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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 5 MAP 2015

HERDER SPRING HUNTING CLUB,
APPELLEE

v.

HARRY KELLER and ANNA KELLER, his wife; J. ORVIS KELLER; ELLIS O. KELLER; HENRY HARRY KELLER; WILLIAM H. KELLER; MARY EGOLF; JOHN KELLER; HARRY KELLER; ANNA BULLOCK; ALLEN EGOLF; MARTIN EGOLF; MARY LYNN COX; ROBERT EGOLF; NATHAN EGOLF; ROBERT S. KELLER; BETTY BUNNELL; ANN K. BUTLER; MARGUERITE TOSE; HENRY PARKER KELLER; PENNY ARCHIBALD; HEIDI SUE HUTCHISON; REBECCA SMITH; ALEXANDRA NILES CALABRESE; CORRINE GRAHAM FISHERMAN; JENNIFER LAYTON MANRIQUE; DAVID KELLER; STEPHEN RICHARD KELLER; MICHAEL EGOLF, their heirs, successors, executors, administrators, and assigns, as well as ANY OTHER PERSON, PARTY OF ENTITY,
APPELLANTS

BRIEF OF AMICUS CURIAE, SWN PRODUCTION COMPANY, LLC

Appeal from the Superior Court's May 9, 2015 Judgment at No. 718 MDA 2013, reversing the March 25, 2013 Judgment of the Court of Common Pleas of Centre County at No. 2008-3434

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INTEREST OF AMICUS CURIAE

SWN Production Company, LLC ("SWN") is a limited liability company having its principal place of business at 10000 Energy Drive, Spring, Texas 77032. SWN is in the business of exploring for, and developing and producing gas and oil in various regions throughout the United States, including Pennsylvania. SWN has a specific interest in the arguments pending in this action ("Action") before the Pennsylvania Supreme Court ("this Court") on Henry and Anna Keller's Petition for Allowance of Appeal ("Appeal") from the Pennsylvania Superior Court's ("Superior Court") May 9, 2015 Order filed to No. 718 MDA 2013("May 2014 Order"), reversing the March 25, 2013 Order ("March 2013 Order") of the Court of Common Pleas of Centre County ("Common Pleas Court") filed to No. 2008-3434.

SWN, previously filed a Brief of Amicus Curiae ("Original Brief") on or about November 13, 2013, in this Action, with the Superior Court. SWN filed its Original Brief because it has an interest in this Action and the Superior Court's adjudication of the effect of past tax sales of unseated land involving oil, gas, and other mineral rights ("Subsurface Rights"). Historically, if the Subsurface Rights had been severed from the surface estate, but were not assessed separately, the owner of the Subsurface Rights was at risk of losing the Subsurface Rights at a tax sale resulting from the surface owner's or owners' failure to pay taxes on the assessed real estate. This issue, which was decided correctly by the Superior Court

in the May 2014 Order and in its reported written decision ("Decision") filed in ***Herder Spring Hunting Club v. Keller***, 93 A.3d 465, 2014 Pa Super 100 (2014), is being contested by the Kellers in this Appeal. This Appeal will affect tens of thousands of acres in Pennsylvania in which SWN has an interest by virtue of oil and gas leases negotiated in reliance upon long standing property law in this Commonwealth which was reaffirmed by the Superior Court in its Decision. Accordingly, SWN seeks to file this Brief ("Brief") as an Amicus Curiae in support of the Decision and in response to the Kellers' Appeal.

COUNTER STATEMENT OF THE QUESTIONS INVOLVED

1. Did the Superior Court err when it properly construed the 1804 Act and the 1806 Act and ruled that the 1935 Tax Sale (which involved the sale of unseated land where the Subsurface Rights had been severed from the surface estate, but not assessed separately) resulted in the owner losing the Subsurface Rights at the 1935 Tax Sale because the surface owner failed to pay taxes on the real estate?

ANSWER: NO

2. Did the Superior Court deny the Kellers their due process rights when it held that the 1935 Tax Sale divested the Kellers of all of their right and title the Subsurface Rights in and under the Subject Property?

ANSWER: NO

3. Are the Kellers' complaints regarding the effect of the 1935 Tax Sale untimely?

ANSWER: YES

4. Did the Superior Court overlook controlling authority when it issued the Decision in this Action?

ANSWER: NO

5. Did the Superior Court exceed the scope of its authority and act as a fact finder in this Appeal?

ANSWER: NO

SUMMARY OF ARGUMENT AND INTRODUCTION

In this Appeal, the Kellers seek to overturn the Decision of the Superior Court which held that a tax sale of real estate conducted in 1935 for the non-payment of real estate taxes of unseated land conveyed all estates in the land, including Subsurface Rights, which were severed, but not separately assessed.

During the relevant time period involved in this Appeal, an owner of the Subsurface Rights had a statutory obligation to report the severance of the Subsurface Rights to the tax assessors for a separate assessment. Part of the consequence of the failure of an owner to do so meant the entire estate, if unseated land, including the Subsurface Rights (not just the surface estate), was considered assessed and was conveyed at a tax sale. Accordingly, ownership of the Subsurface Rights would be divested by a tax sale because the tax assessment was for the entire estate which did not acknowledge a separate severed interest of the Subsurface Rights.

