Welcome!

On behalf of the PBA Shale Energy Law Committee, Co-chairs Anne John, John Carroll and Jeffrey Malak extend a warm welcome to all of our returning and new members, as we present the inaugural issue of your committee newsletter. We would like to acknowledge the efforts of newsletter co-editors Paul Yagelski and Brian Pulito, and contributors Lindsay Berkstresser, Louis M. Kodumal and Lisa C. McManus, who have worked hard to produce this outstanding newsletter. We hope you find it to be informative and that it will prove to be a helpful resource in your practice. We also would like to give a shout out to PBA committee liaison Pam Kance and senior publications editor Patricia Graybill for their expertise and hard work. We are always looking for new ideas to make this committee work for you; this newsletter is an important part of that process. If you would be willing to provide content for the next newsletter, or suggest topics, please contact Paul or Brian directly. Enjoy!

IN THIS ISSUE
Case Summaries ................................................................. 2
Oil & Gas Legislative Update .................................................. 4
Your PBA Shale Energy Law Listserv ........................................ 5
Oil- & Gas-Drilling Regulatory Changes .................................... 6
Use of Eminent Domain for Sunoco Mariner East 2 Pipeline Project .......................................................... 8
Herder Spring Hunting Club v. Keller: Certitude for Oil and Gas Title Practitioners ........................................ 9
Can the Lessor of Oil and Gas Rights Obtain a New Lease by Severing Production Rights from Storage Rights? .................................................. 15

IMPORTANT NOTICE
The PBA Board of Governors approved the association’s Strategic Plan on May 6, 2015. The plan is an important part of the PBA’s vision and contains six primary areas of focus. Please take a few minutes to review it on the PBA website at www.pabar.org and let us know your thoughts and ideas for implementation by our committee.
Brockway Borough Municipal Authority v. Department of Environmental Protection, 131 A.3d 578 (Pa. Cmmw. Ct. 2016). Background: Municipal authority appealed order of an Environmental Hearing Board, which dismissed authority's challenge to issuance of second gas-drilling permit by the Department of Environmental Protection to oil and gas exploration company. Held: 1) Authority failed to meet its burden to prove that issuance of second permit was unreasonable and contrary to law; 2) environmental incursion caused by drilling of first well and projected drilling of second well did not trigger violation of Clean Streams Law or Oil and Gas Act and 3) Department did not violate provision of state constitution governing national resources and public estate when it issued permit.

Camp Ne'er Too Late LP v. Swepi LP, No. 4:14-cv-01715, 2016 WL 2594186 (M.D. Pa. May 5, 2016). Background: Natural gas lessor brought breach of contract action in state court against lessee, which was natural-gas drilling company, regarding obligations under natural gas lease and subsequent right-of-way agreements to construct pipelines, seeking injunctive relief and monetary relief. Lessee removed to federal court. Lessor and lessee both moved for summary judgment. Held: 1) Under Pennsylvania contract law, lessor had standing to sue for breach of lease, although lessor was not signatory to lease; 2) under Pennsylvania contract law, lease with addendum and subsequent pipeline right-of-way agreements were separate legal documents that constituted distinct agreements; 3) lessee did not breach lease and 4) equitable estoppel precluded lessor from asserting claim against lessee.

Chesapeake Appalachia LLC v. Scott Petroleum LLC, 809 F.3d 746 (3d Cir. 2016). Background: After the holder of rights to receive royalties on natural gas leases sought to commence class-action arbitration against an oil and gas company, the company brought action in diversity against the holder, seeking a declaratory judgment as to whether the court or an arbitrator was tasked to interpret an arbitration agreement and whether the agreement permitted class arbitration. Held: The arbitration provision did not clearly and unmistakably provide for class arbitration.

Hall v. CNX Gas Co. LLC, 137 A.3d 597 (Pa. Super. 2016). Background: Oil and gas lessors brought action against lessee, alleging that lessee's allocation of lost and used gas among lessors was unauthorized under lease. Held: As a matter of first impression, the Superior Court held that lessee was not required to pay royalties based on volume of gas measured at each wellhead in absence of lease provision governing allocation.

Herder Spring Hunting Club v. Keller, 93 A.3d 465 (Pa. Super. 2014). (See related article on Page 9). Background: Landowner sought to quiet title and moved for summary judgment on his rights to surface and subsurface rights. Heirs of prior owners of land with purported reservation of subsurface rights cross-moved. Held: Tax sale of unseated property for nonpayment of real-estate taxes effectively rejoined subsurface and surface rights, where grantors had never informed county commissioners of their retention of subsurface rights, and heirs who ostensibly took possession of subsurface rights failed to make known their claim within two years from date of delivery of title.

In re: Condemnation by Sunoco Pipeline, Nos. 1979 C.D. 2015, 1980 C.D. 2015, 1981 C.D. 2015, 2016 WL 3755774 (Cmmwth. Ct. July 14, 2016) (See related article on Page 8). Background: pipeline-service operator sought to condemn property and condemnees filed objections. Held: 1) Collateral estoppel did not bar action; 2) operator was public-utility corporation empowered to exercise eminent domain; 3) operator had power to condemn property for construction of pipeline and 4) there was no basis for the court of common pleas to review the Public Utility Commission's determination of public need.

Kretschmann Farm LLC v. Township of New Sewickley, 131 A.3d 1044 (Pa. Commw. Ct. 2016) Landowner sought review of decision by township's board of supervisors granting gas utility a conditional-use permit to construct gas compressor station. Held: 1) Board's determination to grant conditional use permit to gas utility contained findings of fact and conclusions of law necessary for meaningful appellate review; 2) landowners' challenge to constitutionality of underlying

CONTINUED ON PAGE 3
ordinance was not preserved for appellate review and 3) land-owners failed to show that they were refused the opportunity to be fully heard at hearing on gas utility’s conditional-use application and thus were not entitled to expand the record on appeal.

**Loughman v. Equitable Gas Co. LLC, 134 A.3d 470 (Pa. Super. 2016) (See related article on Page 15).** Background: Oil and gas lessors brought action against lessee and sublessee, seeking declaration that lease and right to produce gas had terminated. Held: Lease’s storage and production rights were not severable. Assignment of production rights did not sever lease.

**Shedden v. Anadarko E. & P. Co. LP,** 136 A.3d 485 (Pa. 2016). Background: Lessors brought action against lessee, seeking judgment declaring that lease of oil and gas rights pertained to oil and gas underlying only 31 of lessors’ 62 acres. Held: 1) Lessees’ payment to lessors for oil and gas underlying only 31 of lessors’ 62 acres and lessors acceptance of payment did not constitute a modification of the oil and gas lease contract and 2) doctrine of estoppel by deed barred lessors from denying that lease of oil and gas rights pertained to oil and gas underlying all of lessors’ 62 acres.

