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Renewing Respect for Record Notice: Cleaning Up the Pennsylvania Title Wash

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RENEWING RESPECT FOR RECORD NOTICE:
CLEANING UP THE PENNSYLVANIA
TITLE WASH

By Marc Prokopchak†

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I. INTRODUCTION

In 1959 Herder Spring Hunting Club ("Herder Spring") purchased a 460-acre tract of land in Centre County, Pennsylvania.† Prior to the purchase, Herder Spring performed a title search and found that approximately sixty years earlier, predecessors-in-title Harry and Anna Keller had severed the land’s subsurface mineral rights from the surface estate by reserving the minerals in their conveyance of the sur-

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place, and had properly recorded the conveyance and reservation. Upon discovering the mineral rights reservation, Herder Spring’s attorney suggested to the seller that a clause should be included in the deed to cover this reservation, and such a clause was added prior to the conveyance to Herder Spring.

In 1973, despite full knowledge of the mineral reservation in the chain of title, Herder Spring began a twenty-five year span of leases on the mineral rights. Then in 2008, Herder Spring commenced a quiet title action against the Kellers and their heirs in the Court of Common Pleas, claiming superior title to the subsurface minerals. When the lower court sided with the Kellers, Herder Spring appealed to the Pennsylvania Superior Court, and subsequently was awarded title to the subsurface mineral rights in May 2014.

If this outcome seems peculiar in light of commonly understood principles of property law, that is because it is. Absent careful inspection of 19th and early 20th century Pennsylvania statutes and case law, or first-hand experience with title disputes relating to valuable subsurface mineral rights in the Pennsylvania Marcellus Shale region, the idea that the Keller heirs could be stripped of their property interest seems anathema to fundamental property concepts. For those familiar with the intricacies of the law, however, Herder Spring provided a fresh endorsement of the “arcane” Pennsylvania property law concept known as the title wash.

To understand the title wash concept, one must first understand the underlying laws that brought it into existence. Accordingly, this Article will begin by providing a brief overview of Pennsylvania’s historical treatment of land for taxation purposes, as well as several important early 1800s state legislative acts, before discussing how

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2. For purposes of this article, unless otherwise specified, the terms “minerals,” “mineral rights,” and “mineral estate” will include all coal, clay, oil, natural gas, and other minerals. It is well settled in Pennsylvania under the Dunham Rule that the term “minerals” alone in a private conveyance does not include oil and natural gas. See Dunham v. Kirkpatrick, 101 Pa. 36 (1882); see also Butler v. Charles Powers Estate ex rel. Warren, 65 A.3d 885, 897–98 (Pa. 2013) (affirming the validity of the long-standing Dunham Rule). The vast majority of the cases addressed in this article—cases that comprise the bulk of Pennsylvania title wash jurisprudence—do not implicate the Dunham Rule, as the mineral reservations and conveyances at issue explicitly enumerate oil and natural gas. See, e.g., Hutchinson v. Kline, 49 A. 312, 317 (Pa. 1901) (“[r]eserving and excepting . . . the gas, coal, iron, and petroleum therein”) (internal quotation marks omitted).

3. Herder Spring, 93 A.3d at 467.

4. Id. The clause states, “This conveyance is subject to all exceptions and reservations as are contained in the chain of title.” Id.


6. Herder Spring, 93 A.3d at 466.

7. Id. at 465, 473.

8. The Superior Court itself used this word to describe the law upon which it relied. See id. at 468.
these two subjects work together to “wash” a title. This discussion will also include the subsequent changes to the laws that effectively abrogated the title wash for more recent titles with less extensive chains of ownership.

Next, this Article will examine the Pennsylvania and related federal courts’ treatment of the title wash and its underlying principles over the past 125 years. As will be shown, until the 2014 *Herder Spring* decision, for more than 100 years the courts largely had been trending away from title wash principles and moving towards a more modern property and real estate tax law perspective. Finally, a balanced solution to the problem will be proposed that advocates for a rule to allow title holders of previously severed and properly recorded subsurface mineral rights at least an opportunity to defend and retain their property rights in the face of a title wash claim. The proposed rule will begin with a rebuttable presumption in favor of the validity of the washed title containing both the surface and subsurface estates. This presumption then can be rebutted by affirmative evidence showing: (1) a separate assessment of the subsurface mineral estate, taxes paid on the subsurface mineral estate, or proof that the assessment used for the tax sale specified separate estates; or (2) a valid, properly recorded severance of the surface and subsurface estates prior to the date of the assessment utilized at the tax sale. This proposed rule would operate prospectively rather than retroactively. Thus, if adopted, it would apply only to pending and future title controversies, so as not to require re-litigation of previously settled title disputes.

**II. The Relevance of the Title Wash**

Before delving into the title wash concept, it makes sense to briefly explain the significance of the property rights potentially affected by this issue—i.e., why the title wash matters today. First, because many of the title disputes impacted by the title wash controversy concern land situated above the Marcellus Shale, the enormous economic value of the properties in dispute demands heightened scrutiny of this issue. Second, the title wash raises significant underlying fairness concerns, especially when it divests unknowing record property owners of their constitutionally revered property interests.

For those unfamiliar with the Marcellus Shale, this geological phenomenon is an enormous underground sedimentary rock formation that involves large portions of Pennsylvania, eastern Ohio, West Virginia, and southern New York.9 Trapped within this rock formation are large natural gas reserves, which experts estimate contain anywhere from 168 to 516 trillion cubic feet of natural gas, valued con-

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servatively in the hundreds of billions of dollars. Due to recent developments in drilling technology that have made this gas accessible, by leasing their property interests to oil and gas companies, owners of mineral rights stand to profit considerably from lease fees and royalty payments.

Pennsylvania, where the shale formations are thickest, has received the most attention from the oil and gas industry, creating what has been coined a new “gold rush” in gas drilling in the Pennsylvania Marcellus Shale regions. Put simply, the determination of oil and natural gas ownership in Pennsylvania—a task often complicated by the title wash—has significant financial implications for the parties involved.

More important, however, are the fairness concerns raised by a system that has for many years enabled record owners to be divested of their duly recorded property interests for simply failing to follow a tax reporting statute (or for not having sufficient proof that the statute was followed, but no tax liability was incurred). As discussed further in Section IV(A) below, this is usually a much more severe punishment than the crime warrants. The inequities of the title wash system are further magnified in situations like Herder Spring, where the land purchaser buys with full knowledge of the recorded mineral estate reservation but strategically uses the title wash to claim superior title to the property.

III. THE ORIGINS OF THE PENNSYLVANIA TITLE WASH

In order to understand the concept of the title wash, one must first understand how Pennsylvania historically treated developed and undeveloped land differently for taxation purposes. This disparate treatment and its concomitant effect on tax sales of the land, coupled with several critical early 1800s statutes, created the title wash system.

10. Id.
12. Bagnell & Hadgkiss, supra note 9, § 32.03.
13. See Kristen Allen, The Big Fracking Deal: Marcellus Shale—Pennsylvania’s Untapped ReSource, 23 VILL. ENVTL. L.J. 51, 52 (2012); George A. Bibkos & Jeffrey C. King, A Primer on Oil and Gas Law in the Marcellus Shale States, 4 TEX. J. OIL, GAS & ENERGY L. 155, 156 (2008–2009) (“a gold rush mentality has been developing in the Marcellus Shale states”); see also Bagnell & Hadgkiss, supra note 9, at § 32.04 (noting there were only thirty to forty gas wells in the Marcellus Shale region of Pennsylvania in January 2008, but 8,000 new drilling permits were issued that year alone).
14. For a synopsis of the case’s factual background, see supra text accompanying notes 1, 3–7.
A. Seated and Unseated Land

Historically, Pennsylvania considered land to be either “seated” or “unseated” for real estate tax assessments. Unseated land was that which, in the eye of the assessor, was unimproved or uncultivated—judged solely by “what has been or is being done upon it.” Seated land, on the other hand, was land that the assessor found to have “such permanent improvements as indicate a personal responsibility for the taxes.” The seated or unseated distinction applied to the entire real property, as well as to separate estates if, for example, the surface had been severed from the subsurface.

