Testimony of Craig Mayer

Vice-President-General Counsel, Pennsylvania General Energy

Senate Environmental Resources & Energy Committee

Hearing on SB 258

March 19, 2013

Mr. Chairman Yaw and Chairman Yudichak and Members of the Committee thank you for the invitation to testify. My brief biography is appended to this statement. Pennsylvania General Energy Company, LLC (PGE) is a Pennsylvania exploration and production company headquartered in Warren, Pennsylvania that was established 30 years ago and has current production in oil and both conventional and unconventional natural gas. PGE employs 160 people. The company controls over 425,000 acres of oil, gas, and mineral lands predominantly across the northern tier of Pennsylvania. We maintain over 3,000 leases and we issue over 375 royalty checks to individuals, families, businesses, and public agencies every month.

Background:

Like most on-shore oil and gas development companies, certainly those of long residence in Pennsylvania, our holdings are leased either from those who own both the surface and mineral estate or from owners of only the mineral estate. These are the mineral estates that were severed from the surface estate – with most of those severances occurring between 1880 and 1930- during the heart of the Industrial Revolution. When I refer to the mineral estate or mineral rights during this testimony it is meant, for ease of discussion, to include, as well, both the oil and gas. It is important to initially understand that in Pennsylvania (and all other states) the surface estate and subsurface estate are considered separate and distinct estates in land albeit "neighbors." Often these two interests in a tract of land are held by the same owner, but just as often they may be owned separate and apart.

The chain of title to mineral estates is commonly established by affirmative conveyance or grant and by exception and reservation in deeds. It is also passed

or conveyed by way of wills or intestacy. PGE generally acquires a full legal opinion of title before we pay any royalties or drill any wells on the lands involved, and these opinions in recognition of Pennsylvania law trace and acknowledge title to the oil and gas regardless of the method of conveyance.

Committee members may not be aware of this, but unlike what you may be familiar with in a typical real estate transaction for a house or lot of agricultural land, real estate title insurance companies do not issue insurance for oil and gas titles. Rather, PGE and operating companies rely on title opinions that are prepared by a relatively small, but highly skilled and experienced community of title attorneys who specialize in this work. The opinions tell us who the title attorney believes owns the oil and gas rights, how much each person owns, and exactly what those rights are. The opinions also identify problems with title. If title fails, meaning we obtained a lease or purchased a mineral estate from a person who did not in fact own the interest, even if that person and we believed that he did, then PGE is at risk of losing its investment and royalty owners are at risk of losing their payments and property. As one can imagine, this can amount to millions and millions of dollars when one unconventional shale well costs between 5 to 10 million dollars and a pad of wells easily 50 million dollars.

Our reliance and the reliance of the banking and business community upon confidence in the certainty and stability of mineral titles and those of our mineral estate owner/royalty owners serve as the very foundation of the Company. If you will, it is the prime asset on a balance sheet.

My understanding is that the impetus for the legislation stems from reported experiences in northeast Pennsylvania counties regarding quiet title actions and difficulties in finding oil and gas rights owners. SB 258, formerly SB 1324, was proposed in order to accord surface owners an advantage in these type actions. Historically in the Commonwealth of Pennsylvania, there have been no reported court decisions awarding a surface owner with ownership of their subsurface "neighbor's" property based upon a theory of abandonment.

We at PGE and our outside counsel believe that SB 258 alters basic property law in Pennsylvania and would destabilize subsurface land titles. SB 258 does so by creating an unusual procedural mechanism in the form of a presumption that could lead to uncompensated transfers of property. Our laws don't permit this with respect to lost or stolen stock certificates and duly recorded conveyances

should not be treated any differently, regardless of their age or apparent difficulty of locating the owner.

To learn more about the current nature or posture of actions to quiet title, and the likely import of SB 258, late last year I retained an abstractor to locate and identify quiet title action cases wherein surface owners were seeking to obtain title to oil, gas, or mineral rights of underlying mineral estates. Based on what was first found in Sullivan County the screening was continued to cover seven counties, namely: Bradford, Tioga, Sullivan, Susquehanna, Lycoming, Clinton, and Wyoming. As a result of this research 124 cases filed from 2008 through 2012, were identified at the various county courthouses and copied. In my view and experience this constituted an unusual and unusually high number of quiet title actions – and certainly so with regard to surface owners claiming title to separately and independently owned mineral estates. I provided the Pennsylvania Independent Oil and Gas Association (PIOGA) a copy of the cases which I will refer to as the "Data Set." PIOGA in turn provided a written set of the case files to the Committee. Two CDs of the "Data Set" are also provided with this statement and marked as Exhibit "Data Set" CD.

Analysis of Quiet Title Actions:

The 124 cases were examined since SB 258 can only be understood in the context of quiet title action practices and process that the Bill expressly amends and incorporates. Attached as Exhibit 1 is a March 5, 2013 memorandum from Attorney Jay Wilkinson who is an experienced lawyer and litigator in the area of oil, gas, and mineral titles, is familiar with litigation in northeast Pennsylvania counties, and is, as well, the co-author of the 2012 "Pennsylvania Oil and Gas Law and Practice," the first and only such Pennsylvania Legal treatise. A copy of his biography is attached to the Exhibit.

Attorney Wilkinson summarizes his critical review of the "Data Set" cases and concludes that default judgments obtained as a result of these quiet title actions, particularly those with affidavit and pleading defects are unlikely to withstand challenges to open or strike the judgments by dispossessed mineral owners who may eventually learn of the judgments.

Based on my review, for example, 57 of the 124 cases have facially defective Pennsylvania Rule of Civil Procedure Rule 430 affidavits. Rule 430 affidavits are

statements required to be filed and to describe why a search for missing defendants was unsuccessful when asking a court for permission to serve defendants by publication. The affidavit is prescribed as a means and layer of protection wherein the affiant submits his statements in the form of an affidavit. The required statement or oath before an officer qualified to administer oaths as prescribed by Pa. C.P. Rule 76, which defines what constitutes or qualifies as an affidavit, is simply missing from the 57 cases I noted. Examples of what I have described can be found at case 2008-CV-315, Sullivan County; case 307-CV-2011, Tioga County; and case 2009-QT-000305, Bradford County. In my opinion these defects alone will sustain motions to strike all of the default judgments entered in those cases. What this means in practical terms for an operating company like PGE is that there would be considerable uncertainty regarding ownership arising from the default judgments which would lead to an inability to obtain marketable or defensible title. This would in turn lead to decisions to not drill on lands with such judgments in the title chain. It would also impact the value of leases and potentially the ability to assign a lease at all with such judgments in the title chain.

My review also shows that in 104 of the 124 cases or 83%, that service of process by publication was the exclusive means of notice, meaning that none of the likely few hundred potential mineral estate owners were ever identified or located such that they might be served in the standard and routine fashions for original process which is typically by personal service. Rather, service took place on a few days usually only within the County in local community newspapers and law journals of very limited circulation. In only one of the many cases where the request to serve by publication was ruled upon did the Court deny the motion. That was in case 2008-1173, in Wyoming County where Plaintiff's Counsel claimed he had made a diligent good faith search and could find no defendants or their addresses. The judge denied the request noting that the address of the assignee of the named defendant "is readily ascertainable by reference to other litigation presently pending in this court."

My review of the "Data Set" shows default judgments were obtained in 97 of the 124 cases or 78% of the cases. However, the review also shows that in none of the 35 actions of the 124 where an attorney appeared on behalf of one or more of the defendants were any judgments obtained against the defendant oil, gas, and mineral owner.

Of the 124 cases 17 are pending resolution. In 10 of the 124 cases petitions to open/strike judgments by defendant mineral owners who have learned of the

judgments and are seeking to recover their property have already been granted or are awaiting resolution.

