CONSTRUCTIVE NOTICE: OKLAHOMA'S HYBRID SYSTEM AFFECTING SURFACE AND MINERAL INTERESTS

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KRAETTLI Q. EPPERSON, PLLC
MEE MEE HOGE & EPPERSON, PLLP
50 PENN PLACE
1900 N.W. EXPRESSWAY, SUITE 1400
OKLAHOMA CITY, OKLAHOMA 73118

PHONE: (405) 848-9100
FAX: (405) 848-9101

E-mail: kqe@meehoge.com
Webpage: www.EppersonLaw.com
www.MeeHoge.com

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KRAETTLI Q. EPPERSON

POSITION: Partner: Mee Mee Hoge & Epperson, PLLP
1900 N.W. Expressway, Suite 1400, Oklahoma City, OK 73118
Voice: (405) 848-9100; Fax: (405) 848-9101
E-mail: kqe@MeeHoge.com; website: www.EppersonLaw.com

COURTS: Okla. Sup. Ct. (May 1979); U.S. Dist. Ct., West. Dist of Okla. (Dec. 1984)

EDUCATION: University of Oklahoma [B.A. (PoliSci-Urban Admin.) 1971];
State Univ. of N.Y. at Stony Brook [M.S. (Urban and Policy Sciences) 1974]; &
Oklahoma City University [J.D. (Law) 1978].

PRACTICE: Oil/Gas & Real Property Title Litigation (Curative; Appeals, Expert Consultant/Witness)
Oil/Gas & Surface Title Opinions
Mediations and Arbitrations

MEMBERSHIPS/POSITIONS:
OBA Title Examination Standards Committee (Co- & Chairperson: 1988 Present);
OBA Nat'l T.E.S. Resource Center (Director: 1989 - Present);
OBA Real Property Law Section (current member, former Chairperson);
OKC Real Property Lawyers Assn. (current member, former President);
OKC Mineral Law Society (current member);
Kiwanis (Downtown OKC Club--member and former President); and
BSA: Vice Chair & Chair, Baden-Powell Dist., Last Frontier Council (2000-2007); former Cubmaster, Pack 5, & Asst SM, Troop 193, All Souls Episcopal Church

SPECIAL EXPERIENCE: Court-appointed Receiver for 5 Abstract Companies in Oklahoma;
Oklahoma City University School of Law adjunct professor: "Oklahoma Land Titles" (1982 - Present), & "Oil & Gas Title Examination" (2015-Present)
Vernons 2d: Oklahoma Real Estate Forms and Practice, (2000 - Present) General Editor and Contributing Author;
Basye on Clearing Land Titles, Author: Pocket Part Update (1998 – 2000); Contributing Author: Pocket Part Update (2001-Present)
Oklahoma Bar Review faculty: "Real Property" (1998 - 2003);
Chairman: OBA/OLTA Uniform Abstract Certif. Committee (1982);
In-House Counsel: LTOC & AFLTICO/AGT/Old Republic (1979-1981);
Urban Planner: OCAP, DECA & ODOT (1974-1979).

SELECTED PUBLICATIONS:
"The Oklahoma Marketable Record Title Act ('aka' The 'Recording Act'): An Argument That This 30-Year Curative Act Can Extinguish Co-Tenancies," 87 OBJ 27 (October 15, 2016)
"Marketable Record Title: A Deed Which Conveys Only the Grantor's 'Right, Title and Interest' Can Be A 'Root of Title'",85 OBJ 1104 (May 17, 2014)
"The Real Estate Mortgage Follows the Promissory Note Automatically Without an Assignment: The Lesson of BAC Home Loans", 82 OBJ 2938 (Dec.10, 2011)

SPECIAL HONORS: Okla. Bar Assn. 1997 Maurice Merrill *Golden Quill Award*;
Okla. Bar Assn. 1990 Earl Sneed *Continuing Legal Education Award*;
Okla. Bar Assn. 1990 Golden Gavel Award: *Title Exam. Standards Committee*

CONSTRUCTIVE NOTICE: OKLAHOMA'S HYBRID SYSTEM AFFECTING SURFACE AND MINERAL TITLES

I. INTRODUCTION[1]

The process in Oklahoma to give constructive notice of instruments relating to real property, or an interest therein (e.g., conveyances and encumbrances, and judgments -- "Instruments"), might appear to be uniform and easy to understand, but is it?

