (Pa. Super. 2014)**. Even if the Act of 1806 did impose

the reporting duty asserted by the plaintiffs, the Pennsylvania Supreme Court declared years ago that the exclusive remedy under the Act of 1806 for a failure to fulfill that duty is ***only*** the imposition of a four-fold tax and not the confiscation and sale of property. ***Philadelphia v. Miller*****, 49 Pa. 440, 451 (1865).**

c. The plaintiffs admit that prior to the 1910 tax sale and the 1940 tax sale, there were never any tax assessments levied against of the Hoyts' right, title and interest in the Oil and Gas Estate. (Sec. Am. Cmp. [App. Exh. 1), ¶ 22; Motion, ¶ 12). Also, Plaintiffs admit[2] that the tax assessments which served as a basis for the 1910 and 1940 tax sales were not made on any drilling, production or other development of the natural gas and oil or other minerals from the Hoyts' Oil and Gas Estate. (Countercl. [App. Exh. 3), ¶¶ 80 & 89; Plaintiffs' Reply to Hoyt Royalty's New Matter[App. Exh. 4], ¶¶ 80 & 89). Further, the Plaintiffs have stated that they no knowledge or other information that any of their predecessors in title have ever drilled, produced, removed or developed natural gas and oil or other minerals from the Hoyts' Oil and Gas Estate, including without limitation at or prior to the 1910 and 1940 tax sales. (Plaintiffs' Reply to Hoyt Royalty's New Matter [App. Exh. 4], ¶ 64). Nor

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[2] Pennsylvania Rule of Civil Procedure 1029(b) provides that "[a] general denial or a demand for proof ... shall have the effect of an admission." Pa.R.C.P. No. 1029(b). *See* ***Piehl v. City of Philadelphia*****, 930 A.2d 607, 615-616 (Pa. Cmwlth. 2007);** ***Scales v. Sheffield Fabricating & Machine Co.*****, 258 Pa. Super. 568, 393 A.2d 680, 681-683 (Pa. Super. 1978).**

do they have any knowledge or information that at the time of the 1910 and 1940 tax sales there existed any technology which could extract the natural gas from the Hoyts' Oil and Gas Estate in a commercially feasible manner. (Plaintiffs' Reply to Hoyt Royalty's New Matter [App. Exh. 4], ¶¶ 81 & 90). Moreover, Plaintiffs have admitted through their general denial that at the time of the 1940 tax sale, Lycoming County was not assessing natural gas and oil interests for purpose of real estate taxes. (Plaintiffs' Reply to Hoyt Royalty's New Matter [App. Exh. 4], ¶ 91). At the time of both the 1910 tax sale and the 1940 tax sale, a mere reservation of an oil and/or gas estate did not create a taxable estate absent some basis upon which a valuation of the estate could be based, such as development in the neighborhood or the sale of oil and gas lands in close proximity. ***F.H. Rockwell & Co. v. Warren County*, 228 Pa. 430, 432, 77 A. 655, 666 (1910).** In their Motion, the plaintiffs have not cited any admissible evidence of any production from the Hoyts' Oil and Gas Estate or any other information upon which a tax assessment could be based, and through their pleadings, the plaintiffs have admitted that no such evidence exists. Absent an assessment, and a failure to pay that assessment, a tax sale cannot convey title to property. *See* ***Miller v. McCullough*, 104 Pa. 624, 629-630 (1884); *Brundred v. Egbert*, 164 Pa. 615, 622, 30 A. 503, 505 (1894); *Albert v. Lehigh Coal & Navigation Co.*, 431 Pa. 600, 613, 246 A.2d 840, 846 *(citing Africa v. Trexler*, 232 Pa. 493, 503, 81 A. 707 (1911); *Albright v. Byers-Allen Lumber Co.*, 204 Pa. 71, 53 A. 648 (1902); *Laird v. Hiester*, 24 Pa.**

**452, 463 (1855); *Bozitsko v. Hoffman*, 207 Pa. Super. 493, 496, 218 A.2d 835 (1966)).**

d. The plaintiffs, who claim title by virtue of a tax sale, must be able to point to substantial compliance with all the prerequisites provided for in the statutes. ***Norris v. Delaware, Lackawanna & Western R.R. Co.*, 218 Pa. 88, 94-95, 66 A. 1122, 1125 (1907). *See also Osmer v. Sheasley*, 219 Pa. 390, 394, 68 A. 965, 966 (1908)**. Among those prerequisites is notice to the landowner and an opportunity to satisfy the tax debt. ***Norris*, 218 Pa. at 94-95, 66 A. at 1125.** In this case, the plaintiffs have offered no evidence that the Hoyts or their successors, heirs and/or assigns were notified that Lycoming County had assessed real estate taxes against their interest in the Oil and Gas Estate and was intending to take and sell their interest in the Oil and Gas Estate because of their alleged failure to pay assessed real estate taxes. Indeed, the evidence shows that such notice was, in fact not given to the Hoyts or their successors. The real estate tax assessment that served as the basis for the 1910 tax sale was made in 1909 in the name of Central PA Lumber for a total assessment of $10.90. (Countercl. [App. Exh. 3], ¶¶74-75).[3] The

[3] Paragraphs 74-75 of Hoyt Royalty's Counterclaim allege that the assessment that served as the basis for the 1910 Tax sale was made in 1909 in the name of Central Pennsylvania Lumber Company for a total assessment of $10.90. The plaintiffs failed to specifically deny those allegations. (Plaintiffs' Reply to Hoyt Royalty's New Matter [App. Exh. 4], ¶¶ 74-75). Therefore, pursuant to Pennsylvania Rule of Civil Procedure 1029(b), those factual averments are deemed admitted. *See infra*., n .1.

real estate tax assessment that served as the basis for the 1940 tax sale was made in 1939 in the name of George A. Elder for a total assessment of $29.64. (Countercl. [App. Exh. 3], ¶¶ 85-86).[4]

e. The confiscation and sale of the Hoyts' and their successors' right, title and interest in the Oil and Gas Estate, without the requisite notice violates their due process rights under the United States and Pennsylvania Constitutions. ***Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).**

* * *

55. Our Supreme Court has provided the following guidance with respect to statutory construction:

> In all matters involving statutory interpretation, we apply the Statutory Construction Act, 1 Pa.C.S. §1501 et seq., which provides that the object of interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. A statute's plain language generally provides the best indication of legislative intent. Only where the words of a statute are not explicit will we resort

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[4] The plaintiffs also failed to specifically deny the factual averments in Paragraphs 85 and 86 of Hoyt Royalty's Counterclaim. (Plaintiffs' Reply to Hoyt Royalty's New Matter [App. Exh. 4], ¶¶ 85, 86). Therefore, those averments are also deemed admitted. **Pa.R.Civ.P. 1029(b)**.