Attached as part of Exhibit 1 and as an example of the type of issues typical in the pending litigation, is a copy of the quite recent February 8, 2013 decision in *Northern Forest v. Keta,* Lycoming County Docket No. 88-02,356 by the Honorable Dudley N. Anderson. It strikes or sets aside a 1988 default judgment in an oil, gas, and mineral rights case – fully 25 years after the judgment was entered. The case turned on facially defective pleadings regarding service of process. The decision in *Northern Forest* has been certified for appeal.

Attached, as well, for the Committee's information is Exhibit 2. It is an October 31, 2011 Wall Street Journal Article titled "Shale Gas Fuels Legal Boom." The article discusses the mounting surface owner vs. mineral owner litigation over oil and gas rights. The case noted in the article, *Hankin v. Grande,* Susquehanna County Docket No. 2009-968 CP, involves a default judgment entered in 1998 being stricken 11 years later in 2009.

In conjunction with the review of the "Data Set" Attorney Wilkinson also discusses SB 258 noting that it would undoubtedly result in increased and unnecessary litigation, and is at odds with the 2006 Dormant Oil and Gas Act, 58 P.S. Section 701.1 et seq (DOGA). He concludes his note with several recommendations - key among them being heightened search standards for finding "unknown" owners and amendments to and use of the DOGA petition and trustee process as the means to address the issue of unlocatable owners of remnant oil and gas rights.

Abandonment Claims:

Under existing Pennsylvania law, abandoned property is defined as "that to which an owner, by external acts voluntarily and intentionally, has relinquished all right, title, claim, and possession with the intention of terminating his or her ownership, but without vesting in any other person and with the intention of not reclaiming further possession or resuming ownership, possession or enjoyment." *Commonwealth v. Wetmore,* 310 Pa. Super. 370, 373, 447 A.2d 1012, 1014 (1982)

Within the "Data Set" there are 72 cases that claim "abandonment" of the mineral estate in favor of the surface estate which is also the express subject of the SB 258 rebuttable presumption. Finding the 72 cases was entirely unexpected

as, to my understanding, claims alleging abandonment of title to real property are very rarely, if ever, seen and the law does not recognize abandonment in favor of other people. Routinely, the complaints initiating each quiet title action describe the plaintiff's surface property and then the reservation in the deed creating the defendants' separate mineral estate. The abandonment pleadings, would then recite a legal argument something like the following:

1. "At no time has any of the Defendants or any other party made a claim or asserted any ownership interest in the gas and oil rights to said property.
2. Plaintiffs have been in actual and exclusive possession of the described property since the time of their purchase....
3. Plaintiffs alone have paid all real estate taxes associated with the property....
4. Plaintiffs have attempted to trace the ownership of the gas and oil rights with no success....
5. Plaintiffs believe and, therefore, aver that any interests in the gas and oil rights with respect to the property by any other party have been abandoned.
6. Plaintiffs ownership interests in the subject gas and oil rights are superior to any other ownership interests."

This rendition of facts and legal conclusions is simply not a cognizable legal theory under Pennsylvania law. When compelled in a defended action to put forth factual evidence to support abandonment of a mineral estate, none of the plaintiffs in the "Data-Set" have been able to do so. The typical scenario is expressed by the Hon. Judge Russell D. Shurtleff, of the Sullivan-Wyoming Court of Common Pleas in *Jordan v. Schug,* Sullivan No. 2008-CV-2009, Opinion and Order dated February 1, 2012, wherein he explains "There are no facts set forth in the Trial Stipulations that illustrate that Defendants intended to abandon their one half interest in the mineral and oil rights that were reserved in the 1907 and 1915 deeds. Rather the Trial Stipulations represent that Defendants were not aware of the reservation made by their great grandparents, Thomas and Nellie Schug, until the publication notice of this action appeared in the Sullivan Review on October 1, 2008." A complete copy of this Opinion has been included as Exhibit 3.

It should also be noted that, none of the 72 cases notifies or joins the Commonwealth as a party to the quiet title action. Given that the Commonwealth has jurisdiction over disposition of tangible unclaimed and

abandoned property under the Fiscal Code, Title 72 P.S. Section 1301.2, the failure to join the Commonwealth as a party renders the judgments in these 72 cases candidates, and probably many others in the "Data Set" for being set aside on the basis that the court had no jurisdiction to dispose of this allegedly abandoned property in the first instance.

Unknown or Un-locatable Oil, Gas, and Mineral Owners:

Our company does not experience particular difficulties with finding owners of oil, gas, and mineral interests. Seldom do we hire professional search services on the basis of a decision that a mineral estate owner is unlocatable and if we do it is done at a very reasonable cost. Typically, our abstractors can identify and locate almost all potential owners through community records, courthouse searches, and the now powerful internet search engines for public and private people-finder databases or identification databases such as Intelius.com, Ancestry.com, and the Social Security Death Index. Additionally, my department, as is almost certainly the case in any attorney office or legal firm, has people, record, and business information finder services available to it through either the WestLaw or LexisNexis legal research databanks.

We identify and find all owners in almost every case and in those that we don't it is easily and significantly less than 1% of the rightful owners (or their interests) that we cannot find.

There are, of course, instances or the potential in any event, when we might not locate any owner(s). This, however, would be an unusual occurrence. It is also important to note that even if we cannot locate all the owners of what are typically undivided tenant-in-common interests this still would not preclude our drilling of wells. Any one of the co-tenant mineral owners, to include surface owners who also own some oil and gas interests can file a petition under DOGA to obtain a lease from a Trustee in favor of the unknown owners and we would then operate under such a lease and pay the trustee the royalty due the unknown heirs. This royalty, if unclaimed, would in time escheat or go to the Commonwealth. DOGA exists for this very purpose.

Senate Bill 258:

With the foregoing and necessary background it is easier to appreciate the shortcomings in SB 258. The flaws are at least three: FIRST, is its immediate retroactive application; SECOND, is realization of its purpose to promote development being cast into quiet title action practices and process; and THIRD, the numerous and consequential interpretive issues associated with and necessarily raised by the Bill.

With respect to the FIRST - retroactivity - SB 258 says that it applies with regard to a "failure... to exercise subsurface rights" for "a period in excess of 50 years." It does not say for the 50 year period immediately preceding the filing of a quiet title action. The start date for that 50 year period could begin, for example, in 1880 at the time when deed reservations of oil, gas, and minerals became a very common and accepted real estate conveyance practice in Pennsylvania. This means that under the Bill, a 2013 Court could rule that title to the subsurface rights could have vested into the surface owner in 1930 upon expiration of an 1880 reservation, but it is only in 2013 that anyone can possibly learn that that is what happened. Moreover, even if the 50 year period were only that period preceding the filing of an action (i.e., there was no "floating" 50 year period), the Act is nonetheless retroactive – the difference being that the retroactivity period is limited to the most recent 50 years.

In either case the oil, gas, or mineral owner would not have had the slightest idea that he had to do anything - now described as an "exercise" of the subsurface right - until 50 years after the fact of his not doing any of the things that by his not doing will likely result in the loss of his property. As other real property owners in Pennsylvania oil, gas, and mineral owners have relied on the fact that recorded deeds secured their property. They, like all other real property owners, have relied on the settled black letter common law that no one can lose title or abandon their real property estates simply because of non-use. At pages 5 and 6 of the *Jordan v. Shug* case, Judge Shurtleff, in dismissing a quiet title action brought by a surface owner seeking title to the oil and gas, succinctly documents and reiterates this long established common law principle that governs real property titles in Pennsylvania.

With respect to the SECOND – the unreliability of quiet title actions – in the first instance, SB 258 amends a procedural statute in the Judicial Code titled rights of action. It cannot therefore, as noted previously, be viewed in isolation or

understood except in conjunction with the quiet title action practices and process it incorporates.