The foregoing description of seated land from Hutchinson v. Kline highlights the importance of the historical differentiation between the two types of property. If the assessor considered the land seated, the property taxes were assessed against the owner; if the land was adjudged unseated, the taxes were assessed against the land itself. This distinction had important consequences. As the Supreme Court of Pennsylvania explained in Fager v. Campbell, in regards to unseated land, “[t]he land itself, 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 . . . .” Thus, if real estate taxes were not paid on seated lands, the owner was charged with the debt, whereas if the taxes for unseated lands went unpaid, the land itself was considered the debtor and would pay its public debt in the only way possible—tax sale by the county treasurer.

B. Important Early 1800s Pennsylvania Statutes

The second major component in the creation of the title wash was several state legislative initiatives of the early 1800s, in particular, the Act of 3 April, 1804 and the Act of 28 March, 1806. After the Revolu-
tionary War, due in part to its large war debt, Pennsylvania attempted to fill its coffers through the sale of warrants for approximately 5 million acres of mostly undeveloped state-owned land. Inflation, along with abuse of the Commonwealth's easily gamed land grant system, created fertile grounds for land speculation, with some notorious speculators individually accumulating over 1 million acres of Commonwealth land.

When the land speculation bubble burst and speculators were unable to pay for land purchased on credit, the legislature enacted several laws to ease the taxing and selling of unseated land. The Act of 3 April, 1804 ("1804 Act") vested tax sale purchasers of unseated lands with good title to "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." Unseated land, therefore, could be sold at a tax sale, identified only by a description of the land—usually in the name of the original warrants—since the law was not concerned with the actual owner. The 1804 Act also required county commissioners to create records of known unseated lands, and provided a five-year statute of repose to challenge a tax sale of land or interests.

Equally important for the title wash, especially when the surface and subsurface estates had been severed, was the Act of 28 March, 1806 ("1806 Act"). It stated, 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 a [statement to the county commissioners signed by holder of unseated lands containing a description of each and every tract so held, the name of the person or persons to whom the original tract so held, 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

24. Id. at 108.
25. Id. at 108–09.
26. Id. at 109.
27. See infra text accompanying notes 31–33. See also F.H. Rockwell & Co. v. Warren Cnty., 77 A. 665, 665–66 (Pa. 1910) ("unseated lands are assessed by survey or warrant numbers, regardless of the owners whose names if used at all are only for the purposes of description").
28. Greevy & Shoemaker, supra note 23, at 109. An 1815 statute decreased the period of redemption for land or interests sold at a tax sale to two years. Id.
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.  

The 1806 Act thus provided an affirmative duty for owners of newly acquired unseated property to report the interest to the proper taxing authorities or face a four-fold tax penalty. This duty applied equally to those who obtained title to only the surface or subsurface estate as to those who acquired entire unseated property, because each estate—whether entire, subsurface, or surface—was considered a separate property interest for taxation purposes.

The key to the title wash came with the disparate treatment of unseated land at tax sales. If an owner of seated land failed to pay the requisite real estate taxes, he could not then legally purchase a better title to the land at a resulting tax sale, because “one cannot profit from his own wrong, or build up or acquire a title founded upon his own neglect.” Because taxes on seated land were assessed against the owner, a purchase of the land at a subsequent tax sale by the owner would be merely a “payment” or redemption for the taxes owed. But because the tax obligation for unseated land was assessed against the land itself rather than the owner, a purchase of the unseated land at a tax sale, even by the record owner, was not considered a redemption.

A helpful example of this principle is found in *Powell v. Lantzy*. There, Flinn, the owner of an entire tract of unseated land, sold the surface estate but reserved the subsurface mineral rights. The new owner of the surface estate subsequently conveyed the property to Lantzy; Flinn likewise conveyed the reserved subsurface mineral estate to new owners. Prior to the severance and conveyances, however, Flinn had failed to pay the real estate taxes that were assessed

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29. Act of 28 March, 1806 § 1, 4 SM. L. 346. In 1933 this law was repealed and replaced by 72 PA. CONS. STAT. § 5020-409, remaining nearly identical to the original version. See 72 PA. CONS. STAT. § 5020-409. It was partially repealed in 2010 insofar as it concerned counties of the second class A, third, fourth, fifth, sixth, seventh, and eighth classes of the state. See 53 PA. CONS. STAT. § 8801.

30. See *Powell v. Lantzy*, 34 A. 450, 451–52 (Pa. 1896) (citing Neill v. Lacy, 1 A. 325 (Pa. 1885) (“[T]he owner of mineral rights by virtue of a reservation in a deed is [not a joint owner with] the owner of the surface. Each has a separate estate. After the severance of the surface from the minerals by conveyance, they form separate estates.”)); see also supra note 18.


32. *Id.*

33. *Id*.; see also Ronald J. Hicks, Jr. & David G. Oberdick, *Debunking the Myths Surrounding Natural Gas Title Washing: “How Can One’s Title Be Divested If Natural Gas Was Not and Cannot Be the Subject of a Proper Real Estate Tax Assessment?”* 85 PA. B. ASS’N Q. 14, 16 (2014).


35. *Id.*

36. *Id.*
on the entire estate. When title to the unseated land, assessed and
taxed as an entire estate prior to severance, was sold at a tax sale,
Lantzy—already the owner of the surface rights—bought the tax sale
title to the entire property. The owners of the mineral estate sued,
claiming, among other things, that Lantzy, as the surface estate owner,
could not have acquired good title to the entire estate at the tax sale
since at the time of the sale he owned part of the property assessed
and sold. The court rejected the mineral estate owners’ claims, hold-
ing that nothing prevented an owner of unseated lands from purchas-
ing a better title at a tax sale, as there existed “no personal
responsibility on the owner therefor . . . [since] [t]he land alone was
liable.”

Thus, title washing became “a means by which an owner of un-
seated land could cure any defects in his former title by defaulting on
the assessed real estate taxes and then purchasing the unseated land at
the subsequent tax sale.” Furthermore, due to the 1806 Act report-
ning requirements for unseated land, and the unseated land tax sale
procedures (both outlined above), the theory developed that when the
subsurface mineral estate was severed but unreported and not sepa-
rately assessed, a subsequent tax sale of the surface estate could rejoin
the two estates and give good title for the entire property to the tax
sale buyer. If the newly created mineral estate was not reported ac-
ccording to the 1806 Act requirements, and the assessment utilized for
the tax sale of the unseated land treated the land as a whole, the
whole is what was conveyed by tax deed.

It takes little imagination to see the potential for fraud with such a
concept, and indeed, fraud inevitably ensued. The large-scale version
of fraud followed this general scheme: owners of extensive tracts of
unseated land who wanted to corner the leather and timber markets
would convey the surface estates to a company they owned, but would
reserve the subsurface mineral rights; the owners would intentionally
forego reporting the severance and paying the property taxes on the
newly created mineral estates; the company would then allow the sur-
face estate property taxes to lapse, permit the surface estate to go to a
tax sale, and use a strawman to purchase the property at the tax sale—
but now with the surface and subsurface estates theoretically rejoined;
finally, the strawman would hold the property for the statutory re-
demption period and then convey the property back to the company.

37. Id.
38. Id.
39. Id.
40. Powell, 34 A. at 451 (citing Coxe v. Gibson, 27 Pa. 160 (1856)).
41. Hicks & Oberdick, supra 33, at 17.
42. See generally Hutchinson v. Kline, 49 A. 312 (Pa. 1901).
43. Id. at 313.
Thus, the original landowners avoided real estate taxes on the subsurface mineral rights, cornered the leather and timber markets, and recovered the property as a whole without paying back taxes. Moreover, the owner of the surface estate conceivably could follow such a scheme regardless of who conveyed the surface estate and reserved the mineral rights—whether a co-conspirator or an unaffiliated and unknowing landowner—so long as the subsurface mineral estate owner failed to follow the 1806 Act reporting requirements or redeem the mineral estate within the statutory period following the tax sale.

Beyond the potential for outright fraud, the tax sale title wash and concomitant theoretical reunification of the previously severed estates creates the potential for a buyer with good notice of the severance of the mineral estate to purchase the surface estate and claim title to the whole.