In this Appeal, the Kellers wish to negate an owner's requirement under certain acts to report unseated lands to the tax assessor for a separate assessment. The Kellers seek to overturn well established Pennsylvania law of the time and invalidate a significant effect of a 1935 tax sale that conveyed the entire estate, including the severed Subsurface Rights, to a purchaser at the tax sale. No claim has been made for fraud; nor was a timely redemption request made. Both the five

year statute of repose and the six year statute of limitations to challenge tax sales long since have passed. Nonetheless, today, the Kellers assert claims to property interests, including alleged ownership of the Subsurface Rights, which claims are barred by the applicable statute of limitations and/or statute of repose. The Kellers' argument seeks to negate a long established rule of property law which affects thousands of titles and is contrary to the holdings of this Court which have guided courts for over a century and upon which scores of title transactions justifiably have relied upon as settled law. To now overrule prior binding precedent, decades after a tax sale has occurred, would be inequitable, unjust and detrimental to the third parties who relied upon the law in effect when they gave consideration to acquire title of unseated land sold at tax sales and would prompt the filing of numerous law suits intended to reconstruct the effect of tax sales which took place decades ago. After giving consideration to the parties' and amicae's positions, briefs and oral arguments, a panel of the Superior Court unanimously vacated the Common Pleas Court granting of summary judgment in favor of the Kellers and against Herder Spring Hunting Club ("Herder Spring"). In doing so, the Superior Court correctly held that a tax sale of unseated property by the Commissioners on November 29, 1935 ("1935 Tax Sale") for non-payment of real estate taxes effectively rejoined the Subsurface Rights and surface rights because the Kellers, the former owner of both the surface and Subsurface Rights of the property in dispute in this Appeal ("Subject

Property"), failed to inform the Commissioners of the retention of the Subsurface Rights by virtue of a Subsurface Rights reservation contained in a Deed dated June 20, 1899, recorded on August 8, 1899, ("Reservation"), and the Kellers' successors in interest, who allegedly have taken possession of the Subsurface Rights, failed to make known their claim within two years from the delivery of title of the surface subject to the Reservation. The Superior Court vacated the Common Pleas Court's March 2013 Order and remanded so that summary judgment could be entered to confirm the award of the Subsurface Rights in favor of Herder Spring and not in favor of the Kellers.

Nothing in this Appeal calls into question the correctness of the Superior Court's ruling in the Decision. In fact, the Superior Court restated the settled law in Pennsylvania which is that, if a tax sale occurs of unseated land as a consequence of an owner's failure to report ownership of the severed interest in the Subsurface Rights to the tax assessors for a separate assessment, the Subsurface Rights are sold and conveyed with the surface estate at a tax sale. As a result, the assessment and sale of the Subject Property in the 1935 Tax Sale conveyed the entire estate to the purchaser. SWN respectfully requests that the relief sought by the Kellers in this Appeal be denied and the Superior Court's Decision be affirmed in all respects.

ARGUMENT

I. SUPERIOR COURT FOLLOWED AND PROPERLY CONSTRUED THE 1804 ACT AND THE 1806 ACT

A. Pennsylvania has Distinguished Between Seated and Unseated Land

Pennsylvania historically has distinguished between seated land and unseated land for tax assessment purposes. Seated lands have permanent improvements. Unseated lands have no such improvements. For seated land, taxes were legally owed by the land record owner. For unseated land, taxes were legally owed by the land itself, and the owner had no personal liability for payment of the taxes. ***Miller v. Leopold***, 23 Pa. Cmwlth. 483, 353 A.2d 65 (Pa. Cmwlth. 1976).

By specific statute, entitled an Act Directing the Mode of Selling Unseated Land for Taxes passed on April 3, 1804 ("1804 Act"), the Pennsylvania legislature enacted a procedure for the sale of unseated land when taxes were due. Section 5 of the 1804 Act provided, in part, that sales of unseated land for taxes "...that are now due, or that may hereafter become due thereon, made agreeably to the directions of this act, 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 thereof." The 1804 Act made clear that a sale of unseated land conducted pursuant

to the 1804 Act was to be considered valid and vested all the estate and interest of the assessed property in the purchaser or purchaser of the lands sold. The 1804 Act also contained a five year statute of repose for bringing of an action to recover lands or rights sold at a tax sale under the 1804 Act.

In 1806, the Pennsylvania legislature passed another statute imposing a requirement on anyone who possessed or acquired unseated land. Such statute was titled an Act Enjoining Certain Duties on the Holders of Warrants Not Executed and On the Holders of Unseated Lands ("1806 Act"). The 1806 Act provided that it shall be the duty of every person hereafter becoming a holder of unseated lands by gift, grant or other conveyance to furnish a signed statement to the tax collector containing a description of the land so held within one year from and after such conveyance. Failure to report the conveyance would result in assessment of four times the amount of the tax of which such land would have been otherwise liable. The Pennsylvania Supreme Court confirmed the duty of owners of unseated land to notify the local taxing authorities of their ownership. ***Heft v. Gephart***, 65 Pa. 510 (Pa. 1870). Though, under the 1806 Act, owners of unseated lands had a duty to furnish a statement of ownership to the county commissioners, no such duty existed on the part of the owner of seated lands, because personal liability already existed. ***Gordon v. Harley***, 165 Pa. Super. 433, 68 A.2d 439 (1949). During the duration of the effectiveness of the 1804 Act and 1806 Act, in conjunction, such 1804 Act and

1806 Act have been interpreted to mean that severed Subsurface Rights which were not reported to the tax collector and not separately assessed, were included as part of the land sold at a tax sale when the land was unseated.

