Title Washing: The Case of the Disappearing Mineral Rights

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Earlier this month, the Pennsylvania Supreme Court affirmed on appeal a hunting club's ownership of a tract of land in its entirety – including both surface and subsurface rights – over the objections of a prior owner's heirs. In *Woodhouse Hunting Club, Inc. v. Hoyt*, Case No. 327 MDA 2017, the court weighed in for the second time in recent years on the concept of "title washing," a creation of early 19th-century property tax law with modern implications. The question addressed in *Woodhouse* was whether a tax sale effectuated in 1902 extinguished a prior reservation of subsurface rights and granted the entire property at issue to the purchaser.

The court's holding in *Woodhouse* closely follows its 2016 decision in *Herder Spring Hunting Club v. Keller*, 143 A.3d 358 (2016), *cert. denied*, 137 S. Ct. 641 (2017). The question before the court in *Herder Spring* was likewise whether the county's sale of property pursuant to unpaid taxes extinguished a prior reservation of the property's subsurface rights and merged them with the property's surface estate. The hunting club had filed an action to quiet title in 2008 against the heirs of prior owners, who claimed they retained ownership of the property's subsurface oil, gas, and mineral rights; this action was presumably spurred by the discovery of gas-bearing Marcellus Shale under the property, and a desire to control oil and gas rights to it. In its lengthy opinion reaffirming the Superior Court's ruling in favor of the hunting club, the *Herder Spring* court explored the history of Pennsylvania's land taxation system and found that the 1935 tax sale had extinguished the Kellers' subsurface rights. They had merged into the purchaser's estate.

The upshot of the *Herder Spring* decision is that title washing, while no longer part of Pennsylvania's law, continues to have an impact on property rights in certain situations. Title washing emerged in the 1800s, when land in the Commonwealth was considered either "seated" – improved – or "unseated" – "wild," or unimproved. Owners of unseated land, which contained no discernable development, were required to provide their county commissioners with a description of the tract of land. Additionally, they were required to provide notice to the commissioners of any severance of subsurface rights. These requirements were meant to encourage landowners to timely and accurately notify the counties of changes in their property ownership. Interestingly, owners of seated land had no such obligation. Without notification of severance of an unseated property, the county commissioners assessed tax on the undivided property and collected taxes from its surface owner. When property taxes failed to be paid, the county would seize and then sell the property as a whole, without regard to any severance of surface and subsurface estates about which the commissioners had not received notice. The severance, because it hadn't been reported to the county, was not reflected in the tax deeds. A purchaser of this land at a tax sale would acquire a fee simple interest in the entire property,

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free and clear of any prior owner's claims to oil, gas, or mineral rights, which were extinguished by the sale – although a two-year redemption period was allowed for during which the delinquent taxpayer could reclaim title. This merging of estates and extinguishing of any previously-reserved rights was known as "title washing." Again, interestingly, seated property was not subject to title washing – a purchaser of seated land at a tax sale did not acquire subsurface rights to the property unless specified in the tax deed. The practice of title washing was phased out in 1947 through changes in the law, but its ability to impact subsequent property grantees remains. Thus, although Herder Spring Hunting Club had notice of the Kellers' 1899 reservation of mineral rights when it acquired the property in question, the club acquired the property free and clear of that reservation, thanks to the "washing" perpetrated by the tax sale.

The fact pattern in *Woodhouse* is strikingly similar to that of *Herder Spring* – in 1893, five Hoyt brothers conveyed away the surface rights to an unseated property while reserving the subsurface rights, but failed to notify the county commissioners of this reservation. Therefore, when the county sold the property in 1902 to satisfy unpaid taxes, the purchaser obtained the entire property in fee simple – the title had been washed, and the Hoyts' subsurface rights extinguished. After various conveyances during the 20th century, Woodhouse, yet another hunting club, became and remained the record owner of the property. In 2011, Woodhouse brought its own action to quiet title against Hoyt Realty, a Colorado company making claim to the property's mineral rights reserved by the current Hoyts' ancestors in 1893. To support their position, Hoyt Realty pointed to the 1893 deed in which the five brothers reserved the severed mineral rights. Woodhouse Hunting Club was notified of this prior reservation when it took title to the property. The trial court, however, held that the 1902 tax sale extinguished that chain of title and the Hoyts' subsurface estate. Following the lead of the 2016 *Herder Spring* decision, the trial court quieted title in favor of the club and enjoined future challenges by Hoyt Realty.

On February 2, the Pennsylvania Supreme Court upheld the trial court's decision and affirmed its reasoning in an unreported opinion. While this decision is not precedent-setting, it does mirror the court's *Herder Spring* findings, and it should serve as a reminder that between 1805 and 1947, title washing occurred and its effects control judicial decisions, and the accuracies of property titles, today. The court noted in *Herder Spring*, "We observe that the holding in this case applies to a very limited subset of cases involving quiet title actions for formerly unseated land sold at a tax sale prior to 1947." 143 A.3d at 378. The *Woodhouse* decision will likely not cause any shifts in Pennsylvania's real property law, but putative holders of subsurface rights (or putative holders only of surface rights) should take note and closely examine the history of their deeds. The title may not be as clean – or as dirty – as they thought it to be.•