As long as there was a tax sale after the severance in the unseated surface estate’s chain of title, and there exists no proof that the mineral estate was separately assessed or taxed after the severance as required by the 1806 Act, the buyer can claim the tax sale reunified the surface and subsurface estates. This is, in fact, exactly what happened in *Herder Spring*.45

Moreover, due largely to one instrumental Pennsylvania Supreme Court ruling from over 100 years ago, the buyer may succeed in divesting the record mineral rights owner of the subsurface estate. *Hutchinson v. Kline* involved an action for ejectment brought by the mineral rights owners of a tract of unseated land against Kline,46 the successor-in-title to the tax-sale purchaser of the surface estate.47 Kline claimed the tax sale title was good as to both the surface and subsurface estates.48 While much of the opinion is dedicated to the parties’ disagreement over whether the land was seated or unseated, the court, relying on the assessment used for the tax sale and the dearth of evidence of the mineral estate owners’ compliance with the 1806 Act, decided the tax sale had effectively divested the record mineral estate owners of their property interest.49 The court stated:

> It was not shown . . . the [record mineral estate owners] . . . paid taxes to Elk county upon the mineral rights reserved, nor returned them for the purpose of taxation in one body. This the [record mineral estate owners] were required to do by the act of the 28th of March, 1806. If they desired their separate estate to be assessed and taxed separate and apart from the surface, there should have been a severance of this separate estate in the assessment.50

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45. See supra text accompanying notes 1, 3–7.
47. *Id.* at 312–13.
48. *Id.*
49. See *id.* at 313, 317–19.
50. *Id.* at 313.
The court further explained that simply because the newly created mineral estate was recorded does not imply the proper taxing authorities had notice of the severance: “[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.” For supporters of the title wash, insofar as it relates to severed surface and mineral estates, *Hutchinson v. Kline* is viewed as the Supreme Court of Pennsylvania’s “stamp of approval” on the theory, and has been relied upon heavily in subsequent mineral estate title disputes.

C. *The End of the Title Wash for Modern Real Estate Titles*

In 1947, Pennsylvania revised many of its real estate tax laws. Both seated and unseated land was to be considered “property” for the revised real estate tax statute. As such, the same tax sale procedures and notice requirements provided by the 1947 tax revision would apply equally to owners of seated and unseated land. The notice procedures for Pennsylvania real estate tax sales, established by the 1947 law, underwent further changes that tracked the pivotal United States Supreme Court decisions on constitutional notice requirements. Thus, before their property interest can be sold at a tax sale, record owners of unseated mineral estates created after the 1947 tax law revisions are now entitled to the same notice procedures as seated landowners.

Pennsylvania has also altered the way it treats oil and natural gas for ad valorem taxation. Early Pennsylvania case law held that oil and natural gas (along with other minerals comprising the subsurface es-

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51. *Id.* at 318.


54. Greevy & Shoemaker, *supra* note 23, at 113; *see also* 72 PA. CONS. STAT. § 5860.101.

55. *See* 72 PA. CONS. STAT. § 5860.102 (describing “property” as including “both seated and unseated land”).

56. *See* 72 PA. CONS. STAT. §§ 5860.301–.609.


tate) could be treated as land for real estate taxation purposes. In 2002, however, the state’s highest court decided *Independent Oil & Gas Ass’n of Pennsylvania v. Board of Assessment Appeals*, holding that underground oil and natural gas do not fall within the meaning of “real estate” or “lands” in current assessment laws, and therefore, because no statutory authority exists to assess oil and natural gas interests, those interests cannot be subject to ad valorem taxes. It follows then, that if oil and natural gas interests are not subject to ad valorem taxes, those interests cannot be sold for unpaid taxes at a sheriff’s sale, as no overdue ad valorem taxes on those interests could exist in the first place. The 2002 *Independent Oil & Gas Association ("IOGA")* decision, however, has been limited to prospective application only.

These changes to Pennsylvania statutes and jurisprudence have effectively eliminated the possibility of modern-day title washing by modifying how unseated subsurface estates can be assessed and sold at tax sales and by clarifying what can be assessed for ad valorem taxation purposes in the first place. Furthermore, prior to the 2014 *Herder Spring* decision, Pennsylvania courts had been steadily moving away from the anachronistic property concepts that enabled the title wash.

IV. **POST-HUTCHINSON V. KLINE JURISPRUDENCE:**

**A MORE MODERN APPROACH**

As previously noted, *Hutchinson v. Kline* is regarded by many to be a ringing endorsement of the idea that, under the right circumstances, a tax sale of unseated land could effectively rejoin previously severed surface and subsurface estates and give good title of both to the tax sale purchaser. But beginning almost immediately after this 1901 decision, Pennsylvania courts largely began to move away from many concepts inherent in the tax sale title wash of previously severed surface and mineral estates.

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62. Id. at 184. See also Coolspring Stone Supply, Inc. v. Cnty. of Fayette, 929 A.2d 1150, 1157 n.9 (Pa. 2007) (explaining that because statutory authority is a prerequisite for a valid tax, absence of oil and natural gas from assessment laws precludes ad valorem taxes on those interests); Hicks & Oberdick, supra note 33, at 16.

63. Greevy & Shoemaker, supra note 23, at 115; see also Oz Gas, Ltd. v. Warren Area Sch. Dist., 938 A.2d 274, 283 (Pa. 2007) (holding IOGA decision applies prospectively).

64. 49 A. 312 (Pa. 1901).

65. See supra text accompanying notes 45–53.
A. F. H. Rockwell & Co. v. Warren County

Only a few years after its *Hutchinson v. Kline* decision, the Supreme Court of Pennsylvania took up *F. H. Rockwell & Co. v. Warren County*. While not overruling *Hutchinson v. Kline*, the *F. H. Rockwell* court spent a large portion of its opinion emphasizing that a severed mineral estate must be assessed properly in order for good title to the estate to be passed at a subsequent tax sale, and also provided examples of how such oil and gas interests may properly be assessed.

In *F. H. Rockwell*’s underlying title dispute, the plaintiffs owned nearly 10,000 acres of unseated land and conveyed the surface property while reserving the mineral rights for themselves. For the years 1904, 1905, 1906, and 1907, the county assessed, and the surface owners paid, the ad valorem taxes on the surface estate, but the plaintiffs failed to pay the separate ad valorem taxes assessed by the county on the reserved mineral estate. When the mineral estate was placed on the county treasurer’s sale list due to unpaid taxes, the plaintiffs filed suit to enjoin the tax sale, claiming that, although separate surface and subsurface estates existed, there was no legal authority to separately assess the mineral estate.

After a lower court ruling granted the plaintiffs’ requested injunction, the county appealed to the Pennsylvania Superior Court. The Superior Court reversed the decision, holding that when the surface and subsurface estates of unseated land are severed, each should be separately assessed and taxed according to its value. On appeal, the Supreme Court of Pennsylvania affirmed the Superior Court’s decision, concluding that: (1) unseated land could be severed into separate surface and mineral estates; (2) each estate was properly considered an interest in land for real estate taxation purposes; and (3) the power to tax each estate separately “necessarily attach[ed].”

Interestingly, the court found it important to conclude its opinion with the following caveat:

[I]t is important to keep in mind the fact that the right to tax depends upon the valuation and assessment of a definite estate in land. If there is no land, there is nothing to tax, and this principle applies as well to minerals as to surface. Because there may be a reservation of oil and gas by the grantor of the surface, or there may be an express grant of all the oil and gas underlying one or several tracts of land, it does not follow that in point of fact there is any

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66. 77 A. 665 (Pa. 1910).
68. Id. at 469–70.
69. Id. at 470.
70. Id.
71. Id. at 476–77.
such estate in existence. When the assessor goes upon the land, it is his duty to make a valuation upon information or knowledge which will furnish some definite fixed basis of valuation. A mere naked reservation of oil and gas in a deed without any other facts to base a valuation upon is not sufficient to warrant the assessment of taxes. Development in the neighborhood, sales of oil or gas lands in close enough proximity to add value, or any other element of value which may form a basis of valuation may be taken into consideration by the assessor or other taxing authorities, but it should always be borne in mind that real estate is the thing being dealt with, and that oil and gas are considered real estate, and, if there be no oil and gas, then there is not real estate to be taxed.73

It is telling that in 1910, only nine years after Hutchinson v. Kline, the Pennsylvania Supreme Court felt it necessary to highlight that a pre-requisite to the local government’s ability to assess and collect real estate taxes on an estate—whether entire, surface, or mineral—was some evidence that the estate actually existed and had value.

