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?"

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ABSTRACT[2]

With the ever-growing potential that Pennsylvania will play a significant role in the United States' production of natural gas in the 21st Century, more lawsuits are being filed over who owns the rights to the subsurface gas. Generally, such lawsuits involve a dispute between the heirs of the early landowner who recorded a deed that severed the natural gas from the surface estate and one whose chain of title emanates from a tax sale held after the severance was recorded. Several commentators have opined that if the land was "unseated" at the time of the tax sale and the severed subsurface estate was not separately assessed, then the tax sale "washed" the prior recorded severance and passed title of the natural gas to the tax sale purchaser even though the underlying tax assessment was directed solely to the surface estate or other mineral interests.[3] However, decisions from Pennsylvania federal and state courts alike, including several from the trial courts in north-central Pennsylvania where such "title washing" was purportedly practiced at the turn of the 20th Century, have cast serious doubts on the extent to which severed natural gas titles have been lost or divested by these early tax sales.

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2. This article contains general information concerning the concept of "title washing" natural gas interests under Pennsylvania law. The information contained herein does not provide and should not be relied on as legal advice or opinion. Nor should it be used or relied upon with regard to any particular facts or circumstances without first consulting with a lawyer. The information and opinions set forth herein may or may not reflect the views of the authors' firm or any particular client or affiliate of the firm.

3. *See, e.g.*, Michael K. Vennum and Grant H. Hackley, *Recognizing New Issues Arising Out of the Marcellus Shale Development—Avoiding Pitfalls—A Primer for Diligent Oil and Gas Title Attorneys*, Pa. Bar Assoc. Qtrly (Jan. 2013), pp. 26-33; Thomas E. Boettger, T*ax Sales: A Threat to Unguarded Oil, Gas, and Mineral Rights*, 67 Dick. L. Rev. 413 (1962-1963).

INTRODUCTION

This article summarizes Pennsylvania's real estate tax laws and the historical taxation of natural gas interests. Also, this article discusses the concept of title washing and its proper application to the real estate taxation of natural gas interests. Finally, it addresses how title washing is being misconstrued by commentators and those claiming title via tax sales in order to improperly deprive owners or the heirs and assigns of their severed natural gas interests.

BRIEF HISTORY OF PENNSYLVANIA REAL ESTATE TAX LAWS AND THE TAXATION OF NATURAL GAS INTERESTS

Under Pennsylvania law, "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."[4] In what is commonly referred to as the Uniformity Clause, the 1874 Pennsylvania Constitution provides that "[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of authority levying the tax, and shall be levied and collected under general laws."[5]

In Pennsylvania, taxation by implication is prohibited.

Pennsylvania's early real estate tax laws treated "lands" differently depending on whether they were "seated" or "unseated."[6] Land was "seated" when the tax assessor "finds upon it such permanent improvements as indicate a personal responsibility for the taxes."[7] If the tax assessor found no permanent improvements, then the land was denoted as "unseated."[8] This difference in land resulted in a primary distinction of how early ad valorem tax collection was handled: namely, if the land was seated, then the obligation to pay the real estate tax was a personal or *in personam* one; but, if the land was unseated, then the obligation to pay any real estate tax arose from the land itself and was *in rem*.[9]

In 1950, the United States Supreme Court ruled that notice procedures based on the distinction between *in personam* and *in rem* liability were unconstitutional.[10] Thirty-three years later, the United States Supreme Court revisited its 1950 decision and adopted the familiar due process standard that notice must be reasonably calculated to inform all parties who hold legally protected property interests.[11] These decisions served as a basis for the Pennsylvania Supreme Court's decision in 1983 to declare the notice provision in the Real Estate Tax Sale Law[12] as unconstitutional.[13] This decision then led to the enactment of the General County Assessment Law,[14] which provides the current procedures for the assessment and collection of ad valorem taxes in Pennsylvania.

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4. *Boulton* v. *Starck*, 369 Pa. 45, 48, 85 A.2d 17, 19 (1951) (*quoting Central Penna. Lumber Company's Appeal*, 232 Pa. 191, 194, 81 A. 204 (1911)).
5. Pa. Const. art. VIII, §1. Note: In the 1968 Pennsylvania Constitution, the Uniformity Clause was renumbered from former Article IX, Section 1, without any change to its language when adopted in 1874.
6. *See, e.g.*, 72 P.S. §5511.21.
7. *Rosenburger* v. *Schull*, 7 Watts 390 (Pa. 1838).
8. *Hutchinson* v. *Kline*, 199 Pa. 564, 49 A. 312, 313 (1901).
9. *Stoetzel* v. *Jackson*, 105 Pa. 562, 567 (1884).
10. *Mullane* v. *Central Hanover Bank & Trust*, 339 U.S. 306, 315 (1950).
11. *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 798-799 (1983). Notably, as early as 1847, the Pennsylvania Supreme Court recognized that no person shall lose his property without a hearing or an opportunity of being heard. *Brown* v. *Hummel*, 6 Pa. 86, 91 (1847). *See also Norris* v. *Delaware, Lackawanna & Western R.R. Co.*, 218 Pa. 88, 66 A. 1122, 1125 (1907) ("It is not the intention of the law, even in cases of tax sales, that an owner shall be deprived of his property by failure to perform a duty imposed by that law, unless he has notice or an opportunity to discharge the duty."); *Philadelphia* v. *Miller*, 49 Pa. 440, 450 (1865) ("Notice, or at least the means of knowledge, is an essential element of every just proceeding which affects rights of persons or property").
12. Act of July 7, 1947, P.L. 1368, No. 2, *as amended*, 72 P.S. §§5860.101 – 5860.803.
13. *First Pennsylvania Bank, N. A.* v. *Lancaster County Tax Claim Bureau*, 504 Pa. 179, 470 A.2d 938, 942 (1983).
14. 72 P.S. §§5020-201, *et seq*.

