



# The Complex World of Simplifying Title in Ohio

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# Welcome



# Today's Presenter



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# Complex World of Simplifying Title

- Background
- Marketable Title Act
- Dormant Mineral Act
- Recent Cases
- The Next Big Thing



# BACKGROUND

# Background

- Common law rule: mineral rights severed from the surface are not subject to abandonment or termination for failure to produce OG or to extract other minerals
- 1961: OH General Assembly enacts Marketable Title Act (MTA)
  - “the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title”
    - Original MTA did not apply to minerals





# Background

- 1973: MTA amended “to enable property owners to clear their titles of disused mineral interests”
  - *Heifner v. Bradford*, 446 N.E.2d 440 (Ohio 1983)
- 1989: General Assembly enacts Dormant Mineral Act (DMA) “to provide a method for the termination of dormant mineral interests and the vesting of their title in surface owners, in the absence of certain occurrences within the preceding 20 years”
- 2006: DMA amended into its present form
  - 2014: DMA amended to require surface owner to file notice of failure to file



# MARKETABLE TITLE ACT

# Marketable Record Title

- ORC 5301.48: Any person who has an unbroken chain of title of record to any interest in land for 40 years or more has a marketable record title, subject to **certain limitations**
  - Chain is unbroken if official public **records** disclose conveyance or other **title transaction** of record not less than 40 years when marketability is to be determined
    - So long as the conveyance or **title transaction** purports to create an interest in either:
      - The person claiming the interest; or
      - Some other person through whom the person claiming the interest can claim title
        - » Provided, that, nothing appears in the records divesting claimant of the interest



# “Title Transaction”

- Defined as “any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee’s, assignee’s, guardian’s, executor’s, administrator’s, or sheriff’s deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage”
  - ORC 5301.47(F)



# “Records”

- The official public records include “probate and other official public records, as well as records in the office of the recorder of the county in which all or part of the land is situate”
  - ORC 5301.47(B)



# Certain Limitations

- ORC 5301.49: Record marketable title is subject to:
  - All interests and defects which are inherent in the muniments for the chain of record title
    - General reference in such muniments to easements, use restrictions, or other interests created prior to **root of title** shall not preserve them unless specific identification is made to a recorded **title transaction**
      - Possibilities of reverter, rights of entry, and powers of termination for breach of condition subsequent are protected only by process outlined in ORC 5301.51



# Certain Limitations

- Record marketable title is also subject to:
  - All interests preserved by filing proper notice or by possession by the same owner continuously for 40 years or more
    - Further explained in ORC 5301.51
  - The rights of any person arising from adverse possession that was wholly or partly subsequent to **root of title**
  - Any interest arising out of title transaction recorded subsequent to effective date of **root of title** so long as the interest hasn't already been extinguished by the MTA
  - Exceptions listed in ORC 5301.53



# “Root of Title”

- Defined as “that conveyance or other title transaction in the chain of title of a person, purporting to create an interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of the date forty [40] years prior to the time when marketability is being determined. The effective date of the ‘root of title’ is the date on which it is recorded.”
  - ORC 5301.47(E)



# Prior Interests

- If an owner has a marketable record title, as defined in ORC 5301.48, subject to the limitations in ORC 5301.49, then that title can be taken by any **person dealing with the land** free and clear of any claim or interest that depends upon something prior to the root of title for its existence
- All such claims prior to the root of title are null and void
  - ORC 5301.50



# “Person Dealing with the Land”

- Defined as including “a purchaser of any estate or interest therein, a mortgagee, a levying or attaching creditor, a land contract vendee, or any other person seeking to acquire an estate or interest therein, or impose a lien thereon”  
– ORC 5301.47(D)



# Preservation of Interests

- Any person claiming an interest that would be extinguished by the MTA can protect it by filing for record a notice of preservation of interest
- Must be filed during the 40-year period immediately following the effective date [i.e., the recording date] of the potential root of title
  - ORC 5301.51(A)



# Notice of Preservation

- In order to be effective and entitled to recording, the notice must:
  - Be in the form of an affidavit
  - State nature of claim to be preserved
  - State names and addresses of persons for whose benefit the notice is filed
  - Contain accurate and full description of all land affected by notice
    - Must be set forth in particular terms and not by general inclusions
      - But if claim is based on recorded instrument, description in notice can be the same as in recorded instrument