While mineral rights, including oil and natural gas, were subject to ad valorem taxes at this time,74 according to the court, a mere reservation of these rights was not enough to trigger the levying of real estate taxes.75 Instead, there had to be some facts tending to prove that minerals actually existed to properly value the mineral estate for the assessment and collection of ad valorem taxes, and to put that mineral estate up for sale if such taxes went unpaid.76 Thus, while the court upheld the right of the county to sell the mineral estate for unpaid ad valorem taxes, it also stressed that those minerals, when severed, must be “properly assessed and sold for the payment of taxes” in order to “convey good title to the minerals.”77

While by no means a direct repudiation of Hutchinson v. Kline, the F. H. Rockwell decision does support the fact that the court was concerned with what real property was being assessed, taxed, and sold at tax sales, and further, believed certain limitations existed to safeguard the fairness of that process. The court found it important to emphasize that a severed mineral estate must be valued properly in order for good title to the mineral estate to be passed at a subsequent tax sale, and provided some rough examples of how proper assessment could be made.

73. Id. at 666.
74. As previously noted, this is no longer the law in Pennsylvania. See supra text accompanying notes 60–63.
75. F. H. Rockwell, 77 A. at 666.
76. Id.
77. Id.
B. Armstrong v. Black Fox Mining & Development Corp.

In Armstrong v. Black Fox,78 the Court of Common Pleas rejected outright the notion that a failure to separately assess severed mineral rights could vest title in a tax-sale purchaser of the surface estate. There, the plaintiffs brought an action for trespass against Black Fox Mining & Development Corporation (“Black Fox”) for removing and selling coal on two adjacent parcels of land in Armstrong County, Pennsylvania, to which the plaintiffs claimed ownership.79 In 1903, the coal rights were severed from the surface estates of both parcels of land and conveyed in separate transactions to the same new owners.80 After multiple conveyances, the coal estates eventually passed to the plaintiffs.81

The surface estate of the smaller fifty-four acre tract remained in possession of the grantor who originally severed and conveyed the coal rights from the surface estate until it was eventually sold for delinquent taxes in 1963 to Arthur and Nancy Duppstadt.82 The Duppstadts entered into a strip-mining lease with Black Fox for the coal—an act which the plaintiffs claimed was not within the Duppstadts’ power because the coal rights had been previously severed and conveyed to other owners.83

Black Fox asserted, among other things, that the coal ownership of the fifty-four acre tract had not been properly assessed for taxation as separate from the surface estate, and therefore title to the entire property passed to the Duppstadts at the 1963 tax sale.84 The court rejected this argument, explaining that even if the coal rights were not separately assessed, “this does not in any way vest title in the Duppstadts.”85

A tax sale for delinquent taxes conveys only that estate owned by the titleholder and covered by the assessment . . . . If the coal rights in the 54 acre tract were not separately assessed, this is a matter between the taxing authorities and the owner of the coal estate. A purchaser at a tax sale of the surface estate would not be able to rely on this to claim he purchased the coal estate as well.86

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79. Id. at 757–58.
80. Id. at 758–59.
81. Id.
82. Id. at 759. The Duppstadts were joined by Black Fox as defendants in the action. Id.
84. Id. at 762.
85. Id.
86. Id.
Thus, the court curtly rejected Black Fox’s tax sale title wash contention, finding title to the coal estate was still properly vested in the plaintiffs.87

C. Day v. Johnson

Day v. Johnson,88 another Court of Common Pleas decision, also focused on the importance of the existence of a taxable mineral estate and a proper assessment of that estate in order for a tax sale to pass title. In 1923, John A. Day sold a 100-acre tract of unseated land in Warren County, Pennsylvania but reserved the mineral rights for himself.89 Neither he nor his grandson—the sole successor to the mineral estate—ever removed or attempted to remove any minerals from the tract, nor was the mineral estate ever submitted for separate assessment and taxation.90 Day’s grandson filed a quiet title action against several defendants who were claiming ownership of the mineral rights on the basis of a 1934 tax sale of the surface estate.91 The defendants, relying in part on Hutchinson v. Kline, claimed that Day’s failure to have the mineral estate separately assessed according to the mandate of the Act of 28 March, 1806 divested him of the reserved mineral estate.92

The court acknowledged the Hutchinson v. Kline holding,93 but was more persuaded by the F. H. Rockwell court’s conclusion, which described the requirements for taxing real property, in particular mineral estates.94 To the Day v. Johnson court, it was only logical that if a mineral estate was not assessed—albeit in contravention of the Act of 28 March, 1806—it could not be properly charged with taxes, nor consequently delinquent in such taxes, and thus title to the mineral estate could not possibly have passed at the 1934 county treasurer’s sale. The court further admonished:

The sole purpose of sale of delinquent taxes is to collect the taxes for the operation of the county and not to deprive the owner of his property. The assessment for tax purposes of the subsurface rights is on the production of the [minerals] from the subsurface not upon an estate where it cannot be determined the valuation thereof. In our opinion the mere creation of an exception and reservation without the operation for the removal of the minerals does not create a taxable estate per se and would not until production is had therefrom

87. Id. at 763.
89. Id. at 557.
90. Id. at 557–58.
91. Id. at 557. The tax sale was based on a 1931 assessment that described the premises as “100 acres, Brokenstraw Township.” Id.
93. Id.
94. See supra text accompanying note 73.
and properly assessed in value. If this were not so the taxing author-
ity could simply assess taxation on speculation as to value.\textsuperscript{95}

The defendants filed seven exceptions to the decision, the thrust of
which again raised the issue of Day’s failure to inform the taxing au-
thorities of the mineral estate reservation.\textsuperscript{96} The court responded that,
while a mineral reservation of unseated land was a taxable entity, no
proper assessment could be made on that estate until production of
the minerals commenced.\textsuperscript{97} Any attempt to assess the mineral estate
for ad valorem taxes in the absence of bringing those minerals to the
surface and giving them a market valuation would be “an exercise of
clairvoyance.”\textsuperscript{98}

\section*{D. The Federal Court Cases}

When discussing Pennsylvania title wash jurisprudence, one cannot
avoid two major federal district court cases, both of which were af-

\subsection*{1. Proctor v. Sagamore Big Game Club}

In Proctor v. Sagamore, the plaintiffs claimed ownership of the nat-
ural gas rights to a 1,100-acre parcel of unseated land in Elk County,
Pennsylvania, and filed an ejectment action in 1954 against defendants
who had removed millions of dollars of natural gas from beneath the
tract.\textsuperscript{100} Both parties moved for summary judgment.\textsuperscript{101} The plaintiffs
claimed title to the natural gas by chaining their title back to Thomas
E. Proctor, who acquired the 1,100-acre parcel from W. D. Bigler in
1893, and then conveyed the surface estate to Elk Tanning Company
on October 1, 1894, while reserving the mineral rights for himself.\textsuperscript{102}
The defendants argued, however, that because the taxes on Bigler’s
unseated parcel went unpaid for 1892 and 1893, and the tract was then
sold at a county tax sale on June 11, 1894, Proctor had been effectively
divested of his title and thus had nothing to convey or reserve when he
granted the surface estate to Elk Tanning Company on October 1,
1894.\textsuperscript{103}

\textsuperscript{95} Day, 31 Pa. D. & C.3d at 558.
\textsuperscript{96} Id. at 562.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{100} Id. at 467.
\textsuperscript{101} Id.
\textsuperscript{102} Id. at 470.
\textsuperscript{103} Id. at 468–70.
The United States District Court for the Western District of Pennsylvania sided with the defendants, agreeing that the June 1894 tax sale of the 1,100-acre parcel was valid, and Proctor’s conveyance and reservation several months later effectively transferred nothing.104 The Third Circuit affirmed this reasoning, holding that “when Proctor gave his deed to Elk Tanning Company, he had no legal title in the surface to convey . . . or in the natural gas to reserve to himself. The reservation could not revive in Proctor the legal title which he had lost by the earlier tax sale.”105