In this regard, the identification of, naming of, searching for, and notifying of defendants under the pleading and service of process rules pertaining to actions in real property, which include quiet title actions, is placed in the hands of the Plaintiff surface owners. This is the party who under the SB 258 winner-take-all adversarial approach may conduct only minimal or cursory searches as the plaintiff is an obviously biased party. Indeed it could very well be that part of the attorney compensation for handling such a lawsuit is a percentage part of any royalty the plaintiff(s) might receive if they subsequently lease their newly acquired mineral rights to an operating company. In short, Plaintiffs would have no real incentive to identify or locate defendants or parties in interest who might know defendants. If defendants did learn of the lawsuit they would come forward and assert ownership in order to protect their property rights. As the "Data Set" evidences the only way judgments are being obtained is through default.

Because of the research available in the "Data Set" we don't have to imagine or speculate about what might happen in the courts and what will likely be experienced with cases relying on SB 258. Case number 305-CV-2011 from Tioga County and case number 2012-CV- 34 from Sullivan County are good examples. Both involve oil and gas companies. According to the pleadings in the Tioga County case, at about the same time as a default judgment quiet title action was being concluded against the unlocatable mineral estate owners, the oil and gas company was negotiating a lease with the very same unlocatable mineral owners. In the Sullivan County case the oil and gas company and 70 royalty owners, all but two of whom are Pennsylvania residents, were never served with notice of the lawsuit (other than by the extraordinary means of publication) despite evidence of the lease and royalty owners interests and their names and addresses being recorded in the courthouse.

With respect to the THIRD, various issues with SB 258 are listed below. They are all significant and consequential.

- Constitutionality: SB 258 is certain to be challenged with regard to both state and federal abridgments respecting retroactivity, impairment of contracts, due process, separation of powers, and uncompensated takings

of private property for private purposes. In my view there is a substantial likelihood that it would be found unconstitutional on one or more grounds.

- Pending Actions: The Bill's effect on pending judicial actions or actions that have been previously filed and discontinued or suspended that assert abandonment of mineral title is not addressed.
- Preservation of Mineral Rights: No opportunity or mechanism is apparent in the Bill where, other than by being embroiled in a lawsuit, assuming the mineral owner learns of it to begin with, may a mineral owner act to preserve rights that may not have been "exercised" in 50 years.
- Partitioning Mineral Estates: With respect to a failure to exercise a subsurface right the Bill could be interpreted in relation to a surface estate that overlays just part of a larger mineral estate to allow for division or partition of the mineral estate with regard to just that plaintiff's surface estate. This would be in direct conflict with established common law which recognizes integrity or cohesion of the mineral estate such that use of part of the estate extends to or means all of the estate to include its appurtenant rights and its vertical and horizontal dimensions including all possible production formations or strata.
- Establishing a Failure to Exercise: A rebuttable presumption assumes that there is some evidence to support or give rise to that which is presumed. The Bill places no procedural obligation on a surface owner plaintiff to demonstrably establish by affidavit and supporting documentation any factual basis for his asserting a failure to exercise. Conversely, the Bill is silent on what rebuts the presumption assuming it is raised.
- Definitions: Apart from identifying minerals, as that word is used in science, as the thing about which the term "subsurface rights" is concerned it is defined circularly as being "rights" or "interests." The term has no common law heritage or interpretive history and would likely take decades of court decisions to be defined in the courts.

Conclusion:

In closing, the subtitle of the Wall Street Journal Article I provided is "*Fights over Underground Rights Confound Companies (and) Pennsylvania Landowners.*" SB 258 could only add to that confusion and consternation, indeed it would inflame it and likely lead to an explosive growth in expensive litigation. At the same time the Act will damage confidence in the stability and certainty of oil, gas, and

mineral ownership. Moreover, it is not just northeast Pennsylvania that would be affected. Millions of acres of Pennsylvania land are held in split-estate ownership.

In 2006 the legislature adopted the Dormant Oil and Gas Act. Through a trustee and non-adversarial process it protects mineral owners to include surface owners who maintain partial ownership interests in minerals and provides for a process to allow for development of mineral resources. It also benefits the Commonwealth through the generation of revenues. We have had six years of experience with it and are learning its strengths and weaknesses and how it might be improved. Respectfully, I would urge the Committee to focus on improvements to DOGA as the way to deal with remnant oil and gas interests rather than proceeding with the flawed SB 258.

Thank you for your attention and, again for the invitation to appear. I am, of course, available to answer any questions you may have.

Biography

Craig L. Mayer, Esq.

Since 2004, Mr. Mayer has been legal counsel with Pennsylvania General Energy Company, L.L.C. and is currently Vice-President and General Counsel. He is a 1974 graduate of Duquesne University School of Law and is a 1968 graduate of the Pennsylvania State University. He is a retired U.S. Marine Corps officer having served on active duty from 1968 to 1992 in various command and staff postings to include service in Vietnam and subsequently as a Judge Advocate and Naval Attaché. In a civilian capacity from 2000 to 2002, he worked in association with U.S. State Department personnel in Egypt and Israel as an International Observer and Team Leader with the U.S. Observer Unit of the Multi-National Force and Observers ("MFO"). The MFO monitors Egyptian and Israeli compliance with the Camp David Peace Treaty Accords. Mr. Mayer resides in Warren, Pennsylvania.

EXHIBIT 1

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March 5, 2013

Craig Mayer, General Counsel
Pennsylvania General Energy
120 Market Street
Warren PA 16365

Via Electronic Mail to: craigmayer@penngeneralenergy.com

Re: Northeastern Pennsylvania Actions to Quiet Title
Senate Bill No. 258, 2013 Session of the General Assembly of Pennsylvania

Dear Craig,

Thank you for sharing the research ("Data-Set") that PGE compiled regarding Quiet Title Actions in Northeastern Pennsylvania.

Your Data-Set confirms that in a vast majority of the Quiet Title Actions in Northeastern Pennsylvania vested property rights of "unknown" mineral owners are being transferred to the surface owners, through a turn of legal procedure caused by, at a minimum, an incomplete and inadequate title search for proper defendants, or at worst an intentional omission of the proper defendants. Regardless of intent, it is clear that the published notices in the local rural papers are not an effective means to notify the real parties in interest. While the default judgments have been successful in creating "clouds" on the real owners title, the Data-Set reveals that the titles obtained by default are as paper thin as the case files creating them. The Judges that have been presented with Petitions to Strike or Open the defaults by the "known" owners are consistently granting that relief. Pennsylvania case law as well as basic constitutional due process demand this relief. For example, in a decision just last month in *Northern Forest v. Keta* out of Lycoming County, the Hon. Judge Anderson struck a default judgment, based on a facially defective Affidavit and Notice by publication that was entered in his county nearly a quarter of a century ago. I have attached a copy of this Opinion in case you have not seen it.

Respect for individual property rights and land titles has been the backbone of a system that has existed in this Commonwealth from our founding days. The Royalty on the extraction of resources was reserved for the sovereign (the King) in England. When we departed from our english roots, we kept the term Royalty but no longer was this potential revenue reserved for the King, the Royalty was made payable to our citizens, the owners of the land. The very first item

on the agenda for Colonel Drake in Titusville Pennsylvania was to perfect the title, locate the rightful owner, and present him with a contract in which the Royalty was made payable to him, not the sovereign. Your industry has maintained the Drake agenda, and determining proper title to the Subsurface is just as important a first step today as it was in the Drake era. The present litigation in your Data-Set represents a step backwards in the perfection of land titles and protection of individual property rights. Senate Bill No. 258 has the potential to accelerate the decline in basic due process safeguards.

From my experiences in the Quiet Title litigation arena, about the same time that an Attorney is filing an Affidavit of Investigation seeking publication against the unknown heirs of a deceased owner to a Court consumed with urgent family and criminal matters, a diligent landman is in the process of negotiating a lease with the same "unknown" but locatable real owner. While, the resultant civil conflict between the holder of title by default and the real owner has kept me very busy for the last several years, at the end of the day the litigants on both sides would be best served by a system that honors and maintains the Constitutional due-process principles guiding the means of transferring one persons property to another.