The purpose of this paper is: (1) to point out the diversity and inconsistencies in our sets of notice statutes, and (2) to suggest that an effort be made to either be sensitive to such diversity or to make some of the statutes uniform.

The two areas where this paper will focus are (1) on the 30-year Marketable Record Title Act ("MRTA")[2] and the Abstractors Act[3], and (2) on Oklahoma Corporation Commission ("OCC") orders (including drilling and spacing orders, and forced pooling orders).[4]

II. GENERAL DISCUSSION

"The general rule is that the record of an instrument entitled to be recorded will give constructive notice to persons bound to search for it. But constructive notice being a creature of statute, no record will give constructive notice unless such effect has been given to it by some statutory provision."[5]

"Everyone knows" that, in Oklahoma, the principal of "first in time is first in right" concerning rights in real property, or an interest therein, is implemented through the notice statutes,

[1] This article was inspired in part by a paper entitled "The Poofing Doctrine: The Impact of the Transfer of Working Interests on the Oklahoma Corporation Commission's Jurisdiction to Pool", [yes, "poofing", not "pooling"] presented to the Oklahoma City Mineral Lawyers Society, on September 15, 2016, by Matthew J. Allen, of Conner & Winters, of Oklahoma City, Oklahoma; see also: "An Analysis of the Evolution of Oklahoma Real Property Law Relating to Lis Pendens and Judgment Liens", Dale L. Astle, 32 Oklahoma Law Review 812 (1979)
[2] 16 O.S§§71 et seq
[3] 1 O.S.§§20-43
[4] 52 O.S. §§87.1 and 87.4
[5] Crater v. Wallace, 1943 OK 250, ¶11, 140 P.2d 1018, 1020

right?[6] And "everyone knows" that, in Oklahoma, if you want to give subsequent purchasers or encumbrancers constructive notice of an Instrument affecting real property, or an interest therein, you must file the Instrument in the county land records where the land is located, right?[7] These notice and recording statutes are referred to herein collectively as the "Core Statutes".

While these Core Statutes appear to clearly lay out a unified system, a closer analysis discloses substantial inconsistencies in these and related filing statutes, due in part to later adopted and amended statutes. For instance, while the entry of general money judgments in the county court clerks' files were immediately considered to be liens and to give constructive notice of the imposition of such liens on the debtor's lands, the filing of such money judgments was moved to the county land records in 1977 in order for them to become liens and give constructive notice.[8] In a similar manner, the filing of mechanics and materialmen's liens was moved from the county court clerks' files to the county land records in 1977 in order to become liens and to give constructive notice.[9] In addition, a later legislative effort was made to require all zoning ordinances be filed in the county land records, but it failed.

The MRTA, which is based on the Uniform MRTA, and was adopted in Oklahoma in 1963, defines the "Records", which form the 30-year chain of title under examination, as follows: "'Records' includes probate and other official public records, as well as records in the county clerk's office".[10] However, as held in 1943: "But constructive notice being a creature of statute, no record will give constructive notice unless such effect has been given to it by some statutory provision".[11] Therefore, any instrument filed in such "Records" (e.g., probate files) which does

[6] 25 O.S. §§ 10-13; In Re N-Ren Corp., 1989 OK 79, ¶8, 773 P.2d 1269, 1271
[7] 16 O.S. §§15-16; 46 O.S. §7; 12 O.S. §§181, 706 and 2004.2; 16 O.S. §S31, 43, 62, 66, and 82-84; 19 O.S. §§263, 287, 291, 298(A), and 298.1; 43 O.S. §134; and 58 O.S. §§428, and 703
[8] 12 O.S.§181 (Supp. 1977)
[9] 42 O.S.§141.1
[10] 16 O.S.§78(b) Records
[11] Crater v. Wallace, 1943 OK 250, ¶11, 140 P.2d 1018, 1020

not have statutory support to deem such filing as constructive notice, is not in fact included in the part of the 30-year chain of title needed to have "marketable record title."