# Notice of Preservation

- In order to be effective and entitled to recording, the notice must:
  - State the name of each record owner of the land affected by notice at time of its recording
  - State recording information of instrument by which record owner acquired title to the land
  - Be made by any person who has knowledge of relevant facts or is competent to testifying concerning them in court
    - ORC 5301.52



# 9/10 of the Law

- An interest can also be protected from the MTA if the same record owner has been in possession of the land continuously for 40 years or more, during which time no title transaction appears in the chain of title and no notice of preservation has been filed so long as possession continues to the time when marketability is being determined
  - In this case, possession is the same as filing the notice to preserve
  - ORC 5301.51(B)



# Exceptions to MTA

- MTA shall not be applied to bar or extinguish:
  - Any lessor as reversioner of right of possession on expiration of lease, or any lessee in and to any lease, except as permitted by the DMA
  - Railroad easements
  - Public utility easements
  - Any easement, the existence of which is clearly observable by physical evidence of its use



# Exceptions to MTA

- MTA shall not be applied to bar or extinguish:
  - Any easement if its existence is evidenced by the location beneath, upon, or above any part of the land described in such instrument of any pipe, valve, road, wire, cable, conduit, duct, sewer, track, pole, tower or other physical facility
  - Any right, title, estate or interest in coal or connected to coal
  - Any mortgage recorded in conformity with ORC 1701.66
  - Any right, title or interest of the US, Ohio, or any political subdivision, body politic, or agency of either
    - ORC 5301.53



# Process for MTA Analysis

- Suggested in *Semachko v. Hopko*, 301 N.E.2d 560 (Ohio App. 8<sup>th</sup> Dist. 1973):
  - Is the property right specifically mentioned or identified in root of title?
  - Is it specifically mentioned or identified in a muniment of the chain of title within 40 years of recording date for root of title?
  - Is it protected by a notice to preserve?
  - Is it one of the interests excepted from the MTA?
    - Leases, easements, coal, mortgages, owned by gov't
  - Is the interest protected by one of the limitations in ORC 5301.49?
    - Possession by single owner for 40 years; adverse poss.

# *Heifner v. Bradford*

- 446 N.E.2d 440 (Ohio 1983)
- 1916: Elvira conveys Blackacre to Fred, reserves OG rights
  - Deed recorded in Muskingum County
- 1931: Elvira dies. Will probated in Tuscarawas County, leaves estate to Lottie and Sarah
- 1936: Fred conveys Blackacre to Charles by warranty deed recorded in Muskingum County
  - No mention of reservation of OG rights
- 1957: Auth. copy of Elvira’s will recorded in Muskingum County, along with affidavit of transfer
- 1957: Affidavits of transfer for Lottie’s estate and Sarah’s estate recorded in Muskingum County
  - Estates passed to their respective children
- 1980: Charles conveys Blackacre to William
- Lottie and Sarah’s heirs bring quiet title action ag. William
- William claims OG has been extinguished by MTA
- Court rules that 1957 recording of Elvira’s will is “title transaction”



# DORMANT MINERAL ACT

# ORC 5301.56

- Any **mineral interest** held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the surface owner if the requirements of ORC 5301.56(E) are met and none of the following applies:
  - The mineral interest is in coal
  - The mineral interest is owned by the federal gov't, state gov't, or any political subdivision or agency
  - Within 20 years immediately preceding the notice required under ORC 5301.56(E), one or more of the following has occurred:
    - Mineral interest has been subject of title transaction
    - Actual production of minerals from lands, or from lease which includes lands subject to mineral interest, or from lands pooled or unitized with such lands
    - Mineral interest has been used for underground gas storage operations
    - Drilling or mining permit has been issued to the holder of the mineral interest
    - A claim to preserve the mineral interest has been filed under ORC 5301.56(C)
    - Separately listed tax parcel number