SENATE BILL NO. 258

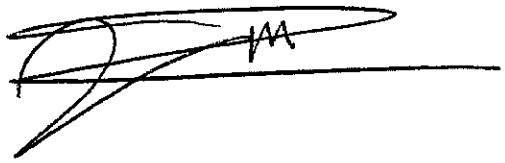
I have reviewed the latest draft of Senate Bill No. 258 that was provided to me by Adam Pankake, Executive Director of the Environmental Resources and Energy Committee. I would very much appreciate the opportunity to testify regarding this Bill and thank you for introducing me to Mr. Pankake in that regards. As revealed by the Data-Set the Northeast counties have experienced an explosive growth in Quiet Title litigation over the last few years. As a starting point regarding the Bill, is it not the case that changes to the Quiet Title Action Evidentiary Rules should be implemented by the Judiciary branch of the Commonwealth? To that end, I think it would be very helpful for the Judiciary to review the files in your Data-Set. Approaching the non-real problem of "unknown" owners by pushing the litigation burden in favor of non-owners under Pennsylvania law, as contemplated in Bill No. 258, will only increase the unnecessary litigation in this arena. Additionally, the basic premise of Bill No. 258 appears to conflict with and attempt to supersede the existing Dormant Oil and Gas Act ("DOGA") of the Commonwealth. The legislature has looked at this issue recently and has decidedly enacted DOGA as the solution to addressing the problem of truly unknown owners. Amendment to DOGA should be the focus of any solution, not placing owners into an existing overstrained and misapplied litigious process. In order to provide clarity in the Quiet Title Action area I would offer the following suggestions:

1. Rule Requirement that all Pleadings contain verified Abstracts of Mineral Title
2. Rule Requirement adding a Statement of Acreage Involved that would include a Metes and Bounds description and any modern or historical plats of the property in dispute.
3. Amendment of Rule 430 to include heightened good faith search standards
4. Establishment of a standardized statewide searchable database of QTA and DOGA actions.

5. Increased implementation of DOGA where appropriate.
6. Amendment of DOGA to permit reversion to Surface Owner under certain circumstances.

Very truly yours,

WILKINSON LAW, LLP



J.C. Wilkinson, III

enc: February 8, 2013 Opinion of the Hon. Judge Anderson, Lycoming County Court of Common Pleas

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

NORTHERN FORESTS II, INC., Plaintiff	: NO. 88 – 02,356 :
	: CIVIL ACTION - LAW
vs.	:
	:
KETA REALTY COMPANY, KETA GAS AND OIL COMPANY, KETA GAS AND OIL CORPORATION, GEORGE C. LEVIN, United States Bankruptcy Trustee and MANUFACTURERS LIGHT AND HEAT COMPANY, their successors and assigns, and anyone claiming by, through or under them, or any of them, Defendants	: : : : : : : : Petition to Strike/Open Judgment

OPINION AND ORDER

Before the court is the Petition for Relief to Strike and/or Open Default Judgment filed by Southwestern Energy Production Company ("Southwestern"), Anadarko E&P Company LP and Anadarko Petroleum Corporation (collectively "Anadarko") on November 28, 2012, joined in by Lancaster Exploration and Development Company, LLC ("Lancaster") by petition filed January 17, 2013, and by International Development Corporation ("IDC") by petition filed January 8, 2013. Argument was heard February 4, 2013.

On December 12, 1988, Plaintiff filed a Complaint in Action to Quiet Title, claiming that (1) it owned certain real estate in Pine and Cogan House Townships, (2) its predecessor in title had reserved from the real estate all natural gas, coal, coal oil, petroleum, marble and other minerals, (3) by various conveyances the Defendants had acquired those mineral rights, (4) it had nevertheless for a period in excess of twenty-one years continuously, adversely, openly and notoriously used, mined, timbered, compiled and sold the minerals without interference, and (5) the Defendants' failure to relinquish their mineral rights on the record placed a cloud on

their title. On December 13, 1988, Plaintiff's counsel filed a "Motion and Affidavit for Leave to Obtain Service by Advertisement" in which he stated: "that he does not know the current whereabouts of the Defendants, and the principals of the corporate entities are unknown, and he does not know any successors or assigns of the above or anyone claiming by, through or under them, or any of them", and requested that the court permit service "on the aforementioned Defendants, their successors and assigns, and anyone claiming by, through or under them or any of them by publication." The motion was granted and an Order for Publication was entered on December 16, 1988. On February 6, 1989, counsel filed a Petition for Judgment, and attached an Affidavit stating that Defendants had been served by publication but had not filed an Answer. A Default Judgment was entered pursuant to that petition, on February 10, 1989, "unless the said Defendants, within thirty (30) days of this Order commence an action in ejectment", and notice was directed to be given by publication. No action in ejectment having been filed by any defendant as of April 3, 1989, a Final Judgment was entered upon praecipe that date.

In the instant petitions, Southwestern, Anadarko, Lancaster and IDC seek to strike or open the judgment, asserting that they hold certain interests in the mineral rights as successors in interest to one Clarence Moore, one Kenneth Yates, and/or certain Proctor heirs, all of whom were title owners of record of some or all of the subsurface rights in some or all of the property at the time of the request to serve by publication. Petitioners contend, and the record confirms, that neither Moore, Yates, or any of the Proctor heirs was named as a defendant in the action, or served with notice of such. Petitioners further contend that Moore, Yates and the Proctor heirs, as titled owners of record at the time, were necessary and indispensable parties, and that their whereabouts could have been readily ascertained through the exercise of

reasonable diligence. Petitioners also argue that since the affidavit filed by counsel on December 13, 1988, did not set forth the reasons why regular service on the defendants could not be made, or the nature and extent of the investigation made to locate potential defendants, it contains a defect apparent from the face of the record and the judgment based thereon is thus facially invalid and must be stricken. The court agrees that the facially defective affidavit requires the judgment be stricken.

At the time the affidavit in this case was filed, the Rules of Civil Procedure provided,[1] in pertinent part, as follows:

> Rule 430. Service Pursuant to Special Order of Court. Publication.
>
> (a) If service cannot be made under the applicable rule the plaintiff may move the court for a special order directing the method of service. The motion shall be accompanied by an affidavit stating the nature and extent of the investigation which has been made to determine the whereabouts of the defendant and the reasons why service cannot be made.

Pa.R.C.P. 430(a). The affidavit filed in this case clearly did not comply with Rule 430(a) as no mention is made of any investigation into the whereabouts of the defendants, merely that their "current whereabouts" are unknown, the principals of the corporations are unknown and their successors or assigns are unknown. The affidavit was therefore defective on its face, *see* Continental Bank v. Rapp, 485 A.2d 480 (Pa. Super. 1984)(standard for "defects" asks whether the procedures mandated by law have been followed), rendering the service improper. S*ee* Deer Park Lumber, Inc. v. Major, 559 A.2d 941 (Pa. Super. 1989) (in order to effect service by publication pursuant to subsection (b) of Rule 430, the party must first file a motion accompanied by an affidavit conforming to the requirements of

[1] Although the rule was amended in 2003, the language of section (a) remains identical.

subsection (a) of the rule). The improper service prevented the court from obtaining personal jurisdiction over the defendants, *See* Sharp v. Valley Forge Medical Center & Heart Hospital, Inc., 221 A.2d 185 (Pa. 1966) (jurisdiction of the court over the person of the defendant is dependent upon proper service having been made), and without personal jurisdiction, the default judgment was void. *See* Wall v. Wall, 16 A. 598 (Pa. 1889) (judgment entered without jurisdiction over the person of the defendant is void). Since the fatal defect in the judgment appears on the face of the record, that judgment is properly stricken. Gee v. Caffarella, 446 A.2d 956 (Pa. Super. 1982).

