The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES

'Title Washing' in Pennsylvania Is Alive and Well

Joel R. Burcat and Megan E. Albright
As originally published in The Legal Intelligencer , August 25, 2016

On July 19, the Pennsylvania Supreme Court affirmed the Superior Court and upheld the ancient, yet ¬controversial, practice of "title washing" in *Herder Spring Hunting Club v. Keller,* 108 A.3d 1279 (2015), (Pa., July 19). In Pennsylvania, title washing occurred under unique circumstances. It applied only to land designated as "unseated" (i.e., undeveloped surface land without improvements). It occurred only where the surface and mineral estates had been severed, either by a sale or a reservation. In cases where a tax sale of the surface occurred, the title to the subsurface became "washed" or extinguished and the subsurface estate merged into the surface estate to become one estate. Consequently, when the surface estate was sold at the tax sale, the purchaser obtained title to both the surface and subsurface estates of the property. Finally, this was a practice that existed only between 1805 and 1947, when the laws of the commonwealth permitted the practice. The impact of title washing is still felt today, however, as the *Herder Spring* case demonstrates.

Until the court's decision in *Herder Spring*, there was considerable debate over the viability of the practice of title washing in Pennsylvania. While it was fairly well-settled that title washing no longer occurred after 1947, it was unclear if the practice continued to have an impact on title in Pennsylvania. *Herder Spring* finally provides clarity and demonstrates that for those unseated properties that were subject to a tax sale from 1805 to 1947, the minerals and surface, in fact, had been merged by the tax sale and the courts today would recognize the merger. This has the potential to affect numerous individuals' property rights.

The issue before the court in *Herder Spring* related to ownership rights of a 460-acre parcel of land located in Centre County, known as the Eleanor Siddons Warrant. In 1899, the property owners, Harry and Anna Keller, sold the surface rights to the property and reserved the subsurface rights to themselves through the deed. Aside from the reservation within the deed, the Kellers took no other actions to provide notice of their reservation and specifically, did not provide notice to the Centre County commissioners. At the time the Kellers sold the surface rights, the property was unseated land. Following a series of transfers of the property's surface rights, the commissioners acquired title to the property in 1935 when it was offered for sale as a result of unpaid taxes. Following the tax sale, the commissioners sold the property to Max Herr in 1941. Herr's estate eventually sold the property to the appellee Herder Spring Hunting Club. During the title search, the club became aware of the Kellers' 1899 reservation of the subsurface rights and accepted a deed that contained language subjecting the conveyance to all exceptions and reservations in the chain of title.

In 2008, the club filed a complaint to quiet title, presumably as a result of the discovery of Marcellus Shale on the property. The club asserted that the 1935 tax sale extinguished the Kellers' 1899 reservation of the property's subsurface rights. The basis of the club's argument was that due to the Kellers' failure to notify the county commissioners pursuant to Section 1 of the act of March 28, 1806, codified as 72 P.S. Section 5020-409 (the "1806 Act"), the taxes were assessed against the entire property, and the sale of the property for delinquent taxes resulted in a sale of both the surface and subsurface rights. Thus, the tax sale of the fee simple estate -extinguished any prior reserved estates in concurrence with the long-standing policy of title washing. In opposition, the Kellers' heirs

claimed that the 1935 tax sale resulted only in the transfer of the property's surface rights and that they were still the owners of the property's subsurface rights.

The Centre County Court of Common Pleas found in favor of the Kellers' heirs and determined the heirs owned the ¬property's subsurface mineral rights. The Superior Court reversed the Common Pleas court and held that through title washing, the property's surface and subsurface rights had merged during the tax sale, and when the property was sold to Max Herr, he obtained title to both the surface and subsurface estates, and as such, the club now owned both estates. The Supreme Court affirmed the Superior Court's decision and upheld the club's ownership rights of the property. The Herder Spring court interpreted the 1806 act to have created an affirmative duty of the Kellers, as holders of unseated land, to notify the county commissioners or the board of assessment and revision of taxes of changes made to the property that would affect the tax assessment. The court held that the Kellers' failure to make such required notice resulted in a legitimate tax sale of the entire property (surface and minerals), pursuant to Section 5 of the act of 1815, codified as 72 P.S. Section 6131. The court also explicitly rejected the Kellers' heirs' due process and estoppel by deed arguments.

The historical basis of title washing relates to a time when much of Pennsylvania was the "Wild West" and vast tracts of land were undeveloped. The General Assembly sought a mechanism to assure that property taxes were paid and landowners properly notified the county authorities of their ownership interests. Title washing was invented as a mechanism to force landowners to notify the counties of their ownership interests, pay their property tax assessments, or face the consequences. (Historically, it also resulted in great abuses as large landowners found ways to avoid paying taxes at all, to have "straw purchasers" buy in their land at tax sales at a fraction of the land's value, then to sell it back to the original owner, sans tax.)

The court's decision only applies to a limited subset of cases. First, it only applies those cases involving unseated land sold at a tax sale prior to 1947. The minerals and surface had to have been severed prior to the tax sale. Also, the mineral owner was obligated to file a notice of the severance with the county commissioners or board of assessment (filing a deed in the recorder of deeds office was not adequate). The ¬current mineral estate owner has the burden of proving that notice was given to the county by his or her predecessor in title. Within this subset, the decision does not apply to tax sales that specified that the assessment involved only the surface or the mineral rights. Finally, it would not apply in ¬scenarios where property owners can show adverse possession. Although the court ¬indicated that its decision potentially has limited application, thousands of acres of land in northern and western Pennsylvania likely are impacted by the determination.

The *Herder Spring* decision likely will cause a number property owners to discover that they possess title to subsurface mineral rights beneath their surface property, even in cases where their deed expressly carves out exceptions and reservations within the chain of title. At the same time, another set of property owners likely will learn that they do not legally possess title to mineral rights they have thought they owned. The Supreme Court's decision, however, largely preserves the status quo, since purchasers of land subject to a title wash most likely were aware of the merger of title to the surface and minerals. It is unlikely that title insurance companies will provide special notice related to the effects of title washing on subjected properties, so it is important to remember *Herder Spring* in cases where title washing could impact title.

Joel R. Burcat is a partner with Saul Ewing and chairman of the firm's oil and gas practice group. He can be reached at jburcat@saul.com. Megan E. Albright is an associate in the firm's real estate, environmental and energy department. She can be reached at malbright@saul.com.