Does the Marketable Record Title Act Apply to Severed Mineral Interests?

Why I believe the Oklahoma MRTA does—not should—**does** apply to the **perfection** of a severed mineral interest as well as to the **protection** of a severed mineral interest.

I believe this is an important topic. Therefore, I am pleased to have the opportunity to participate with Lucas J. Munson by conducting the Tulsa session of the 2013 Cleverdon Seminar on this topic. The applicability of the Marketable Record Title Act ("MRTA") to severed mineral interests seems to be a question which has unduly vexed Oklahoma title examiners for many years. Examiners have always desired to use the curative and simplification features of the MRTA in connection with severed mineral interests. However, it has always been analogous to an article of faith that: “the MRTA does not apply to severed mineral interests.” Kraettli Epperson, in his excellent article published in 2011 refers to this belief as a “general understanding:”

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, other similar title conveyance or 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 Cleverdon Seminar is another opportunity to challenge this general understanding/article of faith. If the decision of the Oklahoma Court of Civil Appeals in Rocket Oil and Gas Co. v. Donabar, 2005 OK CIV APP 111, can serve as a turning point in changing the general understanding, then I believe that examiners can be made to feel comfortable in using a useful tool in the facilitation and simplification of mineral land titles in Oklahoma. Therefore, the purpose of these materials is to set out the basis on which use of the MRTA in connection with severed mineral interests can be justified and sustained. In fact, I’m going to rely on Kraettli Epperson’s and Lucas Munson’s scholarship and simply indulge in a piece of advocacy for the proposition that the MRTA applies to severed mineral interests.

I. The language of the MRTA does not prohibit its use in connection with severed minerals:

With my purpose fully disclosed, let’s look at the provisions of the MRTA which support my position; and, more importantly, let’s explain those provisions that do **not** destroy the premise.

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1 The Marketable Record Title Act is codified as Title 16 O.S. (2011) §§71 through 80

2 “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” by Kraettli Q. Epperson, 82 Oklahoma Bar Journal 2 (March 12, 2011)
Most of us are familiar with the provisions of Title 16 O. S. §71, the section of the Act which sets forth the 30-year root. Since this is such a basic and elementary part of the MRTA, I will mention only in passing that §71 does incorporate the §72 exceptions. Stated most directly, §71 creates a marketable title to “any interest in land” in the last owner in the “unbroken chain of title of record,” “subject only to the matters stated in §72.”

What then are these “matters.” Although §72 incorporates by reference Title 16 O. S. §76, the “matters” are set out in full in §72. They are:

1. Rights of reversioners in leases;
2. **Severed mineral or royalty interests;**
3. Easements and interests in the nature of easements and rights granted, reserved or excepted by instruments creating such easements or interests;
4. Restrictions or agreements which are part of a subdivision development plan; and,
5. Interests of the United States

It is the item numbered “2” which is most often referred to in the general understanding/article of faith that the MRTA doesn’t apply to severed mineral interests. However, I am arguing that this phrase is taken out of context when used to bolster the general understanding/article of faith. Any of us who have examined some number of oil and gas titles, and those who are being mentored or are learning to examine oil and gas titles, have developed, or are developing, a sense that severed mineral chains are a world unto themselves. If we conduct a self-examination of our methods, when an undivided one-half interest in the oil, gas and other minerals in and under a tract of land is severed from the rest of the estate, in the mind of the examiner, this becomes as separate an interest as if the tract of land was divided into two tracts of equal size. We separate out those conveyances which relate only to the grantee of that severed mineral interest and chain the grantee’s “interest in land” as it becomes transferred, divided into smaller fractional interests, is conveyed and inherited. Therefore, in the context of examination, the “subject to matters” set out in §72 are intuitive; it is obvious that failure to continue to refer to the previously severed mineral interests in subsequent surface estate documents is not going to result in such interest being recombined with the surface estate.