# “Mineral Interest” and “Mineral”

- “Mineral interest” is defined as “a fee interest in at least one mineral regardless of how the interest is created and of the form of the interest, which may be absolute or fractional or divided or undivided”
  - ORC 5301.56(A)(3)
- “Mineral” is defined as “gas, oil, coal, coalbed methane, other gaseous liquid, and solid hydrocarbons, sand, gravel, clay, shale, gypsum, halite, limestone, dolomite, sandstone, other stone, metalliferous or nonmetalliferous ore, or another material or substance of commercial value that is excavated in a solid state from natural deposits on or in the earth”
  - ORC 5301.56(A)(4)



# Claim to Preserve

- Notice of claim to preserve must:
  - State the nature of the mineral interest claimed and any recording information upon which the claim is based
  - State that the **holder** does not intend to abandon, but instead to preserve, the holder's rights in the mineral interest
  - Otherwise comply with ORC 5301.52
    - The notice to preserve under the MTA



# Claim to Preserve

- For underground gas storage, any **holder** of an interest used for that purpose may protect its interest, as well as any lessor's interests, by filing a single claim
- **Holder**s of mineral interests may preserve their interests indefinitely by successive filings of claims to preserve
  - Claims to preserve do not affect the right of lessor under OGL to obtain forfeiture of OGL under ORC 5301.332



# “Holder”

- Defined as “the record holder of a mineral interest, and any person who derives the person’s rights from, or has a common source with, the record holder and whose claim does not indicate, expressly or by clear implication, that it is adverse to the interest of the record holder”
  - ORC 5301.56(A)(1)



# Notice to Abandon

- Before a mineral interest can be vested in the surface owner under the DMA, the surface owner must:
  - Serve notice by certified mail, return receipt requested, of the owner’s intent to declare the mineral interest abandoned
    - To each holder or the holder’s successors or assignees
    - At the last known address of each



# Notice to Abandon

- If service of notice cannot be completed to any holder, the surface owner shall publish notice of intent to abandon at least once in a newspaper of general circulation in county where lands are located



# Notice to Abandon

- Whether the notice is served by mail or by publication, it must contain the following:
  - The name of each holder and the holder's successors or assignees, as applicable
  - Description of surface of lands subject to mineral interest
    - Must include volume and page number of recorded deed or other instrument under which surface owner claims title
  - Description of mineral interest to be abandoned
    - Must include volume and page number of recorded instrument on which mineral interest is based
  - Statement that nothing specified ORC 5301.56(B)(3) has occurred in the 20 years prior to date of service or publication of notice
  - Statement that surface owner intends to file affidavit of abandonment in recorder's office at least 30 days, but not later than 60 days, after date notice was served or published



# Affidavit of Abandonment

- At least 30 days, but not later than 60 days, after notice has been served by mail or publication, surface owner must file affidavit of abandonment in recorder's office
- Affidavit must contain:
  - Statement that person filing affidavit is surface owner
  - Volume and page number of recorded instrument on which mineral interest is based
  - Statement that mineral interest has been abandoned
  - Recitation of facts constituting abandonment
  - Statement that notice was served on each holder



# Preservation

- Holder of mineral interest can preserve interest against abandonment by filing within 60 days of service or publication of notice either:
  - Claim to preserve under ORC 5301.56(C)
  - Affidavit identifying event described in ORC 5301.56(B)(3) that has occurred within 20 years immediately preceding service or publication of notice to abandon
- Holder shall also notify surface owner



# Holder Fails to Preserve

- If the holder fails to successfully preserve mineral interest, then surface owner shall file a notice in the recorder's office that:
  - States that person filing notice is surface owner
  - Describes surface of land subject to mineral interest
  - Includes statement: "This mineral interest abandoned pursuant to affidavit of abandonment recorded in volume \_\_, page \_\_"
- After this notice is filed, mineral interest vests in surface owner and record of mineral interest shall cease to be notice to public of mineral interest



# *Corban v. Chesapeake Exploration, L.L.C.*

- 76 N.E.3d 1089 (Ohio 2016)
- Answered cert. question from S.D. Ohio
- 1989 version of DMA not self-executing
  - Didn't automatically transfer ownership of dormant mineral rights by operation of law
- 2006 version of DMA applies to all claims asserted after effective date





