Oklahoma's Marketable Record Title Act

An Argument for Its Application to Chains of Title to Severed Minerals after *Rocket Oil and Gas Co. v. Donabar*

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LIMITING USE OF THE MRTA TO FEE SIMPLE AND SURFACE INTERESTS

The purpose of this article is to explore the applicability of the 30-year presumption of "marketable record title" arising under the Oklahoma Marketable Record Title Act ("MRTA" or "act") when examining the chain of title to severed minerals.[1] The application of the MRTA extinguishes title defects and lien claims which occur prior to the root of title. The opportunity to explore this idea has arisen due to the holding in a fairly recent mineral title related opinion rendered by the Oklahoma Court of Civil Appeals in *Rocket Oil and Gas Co. v. Donabar*, 2005 OK CIV APP 111, 127 P.3d 625 (mandate issued Dec. 23, 2005).

The general understanding among examining attorneys and other mineral title professionals has been that when someone is examining title to a fee simple title (which means it includes both surface and mineral interests) or to a surface title only, the examiner may properly rely upon the MRTA to extinguish substantially all of the title gaps, title defects and liens which pre-date the 30-year old "root of title" (aka the "root"). The root can be either a conveyance, including a deed, or a judicial ruling, including a probate decree, quiet title judgment or divorce decree, and its recordation must precede the date of determination of title (i.e., the date of title examination) by at least 30 years; hence the informal reference to the MRTA as the "30-year Act." The examiner is given the ability to first identify the root and then to scan the documents recorded prior to the root in sufficient detail to identify and to consider those specific instruments and interests which survive the cleansing effect of the MRTA. Such process can both dramatically speed up the title examination process, by reducing the number of documents requiring detailed study, and can significantly decrease the number of title curative actions required to secure marketable or defensible title.[2]

However, the general understanding and practice in Oklahoma, up to now, has been that once a mineral interest is severed from the fee simple title — by a mineral deed, or other similar title conveyance, or a court proceeding transferring only the mineral interest — the ability no longer exists to utilize the benefits of the MRTA to review the now-separate, but mineral-only, chain of title.

This position — disallowing the use of the MRTA in examining a severed mineral chain of title — is based solely upon the long standing interpretation of certain language found in the MRTA by practitioners. Such interpretation is not based on a court case or attorney general opinion, but solely on the general practice in the mineral and title industries in the state. The MRTA contains 10 Sections (16 O.S. §§71-80), including several provisions — discussed below — which refer directly or indirectly to minerals.

While the defendants in the *Rocket* case did not expressly argue that the MRTA does not apply to severed minerals, the appellate court itself stated (¶21): *"the precise issue to be decided on appeal is whether Plaintiffs have 'marketable record title' to the minerals sufficient to extinguish Defendant's mineral interest."* Hence, the appellate court is acting as though the MRTA does apply to severed minerals, and, as will be made clear below, the appellate court never deviates from that assumption.

TITLE EXAMINATION PROCESS USING THE MRTA

A general review of the operation of the act is necessary in order to understand the issues surrounding the critical question as to whether the benefits of the act are available to the title examiner who is considering a severed mineral chain of title.[3]

A quick summary of the usual title examination process, implementing the terms of the act, is as follows:

1) **Abstracting:** A compilation is made of copies of the documents filed of record in the public land records (i.e., county clerk and court clerks' offices[4]) of the local county where the land is located. It is in the form of either a formal abstract of title or an informal collection of the same documents, including only those conveyances or decrees which constitute constructive notice of the documents' contents.[5] Such collection is usually placed in chronological order for the convenience of the review by the examiner, with the earliest instrument at the front.

2) **Examination:** The title examiner reviews such documents, with most examiners starting with the first instrument, usually the government patent.[6] The examiner makes notes of the sequence of owners (evidenced through a series of deeds and decrees) and the existence of outstanding/unreleased liens (e.g., mortgages and tax liens) and encumbrances (e.g., easements and use restrictions).