> to other considerations to discern legislative intent.

***Ephrata Area Sch. Dist. v. County of Lancaster*, 595 Pa. 111, 122, 938 A.2d 264, 271 (2007)**.

56. In Pennsylvania, "there is no such thing as taxation by implication[; rather] all authorities having to do with the valuation and assessment of land and the levy and collection of taxes must look to the statutes for their authority to act." ***Boulton v. Starck*, 369 Pa. 45, 48, 85 A.2d 17, 19 (Pa. 1951)**.

57. Moreover, "taxing statutes are subject to a strict construction and that, if there is any reasonable doubt as to their interpretation, such doubt must be resolved in favor of the taxpayer and against the taxing authority." ***Alan Wood Steel Co. v. Phila. Sch. Dist.*, 425 Pa. 455, 463, 229 A.2d 881, 885 (1967)**. Thus, this Court must strictly construe the Act of 1806

58. When the Act of 1806 is strictly construed, it is clear that the holder of a recorded, severed oil and gas estate has no duty to report any such interest under the Act of 1806 because oil and natural gas are not "lands." Instead, the term "lands" means only the surface estate. ***Coolspring Stone Supply,* 593 Pa. at 348, 929 A.2d at 1155-56**. *See also* ***Indep. Oil & Gas Ass'n of Pa. v. Bd. of Assessment Appeals* ("IOGA"), 572 Pa. 240, 246-47, 814 A.2d 180, 184 (2002)**.

59. Thus, contrary to the plaintiffs' assertions, based on a strict construction of its language, the Act of 1806 imposes no reporting duty upon the holder of a recorded oil and natural gas estate which has been severed from the surface estate.

* * *

68. Authority, controlling at the time of both the 1910 tax sale and the 1940 tax sale holds that there must be an estate in "unseated lands" that is both subject to taxation and being taxed by the taxing authorities in order for a tax sale to be valid. ***Rockwell*, 228 Pa. at 432, 77 A. at 666**. In ***Rockwell***, the Supreme Court held that a mere reservation of an oil and/or gas estate is not "real estate" subject to taxation absent some basis upon which a valuation may be based, such as development in the neighborhood or the sale of oil and gas lands in close proximity. ***Id***. In the absence of any evidence upon which a valuation could be based, a reserved oil and gas estate is not real estate subject to assessment for taxation purposes, and the owner of such non-producing oil and gas would have no knowledge that it was to provide notice of such non-assessable interest. ***Id***. In the absence of an assessment, the duly reserved and non-producing oil and gas rights could not have been sold at any tax sale. ***Boulton*, 396 Pa. at 48, 85 A.2d at 19**.

69. It is well established that judicial construction of a statute becomes part of the legislation from the date of its enactment. ***Commonwealth v. Williams*, 594 Pa. 366, 936 A.2d 12, 26 (2007), *appeal dismissed* 2014 Pa. LEXIS (Pa., July 21, 2014)**. At the time of the 1910 tax sale and the 1940 tax sale, ***Rockwell*** was controlling authority. Therefore, the holding of ***Rockwell*** - that a mere reservation of oil and gas rights without some other evidence upon which to base a valuation does not create a taxable estate - was part of the Act of 1806 at

the time of the 1910 Tax sale and the 1940 Tax sale and requires the existence of such valuation evidence before any duty to report arises under the Act of 1806.

* * *

73. Before a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment of the United States Constitution requires the government to provide the owner "notice and opportunity for hearing appropriate to the nature of the case." ***Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)**. The notice required to comply with the Due Process Clause must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." ***Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983)**; *See also* ***Walker v. City of Hutchinson*, 352 U.S. 112 (1956)** (notice of condemnation proceedings published in a local newspaper was an inadequate means of informing a landowner whose name was known to the city and was on the official records); **Schroeder v. New York City, 371 U.S. 208 (1962)** (publication in a newspaper and posted notices were inadequate to apprise a property owner of condemnation proceedings when his name and address were readily ascertainable from both deed records and tax rolls); ***First Penn. Bank, N.A. v. Lancaster C'ty Tax Claim Bureau*, 504 Pa. 179, 470 A.2d 938 (1983)** (notice to mortgagee of record by publication failed to comply with due process requirements).

74. Similarly, under Pennsylvania law, due process dictates that an owner shall not be deprived of

his property by failure to perform a duty imposed by law (i.e., pay taxes), unless he has notice or an opportunity to discharge the duty (i.e., through the issuance and delivery of a valid assessment). ***Norris v. Delaware, Lackawanna & Western R.R. Co.*, 218 Pa. 88, 66 A. 1122, 1125 (Pa. 1907)**. As a result, "[i]t is hornbook law that, absent a delinquency in the payment of taxes, a tax sale based upon such delinquency must fall." ***Albert v. Lehigh Coal & Navigation Co.*, 431 Pa. 600, 246 A.2d 840, 847 (1968)**. This result is appropriate because "[t]he purpose of tax sales is not to strip the taxpayer of his property but to insure the collection of taxes." ***Hess v. Westerwick*, 366 Pa. 90, 96, 76 A. 745 (1950)**.

75. As early as 1847, our Supreme Court has recognized that no person shall lose his property without due process. ***Brown v. Hummel,* 6 Pa. 86, 91 (1847)**. Further, although an unseated landowner could cure any title defects by defaulting on assessed real estate taxes and purchasing the unseated land at the tax sale and then have vested in him all "estate and interest" sold, ***Coxe v. Gibson*, 27 Pa. 160, 165 (1856)**, the Supreme Comi has made clear that such "title washing" does not destroy any prior recorded estates or interests in the unseated land, whether or not they are separately taxable. ***Tide-Water Pipe Co. v. Bell*, 280 Pa. 104, 115, 124 A. 351 355 (1924)**.

76. In this case, there is no dispute that the Hoyts' 1893 reservation was duly recorded in the Lycoming County Recorder of Deeds' office. (Sec. Am. Cmp. [App. Exh 1], ¶9.A). Thus, pursuant to ***Tide-Water Pipe***, those tax sales did not divest the Hoyts of their recorded interest in the Oil and Gas Estate.