Plaintiff contends in response that although it was not reflected in the affidavit, counsel did indeed exercise due diligence in trying to locate potential defendants, and that the court must hold a hearing to allow for the introduction of evidence to that effect, citing Deer Park Lumber, *supra*. In Deer Park, the trial court heard evidence regarding counsel's efforts to locate the defendants, who (he had stated in an affidavit) were dead or, if living, their whereabouts were unknown. For two reasons, this court does not believe such a hearing would be appropriate or necessary in the instant case. First, although the Superior Court reviewed the evidence in its opinion, its holding, noted above, did not refer to any of that evidence and was clearly based on only the non-conforming affidavit. Deer Park Lumber, *supra*. Second, the Court in Deer Park was facing a petition to open, which the Court noted to be "an appeal to the court's equitable powers", and review of the trial court's rulings in that matter required it to uphold such "absent an error of law or a manifest abuse of discretion." Id. at 943. Since the trial court had refused to open the judgment based on its conclusion that the evidence showed due diligence to locate the defendants, the Superior Court was required to review that evidence in

determining whether the trial court abused its equitable powers (which it did so find). In the instant case, the court is not addressing a petition to open, but, rather, a petition to strike, which does not appeal to the court's equitable powers and *must* be granted if the record reflects a fatal defect. *See* Jones v. Seymore, 467 A.2d 878 (Pa. Super. 1983), and City of Philadelphia Water Revenue Bureau v. Towanda Properties, Inc., 976 A.2d 1244 (Pa. Commw. 2009) (a petition to strike operates as a demurrer to the record and does not involve the discretion of the court.).

Plaintiff also contends that Deer Park was wrongly decided; that Rule 430 does *not* always require an affidavit which sets forth the nature and extent of the investigation which has been made to determine the whereabouts of the defendant and the reasons why service cannot be made. Plaintiff contends that in this case its affidavit was sufficient under subsection (b)(2) of the rule which states that "[w]hen service is made by publication upon the heirs and assigns of a named former owner or party in interest, the court may permit publication against the heirs or assigns generally if it is set forth in the complaint or an affidavit that they are unknown." Pa.R.C.P. 430(b)(2). Again the court rejects this argument for two reasons. First, an argument to a trial court that the Superior Court's decision in a particular case was wrong, without more,[2] must necessarily fall on deaf ears. Second, this court agrees with the Deer Park interpretation of Rule 430. Subsection (b)(2) clearly applies only when the heirs or assigns of a named party remain unknown after investigation, as opposed to when the heirs or assigns are known, allowing

[2] While Plaintiff contends the Pennsylvania Supreme Court has set forth a contrary intent in Myers v. Mooney Aircraft, Inc., 240 A.2d 505 (Pa. 1967), the court finds no reading of Myers which would support such a contention. Myers did not deal with Rule 430, but with Rule 2180, which provides for service on an agent of a defendant corporation at its office or usual place of business. As resolution of the question of effective service required evidence outside of the record, the Court rejected Mooney's petition to strike a default judgment. The court did go on to consider the evidence as though a petition to open had been filed but found that *under the circumstances presented*

publication against them "generally", that is, without naming them. Nothing in that subsection justifies the conclusion that it is meant to take the place of subsection (a). Indeed, by using the words "*when* service is made by publication" at the beginning of subsection (b)(2), the legislature is clearly referring to when permission has been granted under subsection (a).

Plaintiff seeks to avoid the requirements of Rule 430 altogether, apparently, by its next argument: since the action to quiet title was *in rem*, the judgment operated directly on the property and was binding as to all persons and upon the whole world. This argument overlooks an essential prerequisite, contained in the definition of an *in rem* judgment, however: "an adjudication pronounced upon the status of some particular subject matter *by a tribunal having competent authority* for that purpose." Plaintiff's brief at 16 (emphasis added). Thus, while a valid *in rem* judgment may be binding on the entire world, if the tribunal does not have jurisdiction over the parties, its judgment is not valid and is binding on no one. Proper service cannot be dispensed with simply because a matter is *in rem.*

Plaintiff next contends that Petitioners lack standing to bring the instant petitions, alleging that the Proctor heirs have lost some or all of their rights by virtue of certain tax wash sales. Petitioners enter the litigation as parties "*claiming* by, through or under" the named defendants, however. It must not be overlooked that the action is one to quiet title. Plaintiff itself does not have title, but only seeks to gain title by proving a claim of adverse possession. It is not for Defendants to prove their title, but for Plaintiff to prove its title. In reality, Petitioners' standing is no less than that of Plaintiff.

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therein, Mooney was not entitled to relief. Thus, any argument that such ruling shows an intent to allow *facially defective* judgments to stand even in the face of invalid service misses the mark.

Plaintiff also asserts that the concept of laches prevents this court from striking the judgment, pointing out that the judgment was entered 24 years ago. The concept of laches does not apply to a judgment which was entered without jurisdiction, however, as such a judgment is void. *See* Thrivent Financial for Lutherans v. Savercool, 2008 U.S. Dist. LEXIS 104474 (M.D. Pa. 2008). *See also* Jones v. Seymore, 467 A.2d 878 (Pa. Super. 1983) (void judgment must be stricken without regard to the passage of time, if its defectiveness is apparent on the face of the record). While the Superior Court in following this rule has expressed its apparent disagreement with such, *see* Jones, *supra*,[3] the Supreme Court has not taken the Superior Court up on its suggestion that the matter be revisited. Therefore, this court is constrained to follow suit.

Finally, Plaintiff argues that equitable considerations require that the judgment be upheld in spite of any finding that it is void, alleging that there are numerous cases wherein "equitable considerations regulate the availability of relief even from **very "void" judgments**." Plaintiff's brief at 25 (emphasis in original). The court has reviewed all of the cases cited by Plaintiff in support of this proposition and finds that none of them would provide relief in the instant matter. The Myers case, discussed previously in this Opinion, involved a defect which was not apparent on the face of the record and was discussed in the concept of a petition to open, which allowed for consideration of equitable factors. Collins v. City of Wichita, 254 F.2d 837 (19th Cir. 1958), was decided under Federal Rule 60(b) and

[3] "The problems engendered by the rule that laches cannot run against a "void" judgment has been the subject of much thoughtful commentary by Judge (now President Judge) Spaeth. *(Citations omitted.)* We note that while there are recent cases in which this court applies the rule, *e.g., Graham v. Kutler, 275 Pa.Super.Ct. 188, 191, 418 A.2d 676, 677 (1980)*, the Supreme Court cases which fashioned the rule are fairly old. The time may be ripe for the Supreme Court to review whether the rule is still appropriate." Jones v. Seymore, 467 A.2d 878, 880 (Pa. Super. 1983).

involved a challenge to a judgment on the basis that the law had subsequently changed. The judgment in that matter was not considered void. Wilger v. Department of Pensions and Security, 343 So.2d 529 (Ala.Civ.App. 1977), a custody case, also did not involve a void judgment. Ledden v. Ehnes, 126 A.2d 633 (N.J. 1956), did apply the doctrines of laches and estoppel to prevent the opening of a judgment, but did so because the defect in that matter was *not* apparent on the face of the record. In Sunray Oil Corp. v. American Royalty Petroleum Co., 224 P.2d 965 (Okla. 1950), the court imposed a three-year statute of limitations on a *voidable* judgment. Similarly, in Haskell v. Gross, 358 P.2sd 1024 (Colo. 1961), the court found the judgment voidable, not void, as there was no defect on the face of the record. In Gersten v. United States, 364 F.2d 850 (Ct.Cl. 1966), cited by Plaintiff in support of the proposition that very long delay is sufficient reason in itself to deny relief, the court held that the defense of laches is entrenched in the jurisprudence of *demands for back pay or for restoration because of an illegal separation from the civilian federal service.* A judgment was not even involved in that matter. Plaintiff also contends that "denial of relief has turned on the fact that the value of the property has radically changed, for example because of the discovery of minerals", Plaintiff's brief at 25, but neither case cited supports that contention. In Tudryck v. Mutch, 30 N.W.2d 518, 520 (Mich. 1948), a motion to set aside a consent decree was denied on the grounds that "judgment by consent cannot ordinarily be set aside or vacated by the court without the consent of the parties thereto for the reason it is not the judgment of the court but the judgment of the parties." While the court did point out that "none of this litigation would have existed were it not for the discovery of oil on the lands involved therein", Id. at 519, that observation was certainly not the basis for the holding and in fact had nothing to do with it.