"It is well-established in Pennsylvania that the power of a municipal body to tax is statutory and must originate from an enactment of the General Assembly."[15] Pennsylvania tax laws contain no definition for the term "lands."[16] Early decisions from the Pennsylvania appellate courts held that because oil and natural gas, while in place, were land for real estate conveyance and severance purposes, oil and natural gas could be assessed and charged with real estate taxes and sold when not paid.[17] However, in 2002, the Pennsylvania Supreme Court ruled that natural gas and oil are not proper items of real estate taxation because they do not fall within the meaning of either "real estate" or "lands" under Section 201(a) of Pennsylvania's General County Assessment Law.[18] Moreover, in 2007, the Pennsylvania Supreme Court explained that the statements in its earlier decisions to the effect that oil and natural gas were taxable as "lands" were made without "contemplat[ion of] whether any particular statutory provision permitted the taxation of oil and gas interests" or were made in cases which "d[id] not involve a taxing issue."[19] Also, 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."[20] Consequently, in Pennsylvania, there exists no statutory authority that supports the ad valorem taxation of subsurface natural gas interests.[21]

In 2007, the Pennsylvania Supreme Court held that "ad valorem taxes on underground oil and gas reserves are invalid prospectively, *i.e.*, only from the date of the *IOGA* decision and not before."[22] However, the *Oz Ga*s court did not declare that the *IOGA* decision applies prospectively for all purposes. Instead, the Supreme Court addressed only whether "*IOGA* . . . renders those taxes [previously paid by Oz Gas] uncollectible retroactively for a three-year look-back period," such that the taxing authorities must pay back the collected taxes.[23] The *Oz Gas* court justified its holding of non-retroactivity on its determination that "[r]equiring a refunding of the taxes would cause substantial financial hardship to the communities involved."[24] Such "devastating consequences" to taxing authorities does not exist where the sole dispute is over who owns the subsurface oil and gas interests.[25] Thus, under Pennsylvania's "general principle" of retroactivity,[26] the *IOGA* and *Coolspring Stone Supply* decisions hold that subsurface oil and natural gas can never be the basis of a valid real estate tax assessment and subsequent sale, except where the underlying dispute involves the collection of ad valorem taxes prior to the *IOGA* decision.[27]

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15. *Coolspring Stone Supply, Inc.* v. *County of Fayette*, 929 A.2d 1150, 1154 (Pa. 2007).
16. *See, e.g.*, Act of Apr. 3, 1804, §2, 4 Sm. 201 ("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.").
17. *See, e.g., F. H. Rockwell & Co.* v. *Warren County ("Rockwell")*, 228 Pa. 430, 77 A. 665 (1910).
18. *Indep. Oil & Gas Ass'n of Pa.* v. *Bd. of Assessment Appeals ("IOGA")*, 814 A.2d 180, 184 (Pa. 2002).
19. *Coolspring Stone Supply*, 929 A.2d at 1157, n.9.
20. *Id*. at 1155-1156. As the Supreme Court noted: "Land 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.'" *Id*. at 1155 (*citing* Webster's NewWorld Dictionary 791 (2d college ed. 1986)).
21. *Id*. at 1157, n.9.
22. *Oz Gas, Ltd.* v. *Warren Area School Dist.*, 595 Pa. 128, 938 A.2d 274, 283 (Pa. 2007).
23. *Id*. at 281.
24. *Id. See also id*. at 285 ("To avoid the potentially devastating consequences to taxing entities, it is important that taxes collected pursuant to a valid statute remain valid unless and until otherwise determined by this Court.").
25. *Wimer* v. *Pa. Emples. Benefit Trust Fund*, 868 A.2d 8 (Pa. Super. 2005), aff'd 595 Pa. 627, 939 A.2d 843 (Pa. 2007) (a Supreme Court's decision that is declared to have prospective application is "distinguishable because the issue of the retroactive application of a newly enacted amendment to the relevant statute, crucial to the [previous] decision, is not present in the instant case").
26. *Christy* v. *Cranberry Vol. Ambulance Corps., Inc*., 856 A.2d 43, 51-52 (Pa. 2004) ("Our general principle is that we apply decisions involving changes of law in civil cases retroactively to cases pending on appeal."); *McHugh* v. *Litvin, Blumberg, Matusow & Young*, 525 Pa. 1, 574 A.2d 1040, 1044 (1989) ("the general law of our Commonwealth continues to be, as it was at common law, that our decision announcing changes in law are applied retroactively, until and unless a court decides to limit the effect of the change, and that litigants have a right to rely on the change, . . .").
27. *Meske* v. *Hull*, Nos. 2009-CV0117 and 2011-CV-33, Slip op., at 9 (C.C.P. Sullivan C'ty, April 23, 2013) (applied IOGA retroactively to declare that a severed oil and gas estate was not taxable and thus not sold at a 1968 tax sale of the surface estate). *Cf. First Pa. Bank*, 470 A.2d 938, 941 (1983) (applied 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) (applied the *Mennonite Board* decision retroactively to find that a 1983 tax sale was invalid in a case involving

Even if the *IOGA* and *Coolspring Stone Supply* decisions are given prospective application where title is claimed based on tax sales, the Pennsylvania Supreme Court declared in its earlier decisions that an assessor can tax only that which has value; if no gas or oil exists, they cannot be assessed and taxed as if they have value.[28] Consequently, the mere conveyance or reservation of oil or gas in a recorded deed with no other facts to base a valuation upon cannot warrant the assessment of taxes upon such subsurface interests.[29]

THE "TITLE WASH" CONCEPT

Because early real estate taxation of unseated lands was determined to be an *in rem* obligation, the Pennsylvania Supreme Court held that the owner of unseated land could default on the payment of the assessed real estate taxes and purchase the land at the treasurer's sale as may be done by a stranger to the title.[30] Further, for the same reason, the subsequent payment of the assessed taxes by the defaulting owner/now tax sale purchaser was not considered to be a redemption.[31] More importantly, because the early real estate tax laws provided that "[s]ales 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 the land 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,"[32] the Supreme Court declared that "there is nothing in reason or law to prevent a man who holds a defective title [in unseated lands] from purchasing a better [one] at a treasurer's sale for taxes" and that '[i]t is a very common remedy for defective titles."[33]