* * *

Date: October 9, 2014

Respectfully submitted,

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* * *

## APPENDIX P

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**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**No. 08-02327 (D. Anderson)**

**[Filed November 5, 2014]**

DAVID C. BAILEY, et al.,

Plaintiffs,

v.

GEORGE A. ELDER, et al.,

Defendants.

HOYT ROYALTY, LLC, et al.,

Counterclaim Plaintiffs,

v. )
)
DAVID C. BAILEY, et al., )
)
Counterclaim Defendants. )
_____ )

**HOYT ROYALTY, LLC'S AMENDED SUPPLEMENTAL RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND NEW MATTER**

* * *

82. The sole basis for the Baileys' Motion is the Hoyts' alleged failure under the Act of 1806 to notify the Lycoming County Commissioners of their severance of the Hoyt's Oil and Gas Estate from the surface estate before the 1910 and 1940 tax sales. However, the Baileys have misconstrued the Act of 1806 to impose a reporting duty on the owner of a non-producing and non-taxable oil and gas estate. The Act of 1806 does not specifically address the situation where a single parcel of land has been severed horizontally. ***Herder Spring Hunt Club v. Keller*, 93 A.3d 465, 469 (Pa. Super. 2014)**. Nor does a strict construction of the tax statute warrant its application to such situation.

* * *

85. Despite this controlling authority, the Baileys have not strictly construed the Act of 1806. Had such construction been done, then it would have been easily discerned from the statute's plain language that the holder of a recorded, severed oil and gas estate has no duty to report any such interest under the Act of 1806 because oil and natural gas are not "lands." Instead,

the term "lands" means only the surface estate. ***Coolspring Stone Supply,* 593 Pa. at 348, 929 A.2d at 1155-56.**[2] See also ***Indep. Oil & Gas Ass'n of Pa. v. Bd. of Assessment Appeals ("IOGA"),* 572 Pa. 240, 246-47, 814 A.2d 180, 184 (2002).** Consequently, based on a strict construction of its language, the Act of 1806 imposes no reporting duty upon the holder of a recorded oil and natural gas estate which has been severed from the unseated surface estate.

86. In their pleadings, the Baileys have noted certain decisions relied upon by them in support of their argument that the Hoyts had a duty to report their severed oil and gas estate under the Act of 1806: namely, ***Hutchinson v. Kline,* 199 Pa. 564, 49 A. 312 (1901),** and ***Proctor v. Sagamore Big Game Club,* 166 F.Supp. 465 (W.D.Pa. 1958).** However, under the Statutory Construction Act, reliance on such authority is inappropriate because there is no ambiguity in the statute's language, including without limitation the term "lands." **1 Pa.C.S. §1921(b)**. Moreover, neither of these cases engaged in any statutory construction of the Act of 1806. See ***Hutchinson,* 199 Pa. at 564-65, 49 A. at 312; *Proctor,* 166 F.Supp. at 470.** The Pennsylvania Supreme Court has previously refused to follow earlier decisions when such statutory

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[2] In ***Coolspring Stone Supply,*** the Pennsylvania Supreme Court explained that "[l]and is defined as, inter alia, 'the solid part of the earth's surface not covered by water' and as 'a specific part of the earth's surface.'" ***Coolspring Stone Supply,* 593 Pa. at 348, 929 A.2d at 1155** (citing **Webster's New World Dictionary 791 (2d college ed. 1986)).** Accordingly, the Supreme Court held that "neither oil nor gas is a solid structure on the earth's surface" and do not fall within the dictionary definition of the term "land." ***Id.* at 348, 929 A.2d at 1155-1156.**

construction is lacking. *See, e.g.*, ***Coolspring Stone Supply,* 593 Pa. at 350, n.9, 929 A.2d at 1157, n.9; *IOGA,* 572 Pa. at 243, n.5, 814 A.2d at 182, n.5.** Thus, this Court must strictly construe the Act of 1806 in accordance with its plain and unambiguous language.

87. Additionally, even if the Act of 1806 does apply to the holder of a recorded oil and natural gas estate which has been severed from the unseated surface estate, which is expressly denied, the fact remains that the Act of 1806 provides a specific penalty for one's failure to report, which penalty is not the confiscation of one's property. (5/9/14 Super. Ct. Op., p. 13, n. 10.) As the Pennsylvania Supreme Court declared years ago, the statute's exclusive remedy for a failure to report is ***only*** the imposition of a four- fold tax. ***Philadelphia v. Miller,* 49 Pa. 440, 451 (1865).** Under Pennsylvania law, the remedies provided for in the taxing statutes for the collection of taxes are exclusive remedies and "no other remedy than that afforded by the statute can be used." ***Derry Tp. School Dist. v. Barnett Coal Co.,* 332 Pa. 174, 177, 2 A.2d 758, 760 (1938).** Indeed, Section 13 of the Act of March 21, 1806 provides that: "In all cases where a remedy is provided or duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of said acts shall be strictly pursued. ..." **Act of March 21, 1806, 4 Sm. 326, P.L. 558, § 13, 46 P.S. § 156, *repealed* 1972, Dec. 6, P.L. 1339, No. 290, § 4, imd. effective.**

88. Because the Act of 1806 provides only for the assessment of a four-fold tax and not a title divestiture, the Baileys' claim of title based on the 1910 and 1940

tax sales is without statutory or other legal authority. The Pennsylvania Supreme Court's decision in ***Philadelphia v. Miller*** is illustrative of this point. In that case, which was decided approximately thirty-six years prior to ***Hutchinson,*** the Supreme Court ruled that a tax sale of unseated land that was warranted in the name of James Trembel and surveyed as 401.57 acres was invalid when the underlying assessment was in the name of "John Turnbull" for "four hundred acres." ***Philadelphia,* 49 Pa. at 448-456**. In reaching this holding, the Supreme Court rejected the argument that failure to comply with the Act of 1806 can result in a divestiture of one's unseated land. ***Id.* at 450**. As the Supreme Court succinctly stated:

> Owners of unseated lands are for the most part non-residents, far away from their property. Under these circumstances, to erect the high standard of diligence thus set up for us, where the penalty of its non-observance is so greatly disproportioned, as is the loss of a man's whole estate to the pittance of tax imposed upon it, is to exact a duty most onerous, and higher than the law itself has given us. ***The penalty of the law for a failure to make a return of land for taxation is fourfold taxation, but not confiscation of estate. We should not be wiser than the law.***

***Id.*** (emphasis added).[3]

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[3] Of course, if the oil and gas interests have no value, then no real estate tax in any amount, including a four-fold penalty, would be due. As a result, the dispossession through a tax sale of non-taxable oil and gas interests (to the extent they fall within the

89. When the Act of 1806 is strictly construed, it becomes clear that the Baileys' reliance on any purported failure by the Hoyts to report their severed oil and gas interests fails as a matter of law. Accordingly, judgment in favor of the Baileys must be denied.