A critical issue in Proctor v. Sagamore is that both the assessment of the unseated land and the resultant tax sale based on this assessment, which divested Proctor of his legal title, took place before Proctor severed and conveyed the surface and subsurface estates.106 So while the district court upheld the principle that a valid tax sale of unseated land for previously unpaid taxes could divest a new legal owner of title, commentators are quick to point out that because the assessment and tax sale occurred prior to severance, a feature also present in Powell v. Lantz,107 these two oft-cited Pennsylvania cases are of limited value in the dispute over the validity of the purported rejoining of previously severed surface and mineral estates through a subsequent assessment and tax sale for the unseated surface property.108

2. New York State Natural Gas Corp. v. Swan-Finch Gas Development Corp.

The second major federal case, New York State Natural Gas Corp. v. Swan-Finch Gas Development Corp.,109 was decided by the same district court only a year after Proctor v. Sagamore.110 There, both the plaintiffs and the defendants agreed on the common source of title for a 1,050-acre tract of unseated land in Clearfield County, Pennsylvania, but disagreed as to the ownership of the natural gas rights after an 1887 severance and conveyance of the mineral estate to Caledonia Coal Company.111 The defendants chained their title back to Caledonia Coal Company, claiming the initial 1887 conveyance of the mineral estate presumptively included the natural gas, and alternatively, they acquired the natural gas rights through a treasurer’s sale for unpaid taxes on the mineral estate for the 1896 and 1897 tax years.112

104. Id. at 470.
105. Proctor v. Sagamore Big Game Club, 265 F.2d 196, 201 (3d Cir. 1959).
107. See supra text accompanying notes 34–40.
108. See, e.g., Hicks & Oberdick, supra note 33, at 21–22.
110. See id. at 191.
111. Id. at 185–86.
112. Id. at 186.
The defendants’ first claim—that the 1887 mineral estate deed to Caledonia Coal Company containing the words “and other minerals of every kind and character” presumptively included natural gas—was rejected by the district court, which instead sided squarely with the long-held Pennsylvania jurisprudence that natural gas is not presumed to be included in such private conveyance language.113

The defendants alternatively argued that the 1898 tax sale of the mineral estate had divested the plaintiffs’ predecessors-in-title of their natural gas rights.114 In this case, the surface estate and mineral estate had been separately assessed for approximately eight years—the surface estate assessed to the grantor and the mineral estate assessed to Caledonia Coal Company—and both estates were sold separately at an 1898 treasurer’s sale for unpaid 1896 and 1897 ad valorem taxes.115 The defendants, whose chain of title included the purchaser of the mineral estate at the 1898 tax sale, claimed the assessments identified as “mineral” and charged to Caledonia Coal Company necessarily included the natural gas because no separate assessment had been made on the natural gas rights retained by the surface owner after the severance.116 Therefore, defendants contended, the mineral assessments and resultant tax sale must have included the natural gas rights,117 and thus conveyed good title to those rights to the mineral estate tax sale purchaser.118

The plaintiffs, on the other hand, claimed that only those minerals that were conveyed to Caledonia Coal Company in the 1887 deed passed at the 1898 mineral estate tax, and nothing more.119 Since the natural gas rights were not included in the severance and conveyance to Caledonia Coal Company in 1887, they necessarily remained in the surface owner; could not have been included in the mineral estate assessments and tax sale; and were therefore sold to the 1898 tax sale purchaser of the surface estate, who was a link in plaintiffs’ chain of title.120

The district court agreed with the plaintiffs, reasoning that the natural gas could not have been included in the “mineral” assessment and resultant tax sale as “[t]hat was not a property right which passed to Caledonia Coal Company in its deed.”121 The court went on to explain that, while there had never been a separate assessment of the

113. Id. at 186–88; see also supra note 2.
115. Id. at 189–90.
116. Id. at 190–91.
117. The defendants claimed this was so even if, perhaps, the assessor mistakenly included the natural gas interest in the mineral assessments. See N.Y. State Natural Gas Corp. v. Swan-Finch Gas Dev. Corp., 278 F.2d 577, 579 (3d Cir. 1960).
118. Id.
120. Id.
121. Id.
natural gas rights—rights that the court determined were retained by the surface estate owner after severance—

[T]he mere naked conveyance or reservation of oil or gas in a deed without other facts to base a valuation upon is not sufficient to warrant the assessment for taxes . . . . [A]n owner does not lose title by virtue of failure to have his gas assessed. Any failure to have property assessed might be the subject of contention between the taxing authorities and the owner, but does not assist a stranger to the title claiming ownership.\(^\text{122}\)

On appeal, the Third Circuit affirmed.\(^\text{123}\) Addressing the defendants’ (there, appellants’) argument, which was grounded in *Hutchinson v. Kline*, that the 1898 tax sale divested the surface estate owner of the natural gas rights because the natural gas had never been separately assessed; the court relied on *F. H. Rockwell* to conclude that,\(^\text{124}\) absent some affirmative showing that the general mineral assessments charged to Caledonia Coal Company included natural gas, the purchaser of the mineral estate at the 1898 tax sale could not have acquired the natural gas rights.\(^\text{125}\)

In order for the natural gas rights to justifiably pass at the 1898 mineral estate tax sale, the court explained, there had to be “some reason to believe at the time of the assessments in question that gas of commercial potential was present . . . and that it had value which could be estimated.”\(^\text{126}\) Because natural gas was not even considered to be accessible in this area until very recently,\(^\text{127}\) the general mineral assessments on which the 1898 mineral estate tax sale was based were not intended to, nor did they, include the natural gas rights.\(^\text{128}\)

*Swan-Finch*, like *Proctor v. Sagamore*, is factually distinguishable from the *Hutchinson v. Kline* and *Herder Spring* concept of a tax-sale title wash serving to rejoin previously severed surface and mineral estates. In *Swan-Finch*, there were separate assessments for the surface and mineral estates, and each were separately sold at the 1898 treasurer’s sale. It is important to note, however, that both the district court and the Third Circuit were at odds with the idea of a tax sale divesting a record owner of a reserved property interest simply because the owner failed to have that right separately assessed. In these federal judges’ opinions, that was not enough. A tax sale could only

\(^\text{122}\). Id. at 192–93 (citing F. H. Rockwell & Co. v. Warren Cnty., 77 A. 665, 666 (Pa. 1910)).
\(^\text{124}\). F. H. Rockwell, 77 A. at 666; see also supra text accompanying note 73.
\(^\text{125}\). Swan-Finch, 278 F.2d at 579.
\(^\text{126}\). Id. at 580.
\(^\text{127}\). Hydraulic fracturing was not invented until 1949, only eleven years prior to the Third Circuit’s *Swan-Finch* decision. See id.
\(^\text{128}\). Id.
pass what had been clearly and properly assessed. Failure to separately assess a reserved property interest was only fatal if the assessment used in the subsequent tax sale included proper assessment of that interest.

E. Herder Spring Hunting Club v. Keller

As one can see, Pennsylvania and related federal jurisprudence following *Hutchinson v. Kline* almost unanimously moved away from the principles of the title wash theory that a tax sale of unseated surface land could rejoin previously severed surface and mineral estates and divest a mineral estate owner of a duly-recorded property interest that was not separately reported and assessed. It seemed as though developments in notice requirements, the treatment of unseated land for taxation purposes, and ad valorem taxation of mineral rights had modernized the court’s approach to this issue of Pennsylvania property law. *Herder Spring*, however, marked a drastic about-face in this modern trend.

Not only did the *Herder Spring* court reaffirm *Hutchinson v. Kline*, it essentially established—as a matter of law—that if an unseated tract was severed into separate surface and mineral estates, and the owner of the newly-created mineral estate did not report the property interest to the taxing authorities as required by the Act of 28 March, 1806, any subsequent assessment of the unseated parcel—absent some specific reference in the assessment to the contrary—necessarily included the entire estate. Accordingly, any county treasurer’s sale based on that assessment was a valid sale of the whole property (both surface and subsurface rights).

The *Herder Spring* court further rebutted the premise raised in the federal decisions that since there had been no valuation of the mineral

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129. Swan-Finch, 278 F.2d at 579 (“the *Hutchinson [v. Kline]* case recognizes and is predicated upon the well-established rule that a tax deed conveys only such interest as was actually assessed”).