Hence, "title washing" under Pennsylvania real estate tax laws was a means by which an owner of unseated lands 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, having vested in him all "estate and interest" sold.[34] In such circumstance, the title was "washed," because "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."[35]

However, "title washing" does not wipe out or destroy prior estates or interests in the unseated land. Rather, "[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."[36] 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."[37] As the Supreme Court explained when discussing whether an 1824 tax sale of an unseated land extinguished a ground rent estate in a recorded 1807 deed:

> The rent in this case, though it issued out of ground or land, is considered as an estate altogether distinct, and of a very different nature from that which the owner of the land has in the land itself. Each is considered the owner of a fee-simple estate. The one has an estate of inheritance in the rent, and the other has an estate of inheritance in the land out of which the rent issues. The one is an incorporeal inheritance in fee, and the other a corporeal inheritance in fee; and each made, by our acts of Assembly, separate and distinct subjects of taxation. ***There is, therefore, no reason why the collection, or the mode of collecting a tax assessed upon the one, should have any effect whatever upon the other.*** It would be

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breach of a mortgage agreement, rejecting the claim that retroactive application would cloud the titles of many sales).

28. *Rockwell*, 77 A. at 666.
29. *Id. See also New York State Nat'l Gas Corp.* v. *Swan-Finch Gas Devel. Corp.*, 173 F.Supp. 184, 191 (W.D. Pa. 1959), *aff'd* 278 F.2d 577 (3d Cir. 1960); *New York State Nat'l Gas Corp.* v. *Swan-Finch Gas Devel. Corp.*, 278 F.2d 577, 579-580 (3d Cir. 1960).
30. *See Powell* v. *Lantzy*, 173 Pa. 543, 34 A. 450 (1896); *Neill* v. *Lacy*, 110 Pa. 294, 1 A. 325 (1885).
31. *Id.*
32. *See, e.g.*, Act of Apr. 3, 1804, §5, 4 Sm. 203.
33. *Coxe* v. *Gibson*, 27 Pa. 160, 165 (1856).
34. *Id.*
35. *Caul* v. *Spring*, 2 Watts 390, 396 (1834).
36. *Tide-Water Pipe Co.* v. *Bell*, 280 Pa. 104, 124 A. 351, 355 (1924).
37. *Id.*

> monstrous, and the most gross injustice imaginable, to hold, where the owner of the rent has paid the tax assessed thereon, that his estate shall be extinguished, or sold afterwards by a sale made of the land for and on account of the non-payment of the taxes assessed upon it. ***Such a thing is wholly unnecessary, and was never intended or designed by the legislature.***[38]

Hence, a sale of unseated land for taxes does not extinguish or "wash" estates or interests of third persons in such unseated land.[39]

APPLICATION OF "TITLE WASH" TO NATURAL GAS INTERESTS

So, how does title wash apply to natural gas interests that are severed from the surface of unseated lands? To answer that question, you must keep in mind the following ten aspects of Pennsylvania law.

First, it is well established that a deed cannot grant a greater property interest than that owned by the grantor.[40] Thus, regardless of whether the land or estate being sold is seated or unseated, a sale for delinquent taxes conveys to the purchaser only that estate owned by the titleholder and covered by the assessment which led to the sale.[41]

Second, there exists no authority in Pennsylvania that a tax sale can divest a property owner, who can establish a valid chain of title through recorded deeds and has paid all assessable taxes on such property, of title to the property by listing it for a tax sale based on assessments that were never or improperly made on such property.[42] In other words, "[a] valid assessment . . . is a necessary prerequisite which must be complied with, otherwise the sale is void."[43] If there is no valid assessment, any tax sale based thereon is void, and no interest passes to the purchaser.[44] Moreover, if a tax sale is void for want of authority to make it, the property owner need not redeem it and his failure to do so is not a matter upon which the purchaser or his assigns can rely to claim title.[45]

Third, it is well settled in Pennsylvania, both as to seated and unseated land, that the description in the assessment and in the tax deed must identify the property, or the assessment will be void and title to the property will not be passed by a tax sale.[46] "It is not necessary that the descriptions be by metes and bounds, but the land must be so identified that the owner, the collector, and the public can determine what property is being assessed or sold[.]"[47] Hence, an assessment that uses the word "Mineral" or "Min." along with a name that is associated with only the surface or coal estates cannot support a divestiture of a natural gas title because of a subsequent tax sale based on such assessment.[48]

Fourth, 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

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38. *Irwin* v. *Bank of United States*, 1 Pa. 349, 352-353 (1845) (emphasis added).

39. *Western P. R. Co.* v. *Johnston*, 59 Pa. 290, 294 (1869). *See also Kline* v. *Lawrence County Comm'rs*, 84 Pa.D.&C. 1, 11-12 (C.C.P. Lawrence C'ty 1951) ("The Act of May 21, 1943, P. L. 364, amending section 17 of the Act of May 29, 1931, P. L. 280, as further amended by the Act of May 24, 1945, P. L. 945, par. 2, 72 PS (5971 (q)), does not authorize the extinguishing of an estate in coal severed many years previously but only estates in the nature of municipal claims or taxes, mortgages or ground rents.").

40. *Wagner* v. *Landsville Camp Meeting Ass'n*, 24 A.3d 374, 376 (Pa. Super. 2011).

41. *Miller* v. *McCullough*, 104 Pa. 624, 629-630 (1884) (unseated land); *Brundred* v. *Egbert*, 164 Pa. 615, 622, 30 A. 503, 505 (1894) (seated land). *See also Babcock Lumber Co.* v. *Faust,* 156 Pa. Super. 19, 26, 39 A.2d 298, 302 (1944) ("The lien for unpaid taxes attaches only to the estate assessed, and that estate, but no more, passes at a public sale even though the authorities assume to convey land against which there had been no valid assessment.").