* * *

95. In this case, the Baileys have admitted that the unpaid assessments which served as a basis for the 1910 and 1940 tax sales were solely in the name of the then surface estate owners and not in the name of the Hoyts or their business, and that the underlying assessments were not based upon the production of natural gas, oil or other minerals or mineral rights under the assessed acreage. Moreover, the Baileys have admitted that at or prior to the time of the 1910 and 1940 tax sales, the Hoyt Oil and Gas Estate was not assessed for taxation purposes. Nor could any such assessment of the natural gas and oil interests be legally or validly made because the taxing authorities lacked the requisite statutory authority to do so, because the mere exception and reservation of an oil and gas estate in a recorded deed did not create a taxable estate in "lands" which by definition and strict interpretation refers to only the surface estate, and/or because there was no production, removal or development of the natural gas and oil at that time. ***Coolspring Stone Supply*, 593 Pa. at 348, 929 A.2d at 1155-56; *IOGA*, 814 A.2d at 184; *F.H. Rockwell &***

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plain and ordinary meaning of the term "lands") would not address the government's concern for locating taxable unseated lands to satisfy unpaid taxes.

***Co. v. Warren County*, 228 Pa. 430, 432, 77 A. 655, 666 (1910).** Accordingly, a genuine issue of material fact exists as to whether a tax deed premised on an assessment in the name of the unseated surface estate owner could have and did convey title to the Hoyt Oil and Gas Estate as part of the 1910 and 1940 tax sales.

96. It is a well-established rule of property that a deed with an exception and reservation of the underlying oil, gas or other subsurface interest "works a severance of the estate so conveyed from the surface, and if the deed be recorded it is constructive notice to all the world of the fact of severance." ***Delaware & Hudson Canal Co. v. Hughes*, 183 Pa. 66, 69-70, 38 A. 568, 569 (1897). *See also First Citizens Nat'l Bank v. Sherwood*, 583 Pa. 466, 471, 879 A.2d 178, 181 (2005)** (as a matter of law, a party has constructive notice of deeds and other written agreements affecting real estate which are properly recorded, even if defectively indexed). Moreover, an owner's right to sever an oil and gas estate from the surface estate by an exception and reservation in a recorded deed is not impacted in any manner by the differences that may exist in the power of taxing authorities to levy and collect taxes on unseated versus seated lands. ***Rockwell*, 77 A. at 665-66**. Accordingly, an owner's severance of an oil and gas estate from the surface estate by an exception and reservation in a recorded deed is not lost or destroyed because different methods of making assessments and collecting taxes levied against unseated lands were enacted by the Pennsylvania legislature. ***Id. See also Tide-Water Pipe Co. v. Bell*, 280 Pa. 104, 124 A. 351, 354 (1924)** (courts must strictly adhere to rules of property unless specifically altered by legislation).

97. In ***Tide-Water Pipe,*** the plaintiff company had recorded in 1882 with the office of the recorder of deeds a right-of-way for the construction and maintenance of one or more petroleum pipes upon certain unseated farm land owned by the property's then owners. ***Tide-Water Pipe,*** **280 Pa. at 108, 124 A. at 352.** In 1918, the unseated farm land was sold for unpaid taxes which had been assessed years after the right-of-way had been recorded. ***Id.*** **at 108-09, 124 A. at 352.** As part of the tax sale, neither the right-of-way nor the plaintiff company was mentioned. ***Id.*** **at 109, 124 A. at 352.** After the defendant purchased the property at the tax sale and waited for the two-year redemption period to expire, defendant brought an ejectment action against the plaintiff company, claiming that he had obtained good title to the whole property under the provisions of section 5 of the **Act of April 3, 1804, 4 Sm. L. 201, P.L. 517, 72 P.S. §6044,** ***repealed*** **1949, April 6, P.L. 400, No. 47, § 1,**[4] which purportedly divested plaintiff's title to the right-of-way. ***Id.*** **at 110 & 115, 124 A. at 353 & 355.**

98. On appeal, the Pennsylvania Supreme Court disagreed, "being of the opinion that Plaintiff's title to the right-of-way has not been lost." ***Id.*** **at 110, 124 A. at 353.** In rejecting defendant's position, the Pennsylvania Supreme Court recognized that under

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[4] Section 5 of the Act of April 3, 1804 provides: "That sales of unseated lands for taxes . . . shall be in law and equity valid and effectual, to all intents and purposes, to vest in the purchaser or purchasers of lands sold as aforesaid, all the estate and interest therein, that the real owner or owners thereof had at the time of such sale, although the land may not have been taxed or sold in the name of the real owner thereof."

the Act of April 3, 1804, "a sale of unseated land for taxes . . . vests the title, when regularly made, in the vendee, to the exclusion of all claimants to the land of a prior date." ***Id.*** **at 115, 124 A. at 355.** However, the Supreme Court explained that, as written, the act divests only those prior claimants to the estate and interest of the real owner of the unseated land that was assessed and sold, and not others whose estates or interests were duly severed and recorded prior to the assessment, regardless of whether those estates or interests were separately taxed. ***Id.*** As the Supreme Court succinctly stated:

> It is the "estate and interest . . . [of] the real owner or owners" of the land sold, which passes by the sale, and not some other estate or interest, which the "real owner or owners" did not have. The default of "the real owner or owners" was the failure to pay taxes on the [unseated] land, which they owned and which was subject to the right-of-way; the title which the purchaser acquired was the title of that "real owner or owners," and not also an interest of some other owner, not taxed or referred to in the statute.

***Id.***

99. Here, the Hoyts followed the well-established rule of property by recording in the Lycoming County Recorder of Deeds' office their deed containing their 1893 reservation. Moreover, that recording was done well in advance of the 1910 and 1940 tax sales and the assessments which led to those sales. Neither the Act of 1806 nor any other legislation has abrogated this rule of property or otherwise advised the Hoyts or their

heirs, successors and assigns that their recorded oil and gas reservation could be divested through a tax sale made in the name of the then unseated surface estate owner. Thus, based on ***Tide-Water Pipe,*** judgment in favor of the Baileys is inappropriate. To hold otherwise abrogates well-established rules of property and violates the due process rights of the Hoyts and their heirs, successors and assigns.