At the time this MRTA was adopted there was already an extensive statutory framework in place to control the process of recording Instruments in the county land records to achieve marketable record title, adopted beginning in 1910. This "Records" language of the MRTA, when initially adopted, may have reflected such existing recording statutes, but, in the later decades -- as statutory changes were made to such recording framework -- that language in the MRTA became outdated. In order for such "probate and other official public records" to give constructive notice, the Core Statutes, and other related statutes, make it clear that, by 1977, not only conveyances and encumbrances, but also judgments, must be filed in the county land records.[12]

To add to this diversity, it should be noted that railroad and utility related mortgages are not required to be filed in the county clerk's local land records. They constitute constructive notice when recorded simply with the Oklahoma Secretary of State.[13]

However, there is another large set of records affecting interests in real property, which apparently constitute constructive notice without being filed in the county land records. This is the set of records relating to oil and gas interests when the Oklahoma Corporation Commission ("OCC") enters orders (e.g., for drilling and spacing units, and forced pooling) impacting interests in real property[14].

III. CONSTRUCTIVE NOTICE VS. THE MRTA, AND THE ABSTRACTING ACT

Determination of the owner of real property or an interest therein is based on a review of the "record title".[15]

[12] 16 O.S. §§31, 43, and 181; 58 O.S. §§428 and 703
[13] 46 O.S. §17
[14] 52 O.S. §§87.1 and 87.4
[15] Oklahoma Title Examination Standard 1.1 provides:

No one seriously questions the need to file in the county land records any conveyances and encumbrances (e.g., deeds, mortgages, leases, restrictions, and liens) and any judgments affecting real property or an interest therein.[16]

However, while all District Court judgments relating to real property, including probate decrees, must -- under the Core Statutes -- be filed in the county land records to constitute constructive notice of their contents, there are two sets of specific statutes that imply that filings made in records outside the Core Statutes scheme are somehow part of the "marketable record title" that surface and oil/gas title examiners must review.[17]

The MRTA was adopted in 1963, and amended in 1972. It provides what is probably the "strongest" curative act because it is not based on a statute of limitations concept which extinguishes the remedy after a certain period of time, but is a statute of repose which -- after 30 years -- extinguishes the right itself (in real property or an interest therein) after the lapse of the specified time.[18]

The compilation of conveyances and encumbrances, and judgments ("Instruments"), which is organized and reviewed in chronological order, is called an "abstract of title". It consists of either (a) all Instruments filed from sovereignty (patent from government) up to the present, or (b) (i) all Instruments filed over the last 30 years, plus (ii) a selected group of Instruments filed before that 30 year period began all the way back to sovereignty (patent from government).[19]

"A marketable title is one free from apparent defects, grave doubts and litigious uncertainty, and consists of both legal and equitable title fairly deducible of record."; and 52 O.S. §570.10 (D)(2)(a) regarding the Production Revenue Standards Act relating to oil and gas, provides: "Marketability of title shall be determined in accordance with the then current title examination standards of the Oklahoma Bar Association."

[16] See footnote 34

[17] The MRTA and the OCC statutes, discussed herein

[18] Mobb v. City of Lehigh, 1982 OK 149, ¶12, 655 P.2d 547, 551

[19] 16 O.S. §71 and 76(A)

The title examiner reviews (a) a formal or informal printed (or digital) compilation of the relevant Instruments (an "Abstract of Title" or "Abstract"), or (b) the records themselves (the county land index and relevant Instruments), depending on the purpose for the examination.[20]

The Instruments which are to be reviewed will only give the necessary constructive notice, so that they can be relied upon, if they are filed in the proper "records". As noted above, the MRTA defines "Records" as not just the county land records, but also: "probate and other official public records".[21] Consequently, the MRTA allows the review of probate court records, even if such probate decrees never find their way into the county land records. Therefore, there is an apparent inconsistency between the "Core Statutes" and the MRTA. This inconsistency may have been caused by the amendment of 12 O.S. §181 in 1977, which for the first time required judgments to be filed in the county land records instead of originally being constructive notice upon the simple filing of the judgment in the county court clerk file. Until 1977 such judgments were constructive notice without being filed in the county land records, but not after that date. However, the MRTA was not amended to reflect this change, thereby creating such inconsistency.

