

Chapter 6

Oil, Gas and Mineral Titles: A Short Analysis of Available Curative Actions for Common Title Defects¹

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§ 6.01. **Scope and Introduction.**

This chapter will explore the most common tools available for the cure of frequently encountered title defects in eastern oil and gas titles. On selected points, the laws of the states of Kentucky, Michigan, Ohio, Pennsylvania, New York, Virginia and West Virginia will be discussed. Among the defects to be considered will be description errors and deficiencies, acknowledgment errors and deficiencies, internal defects in instruments, execution errors and deficiencies, lack of record title in indispensable parties, missing parties such as intestate heirs, spousal joinder, heirs under will, co-tenants, corporate informalities, non-profit informalities, unincorporated association and trust informalities, dissolved and otherwise unavailable corporations, recording and indexing errors, lack of record evidence of death of spouses, co-

tenants and other parties in survivorship/entireties estates, unsatisfied mortgages, unsatisfied judgments, tax claims and defective tax sales and defective judicial sales.²

§ 6.02. The Standard by Which Title Defects Are Defined.

A consideration of the "cure" of title defects must begin with an analysis of what is meant by the concept of a "defect" in title. As with most legal issues, the concept of "defects" in title is capable of several definitions depending upon the standard of title being employed in any specific case. The optional standards range from "perfect" title through "record" title to highly customized standards of "marketable" title which are established on a client by client or a project by project basis.

It is irrational for anyone to expect an eastern title to be evaluated against a standard of perfect title. This would require continued examination to a conveyance of an absolute fee from the sovereign with an unbroken and legally intact chain to the current owner/lessor. The concept of "perfection" would also impose requirements to identify, to evaluate and to report non-record matters which could have an effect upon the title. Even if it were physically possible to access the record and non-record elements necessary to evaluate a title against a "perfect" title standard, the cost of such examination would be prohibitive in most eastern states. There are so few titles which would withstand such an evaluation that requests to utilize this standard would be economically impractical.

The inability to obtain "perfect" title usually leads the industry and the bar to work with alternative standards. The most common alternative concepts are "marketable" and "record" title. Both the "marketable" and the "record" title standards share a common approach of requiring examination of defined land office records for agreed periods of time. The regularity of transactions affecting a specific title is determined through an analysis of all relevant documents found in the defined land records throughout the examination period in both the "marketable" and "record" title standard approaches. The two standards differ in the determination of reportable defects. The "record" title standard allows no deviation from record perfection during the examination period. "Marketable" title analysis, on the other hand, accepts certain record defects as unremarkable or unreportable provided that those defects do not cross a defined line of severity. That line is most commonly the line over which the title can no longer be considered to be reasonably free from the probability of litigation.³

"Marketable" title is a moving target. The decision of which defects have the potential of producing litigation in which transactions is highly subjective and particularly dependent upon the experience and expertise of the examiner. The placement of the dividing line between acceptable and reportable defects should be defined in the engagement arrangement between client and examiner when the "marketable" title model is selected for any project. A defect which is an improbable source for litigation on the title for a \$40,000 country cabin may well give rise to serious contention and litigation on a \$5,000,000 oil and gas development property. Use of "marketable" title examination rules in mineral development projects requires an examiner with broad expertise in evaluating the litigation potential of both general title defects and of defects particular to oil, gas and mineral titles, in addition to an ability to strictly separate title judgments made in the oil, gas and mineral venue from those applied to residential or many commercial real property projects.

"Record" title is always grounded in an objective standard and provides a much greater potential for certainty in communication between the examiner and the client's land professionals. For this reason, the author has always recommended that the client and examiner agree that the