Likewise, in Hayward Union High School District of Alameda County v. Madrid, 234 Cal.App.2d 100, 128 (1968), the court denied relief based on a statute of limitations, and although the court noted that "[i]t wasn't until the property for which they had received a price fixed by three disinterested appraisers had increased greatly in value that they became attentive to the uses made and to be made of the property", this comment was merely a pointed remark directed at the defendants in the course of scolding them for failing to take appropriate action within the limitations period and played no part in the holding.

Finally, Plaintiff argues boldly that "when a third party has shown reliance in fact, relief will not be given when it will adversely affect innocent third parties, such as bona fide purchasers", Plaintiff's brief at 25, citing Voorhees v. Jackson, 35 U.S. 449 (1836). Voorhees did not involve a petition to strike a void judgment, however, and therefore cannot be relied upon to avoid the directive of Jones v. Seymore that a void judgment must be stricken without regard to the passage of time.

The judgments of April 3, 1989, and February 10, 1989, having been entered by a court which had no jurisdiction over the defendants, must be stricken.

ORDER

AND NOW, this 8th day of February 2013, for the foregoing reasons, the Petitions to Strike are hereby GRANTED. The Default Judgment entered February 10, 1989, and the Final Judgment entered April 3, 1989, are hereby STRICKEN. The Prothonotary is directed to mark the docket accordingly.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Prothonotary
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Hon. Dudley Anderson

J.C. WILKINSON, III – "JAY"

Background:

Born and raised in center city Philadelphia, PA. Attended Chestnut Hill Academy.

Dickinson College, BS. - Major Economics, Minor Geology.

Real Estate Development – Former Chairman and President of the Endless Mountains Land Development Company (EMLDC) a publicly held company. Continues to lead the business activities of the now merged consolidated private company Wilkinson Development Group, Inc. Company focuses activities on the adaptive reuse of residential and commercial properties of historic significance.

Dickinson School of Law, JD. – Attended law school as a non-traditional student with a full time career outside of his legal studies. Served as a judicial clerk to the Hon. Judge Kevin A. Hess of the Cumberland Court of Common Pleas.

Married to Laurie Geise Wilkinson an accomplished Interior Design professional from the Washington DC metro-area and mother of their four-year old son - Ayden Stone Wilkinson.

Licensed to practice Law in Pennsylvania and Ohio. Member: Pennsylvania Bar Association, American Association of Professional Landmen, Energy and Mineral Law Foundation.

Representative Matters:

"Of Counsel" – Assisted a number of mid-continent based law firms including Burleson LLP in navigating the expansion of their practice areas into the eastern Appalachian basin. In that capacity provided counseling in regards to unique title circumstances in Pennsylvania. Presently, serving Of Counsel to the Houston, Texas based firm of Martin, Bode, Werner and Mann. www.mbwm.com

Local Counsel – Counseled individuals, farming families, and hunting clubs in regards to the oil and gas development process and their rights and responsibilities under the Oil and Gas Lease transaction. Much of this representation has been provided "pro-bono" free of fees or at reduced rate.

Title Confirmation – Rendered Opinions of Mineral Title for numerous Oil and Gas Exploration Company clients with operations throughout the Commonwealth of Pennsylvania and the State of Ohio.

Litigation –Served as lead counsel and second chair in Actions to Quiet Title that involve the disputed ownership of Subsurface rights in courtrooms across Pennsylvania.

Author – Co-author of the first edition of Pennsylvania Oil and Gas Law and Practice, the only Pennsylvania specific treatise in this subject area, published by the George T. Bisel Company, Inc. (2012). www.bisel.com

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PENNSYLVANIA OIL AND GAS LAW AND PRACTICE

First Edition

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Edited by James W. Adams, Jr.

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EXHIBIT 2

THE WALL STREET JOURNAL.
WSJ.com

U.S. NEWS | OCTOBER 31, 2011

Shale Gas Fuels Legal Boom

Fights Over Underground Rights Confound Companies, Pennsylvania Landowners

By DANIEL GILBERT And KRIS MAHER

The natural-gas boom in Pennsylvania is stoking legal battles over who owns gas that was worthless until a few years ago but now holds the promise of great wealth.

John Francis Peters for The Wall Street Journal

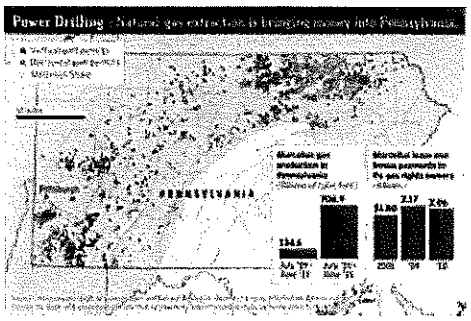
Jim Grande is facing a lawsuit over the mineral rights on the Pennsylvania farm he has owned since 1965.

New drilling techniques have made it possible for energy companies to extract natural gas from a layer of rock deep underground called the Marcellus Shale, and the companies have paid Pennsylvania property owners billions of dollars since 2008 for the right to do so.

But because surface rights to properties in the state are sometimes sold separately from rights to the underlying minerals, such as coal, or oil and gas, and because mineral law in Pennsylvania remains murky, lawsuits are mounting.

These skirmishes could cause problems both for the energy industry and for people like Jim Grande, a retired printer in northern Pennsylvania. The 158-acre farm he bought in 1965 didn't include mineral rights, which are commonly sold separately in Pennsylvania.

When a quarry operator asked to mine stone from his property years later, Mr. Grande hired a lawyer to help him acquire the mineral rights to his land. A judge granted him ownership in 1999 after no one came forward to dispute his claim.



A decade later, Chesapeake Energy Corp. offered him $293,000 to drill for natural gas. After consulting with a lawyer, Mr. Grande said, he signed the lease and took the money. Six months later, he was sued by the heirs of a former owner of the property who proved he had improperly claimed mineral rights belonging to them.

"It scared the hell out of me, to be blunt," said Mr. Grande, who is 81 years old and, with his wife, lives on a $944 monthly check from Social Security. He hopes to settle the lawsuit by paying the money back to Chesapeake, but he said he has spent more than half the money, largely on taxes and legal fees.

An attorney for the heirs who sued Mr. Grande didn't respond to requests for comment. Chesapeake, also a defendant in the suit, declined to comment.

No one tracks the number of disputes over gas ownership in Pennsylvania, but lawyers and court clerks in counties with heavy drilling say such conflicts are mounting. "I predict it will become the predominant area of litigation in the next year or two," said Joel Burcat, a lawyer at Saul Ewing in Harrisburg, Pa.

John Lowe, a professor of mineral law at Southern Methodist University in Dallas, said Pennsylvania is a particularly fertile ground for lawsuits because mineral law there hasn't developed as thoroughly as in states with longer histories of natural-gas production.

"You have all of this money sloshing around, and unanswered questions are getting addressed," Mr. Lowe said.

Historically, litigation over mineral rights often follows a boom in oil and gas production; such cases continue to crop up in states like Texas and Louisiana. Laws governing ownership of mineral rights vary from state to state, but it is common in many to sell separate rights to minerals, coal, oil and gas.