* * *

107. Before a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment of the United States Constitution requires the government to provide the owner "notice and opportunity for hearing appropriate to the nature of the case." ***Mullane v. Central Hanover Bank & Trust Co.,*** **339 U.S. 306, 313 (1950).** The notice required to comply with the Due Process Clause must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." ***Mennonite Bd. of Missions v. Adams*****, 462 U.S. 791, 795 (1983)** *See also* ***Walker v. City of Hutchinson*****, 352 U.S. 112 (1956)** (notice of condemnation proceedings published in a local newspaper was an inadequate means of informing a landowner whose name was known to the city and was on the official records); ***Schroeder v. New York City*****, 371 U.S. 208 (1962**) (publication in a newspaper and posted notices were inadequate to apprise a property owner of condemnation proceedings when his name and address were readily ascertainable from both deed records and tax rolls); ***First Penn. Bank, N.A. v. Lancaster C'ty Tax Claim Bureau*****,**

**504 Pa. 179, 470 A.2d 938 (1983**) (notice to mortgagee of record by publication failed to comply with due process requirements).

108. Similarly, under Pennsylvania law, due process dictates that an owner shall not be deprived of his property by failure to perform a duty imposed by law (*i.e.*, pay taxes), unless he has notice or an opportunity to discharge the duty (*i.e.*, through the issuance and delivery of a valid assessment). ***Norris*, 66 A. at 1125.** Indeed, as early as 1847, the Pennsylvania Supreme Court has recognized that no person shall lose his property without due process. ***Brown v. Hummel*, 6 Pa. 86, 91 (1847).** As a result, "[i]t is hornbook law that, absent a delinquency in the payment of taxes, a tax sale based upon such delinquency must fall." ***Albert v. Lehigh Coal & Navigation Co.*, 431 Pa. 600, 246 A.2d 840, 847 (1968)**. This result is appropriate because "[t]he purpose of tax sales is not to strip the taxpayer of his property but to insure the collection of taxes." ***Hess v. Westerwick*, 366 Pa. 90, 96, 76 A. 745 (1950)**.

109. Further, although an unseated landowner could cure any title defects by defaulting on assessed real estate taxes and purchasing the unseated land at the tax sale and then have vested in him all "estate and interest" sold, ***Coxe v. Gibson*, 27 Pa. 160, 165 (1856),** the Pennsylvania Supreme Court has made clear that such "title washing" does not destroy any prior recorded estates or interests in the unseated land, whether or not they are separately taxable. ***Tide-Water Pipe*, 280 Pa. at 115, 124 A. at 355.** To hold otherwise would be a violation of both federal and state due process. ***Mullane*, 339 U.S. at 311; *Mennonite***

***Bd. of Missions*, 462 U.S. at 795; *Walker*, 352 U.S. 112; *Schroeder*, 371 U.S. 208; *First Penn. Bank*, 470 A.2d 938**.

110. In this case, there is no dispute that the Hoyts' 1893 reservation was duly recorded in the Lycoming County Recorder of Deeds' office. Moreover, the Baileys have not offered any evidence that as part of the 1910 and 1940 tax sales, the Hoyts or their successors, heirs and/or assigns were notified that Lycoming County had assessed real estate taxes against their interest in the Hoyt Oil and Gas Estate and was intending to take and sell their interest in the Hoyt Oil and Gas Estate because of the Hoyts' alleged failure to pay assessed real estate taxes. Indeed, the evidence shows that such notice was, in fact, not given to the Hoyts or their heirs, successors and assigns.[6] Thus, absent evidence of proper notice being given of the underlying assessments and subsequent tax sales, the Baileys are not entitled to judgment in their favor.

111. The alleged confiscation and sale in 1910 and/or 1940 of the rights, title and interests of the Hoyts and their heirs, successors and assigns in the Hoyt Oil and Gas Estate (which undisputedly were set forth in a deed that was duly recorded in the Office of the Recorder of Deeds of Lycoming County and thus known to all) without the requisite notice and

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[6] Moreover, because oil and natural gas do not fall within the plain and ordinary meaning of the term "land," *see infra.*, n. 2, and because they were not otherwise assessable in any other manner, they were not taxable or otherwise subject to assessment or a duty to report under the Act of 1806 and, thus, the Hoyts and their heirs had no need or reason to redeem them.

opportunity to satisfy the tax debt violates due process under the United States and Pennsylvania Constitutions. ***Mullane*, 339 U.S. at 311; *Mennonite*, 462 U.S. at 795; *Walker*, 352 U.S. 112; *Schroeder*, 371 U.S. 208; *First Penn. Bank*, 470 A.2d 938**. Accordingly, judgment in favor of the Baileys is inappropriate.

112. In reply to the Hoyts' due process argument, the Baileys rely on the decision in ***Texaco, Inc. v. Short*, 454 U.S. 516 (1982).** However, the statute at issue in that case was not a tax statute but instead a property abandonment statute that has been rejected by the Pennsylvania General Assembly several times.[7] Unlike property abandonment statutes, the purpose of tax statutes is the collection of taxes and not the confiscation of property. Therefore, in Pennsylvania, "taxing statutes are subject to a strict construction and that, if there is any reasonable doubt as to their interpretation, such doubt must be resolved in favor of the taxpayer and against the taxing authority." ***Alan Wood Steel Co. v. Phila. Sch. Dist.*, 425 Pa. 455, 463, 229 A.2d 881, 885 (1967)**.

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[7] Pennsylvania's current Dormant Oil and Gas Act does not authorize an abandonment or confiscation of dormant oil and gas interests. Instead, Pennsylvania's DOGA mandates the establishment of a trust for any unknown owners of such interests. *See* **58 P.S. § 701.2** ("The purpose of this act is to facilitate the development of subsurface properties by reducing the problems caused by fragmented and unknown or unlocatable ownership of oil and gas interests and to protect the interests of unknown or unlocatable owners of oil and gas. It is not the purpose of this act to vest the surface owner with title to oil and gas interests that have been severed from the surface estate.") & **58 P.S. § 701.4**.