3) **Chaining Title:** A review of the owners should disclose a connected (i.e., unbroken) sequence of grantees acquiring title from a grantor who previously received title as a grantee from a prior grantor, going back eventually all the way to the initial conveyance which is from the federal government or an Indian tribe. This is referred to as going all the way back to sovereignty (i.e., getting the title out of the government).

4) **Curing Gaps:** If there are any gaps in the sequence of deeds or decrees connecting one grantor to the next grantor, or if a document has a substantive defect making it invalid, such omission or defect is noted and a requirement is made to cure such skip or defect in the chain of title. The usual requirement is either to secure a conveyance from the potential claimant or, if that option proves fruitless, to conduct a lawsuit (e.g., probate decree or quiet title suit based on adverse possession) to establish or to confirm that title is in fact held by the purported owner.

5) **Noting Liens/Encumbrances:** In addition, the examiner will note any unreleased or unexpired liens (e.g., mortgages, tax liens, judgment liens, etc.), and any easements, restrictions and leases which encumber the land.

6) **Curing Liens/Encumbrances:** Such unreleased claims will be reviewed to determine whether such liens threaten to extinguish (e.g., through a foreclosure sale) the owner's interest, or to unreasonably limit the proposed buyer's planned use and possession (e.g., a blanket pipeline easement) and hinder the subsequent reconveyance of the land. If such outstanding claims repre-

sent an unacceptable impediment, then a requirement is made to secure the release or extinguishment of such interest.

7) **Multiple Gaps and Liens/Encumbrances:** As one can imagine, if such a title review covers an extended period of time, such as 50 to 100 years, there may be many gaps or liens/encumbrances to consider and resolve. Some of the existing gaps and liens/encumbrances may be due to the parties' failure to record signed conveyances or releases, or their making of simple mistakes in drafting, or their failure to take actions such as conducting necessary probates; there also may be nearly insurmountable obstacles to securing a corrective or disclaiming deed, such as the inability to secure the cooperation of claimants who are dead, unresponsive or impossible to find.

8) **Expense and Time to Cure:** The effort to remedy all of these problems can sometimes be not only time consuming and expensive, but might either require efforts and expenses which exceed the value of the interest at stake, or cause substantial consequential damages due to the delay in proceeding with a planned transaction (e.g., a sale or loan) or a project (e.g., drilling a well or building a subdivision). Clearly, it would be useful if there was an authoritative tool to use to reduce the numbers of defects and liens which require curative action.

9) **MRTA Application:** Under the provisions of this act, the examiner can a) go back in time 30 years from the date of the examination (i.e., the date of determination of the status of title), b) identify the first conveyance or decree which has been recorded for at least 30 years, known thereafter as the "root of title" or the "root", c) briefly scan the documents pre-dating such root to identify those documents which survive the cleansing impact of the act, such as plat restrictions and easements[7] and d) make any requirements needed to correct or release both the post-root title defects and liens/encumbrances, and any surviving pre-root title defects and liens/encumbrances.

10) **Benefit of MRTA:** The impact of the act is to extinguish many, if not all, pre-root claims, thereby resulting in the elimination of the need to require and undertake numerous curative actions, such as securing corrective deeds, determining heirs and conducting quiet title lawsuits.[8] So, what is a severed mineral interest and why would the MRTA not apply, making it possible to eliminate the need to make numerous curative requirements in those chains of title dealing solely with a severed mineral chain of title? A fee simple title includes the title to 1) the surface, 2) the space above, and 3) the ground below including minerals.[9] These components of the fee simple title can remain together perpetually, or they can be severed to separate the minerals from the rest of the fee simple.[10] This remaining (non-mineral interest) is sometimes referred to as the "surface" interest or "surface" estate. Due to the air rights and certain non-mineral constituents of the ground which often remain with the non-mineral interest (e.g., water), it is more accurate to refer to such interest as the "fee simple less the minerals". Technically, the term "surface estate" is ambiguous.[11] However, for convenience, such non-mineral interest shall be referred to herein as the surface interest. Such severance occurs when there is a conveyance such as a mineral deed, or a decree such as a probate decree covering only the minerals.