Countless sales of unseated lands were conducted in Pennsylvania pursuant to the 1804 Act and the 1806 Act. Tax sales of unseated land conveyed good title and such title was recognized throughout Pennsylvania. This Court confirmed such recognition and held that it was not aware of any objection to the title derived from a tax sale, the law being settled that, where unseated land is sold for taxes and severed interests have not been assessed separately, the entire estate passes to the purchaser. ***Collins v. Barclay***, 7 Pa. 67 (1847).

The effect of the 1804 Act was that all prior ownerships were merged in and divested by the tax sales. As a result, a new independent title was created. The unseated land, and not the owner, owed the taxes, and the owner had no personal liability for payment of the taxes. There was a clear distinction between tax sales and execution sales. In tax sales, the entire estate is sold, and in execution sales, only the interest of the debtor is sold. ***Tax Sale and Titles,*** Section 107 by John Whitworth.

A tax lien itself is notice to the whole world of liability of the land for all public assessments and every one claiming an interest in the land is bound at his peril to pay the tax and, thus, protect the interest from forfeiture or sale. If he or she

neglects his or her duty in this respect, his or her title becomes extinct and the new independent title becomes vested in the tax sale purchaser, freed from all prior liens and encumbrances on the former estate and from every interest carved out of the old fee. The fee of the land passes and not the interest of the former owners. ***Id.*** Section 108.

If land was seated, the taxes were collected from the person, but if the land was unseated, taxes were collected from the land itself. In this Appeal, the Subject Property consisted of unseated land under which the Subsurface Rights had been previously reserved, but not separately assessed. The taxes were owed by the Subject Property and, not the record owner. When the Subject Property was sold at the 1935 Tax Sale, the entire estate was sold, including the Subsurface Rights. In drawing this conclusion, the Superior Court committed no error of law.

Even though the Subsurface Rights were severed from the surface of the Subject Property by virtue of the Reservation, because the land of the Subject Property sold at the 1935 Tax Sale was unseated, the severed and reserved Subsurface Rights still passed at the 1935 Tax Sale to the tax sale purchaser.

In Pennsylvania, ownership of land may be divided. One person may own the surface and another the Subsurface Rights. Pursuant to the 1806 Act, the owners of the Subsurface Rights were required to report ownership of the Subsurface Rights for assessment purposes even though they had no personal responsibility for

payment of the taxes. The Kellers should have reported their ownership of the Subsurface Rights to the Commissioners, but failed to do so. Because they failed to do so, their title to the Subsurface Rights was divested by the 1935 Tax Sale. ***Hutchinson v. Kline***, 199 Pa. 564, 49 A. 312 (1901).

B. Owner of Subsurface Rights of Unseated Land Had Duty to Notify Tax Assessor

In ***Hutchinson***, ***Id.*** this Court confirmed the consequences of the Subsurface Rights owner's failure to notify the tax assessors by affirming per curiam, the judgment "...on the opinion of the learned Judge below." By adopting the lower court's opinion without qualification, this Court held that, when an owner of lands conveys the surface and reserves the Subsurface Rights, it is his duty to notify the county commissioners of this fact. If he fails to do so and, thereafter, the lands are assessed upon the entire estate as unseated lands and are sold as such at a tax sale, the owner of the surface may purchase at such sale and acquire good title to the Subsurface Rights, too. In ***Hutchinson***, Charles Hutchinson, Jerome Powell's successor, claimed title to both the surface and Subsurface Rights as a result of a 1892 tax sale. Charles Hutchinson sued, arguing that the assessment of taxes for which lack of payment resulted in a subsequent tax sale, applied only to the surface estate which was separate from the Subsurface Rights. This Court rejected these arguments and affirmed, without any qualification, the opinion which is reported as part of the case and approved the holding that, because it had been Charles

Hutchinson's duty to report the severance of the Subsurface Rights to the tax assessors for a separate assessment, and he failed so to do, because unseated land was involved, a consequence of his failure was that the unseated land, including the Subsurface Rights, were considered assessed and conveyed at the tax sale, not just the surface estate. Accordingly, ownership of the Subsurface Rights was divested by the tax sale because the tax assessment was for the original warrant which did not acknowledge a severed interest of the Subsurface Rights. ***Id.*** The result in ***Hutchinson*** made good common sense from a public policy perspective. Though the owner of the separate Subsurface Rights took the risk of paying fourfold taxes if he was discovered by the tax collector before he notified the tax collector of his interest, he also undertook a risk of losing his interest if the owner of the surface estate failed to pay taxes that were assessed against the unseated land when the tax collector was not informed of the reservation.

In this Appeal, the Subject Property was assessed as unseated land, and the Kellers admit that they have no evidence that they or their ancestors ever complied with the 1806 Act requiring reporting of unseated lands, and neither the tax records, nor the record in this Appeal reflect that the Subsurface Rights in the Subject Property were separately assessed. Therefore, as in ***Hutchinson***, the assessment and sale of the Subject Property conducted in the 1935 Tax Sale conveyed the entire estate to the purchaser at the 1935 Tax Sale, including the severed Subsurface

Rights.