132. For a factual background of *Herder Spring Hunting Club v. Keller*, see supra text accompanying notes 1, 3–7.

133. *Herder Spring*, 93 A.3d at 471.

134. “If information regarding the 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.” *Id.* at 472 (emphasis added); *see also id.* at 469 (“[I]f 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.”).

135. *Herder Spring*, 93 A.3d at 472 (“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 [sic] sold pursuant to any tax sale . . . .”).
rights, there could be no proper tax assessment of them, and thus they could not be sold at a subsequent tax sale for delinquent taxes. The court admonished, “[T]he import of the Act [of 28 March, 1806] is that it allows the tax assessors the opportunity to independently assess a value to severed rights. . . . One cannot say the mineral rights were never valued when the commissioners were not given the opportunity to independently value them.”

V. CLEANING UP THE TITLE WASH

Decisions such as Armstrong v. Black Fox and Day v. Johnson are directly at odds with Herder Spring. For the Armstrong and Day courts, a failure to separately assess severed mineral rights could not possibly subject such interests to a tax sale, as a proper assessment was a logical prerequisite for any property interest to pass at a tax sale for unpaid ad valorem taxes. A failure to report simply could not vest title in a stranger who purchased the surface estate at a tax sale. The Herder Spring court, on the other hand, decided that if a severance of the mineral rights was never reported for separate assessment (or could not be proven to have been reported), whatever assessment was made on the land and used at a subsequent tax sale necessarily was for the entire unseated property. And, absent some affirmative proof to the contrary, good title for the whole property passed to the tax sale purchaser.

The federal court cases attempting to apply Pennsylvania law do little to clarify the murky waters of this peculiar property issue. First, as previously explained, the Proctor v. Sagamore decision dealt with a

136. Id. at 472 n.11.
137. Id. (Pa. Super. Ct. 2014). The Herder Spring court further claimed that the Supreme Court of Pennsylvania had addressed this issue in Bannard v. N.Y. State Natural Gas Corp., 293 A.2d 41 (1972). Id. In Bannard, the court explained that a disagreement about what was properly valued—coal, clay, oil, natural gas, and/or other minerals—in a particular mineral assessment should be disputed at the time of the assessment with the taxing authorities, not “collaterally attacked fifty years later.” Bannard, 293 A.2d at 49. It should be noted, however, that while the Herder Spring court concluded that the Bannard court addressed and rejected the argument that a severed mineral estate that was never separately assessed could not be sold at a tax sale for delinquent property taxes, in reality the Bannard court only addressed the narrow issue of what was presumptively included in a general “mineral” assessment for conveyance and tax sale purposes. Id. at 48–49. The Bannard court explained that if the intention of the parties to a mineral estate conveyance clearly indicated that the mineral estate included oil and natural gas, a subsequent general “mineral” assessment utilized for tax sale purposes necessarily included the oil and natural gas. Id. at 47–49. If no oil and natural gas actually existed when these assessments were made, such a disagreement should be made to the taxing authorities at the time of the over-valuation, not at a title dispute fifty years later; otherwise, there could be “protracted collateral investigation and litigation” about what was actually assessed and transferred in every mineral estate tax sale. Id. at 49.
138. See Herder Spring, 93 A.3d at 469, 472; see also supra notes 134–35.
139. Herder Spring, 93 A.3d at 472–73.
distinguishable factual situation in which an entire unseated property, prior to any severance, was assessed and sold at a tax sale for delinquent taxes.\textsuperscript{140} The Swan-Finch district and circuit courts then rejected the idea that failure to report a severed property interest, in and of itself, was fatal to an ownership claim.\textsuperscript{141} Rather, these courts admonished, one claiming title to a severed property interest through a tax sale must affirmatively show that the property interest in dispute was properly included in the assessment(s) used in the subsequent tax sale.\textsuperscript{142} Only then did the property interest pass to the tax-sale purchaser through the treasurer’s deed.\textsuperscript{143}

It has been over 100 years since Hutchinson v. Kline—the last Pennsylvania Supreme Court case to arguably address the issue of whether a tax sale for unseated surface land can rejoin a previously severed and recorded mineral estate, thereby divesting the record mineral owner of his legal property interest. The time is ripe for the Supreme Court to revisit this issue and, as this Article argues, to move away from outdated and unfair legal principles that are no longer relevant to Pennsylvania property and tax law. The court needs to establish a consistent and more equitable method for resolving these peculiar and complicated title disputes.

This Article proposes a rule that would begin with a rebuttable presumption that a general assessment and resultant tax sale for unpaid real estate taxes on unseated land, prior to the 1947 changes in Pennsylvania ad valorem taxation laws,\textsuperscript{144} included the entire property. Those claiming ownership of the subsurface mineral rights would be able to rebut this presumption and prove superior title in one of two ways.

First, no mineral rights would be considered to have passed at the tax sale if the claimant could affirmatively prove that the assessment on which the tax sale of the surface estate was based was not an assessment of the whole property. Such proof would include any indication on the tax sale assessment showing only the surface was assessed; any proof that a separate assessment was requested and, or completed for the mineral estate after severance; or any proof that taxes for the mineral estate were charged to, or paid by, the record mineral estate owner. This is not a controversial concept, and generally comports with most of the title wash jurisprudence to date, as it is well established that only the estate that is assessed passes at a tax sale.\textsuperscript{145}

\begin{itemize}
  \item \textsuperscript{140} See supra notes 100–08 and accompanying text.
  \item \textsuperscript{141} See supra notes 122, 124–28 and accompanying text.
  \item \textsuperscript{142} Id.
  \item \textsuperscript{143} Id.
  \item \textsuperscript{144} See supra text accompanying notes 54–59.
  \item \textsuperscript{145} See N.Y. State Natural Gas Corp. v. Swan-Finch Gas Dev. Corp., 173 F. Supp. 184, 191 (W.D. Pa. 1959), aff’d, 278 F.2d 577 (3d Cir. 1960) (“it is but elementary that only the estate assessed passes at a tax sale”); Babcock Lumber Co. v. Faust, 39 A.2d 298, 302 (1944) (“lien for unpaid taxes attaches only to the estate assessed, and that
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The second option is that a claimant could rebut the presumption of the minerals passing at the tax sale of the surface estate by affirmatively proving that a valid severance and recording of the mineral estate was made prior to the assessment and tax sale that purportedly rejoined the severed estates.146 This could include, for example, a properly recorded severance and conveyance of the mineral estate to a new owner, or a severance and reservation of the mineral rights in a conveyance of the surface estate.

Concededly, this second alternative would be a change from the current understanding of Pennsylvania law. As it presently stands, earlier court decisions have largely rejected the idea of relying on the recording process to prove ownership in tax sale title disputes. In *Hutchinson v. Kline*, the court explained that recording the reservation of mineral rights was not notice to the assessors, and did not protect the mineral estate owner of divestment at a subsequent tax sale if the taxing authorities were not informed of the newly-created estate in accordance with the Act of 28 March, 1806.147 The *Herder Spring* court adopted this reasoning.148 There are, however, strong arguments for implementing this change.

A. Intent of the Legislature and Severity of Divestment

There is considerable weight to the contention that the Act of 28 March, 1806 was enacted to raise revenue for the counties, not to divest mineral estate owners, who had taken due care to properly record, of their property interest.149 It is well settled in Pennsylvania that the purpose of tax sales is to raise revenue, not to extinguish property rights.150

This argument is bolstered by the fact that the Act itself provided a four-fold penalty for failing to comply with the reporting and assess-

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146. This second option tracks Pennsylvania recording law, insofar as Pennsylvania does not have a Marketable Title Act that would automatically extinguish title defects more than a certain number of years old. See *BLACK'S LAW DICTIONARY* 1115 (10th ed. 2014) (defining marketable title act as “[a] state statute providing that a person can establish good title to land by searching the public records only back to a specified time (such as 40 years)”; see also *NANCY SAINT-PAUL, CLEARING LAND TITLES* § 5 (3d ed. 2014) (providing comprehensive, updated list of states that have some form of marketable title act; Pennsylvania is not included).