> "A contract for the sale of land or an interest therein will usually expressly or by implication require the seller to provide 'marketable title' to the buyer."

As will be discussed below, a review of the language of the MRTA discloses a possible ambiguity as to whether the act provides its benefits solely to holders of fee simple and surface interests, and not to owners under separate mineral chains of title.

A contract for the sale of land or an interest therein will usually expressly or by implication require the seller to provide "marketable title" to the buyer.[12]

When a producer of minerals withholds the proceeds from its sale of minerals from the mineral owner/lessor, state statutes impose a 6 percent per annum penalty for such delay in payment, with the amount of penalty being doubled to 12 percent if the title is in fact "marketable." The definition of marketable title, which is to be used in dealing with such mineral title, is to be found in the Oklahoma Title Examination Standards.[13]

According to the Oklahoma Title Examination Standards, Section 1.1:

> *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**.*

Or, as stated in 16 O.S.§78(a) of the MRTA:

> ***"Marketable record title" means a title of record as indicated in Section 71 of this title**, which operates to extinguish such interests and claims, existing prior to the effective date of the root of title, as are stated in Section 73 of this title.*

So the title examiner has two options: 1), ignore the MRTA; review the record chain of title all the way back to sovereignty; and set up any identified defects and liens/encumbrances (no matter how old) to be corrected (unless extinguished by another curative act), or (2) apply the MRTA (and other applicable curative acts[14]); review all documents in the record chain of title from the current date back to the root; and, thereafter, only review those "pre-root" documents, which are expressly unextinguished by the provisions of the act, back to sovereignty, and set up any identified defects or liens/encumbrances (being reduced in number by the application of the MRTA) with requirements to be cured.[15] The MRTA is powerful in part because it is a statute of repose, rather than a statute of limitation.[16]

DOES THE MRTA APPLY TO SEVERED MINERAL CHAINS?

So, what constitutes a "marketable record title" under the MRTA and, consequently, when does the Act apply? 16 O.S.§71 (referred to above) provides:

> ***Any person** having the legal capacity to own land in this state, **who has an unbroken chain of title of record to any interest in land for thirty (30) years or more, shall be deemed to have a marketable record title to such interest** as defined in Section 78 of this title, subject only to the matters stated in Section 72 of this title. A person shall be deemed to have such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than thirty (30) years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest, either in*
>
> *(a) the person claiming such interest, or*
>
> *(b) some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest; with nothing appearing of record, in either case, purporting to divest such claimant[17] of such purported interest.*

Consequently, the act appears to apply to "any interest in land," and is not expressly limited to just a fee simple interest (which would require that both surface and mineral interests were currently together) or to a surface interest (i.e., fee simple less minerals), but more widely impacts "any interest in land."

By statute, the terms land, real estate and premises are synonymous.[18] It has been held by Oklahoma's Supreme Court that a lessee's interest arising from a mineral lease is not "real property", but is an "interest in real property".[19] While it is appropriate to look outside an act to seek the definition of terms used in the act (e.g., "any interest in land") or to identify any limitations on its application (e.g., does not cover severed mineral titles), the first step to take is to see whether the act itself provides such direct or implied definitions or limitations.

What is the stated purpose of the act? According to 16 O.S.§80:

> *This act shall be liberally construed to effect the legislative purpose of simplifying and facilitating **land title transactions** by allowing persons to rely on a record chain of title as described in Section 1 [§71] of this act, subject only to such limitations as appear in Section 2 [§72] of this act.*

What are the "land title transactions" which are being referred to? Under 16 O.S.§ 78(f):

> *'**Title transaction' means any transaction affecting the title to any interest in land, including title by** will or descent, title by tax deed, **mineral deed**, lease or reservation, or by*

trustee's, referee's, guardian's, executor's, administrator's, master in chancery's, sheriff's or marshal's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage.