The Oklahoma Abstractors Act dictates what land related records (a) must be maintained by the licensed abstract companies, including being indexed and copied, and (b) must be included in a formal abstract prepared for a title examination, but it was not amended in 1977 either. Apparently the abstract companies maintain indexes to and copies of various pleadings from court clerk files in their collection (the "abstract plant") and then include them in the formal Abstract, even though such Instruments do not constitute constructive notice.[22]

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[20] If the title examination is conducted in order to issue a title insurance policy there must be a formal abstract prepared and certified by a licensed abstractor (or a prior title policy plus a supplemental formal abstract) and, the examination must be made by a licensed Oklahoma attorney. (36 O.S. §5001(C)). Otherwise, the party requesting the title examination can specify the record review process to be used.

[21] 16 O.S.§78(b)

[22] 1 O.S.§§20 et seq; 1 O.S.§21 provides, in pertinent part:

The unintended consequences of this failure of the Abstractors Act being amended to clearly reflect the new (1977) constructive notice statute relating to judgments is that judgments which are not filed in the county land records are still being included in the Abstract, at least by some abstractors. This results in (a) some titles being treated as valid which really contain "gaps" and as having defects in title or encumbrances to be cured, although such judgments do not officially impact title, (b) an increased cost to prepare the Abstract, if the charges are based on pages included, rather than timeframe covered, and (c) giving the title examiner, title company and beneficiary of the title insurance policy "actual notice" (not "constructive notice") of such Instruments.[23] The official Uniform Abstractors Certificate is ambiguous as to whether post-1977 judgments should be and whether they are included in such abstracts. So long as this Uniform Abstractor's Certificate follows the Abstractors Act, it continues to perpetuate these inconsistencies.[24]

As used in the Oklahoma Abstractors Act:

1. "Abstract of title" is a compilation in orderly arrangement of the materials and facts of record, in the office of the county clerk and court clerk, affecting the title to a specific tract of land issued pursuant to a certificate certifying to the matters therein contained;

2. "Abstract plant" shall consist of a set of records in which an entry has been made of all documents or matters which legally impart constructive notice of matters affecting title to real property, any interest therein or encumbrances thereon, which are filed, recorded and currently available for reproduction in the offices of the county clerk and the court clerk in the county for which such abstract plant is maintained.

[23] Benefiel v. Boulton, 2015 OK 32, ¶4, 350 P.3d 138, 141: *"Specifically, COCA found that notwithstanding Plaintiff's failure to file the divorce decree with the Seminole County Clerk, inclusion of the judgment in the abstract of title provided Boulton [the innocent buyer] with actual notice of the lien."*

[24] Form 17 of the Oklahoma Abstractors Board provides:
2. The records of the Court Clerk and the County Clerk of said County disclose that there are no executions, court proceedings, suits pending in any of the Courts of Record in said County, or liens of any kind affecting the title to said real estate, and there are no judgments or transcripts of judgments indexed and docketed on the judgment docket against any of the following named parties affecting the title to said real estate, except as shown in the Abstract: [NAMES CERTIFIED TO / NOTATION AS TO OUTSTANDING PROCEEDINGS / OR "NONE FOUND"]

An effort should be made to analyze these inconsistencies between the post-1977 recording statutes, the MRTA and the Abstractors Act, in order to reconcile and correct them.