**Robinson Township v. Commonwealth of Pennsylvania,** No. 104 MAP 2014, No. 105 MAP 2014, 2016 WL 5597310 (Pa. Sept. 28, 2016). Background: In February 2012, the Pennsylvania General Assembly passed Act 13 of Feb. 14, 2012, P.L. 87 (Act 13), a law regulating the oil and gas industry, which, *inter alia,* repealed parts of the Oil and Gas Act of 1984, Act No. 223 of 1984, P.L. 1140 (effective April 18, 1985). Act 13 was codified in Title 58 of Pennsylvania Consolidated Statutes, creating six new chapters therein, the specific provisions of two of which — Chapters 32 and 33 — were at issue on this appeal. *Robinson Township v. Commonwealth of Pennsylvania,* 623 Pa. 564, 83 A.3d 901 (2013) struck the entirety of Sections 3215(b), 3215(d), 3303, and 3304 of Act 13 as violative of the Pennsylvania Constitution and enjoined the application and enforcement of Sections 3215(c) and 3215(e) and Sections 3305 through 3309 to the extent that they implemented and enforced the provisions of Act 13 that the Court invalidated. On remand, the Commonwealth Court held that certain sections of Act 13 were not severable and hence unconstitutional and upheld the constitutionality of other sections. There was a consolidated appeal. Held: The Commonwealth Court’s order was affirmed in part and reversed in part as follows: 1) Sections 3305-3309 of Act 13 are not severable from Section 3304 and Section 3303 of Act 13, which the Supreme Court held unconstitutional in *Robinson Township v. Commonwealth of Pennsylvania,* 623 Pa. 564, 83 A.3d 901 (2013), nor severable from Section 3302 of Act 13, as modified by the Commonwealth Court through its striking of the last sentence of that section. Accordingly, the application and enforcement of Sections 3305 through 3309 were enjoined. The Commonwealth Court’s order was affirmed with respect to this question. 2) Act 13 does not violate the single-subject rule of Article III, Section 3, of the Pennsylvania Constitution with its inclusions of Section 3222.1(b)(10) and 3222.1(b)(11), since those provisions are germane to the overall subject of Act 13, regulation of the oil and gas industry in Pennsylvania. The order of the Commonwealth Court was affirmed with respect to this question. 3) Sections 3222.1(b)(10) and 3222.1(b)(11) of Act 13, which limit health-professionals’ access to and use of information regarding chemicals used in the hydraulic-fracturing process, which have been designated confidential and proprietary information or trade secrets by a vendor, service provider or well operator, violate the prohibitions in Article III, Section 32, of the Pennsylvania Constitution against the enactment of “special laws,” and, hence, application and enforcement of those sections was enjoined. The order of the Commonwealth Court was reversed in relevant part. 4) Section 3218.1 of Act 13, which requires notice by the Pennsylvania Department of Environmental Protection in the event of a spill of chemicals or waste associated with the fracking process to public water facilities, but not to owners of private wells, violates the prohibition of Article III, Section 32, of the Pennsylvania Constitution against the enactment of “special laws,” and, hence, application and enforcement of this section was enjoined. The Commonwealth Court was reversed in relevant part. 5) Section 3241 of Act 13, which facially permits any private corporation empowered to transmit, sell or store natural gas or manufactured gas in Pennsylvania to seize subsurface lands of a private-property owner for the purpose of storing natural gas therein, violates the Fifth Amendment of the U.S. Constitution and Article I, Section 10, of the Pennsylvania Constitution by permitting a taking of private property for a private purpose. Consequently, application and enforcement of this section was enjoined. The order of the Commonwealth Court was reversed in relevant part.
ENACTED LEGISLATION

2016 Act 52
Pennsylvania Grade Crude Development Act
Act of June 23, 2016, P.L. 379, No. 52
An Act: Establishing the Pennsylvania Grade Crude Development Advisory Council; and providing for duties of the Pennsylvania Grade Crude Development Advisory Council and the Department of Environmental Protection, for administrative support and for regulation of conventional oil and gas wells.

2016 Act 85
Fiscal Code - Omnibus Amendments
Act of July 13, 2016; P.L. 664, No. 85
Section 1609-E Oil and Gas Conservation
Notwithstanding Section 3(b) of the Act of July 25, 1961 (P.L. 825 No. 359), known as the Oil and Gas Conservation Law, the Oil and Gas Conservation Law shall not apply to or affect any well or wells which do not penetrate beyond the Onondaga horizon, or in those areas in which the Onondaga horizon is nearer to the surface than 3,800 feet, any well or wells which do not exceed a depth of 3,800 feet beneath the surface or any well or wells that unintentionally penetrate the Onondaga horizon or do not intentionally produce oil or gas from the Onondaga horizon. For the purposes of the Oil And Gas Conservation Law, the question of whether a pool is covered by that law shall be determined by the depth of the producing interval in the discovery well in such pool, and if such producing interval is covered by that law, all wells drilled to such pool shall be covered by that law, even though some of the wells in the pool, if considered alone, would not be covered by that law.

Pending Legislation

Senate Bill 147, P.N. 94
Prime Sponsor: Sen. Yaw
Introduced: Jan. 14, 2015
Last Action: Referred to Environmental Resources and Energy, Feb. 2, 2015
An Act: Amending the Oil and Gas Lease Act, expanding upon Act 66 of 2013 by allowing royalty-interest owners the opportunity to inspect records of a gas company to verify proper payment. All information provided by the gas company would be confidential in nature and could not be disclosed to any other person. In addition, the bill requires that proceeds from production of oil and gas shall be paid within 60 days of production.

Senate Bill 313, P.N. 203
Prime Sponsor: Sen. Yaw
Introduced: Jan. 23, 2015
Last Action: Referred to Environmental Resources and Energy, Jan. 23, 2015
An Act: Amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in unconventional oil and gas conservation, consolidating the Oil and Gas Conservation Law with modifications relating to definitions, standard-unit order, process, administration, standard of review, hearings and appeals, establishment of units, integration of various interests, lease extension and scope, providing for gas and hazardous liquids pipelines, and repealing the Oil and Gas Conservation Law.

Senate Bill 953, P.N. 1182
Prime Sponsor: Sen. Greenleaf
Introduced: July 16, 2015
Last Action: Referred to Environmental Resources and Energy, July 16, 2015
An Act: Expanding the natural gas infrastructure throughout the commonwealth through competitive sealed bidding and providing for powers and duties of the Pennsylvania Public Utility Commission.

House Bill 67, P.N. 58
Prime Sponsor: Rep. Godshall
Introduced: Jan. 21, 2015
Last Action: Referred to Environmental Resources and Energy, Jan. 21, 2015
An Act: Amending the Dormant Oil and Gas Act providing for oil- and gas-estate abandonment and for preservation of interests in oil and gas. The act would provide for the return of oil and gas rights to a surface owner if an interest in the oil and gas owned by a person other than the owner of the surface property is deemed abandoned following 20 years of dormancy.

CONTINUED ON PAGE 5
**House Bill 70, P.N. 61**  
Prime Sponsor: Rep. Godshall  
Introduced: Jan. 21, 2015  
Last Action: Referred to Environmental Resources and Energy, Jan. 21, 2015

An Act: Amending the Dormant Oil and Gas Act to allow landowners to petition the court of common pleas to hold an unknown or nonlocatable owners’ oil and gas estate in a trust to allow the surface owner to purchase those rights. The bill sets the standards for determining the market value of the oil and gas rights, and upon sale of the oil and gas rights to the surface owner, it would hold the proceeds of the sale in trust for the unknown or non-locatable owner. The landowner would then be able to lease the oil and gas rights for development.

**House Bill 621, P.N. 721**  
Prime Sponsor: Rep. Major  
Introduced: Feb. 26, 2015  
Last Action: Referred to Environmental Resources and Energy, May 28, 2015

An Act: Intended to address the recording of blanket oil and gas lease assignments by providing standards for the recording of these documents.