That is the case in Pennsylvania, where new legal questions are coming up on some fundamental issues. These include whether ownership of shale gas, which is tightly bound to the rock in which it is found and usually extracted using horizontal-drilling techniques, should be treated differently from conventional gas extracted through traditional vertical wells.

In September, in a tangled case involving an 1881 land sale, a state appellate court found some merit in the argument of a Susquehanna County couple's claim that shale gas should belong to those who own the rock that contains it, and not to those who own rights to conventional natural gas on the property.

The court sent the case back to a lower court for expert testimony, raising questions about the validity of some leases and sending tremors of uncertainty through the industry.

Lawyers for energy companies have called for the Pennsylvania Supreme Court to immediately review the case and quell the uncertainty.

Range Resources Corp., which has bought a lot of drilling rights in the Marcellus, got so many phone calls and emails about the case that in late September it drafted a letter to investors and analysts.

"Range does not expect the ultimate ruling to result in a change in law," the Fort Worth, Texas, company wrote, adding it would conduct business as usual but would identify leases that could be affected by the case.

Write to Daniel Gilbert at daniel.gilbert@wsj.com and Kris Maher at kris.maher@wsj.com

EXHIBIT 3

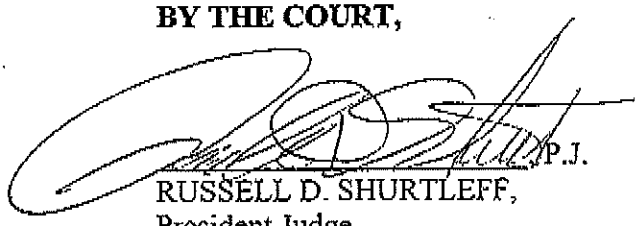
JOHN J. JORDAN, ANNA SCOTT, BETTY MYERS, LINDA CONDON, RICHARD JORDAN, JOYCE WILSON, GEORGE JORDAN, JEFFREY D. JORDAN AND SUZANNE E. LITELMAN JORDAN Plaintiffs	:	IN THE COURT OF COMMON PLEAS OF SULLIVAN COUNTY CIVIL ACTION – LAW QUIET TITLE
vs. THOMAS J. SCHUG and NELLIE E. SCHUG, and all their heirs and assigns, Defendants	:	NO. 2008-CV-249

RECORDED
2012 FEB -2 P 4:00
SULLIVAN COUNTY

ORDER

AND NOW, this 1st day of February, 2012 after taking judicial notice of the Trial Stipulations presented by and signed by attorneys for all parties, consideration of Plaintiffs' Trial Brief and Defendant's Trial and Reply Briefs, **IT IS HEREBY ORDERED, ADJUDGED and DECREED** that Plaintiffs' claim to Quiet Title is **DENIED** and Defendants' claim to Quiet Title is **GRANTED**, such that one-half interest in the oil an mineral rights is vested in all of the lawful heirs and assigns of Thomas and Nellie Schug for the reasons set forth in the attached opinion.

BY THE COURT,



P.J.
RUSSELL D. SHURTLEFF,
President Judge

JOHN J. JORDAN, ANNA SCOTT, BETTY MYERS, LINDA CONDON, RICHARD JORDAN, JOYCE WILSON, GEORGE JORDAN, JEFFREY D. JORDAN AND SUZANNE E. LITELMAN JORDAN Plaintiffs	:	IN THE COURT OF COMMON PLEAS OF SULLIVAN COUNTY CIVIL ACTION – LAW QUIET TITLE
vs.	:	
THOMAS J. SCHUG and NELLIE E. SCHUG, and all their heirs and assigns, Defendants	:	NO. 2008-CV-249

RECORDED
2012 FEB -2 P 4:00
SULLIVAN COUNTY

J. Howard Langdon, Esquire – Attorney for Plaintiffs
Michael H. Collins, Esquire – Attorney for Defendants

OPINION

Shurtleff, P.J., January 26, 2012:

I. BRIEF FACTS AND PROCEDURAL HISTORY

Counsel for the parties filed Trial Stipulations on or about March 28, 2011. This Court takes Judicial Notice of said Trial Stipulations and it on those agreed upon facts that this Opinion is rendered.

II. DISCUSSION

The main issue presented before this Court is whether a one half interest in mineral and oil rights located in the subsurface of real property owned by Plaintiffs belongs to Plaintiffs or Defendants. Plaintiffs are the owners of two tracts of land, both coming from the same parent parcel, located in Davidson Township, Sullivan County, Pennsylvania. (Tr. Stip .3/28/11, ¶¶1(a)-(h)). The first parcel consists of 161.225 acres and the second consists of 2.20 acres. (Tr. Stip. 3/28/11, ¶4). Plaintiffs' predecessor in title acquired the land in 1957. (Tr. Stip. 3/28/11,

¶¶3, 4). A deed in the chain of title reflects that in 1907 Thomas J. Schug and Nellie Schug transferred the land to Brady P. Chestnut and Herbert Chestnut with the following reservation:

> "the parties of the first part for themselves, their heirs and assigns reserve one half interest in all minerals and oils that may at any time be found on said lands."

(Tr. Stip. 3/28/11, ¶7). This reservation was included in deeds in the chain of title in 1907 and 1915, but was not included in the subsequent deeds of 1953, 1957, 1982, 1989 and 1996. (Tr. Stip. 3/28/11, ¶¶9, 10). As such, Plaintiffs argue that they have acquired the one half interest in mineral and oil rights through adverse possession, that they have ousted Defendants from their one half interest in the mineral and oil rights, that Defendants have abandoned their rights to the one half interest in the mineral and oil rights and that Defendants have not met their burden of proof in demonstrating that Defendants' Order of ejectment should be granted.

As the Trial Stipulations represent, Plaintiffs acquired the farm from their father in 1996, who purchased the land with his wife in 1957. (Tr. Stip. 3/28/11, ¶16). Since 1957, Plaintiffs have utilized the land for timber, firewood, crop and recreational purposes, including constructing a pond and pavilion. (Tr. Stip. 3/28/11, ¶16). Plaintiffs, Jeffrey D. Jordan and Suzanne E. Litzelman Jordan constructed a home on the 2.20 acre parcel and utilized said since 1989. (Tr. Stip. 3/28/11, ¶16). Plaintiffs and their predecessors have paid the real estate taxes on the subject property since 1957. (Tr. Stip. 3/28/11, ¶¶18, 19). Plaintiffs and their immediate predecessors in title leased the subject properties on three occasions for the development of oil, gas and minerals, as represented by recorded leases in 1972, 1986 and 2008. (Tr. Stip. 3/28/11, ¶¶21, 22).

Based upon these facts, Plaintiffs argue that their possession of the property has been actual, continuous, visible, distinct, exclusive, notorious, hostile and adverse to the rest of the world, including their possession of the subsurface rights. Plaintiffs further argue that because

the deeds recorded in 1953, 1957, 1982, 1989, and 1996 do not include a provision reserving a one half interest in the mineral and oil rights and because all deeds are recorded, the world has been placed on notice that Plaintiffs and their immediate predecessors in title hold and held title to both the surface and subsurface rights. This Court cannot agree.