* * *

Date: November 5, 2014

Respectfully submitted,

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* * *

## APPENDIX Q

### 72 P.S. § 5020-409

**§ 5020-409. Persons acquiring unseated lands to furnish statement to county commissioners**

It shall be the duty of every person hereafter becoming a holder of unseated lands, by gift, grant or other conveyance, to furnish to the county commissioners, or board for the assessment and revision of taxes, as the case may be, a statement signed by such holder, or his, her, or their agent, containing a description of each tract so acquired, the name of the person or persons to whom the original title from the Commonwealth passed, and the nature, number and date of such original title, together with the date, of the conveyance to such holder, and the name of the grantor, within one year from and after such conveyance, and on failure of any holder of unseated lands to comply with the injunctions of this act, it shall be the duty of the county commissioners to assess on every tract of land, respecting which such default shall be made when discovered, four times the amount of the tax to which such tract or tracts of land would have been otherwise liable, and to enforce the collection thereof, in the same manner that taxes due on unseated lands are or any be assessed and collected: Provided, That nothing in this section shall be construed as giving greater validity to unexecuted land warrants than they are now entitled to, nor to the detriment of persons under legal disabilities, provided such person or persons comply with the foregoing requisitions within the time or times

limited, respectively, after such disability shall be removed.

History

Act 1933-155, P.L. 853, § 409, approved May 22, 1933, eff. Sept 1, 1933.

## APPENDIX R

### *The Statutes at Large of Pennsylvania*

### CHAPTER MMDXXIV.

AN ACT DIRECTING THE MODE OF SELLING UNSEATED LANDS FOR TAXES.

Section I. (Section I, P. L.) Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, That in order to furnish the commissioners of the several counties within this commonwealth with information necessary for levying and collecting the several taxes which by law they are or may be directed and required to levy and collect, it shall be the duty of the deputy-surveyors of the several counties aforesaid, at any time upon the application of the said commissioners to make out (on oath or affirmation) a correct return to them of all the lands surveyed within their respective counties, whereof as deputy-surveyors they may have drafts, maps or plates, made by themselves or their predecessors in office, and of all the warrants or orders of survey to them directed, and not yet executed, or of such of them as the said commissioners may require, which returns shall include a list of the number of acres contained in each survey or warrant, and of the names and surnames of the original warrantees, the waters on which the same is situate, the land contiguous thereto, and the township, if known, wherein the same may lie; for

which returns the said deputy-surveyors shall receive from the county treasurer, on the order of the commissioners, four cents for each warrant or survey thus returned to the said commissioners; and every deputy-surveyor, who, when required, shall refuse or neglect to make such return, shall forfeit and pay for every such neglect or refusal one hundred dollars, to be recovered as other debts of equal amount are or may be by law recoverable; and the said county commissioners are hereby enjoined and required to provide and keep a suitable book or books, in which they shall cause to be entered the number of acres surveyed, the name of the original owner and boundaries, so far as it shall be known to them, of each tract mentioned in every such return which they have already received or may hereafter receive from any of the deputy-surveyors aforesaid.

Section II. (Section II, P. L.) And be it further enacted by the authority aforesaid, That all unseated lands within this commonwealth, held by individuals, companies or bodies corporate, either by improvement, warrant, patent or otherwise, shall, for the purpose of raising county rates and levies, be valued and assessed in the same manner as other property; but the collection of taxes already laid, or that may hereafter be laid or assessed, on unseated lands, shall not be enforced by sale of such lands, until after the expiration of twelve months from and after the same shall have been assessed, and until notice he given by the commissioners of the proper county, for four weeks, in three of the daily newspapers of the city of Philadelphia, and in one other newspaper in or nearest to the county where such lands lie, that one or more than one year's tax is due upon the unseated lands

within such county; and if any tax now due or that may hereafter become due as aforesaid, together with the costs necessarily accrued thereon, shall, for the space of three months after such notice shall have been given, remain unpaid, then, in every such case, the said county commissioners shall issue their warrants, under their hands and seal of office, directed to the sheriff or coroner of the proper county, commanding him, after having given within his proper county, at least thirty days notice in one newspaper printed in such county, or if there be no newspaper printed in the county, then one printed nearest thereto, and by written or printed advertisements set up in at least three public places, one of which shall be at the court-house in said county, stating that the sale of unseated lands for arrearages of taxes will commence on a certain day, to make public sale of the whole or any part of such tracts of unseated lands as he may find necessary for the payment of the taxes due thereon, respectively, and of all costs necessarily accrued thereon, by reason of such delinquency, and to make and execute a deed or deeds, in fee simple, to the purchaser or purchasers of any unseated lands so sold, and the same in open court of common pleas of the proper county, duly to acknowledge; it shall also be the duty of said sheriff or coroner, to take from such purchaser or purchasers, bonds in his own name, with warrants of attorney annexed, for any surplus money that may remain after satisfying and paying the taxes and costs aforesaid, and the same bonds forthwith to file in the office of the prothonotary of the proper county, together with at least one attested copy of the advertisements, which shall so as aforesaid by him have been set up.

Section III. (Section III, P. L.) And be it further enacted by the authority aforesaid, That it shall be the duty of the said county commissioners to file in the prothonotary's office aforesaid, one at least of each of the newspapers in which they shall have published their general notice; which newspaper, so filed, together with the affidavit of at least one of the printers, that the aforesaid notice was published in the usual number of his papers, and the advertisement of the sheriff or coroner, filed as aforesaid, shall at all times thereafter, in any trial or law or in equity, respecting the validity of sales made by virtue of this act, be deemed and taken as sufficient evidence of legal notice having been given of the sales hereby directed to be made; and no action for recovery of said lands shall lie, unless the same be brought within five years after the sale thereof, for taxes as aforesaid: Provided always, that where the owner or owners of such lands sold as aforesaid, shall at the time of such sale be minor or minors, insane, and residing within the United States, five years after such disability is removed, shall be allowed such person or personal their heirs or legal representatives, to bring their suit or action for recovery of the lands so sold; but where the recovery is effected, in such cases the value of the improvements made on the lands so sold, after the sale thereof, shall be ascertained by the jury trying the action for recovery, and paid by the person or persons recovering the same, before he, she or they shall obtain possession of the lands so recovered.