**House Bill 1391, P.N. 1995**  
Prime Sponsor: Rep. Everett  
Introduced: June 29, 2015  
Last Action: Re-committed to Rules, June 27, 2016

An Act: Amending the Oil and Gas Lease Act providing for definitions; providing for minimum royalty payment for unconventional gas-well production; further providing for apportionment, and providing a remedy for failure to pay the minimum royalty on unconventional gas wells. The act is intended to ensure that Pennsylvania landowners are paid the minimum royalty payment for natural gas as prescribed by the current Pennsylvania law.

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**YOUR SHALE ENERGY LAW COMMITTEE LISTSERV**

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Oil- and Gas-Drilling Regulatory Changes

By Lindsay A. Berkstresser, Esq.

The Pennsylvania Department of Environmental Protection (DEP) proposed several significant amendments to the regulations at 25 Pa. Code Chapter 78 governing oil and gas extraction. The final-form rulemaking contains separate standards for conventional well development (Chapter 78) and unconventional well development (Chapter 78a). The regulations will impact nearly all aspects of oil and gas well development in Pennsylvania. Key components of oil and gas production addressed in the regulations are drilling and extraction permits; treatment of production waste; well drilling, operation and plugging; site restoration; and reporting requirements.

After an extensive review process, the Chapter 78a amendments became effective on Oct. 8, 2016 following publication in the Pennsylvania Bulletin. Unconventional well operators are now subject to the new rules. However, the proposed regulations for the conventional industry have not been adopted and are subject to further legislative and regulatory changes. Major legal and technical developments affecting the oil and gas industry have occurred since the regulations were last updated in 2001. The 2012 Oil and Gas Act (Act 13) established new environmental protection standards that will be implemented through the Chapter 78a regulations. Enhanced drilling techniques targeting the Marcellus Shale formation have enabled the expansion of natural-gas development which, according to DEP, has created a need for reinvigorated performance standards. DEP promulgated the proposed amendments in response to these advancements.

Permitting and Pre-drilling Requirements

The amendments contain new rules for obtaining drilling and extraction permits applicable to both conventional and unconventional wells. All permit applications must be submitted electronically through DEP’s website. Applicants must demonstrate that the proposed well-site location will protect nearby bodies of water, watercourses and wetlands. Well-permit applicants also must address potential impacts of the well site to threatened or endangered species. When considering the well-permit application, DEP will examine the impact of the proposed well on public resources, such as schools and playgrounds, and applicants must specify if the proposed well site or access road may impact such public resources. DEP may impose conditions on well permits necessary to prevent probable harmful impacts to public resources. Prior to commencing production activities, well operators must evaluate the potential for hydraulic fracturing activities to impact abandoned, inactive and operating wells and monitor at-risk wells.

Well-Site Operations

The regulatory changes affect both conventional and unconventional well-site operations. Secondary containment around oil- and condensate-storage tanks will be required at unconventional sites. At conventional sites, secondary containment would be required at new, replaced or refurbished brine tanks or tanks with more than a 1,320-gallon capacity for storing oil. Borrow pits used in support of conventional and unconventional oil and gas development must be operated in accordance with environmental-protection standards. The regulations also establish new rules related to environmental protection for gathering-line construction and horizontal directional drilling beneath streams. These rules are only applicable to unconventional operations.

Fluids Storage and Disposal

The regulations treat conventional and unconventional wells differently with respect to the storage and disposal of fluids used for production. While the unconventional industry will be prohibited from utilizing pits to store drill cuttings and waste fluids at the well site, the conventional industry would be permitted to continue this practice for pits that are less than 3,000 square feet and store less than 125,000 gallons of fluid. Larger pits may be permitted with prior DEP approval. The conventional industry would be permitted to dispose of drill cuttings at the well site; unconventional operators must obtain an individual permit to do so. The proposed regulations would allow beneficial uses of brine, such as for dust suppression and de-icing purposes, in the conventional industry. Unconventional operators will not be permitted to use waste fluid for these purposes.

Tank Maintenance

The new rules establish stiffer requirements for tank maintenance in the unconventional industry. Unconventional
operators will be required to undertake measures to prevent vandalism to tanks, such as installing valve locks, open-end caps, retractable ladders or other protective devices. No such requirement is proposed for the conventional industry. Unconventional well operators will be required to perform routine-maintenance tank inspections once a month; conventional well operators must inspect once a quarter.

Temporary Pipelines

Chapter 78a contains new standards for the unconventional industry concerning temporary pipelines used to transport freshwater and wastewater for oil and gas operations. Well-development pipelines must be installed above ground and may not be installed through existing stream culverts, storm-drain pipes or under bridges that cross streams without DEP approval. Development pipelines must undergo pressure testing and be equipped with protective mechanisms that prevent the discharge of more than 1,000 barrels of fluid. Operators will be required to obtain DEP approval for well-development pipelines operating for more than a year. Well-development pipelines must be removed when the well site is restored and operators will be obligated to maintain certain records regarding pipeline location, type of fluids transported, installation date, pressure results and maintenance. These requirements do not apply to the conventional industry.

Water Supply

The regulations adopt stricter standards for water-supply restoration than were established in Act 13. Operators must restore or replace the water supply with one that meets Safe Drinking Water Act standards or is as good as pre-drilling conditions if the water supply exceeded the Safe Drinking Water Act standards. Also in accordance with Act 13, unconventional operators must develop a DEP-approved water-management plan before water can be withdrawn for hydraulic-fracturing purposes. No such requirement exists for conventional operators.

Reporting Requirements

The amendments contain new reporting requirements. Conventional operators would be required to report production and waste data on an annual basis; unconventional operators must report monthly. For both industries, any spill containing pollutants that exceeds five gallons and is not completely contained within secondary containment must be reported to DEP.

Next Steps

Certain obstacles remain before any comprehensive Chapter 78 amendments can take effect. On June 23, 2016, Gov. Tom Wolf signed Act 52 of 2016 (Senate Bill 279), which abrogates the proposed revisions to Chapter 78 and instructs that any future rulemaking for the conventional industry must be undertaken independently of the unconventional industry regulations. DEP now has an opportunity to revisit the regulations for the conventional industry. A new rulemaking could retain the previously proposed mandates. However, much like the development of DEP’s originally recommended Chapter 78 amendments, this process could take approximately two years.

Lindsay A. Berkstresser is an associate with Post & Schell PC, Harrisburg, in the firm’s Energy Group.
The Mariner East 2 pipeline project being undertaken by Sunoco Logistics Partners LP (Sunoco Pipeline) is an approximately 350-mile proposed pipeline route to deliver natural gas liquids such as propane to a Sunoco terminal located in Marcus Hook, Delaware County, just south of Philadelphia.

On July 14, 2016, the Commonwealth Court, en banc, issued a decision on three consolidated cases (Lands of Martin (No. 1979 C.D. 2015), Lands of Fitzgerald (No. 1980 C.D. 2015), and Lands of Nickey (No. 1981 C.D. 2015)) involving landowner appeals from the order of the Cumberland County Court of Common Pleas overruling their preliminary objections submitted in opposition to declarations of taking filed by Sunoco Pipeline for its Mariner East 2 pipeline project.

In a 5-2 decision authored by the Judge Renée Cohn Jubelirer, the Commonwealth Court concluded that the lower court did not err in overruling the preliminary objections to the declarations of taking, and that Sunoco is regulated as a public utility by the PUC and is a public-utility corporation, and that Mariner East intrastate service is a public-utility service rendered by Sunoco within the meaning of the Business Corporation Law, 15 Pa.C.S. §§ 1103, 1511.