Federal courts addressing the tax sale of unseated land also followed the doctrine cited in ***Hutchinson*** and upheld the validity of such sales. In ***Proctor v. Sagamore Big Game Club***, 265 F.2d 196 (3rd Cir. 1959), the Third Circuit Court of Appeals was asked to validate a tax sale that occurred in 1894. The Heirs of Thomas E. Proctor, Sr. ("Proctors") filed suit in the District Court for the Western District of Pennsylvania, claiming that they held the Subsurface Rights under certain property in Elk County, Pennsylvania, and further alleging that rival claimants to the Subsurface Rights were trespassers who should be deemed to hold such Subsurface Rights in trust for the benefit of the Proctors. This case involved unseated land. When the Proctors acquired title to the land in 1893, the taxes for 1892 were unpaid and constituted a lien upon the land. Because the Proctors failed to pay delinquent taxes on the land, the land was sold at a tax sale on June 11, 1894 to George Childs. The Third Circuit Court reasoned that the tax sale and the treasurer's deed, if valid, conferred upon Gerorge Childs a fee simple title. The Third Circuit Court went on to state that this included not only the surface of the land, but the Subsurface Rights as well citing ***Powell v. Lantzy***, 173 Pa. 543, 34 A. 450 (1896). After the tax sale, in spite of, or, perhaps, in ignorance of, the tax sale which divested him of the Subsurface Rights, Thomas Proctor purported to convey the land to Elk Tanning Company by deed which purported to reserve the Subsurface Rights. The Third

Circuit Court correctly reasoned that it was of no moment that Thomas Proctor's deed to Elk Tanning Company reserved the Subsurface Rights because, if the tax sale to George Childs cut off all of Thomas Proctor's legal title to the warrant, including his title to the Subsurface Rights (subject only to his right of redemption under Pennsylvania law), then, when Thomas Proctor gave the deed to Elk Tanning Company, he had no legal title to the surface or in the reserved Subsurface Rights to convey to Elk Tanning Company.

The Third Circuit Court upheld the tax sale's conveyance of both the surface interests and Subsurface Rights and determined that the Proctors' claim for a constructive trust was deficient. The equities of the case did not favor the Proctors. The Third Circuit Court stated that, even assuming that a constructive trust had arisen in Thomas Proctor's or the Proctors' favor following the tax sale, the Proctors were barred from maintaining the action. The Proctors' asserted rights came into being in 1894, more than sixty years before they filed suit. The District Court specifically held that the Proctors' claims were barred by the third section of the 1804 Act which provided that no action for recovery of said lands (unseated lands sold at a tax sale) shall lie unless the same be brought within five years after the sale thereof of taxes as aforesaid. The five year limitation period imposed by the 1804 Act was intended to protect landholders from claims asserted years later by parties similar to the Proctors. The statute of repose was intended to ensure greater

certainty of title and make more secure the enjoyment of real estate against claims brought later based upon a theory of an implied trust. ***Ross v. Suburban Counties Realty Corp.***, 356 Pa 126, 51 A.2d 700 (1947).

When citing ***Hutchinson***, the Third Circuit Court correctly noted in that, if there had been a severance of the title of the Subsurface Rights prior to the assessment of 1892 and 1893 and if each of the severed interests had been separately assessed, a tax sale only would have conveyed title only to the particular estate as to which taxes were in default. But, in ***Ross***, despite the severance, there had been no such prior separate assessments. The Proctors did not allege fraud and the Third Circuit Court did not find any fraud which might have invalidated the tax sale. The Third Circuit Court found that the evidence, at most, pointed to a ***bona fide*** mistake as to the tax sale's legal consequences and that the statute of limitations presented an insuperable bar to the action. The statute of limitations referenced in the Third Circuit Court was repealed in 1978. Nonetheless, under current law, a similar claim would appear to be subject to a general six year statute of limitations under **42 Pa. C.S.A. §5527(b)**. Even if an action were commenced today and a court would be sympathetic to a theory of fraud, redemption or constructive trust, such a claim should be barred by the applicable statute of limitations or by the equitable doctrine of laches. Failure to exercise rights within a reasonable period of time can

cause a loss of such rights, particularly when enforcement of such rights prejudice innocent third parties. A treasurer's deed issued pursuant to a tax sale can be defeated only by fraud or want of authority to sell. ***Miller v. Leopold, supra***. Even if there was a gross defect or irregularity or lack of authority to sell, such irregularities were cured by an absolute confirmation of sale. In this Appeal, the Kellers did not allege fraud or any gross defect or irregularity with regard to the 1935 Tax Sale (nor has any one since the 1935 Tax Sale). As a result, the statute of repose and/or applicable statute of limitations, both now and as then in existence, are bars to any claim by the Kellers that they own the Subsurface Rights in the Subject Property.