So far, our analysis shows that the act is expressly intended to cover "any transaction affecting the title to any interest in land, including title by…mineral deed."

So why do examiners regularly fail to apply this act to severed mineral titles? There is language in the act which provides at 16 O.S.§72:

Such marketable record title shall be subject to:

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(e) The exceptions stated in Section 76 of this *title as to rights of reversioners in leases,* ***as to severed mineral or royalty interests,*** *as to easements and interests in the nature of easements, and rights granted, reserved or excepted by instruments creating such easements or interests, or restrictions or agreements which are part of a subdivision development plan, and as to interests of the United States.*

What does such exceptions language from Section 76 provide in regard to minerals? Part a) from Section 76 provides in pertinent part:

Sections 71 through 80 of this title shall not be applied… to bar or extinguish any mineral or royalty interest which has been severed from the fee simple title of the land;…

This language from Section 76 could be applied in the following two completely different ways, in regard to severed mineral titles:

Option 1: Avoid Re-Combining Separate Surface and Mineral Titles: Once a fee simple title has had the minerals severed from it, thereafter, a deed or other conveyance from such surface owner to a grantee should include language expressly excluding the minerals. If such later conveyance fails to except out the previously severed minerals, it should not be interpreted under the MRTA to constitute a root as to both the surface and the severed minerals (together); this is because if such incorrect (i.e., overconveyancing) deed was treated as a root for both the surface and the mineral interest (together), the minerals would become owned by the surface owner (or his successors), under the MRTA after 30 years, assuming the mineral owner failed to file some document disputing such error in the interim.[20]

Some version of the MRTA was initially adopted by several states and then a uniform version was created as an amalgamation of such earlier versions. Thereafter, once a Uniform MRTA was created, each state either adopted this uniform version "as is" with no changes, or adopted it in a modified form to accommodate what were perceived as unique local issues.[21]

Oklahoma modified the Uniform MRTA, before enacting it, to protect the mineral industry from the possible forfeiture of mineral interests which would occur under the terms of the unmodified version of the act. This interpretation of Oklahoma's version of the act, as enacted, to protect against such forfeiture of minerals (i.e., preventing a merger back into the surface title) is logical, due to its express modifications embodied in Section 76 (quoted above).

Option 2: Avoid Applying Act to Severed Mineral Chains: The current industry interpretation of the act goes beyond protecting against forfeiture of severed minerals back to the surface owner. The act was expressly adopted in Oklahoma for the purpose of: "*simplifying and facilitating land title transactions*" (§80), where: "'*Title transaction' means any transaction affecting the title to any interest in land,* ***including title by…mineral deed****…*" (§78(f)) However, the exceptions language of §§72 and 76 (quoted above) causes examiners to summarily conclude that the act does not aid in the independent review of a mineral chain of title which has been previously severed from the fee simple. If the act could be applied to such severed mineral chains, then the examination of such chains would take less time and there would probably be fewer curative requirements. At a minimum, when the mineral lessee would normally make a business-risk decision to waive some or all of such pre-root-related requirements at the leasing or drilling stage, the problems will in fact be extinguished and can be ignored on a legal basis, using the MRTA, reducing concerns when it is time to produce a division order opinion.

In the absence of a court case or attorney general opinion holding otherwise, this conservative interpretation of the MRTA will continue to withhold the act's benefits to a significant industry in the state.

Are there any cases or attorney general opinions in Oklahoma either supporting or disput-

ing this conservative approach? There have been no attorney general opinions on point, and the reported cases which discuss the MRTA have not, up to this point, considered this particular issue.[22]

HOLDING IN THE *ROCKET* CASE

However, in 2005 the Oklahoma Court of Civil Appeals issued an opinion which appears to directly apply the benefits of the MRTA to a severed mineral chain of title.