IV. OKLAHOMA CORPORATION COMMISSION ORDERS AS CONSTRUCTIVE NOTICE

A. Notice of OCC Orders

The orders issued by the Oklahoma Corporation Commission ("OCC") -- such as drilling and spacing unit orders, and forced pooling orders – are not usually filed in the county land records where the land is located. Are they constructive notice[25] of such changes in title to subsequent purchasers and encumbrancers[26]? If so, we have what appears to be a hybrid or dual constructive notice system where you must look in two databases, meaning the OCC records and the county land records. The risk is that, when conflicts in claims of ownership arise, third parties might raise arguments claiming they did not have "constructive notice" of the orders which are only filed with the OCC. A case that reached that conclusion is discussed below (In re Cornerstone).

However, it should be noted that there is a 1982 Oklahoma Supreme Court case which held that, once an OCC proceeding is filed with the OCC, such proceeding is notice to subsequent purchasers acquiring an interest during the proceeding.[27] By extension, it might be argued that any order resulting from such proceeding is also notice to subsequent third party purchasers and encumbrancers.

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[25] 25 O.S.§12: "Constructive notice is notice imputed by the law to a person not having actual notice."

[26] 16 O.S.§ 15: "Except as hereinafter provided, no acknowledgment or recording shall be necessary to the validity of any deed, mortgage, or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, lease, or other instrument relating to real estate other than a lease for a period not exceeding one (1) year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as herein provided. No judgment lien shall be binding against third persons unless the judgment lienholder has filed his judgment in the office of the county clerk as provided by and in accordance with Section 706 of Title 12 [12-706] of the Oklahoma Statutes"; and 16 O.S.§16: "Every conveyance of real property acknowledged or approved, certified and recorded as prescribed by law from the time it is filed with the register of deeds for record is constructive notice of the contents thereof to subsequent purchasers, mortgagees, encumbrancers or creditors."

[27] Chancellor v. Tenneco Oil Co., 1982 OK 122, ¶ 17, 653 P.2d 204, 206.

However, it would create a more uniform procedure, if such OCC judgments were filed in the county land records. However, before such practice was adopted, all of the following questions would have to be answered in the affirmative:

1. Is the Commission acting as a court when issuing such spacing and pooling orders,[28]
2. Do such orders affect real property or an interest in real property, and
3. Would such orders give constructive notice, if such orders were filed of record in the county land records?

B. Is The OCC a "Court of Record"?

The Oklahoma Supreme Court has held:

> *While Art.7§1, Okl. Const., creates courts and invests them with judicial power, the Corporation Commission stands established and governed by the provisions of Art. 9 §§15-34, Okl. Const. Within the limits of authority conferred on it by constitutional provisions as well as by statutory enactments, the Commission may exercise legislative, judicial and executive power. There can be absolutely no doubt of the Commission's legitimate claim to adjudicative authority. When in individual proceedings it sits to hear and decide the issues before it, it acts, pursuant to Art. 9, §19, Okl. Const., in the exercise of 'powers and authority of a* ***court of record'****.* [29]
>
> *The Commission's dispute-settling power clearly stands reposed in it by virtue of a direct constitutional mandate. Our fundamental law explicitly charges that body with the responsibility of a* ***'court of record'****. In short, the Constitution's command is that, when acting in an adjudicative capacity, the Commission is to be treated as the functional analogue of a* ***court of record****.*[30]

[28] 52 O.S.§ 87.1(a): Well Spacing and Drilling Units; 52 O.S.§87.1(e) Forced Pooling

[29] Monson v. State ex rel. Oklahoma Corp. Com'n, 1983 OK 115, ¶4, 673 P.2d 839, 841-842

[30] *id.* ¶5; see also: "The Oklahoma Corporation Commission (OCC), when exercising its adjudicatory authority to enter a forced pooling order, is the functional analogue of a court of record with dispute resolution authority conferred by Constitutional grant. 52 O.S. Section 86.1", NBI Services, Inc. v. Corporation Commission of State, 2010 OK CIV APP 86, ¶¶19-20, 241 P.3d 685, 690 (dealing with forced pooling). See also: PSO v Norris Sucker Rods, 1995 OK CIV APP 101, ¶13, 917 P.2d 992, 998 (dealing with utility rates and refunds); Leck v. Continental Oil Co., 1989 OK 173, ¶22, 800 P.2d 224, 230 (dealing with fraud in restricting allowables); New Dominion, LLC v. Parks Family, 2008 OK CIV APP 112, ¶14, 216 P.3d 292, 296 (clarifying forced pooling order).