Not only did federal courts follow the holding of this Court in ***Hutchinson***, but so did the Pennsylvania Commonwealth Court when it decided a quiet title matter in ***Moore v. Com., Dept. of Environmental Resources***, 129 Pa. Cmwlth. 628, 566 A.2d 905 (1989). The Pennsylvania Commonwealth Court was asked to determine the effect of certain tax sales occurring in the periods between 1908 and 1926 and from 1933 to 1938. In deciding the case, the Commonwealth Court cited the ***Proctor*** case and held that the Board of Property accurately determined that an un-assessed subsurface estate coexisting with an unseated surface estate is subject to extinguishment by the occurrence of a tax sale of the serviant surface estate. In doing so, the Pennsylvania Commonwealth Court affirmed the validity of tax sales

of unseated land that conveyed both the surface and the severed, but not separately assessed, Subsurface Rights to Central Pennsylvania Lumber Company ("CPLC"). The Pennsylvania Commonwealth Court concluded that CPLC enjoyed title to the whole of the estate (both the surface and the Subsurface Rights) which it derived from tax sales, when, in 1933, it made a conveyance which included a reservation of the Subsurface Rights. Although this Court is not bound to follow either the Court of Appeals for the Third Circuit in ***Proctor v. Sagamore Big Game Club, supra,*** nor ***Moore v. Com., Dept. of Environmental Resources, supra***, the reasoning of those cases should be persuasive in reaching a decision in this Appeal and reenforce this Court's prior holdings in ***Powell*** and ***Hutchinson*** which have guided Pennsylvania's courts for more than a century and which scores of title transactions justifiably have relied upon as settled law.

The Kellers allege that the Superior Court committed an error by relying on the state of law as it existed during the relevant period to determine the impact the 1806 Act. As stated previously, the 1806 Act provided that it shall be the duty of every person hereafter becoming a holder of unseated lands by gift, grant or other conveyance to furnish a signed statement to the tax collector containing a description of the land so held within one year from and after such conveyance.

In this Appeal, the Kellers submit that the Kellers' and Keller's successors in interest had no duty timely to report his or their interest in the Subsurface Rights to

the Commissioners pursuant to the 1806 Act because the Subsurface Rights are not "lands." Such argument fails to appreciate that the Subsurface Rights constitute a separate estate in the "land." Pennsylvania law recognizes that oil and gas (and other Subsurface Rights) may exist as a separate estate in the "land." ***Bannard v. New York State Natural Gas Corp.***, 448 Pa. 239, 293 A.2d 41 (Pa. 1972) When title to the Subsurface Rights is severed from the owner of the surface estate, and vested in a separate owner, an estate in the "land" is created. In other words, the Subsurface Rights are part of the "land." ***Duquesne Natural Gas Co. v. Fefolt***, 203 Pa.Super. 102, 198 A.2d 608 (1964). From a policy standpoint, the Kellers' contention would eviscerate the significance of this Court's decision in ***Heft, supra,*** and result in no consequence to either deliberate or negligent failure to comply with the 1806 Act.

In the Appeal, the Kellers suggest that the Superior Court overlooked controlling authority in writing its Decision, including ***F.H. Rockwell & Co. v. Warren County***, 228 Pa. 430, 77 A. 655 (1910). In making this argument, the Kellers ignore the responsibility set forth in the 1806 Act requiring the owners of a severed interest in the land to notify the Commissioners of such severance. The Commissioners only can assess estates and interests of which they know. In failing to notify the Commissioners of their ownership in the severed Subsurface Rights, the Kellers did not comply with the 1806 Act and denied the Commissioners the opportunity to assess such Subsurface Rights. The Superior Court also cited this

Court's holding in ***Bannard, Supra.*** which rejected a similar argument (ie, that only minerals known to exist at the time and place can be valued by the assessors). In ***Bannard***, this Court dismissed that same argument now being advocated by the Kellers and stated that acceptance of the proposition that only minerals known to exist at the time and place can be valued by the assessors would lead to confusion and speculation for no one would know what actually had been sold. Attempts to determine the presence of oil or gas when they assessed 'minerals' would lead to protracted collateral investigation and litigation. In ***Bannard***, this Court also stated that, if an assessment or sale is believed to be improper because of overvaluation, such cannot be collaterally attacked fifty years later. The owner must petition immediately for exoneration. The Superior Court in the Decision also noted that ***Bannard*** recognizes the requirement to promptly challenge a tax sale.

Section 5, of the 1804 Act, makes clear that sales of unseated land for taxes shall be valid in law and equity 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 thereof.

It is important to note that ***F.H. Rockwell*** did not address either the 1804 Act or the 1806 Act which required the reporting of unseated lands and ownership of the Subsurface Rights so that a separate assessment could be made. ***F.H. Rockwell*** did

not overrule ***Hutchinson,*** but rather reaffirmed the legal principle that Subsurface Rights and surface interests could be assessed separately. As a result, this Court's decision in ***F.H. Rockwell*** did not address or reverse the long standing settled law that an owner's failure to report to the local tax assessor ownership of the Subsurface Rights of unseated land meant that the entire estate, including the Subsurface Rights, was subject to conveyance at a tax sale and not just the surface estate.

Similarly, the Kellers' argument that the 1935 Tax Sale did not convey oil and gas because the oil and gas had no value in the 1930s is contrary to Pennsylvania authority. This Court in ***Wilson v. A. Cook Sons Co.***, 298 Pa. 85, 148 A. 63 (1929) addressed the Kellers' argument:

> If he believed it had no value he could have protested to the county commissioners.. The following..is applicable here: 'And who are the persons who object to the proceedings? The landowner, whose duty it was in the year 1805 to furnish the commissioners the very information which would have prevented the alleged difficulty, but who, it appears, neglected it for upwards of thirty years, when knowing, or, what is the same thing, bound to know, that his land was liable for its proportion of the public burden, neglects or refuses to pay the tax assessed and suffers his land to be sold, and then, after this long neglect, when the land has risen in value seeks to destroy a title which accrued in consequence of his failure to perform a duty which the law has imposed on him.

