

## Ohio Title Issues



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## Ohio Facts

- Ohio is the 17<sup>th</sup> State in the Union
- It is the 34<sup>th</sup> Largest State and the 7<sup>th</sup> most populous
- Ohio comes from the Iroquois word for "Great River"
- It is the birthplace of 7 Presidents
- It has 88 Counties
- The first state (1803) in the Union under the Northwest Ordinance



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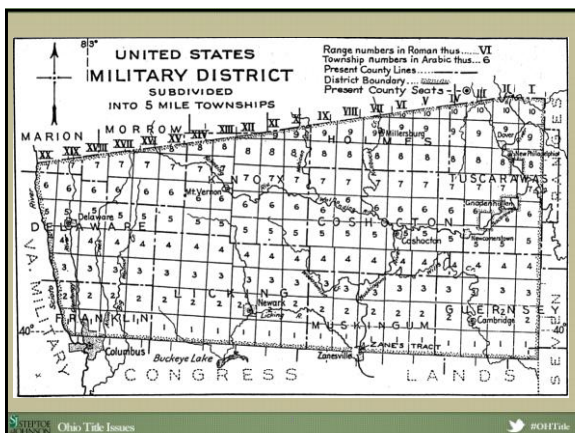
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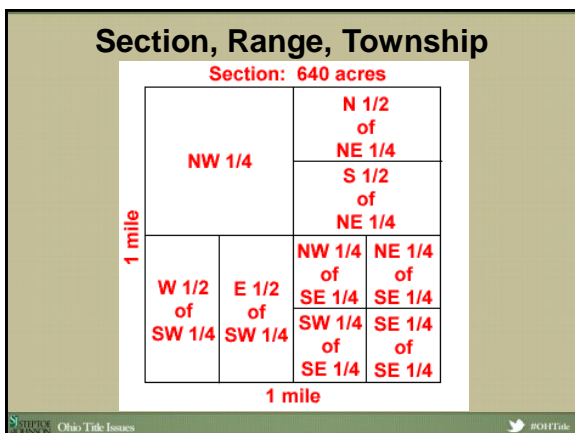
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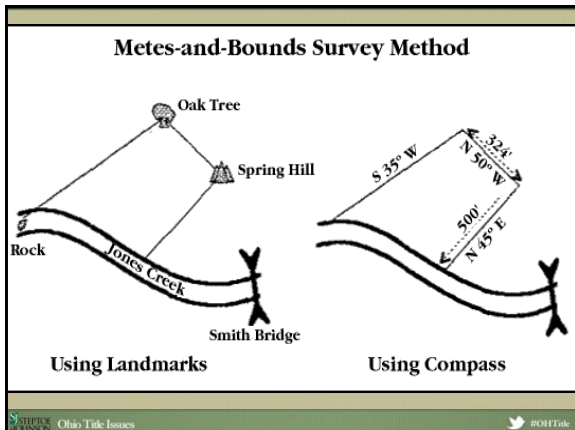
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- ### Drilling Opinions of Title
- Scope of Search of Real Estate Records  
(Client Assessment of Risk)
  - Can Go Back to Original Patent  
(Grant of Land from the U.S.A.)
  - Often Standard Will Be to 1859  
(Or Further to a General Warranty Deed)
  - Drake's Well (Titusville, PA)  
(Severances/Leases Soon After in OH)
  - County Real Estate Records  
(Patents in Bureau of Land Management)

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### Where do I find the records?

- Recorder
- Clerk of the Court of Common Pleas
- Auditor

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### Minerals in Place and Extracted

- In Ohio, the term “minerals” will include oil and gas, unless it can be determined that the intent in a document was not to include oil and gas. *Detlor v. Holland*, 57 Ohio St. 492, 49 N.E. 690 (Ohio 1898).
- Oil and gas in place is an interest in real estate. *Pure Oil Co. v. Kindall*, 116 Ohio St. 188; 156 N.E. 119 (Ohio 1927).
- Extracted minerals are personal property.

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### Rule of Capture

- Oil and gas was considered to be of a “migratory character.” *Detlor v. Holland*, *supra*.
- In 1897, the Ohio Supreme Court determined that Ohio was a rule of capture state. *Kelley v. The Ohio Oil Co.*, 57 Ohio St. 317, 49 N.E. 399 (Ohio 1897).

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### Rule of Capture



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### General Categories of Defects

- Prior Open Oil and Gas Leases  
(Risk – Your Lease is Top Lease)
- Defective Execution of Your Lease by Entity Lessor (or Lack of Authority)  
(Risk – Your Lease is not Valid)
- Broken Chain of Title of Lessor  
(Risk – Your Lease is not Valid)
- Impaired Title of Lessor (Liens, etc.)  
(Risk – Your Lease is Encumbered)

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### What to do about "old" leases?