42. *Poffenberger* v. *Goldstein*, 776 A.2d 1037, 1042 (Pa. Cmwlth. 2001).

43. *Nypen Corp.* v. *Sechrist*, 138 Pa. Super. 361, 365, 10 A.2d 822, 824 (1940) (*citing Simpson* v. *Meyers*, 197 Pa. 522, 527, 47 A. 868 (1901)).

44. *Urban Redevelopment Condemnation Case*, 406 Pa. 6, 10, 178 A.2d 149, 150 (1961); *Poffenberger*, 776 A.2d at 1042.

45. *Albert* v. *Lehigh Coal & Navigation Co.*, 431 Pa. 600, 246 A.2d 840, 847 (1968); *Simpson*, 47 A. at 870-71.

46. *Hunter* v. *McKlveen*, 361 Pa. 479, 65 A.2d 366, 367 (1949). *See also Franklin Coal Co.* v. *Bertels*, 109 Pa. 550, 553 (1885) ("A sale of unseated land for taxes passes the title to the purchaser although the land may not have been taxed and sold in the name of the real owner. In such a case, however, the land must be identified and distinguished in the assessment as the same land as that in controversy; and in case of dispute the question of identification is for the jury.").

47. *Hunter*, 65 A.2d at 367 (*citing Norris* v. *Delaware, Lackawanna & Western R.R. Co.*, 218 Pa. 88, 66 A. 1122, 1125 (1907)).

48. *Swan-Finch*, 173 F.Supp. 184, 191 (W.D. Pa. 1959); *Swan-Finch*, 278 F.2d 577, 579-580 (3d Cir. 1960); *New Shawmut Mining Co.* v. *Gordon*, 43 Pa.D.&C. 2d 477, 488-494 (C.C.P. Clearfield C'ty 1963).

discharge the duty (i.e., through the issuance and delivery of a valid assessment).[49] 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."[50] 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."[51]

Fifth, "where there is a divided ownership in unseated lands, the surface being owned by one party and the minerals by another party, the surface is subject to assessment for taxes as unseated land and a tax deed would convey the title to the surface only if the tax was assessed against the surface only, and the minerals when severed are subject to separate assessment in the same manner as the surface and a tax title to the minerals when properly assessed and sold for the payment of taxes would convey a good title to the minerals."[52] Hence, the owner of subsurface rights under unseated lands, holding by virtue of an exception and reservation in a recorded deed, is neither a tenant in common nor a joint tenant with the owner of the surface; instead, each owner has a separate estate taxable according to their several interests.[53]

Sixth, under Pennsylvania law, an owner's right to sever a subsurface 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.[54] Accordingly, an owner's severance of a subsurface estate from the surface estate by an exception and reservation in a recorded deed is not lost or destroyed because the Pennsylvania legislature has provided over the years different methods of making assessments of unseated lands and of collecting taxes levied against them.[55]

Seventh, "[w]hen such a conveyance has been made of the coal or other mineral, it 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."[56] More-over, "[t]he recording of a deed is notice, notwithstanding the party to be affected by it may never have known of its existence or of the severance wrought by it, because he might have known if he had exercised the vigilance the law requires of him, and examined the record."[57]

Eighth, to the extent the *IOGA* and *Coolspring Stone Supply* decisions are prospective only, when one records a deed containing an exception of the natural gas, oil and other minerals and mineral rights, "there [is] a severance of the oil, gas and minerals from the surface and . . . this constitute[s] an estate in land subject to taxation even if this mineral estate [does] underly unseated lands."[58] However, an assessor can tax only that which has value; if no natural gas exists, the gas cannot be assessed and taxed as if it has value.[59] Consequently, the mere

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49. *Norris*, 66 A. at 1125.
50. *Albert*, 246 A.2d at 847.
51. *Hess* v. *Westerwick*, 366 Pa. 90, 96, 76 A. 745 (1950).
52. *Rockwell*, 77 A. at 666. *See also Finnegan* v. *Pennsylvania Trust Co*., 5 Pa. Super. 124, 129 (1897) ("After severance of the surface from the underlying strata, whether by reservation or by express grant, the mineral right is an independent interest in land; it forms a distinct possession; is held upon a distinct title; and is as much the subject of sale, devise or inheritance and of separate taxation and incumbrance as the surface.").
53. *Neill*, 1 A. at 325.
54. *Rockwell*, 77 A. at 665-666.
55. *Id*.
56. *Delaware & Hudson Canal Co.* v. *Hughes*, 183 Pa. 66, 69-70, 38 A. 568, 569 (1897).
57. *Delaware & Hudson Canal*, 38 A. at 570. *See also First Citizens Nat'l Bank* v. *Sherwood*, 879 A.2d 178, 181 (Pa. 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); *Clancy* v. *Recker*, 455 Pa. 452, 316 A.2d 898, 902 (1974) ("the deeds to the [prior purchasers] which were a matter of public record would constitute constructive notice that some type of development plan with building restrictions existed and was intended by the owners"); *Finley* v. *Glenn*, 303 Pa. 131, 136, 154 A. 299, 301 (1931) (a grantee is responsible for knowing all restrictions within his or her chain of title capable of discovery upon examination of recorded deeds); *Weik* v. *Estate of Brown*, 794 A.2d 907, 911 (Pa. Super. 2002) ("Clearly, the recording statute has been given effect beyond determining priority of title. It has been interpreted to give notice to the public of title transfer and the contents of a deed.").
58. *Rockwell*, 77 A. at 666.
59. *Id*. ("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*. . . . Development in the neighborhood, sales of oil or gas 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*.") (italics added).

conveyance or reservation of natural gas in a recorded deed with no other facts to base a valuation upon cannot warrant the assessment of taxes upon such subsurface interest.[60]