C. The 1935Tax Sale Involved Unseated Land

In their arguments to upset the 1935 Tax Sale, the Kellers fail to appreciate the distinction between seated land and unseated land and the consequences of such a distinction. Pennsylvania historically has distinguished between seated land and unseated land for tax assessment purposes. Seated lands have permanent improvements. Unseated lands have no such improvements. For assessment and taxation purposes, seated lands were treated differently from unseated lands. Seated lands are assessed in the name of the owners while unseated lands are assessed by survey or warrant numbers regardless of the owners whose names (if used at all) are used only for the purpose of description. For seated land, taxes were legally owed by the land record owner. For unseated land, taxes were legally owed by the land itself, and the owner had no personal liability for payment of the taxes. ***Miller, Supra.*** The Commissioners in assessing tax values to a particular property are not concerned with names of the owners, but are concerned only with the land itself.

This Court again recognized the distinction between the tax sale of seated land and the tax sale of unseated land in ***Hess v. Westerwick,*** 366 Pa. 90, 76 A.2d 745 (Pa. 1950). In ***Hess***, this Court held that a tax sale was invalid because no written notice of sale was given to the person who was the owner of the property when taxes were assessed. The ***Hess*** case involved the tax sale of seated land,

rather than the tax sale of unseated land. The notice requirements and procedure for the tax sale of seated lands are not the same as for the tax sale of unseated lands. Each involves different statutes, different notice requirements and different procedures.

Recognizing the differences between the tax sale of seated land and the tax sale of unseated land, this Court emphasized that its decision in ***Hess*** was limited to seated land tax sale notice and procedure and not unseated land tax sale notice and procedure. The 1935 Tax Sale involved the tax sale of unseated land, not the tax sale of seated land; thus, any reliance upon Hess and any other cases involving the tax sale of seated land misses the mark. [1]

II. THE SUPERIOR COURT DID NOT DENY DUE PROCESS RIGHTS

The Kellers (and other amicus curiae supporting the Kellers) allege generally that their constitutional rights have been violated by the sale of the Subject Property at the 1935 Tax Sale.[2] Specifically, the Kellers assert that the 1935 Tax Sale divested the Proctor Heirs of the Subsurface Rights to the Subject

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[1] The Kellers have not raised the issue of notice with regard to the 1935 Tax Sale in the Court of Common Pleas or the Superior Court and any argument that may be made in this Appeal based upon inadequate notice was waived.

[2] The Kellers have not raised the issue of constitutional or due process violations with regard to the 1935 Tax Sale in the Court of Common Pleas or the Superior Court and any argument that may be made in this Appeal based upon an ineffective 1935 Tax Sale was waived.

Property without due process. In alleging error, the Kellers wish to apply modern sensibility to what was effectuated by the 1935 Tax Sale. The Kellers seek retroactively to nullify the effect of the 1935 Tax Sale and, consequently, tax sales that occurred many decades ago. This Court has warned against retroactively applying its holdings on the taxation of Subsurface Rights. In ***Oz Gas, Ltd., v. Warren Area School Dist.***, 595 Pa. 128, 938 A.2d 274 (Pa. 2007), this Court addressed the retroactivity of its holding in ***Independent Oil and Gas Ass'n of Pennsylvania v. Board of Assessment of Fayette County,*** 572 Pa. 240, 814 A.2d 180 (Pa. 2002). In ***Oz***, this Court held that its holding in ***Independent Oil and Gas Ass'n of Pennsylvania*** was prospective only and that the case involved only a statutory interpretation, and not a constitutional issue, and that the taxes assessed and collected on the Subsurface Rights in question in that case were valid prior to the ***Independent Oil and Gas Ass'n of Pennsylvania's*** decision. This Court stated that, because for nearly a hundred years, property owners have paid taxes on Subsurface rights and tax sales had resulted because of non payment of those separately assessed taxes, a retroactive application of ***Independent Oil and Gas Ass'n of Pennsylvania*** would, in effect, invalidate each of the tax sales, perhaps, leaving prior owners to seek return of properties lost at those taxes sales. In order to preclude attempts to reverse real estate history, this Court holding in

Independent Oil and Gas Ass'n of Pennsylvania specifically was made prospective only.

A similar sentiment again was expressed by this Court by its reluctance to upset centuries of property law in ***Butler v. Charles Powers Estate, ex rel. Warren***, 65 A.3d 885 (Pa. 2013) In ***Butler***, this Court rejected a challenge to a long standing interpretation of the ***Dunham Rule***. This Court held that a rule of property upon which rights have been determined over a period of hundreds of years should not be upset. This Court reasoned that a well established and relied upon rule of property law, that references to minerals presumptively does not include gas, continues to remain effective in all situations in which a deed reservation does not expressly include gas as part of the reservation. A rule of property law long established should not be overturned in the absence of compelling reason of public policy or imperative demands of justice. ***Smith v. Glen Alden Coal Co.***, 347 Pa. 290, 32 A.2d 227 (Pa. 1943).