Judge P. Kevin Brobson’s dissent focused upon the constitutionally protected rights of private-property owners. He concluded that the trial court’s analysis of the takings at issue and the landowners’ arguments were incomplete and did not address the “key legal question of whether Sunoco’s ‘true purpose’ behind the takings is to provide intrastate public-utility service to Pennsylvanians of the type authorized by the PUC.” Judge Patricia A. McCullough’s dissent raised concerns that Sunoco was attempting to avoid what may be the collateral-estoppel effect of the York County Court of Common Pleas decision, and to use the sovereign power of eminent domain to take the landowners’ property interests for an exclusively private benefit.

Also in connection with the Sunoco Mariner East 2 project, the Pennsylvania Department of Environmental Protection (DEP) recently held a series of hearings in August to hear testimony on permits Sunoco Pipeline needs to encroach on waterways.

More information regarding news coverage of the DEP hearings can be found at:


Louis M. Kodumal is a member of the PBA Shale Energy Committee and is a past section chair and current member of the PBA Real Property, Probate and Trust Law Section. Portions of this article were originally included in materials presented as part of the CLE program “Annual Update in PA Real Estate Law,” for the Real Property, Probate and Trust Law Section’s Annual Retreat in August 2016.
Herder Spring Hunting Club v. Keller: Certitude for Oil and Gas Title Practitioners

By Lisa C. McManus, Esq.

The rise of the Marcellus Shale play in Pennsylvania within the last decade spurred renewed interest in the tax-sale statutes enacted at the turn of the 19th century and the loss of oil and gas titles arising from application of those laws. Although an innumerable number of tax sales of seated and unseated tracts alike occurred throughout the late 19th to mid-20th centuries, the oil, gas and mineral rights subject to divestiture under those laws were, in the majority of cases, not valuable enough to pursue litigation for loss of title. Many of the owners of those interests and their heirs were unaware of the tax sales and their effect on title. The suits that were filed often resulted in case law that was conflicting, unclear or both. As high-value oil and gas leasing in Pennsylvania increased based on the discovery of this lucrative shale play, so too has litigation over title rights increased.

Until recently, oil- and gas-title practitioners have been in a quandary over how to address the issue of “title washing.” Most title opinions addressing titles containing a history of unseated tax sales reflected a requirement for curative as to the sale, which placed the onus on the operator to cure title or take a business risk to go forward with development absent certainty as to the validity of those sales. The Pennsylvania Supreme Court’s recent decision in Herder Spring Hunting Club v. Keller, 2016 Pa. LEXIS 1512 (Pa. July 19, 2016), has provided counsel and clients alike with needed certitude regarding the validity of these tax sales.

A. Tax-Sale Foundations

To understand the import of the Herder Spring decision, some background is necessary.


Currently, oil and gas interests are not subject to property taxation. Independent Oil & Gas Association v. Board of Assessment of Fayette County, 572 Pa. 240, 814 A.2d 180 (2002) (IOGA). Prior to the decision in IOGA, many counties assessed such interests as part of the property-tax base, but conflicting law existed as to whether oil and gas was the proper subject of taxation given its fugitive nature, the uncertainty as to its existence under a tract and, if it did exist, in what quantity. In IOGA, the court held that the assessment statutes do not provide for the taxation of oil and gas interests because they are not “lands” or any physical improvement “permanently affixed” to the ground. Id. 572 Pa. at 247. In Oz Gas Ltd. v. Warren Area Sch. Dist., 595 Pa. 128, 938 A.2d 274 (Pa. 2007), the Pennsylvania Supreme Court clarified that the decision in IOGA that 72 Pa. Stat. Ann. § 5020-201(a) prohibited counties from collecting taxes on oil and gas reserves that remained in the ground applied only prospectively. Oz Gas Ltd., 595 Pa. at 146, 938 A.2d at 285. Accordingly, tax sales of oil and gas rights prior to IOGA cannot be challenged on the basis that no authority existed for the taxation of the oil and gas interest. See, e.g., Zubek Inc. v. County of Somerset, Somerset County No. 289 Civil 2011 (holding that when oil and gas properties were put up for public sale and no bids were proffered, title validly passed to the County of Somerset because the oil and gas taxes at the time were valid and the Tax Claim Bureau and County was permitted to sell the oil and gas properties at a private sale). Thus, taxation and sale of oil and gas interests post-IOGA is simple to analyze from a title standpoint, but what about sales arising prior to that time?

2. The Seated v. Unseated Distinction. Traditionally in Pennsylvania, the tax assessor prepared both a seated and an unseated list. An assessment would be returned on the seated list if it had been permanently improved with residential structures or personal property or by the pro-
certitude for oil and gas title practitioners

continued from page 9

duction of a regular profit through cultivation, lumbering or mining. Unimproved or "wild" tracts were considered unseated. This distinction is determinative of what effect a tax sale had on unassessed severed oil and gas interests. Barnard v. New York State Natural Gas Corp., 448 Pa. 239, 293 A.2d 41 (1972). In 1947, the Pennsylvania Legislature enacted a substantial revision of real estate tax law. The new statute, inter alia, removed the distinction between seated and unseated lands and revised tax-sale notice requirements. See Real Estate Tax Sale Law, P.L. 1368, No. 542 (1947), as amended, 72 P.S. § 5860.101 through 72 P.S. § 5860.803.

3. Authority to Sell. A county's authority to sell land for the non-payment of taxes prior to 1947 arose from several statutes, including the following:

a. The Act of 1804. The Act of 1804, April 3, P.L. 517, 4 Sm. L. 201, was entitled "An act directing the mode of selling unseated lands for taxes." This act required surveyors to report to the county commissioners all lands surveyed in the county with the acreage and the surnames of the original warrant. Commissioners were required to keep a book listing this data. Pursuant to the act, an owner of unseated lands had no duty to pay the taxes assessed on the lands; the land itself was liable for the tax. Of great importance is Section 5 of the act, which provided as follows: "Sales of unseated land, for taxes that are now due ... shall be in law and equity valid and effectual, to all intents and purposes, to vest in the purchaser or purchasers of lands 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.

Thus, "a tax sale extinguishes all previous titles," Reinholtz v. The Zerb Run Improvement Co., 29 Pa. 139, 145 (Pa. 1858), and excludes "all other claimants to the land of a prior date." Caul v. Spring, 2 Watts 390, 396 (Pa. 1834)."

Herder Spring, 2016 Pa. LEXIS 1512, *21-22 (Pa. July 19, 2016). See also Fager v. Campbell, 5 Watts 287 (1836); Greensboro Ferry Company v. New Geneva Ferry Company, 34 Pa. CC 33 (1907) (holding that it is immaterial at the time of the tax sale what the actual state of ownership is or how many derivative interests may have been carved out of the land).

b. The Act of 1806. Pursuant to Section 1 of the Act of 1806, March 28, P.L. 644, 4 Sm.L. 346, retilted as 72 P.S. § 5020-409, persons who acquired unseated land were required to furnish a statement describing that land to the county commissioners or to the board for the assessment and revision of taxes so that a proper tax assessment could be levied. Herder Spring Hunting Club v. Keller, 93 A.3d 465, 468-69 (Pa. Super. Ct. 2014), aff'd, 2016 Pa. LEXIS 1512 (Pa. July 19, 2016). The tax system treated unseated land "in reference to the original warrants when not otherwise directed by the owners." Id. at 471 (quoting Hefi v. Gephart, 65 Pa. 510, 516 (1870)). The Act of 1806 provided for a penalty for failure to report of four times the amount of the tax due. Notably, the act placed no duty on the commissioners or any other county official to search the land records in order to determine whether interests were being properly reported.

c. Act of 1815. Prior to the Act of March 13, 1815, 6 Sm. L. 299, 2 Purd. (12th ed.) 2056 et seq., it was nearly impossible to sustain a tax title if it was attacked in the courts, but the Act of 1815 established statutory prerequisites that, if proved, would sustain title in the purchaser. Osmer v. Sheasley, 219 Pa. 390, 394; 68 A. 965, 966 (Pa. 1908). That act established a rebuttable presumption that every action concerning the tax sale was correctly done. After passage of the act, a tax sale purchaser needed to show that 1) the purchased land was unseated, 2) a tax was charged by commissioners, 3) the tax was unpaid and 4) the land was sold and was not redeemed within two years. The statute provided specific instructions regarding the process of selling unseated land to collect unpaid taxes and provided for finality after two years if no redemption had occurred.