149. See *Hicks & Oberdick, supra* note 33, at 18–19.

ment mandate.\textsuperscript{151} The Herder Spring court, citing no evidence other than its own reasoning, dismissed the four-fold tax penalty argument in a footnote.\textsuperscript{152} It reasoned that since the penalty was available when the Hutchinson v. Kline and Roaring Creek decisions were issued,\textsuperscript{153} but was not applied by those courts, the penalty must have been imposed only in instances where the land had not been sold at a tax sale.\textsuperscript{154}

But the previously mentioned Day v. Johnson, Armstrong v. Black Fox, and Swan-Finch courts, however, support the idea that tax sales were not meant to divest an unknowing record owner of his property interest. To those courts, a dispute about whether a separate assessment was properly made should be settled with the taxing authorities, not by vesting ownership in a stranger to the title. Perhaps the best summation of the argument for enforcing the four-fold tax penalty, as opposed to stripping record owners of their property interests for failure to comport with the Act of 28 March, 1806, is found in City of Philadelphia v. Miller:\textsuperscript{155}

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.\textsuperscript{156}

Even in the cases that pre-date Hutchinson, which are often cited by proponents of the title wash, the courts emphasize that stripping a record owner of his property interest is a drastic, and in some circumstances, unjust result. For instance, in Williston v. Colkett,\textsuperscript{157} the owner of a newly created 600-acre unseated parcel knowingly paid taxes on only 200 acres—as the taxing authorities mistakenly included

\begin{itemize}
\item 151. See Act of 28 March, 1806 § 1, 4 Sm. L. 346 (repealed and replaced by 72 Pa. Cons. Stat. § 5020–409) (“on failure of any holder of unseated lands to comply with . . . this act, it shall be the duty of the county commissioners to assess on every tract of land . . . four times the amount of the tax to which such tract or tracts of and would have been otherwise liable”).
\item 152. See Herder Spring, 93 A.3d at 471 n.10.
\item 154. Herder Spring, 93 A.3d at 471 n.10
\item 156. Id. at 450. See also Hicks & Oberdick, supra note 33, at 23 n.92 (“The law does not confiscate a man’s land although he does not return it to the commissioners, and they do not know of it and do not tax it. The Act of 1806 directs that if land is not returned by the owner and not taxed, a fourfold tax may be assessed on it when discovered; this penalty may be imposed, but no other.”) (quoting Strauch v. Shoemaker, 1 Watts & Serg. 166, 178 (Pa. 1841) (Huston, J., dissenting)).
\end{itemize}
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only 200 acres in their assessment—instead of notifying the county commissioner, in accordance with the Act of 28 March, 1806, that he was responsible for three times the acreage.\footnote{158. Id. at 38–39.} Subsequently, the land underwent a treasurer’s sale for unpaid taxes, with the treasurer’s deed showing 200 acres sold.\footnote{159. Id. at 39.} The court, notwithstanding the treasurer’s deed, held that all 600 acres had been transferred by the tax sale due to the owner’s failure to properly report and assess the property.\footnote{160. Id.} It is telling that the court spent nearly the entire opinion emphasizing that the owner’s knowing and willful misconduct justified the harsh result of divestment of his legal property interest.\footnote{161. Id.}

In 1889, in the \textit{Roaring Creek} case, also cited with approval by the \textit{Herder Spring} court, the Court of Common Pleas judge acknowledged in dicta that under current law a general assessment and tax sale of unseated land would pass title to the surface and subsurface estates regardless of separate record ownership.\footnote{162. Roaring Creek Water Co. v. Northumberland Cnty. Comm’rs, 6 Pa. C.C. 473, 476 (Ct. Com. Pl. 1889).} While he conceded that the taxing authorities were not legally required to take notice of the titles of the parties, doing so, he concluded, would “doubtless . . . be convenient and just to them.”\footnote{163. Id.}

\textbf{B. Record Notice is Notice to the World}

Just as the \textit{Roaring Creek} court suggested, recognizing properly-recorded titles would impart a measure of fairness and justice into the title wash system. While the law clearly did not require taxing authorities to perform title searches, this does not mean that it would be unfair to expect more from those purchasing or leasing real estate interests, especially in modern times. Recording a deed containing a severance of the surface and mineral estates, after all, is “constructive notice to all the world of the fact of severance.”\footnote{164. Del. & Hudson Canal Co. v. Hughes, 183 Pa. 66, 70 (1897). Constructive notice through proper recording is widely recognized as “just as effectual for the protection of the rights of the parties as an actual notice by word of mouth or otherwise.” 66 AM. JUR. 2D Records & Recording Laws § 75 (1964).}

Record notice becomes particularly important when considering not just the historical perpetration of widespread fraud,\footnote{165. See supra text accompanying note 44.} but also the troubling factual situations like in \textit{Herder Spring}. There, a sophisticated buyer of unseated surface property, with full knowledge of the previous severance of the mineral estate, cavalierly leased the mineral

\begin{itemize}
\item 158. Id. at 38–39.
\item 159. Id. at 39.
\item 160. Id.
\item 161. Id. In an effort to highlight the owner’s intentional tax fraud, the court described his conduct with phrases like, “[h]e was silent for his own advantage, when truth and the interest of the public required him to speak,” and “he has brought the evil on himself.” Id. at 39.
\item 163. Id.
\item 164. Del. & Hudson Canal Co. v. Hughes, 183 Pa. 66, 70 (1897). Constructive notice through proper recording is widely recognized as “just as effectual for the protection of the rights of the parties as an actual notice by word of mouth or otherwise.” 66 AM. JUR. 2D Records & Recording Laws § 75 (1964).
\item 165. See supra text accompanying note 44.
\end{itemize}
rights and then sued to quiet title, relying—not illogically—on the purported reunification of the previously severed estates through a tax-sale title wash. There is something fundamentally wrong with a system that rewards this type of behavior with superior title. But the Herder Spring court interpreted the current state of Pennsylvania law to allow just such a result.

Instead of stripping unknowing mineral estate owners, like the Keller heirs, of duly recorded property interests, the onus should be on the buyer or lessee to exert due diligence by performing a detailed title search, and—just as when purchasing entire real property—to be required to respect properly recorded severed interests. Even though the task may require more effort due to the historically disparate treatment of seated and unseated land, performing an accurate and diligent title search is far from impossible. Moreover, many of the modern purchasers or lessees are large oil and gas companies, with more than sufficient resources to hire experienced and competent title attorneys.

C. Accurate Assessments and Changes in Oil and Gas Law

Finally, one cannot discuss the divestment of duly recorded mineral rights through a tax sale without confronting the thorny issue of just how an assessment was made, and what was properly assessed and therefore sold at a treasurer’s sale. As mentioned above, it is well settled in Pennsylvania that a “lien for unpaid taxes attaches only to the estate assessed, and that estate, but no more, passes at a public sale.” But how would an assessor in the 1800s or early 1900s, making a visual assessment on unseated land, be able to properly include a value on the minerals beneath the surface?

This question is magnified in a region where the most valuable mineral—natural gas—could not be extracted in a commercially viable way until the development of hydraulic fracturing in 1949, a process

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166. Because ad valorem taxes for unseated land historically were assessed against the land itself, see supra text accompanying notes 19–22, tax deeds for unseated land in title chains often will not provide the name of the previous owner, but will instead describe the land according to the original warrants, thus requiring a title examiner to go back to the initial land warrants and chain the mineral interests forward. See Michael K. Vennum & Grant H. Hackley, Recognizing New Issues Arising Out of the Marcellus Shale Development—Avoiding Pitfalls—A Primer for Diligent Oil and Gas Title Attorneys, 84 Pa. B. Ass’n Q. 25, 33 (2013). Furthermore, if land was determined to be unseated for taxation purposes, it was to be recorded in separate unseated land books that were kept by most counties, which must be reviewed to determine the status of the land during pre-1947 conveyances. See id.

167. See, e.g., Vennum & Hackley, supra note 166, at 33 (providing step-by-step title search instructions for the “diligent title attorney” when dealing with real estate that may have been affected by a title wash).


that was not economically feasible in Pennsylvania until very recently.\textsuperscript{170} Thus, one cannot help but wonder how a basic, general assessment of unseated land at that time could have valued the subsurface minerals in any meaningful way.\textsuperscript{171} This particular dilemma poses a rather gaping hole in the \textit{Herder Spring} court’s argument that “[o]ne cannot say the mineral rights were never valued when the commissioners were not given the opportunity to independently value them.”\textsuperscript{172} Even if presented with such an opportunity, how could the county commissioners at that time possibly have made a meaningful valuation and assessment of a mineral estate—particularly oil and natural gas interests—in order for the estate to then be sold at treasurer’s sale?