- Obtain a release!  
(from correct party)
- Affidavit of forfeiture (ORC 5301.332)
- Affidavit of non-production (ORC 5301.252)
- But remember ...



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### Affidavits may not always be true

- Some folks aren't always as truthful as they seem
- Even truthful folks may think they know the truth to tell, but don't know
- E.g., OH as non-apportionment state, forgotten heir



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### Non-apportionment



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### Current Owner of Oil and Gas

- Obviously, oil and gas lease needs to be from current owner of oil and gas
- Not always easy to determine in Ohio, especially with severed oil and gas

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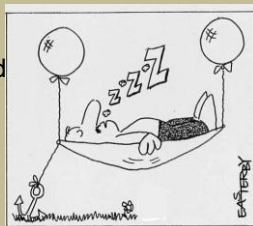
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### Ohio's Dormant Mineral Act

- ORC 5301.56
- Only applies to severed fee mineral interests
- Does not apply to coal
- 1989 Version
- 2006 Version
- 20 year requirement (but which 20 years??)



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### Ohio's Dormant Mineral Act

# JULY 1, 1986!!

Severances of mineral interests before this date are possibly subject to the 1989 Version of the Act (severed more than 20 years before 6/30/2006 effective date of 2006 Version) and need to be examined closely to determine if there has been possible automatic abandonment.

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### Ohio's Marketable Title Act

- ORC 5301.47-56
- Any person "who has an unbroken chain of title of record to any interest in land for forty years or more, has a marketable record title to such interest." ORC 5301.48.
- Purpose is to simplify and facilitate land title transactions. ORC 5301.55.
- "Preserving notice" recorded in land records will preserve interest, as will specific reference to interest in "muniments" of title.

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### Ohio's Marketable Title Act

- Does not apply to extinguish interests in coal, or railroad or public utility easements, or easements observable by physical evidence.
- Best viewed as a shield to defend title, rather than as a sword to attack another's title. Can be useful to defend record title when there is a mysterious gap in title that cannot be explained.
- Not a substitute for due diligence!

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### Usual Forms of "Entities"

- Sole Proprietorship (not separate entity)
- Partnership
- Limited Partnership
- Limited Liability Company
- Corporation (profit/not-for-profit)
- Trust (not separate entity)
- Governmental Entities/Agencies (not discussed today)
- Watch for special rules, issues of authority

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### In General, Lease Is Signed By...

- Sole Proprietorship – Individual (may be fictitious name filing, "doing business as")
- Partnership – All Partners
- Limited Partnership – General Partner
- Limited Liability Company – All Members or Manager
- Corporation – At least one Officer
- Always Look for Proof of Authority of Individual to Sign for Entity

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### Trusts In Ohio

- Not separate entity
- Title in natural or corporate person, as trustee
- New curative statute
- Disclosed trusts ("John Smith, Trustee of the Smith Family Trust dated June 1, 2000")
- Duty to inquire
- Undisclosed trusts ("Blind" or "naked") ("John Smith, Trustee")
- "No duty to inquire"
- Memorandum of Trust
- Affidavit of Trust
- Specify powers, etc. (sell or lease real estate)
- 2007 Trust Code

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### Joint Ownership

- Joint Tenants with the right of survivorship (must be specified)
- A and B, "for their joint lives, remainder to the survivor of them." A dies, property vests in B.
- Not severed unless all join deed to stranger or all but one join deed to that one
- Tenants in common (default rule)
- Even husband and wife!
- A and B. A dies, 50% of property vests in A's heirs.
- No restriction on severance.

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### Tenancy by Entireties

- Only for husbands and wives by deeds recorded between dates of 2-9-1972 and 4-3-1985
- A and B, "husband and wife, for their joint lives, remainder to the survivor of them."
- Not alienable by one spouse without other's consent

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### The Power of Dower

Ohio still recognizes statutory dower

ORC 2103.01



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### Dower

- A 1/3 life estate in the surviving spouse.
- Spouse must join in executing oil and gas lease to release inchoate dower.
- Deed from one spouse to another is not sufficient to release the grantor spouse's inchoate dower interest (unless the deed is pursuant to a divorce decree).
- In general, only death, absolute divorce or joining in a conveyance to a third party can release the inchoate dower interest.