Based on these statutes, taxing and advertising land solely in name of a warrant rather than the current owner was sufficient because "[t]he assessors and commissioners cannot know of all the transfers of title which take place."

Herder Spring. 2016 Pa. LEXIS 1512, at *18 (citing Morin v. Harris, 9 Watts at 324). The tax sale of the property conveyed all of the interests, regardless of the owners. The nature of a tax sale on unseated land is further defined by comparing it with a sheriff’s sale. In the latter, only the title of the debtor is sold, whereas in the former the land itself is sold. Strach v. Shoemaker, 1 Watts & Serg. 166 (1841); Reinholtz v. Zerb Run Improvement Company, 29 Pa. 139 (1858). This is in contrast to seated land, wherein the interest of the owner is sold, requiring notice directly to the owner.

continued on page 11
CONTINUED FROM PAGE 10

B. Title Washing

Based on the foregoing statutory authority, the practice of “title washing” arose. A “title wash” occurred when the owner of unseated land lost his interest at tax sale, and any prior unassessed oil, gas and mineral interest passed to the grantee at the tax sale along with the surface, unless the oil, gas and minerals were specifically excluded in the tax deed, even though a prior severance of such interests had occurred. Hutchinson v. Kline, 199 Pa. 564 (1901). In other words, the surface and subsurface estates were merged and vested in the tax-sale purchaser.

Thus surface owners of unseated lands could intentionally fail to pay the taxes, allow the property to be sold at a tax sale, have the property purchased by a “straw man,” and record the deed from the treasurer and a deed back into the surface owner after the redemption period expired and thereby obtain ownership of both the surface and the oil, gas and minerals. Title washing was recognized by the courts of this commonwealth as eliminating the prior outstanding exceptions and reservations of oil, gas and mineral rights, thereby vesting the surface owner with the interests previously reserved. See Proctor v. Sagamore Big Game Club, 166 F. Supp. 415 (W. D. Pa 1955), aff’d, 265 F.2d 196 (11 Cir 1956) (“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.”); Moore v. Commw. of Pennsylvania DEP, 129 Pa. Commw. Ct. 628, 566 A.2d 905 (1989).

Some historical context provides insight into the foundation of the unseated tax law and title washing. Pennsylvania’s early land law developed from policies instituted by William Penn’s sons in an attempt to encourage organized settlement and payment for land. Wealthy speculators from the East Coast often obtained warrants and failed to pay taxes on the land or develop the property. Because the areas involved were generally in the center of the Pennsylvania wilds and communication was difficult, taxing authorities did not necessarily know who owned unimproved property in order to assess and collect taxes. The uncertainty of the finality of a tax sale frequently led to the county’s inability to sell the properties for taxes.

With the advent of Marcellus drilling, title practitioners were called upon to pass upon titles that included one or more “title washes.” Despite the frequency with which these types of tax sales occurred, genuine concern existed regarding the validity of such proceedings. Although many cases recognized the validity of title washing, a number of decisions called it into question. See, for example, E.H. Rockwell & Co. v. Warren County, et al., 228 Pa. 430, 77 A. 665, 665-666 (Pa. 1910) (holding that if no oil or gas is proved to exist, nothing exists to tax); New York State Natural Gas Corp. v. Swan-Finch Gas Development Corp., 278 F.2d 577, 579 (3d Cir. 1960) (holding that sale of mineral rights at tax sale did not include natural-gas rights because no tax assessment of natural gas could be made absent proof of existence of natural gas on the premises); Day v. Johnson, 31 Pa. D. & C. 3d 556 (1983) (C.C.P. Warren C’ty 1983) (holding that as severed oil and gas estate never produced, it could not be taxed or sold for delinquency); Herder Spring Hunting Club v. Keller, 2010 Pa. Dist. & Cnty. Dec. LEXIS 729 (C.C.P. Centre C’ty 2010) (finding that tax sale of unseated land did not convey the severed subsurface rights); Meske v. Hull, 2009-CV0117 and 2011-CV-33, slip op. (C.C.P. Sullivan C’ty, Apr. 23, 2013) (holding that title washing violates 14th Amendment). Without appellate guidance, it was impossible for title practitioners to give any sense of certainty to their clients.

C. Herder Spring at the Superior Court

A collective sigh of relief (or was it apprehension?) was heard from the title bar when the Pennsylvania Superior Court took up the appeal of the Herder Spring decision. At last, appellate guidance was on the horizon. In Herder Spring Hunting Club v. Keller, 93 A.3d 465, 2014 Pa. Super 100 (Pa. Super. Ct. 2014), aff’d, 2016 Pa. LEXIS 1512 (Pa. July 19, 2016), a unanimous three-judge panel of the Pennsylvania Superior Court re-affirmed the validity of title washing. The Herder Spring case involved a dispute over a tract in which the subsurface estate had been reserved by the Kellers in 1899. In 1935, the assessed surface tract was sold at treasurer’s sale to the county for delinquent taxes. Herder Spring Hunting Club’s predecessor purchased the property from the county in 1941. The Kellers’ heirs and assigns and the Herder Spring Hunting Club both claimed the rights to the oil and gas estate, leading to the litigation.

In holding that Herder Spring owned the oil and gas estate by virtue of the tax sale, the court noted,

The relevant case law established that the acts taken by the commissioners regarding the tax sale were presumed to comport with applicable statutes and regulations, subject to contrary proof produced within two years of the foreclosure. The person who severed rights to unseated land was under an affirmative duty imposed by statute to inform the county commissioners or appropriate tax board of that severance, thereby allowing both portions of the property to be independent-

CONTINUED ON PAGE 12
Herder Spring Hunting Club v. Keller: 
Certitude for Oil and Gas Title Practitioners
CONTINUED FROM PAGE 11

ly valued. 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.

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 sold pursuant to any tax sale, absent proof within two years, of the severance of rights.

Id. at 471-72. Further, the law assumes that the lack of an assessment is based on the lack of reporting. Id. at 473. See also Keta Gas & Oil Co. v. Proctor, Lycoming County No. 50 – 00,571 (Aug. 14, 2015).

Accordingly, the court determined that because the land was unseated, the Kellers had an affirmative duty to notify the tax assessor after they severed the oil, gas and minerals to allow for independent assessment of the subsurface. Because no evidence existed that the Kellers notified the assessor of the severance, nor was there evidence that the oil and gas had ever been separately assessed, the court held that the tax sale and ensuing commissioner’s deed extinguished the Keller’s reservation of oil and gas and vested the merged surface and subsurface estate in Herder Spring.