Section IV. (Section IV, P. L.) And be it further enacted by the authority aforesaid, That the bonds taken by the sheriff or coroner for surplus monies, and filed as aforesaid, shall, from the date of the deed

executed by him as aforesaid, bind as effectually and in like manner as judgments, the lands by him sold, into whose hands or possession soever they may come; and the owners of said lands, at the time of sale, or their heirs, assigns or other legal representatives, may, at any time within five years after such sales, cause actions to he entered on the docket of the said prothonotary, in the name of the sheriff or coroner, for the use of the said owners, their heirs or assigns, or other legal representatives; and if the monies mentioned or contained in such bonds, together with legal interest from the time it is demanded, be not paid within three months after such entry, execution shall issue forth with for the recovery of the same.

Section V. (Section V, P. L.) And he it further enacted by the authority aforesaid, That sales of unseated lands, for taxes that are now due, or that may hereafter become due thereon, made agreeably to the directions of this act, shall be in law and equity valid and effectual, to all intents and purposes, to vest in the purchaser or purchasers of lands sold as aforesaid, all the estate and interest therein, that the real owner or owners thereof had at the time of such sale, although the land may not have been taxed or sold in the name of the real owner thereof.

Section VI. (Section VI, P. L.) And be it further enacted by the authority aforesaid, That every tenant who may or shall occupy or possess any lands or tenements, shall be liable to pay all the taxes which during such occupancy or possession may thereon become due and payable; and having so paid such taxes, or any part thereof, it shall be lawful for him, by action of debt or otherwise, to recover said taxes from

his landlord, or, at his election, to defalcate the amount thereof in the payment of the rent due to such landlord, unless such defalcation or recovery would impair any contract or agreement between them previously made.

Section VII. (Section VII, P. L.) And be it further enacted by the authority aforesaid, That the twenty-fifth section of the act for raising county rates and levies, passed the eleventh day of April one thousand seven thousand and, ninety-nine,[1] and so much of any other act of assembly as is hereby altered or supplied, be and they are hereby repealed; but nothing in this act contained shall be construed to impair or in any wise affect the act, entitled "An act prohibiting the commissioners of the respective counties of this commonwealth from selling, for a limited time, unseated lands for taxes," passed the eighth day of Ferbuary in the present year.[2]

Approved April 3, 1804. Recorded in L. B. No. 10, p. 37.

Note ([1]). Chapter 2095; Statutes at Large, p. 375.

Note ([2]). Chapter 2427. Supra, this; volume, p. 566.

ACTS

OF THE

GENERAL ASSEMBLY OF PENNSYLVANIA

Passed at a Session which was begun and held at Lancaster on Tuesday, December 4th, 1804, and from thence continued until April 4th, 1805, (inclusive).

## UNSEATED LANDS SELLING OF FOR TAXES

### Act of Mar. 13, 1815, P.L. 177, No. 128 Cl. 53

AN ACT

To amend the act, entitled "An act directing the mode of selling unseated lands for taxes, and for other purposes."

**Compiler's Note:** Section 801 of Act 542 of 1947 provided that Act 128 is repealed in so far as it applies to taxing districts coming within the provisions of and operating under Act 542.

Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, That the treasurers of the several counties in this commonwealth, shall be, and they are hereby respectively authorized and directed, to commence on the second Monday in June, in the year one thousand eight hundred and sixteen, and at the expiration of every two years thereafter, and adjourn from day to day if it shall be found necessary so to do, and make public sale of the whole or any part of such tracts of unseated lands, situate in the proper county, as will pay the arrearages of the taxes, any part of which shall then have remained due and unpaid for the space of one year before, together with all costs necessarily accruing by reason of such delinquency, and to make and execute a deed or deeds, in fee simple, in the manner directed by the act to which this is a further supplement; and in one other newspaper in or nearest to the county where such lands lie, under the penalty of fifty dollars, in each and every case, to be recovered

by the owner or owners of the land sold as aforesaid, as debts of like amount are by law recoverable, but the neglect of such treasurer to cause the said publications to be made, shall not, in any case, invalidate any sale made in pursuance of the provisions of this act.

(1 repealed in part Mar. 9, 1847, P.L.278, No.221)

Section 2. Treasurer to execute deeds for lands sold by predecessor; validation

When any treasurer, who shall have made sale of unseated lands, as aforesaid, shall die or be removed from office, or when the term of office of such treasurer shall have expired, before any deed or deeds are executed by him to the purchaser or purchasers, then, and in every such case, it shall be the duty of the treasurer, for the time being, to perfect such title and execute a deed or deeds to the purchaser or purchasers, and they are hereby empowered and required, upon the full discharge and payment of the money or price for which the said lands were sold, with such cost and charges as remain unpaid to the former treasurer, to make, execute and acknowledge any deed or deeds, and to perform and do all other matters and things that by the former treasurer might, could or ought to have been performed or done, which, when done, shall be held and adjudged as effectual in law as if the title had been completed by the former treasurer; and any deed or deeds heretofore executed by any treasurer in accordance with this section are hereby validated.

(2 amended Apr. 13, 1933, P.L.34, No.29)

Section 3. Payment of purchase money

It shall be the duty of the purchaser at treasurers' sales, as soon as any deed or deeds shall have been tendered, after the deeds are acknowledged in the court of common pleas of the proper county, by the treasurer who made the sale, or his successor, as the case may be, to pay to the treasurer the amount of the purchase money, or such part thereof as shall be necessary to pay off the taxes and costs, and also to pay, in addition, the sum of one dollar for the use of the prothonotary for entering the acknowledgment of the deed; and in case the amount is not forthwith paid, it is hereby declared to be the duty of the treasurer to bring an action of debt, in the name of the proper county, for the same, in such courts as debts of equal amount are by law recoverable, and when judgment is obtained there shall be no stay of execution, nor shall it be competent for the defendant in such suit, to give, in evidence, any irregularity in the assessments or proceedings of the commissioners or treasurer, touching any sale made in pursuance of this act. 1815, March 13, P.L. 177, 6 sm. L. 299, Sec. 3.