It is generally thought that the OCC is not bound by Title 12 which "governs the procedure in the district courts of Oklahoma in all suits of a civil nature".[31] However, it should be noted that at least one of the Rules for District Courts has been found to be binding on the OCC. This was in a case where the OCC had given only publication notice in a drilling and spacing proceeding and took a default judgment, with no attempt at personal or mailed service. Such publication notice was allowed to be used and relied on under the existing applicable OCC statute without first attempting personal service[32]. However, the Oklahoma Supreme Court ruled that, based on both Oklahoma and U.S. Supreme Court cases dealing with due process, such publication notice could not be used as the sole means of notice. The court confirmed that (prospectively) the constitutional concept of due process must be followed by the OCC -- meaning giving personal or mailed service. The case went further and held that the OCC must follow Rule 16, Oklahoma Rules for District Courts, because such Rule "provides the procedural measures that must be followed before a **judgment** may be taken against a defendant served solely by publication."[33] So, it appears that such OCC order is a **"judgment**".

The first question could be answered in the affirmative: *Yes, the Commission is acting as a "court of record" when issuing "judgments", such as drilling and spacing orders, or forced pooling orders.*

C. Do Such Orders Impact Real Property or Real Property Interests?

[31] 12 O.S.§2001; according to the official Committee comment to 12 O.S.§2001 of the Oklahoma Pleading Code: "The Oklahoma Pleading Code does not apply to proceedings held before a body (such as an administrative agency) other than a district court, unless that body adopts the Oklahoma Pleading Code to govern its procedure." The OCC has not adopted the Pleading Code and has established its own procedures and rules.
[32] 52 O.S. §87.1(a)
[33] Carlile Trust v. Cotton Petroleum Corp., 1986 OK 16, footnote 26, 732 P.2d 438, 443

There is no dispute that a owner of an oil and gas leasehold holds "an interest in real property".[34]

Also, it is clear that a spacing order "affects the proprietary incidents of the mineral estate of every owner sought to be brought within the new unit…", and it "creates the unit, pools royalty interests within the unit, directs that only one well be drilled in the unit within a specific location and prohibits the drilling of a well at another location or operating a well in violation of the spacing order."[35]

Similarly, the applicant for a forced pooling order must hold a divided or undivided interest in the right to drill in an existing unit, and he can join in such proceeding the owners of the right to drill who have not agreed through a lease or other agreement to allow such drilling. Such proceeding before the OCC is intended to result in an order authorizing the applicant to drill and to specify the "lease" terms granted to the owners. Such terms include the alternative to either participate in the costs and revenues of drilling or to accept a court-determined reasonable lease bonus and royalty share.[36]

The second question could be answered in the affirmative: *Yes, such orders (judgments) affect real property or an interest in real property.*

D. Do Such Orders Give Constructive Notice, If Filed?

It is mandatory for any instrument affecting real property or an interest therein to be filed of record in the county land records to give constructive notice. This includes mineral deeds and oil and gas leases.[37]

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[34] Hinds v. Phillips Petroleum Company, 79 OK 22, ¶5, 591 P.2d 697, 698-699; Cornelius v. Jackson, 1948 OK 61, ¶20, 209 P.2d 166, 170.