Where subsurface rights have been severed from surface rights, the continued possession and enjoyment of the surface estate will not give title by adverse possession of the subsurface estate, unless there is an actual entry upon and use of the underlying minerals for the requisite time period. *Plummer v. Hillside Coal & Iron Co.*, 160 Pa. 483, 28 A. 853 (1984); *Shaffer v. O'Toole*, 964 A.2d 420, 423 (Pa.Super. 2000); *Medusa Portland Cement Co. v. Lamantina*, 353 Pa. 53, 44 A.2d 244 (1945). The exclusive possession of the surface by the surface owner does not establish adverse possession of the [mineral estate]. *Shearer v. Rochester & Pittsburgh Coal Co.*, 20 Pa.D.&C.3d. 67, 76 (Pa.Com.Pl. 1981). In order to adversely possess the subsurface after a recorded severance, the surface owner must take an affirmative action towards the subsurface. "If he would acquire any part of the mineral, he must make his entry upon, and maintain his position within, the limits of the mineral estate for the requisite period of time in an open, notorious, exclusive and continuous manner." *Delaware & H Canal Co. v. Hughes*, 38 A. 568, 569 (Pa. 1897). Other state courts have held that in order to achieve title to oil and natural gas by adverse possession, actual possession, meaning drilling and production, of the minerals must occur for the time period prescribed, 21 years. *See e.g. Natural Gas Pipeline Co. of America v. Pool*, 124 S.W.3d. 188 (Tex. 2003); *Schaneman v. Wright*, 470 N.W. 566, 577 (Neb. 1991).

Plaintiffs' reliance on *Medusa Portland Cement Co. v. Lamantina* in arguing that they have acquired the rights to the entire subsurface of the property is misplaced. While it is true

that the Court in *Medusa* found that the rights to coal were acquired through adverse possession, the Court reasoned so by stating "while there was not a period of 21 years of actual day-to-day mining, there was substantial operations of drilling, testing, mining and leasing from time to time during such period." *Medusa Portland Cement Co. v. Lamantina*, 353 Pa. 53, 44 A.2d 244 (1945).

There is nothing contained in the Stipulated Trial Facts that illustrates that Plaintiffs have made an actual entry into the subsurface estate for the requisite period of time, 21 years, to claim adverse possession. Although Plaintiffs have had three (3) separate recorded oil, gas and mineral leases, this alone, does not require actual entry upon the subsurface. In fact, Plaintiffs have stipulated that they have not removed any minerals or oils from the property. (Tr. Stip. 3/28/11, ¶23). Furthermore, in their Pre-Trial Memorandum Plaintiffs stated that they were not aware of the 1907 reservation until they entered into an oil and gas lease, dated March 5, 2010, (Tr. Stip. 3/28/11, ¶22), and were only paid one half of the rental amount because of the reservation now in dispute.

Plaintiffs next argue that Defendants have abandoned their interest rights to the subsurface and that Plaintiffs have ousted Defendants from their rights. Again, this Court cannot agree.

Abandoned property is defined as that to which an owner, by external acts voluntarily and intentionally, has relinquished all right, title, claim, and possession with the intention of terminating his or her ownership, but without vesting in any other person and with the intention of not reclaiming further possession or resuming ownership, possession or enjoyment. *Commonwealth v. Wetmore*, 310 Pa.Super. 370, 373, 447 A.2d 1012, 1014 (1982), *see also*, 6 Summ.Pa.Jur.2d. Property §12:9. A mere nonuser does not constitute abandonment. *MacCurdy*

v. Lindey, 349 Pa. 655, 659, 37 A.2d 514, 518, (1944), *citing, United Natural Gas Co. v. James Bros. Lumber Co.*, 325 Pa. 469, 471, 191 A. 12, 14 (1937). There must be an intention to abandon, together with external acts by which such intention is carried into effect. *Id.* In other words, the mere nonuse of the subsurface does not terminate the owner's interest in the subsurface. Furthermore, title to corporeal hereditament cannot be abandoned. *Hummel v. McFadden*, 395 Pa. 543, 150 A.2d 856 (1959). Nor can property held with perfect title. 6 Summ.Pa.Jur.2d. Property §12:13.

There are no facts set forth in the Trial Stipulations that illustrate that Defendants intended to abandon their on half interest in the mineral and oil rights that were reserved in the 1907 and 1915 deeds. Rather the Trial Stipulations represent that Defendants were not aware of the reservation made by their great grandparents, Thomas and Nellie Schug, until the publication notice of this action appeared in the Sullivan Review on October 1, 2008. (Tr. Stip. 3/28/11, ¶¶24, 25). Once aware of the reservation, they immediately filed an Answer and Counterclaim Ejectment action.

Plaintiffs further argue that Defendants have been ousted. Ouster must be proven by decisive, unequivocal acts or conduct. *Nevling v. Natoli*, 434 A.2d 187 (Pa.Super. 1981). If one co-tenant purports to sell, in fee simple, the entire estate, and the subsequent purchaser possesses the fee for more than 21 years, the sale and conveyance to the purchaser is considered an ouster because it is an assertion of claim to the entire property that is wholly incompatible with an admission that the other co-tenant has any rights in the property. *Medusa, supra*, at 244. Plaintiffs argue that the oil and mineral rights in 1907 were owned by co-tenants, with one half interest in Thomas and Nellie Schug and one half interest with Brady and Herbert Chestnut. Because the Jordans now own the Chestnuts' interest, Plaintiffs allege they have ousted the

interest of the Schugs. There is nothing in the Stipulated Facts to support Plaintiffs' argument. In fact, when analyzing the chain of title, it is clear to see that Brady Chestnut had knowledge of the reservation as such language was contained in both deeds to which he was a party. It is not until sometime after his death, when Mabel Myers, as the Administratrix of Brady Chestnut's Estate, that the reservation language is excluded from the deed. This, by no means, proves a decisive and unequivocal act to oust the Schugs from their title to one half interest in the mineral and oil rights on subject property.

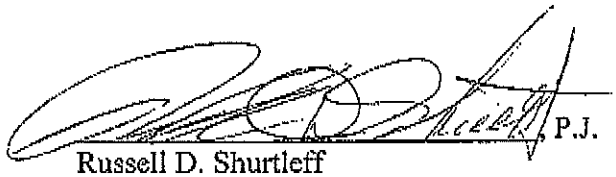
Lastly, this Court notes that it is well settled that the grantee of property must search for conveyances made by anyone who held title. *Finley v. Glenn*, 154 A. 299 (Pa. 1931). The grantee of a deed has the duty to search the chain of title, which arises because the grantee takes the property subject to any restriction or servitude which appears in the line of title, even though he or she may not have any actual knowledge of its existence. *Southall v Humbert*, , 685 A.2d 574 (1996). In *Owens v. Holzheid*, the Pennsylvania Supreme Court held that a grantee had constructive notice of an easement where the deed to the grantee and to the grantee's immediate predecessors in title did not reference a reserved easement, but an earlier deed the grantee's chain of title did. *Owens v. Holzheid*, 335 Pa.Super. 231, 484 A.2d 107 (Pa. 1984). The Court reasoned that in Pennsylvania a grantee of a deed has a duty to search the chain of title. *Id.*

In the case at hand, Plaintiffs parents acquired the land by deed dated 1953, only forty six (46) years since the original reservation was recorded. The reservation was again recorded in 1915, approximately twenty eight (28) years before the property entered Plaintiffs' family. The recorded reservation would have been easily obtainable with a title search of the property. As such, Plaintiffs' claim must fail.

III. CONCLUSION

For the foregoing reasons, Plaintiff's claims are DENIED. Judgment is to be entered for Defendants such that the lawful heirs and assigns of Thomas J. Schug and Nellie E. Schug are the owners of one half interest in the minerals and oils found on the subject properties, known as Sullivan County Tax Parcel Number 03-008-0009, recorded on July 19, 1996, in Sullivan County Record Book 029 at page 0911 and Sullivan County Tax Parcel Number 03-008-0009-001, recorded September 20, 1989, in Sullivan County Record Book 110 at page 864, and by corrective deed dated December 15, 1989 in Sullivan County Record Book 111 at 177.

BY THE COURT:



P.J.
Russell D. Shurtleff

cc: *Written notice of the entry of the foregoing Order has been provided to each party pursuant to Pa.R.C.P. 236(a)(2) by mailing time-stamped copies to:*

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