In *Rocket Oil and Gas Co. v. Donabar*, 2005 OK CIV APP 111, 127 P.3d 625, the appellate court affirmed the trial court's holding that quieted title against a defendant, with both courts relying on a **mineral deed** as the root of title. Such defendant claimed in a lawsuit filed in 2001 to be the holder of a fee simple interest (including both surface and mineral interests) based on a 1971 deed which followed a deed to his predecessor in title covering a fee simple which was first effective in 1924[23]. No other deeds involving the defendant's chain appeared in the records between 1924 and 1971. The plaintiff sought to quiet title against the defendant's claim arising under the 1971 deed, arguing that the defendant's 1971 deed came from a grantor whose claim of interest under the 1924 fee simple deed was already extinguished by the MRTA by 1971. The plaintiff was relying on a 1929 mineral deed as his root of title, to extinguish the defendant's claim under the earlier 1924 deed.[24]

Upon analysis of both versions of the MRTA (i.e., 30-year and 40-year versions), the appellate court looked at several possible roots, and concluded (applying the 40-year version) that the plaintiff's 1929 **mineral deed** was the root of title and that the application of the MRTA fully extinguished in 1969 (i.e., 1929 plus 40 equals 1969) the defendant's claim to a fee simple interest (including the minerals) under a 1924 deed. Such extinguishment was deemed to have occurred before the defendant filed his 1971 deed.[25]

It appears that, with the issuance of the holding in the *Rocket* case, we now have an Oklahoma appellate case on point (at least persuasive, although not precedential in weight[26]), which applies the provisions of the MRTA to extinguish a claim to the mineral portion of a fee simple interest (covering both mineral and surface interests in a 1924 deed) which predates the root of title (i.e., the plaintiffs' 1929 mineral deed) for a competing severed mineral chain of title. As noted above, the appeals court stated in the *Rocket* case (¶21): "*the precise issue to be decided on appeal is whether Plaintiffs have 'marketable record title' to the minerals sufficient to extinguish Defendant's mineral interest.*"

Consequently, the *Rocket* case gives support to an argument in favor of the application of the MRTA to extinguish pre-root gaps in title or liens/encumbrances relating to a severed mineral chain of title. While we will still need to look for a precedential case on point from the Oklahoma Supreme Court, this holding by the Court of Civil Appeals in the *Rocket* case supports an argument in favor of altering the industry's previous interpretation.

If followed, this new development — leaning towards application of the act to severed mineral title chains — would provide substantial benefits to the mineral industry by speeding up and simplifying the examination process, and eliminating substantial numbers of curative requirements.

Note: The author expresses appreciation for comments made on a draft of this article by several attorneys including Scott McEachin and others.

1. 16 O.S. §§71-80

2. As stated by Donald A. Pray in "Title Standards and Marketable Title," 38 OBJ 611 (1967): "According to Professor Lewis Simes of the University of Michigan, the Marketable Title Act is neither a statute of limitations nor a curative act. In his opinion, it is a 'unique enactment of the Legislature.' Instead of interests being cut off because of a claimant's failure to sue, as would be the case if a statute of limitations were involved, the claimant's interest is extinguished because he failed to file a notice. The Marketable Title Act imposes upon an owner a burden of recording which was imposed when the recording acts were first passed. The essence of the Marketable Title Act is simply this. If a person has a record chain of title for 40 years, and no one else has filed a notice of claim to the property during the 40-year period, then all conflicting claims based upon any title transaction prior to the 40-year period are extinguished."

Also, see the articles entitled: "Oil and Gas Title Examination Basic Terms" by Kraettli Q. Epperson (Paper#232), "Marketable Title: What Is It and Why Should Mineral Title Examiners Care?" by Kraettli Q. Epperson (Paper#194), and "'Defensible Title' When Examining Oil and Gas Interests: An Overview of the Law in Oklahoma" by Kraettli Q. Epperson (Paper#222), all available online at www.eppersonlaw.com.