Ninth, there exists no statutory authority in Pennsylvania that supports the real estate taxation of natural gas interests.[61] Further, even if a proper item of taxation, 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]."[62] As a result, "an owner does not lose title by virtue of failure to have the 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 [from a tax sale based on an assessment made after one records a deed or other writing containing a severance]."[63]

Tenth, a tax sale of property extinguishes only liens, not estates or interests of third persons.[64] This point ties back to the law that a sale for delinquent taxes conveys to the purchaser only that estate covered by the assessment which led to the sale.[65]

Thus, because the *IOGA* and *Coolspring Stone Supply* decisions have declared that natural gas interests can never be legally assessed and sold for real estate taxes, natural gas cannot be the proper subject of a title wash that occurs after the natural gas has been severed from the unseated surface estate through a deed reservation. Moreover, even prior to the *IOGA* and *Coolspring Stone Supply* decisions, title to a duly severed oil and natural gas estate could not legally pass or "wash" via a tax sale based on an assessment made in the name of the owner of the unseated surface estate absent either (i) production of the natural gas and a valid assessment thereon, or (ii) an assessment based on some other "definite fixed basis of valuation" of the natural gas by an applicable taxing authority.[66] As the Warren County Court of Common Pleas explained several years ago:

> In the instant case the parties agree there has been no operations for oil and gas since the creation of the exception and reservation. The interest created by the exception and reservation was never assessed for taxation purposes and if not so assessed there obviously could be no sale thereof for delinquent taxes. 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 oil and gas 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 and properly assessed in value. If this were not so the taxing authority could simply assess taxation on speculation as to value. . . .
>
> Here, John A. Day created a separate estate distinct from the surface by his exception and reservation albeit unseated land it was never produced and therefore never assessed or charged with taxes and consequently there could be no delinquency thereof that could have been sold by the treasurer in 1934.[67]

Similarly, as the Centre County Court of Common Pleas recently noted:

> In *F.H. Rockwell & Co.* v. *Warren County*, 228 Pa. 430, 433, 77A. 655, 666 (1910), the Court noted "[a] mere naked reservation of oil and gas in a deed without other facts to base a valuation upon is not sufficient to warrant the assessment of taxes. *Id.* at 433. In *Day* v. *Johnson*, 31 Pa.D.&C.3d 566, 1983 WL 968 (Pa. Com. Pl., 1983), the court found in favor of a plaintiff who claimed ownership through a tax sale. The *Day* court found the subsurface interest was never assessed for taxation purposes and therefore could not be sold for delinquent taxes. *Id.* at 558. The court further found the creation of an exception and reservation without operation for the removal of the minerals does not create a taxable estate per se and would not until production is commenced and the property is assessed. *Id.* The court provided the as-

60. *Id.*
61. *Coolspring Stone Supply*, 929 A.2d at 1157, n.9; *IOGA*, 814 A.2d at 184.
62. *Swan-Finch*, 278 F.2d at 580.
63. *Swan-Finch*, 173 F.Supp. at 193.
64. *Irwin*, 1 Pa. at 352-353; *Western P. R. Co.*, 59 Pa. at 294; *Kline*, 84 Pa.D.&C. at 9-12.
65. *See, infra.*, n.41.
66. *Day* v. *Johnson*, 31 Pa.D.&C. 3d 556, 558-561 (C.C.P. Warren C'ty 1983).
67. *Day*, 31 Pa.D.&C. 3d at 558-561.

> sessment for tax purposes of the subsurface rights is on the production of the oil and gas from the subsurface not on an estate where valuation cannot be determined. The present case is analogous to *Day*. As Defendants note, Plaintiff admits the subsurface rights were not assessed prior to the 1935 tax sale. Furthermore, Plaintiff does not have any evidence that there has ever been production of subsurface resources on the property since the recordation of the Keller reservation in 1899. Because the subsurface interest was never assessed for taxation purposes it could not have been sold for delinquent taxes.[68]

The lack of title wash of one's natural gas rights when there has been no gas production and no valid assessment thereon following the recording of a deed creating the separate estate is consistent with the law as it applies to other minerals, such as coal.[69] Accordingly, to the extent that the *IOGA* and *Coolspring Stone Supply* decisions do not apply retroactively, title "washing" of natural gas interests occurs only where both the gas estate and the surface estate are validly assessed—or only the gas estate is validly assessed—and sold at a tax sale.[70] In such a case, the tax sale purchaser acquires only the interests that were properly assessed—that is, either both the natural gas and surface estates, or just the natural gas interests.[71] But, "[w]here mineral rights have been severed from surface rights and are not separately assessable or assessed, only the surface passes in a tax sale for failure to pay taxes."[72]

MISAPPLICATION OF "TITLE WASH" TO NATURAL GAS INTERESTS

Despite the previous analysis, there are several commentators who have opined that if the unseated land and severed natural gas interests were not separately assessed, then a subsequent tax sale "washes" the prior recorded severance and passes title of the natural gas to the tax sale purchaser even though the underlying tax assessment was directed solely to the surface estate or other mineral interests.[73] To support this position, these commentators, and those claiming title to severed natural gas interests via tax sales, rely on the cases of *Powell* v. *Lantzy*, 173 Pa. 543, 34 A. 450 (1896), *Hutchinson* v. *Kline*, 199 Pa. 564, 49 A. 312 (1901), *Proctor* v. *Sagamore Big Game Club*, 166 F.Supp. 465 (W.D. Pa. 1958), *aff'd* 265 F.2d 196, 203 (3d Cir. 1959), and *Moore v. Commonwealth*, 129 Pa. Cmwlth. 628, 632-633, 566 A.2d 905, 908 (Pa. Cmwlth. 1989). However, a close examination reveals that they do not represent persuasive authority on the title washing of severed natural gas interests.