Notably, the court rejected the argument that even if the Act of 1806 imposed a duty to report the severance and the severance was not reported, the only possible penalty under the act was four-fold taxation, not the confiscation of the property. The court concluded that “the four-fold penalty was to be imposed in those situations where no tax sale had taken place.” Id. at 473, n.10.

Detractors of title washing have also decried the violation of due process, but the Herder Spring court noted in closing that, 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 seizure of the property for failure to pay tax and the subsequent 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.

Id. at 473. Thus, the court balanced the due-process arguments with the need for stability of title based on long-standing practice and the statutory law and circumstances of the time. This decision comports with the U.S. Supreme Court’s holding in Texaco Inc. v. Short, 454 U.S. 516 (1982), that the state may enact legislation making the continuation of a property right contingent upon the performance of an act within a specified period of time provided that the required acts are not arbitrary and are related to legitimate state goals. The Texaco Court determined, inter alia, that a dormant mineral statute did not extinguish the property rights of mineral owners without adequate notice because property owners are charged with knowledge of relevant statutory provisions affecting the control or disposition of their property and the state is not bound to notify property owners of the running of a statute of limitations.

See also Bailey v. Elder, 2015 Pa. Super. Unpub. LEXIS 4090 (Pa. Super. Ct. 2015). In Bailey, a three-judge panel of the Superior Court upheld Judge Dudley Anderson’s opinion on summary judgment in the Lycoming County Court of Common Pleas. Bailey v. Elder, No. 08–02,327 (Dec. 10, 2014). Plaintiffs in Bailey alleged that although defendants had reserved all oil, gas and mineral rights to themselves when deeding the property to Elk Tanning Company in 1893, those rights had been lost, inter alia, through a tax sale in 1910. Judge Anderson addressed multiple objections to title washing and dismissed them, as follows:

Defendant first argues that the tax deed did not pass title to the subsurface estate because the taxing authorities lacked the statutory authority to assess the subsurface estate as such did not constitute “lands,” citing Coolspring Stone Supply v. Fayette County, 929 A.2d 1150 (Pa. 2007), and Independent Oil & Gas Association of Pennsylvania v. Board of Assessment Appeals of Fayette County, 814 A.2d 180 (Pa. 2002). While the court in Independent Oil & Gas did hold that there is no statutory authority for the assessment of real-estate taxes on oil and gas interests, it later announced that such holding would not be applied retroactively, Oz Gas Ltd. v. Warren Area School District, 938 A.2d 274 (Pa. 2007). Thus, at the time of the sale, the assessment was valid under the law then in effect, and this argument to the contrary is without merit.

Defendant similarly argues that the taxing authorities could not assess the subsurface estate as no production was occurring which

CONTINUED ON PAGE 13
would have provided a basis for valuation. This argument was rejected in *Herder Spring*, which looked to the Pennsylvania Supreme Court’s ruling in *Bannard v. New York State Natural Gas Corporation*, 293 A.2d 41 (Pa. 1972), that although mineral rights should not be taxed as if gas or oil existed if it did not, a tax sale believed to be improper because of overvaluation cannot be collaterally attacked 50 years later. *Herder Spring*, supra, fn. 11. In this matter, the attack comes over 100 years later and will not be countenanced.

Next defendant argues that any failure to report the severance cannot serve as a basis for the extinguishment of the subsurface rights through the tax sale as, under a strict construction of the Act of 1806, there was no duty to report the severance. The court in *Herder Spring* specifically found, however, that “[t]he person who severed the unseated land was under an affirmative duty imposed by statute to inform the county commissioners or appropriate tax board of that severance, thereby allowing both portions of the property to be independently valued.” *Id.* at 471. This argument is therefore without merit.

*Bailey*, at 3-4. The court went on to rebuff defendant’s attempts to place the burden of proving compliance with tax-sale procedures to the plaintiffs, in particular noting that defendant’s claim that flooding had occurred several times in the area and could have led to the loss of assessment records reflecting the property was insufficient evidence to prove that the court’s records regarding this tax sale were impacted. Finally, the court engaged in a review of the claim of due-process violation by examining the *Texaco* decision, noting that the Supreme Court had determined that a state’s fiscal interest in collecting property taxes is manifest. *Bailey*, at 11 (citing *Texaco*, 454 U.S. 516, 529 (1982)). As the reporting requirement in the unseated tax law furthered that interest, the slight burden on the landowner was outweighed by the benefit to the Commonwealth. *Id.* at 12.

*Herder Spring at the Supreme Court*

Predictably, the opinion of the Superior Court was appealed. On July 19, 2016, the Pennsylvania Supreme Court affirmed in a 5-0 decision. After engaging in an extensive historical review of the taxation of unseated land in Pennsylvania, the court determined that the 1935 tax sale of unseated property was a conveyance of both the surface and severed subsurface estate, as the severance had not been reported and the interest had not been separately assessed. *Id.* at *38.

The court’s key holding are as follows:

**Whether the 1935 tax sale to the county commissioner resulted in the sale of only the surface estate or the entire warrant.**

**Holding:** The court determined that while the Kellers did not have an affirmative duty to report their ownership under the Act of 1806, their failure to do so resulted in the continued assessment and taxation of the property as a whole. *Id.* at *37-38. Next, the court held that the use of the name of the current surface owner for the sale did not limit the sale to the surface only because unseated land was assessed and taxed in the name of the warrant, and any reference to the presumed-current owner was merely used for descriptive purposes. *Id.* at *38-39. Moreover, the court found unpersuasive the argument that the Act of 1806’s four-fold penalty applied to the case and limited the consequences of the failure of the Kellers to have their interest separately assessed, finding that the four-fold statutory penalty applied to failure to report, not the failure to pay the taxes due. *Id.* at *39.

**Whether the 1935 tax sale should not be deemed to encompass the reserved mineral rights because those rights did not have taxable value in 1935.**

**Holding:** The court determined that the potential assessable value of minerals was irrelevant to whether the 1935 assessment addressed the warrant as a whole or merely the surface estate because such a theory would produce chaos, whereby courts today would be required to determine whether certain minerals or other subsurface rights would have had taxable value in the late 1800s. *Id.* at *39-40. Additionally, the court noted that the Kellers should have disputed this issue within the two-year redemption period because after the expiration of that period, a challenge to the propriety of the tax sale would not be heard under Section 4 of the Act of 1815: “no alleged irregularity in the assessment, or in the process or otherwise, shall be construed or taken to affect the title of the purchaser, but the same shall be declared to be good and legal.” *Id.* at *41-42 (citing 72 P.S. § 6091).
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Whether “titlewashing” does not apply to duly recorded prior estates or interests because the tax sale under Section 5 of the Act of 1804 only conveys the interest “of the real owner or owners.”

**Holding:** The court distinguished case law providing that easements and rights of way are not divested by a tax sale because here, surface and subsurface properties were assessed as a whole and because the existence of a severance is not open and notorious and cannot be viewed by the assessor. Furthermore, the court deemed the timing of severance as related to the assessment irrelevant where the tax was unpaid, emphasizing that the land itself was liable for the payment of the tax, not the owner. *Id.* at *43-44.

Whether documents in the record demonstrate the 1935 tax sale was imposed on the warrant as a whole.