3. It should be noted that the holding in the *Rocket* case expressly decided, for the first time, that the MRTA is constitutional (¶'s 49-58)

4. 16 O.S.§78(b) (Public records under the MRTA).

5. See the abstracting and notice statutes at 1 O.S.§ 21(1) (Contents of abstract); 25 O.S. §§10, 12 (Actual and constructive notice defined); 12 O.S.§181 (Recording property judgment as notice); 16 O.S.§§15, 16 (Recording conveyance as notice to third parties); and 46 O.S.§§6, 7 (Recording mortgage as notice to third parties); and see the articles entitled: "Have Judgment Lien Creditors Become 'Bona Fide Purchasers'?" by Kraettli Q. Epperson, 68 *Oklahoma Bar Journal* 1071 (March 29, 1997), (Paper#106), available online at www.eppersonlaw.com.

6. I prefer to start at the back of the abstract and examine towards the beginning, in order to promptly identify the root and spend less time examining the pre-root documents, because the possible interests arising from many of them are eliminated by the cleansing impact of the MRTA.

7. See *Rocket* ¶16; 16 O.S. §73 provides: "Subject to matters stated in Section 2 hereof, such marketable record title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims or charges whatsoever, the existence of

which depends upon any act, transaction, event or omission that occurred prior to the effective date of the root of title. All such interests, claims or charges, however denominated, whether legal or equitable, present or future, whether such interests, claims or charges are asserted by a person sui juris or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.";16 O.S.§72 provides: Such marketable record title shall be subject to: …

(e) The exceptions stated in Section 76 of this title as to rights of **reversioners in leases**, as to **severed mineral or royalty interests,** as to **easements** and interests in the nature of easements, and rights granted, reserved or excepted by instruments creating such easements or interests, or **restrictions or agreements which are part of a subdivision development plan**, and as to **interests of the United States**."

8. *Rocket* at ¶19 states: "The 30-year MRTA was summarized by the Court in *Mobbs v. City of Lehigh*, 1982 OK 149, ¶8, 655 P.2d 547, 550, as follows: The act is based upon the principle that when one has clear record title for at least thirty years, all interests recorded prior to this period should be cut off unless preserved by filing a proper notice. To effectuate this principle the Act focuses upon the concepts of 'root of title' and 'marketable record title.'" (Emphasis added; footnotes omitted.)

9. 16 O.S.§29 states: "Every estate in land which shall be granted, conveyed or demised by deed or will shall be deemed an estate in fee simple and of inheritance, unless limited by express words."; 60 O.S.§64 provides: "The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it."

10. See the article entitled: "Oil and Gas Title Examination Basic Terms" by Kraettli Q. Epperson (Paper#232), available online at www.eppersonlaw.com.

11. According to the holding in *Blythe v. Hines*, 1977 OK 228: "We conclude that under the facts in this case the grant of the "surface estate" with no reservation of minerals, oil and gas or any previous conveyance affecting any portion of the fee simple title was ambiguous."

12. According to *Am Jur* 2d: "**An agreement to sell and convey land is in legal effect an agreement to sell a title to the land, and in the absence of any provision in the contract indicating the character of the title provided for, the law implies an undertaking of the part of the vendor to make and convey a good or marketable title to the purchaser.** A contract to sell and convey real estate ordinarily requires a conveyance of the fee simple free and clear of all liens and encumbrances. There is authority that the right to the vendee under an executory contract to a good title is a right given by law rather than one growing out of the agreement of the parties, and that he may insist on having a good title, not because it is stipulated for by the agreement, but on his general right to require it. In this respect, the terms "good title," "marketable title," and "perfect title" are regarded as synonymous and indicative of the same character of title. To constitute such a title, its validity must be clear. There can be no reasonable doubt as to any fact or point of law upon which its validity depends. **As is sometimes said, a marketable title must be one which can be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence**." (emphasis added) (77 *Am Jur* 2d §115 Title of Vendor: Generally; Obligation to furnish good or marketable title).