Some courts have recognized this conundrum deciding that a proper valuation, specifically of minerals like oil and natural gas, was impossible at the time the assessments in question were made. Thus, it would be logically inconsistent to say that such property interests passed at a subsequent tax sale.\textsuperscript{173} This valuation difficulty also appears to be what concerned the Supreme Court of Pennsylvania in \textit{F. H. Rockwell}, where it warned that a mere “naked reservation” of minerals rights would not be sufficient to mandate property taxes; there had to be some logical method of valuation in order for taxes to be levied on those interests.\textsuperscript{174}

The \textit{Herder Spring} court’s answer to this issue was simply to presume that any general assessment of unseated land, absent affirmative proof to the contrary, included the entire estate; was a valid and accurate assessment of the entire property unless challenged at the time it was made; and thus passed the entire estate at a subsequent treasurer’s sale for unpaid taxes. This solution, however tidy it may appear, raises serious concerns about fairness to the record mineral estate owners.

First, as some commentators have noted, absence of an assessment or proof of taxes paid does not necessarily mean notice was not provided to the taxing authorities: “[I]t is equally plausible that the requisite notice was given but no taxable estate existed because the county

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{171} That is, unless circumstances existed like those described in \textit{F.H. Rockwell}: “[d]evelopment in the neighborhood, sales of oil or gas lands in close enough proximity to add value, or any other element of value which may form a basis of valuation.” F. H. Rockwell & Co. v. Warren Cnty., 77 A. 665, 666 (Pa. 1910).
\item \textsuperscript{173} See, e.g., Day v. Johnson, 31 Pa. D. & C.3d 556, 562 (Ct. Com. Pl. 1983) (trying to put a value on subsurface minerals like oil and natural gas, without bringing them to the surface and giving them a market valuation, would be an “exercise in clairvoyance”).
\item \textsuperscript{174} \textit{F. H. Rockwell}, 77 A. at 666.
\end{enumerate}
\end{footnotesize}
lacked a sufficient basis to value such interests.” Thus, it is entirely conceivable that taxes may not have been assessed against a mineral estate because there simply was no basis for levying those taxes. But the *Herder Spring* decision completely ignores this potential scenario. Instead, the court attempts to create a virtually per se rule that recorded, severed mineral interests, which lack affirmative proof of separate assessment or taxation, will pass at a subsequent treasurer’s sale of the surface estate as long as that sale is based on a general assessment of the unseated land.

Second, the understanding and laws concerning ad valorem taxation of oil and natural gas interests have dramatically changed in Pennsylvania. Courts have realized that it makes little sense to assess taxes on these subsurface minerals that exist in potentially unknown quantities—the value of which can fluctuate drastically—until actual extraction of those minerals. Punishing record mineral estate owners by divestment of their property interest for allegedly not reporting or paying taxes on minerals that are nearly impossible to value or assess until extracted is anathema to both current law and common sense. As understanding and laws progress, there must be a compelling reason why the treatment of historical property law issues should not follow suit.

Many of the concerns with revising the contours of the title wash center around upsetting years of Pennsylvania property and tax jurisprudence. These concerns, however, can be addressed in the same manner in which the *IOGA* court reversed the long-held rule that oil and natural gas were considered “land” for ad valorem taxation: apply the new rule prospectively only.

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176. See *supra* text accompanying notes 54–63.
177. Until the *IOGA* decision in 2002, the rule of law in Pennsylvania was that minerals like coal, oil, and natural gas, even when simply lying dormant, were considered taxable real estate as long as they had value. See *F. H. Rockwell & Co. v. Warren Cnty.*, 77 A. 665, 665 (Pa. 1910) (“oil, gas, and coal are minerals, and, when the title to the same is severed from the owner of the surface and is vested in a separate owner, an estate in land is thus created, which if it be of any value, may be taxed”). Thus, since *F. H. Rockwell* and until *IOGA*, local governments had been taxing oil and gas interests and relying on the revenues produced. *Oz Gas, Ltd. v. Warren Area Sch. Dist.*, 938 A.2d 274, 278–79 (Pa. 2007). *IOGA* only applies, however, to oil and natural gas; coal and other similar “fixed” mineral interests are still subject to ad valorem taxation prior to extraction. See *Indep. Oil & Gas Ass’n of Pa. v. Bd. of Assessment Appeals of Fayette Cnty.*, 814 A.2d 180, 184 (Pa. 2002).
178. See, e.g., *Herder Spring Hunting Club v. Keller*, 93 A.3d 465, 473 (Pa. Super. Ct. 2014) (“We do not believe it proper to reach back, more than three score years, to apply a modern sensibility and thereby undue that which was legally done.”); Greevy & Shoemaker, *supra* note 23, at 115 (“[The title wash] was a rule that was needed and was created by statute to meet the contingencies of the times. Many titles to what is now very valuable oil and gas are dependent upon that rule, which has stood inviolate for roughly 200 years.”).
Thus, any title dispute regarding severed surface and mineral estates that has previously been adjudicated through the application of historic title wash principles would be left undisturbed, while courts would resolve pending and future disputes by applying the new proposed rule. Furthermore, those owners or lessees who have removed and sold minerals and paid royalties based on previous understandings of title superiority would not be responsible for damages or restitution to newly determined mineral owners.

Another concern regarding a change in the current law is that there may be parties who have made decisions about property ownership and acquisition based on the current understanding of the title wash but whose titles have not yet been challenged in court. Those parties may claim it is unfair that they acquired property and believed that property included the mineral rights, but enactment of the proposed rule would instead vest superior title in the previous record owner. The problem with this argument is that parties making such a claim would most likely fall into one of two categories: (1) sophisticated buyers who have performed extensive title research, are fully aware of the prior mineral estate reservation, and have consulted with legal experts on the status of the mineral rights after the tax sale; or (2) unsophisticated buyers who have failed to perform a proper title search to uncover the prior reservation.

While neither category engenders great sympathy, it is the former that evokes the least concern. Buyers like Herder Spring Hunting Club, who are fully cognizant of the prior reservation and have sought legal advice concerning the issue, should doubtless understand that the law in this area is far from settled. Purchasing vast tracts of real property and leasing the mineral rights in reliance on a tax sale in the chain of title that purportedly rejoined a previously severed and recorded mineral estate is, at best, a legal gamble. This gamble is especially apparent for modern-day buyers and lessees, as the various court decisions on this issue have been anything but consistent. At the end of the day, it can hardly be considered truly unfair for the purchaser of real property, having actual or constructive notice of a previous severance and separate ownership of the mineral rights, to be compelled to admit that the record mineral owner holds superior title.

VI. Conclusion

The proposed rule is not a perfect solution, and it unfortunately leaves many previous record mineral estate owners, who have been stripped of their property interests by the title wash, without means of redress. Making such a modification in the law retroactive, however,
would arguably introduce too much uncertainty into innumerable past real estate transactions. 179

But even an imperfect progression towards more equitable outcomes—which better reflect modern legal values—easily trumps clinging to outdated concepts for no other reason than continuity. As the late Pennsylvania Supreme Court Chief Justice Samuel J. Roberts admonished:

[The Pennsylvania Supreme] Court has full authority, and the corresponding duty, to examine its precedents to assure that a rule previously developed is not perpetuated when the reason for the rule no longer exists and when application of the rule would cause injustice. On previous occasions this Court has not hesitated to reconsider precedent in light of current social conditions and public policy.180

The need for the title wash has long since vanished, and the time is ripe for Pennsylvania to implement a more equitable and modern rule.

179. For example, suppose a party, who previously litigated and won a mineral estate title dispute based on a court’s favorable view of the tax sale title wash, then conveyed the mineral estate to a new owner. If the proposed rule would apply retroactively, the new good faith owner of the mineral estate could be subject to a quiet title action by the party who lost the previous title dispute. Furthermore, depending on when the original title dispute took place, there could be multiple subsequent conveyances that all would be upended by a retroactive application of the proposed rule.