II. The Decision of the Oklahoma Supreme Court in Wood v. Sympson **1992 OK 90** does not hold that the MRTA does not apply to severed mineral interests

Here again, language taken out of context (or perhaps, more correctly, some poorly chosen language) is interpreted to support the general understanding/article of faith. Here is the language:

**C. OKLAHOMA MARKETABLE RECORD TITLE ACT**

¶31 Appellants next claim the Oklahoma Marketable Record Title Act, **16 O.S. 1981 § 71** et seq. may be utilized to bar Sympson's claim. The argument is without merit. Section 76 of said Act expressly provides, “[t]his act shall not be applied . . . to bar or extinguish any mineral or royalty interest which has been severed from the fee simple
title to the land. . ." The interest involved here, is a severed mineral interest. The provisions of this latter Act do not, therefore, apply.

In context, the “Appellants” are the owners of the surface, or fee simple, estate who are trying to use the MRTA to recombine or “bar” the interest claimed by Sympson, who owns a severed mineral interest. The rest of the paragraph, in context, is elementary MRTA interpretation, i.e. recital of the Title 16 O. S. §72/Title 16 O. S. §76A exceptions (they cross-reference and are identical); that Sympson is a severed mineral interest owner; therefore, the provisions of the MRTA cannot be used to bar or extinguish Sympson’s severed mineral interest. I should explain my characterization of the wording of the opinion as poorly chosen. Let’s isolate only the last two sentences of the quoted paragraph:

The interest involved here, is a severed mineral interest. The provisions of this latter Act do not, therefore, apply.

Reading only the last two sentences, one could misconstrue the Court’s holding to be:

1. If a severed mineral interest is claimed,
2. Then the provisions of the MRTA do not apply.

However, I want to emphasize just exactly what the context was in Wood v. Sympson. James O. Wood, et al (“Appellants”) had brought suit against Sympson to quiet title against Sympson’s severed mineral interest. The surface, or fee simple, owners were trying to use the MRTA to extinguish a severed mineral interest and recombine it with the surface interest. The facts of the case may seem a bit more complex due to the fact that the interest of Sympson’s predecessor in title was established by the doctrine of after-acquired title. However, the Court clearly found that the severed mineral interest was properly vested in Sympson’s predecessor, and, subsequently, in Sympson, by a proper application of this doctrine.

Sympson was not asserting that the MRTA established his interest; he was asserting that the MRTA protected his interest. This is a crucial distinction in the context of the wording used by the Court. The Court’s decision applied the MRTA’s provisions literally; i.e. §72 and §76A provide specific exceptions (technically matters to which the surface interests are subject) to provide exactly the protection extended to Sympson’s interest by the Court. The argument which was “without merit” was the argument asserted by the Wood group. The Court properly applied §§72 and 76A to protect Sympson’s interest. I would respectfully submit that what the Court meant was: “The provisions of this latter Act [MRTA] do not, therefore, apply” to extinguish Sympson’s interest and vest it instead in Appellants. The inclusion of the italicized phrase, which I have added, would have made clearer what the Court actually held.

Therefore, in conclusion on this point, let me attempt to be as clear as possible. The heading of this section does use a double negative. So, stated positively, the decision of the Oklahoma Supreme Court in Wood v. Sympson properly applies the MRTA to protect a severed mineral interest.
III Talking points for the applicability of the MRTA to severed mineral interests

In light of the fact that we are challenging a deeply held general understanding; even more so, a deeply held article of faith to some title examiners, what do we say if one of our peers looks at us as an apostate or, even worse, a title heretic? We don’t want our reputations burned at the stake, so to speak. Here is a talking points outline for the applicability of the Act to severed mineral interests:

The executive summary:

1. The Act, by its own terms, applies to severed minerals
   a. A severed mineral interest is an interest in real property which can be created by grant or reservation; and,
   b. Either a mineral deed or a reservation is a “title transaction” pursuant to the provisions of Title 16 O. S. §78(f).
   c. "Root of title" means that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title... Title 16 O.S. §78(e)

2. Therefore, if the interest claimed by a person is a severed mineral interest and there exists a title transaction, recorded for 30 years, which constitutes a root of title in compliance with the provisions of Title 16 O. S. §71 and Title 16 O. S. §73; then that person has a marketable title to such severed mineral interest.