13. 52 O.S.§570.10 declares: "Marketability of title shall be determined in accordance with the then current title examination standards of the Oklahoma Bar Association."

14. Such curative statutes include, among others: 16 O.S.§4(D) (absence of marital status cured after 10 years); 16 O.S.§ 27a (absence of acknowledgment cured after 5 years); and 16 O.S.§§29.1 to 29.6 (Simplification of Land Titles Act: cures defects in various court proceedings and conveyances after 10 years)

15. As stated by Donald A. Pray in "Title Standards and Marketable Title," 38 *OBJ* 611 (1967), pg. 614, "All other interests prior to the 40-year period are extinguished such as ancient mortgages, titles by adverse possession, interests which are equitable as well as legal and future as well as present. Possibilities of reverter and rights of re-entry will also be extinguished under the act."

16. See footnote 2 ; also see: *Bennett v. Whitehouse*, 690 F. Supp. 955 (W.D. Okla.1988) (MRTA is constitutional and self-executing); the Oklahoma Supreme Court held in *Mobbs v. City of Lehigh*, 1982 OK 149, 655 P.2d 547 that the Marketable Record Title Act was not a statute of limitations; the court said that, unlike a statute of limitations which barred the remedy, the Marketable Record Title Act had as its target the right itself; see *Allen v. Farmers Union Co-operative Royalty Co.*, 1975 OK 102, 538 P.2d 204, which applies the exceptions expressed in the MRTA's terms to defeat an attempt by the holder of a severed mineral interest to expand its ownership of oil, gas and other minerals to include metallic ores.

17. 16 O.S.§71 uses the term "*purporting to divest such claimant of such purported interest…*"; such term reflects the fact that once the holder of title, holding under the chain flowing from the Root of Title, conveys away his interest to a subsequent grantee, he cannot continue to claim to hold such interest, because such conveyance "divests" the owner of such interest.

18. 16 O.S.§14: "The words "land," "real estate" and "premises" when used herein or in any instrument relating to real property, are synonyms and shall be deemed to mean the same thing, and unless otherwise qualified, to include lands, tenements and hereditaments; and the word "appurtenances" unless otherwise qualified shall mean all improvements and every right of whatever character pertaining to the premises described."

19. *First Nat. Bank v. Dunlap*, 1927 OK 67 (Judgment lien does not attach to a lessee's oil and gas interest which is only an "interest in real estate").

20. Some states have a lapse statute causing severed undeveloped mineral titles to merge back into the surface title, after the minerals remain undeveloped for a certain period of time. Oklahoma does not have such a statute; however, as explained in the *Rocket* case, at ¶'s 49-58, lapse statutes in general are constitutional, based on a U.S. Supreme Court case (*Texaco, Inc. v. Short*, 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 738 (1982)), and, by analogy, the Oklahoma MRTA is also constitutional.

21. John F. Hicks, V.9 No.1 *Tulsa Law Journal* 68 (pg. 71-72) stated: "Throughout the twentieth century there have been attempts to solve the problems inherent in the American Conveyancing system. One of the most successful approaches has been through marketable record title legislation. In 1919, Iowa adopted a rudimentary marketable record title act that barred all actions based upon any claim arising or existing prior to January 1, 1900, unless notice of the claim was filed before July 4, 1920. The date of the bar or recording requirement has been advanced periodically. The innovation of the act is that it went beyond the conventional statutes of limitation in applying to claims that were not presently actionable, to future interest as well as present interests, to contingent interests as well as vested interests, and to persons under disabilities as well as those of full capacity. The act was comprehensive in its approach to eliminating defects and stale claims in a title."