**Holding:** After noting that the extant law provided that unseated land was assessed according to the original warrant, absent direction from owners and that a tax sale conveys the property covered by the assessment, the court found that the documents in the case provided no indication that the assessment and taxation occurred on anything other than entire warrant. *Id.* at 45-46. When neither the Kellers nor the surface owners challenged the assessment or the tax sale within the redemption period, their title was extinguished. *Id.* at 46.

Whether the Kellers and their heirs were deprived of due process because of the lack of actual notice prior to the tax sale.

**Holding:** After noting that at the time of the 1935 tax sale, constructive notice through publication was sanctioned for *in rem* actions, but later U.S. Supreme Court precedent set a higher bar, the court nonetheless determined that the courts approve of notice by publication where “it is not reasonably possible or practicable to give more adequate warning.” *Id.* at *49-50 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)). The court further held that what was “‘reasonably possible or practicable’ and what would constitute an ‘extraordinary effort’ requires consideration of the constraints of the era.” *Id.* at *50. In that vein, the court cited *City of Philadelphia v. Miller*, 49 Pa. 440, 450-52 (Pa. 1865), wherein it had held that notice by publication was proper notice in most cases involving unseated land. *Id.* at *50-51. That court had found “ample provision for notice to the owner” in the unseated tax law “through the procedures of creating and compiling the surveys describing the land, allowing the owner a year to pay the taxes assessed, and providing and requiring 60 days’ notice of the sale in daily papers both in the relevant county and Philadelphia, in which the property was described by reference to the warrantee or owner.” *Id.* (quoting *City of Philadelphia*).

Moreover, the court noted that ownership of unseated land was often contested, and tax officers were not required to decide between contestants. Often the deed was not recorded, the name was not registered, the owner was not known, no one was in actual possession and no apparent owner or reputed owner was in the neighborhood of the property. Finally, with the two-year redemption period, all the owner had to do was look after his interest within a two-year period. The court found all of these factors to militate in favor of upholding the notice provisions. *Id.* at *52-53.

Whether Herder Spring should be estopped from asserting claim to OGMs based on 1959 deed’s “subject to” exceptions and reservations clause.

**Holding:** Although the Keller heirs had claimed that the inclusion of the phrase “subject to all exceptions and reservations as are contained in the chain of title” in Herder Spring’s deed was sufficient to estop Herder Spring from claiming the oil and gas interest, the court rejected this position, noting that no specific mention of the Keller exception and reservation had been made and no reservation was “contained in the title” when Herder Spring obtained the property because the 1935 tax sale had extinguished the prior Keller reservation of the subsurface estate. *Id.* at *54-55.

In closing, the court did note that its holding applied to a very limited subset of cases involving quiet title actions for formerly unseated land sold at a tax sale prior to 1947. Nonetheless, the court’s opinion provides clarity to oil- and gas-title practitioners that has long been wanting.

Lisa C. McManus serves as vice-president, legal and general counsel at Pennsylvania General Energy Company LLC in Warren. Previously she maintained a private practice concentrating on oil and gas law and general business and transactional matters. She is the author of numerous articles on oil and gas law and frequently lectures and plans continuing legal education programs for various organizations.
Recently, Pennsylvania’s Superior Court rendered a decision that may have a significant impact on whether production rights may be severed from storage rights in a dual-purpose oil and gas lease.

In Pennsylvania, it is not unusual to find an oil and gas lease that provides for both production and storage of gas. These leases are known as dual-purpose leases. Many of these leases do not pay bonuses to the lessor of the oil and gas rights and do not pay royalties in excess of the state minimum of 12.5 percent. In fact, many of these dual-purpose leases pay only small amounts for production and storage, usually a few hundred dollars per production well and a few hundred dollars per storage well.

Under many dual-purpose leases, gas is being stored but no production of gas is taking place, and it is not unusual to find that no production of gas has ever taken place. Under such circumstances and where lessors of oil and gas rights are being offered bonuses that can run into thousands, if not hundreds of thousands, of dollars with royalty percentages in excess, if not well in excess, of 12.5 percent, the issue arises as to whether production rights in a dual-purpose lease can be severed from storage rights. For the lessor of the oil and gas rights under a dual-purpose lease, the situation becomes very practical, very fast: “Everyone else is receiving thousands of dollars in bonus money with a great royalty and I’m only getting a few hundred dollars a year. Why can’t I get the same? My oil and gas company has never produced any gas, and there is another oil and gas company that wants to lease my rights. Why can’t I get a new lease?”

One of the arguments that is invariably made in favor of a new lease is that the production rights can be severed from the storage rights. One of the main arguments employed to support this argument is the use of the disjunctive “or” in the durational clause, aka habendum clause, of the dual-purpose lease. The durational provision provides that either the production of gas or the storage of gas will maintain the lease in effect. Accordingly, as the disjunctive “or” is used, it is argued that the production rights are severable from the storage rights. As such, and where the oil and gas company has not produced any gas, the lessor also argues that the oil and gas lease is no longer in effect as to the production rights. Accordingly, the lessor should be able to re-lease the production rights. Is, however, the use of the disjunctive “or” in a dual-purpose lease an indicator of severability? Based upon Loughman v. Equitable Gas Co., 134 A.3d 470 (Pa. Super. 2016), the answer is “no.”

On Aug. 11, 1966, Dorothy Loughman entered into a lease of the oil and gas under her tract of approximately 250 acres in Morris Township, Greene County, with Equitable Gas Co. LLC (Equitable). By the terms of this lease (Loughman lease), Equitable acquired the right to produce oil and gas and “to inject gas for storage or represuring in the substrata and to remove same therefrom by pumping or otherwise.” The Loughman lease provided for a flat rent for each producing well, delay rent of $250 per year, and storage rent of $500 per year, or $2 per acre per year.

Dorothy Loughman’s successors-in-interest (the Laughmans) filed an action in Greene County seeking to have the Loughman lease declared terminated because of the failure of Equitable or its assigns to produce any oil or gas since the lease was signed.

The Laughmans filed a motion for summary judgment asking the court to declare that all production-related rights under the Loughman lease were terminated. They contended that a 2011 sublease agreement between Equitrans LP (Eitrans), who had received the Loughman lease from Equitable, and EQT Production Company (EQT) treated production rights and storage rights as severable and that the production rights were terminated because no oil or gas well was ever drilled on the property. Equitable, Equitrans and EQT countered by arguing that the sublease agreement did not sever production and storage rights and that the production rights are not severable from the storage rights under the terms of the Loughman lease.

The trial court denied the Laughmans’ motion and issued a memorandum in which it concluded that “the lease was not severable and had been held by the lessee, or its assigns, by paying the storage rents provided for in the lease.” The trial court also determined that the 2011 sublease agreement did not alter the outcome because it was simply a sublease and was of little use in determining the intent of the parties to the Loughman lease, executed in 1966.
Can the Lessor of Oil and Gas Rights Obtain a New Lease by Severing Production Rights from Storage Rights?

CONTINUED FROM PAGE 15

In deciding whether production rights were severable from storage rights, the Superior Court relied on Jacobs v. CNG Transmission Corp., 565 Pa. 228, 772 A.2d 445 (2001), wherein the issue of the severability was examined. In so doing, the Supreme Court held that:

[A]bsent express language that a contract is entire, a court may look to the contract as a whole, including the character of the consideration, to determine the intent of the parties as to severability and may also consider the circumstances surrounding the execution of the contract, the conduct of the parties, and any other factor pertinent to ascertaining the parties’ intent. The court need not make a specific predicate finding of ambiguity before undertaking the inquiry — indeed, if the contract were crystal clear as to the parties’ intent, severability likely would not be a contested issue.