The Kellers' contention that they were deprived of due process is without merit. The 1935 Tax Sale was a public tax sale, open to everyone, including the Kellers, who were free to participate and bid on the Subsurface Rights of the Subject Property even though they improperly failed to notify the Commissioners of their reserved interest in the Subsurface Rights. Even after the 1935 Tax Sale, the Kellers still had an opportunity to redeem what was sold at the 1935 Tax Sale.

In addition, the Kellers were free to challenge the 1935 Tax Sale, but failed to do so until after the expiration of the statute of repose. In fact, the Kellers and their successors in interest failed to do anything for almost one hundred years. Now, the Kellers are time-barred from challenging the 1935 Tax Sale or redeeming what was lost at the 1935 Tax Sale.

The Kellers contend that, in today's world, the tax sale of unseated land violates modern constitutional holdings and safeguards. However, this Court should not institute legal chaos by vacating all historical tax sales based on how the past tax sales system might be viewed today. As stated by the Superior court in the Decision:

> 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.

Likewise, in ***Oz, supra,*** this Court rejected the retroactive nullification of past tax sales, recognizing the "potentially devastating consequences" that would occur. Accordingly, any attempt by the Kellers to impugn Pennsylvania's tax sale system in place in 1935 under the guise of current constitutional concepts , and the catastrophic consequences that would follow, should be rejected.

III. KELLERS' COMPLAINTS REGARDING 1935 TAX SALE ARE TIME-BARRED

The Kellers' complaints regarding the 1935 Tax Sale are time-barred. Specifically, the Kellers' failure to object to any alleged procedural irregularity in the 1935 Tax Sale previously in a timely manner means that any objections which they now have are barred by the two year redemption period and/or the applicable statute of limitations. The Kellers lost the right effectively to upset the 1935 Tax Sale by proving an irregularity two years after the sale was completed.

The Kellers have waited almost one hundred years to challenge the result of the 1935 Tax Sale. The time for challenging the result of the 1935 Tax Sale has long since passed.

Courts have routinely required the prompt challenging of a tax sale. The Third Circuit Court of Appeals in ***Proctor, supra*** in footnote 3 recognized the requirement to promptly challenge the tax sale of unseated land. Specifically, the Court held that the Proctors' claim to the severed Subsurface Rights were barred by the third section of the 1804 Act which provided that no action for recovery of said lands (unseated lands sold at tax sale) shall lie unless the same be brought within five years after the sale thereof of for taxes as aforesaid. The five year period of limitation imposed by the 1804 Act was intended to protect landholders from claims asserted years later by parties which claims are similar to the claims

now being raised by the Kellers The statute of repose was intended to ensure greater certainty of title and make more secure the enjoyment of real estate against claims brought later based upon a theory of an implied trust. ***Ross, supra***. The Kellers' complaint regarding the result of the 1935 Tax Sale is time-barred either under the two year redemption period or under the five year statute of repose.

The two-year redemption statute provides that, once the redemption period has passed, no alleged irregularity in the assessment, or in the procedure 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. Act of March 13, 1815 ("1815 Act"); see also ***Ryan v. Bruhin***, 88 Pa. Super. 61, 1926 WL 4258 (Pa. Super. 1925) (quoting the statute and noting that this Court has given it full effect.") It is undisputed that the Kellers did not seek to redeem the Subject Property and/or the Subsurface Rights within two years of the 1935 Tax Sale.

Likewise, the Kellers' argument is barred by the five year limitations period applicable to the tax sales (statute of repose). ***Kaiser Energy, Inc., v. Com., Dept of Environmental Resources***, 113 Pa. Cmwlth. 6, 535 A.2d 1255 (Pa. Cmwlth. 1988). In ***Kaiser***, the Kaisers attempted to challenge the validity of a tax sale in 1823; but, the Pennsylvania Commonwealth Court correctly determined that the time of challenge had long since passed under the 5 year statute of repose. It is undisputed that the Kellers did not challenge the 1935 Tax sale within five years,

and they cannot challenge the 1935 Tax Sale almost one hundred years later. ***Rogers v. Johnson***, 67 Pa. 43, 1871 WL 10974 (Pa. 1870). In ***Rogers,*** this Court held that the five year limitations period barred a prior owner from challenging a tax sale, even where the tax sale was defective due to the treasurer's non-compliance with the required tax sale procedures (which noncompliance with required procedure is not alleged in this Appeal). Therefore, the Kellers' Appeal is time barred.

The Kellers' complaints regarding the 1935 Tax Sale on constitutional grounds also are barred by the current statute of limitations which is applicable to challenged tax sales.

The statute of limitations in Pennsylvania to challenge a tax sale, including challenges on constitutional grounds, is six years. Specifically, **42 Pa. C.S.A. §5527(b)** provides:

> **Other civil action or proceeding**. Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by Section 5531 (relating to no limitation) must be commenced within six years.

In ***Poffenberger v. Goldstein***, 776 A.2d 1037 (Pa. Cmwlth. 2001), the Pennsylvania Commonwealth Court interpreted **42 Pa. C.S.A. §5527** and held that an action to set aside a tax sale was subject to a six year statute of limitations. In

Poffenberger, the Pennsylvania Commonwealth Court reversed in part a lower court's decision and found that the lower court erred in invalidating tax sales on the basis of deficiencies in notice because such challenges were brought more than six years after the tax sale in issue (a 1985 tax sale). A party challenging a tax sale, including challenges on constitutional grounds (not founded on lack of jurisdiction), made more than six years after the sale, is barred by the statute of limitations. In this Action, because more than six years have passed since the 1935 Tax Sale, any constitutional challenge now complained of by the Kellers is beyond challenge and barred by the applicable statute of limitations (six years).