[35] Carlile Trust v. Cotton Petroleum Corp., 1986 OK 16, ¶¶9 & 11, and footnote 19, 732 P.2d 438, 442 and 443; 52 O.S.§87.1(a)

[36] 52 O.S.§87.1(e); Tenneco Oil Company V. El Paso Natural Gas Company, 1984 OK 52, ¶9 , 687 P.2d 1049, 1051

[37] "Recording is not necessary to the validity of any deed, mortgage, or contract relating to real estate to establish validity between the parties. 16 O.S. 1910, § 15. However, no deed, mortgage, contract, bond, lease, or other

Constructive notice statutes are in one sense "permissive". The instrument is binding between the parties without being filed. However, "permission" is granted to file it and, thereby, give notice, and, therefore, it is "mandatory" only if you desire to give constructive notice.[38]

The parties to an OCC proceeding would certainly want the terms of such orders to be notice to and to be legally binding on not just the persons directly joined in the proceeding, but on subsequent purchasers and encumbrancers.

However, no instrument, as previously noted, even if it is inadvertently accepted and filed in the county land records, constitutes constructive notice unless there is a statute: (1) allowing the specified document to be filed, and (2), once filed, making such filing constructive notice.[39]

There are currently statutes which permit judgments affecting real property or an interest therein to be filed in the county land records and, once filed, to constitute constructive notice to subsequent purchasers and encumbrancers.[40] However, the primary statute, 12 O.S.§181, explains how constructive notice is given of a District Court judgment affecting real property, and, from 1910 up until 1977, provided: "It [the judgment] shall operate as such [constructive] notice, without record, in the county where it is rendered." In 1977, §181 was changed and thereafter

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instrument relating to real estate shall be valid against third persons unless acknowledged and recorded. Id. An oil and gas lease is not, per se, real property, but it does create an interest in real property *Amarex v. El Paso Natural* Gas *Co.*, 772 P.2d 905, 908 (Okl.1987) and many of the laws of real property apply. Third persons traditionally rely upon land records for information regarding interests in land. Id." Anson Corporation v. Corp. Commission of Oklahoma, et al, 1992 OK CIV APP **37,** ¶9, 839 P.2d 676, 679

[38] See footnotes 4 and 5 above.

[39] Crater v. Wallace, 1943 OK 250, ¶15-16, 140 P.2d 1018, 1020 (holding that an affidavit filed without statutory authority making its contents constructive notice is not constructive notice); other existing statutes have, since 1985, allowed the filing of informational affidavits to give constructive notice of certain matters, but such permitted content does not include these kinds of changes in mineral title, 16 O.S. §§ 82-83; Oklahoma Examination Title Standard 3.2: Affidavits and Recitals.

[40] 12 O.S.§181: "When any part of real property, the subject matter of an action, is situated in any other county or counties than the one in which the action is brought, a certified copy of the judgment in such action must be recorded in the office of the county clerk of such other county or counties, before it shall operate therein as notice. It shall operate as such notice, when recorded in the office of the county clerk, in the county where it is rendered."; and 16 O.S.§31: "Any judgment or decree of a court of competent jurisdiction finding and adjudging the rights of any party to real estate or any interest therein, duly certified, may be filed for record and recorded in the office of the register of deeds, with like effect as a deed duly executed and acknowledged."

provided: "It [the judgment] shall operate as such [constructive] notice, when recorded in the office of the county clerk, in the county where it is rendered." Consequently, as of 1977, filing in the county land records became necessary to give constructive notice, and failure to file the judgment in the county land records, where the land is located, means there is no constructive notice thereof.

In addition, there is a statute, which is located in Title 58, which is the probate code (which is not a civil action, but is a special proceeding), that contains mandatory language about recording a broad range of probate decrees affecting real property (§711):

> *When a judgment or decree is made, setting apart and defining the homestead, confirming a sale, making distribution of real property, or determining any other matter affecting the title to real property, a certified copy of the same* ***must*** *be recorded in the office of the county clerk of the county in which the real property is situated….*[41]

Therefore, this statute makes it clear that failure to file such probate judgment or decree in the county land records means such instrument does not give constructive notice.

In 1979, Charles Nesbitt (then recent Oklahoma Attorney General and then current member of the OCC) encouraged the filing of OCC forced pooling orders in the county land records.