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### Need Word "Heirs" Pre-1925

- Statute enacted effective 6-13-1925 (current ORC 5301.02)
- Before then a grant without word "heirs" would create only a life estate in grantee with reversion of fee to grantor
- Same rule for reservation of mineral interests, reserves only a life estate without word "heirs"

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### After-Acquired Title

- Needs warranty of title for doctrine to apply
- A conveys to B (Deed 1) and B conveys to C (Deed 2), but Deed 2 gets recorded first. The warranty which B gave to C in Deed 2 is what estops B or B's heirs or assigns from claiming any further title under Deed 1.
- Also called estoppel by deed

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### Deed Recorded After Death

- *Kniebbe v. Wade*, Supreme Court of Ohio in 1954 ruled that deed recorded 13 days after death of grantor was invalid
- Has to be delivery before death to pass title
- Deed was held in box in house to which both husband and wife had access. Court ruled if a grantor retains the right to control or reclaim a deed, there is no delivery.
- Deed can't be used as testamentary substitute

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### Power of Attorney

- No OH statutory form of POA
- POA must be recorded before a deed
- A "general" power (e.g., "anything the principal could do if present") is NOT sufficient under OH law
- Must be a specific grant of authority to convey or lease real estate

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### Minerals Under Right of Way

- The general rule in Ohio, at least for municipalities, is that fee title to streets is held by the village or city in trust for street purposes, and therefore the abutting fee owner owns the fee to the centerline, below the depth from the surface needed for street purposes. *Hamilton, Glendale & Cincinnati Traction Co. v. Parish*, 67 OS 181 (1902).
- State of Ohio rights of way in fee include title to minerals, which the State can lease.

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### No Reservation to Stranger

- The general rule in Ohio is that a grantor cannot reserve an interest to a third party or to a stranger to the deed. The reservation will prevent the interest from passing to the grantee but will not vest the interest in the third party without a separate conveyance.
- “A to B, reserving oil and gas to C,” will keep oil and gas in A.

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### No Witnesses

- Effective 2-1-2002, two witnesses were no longer required for signatures on recorded instruments in OH, and the statute provided that instruments executed and recorded prior to 2-1-2002 without witnesses were presumed to be valid and to provide constructive notice to all persons. ORC 5301.01.

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### Defective Acknowledgments

- Instrument of record for more than 21 years is cured of a missing or defective certificate of acknowledgment, by ORC 5301.07(B) and (C).
- Under Ohio law a defective acknowledgment makes the deed or lease effective as between the parties only.
- A totally blank acknowledgment is defective. *Campbell v. Krupp*, 195 Ohio App.3d 573 (Ohio App. 2011).

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### The moment of Death



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### The Probate Estate

- Executor/Executrix appointed by the Probate Court
- Marshals assets, settles estate
- Will specifies powers of executor
- Without express authority in Will, Court approval is required for an Executor to sell property
- Lapse / but anti-lapse for BLOOD relatives
- Certificate of Transfer!

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### The Intestate Estate



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### Intestacy = No Will

- MUST STILL BE ADMINISTERED!!
  - Probate court appoints an administrator
  - Wide latitude to appoint
  - Property needs court order to transfer
- Ohio has had very confusing laws of intestacy, especially early on, e.g., “Ancestral” v. “Nonancestral” lands
- Certificate of Transfer!!

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### Transfer on Death Deeds/Affidavits

- 8/1/2000 – 12/28/2009 – ORC 5302.22-24
- Deed creating a beneficiary who would inherit property upon death.
- Simply a device used to avoid probate.
- Named beneficiary has no legal interest until time the event happens (death).
- 12/28/2009 - Present
- Transfer on Death Affidavit allows a beneficiary to be named.

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### Mortgages

- Mortgages are consensual liens on real estate granted as security for a debt.
- Usual view of Ohio mortgages is that mortgagor retains legal title, subject to the lien.

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### New Foreclosure Protection

*Don't bank on it*

- ORC 1509.31
- Enacted effective June 30, 2010
- Super priority for oil and gas leases



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### Judgments

- Judgments are a lien upon real estate within a county when a certificate of judgment is filed.
- Not a lien on after-acquired property.
- Valid for 5 years from the date of (1) filing the certificate, or (2) issuance of the last execution.
- Exception -- Liens in favor of the State of Ohio are effective for 10 years.

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### Mechanic's Liens

- Mechanics' liens continue in force for six years after the affidavit is filed in the county recorder's office. If action is brought to enforce the lien, it continues until final adjudication. (ORC 1311.13(C))

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## Real Estate Taxes

- Real estate taxes become a lien on the property as of January 1<sup>st</sup> of the current year. They are a lien until paid.
- Ohio assesses taxes one year behind, for example, the second half 2011 taxes were due in July 2012.
- **HOWEVER** – Current year taxes are still a lien even though not yet due and payable.

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## Thank You!



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## Material Disclaimer

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