vantage point

Unseating Mineral Claims

Sometimes one piece of news relates to another in a chance encounter that makes both stand out more than they might separately, as happened in May of this year. One is ongoing as an appeal to the Pennsylvania Supreme Court regarding what is called "title washing" in this state relating to gas, oil, and mineral claims, and that's the topic I'll focus on today. The other May event was FEMA's issuance of a policy regarding floodplain acquisitions with Hazard Mitigation Assistance (HMA) funds. Properties that have "oil, gas, and other mineral encumbrances that may allow hydraulic fracturing/HDD [horizontal directional drilling] to occur" are not eligible for buyouts. FEMA Mitigation Policy FP 302-405-146-1 prohibits all such post-acquisition activities as well.

Back to Topic One, which requires a little background in Pennsylvania titles. Those working in states with Marketable Title Acts (requiring re-recordation of interests within legislated time frames to keep them active and valid) may see some similarity in the legal outcomes. Such laws try to "clear" titles with simple expediency as the primary objective. *Herder Spring Hunting Club v. Harry and Anna Keller* (*93 A.3d 465*, May 2014) illustrates one of the pitfalls.

An abbreviated legislative history sets the stage. Pennsylvania has long categorized property for tax purposes as "seated" (containing permanent improvements) or "unseated" (unoccupied and unimproved). An 1806 Act addressed only surface subdivisions, but landowners making horizontal severances of subsurface interests must also notify the county commissioners or county tax board so that proper tax assessments can be levied against surface and subsurface interests separately. Of course, such transactions must also be memorialized in recorded deeds.

Seated lands were assessed in the name of the owners but unseated lands were assessed by survey or warrant number. Assessors are not required to search chain of title. Therefore, without a statement of subsurface rights within a year of conveyance, any unseated lands valued as a whole (surface and subsurface rights together) would be seized and sold as a whole, clearing and "washing" the title, subject to a two-year window for a disseized owner to prove severance rights. This has led to problems over time, as purchasers often started improving unseated lands bought at tax sale within that two-year limit, but that's a different difficult story.

Harry and Anna Keller sold the surface rights to their land in Centre County in 1899, specifically including in the recorded deed a lengthy paragraph excepting and reserving "all the coal, stone, fire clay, iron ore and other minerals of whatever kind, oil and natural gas lying or being, or which may now or hereafter be formed or contained" in or upon the land, including rights to enter to extract these materials and build such facilities as necessary to do so. But there is no record that the Kellers ever notified the commissioners or assessors of this severance, and so the surface and subsurface rights of the unseated lands were treated as a whole during the 1935 tax seizure and subsequent 1941 tax sale. In 1959, Herder Spring Hunting Club investigated the property, and took title "subject to all exceptions and reservations as are contained in the chain of title" in 1960.

Until the Marcellus Shale boom, all was quiet. Now of course the lure of wealth has changed the title landscape. The Keller heirs successfully argued before the Commonwealth Court that the Hunting Club had constructive notice of the reserved rights, but this May the Superior Court found that at the time of the Club's acquisition, "there were no active exceptions or reservations in the chain of title, the horizontal severance having been extinguished more than one decade earlier"—based on "arcane law" repealed in 1961. In a nearly apologetic remand requiring award of subsurface rights to the Hunting Club, the Superior Court states, "we are aware that our resolution of this matter is at odds with modern legal concepts. This resolution may be seen as being unduly harsh. However, at the time of the relevant transactions—the [1935] seizure of the property for failure to pay tax and the subsequent [1941] Treasurer's sale - this was the appropriate answer. We do not believe it proper to reach back, more than three score years, to apply a modern sensibility and thereby undo that which was legally done."

Title washing has an unsavory history in Pennsylvania, a practice used and abused by the leather industry in particular: owners of unseated lands wanting the mineral rights sometimes purposely allowed tax seizure, buying back the lands "whole" at the legally prescribed rate of four times the unpaid assessments. But the moral of today's story is that merely reading the chain of title may not tell us who actually owns various interests in land. There may be other laws, past or present, that have significant relevance to unscrambling ownership of rights. ■

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