# RECENT CASES

# ***Blackstone v. Moore***

- 1915: Kuhn conveys 60-acre tract to Brown
  - “Except Nick Kuhn and Flora Kuhn, their heirs and assigns reserve one half interest in oil and gas royalty in the above described Sixty (60) acres.”
- 1969: Carpenter, successor in interest to Brown, conveys tract to Blackstone
  - “Excepting the one-half interest in oil and gas royalty previously excepted by Nick Kuhn, their [sic] heirs and assigns in the above described sixty acres”
    - All deeds between 1915 and 1969 also mentioned Kuhn reservation
- 2001: Blackstone conveyed land to himself and wife, with the same exception language



# ***Blackstone v. Moore***

- 2012: Blackstone brought quiet title action against Kuhn heirs
  - Royalty interest abandoned under DMA and extinguished under MTA
- Trial court granted summary judgment to Blackstone under DMA and MTA
- Kuhn heirs appealed to 7<sup>th</sup> District Court of Appeals
- 7<sup>th</sup> District reversed on both claims
  - Held royalty interest preserved by reservation language in 1969 deed
  - Blackstone appealed to Supreme Court



# ***Blackstone v. Moore***

- Supreme Court accepted two propositions
  - Specific identification contemplated in ORC 5301.49(A) requires sufficient reference that title examiner may locate prior conveyance by going directly to identified conveyance record in recorder's office without checking conveyance indexes
  - Exception to marketable record title does not include interests and defects, created by recorded title transactions prior to root of title, of which person has actual knowledge, if the reference to such recorded title transaction is general rather than specific

# ***Blackstone v. Moore***

- Court focused on first proposition
- Under MTA, there is a three-step inquiry:
  - Is there an interest described in the chain of title?
  - If so, is the reference a “general reference”?
  - If answers to first two questions are yes, then does the general reference contain specific identification of recorded title transaction?
- Court found that reference to Kuhn reservation in 1969 deed was not a “general reference” because it contained details and particulars about the interest (kind of interest; who created it)
- 2018-Ohio-4959 (Ohio Dec. 13, 2018)

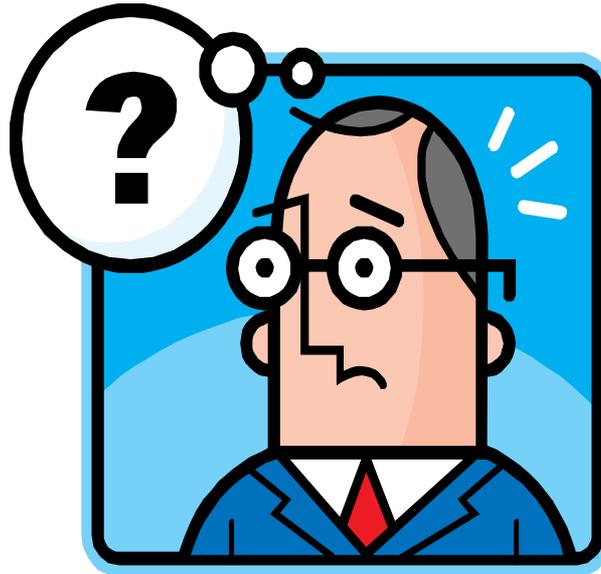


# DMA Due Diligence

- ORC 5301.56(E)(1) allows notice of intent to abandon by publication when notice cannot be completed by certified mail
  - Attempt to serve by mail is unnecessary where reasonable search fails to reveal names or addresses of potential holders
  - What makes for a reasonable search?
    - *Shilts v. Beardmore*, 2018-Ohio-863 (Ohio App. 7<sup>th</sup> Dist. Mar. 5, 2018)
      - Probate records, public records, ODNR records, internet search = reasonable due diligence
    - *Sharp v. Miller*, 2018-Ohio-4740 (Ohio App. 7<sup>th</sup> Dist. Nov. 26, 2018)
      - What constitutes “reasonable due diligence” depends on facts and circumstances of each case
      - Probate records, deed search, but no internet search
        - » Still reasonable under the circumstances

**THE NEXT BIG THING**

***QUESTIONS?***



# *Thank You*



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***Oil and Gas Contract Pitfalls  
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**February 21, 2019**

**Noon Eastern**

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