3. As relevant to this inquiry, “the interest claimed” by an owner in Oklahoma may be limited to an interest in the mineral estate, may be an interest in the surface estate which includes an interest in the mineral estate or may be an interest only in the surface estate.

4. The exceptions recited in Title 16 O. S. §72(e) and established in Title 16 O. S. §76A, are, for the purpose of this inquiry, designed to make clear that a severed mineral interest, i.e. an interest limited to an interest in the mineral estate alone, cannot be extinguished by an instrument which refers to the surface of the land in and under which the mineral estate is located and would be effective as a root of title to an interest in the surface estate even though that instrument does not specifically except the outstanding mineral estate.

5. The statement in the decision of the Oklahoma Supreme Court in Wood v. Sympson, 1992 OK 90, to-wit: “Appellants next claim the Oklahoma Marketable Record Title Act, 16 O.S. 1981 § 71 et seq. may be utilized to bar Sympson’s claim. The argument is without merit. Section 76 of said Act expressly provides, "[t]his act shall not be applied . . . to bar or extinguish any mineral or royalty interest which has been severed from the fee simple title to the land. . . ." The interest involved here, is a severed mineral interest. The provisions of this latter Act do not, therefore, apply” must be read in context; the Supreme Court’s decision properly upholds a severed mineral interest against a claim by the then owner of the surface estate, thereby properly applying the exception set forth in the MRTA.
6. The applicability of the Title Examination Standards to the determination of “marketability” as defined in the Production Revenue Standards Act [Title 52 O.S. §570.10D.2.a] makes it critical that Oklahoma examiners understand the distinction between the protection provided by the exception of the operation of the MRTA as set out in Title 16 O. S. §72(e) and Title 16 O.S. §76A and the inclusion of the interest claimed provided by Title 16 O. S. §78(f).

7. The provisions of Title 16 O. S. §72(e) and Title 16 O.S. §76A must be used to protect a validly claimed interest in the mineral estate.

8. The provisions of Title 16 O. S. §78(f) must be used to perfect a validly claimed interest in the mineral estate.

9. The provisions of Title 16 O. S. §§78(C) and (D) must be used to protect a validly claimed interest in the surface estate.

IV Conclusion

I am going to claim that I have remained true to my goal of advocacy above scholarship. I have been guilty of one double negative (the does not/does not phrasing of the heading for Section II), but I have studiously avoided any on-the-one-hand vs. one-the-other-hand analysis. I’ve included, in an appendix, a chart outlining a hypothetical chain of title to the surface and one-half of the oil, gas and other minerals vs. a related chain to the remaining one-half of the oil, gas and other minerals. In my opinion, this makes obvious the point that there is no reason the owner claiming the surface and a mineral estate should be accorded the benefit of the MRTA, while the identically situated severed mineral interest owner of the remaining half is forced to provide additional curative. I believe this “equal protection” hypothetical vividly demonstrates the point that the Act applies.

Further, I do not believe that a valid argument can be made, solely from the language of the MRTA, that its use in connection with a severed mineral interest is prohibited. Read carefully, and as a whole, Title 16 O. S. §71 through 80 is applicable to “any interest in land.” A severed mineral interest clearly falls within that statutory definition.

I want to briefly address the issue of whether the MRTA is “self-executing.” Here, again, I believe it would be better to state that the MRTA does serve to extinguish interests by operation of law and, in that sense operates without judicial action; however, I do think it should be stated that the MRTA is not, in every instance, “self-proving.” There may be less curative, or easier curative, but the facts which establish the operation of the Act must appear of record. To be “marketable” within the meaning of the Production Revenue Standards Act, the title must be such that it meets the requirements of Title Examination Standard 1.1.
Therefore, whatever level of curative is necessary to perfect a record interest, the nature of that curative should be determined, among other things, by the applicability of the MRTA to that interest. All interests, including severed mineral interests, should be reviewed using the MRTA as a tool, so that, in the words of the Act:

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.
*Recites that A.2 is surviving spouse and sole heir of A.1; Affidavit form disinterested third person also appears of record