Initially, *Powell* and *Proctor* are cited because of the following statement by the district court in *Proctor*: "When 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. *Powell* v. *Lantzy*, 173 Pa. 543, 34 A. 450."[74] However, in both *Powell* and *Proctor*, the natural gas or mineral estates found to be sold as part of the tax sales were not severed from the unseated surface estates by an exception and reservation in a recorded deed until after the tax assessments had been made.[75] As a result, the tax sales in both cases were held to impact all estates in land (i.e., the "whole"), despite the belated severances.[76] This is what led the *Proctor* court to conclude that the severance of the natural gas interests was a nullity because "the tax sale of June 11, 1894 extinguished Proctor's title acquired in the deed from Bigler, et al. on June 5, 1893, and cut off the exception and reservation of the gas mentioned in his deed of October 1, 1894 to Elk

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68. *Herder Spring Hunting Club* v. *Keller (Herder Spring I)*, No. 2008-3434, Slip op., at pp. 6-7 (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) (internal footnote omitted).
69. *See, e.g., Norris*, 66 A. at 1125-1127 (where there was a severance of the coal, after which the surface continued to be assessed but the coal was not assessed, title to the coal did not pass via the tax sale); *Armstrong* v. *Black Fox Mining & Dev. Corp*., 15 Pa.D.&C. 3d 757, 762-763 (C.C.P. Armstrong C'ty 1980) (same); *Kline*, 84 Pa.D.&C. at 8 (same).
70. *Rockwell*, 77 A. at 666; Day, 31 Pa.D.&C. 3d at 558-561; *Swan-Finch* I, 173 F.Supp. at 191.
71. *Id*.
72. *Bailey* v. *Elder*, No. 08-02327, Slip op. (C.C.P. Lycoming C'ty, filed May 30, 2013).
73. *See, infra*., n.3.
74. *Proctor*, 166 F.Supp. at 475-476.
75. *See Powell*, 34 A.2d at 451; *Proctor*, 166 F.Supp. at 468; *Proctor*, 265 F.2d at 199, n.4.
76. *See Powell,* 34 A.2d at 452; *Proctor*, 166 F.Supp. at 470-471; *Proctor*, 265 F.2d at 199, n.4.

Tanning Company."[77] Hence, where the natural gas severance occurs before any identified tax assessment, *Powell* and *Proctor* are factually inapposite.[78]

On appeal in *Proctor* and in *Moore*, both the Third Circuit Court of Appeals and the Pennsylvania Commonwealth Court imply or state that to avoid extinguishment via a tax sale of an unseated surface estate, the unseated mineral estate must be separately assessed.[79] However, as the Third Circuit Court of Appeals noted, the *Proctor* case dealt with the situation where the severance by recorded deed occurred after both the assessment and the tax sale.[80] Similarly, as the Commonwealth Court stated in *Moore* immediately before making its statement, "the effect of the tax sales from 1908 to 1926 is of no moment to our resolution of this dispute."[81] As such, these statements by the Third Circuit Court of Appeals and the Pennsylvania Commonwealth Court constitute dicta and are not binding precedent.[82]

As for *Hutchinson*, that decision was a *per curiam* affirmance of a lower court's decision without a formal opinion by the Pennsylvania Supreme Court.[83] In the lower court opinion, the trial court ruled that based on the then existing Act of March 28, 1806 (the "Act of March 28, 1806"),[84] where there is a severance of the surface from the subsurface, the mineral owner has a duty to notify the county commissioners of this, "and if he fails to do so, and thereafter the lands are assessed as to the entire estate as unseated lands, and sold as such at a tax sale, the owner of the surface may purchase at such sale, and acquire good title to the minerals."[85] However, on appeal to the Supreme Court, the arguments raised on appeal were not the proper interpretation or application of the Act of March 28, 1806, but instead whether the land was seated as opposed to unseated, and whether the defendant could purchase the mineral estate at the tax sale in violation of his contract to pay the assessed taxes that served as a basis for the sale.[86] Thus, although an order of *per curiam* affirmance on the basis of the lower court's opinion generally means that the Supreme Court agrees with the lower court's rationale employed in reaching its final disposition, "the per curiam order is never to be interpreted as reflecting [the Supreme] Court's endorsement of the lower court's reasoning in discussing additional matters, in dicta, in reaching its final disposition."[87] Consequently, the *per curiam* order in *Hutchinson* does not have precedential value beyond its final disposition of the issues raised on appeal.[88]

Additionally, although the statute discussed by the trial court in *Hutchinson* imposes a duty on the owner of unseated "lands" to notify the county commissioners of such ownership, Pennsylvania law provides that before any such duty arises, there must be an estate in "land" that is both subject to taxation and being taxed by the requisite taxing authorities. As the Pennsylvania Supreme Court explained in *Rockwell*:

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77. *See Proctor*, 166 F.Supp. at 470. *See also Proctor*, 265 F.2d at 200-201 ("It is of no moment that Proctor, in his deed to Elk Tanning Company, reserved the natural gas to himself and to his heirs and assigns. If the tax sale to Childs cut off all of Proctor's legal title to the warrant, including his title to the natural gas, subject only to his right of redemption under Pennsylvania law—as we hold that it did—then when Proctor gave his deed to Elk Tanning Company, he had no legal title in the surface to convey to Elk Tanning Company 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.").

78. *Bailey*, Slip op. at 3, n.1.

79. *See Proctor*, 265 F.2d at 199, n.4 (*citing generally Rockwell*, 77 A. 665); Moore, 566 A.2d at 908 (*citing generally Proctor*, 166 F.Supp. 465).

80. *Proctor*, 265 F.2d at 199, n.4 ("But there had been no . . . severance [of the title of the gas from the title of the surface prior to the assessments for 1892 and 1893]), & at 200-201, *supra*. *See also Proctor*, 166 F.Supp. at 468 & 470 (same).

81. *Moore*, 566 A.2d at 908.

82. *Holt* v. *2011 Legislative Reapportionment Comm'n*, 38 A.3d 716, 732 (Pa. 2012) ("it is settled that dicta has no binding effect"). *See also Wertz* v. *Chapman Twp*., 559 Pa. 630, 642, 741 A.2d 1272, 1278 (1999) (a federal court's interpretation of state law does not bind state courts); *Martin* v. *Hale Prods*., 699 A.2d 1283, 1287 (Pa. Super. 1997) (same).