IV. SUPERIOR COURT DID NOT OVERLOOK CONTROLLING AUTHORITY

The Kellers also allege that the Superior Court's Decision is contrary to the holding in ***Tide-Water Pipe Co. v Bell***, 280 Pa. 104, 124 A. 351 (1924). The Kellers attempt to extend the holding of ***Tide-Water*** to apply to title washing and estates of unseated land. But, the ***Tide-Water*** holding does not apply to the relevant facts in this Appeal. In ***Tide-Water***, this Court held that, if land is sold for taxes, an easement, servitude or interest in the nature of an easement is not destroyed, and the purchaser takes subject to the easement. But, an easement is not an estate in land. An easement is a liberty, privilege or advantage which one may have in the lands of another which cannot be an estate or interest in the land itself

or a right to any part of it. ***Clements v Sannuti***, 356 Pa. 63, 51 A.2d 697 (1947). In contrast, Subsurface Rights are considered a separate estate in land. ***Bannard, supra.*** An easement is not a fee simple determinable interest or an estate in land such as the Subsurface Rights and thus, the holding in ***Tide-Water***, is not applicable.

The Kellers allege that the Superior Court committed an error by not recognizing the Reservation. Such contention is incorrect because there was no need to recognize the Reservation. Based on the 1901 case of ***Hutchinson*** discussed earlier in this Brief, the law in 1935 was clear. As the Superior Court summarized, the Treasurer of Centre County obtained the Subject Property as a whole and transferred it to the Commissioners as a whole at the 1935 Tax Sale. Although the 1959 deed (to Herder Spring) made mention of the conveyance being subject to all exceptions and reservations as are contained in the chain of title, there were no exceptions or reservations in the chain of title, because the effect of the Reservation had been extinguished more than one decade earlier. Neither the 1806 Act nor any case law interpreting the 1806 Act allow for the preservation of a reservation of land rights through a deed created and delivered after a tax sale. As the Superior Court aptly stated in the Decision "We do not believe, and the Keller heirs have provided no authority for, the proposition that such general language acknowledging the possibility of exceptions or reservations serves to re-

sever that which had been united."

Lastly, ***Northern Coal & Iron Co. v. Burr***, 42 Pa. Super. 638, 1910 WL 4044 (Pa. Super 1910) does not support the Kellers' contentions. In ***Northern Coal***, this Court reaffirmed the importance of the 1806 Act in finding that there was no severance for the purposes of taxation, because no notice of the ownership of coal was given to the assessing authorities by Northern Coal as required by the 1806 Act.

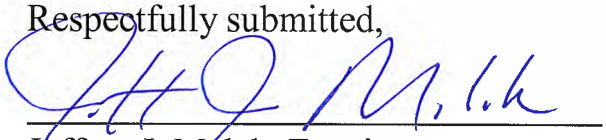
V. SUPERIOR COURT DID NOT ACT AS FACT FINDER

The Kellers allege also that the Panel acted as a fact finder in its Decision. Such contention is without merit because there is no evidence in the record, the Kellers' Motion for Summary Judgment, their Brief in this Appeal or in the Application that supports any claim (or finding had one been made) that the Kellers or their successors in interest informed the Commissioners of the Reservation as they were required to do pursuant to the 1806 Act.

CONCLUSION

The settled law in Pennsylvania is that, if a tax sale occurs of unseated land, as a consequence of an owner's failure to report ownership of a severed interest in the Subsurface Rights to the tax assessors for a separate assessment, the Subsurface Rights are conveyed with the surface estate. In this Appeal, the Subject Property was assessed as unseated land, (and the Kellers admit and the record confirms) that they have no evidence that they or their predecessors in title ever complied with the 1806 Act requiring reporting of the Subsurface Rights in unseated lands. The tax records do not reflect any separately assessed Subsurface Rights in the Subject Property. Therefore, the assessment and sale of the Subject Property in the 1935 Tax Sale conveyed the entire estate to the purchaser at the 1935 Tax Sale, including the Subsurface Rights of the Subject Property. Accordingly, for all of the reasons and arguments set forth above and for all of the reasons and arguments set forth in the record in this Action, the Appeal of the Kellers should be denied and the May 2014 Order and Decision of the Superior Court should be affirmed in all respects.

Respectfully submitted,



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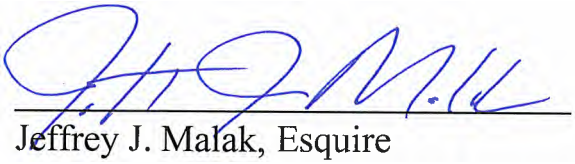
CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief of Amicus Curiae, SWN Production Company, LLC, complies with the word count limitation set forth in Pennsylvania Rule of Appellate Procedure 2135 and contains 8,929 words.

Respectfully submitted,



Date: April 30, 2015

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I, Jeffrey J. Malak, Esquire, do hereby certify that I have this day served the Brief of Amicus Curiae, SWN Production Company, LLC, by U.S. Mail, first class, postage prepaid, to the following, which satisfies the requirements of **Pa. R.A.P. 121**:

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