



# The (Still) Complex World of Simplifying Title in Ohio

**This webcast will begin promptly at 12:00 PM Eastern**

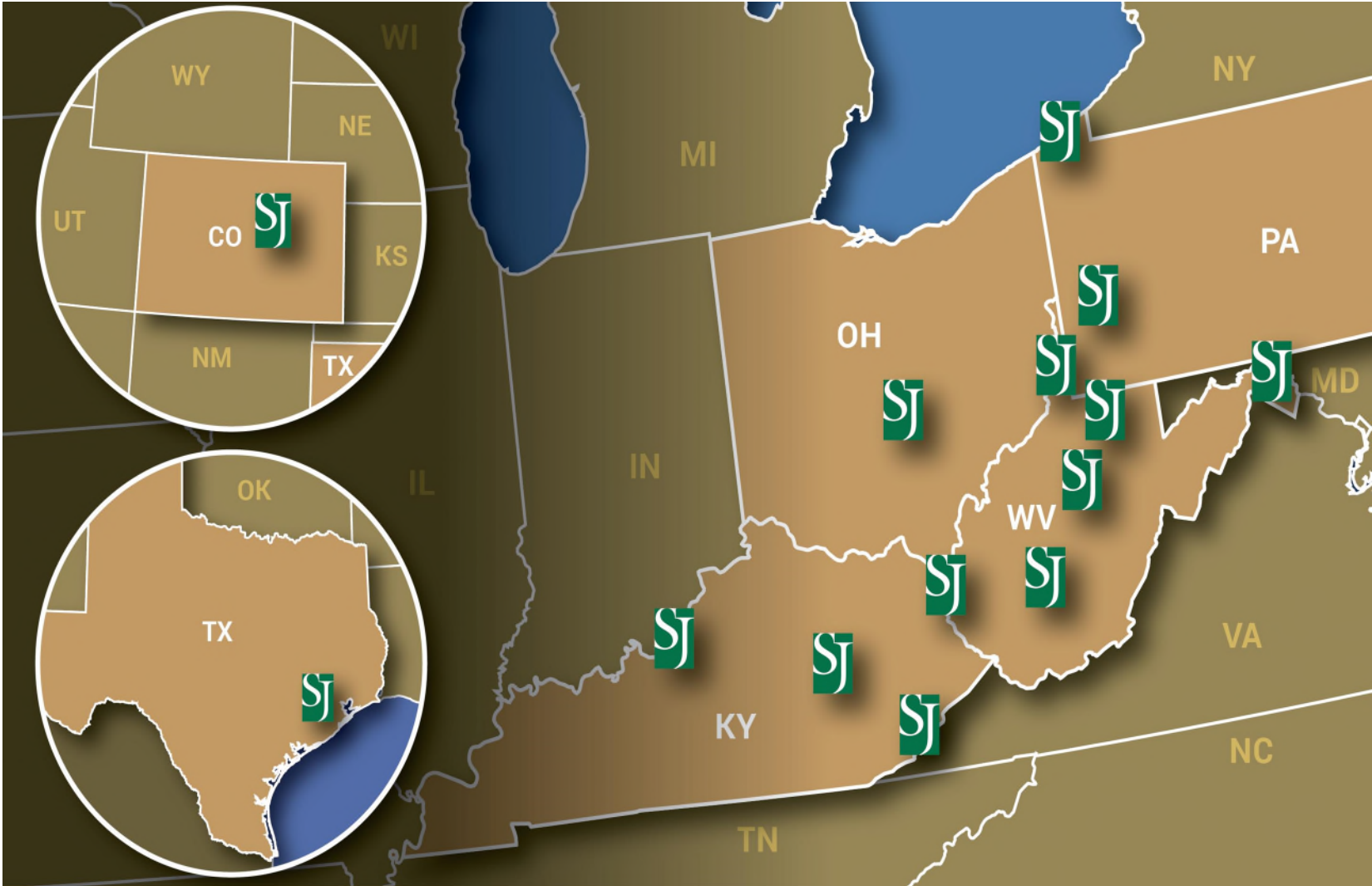
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# Welcome



# Today's Presenter



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# The (Still) Complex World of Simplifying Title

- Background
- Marketable Title Act
- The Last Big Thing
- Appeals Court Cases *After Blackstone*
- 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





# *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"



# 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

A vertical image on the left side of the slide. The top portion shows an oil derrick on a grassy field under a blue sky. The bottom portion shows a close-up of a reddish-brown rock face with a black line drawn across it.