83. *See Hutchinson*, 199 Pa. at 572, 49 A. at 319 ("PER CURIAM: This judgment is affirmed on the opinion of the learned judge below.").

84. *See* Act of March 28, 1806, §1, 4 Sm. 346, *repealed and restated by* Act 1933-155, P.L. 853, §409, 72 P.S. §5020-409.

85. *Hutchinson,* 199 Pa. at 568.

86. *Id*. at 571-572.

87. *Commonwealth* v. *Tilghman*, 543 Pa. 578, 673 A.2d 898, 904 (Pa. 1996).

88. *Id. See also In re Stevenson*, 40 A.3d 1212, 1216, n. 5 (Pa. 2012); *Commonwealth* v. *Proetto*, 575 Pa. 511, 837 A.2d 1163, 1165 (2003) (Newman, J., concurring).

> [T]he 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 the surface. Because there may be a reservation of oil or gas by the grantor of the surface, or there may be an expressed grant of all the oil or gas underlying one or several tracts of land, it does not follow that in point of fact there is any such [taxable] 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 or 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 authority, but it should always be borne in mind that real estate is the thing being dealt with and the oil and gas are considered real estate and if there be no oil or gas then there is no real estate to be taxed."[89]

Consequently, because the mere conveyance or reservation of oil or gas in a recorded deed with no other facts to base a valuation upon cannot warrant the assessment of taxes, no notification duty arises under the Act of March 28, 1806.[90]

Further, the Act of March 28, 1806 provides for a remedy when any holder of unseated lands fails to comply with his or her statutory reporting duty, that remedy being "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."[91] As written, the Act of March 28, 1806 does not provide for a title divestiture of one's unseated land.[92] Under Pennsylvania law, "the remedies given by these statutes for the collection of taxes are exclusive,"[93] and "[w]hen a statute provides a remedy by which a right may be enforced, no other remedy than that afforded by the statute can be used."[94] Indeed, at the time the *Hutchinson* case was decided, Section 13 of the Act of March 21, 1806 provided 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. . . ."[95] Consequently, because the Act of March 28, 1806 provides only for the assessment of a fourfold tax and not a title divestiture, the trial court's dicta in *Hutchinson*—which imposes a different remedy—is contrary to Pennsylvania law.[96]

The fact that the trial court's dicta in *Hutchinson* is contrary to Pennsylvania law and not persuasive authority is illustrated by the Pennsylvania Supreme Court's decision in *Philadel-*

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89. *Rockwell*, 77 A. at 666 (emphasis added).

90. *Rockwell*, 77 A. at 666. *See also Swan-Finch*, 173 F.Supp. at 191; *Swan-Finch*, 278 F.2d at 579-580.

91. *See* March 28, 1806 Act, §1, *supra. See also Morton* v. *Harris*, 9 Watts 319, 326 (1840) ("The act of 1806, directs the owners of unseated land, under the penalty of a four-fold tax, to make a return to the commissioners of each and every tract held by them, and the name of the person to whom the original title from the commonwealth passed."); *Lycoming County Comm'rs Petition*, 62 Pa.D.&C. 1, 22 (C.C.P. Lycoming C'ty 1947) ("A reading of the statutes shows the duty is clearly mandatory on the part of the county commissioners to impose a fourfold penalty tax on land whose owner has failed to give the required notice under the Act of 1806 and subsequent acts reenact the same provision.").

92. *Philadelphia*, 49 Pa. at 451 ("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."). *See also Strauch* v. *Shoemaker*, 1 W. & S. 166, 178 (1841) (Huston, J, dissenting) ("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."), *cited with approval in Auman* v. *Hough*, 31 Pa. Super. 337, 346 (1906) ("the dissenting opinion of Huston, J., is worthy of consideration in connection with the modern decisions").

93. *Derry Tp. School Dist.* v. *Barnett Coal Co.*, 332 Pa. 174, 2 A.2d 758, 760 (1938).

94. *Derry Tp. School Dist.*, 2 A.2d at 760.

95. 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.

96. Of course, if the subsurface 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 subsurface interests (to the extent they fall within the plain and ordinary meaning of the term "lands") does not address the government's concern for locating taxable unseated lands to satisfy unpaid taxes, which is often cited as justification for the trial court's decision in *Hutchinson. See, e.g., Boettger, supra.*

phia v. *Miller*.[97] In that case, which was decided approximately thirty-six years prior to *Hutchinson*, Pennsylvania's highest 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."[98] In reaching this holding, the Supreme Court rejected the argument that failure to comply with the Act of March 28, 1806 can result in a divestiture of one's unseated land.[99] 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.[100]

Moreover, nine years after *Hutchinson*, the Pennsylvania Supreme Court decided *Rockwell*, wherein it explained that "title washing" is limited to those situations where taxes are assessed against the natural gas rights and those rights are sold at a subsequent tax sale.[101] In *Rockwell*, the Supreme Court recognized both the *Powell* and *Hutchinson* decisions, but ruled that the tax laws involving seated and unseated lands were not intended to and did not interfere with an owner's right to sever his natural gas rights through an exception and reservation in a recorded deed.[102] Accordingly, the Supreme Court in *Rockwell* held that:

> [W]here there is a divided ownership in unseated lands, the surface being owned by one party and the minerals by another party, the surface is subject to assessment for taxes as unseated land and a tax deed would convey the title to the surface only if the tax was assessed against the surface only, and the minerals when severed are subject to separate assessment in the same manner as the surface and a tax title to the minerals when properly assessed and sold for the payment of taxes would convey a good title to the minerals."[103]

Additionally, in *Rockwell*, the Supreme Court explained that "the right to tax depends upon the valuation and assessment of a definitive estate in land," and that "[i]f there is no land there is nothing to tax."[104] The Supreme Court further noted these principles apply to both the surface and subsurface estates in land and that "[b]ecause 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 such estate in existence."[105] Hence, "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," and "if there be no oil and gas, then there is no real estate to be taxed."[106]