"In 1945, Michigan adopted a prototype of the current Model Marketable Record Title Act. Its features are similar to the Model Act, upon which the Oklahoma Act is based. Lewis Simes and Clarence Taylor of the University of Michigan Law School used the Michigan Act as the basis for a joint project with the Section of Real Property, Probate and Trust Law of the American Bar Association and the University of Michigan Law School, which resulted in the publication of the Model Marketable Record Title Act. The Model Act provides that outstanding interests and defects that are not found within the recent history of the chain of title in question are extinguished as a matter of law. The Model Act is comprehensive in its approach to eliminating stale claims and defects in a title in the same way as is the Iowa Act discussed earlier. A total of fifteen states have now adopted some type of marketable record title legislation. Some of the acts are similar to the original Iowa Act in that they impliedly extinguish old outstanding interests and defects by barring any remedial action on the claims. A majority of states adopting this type of legislation have used the framework found in the Model Act which expressly extinguishes certain outstanding interests and defects. The Oklahoma Act, adopted in 1963 and amended in 1970, is substantially similar to the Model Act."

22. Such as *Mobbs v. City of Lehigh*, 1982 OK 149, 655 P.2d 547, *supra;* and *Anderson v. Pickerering*, 1975 OK CIV APP 42, ¶16, 541 P.2d 1361, holding: "The Merchantable Title Act provides a method through which title may be quieted statutorily. It is not self-executing, nor does it provide a perfect remedy for every instance." But see: *Bennett v. Whitehouse*, 690 F. Supp. 955 (W.D. Okla.1988) (MRTA is constitutional and self-executing); see footnote 20 re: constitutionality of the MRTA.

23. See *Rocket* ¶'s 39-41; the facts disclosed in the opinion showed that there was a 1922 deed covering the fee simple interest, but that the grantor thereon did not acquire the stated interest until 1924; consequently, through the doctrine of after acquired title the 1922 deed was first effective in 1924; see 16 O.S.§17 (after acquired title); see *Rocket* ¶'s 3-5, 13-18, and 23.

24. The 30-year version of the MRTA was preceded by a 40-year version, which 40-year version was determined to be the applicable version of the act.

25. See footnote 23; the defendants' 1971 deed could have served as a notice of interest under the MRTA to keep an earlier interest alive (i.e., the 1924 deed), but it would be an effective notice if and only if it had been filed **before the earlier interest (under the 1924 deed), that it is trying to preserve, was already extinguished** (in 1969) by the effect of the MRTA; 16 O.S.§74(a) provides, in part: "Any person claiming an interest in land may preserve and keep effective such interest by filing for record **during the thirty-year period immediately following the effective date of the root of title** of the person whose record title

would otherwise be marketable, a notice in writing, duly verified by oath, setting forth the nature of the claim."

16 O.S.§72 provides: "Such marketable record title shall be subject to: … (d) Any interest relating to a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title of record is started; provided, however, that such recording shall not revive or give validity to any interest which has been extinguished prior to the time of the recording by the operation of Section73 of this title."

26. *National Cowboy Hall of Fame and Western Heritage Center v. State of Oklahoma Ex Rel. The Oklahoma Human Rights Commission*, 1978 OK 76, ¶11, 579 P.2d 1276, 1279.

27. It must be recognized that application of the MRTA to severed minerals will bring some difficult issues for practitioners and the courts to consider. Such issues include 1) whether the MRTA can be of practical use with fragmented mineral titles as found in most Oklahoma titles; 2) whether the MRTA would be applied if the bundle of rights that make up mineral interests is unbundled in some manner; 3) whether the MRTA will be applied to oil and gas leasehold titles; 4) whether the rules of possession and adverse possession of severed minerals and oil and gas leaseholds are compatible with the MRTA and the legislative intent of such act; 5) whether the MRTA can be utilized if the minerals severed go beyond the usual oil, gas and other hydrocarbons and separate chains of title are created for different minerals like coal, gold, silver, uranium, et al.; and 6) whether this new expanded application of the act was the actual intent of the Legislature. Application of the MRTA to severed minerals may require the oil and gas industry to review its business risk approach to at least some title issues.

ABOUT THE AUTHOR

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