# 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)(emphasis added)





# When is marketability determined?

- Possibilities:
  - *Semachko v. Hopko*, 301 N.E.2d 560 (Ohio App. 8<sup>th</sup> Dist. 1973)(trial date)
  - *David v. Paulsen*, 137 N.E.3d 689 (Ohio App. 7<sup>th</sup> Dist. 2019)(date when party sought to enforce purportedly superior right—date complaint was filed)
  - *Senterra Ltd. v. Winland*, 2019-Ohio-4387 (Ohio App. 7<sup>th</sup> Dist. 2019)(date of trial or date of summons)
  - *Richmond Mills, Inc. v. Ferraro*, 2019-Ohio-5249 (Ohio App. 7<sup>th</sup> Dist. 2019)(date notice of DMA abandonment was filed)





# 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

A vertical image on the left side of the slide. The top portion shows a black oil well derrick against a blue sky with light clouds. Below the derrick is a green grassy field. The bottom portion of the image shows a close-up of a reddish-brown rock face with a dark, diagonal crack or crevice.

# “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
  - Differs from DMA: preservation must be filed within 20-year period prior to filing of affidavit of abandonment
    - 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)
- *Richmond Mills, Inc. v. Ferraro*, 2019-Ohio-5249 (Ohio App. 7<sup>th</sup> Dist. Dec. 9, 2019)



# 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.



# THE LAST BIG THING



# *Blackstone v. Moore,* 122 N.E.3d 132 (Ohio 2018)

- 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,* 122 N.E.3d 132 (Ohio 2018)

- 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,* 122 N.E.3d 132 (Ohio 2018)

- 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,* 122 N.E.3d 132 (Ohio 2018)

- 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)
- Concurring opinion by Justice DeGenaro: Court’s decision should not be read to implicitly hold that more general MTA continues to apply to mineral interests following enactment of more specific DMA



# APPEALS COURT CASES AFTER *BLACKSTONE*



# Appeals Court Cases after *Blackstone*

- *Miller v. Mellott* (7<sup>th</sup> Dist. Feb. 6, 2019)
  - Trial court erred when it refused to apply MTA in case regarding 1947 mineral reservation, but error did not require reversal because surface owner couldn't establish root of title
- *Stalder v. Bucher* (7<sup>th</sup> Dist. Mar. 12, 2019)
  - 1946 OG reservation—"all oil and gas in the underlying said premises"
  - 1956 deed—"all of the oil, gas, coal and all other minerals" and back reference to 1946 deed
  - Court held that MTA and DMA both applied to OG reservation, but it was preserved because 1956 deed was root of title and it contained specific reference to 1946 reservation





# Appeals Court Cases after *Blackstone*

- *West v. Bode* (7<sup>th</sup> Dist. Sept. 30, 2019)
- *Senterra Ltd. v. Winland* (7<sup>th</sup> Dist. Oct. 11, 2019)
- *Richmond Mills, Inc. v. Ferraro* (7<sup>th</sup> Dist. Dec. 9, 2019)
- *Erickson v. Morrison* (5<sup>th</sup> Dist. Dec. 30, 2019)



# THE NEXT BIG THING

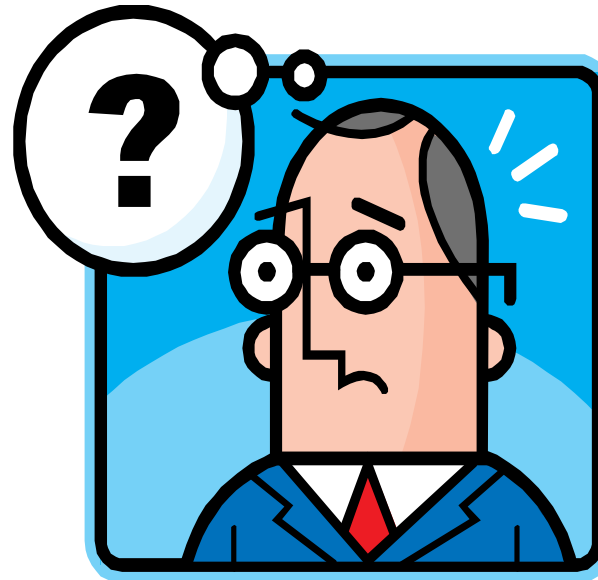


# The Next Big Thing

- Jan. 21, 2020: Ohio Supreme Court accepted an appeal in *West v. Bode*
  - Does the DMA supersede and control over the MTA regarding the termination or abandonment of severed oil and gas interests?



# QUESTIONS?





# Next Month

Step toe & Johnson Energy Webcast March 19th

The Administration of Land Administration

Presenter: Paula Rauchfuss

# Thank You



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