Section 4. Owners may redeem within two years

If the owner or owners of lands sold as aforesaid, shall make, or cause to be made, within two years after such sale, an offer or legal tender of the amount of the taxes for which the said lands were sold, and the costs, together with the additional sum of fifteen per cent on the same, to the county treasurer, who is hereby authorized and required to receive and receipt for the same, and to pay it over to the said purchaser upon demand, and if it shall be refused by the said treasurer, or in case the owner or owners of land so sold, shall

have paid the taxes due on them, previously to the sale, then, and in either of these cases, said owner or owners shall be entitled to recover he same by due course of law, but in no other case and on no other plea, shall an action be sustained, and it is hereby declared that so much of the act to which this is a supplement, (Act of 1804, April 3, P.L. 517 as requires notice of the taxes being due and sale thereon to be given in certain public newspapers, is repealed, and that no alleged irregularity in the assessment, or in the process or otherwise, shall be construed or taken to affect the title of the purchaser, but the same shall be declared to be good and legal. Provided, That where the owner or owners of land sold as aforesaid, shall, at the time of such sale, be an orphan or orphans, or insane, and residing within the United States, two years after such disability is removed, shall be allowed such person or persons, their heirs or legal representatives, to bring their suit or action for recovery of the lands so sold, but where the recovery is affected in such cases, the value of the improvements made on the land so sold, after the sale thereof, shall be ascertained by the jury trying the action for recovery, and paid by the person or persons recovering the same, before he, she or they shall obtain possession of the lands so recovered. 1815, March 13, P.L. 177, 6 sm.L. 299, Sec. 4; 1935, July 12, P.L. 663, Sec. 1.

Section 5. Commissioners to purchase lands not bringing taxes and costs; taxation

If any tract of unseated land, hereafter to be sold for taxes due at this time, or which shall hereafter be imposed, shall not have bidden for it a sum equal to the whole amount of taxes for which it shall have been

advertised, and the costs accrued, then, and in that case, it shall be the duty of the commissioners of the proper county, or any one of them, to bid off the same, and a deed shall thereupon be made by the treasurer to the commissioners for the time being, and to their successors in office, to and for the use of the proper county, and it shall be the duty of the commissioners to provide a book, wherein shall be entered the name of the person as whose estate the same shall have been sold, the quantity of land, and the amount of taxes it was sold for, and every such tract of land shall not thereafter, so long as the same shall remain the property of the county, be charged in the duplicate of the proper collector; but for five years next following such sale, if it shall so long remain unredeemed, the commissioners shall, in separate columns in the same book, charge every such tract of land with reasonable county and road tax, according to the quality of the said land, not exceeding in any case the sum of six dollars for every hundred acres. 1815, March 13, P.L. 177, 6 sm. L. 299, Sec. 5.

Section 6. Right of redemption to endure for five years

The right of redemption shall remain in the real owner of such land for five years after such sale, and on paying the treasurer of the county all the taxes and costs due thereon at the time of sale, and interest therefor for the same time, and also the taxes which shall have been assessed thereon from year to year after the sale and interest of each assessment to be counted from the time it ought to have been paid, and on the production of the treasurer's receipt, the commissioners shall, by deed poll, indorsed on the back

of the treasurer's deed to them, convey to the person who shall have been the owner of the land at the time of sale, or his legal representative, all the right and title which the county may have acquired under such sale as aforesaid; the monies so received for road taxes shall be paid to the supervisors of the roads of the townships within which such lands shall lie, on orders to be drawn by the commissioners on the treasurer to be applied by them in making and repairing the roads and highways in their respective townships. 1815, March 13, P.L. 177, 6 sm. L. 299, Sec. 6.

Section 7. And be it further enacted by the authority aforesaid, That if the owner of any such land shall not redeem the same within the period aforesaid, it shall thereafter be lawful for the commissioners to sell any such land, by public sale, and make a deed therefor to the purchaser, which shall be available in law, as well against the county as against the person or persons as whose estate the same had been sold, but no tract shall be sold for a sum less than the amount of taxes, costs and interest which shall be due at the time of such sale by the commissioners, and such land shall thereafter be charged by the township assessors in the name of such last purchaser or redeemer, as other lands of equal value may be charged, and shall again be liable to be assessed and sold for taxes, agreeably to this act and the act to which this is a supplement.

Section 8. May be paid in advance

Any board of commissioners may direct the treasurer of the proper county to receive in advance, for any term not exceeding six years, a sum which in their estimation shall be equal to the taxes that ought to be imposed on any such land or lands, during the period

for which they shall so compound with the owner as aforesaid. 1815, March 13, P.L. 177, 6 sm. L. 299, Sec. 8.

Section 9. Form of treasurer's deed

The form of the deed required by this act to be executed by the treasurer to the commissioners, may be in the following words, viz.: Whereas, A tract of unseated land containing --- acres, situate --- Township, in the County of ------ surveyed to ------ hath been rated and assessed with divers taxes, to wit, county taxes ------ dollars, and road taxes ------ dollars, which remain unpaid, and the treasurer having offered the same for sale, agreeably to law, and no person bidding therefor a sum equal to the amount of taxes due, and the costs of advertising and sale, it therefore became the duty of the commissioners to buy the same, which they have accordingly done on the ------ day of ---- last past, for the sum of ----- dollars. Now, this Indenture witnesseth, that i, ----- Treasurer of said county, do, for and in consideration of the said sum, grant, bargain and sell the said tract of land to ------ Commissioners of said county, to hold to them and their successors in office forever, subject to the redemption allowed by law. In witness whereof, I have hereunto set my hand and seal, the ------ day of ------

Sealed and delivered in the presence of ------ (seal)

Acknowledged by the grantor before ------ one of the justices of the Peace of the County of ------

Witness the hand and seal of said justice, the ------ day of ------ (seal)

All which sales to the commissioners shall be entered by their clerk in their book of minutes, as well as any redemption which may happen and sales by them after the right to redeem is passed over. 1815, March 13, P.L. 177, 6 sm.L. 299, Sec. 9.

**Compiler's Note:** Section 28 of Act 207 of 2004 provided that any and all references in any other law to a "district justice" or "justice of the peace" shall be deemed to be references to a magisterial district judge.

## UNSEATED LANDS - SALE OF

### Act of Mar. 9, 1847, P.L. 278, No. 221 Cl. 53

AN ACT

In relation to the sales of unseated lands in the several counties of this commonwealth.

Section 2. Publication of notice of sale

It shall be the duty of the county treasurer to publish the notice, as aforesaid, once a week for three consecutive weeks in at least two newspapers, if so many be published within the county in which the lands lie; and if two newspapers be not published in the said county, then in one newspaper in or nearest to the same, under the same penalty in each case, and subject to the same provisions as specified in the said first section of the act above mentioned.

The cost of the said publication of the above notice shall be taxed as part of the costs of such proceedings, and shall be paid in the same manner as costs of the proceedings are paid upon the sale of seated lands. 1847, March 9, P.L. 278, Sec. 2; 1925, March 26, P.L. 82, Sec. 1; 1945, April 25, P.L. 302, Sec. 1.