Id. at 452.

In accordance with Jacobs, the Superior Court in Loughman went first to the language of the Loughman lease to determine whether it clearly addressed the issue of severability and concluded that it did not. The Superior Court then looked at the contract as a whole and concluded that it was clear that the Loughman lease did include disjunctive language addressing the duration of the contract, specifying that the lease was to remain in effect as long as the “land is operated for the exploration or production of gas or oil, or as gas or oil is found in paying quantities thereon, or stored thereunder or as long as said land is used for the storage of gas or oil on lands in the general vicinity of said land.” (emphasis in original).

Loughman, 134 A.3d at 475.

The Loughmans argued that the use of the term “or” confirmed that the production rights and the storage rights are separate and divisible rights that can be, as the parties have treated them, severable. The Superior Court disagreed, holding the exact opposite.

Based upon its review of the record, including the Loughman lease, the assignment, and the sublease agreement, the Superior Court found that the durational provisions of the Loughman lease were clearly and unambiguously written in the disjunctive and provide that the Loughman lease shall continue during either production or storage. Further, the 2011 sublease agreement specifically expressed Equitran’s intent not to sever production and storage rights. In the event, EQT, as the sublessee, elected to surrender its rights, the nonsevered production rights associated with the Loughman lease would automatically revert to Equitran. Recognizing that its goal is to ascertain and effectuate the intention of the parties, its examination of the contracts led the Superior Court to conclude that the parties intended the Loughman lease to be nonseverable.

Based upon Loughman the use of the disjunctive “or” in a durational clause is not an indication of severability. On the contrary, it would be an indication that a dual-purpose lease is an entire contract.

Does Loughman, however, preclude any argument by the lessor of the oil and gas rights that the production rights in a dual-purpose lease can be severed from storage rights where the disjunctive “or” is used in the durational clause? In light of Jacobs and Loughman itself, the answer should be “no.” Use of the disjunctive “or” may be an indication that the dual-purpose lease is entire, but that should not end the inquiry.

Under Jacobs, if there is no express language in the contract that the contract is entire, the entire contract, or in this case, an oil and gas lease, must be looked at as a whole. This may include a review of the character of the consideration. The court may also consider the circumstances surrounding the execution of the contract, the conduct of the parties, and any other factor pertinent to ascertaining the parties’ intent. This is what the Superior Court did in Loughman. It did not only rely on the use of the disjunctive “or” in arriving at its decision. It also reviewed the other contracts between Equitable and Equitrans and Equitran and EQT.

In examining these contracts, it is important to note that the conveyance of the Loughman lease by Equitable to Equitran was done by assignment in 1988 and the sublease agreement between Equitrans and EQT was in 2011. These contracts were entered into subsequent to the 1966 Loughman lease with parties; i.e., Equitrans and EQT, who were not the original contracting parties to the Loughman lease; i.e., Dorothy Loughman and Equitable. Loughman reviewed these contracts despite the trial court’s determination that the 2011 sublease agreement was of little use in determining the intent of the parties to the 1966 Loughman lease. Recognizing that its goal was to effectuate the intention of the parties; i.e., the intent of the original contract-
Can the Lessor of Oil and Gas Rights Obtain a New Lease by Severing Production Rights from Storage Rights?

CONTINUED FROM PAGE 16

ing parties, the Superior Court did so by examining subsequent contracts with different contracting parties, which led it to the conclusion that the original parties to the Loughman lease intended the lease to be nonseverable.

The Superior Court’s approach to deciding the severability issue is important as in addition to the trial court in Loughman, at least one other court has indicated that the assignment of production rights subsequent to the original oil and gas lease by a subsequent party to the lease was irrelevant in determining the intent of the original contracting parties. See Penneco Pipeline Corp. v. Dominion Transmission Inc., No. 05-537, 2007 WL 1847391 at *6 (W.D. Pa. June 23, 2007).

In light of Loughman, subsequent conduct by subsequent parties can also be examined to determine whether production rights are severable from storage rights and can be examined even if the disjunctive “or” is used in the durational clause. See also Sun Co. v. Pennsylvania Turnpike Comm., 708 A.2d 875, 880 (Pa. Commw. Ct. 1998), (the Commonwealth Court, in acknowledging that the conduct of one party is always relevant in interpreting a contract and may be the strongest indication of the intention of the parties to the contract, considered the conduct of a subsequent assignee to a lease in interpreting the contract); Pathmark Stores, Inc. v. Gator Monument Partners LLP No. 08-3082, 2009 WL 5184483, at *7 (E.D. Pa. Dec. 21, 2009) (specifically rejecting the contention that only the conduct of the original contracting parties is relevant in interpreting the meaning of a contract; i.e., a lease; most courts disagree with such a view); Getty Petroleum Mktg. Inc. v. Shipley Fuels Mktg. LLC, No. 07-340, 2007 WL 2844872, at *20 (E.D. Pa. Sept. 27, 2007) (“This construction is reinforced by the parties’ course of performance. Every assignee of the Agreement, prior to Getty provided Defendant Shipley with both Mobile brand petroleum products and Mobile trademarks.”); Lafitte Co. v. United Fuel Gas Co., 177 F. Supp. 52, 60 (E.D. Ky. 1959) (“Not only is the conduct of the parties with respect to the matter of accepting the monthly royalty payments over a period of more than [25] years significant, but it must be born in mind that the lease was transferred on three different occasions. It is proper to assume that on each of these occasions the [provisions at issue] were taken into careful consideration by both the seller and the purchaser …”); Warner-Lambert Pharm. Co. v. John J. Reynolds Inc., 178 F. Supp. 655, 688 (S.D.N.Y. 1969) (“The continued periodic payments and the affirmation of the obligation by Plaintiff’s predecessor, long after the event upon which Plaintiff relies occurred, is strong evidence that the obligation to pay still continues in force and effect …”).

Bottom Line: Under Loughman, the use of the disjunctive “or” in the durational clause of a dual-purpose lease is not an indication of the severability of production rights from storage rights. It is an indication that the contract is entire; however, this does not end the inquiry.

In accordance with Jacobs, the contract as a whole, including the character of the consideration, the circumstances surrounding the execution of the contract, the conduct of the parties and any other facts pertinent to ascertaining the parties’ intent may still be looked at to determine whether production rights can be severed from storage rights in a dual-purpose lease. In reviewing the conduct of the parties, it is not only the conduct of the original contracting parties that may be examined but, in addition, subsequent conduct, including contracts; e.g., an assignment, may also be looked at to determine the original contracting parties’ intent as to severability.

In light of Loughman, the task of a lessor in endeavoring to sever production rights from storage rights in a dual-purpose lease may be more problematic, but it is not impossible.

Loughman does not foreclose such an attempt.

Paul R. Yagelski is a partner at Rothman Gordon PC and a member of the bars of Pennsylvania, Ohio and West Virginia, representing owners of oil and gas interests. He is co-chair of Rothman Gordon’s Oil and Gas Section.

Dear fellow members of the Shale Energy Law Committee:

We hope that you enjoyed the first issue of the PBA Shale Energy Law Committee newsletter. Future issues will continue to include case summaries, legislative updates, regulatory changes and articles concerning subjects that impact shale-energy law. Should you have any input as to how we can make the newsletter better, please forward your suggestions to us. Our goal is to make the newsletter as informative as possible.

Best regards,

Paul R. Yagelski and Brian Pulito

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