> *Strangely enough, a forced pooling order of the Corporation Commission is the only judgment directly affecting real estate which is not recorded in the county where the land is located. There is authority for such recordation, but the practice is otherwise.* [16 O.S.§31] *Literally thousands of pooling orders remain technically effective, with the working interest rights thereunder in limbo.*
>
> *The solution would appear to be a statute, or a provision in the order itself, that a forced pooling order is not effective until recorded in the county where the unit is located. Thereby, previous pooling orders, like unreleased oil and gas leases, would come to the attention of the title examiner.*[42]

[41] 58 O.S.§703 provides: "When it is provided in this chapter that any order or decree of a district court or judge, or a copy thereof, must be recorded in the office of the county register of deeds, notice is imparted to all persons of the contents thereof, from the time of filing the same for record."

[42] Oklahoma Attorney General from 1963 to 1967, and a member of the OCC from 1969 to 1975: "A Primer on Forced Pooling of Oil and Gas Interests in Oklahoma", 50 OBJ 648 (1979); 16 O.S.§31

The forced pooling orders entered by the OCC contain a list of the alternative "lease terms" available to unleased owners of the drilling rights, including either participating, or accepting specified bonuses and royalties. However, such orders do not contain the parties' actual elections or defaults; such written elections are received by and kept by the operator/applicant. Apparently to address this deficiency in the content of the OCC records, the legislature adopted a statute in 1993: (1) allowing the filing of an affidavit in the county land records containing information concerning the elections made (or default terms deemed selected) under such forced pooling order, and (2) declaring that such filing of an affidavit gives constructive notice.[43] While the filing of a judgment in the county land records has always given constructive notice, in the absence of such enabling legislation, the recording of an affidavit would not give constructive notice.[44]

The implication of the adoption of this remedial legislation could be that in the absence of such filing there is no constructive notice of the elections made.

The weight to be given to a decision from a bankruptcy court sitting in another state, but expressly declaring that is it applying Oklahoma law is unclear. However, there is a case which holds that filing of these OCC orders in the county land records is mandatory in order to give constructive notice. The bankruptcy court for the Northern District of Texas held that Oklahoma law requires that both a drilling and spacing order, and a forced pooling order (presumably through an affidavit disclosing the results of the elections[45]), must be filed in the county land records before such order constitutes constructive notice. This case held:

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[43] 52 O.S.§87.4

[44] Crater v. Wallace, 1943 OK 250, ¶15-16, 140 P.2d 1018, 1020 (holding that an affidavit filed without statutory authority making its contents constructive notice is not constructive notice); other existing statutes have, since 1985, allowed the filing of informational affidavits to give constructive notice of certain matters, but such permitted content does not include these kinds of changes in mineral title, 16 O.S. §§ 82-83; Oklahoma Examination Title Standard 3.2: Affidavits and Recitals.

[45] 52 O.S.§87

> *Further,…, no spacing or pooling orders were filed in the Hughes County records to put the Plaintiffs on constructive notice of the existence or extent of any of the units where the wells that the Plaintiffs worked on were located.*
>
> *Accordingly, the Court must conclude, based on the lack of any demonstrated link between the Exhibit A leases and the wells the Plaintiffs worked on, that the Plaintiffs are not charged with constructive knowledge of the contents of Union Bank's mortgage, including the blanket grant of security interests, simply because of the appearance of the Oklahoma Mortgage in the chain of title for the Exhibit A leases.*[46] *(Emphasis added)*

The third question could be answered in the affirmative: *Yes, such orders (judgments) would probably give constructive notice, if such orders (judgments) were filed of record in the county land records.*

Conclusion

There appears to be a hybrid and possibly inconsistent system for giving constructive notice of Instruments affecting real property or an interest therein, including both surface and mineral titles.

An effort should be made to analyze the existing statutes on constructive notice, the recording acts, the MRTA, the Abstractors Act, and the OCC statutes to determine (1) are there inconsistencies, (2) should such inconsistencies be corrected, and (3) should such hybrid dual system be continued for railroad and utility mortgages, and OCC spacing and pooling orders?

[46] In re Cornerstone E & P Company, 436 B.R. 830, 852 (2010), N.D. Texas, Dallas Division.