Following *Rockwell*, Pennsylvania federal and state courts alike have concluded that *Hutchinson* and the other decisions cited by commentators are inapplicable to the situation where a non-taxable natural gas estate is created by a deed recorded years before there exists an unpaid assessment against the unseated surface or other mineral estate and a resulting tax sale thereon.[107] For example, in *Day*, the Warren County Court of Common Pleas held that where oil and gas rights have been severed from the surface estate and were never assessed real estate taxes, "there obviously could be no sale thereof for delinquent taxes."[108]

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97. *See, infra*., n.11.
98. *Philadelphia*, 49 Pa. at 448-456.
99. *Id*. at 450.
100. *Id*. (emphasis added).
101. *Rockwell*, 77 A. at 666.
102. *Id*.
103. *Id*.
104. *Id*.
105. *Id*.
106. *Id*.
107. *See, e.g., Swan-Finch*, 278 F.2d at 579-580; *Swan-Finch*, 173 F.Supp. at 193; *Day*, 31 Pa.D.&C. 3d at 559-560; *Herder Spring I, supra*., Slip op., at p. 6, n.5; *Meske, supra*., Slip op., at 8; *Bailey, supra*., Slip op. at n.3.
108. *Day*, 31 Pa.D.&C. 3d at 558.

Similarly, in *Swan-Finch*, which was decided by the same federal district court a year after its decision in *Proctor*, the Third Circuit Court of Appeals rejected the applicability of *Hutchinson* to situations where the evidence reveals that the assessment which served as a basis for the tax sale of an unseated surface estate did not include a valuation and taxation of natural gas rights that were duly severed beforehand by a recorded deed.[109]

Further, to prove that the notice required under the Act of March 28, 1806 was not given, a party claiming title based on such failure must submit evidence that the unseated land was assessed to an "unknown owner."[110] As the Pennsylvania Superior Court explained years ago:

> If there had been but a single assessment simply describing the property "owner unknown; Jesse Shove tract," and nothing more, the contention of the plaintiff that it acquired title to the minerals under the surface, by virtue of the tax sale, would have been entirely proper, supported by abundant authority.[111]

In such situation, the fact that the local taxing authority was assessing an unseated estate in "lands" (whether both the surface and subsurface estates or just one of them) and did not receive the requisite notice of ownership of such unseated taxable estate is proven.[112] But, where the assessment is made in the name of the known owner of the severed unseated surface estate, then one fails to prove that the requisite notice under the Act of March 28, 1806 was not given.[113] On the contrary, it is equally plausible that the requisite notice was given but that no taxable estate existed because either the county was not making assessments against such subsurface interests or lacked a sufficient basis to value such interests.

Where "[t]here is no evidence one way or another whether [a subsurface estate owner] ever reported their ownership interest for assessment purposes" and "[the parties] are unable to locate evidence of any reserved mineral interest being reported to the county for taxation purposes consistent with the Act of March 28, 1806," any claim of ownership based on *Hutchinson* fails as a matter of law.[114] Indeed, where there exists evidence that the unseated surface owner reported its ownership interest to the county for taxation purposes, logic dictates the lack of any reserved natural gas interest being taxed is more because the interest was not taxable or not being taxed, rather than the title owner's failure to report the natural gas interest for assessment. To conclude otherwise would mean that the unseated surface owner misrepresented the true nature of its interest by reporting it owned more than the unseated surface estate.

In the end, *Powell, Hutchinson, Proctor* and *Moore* do not represent persuasive authority on the title washing of natural gas interests that are severed years before a tax sale premised upon an assessment made in the sole name of the unseated surface estate owner and with no other indication that natural gas was taxable or being properly taxed. Instead, when there has been no operations for the production of natural gas following the title severance of such gas from the surface estate, and the natural gas interest either has not been or cannot be assessed for real estate taxes, then, absent any other evidence to the contrary, there can never be a delinquency of unpaid taxes which can be sold and purchased at a real estate tax sale.[115]

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109. *Swan-Finch*, 278 F.2d at 579-580.

110. *N. Coal & Iron Co.* v. *Barr*, 42 Pa. Super. 638, 643 (1910). Also, if no owner's name is used, then the assessment must include a sufficient description of the land so that its exact boundaries can be ascertained; otherwise, the assessment and any resulting tax sale are void and no interest passes as a matter of law. *Hunter* v. *McKlveen*, 361 Pa. 479, 65 A.2d 366, 368 (1949).

111. *N. Coal & Iron*, 42 Pa. Super. at 643.

112. *Id*.

113. *Id*. at 643-644.

114. *Herder Spring I, supra*., Slip op., at p. 7. *Cf. Hutchinson*, 49 A. at 313 (based on the record, including the trial testimony of the local tax assessor, the trial court held that there was no "evidence to show that the plaintiffs or anyone under whom they claim title paid taxes to Elk County upon the mineral rights reserved, nor returned them for the purpose of taxation in one body"; accordingly, the trial court refused to find that such assessor "knew at the time of making such assessments that the gas, coal, iron and petroleum in said lands had been severed into a separate estate, and were not then owned by Hamlin & Gilpin, and were not valued in the assessment to them").

115. *See, infra*., n.107.

CONCLUSION

Although title washing can cure defects that may exist in one's title to unseated land, it is not a judicially recognized means by which one can acquire title in other unseated land that is not the subject of the underlying real estate tax assessment or the resulting tax sale. When one contends he or she has acquired via a real estate tax sale another's severed natural gas interests, it is important that the heirs or assigns of such natural gas interests examine the underlying real estate tax assessment and tax sale records and determine if there is any evidence that the natural gas interests were included in the assessment and tax sale. If there exists no such evidence and the natural gas was severed from the surface estate years before the underlying tax assessment, then no title washing of the natural gas estate probably occurred even though the surface estate is unseated land.