Comparative Mineral Law

OKLAHOMA

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INTRODUCTION

You are asked to go to Oklahoma and check records for exploration purposes. What are the significant differences in oil and gas law between Oklahoma and other states? This article can serve as a convenient refresher of basic principles for an experienced landman who has already worked in Oklahoma.

We hope this article will be of value to all landmen, both office and field, and to attorneys dealing with oil and gas title issues in different states. We attempt to provide general rules, or black letter law, with enough detail to be of practical benefit.
DISCLAIMER

The purpose of this article is to provide general principles of oil and gas law or of court procedures applicable to the activities of a landman. All of the subjects discussed herein could be and likely have been discussed in much greater detail in other articles or legal treatises. This article is intended only to provide these principles in a summary form so that a landman may review these principles prior to checking the records in a state where he has not had previous experience as an initial aid to his evaluation of lease prospects.

While the authors have sought to draw together statutory and case law from numerous jurisdictions, the law is subject to many exceptions or variations from general principles, depending on the precise fact situation. The law also is subject to frequent change by reason of constant legislative and judicial review. Even as this article reaches publication it is possible that some change already may have occurred in that statutory or case law. Because of this, any reader who has a legal question, even if it regards a matter discussed in this article, should seek the professional advice of an attorney of his choosing to analyze the application of the law to the specific facts involved.
BIOGRAPHICAL SKETCH

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Timothy C. Dowd is an attorney with Elias, Books, Brown, Peterson & Massad in Oklahoma City, Oklahoma. He graduated from the University of Tulsa College of Law in 1979.

Mr. Dowd is a past President of the Oklahoma City Mineral Lawyers Society for 1996-97.

Mr. Dowd is also an Adjunct Professor of Oil and Gas Law at Oklahoma State University - Oklahoma City.

Mr. Dowd is a member of the Legal Committee of the Interstate Oil and Gas Compact Commission, the Advisory Council to the Marginal Well Commission of Oklahoma and the OSU-OKC Advisory Committee for the Center for Environment and Energy.

Articles written by Mr. Dowd include:

*Oil and Gas Liens in Oklahoma*, 51 Okla. L. Rev. 309 (1998)


*A Comparative review of the Oil and Gas Law of Oklahoma and Arkansas*, Landman (May/June, 1996 and July/August 1996)

*Significant Differences in Oil and Gas Principles Between Producing States - Texas and Oklahoma*, Landman (November/December 1989 and January/February, 1990)

*The Doctrine of Merger of Title When the Mortgagee Acquires the Mortgagor’s Land*, 58 Okla. B.J. 823 (1987)

*Oklahoma Senate Bill 160*, Landman (February, 1986)

*Gulfstream Petroleum Corp. v. Layden: A Spacing is a Jurisdictional Prerequisite to a Pooling Order*, 52 Okla. B.J. 1559 (1981)

Mr. Dowd is a member of the American Bar Association, the Natural Resources Section, and the Oklahoma Bar Association, the Mineral Law Section, as well as a member of the Oklahoma City Mineral Lawyers Society and Oklahoma City Real Property Lawyers. Mr. Dowd is also on the Board of Directors of Oklahoma County Bar Association.

Mr. Dowd has previously lectured at various seminars sponsored by various groups, including American Association of Petroleum Geologists, American Association of Petroleum Landmen, The Amarillo Association of Petroleum Landmen, Arkansas Bar Association, Colorado School of Mines, Capital Association of Professional Division Order Analysts, Dallas Association of Petroleum Landmen, Dallas Bar Association, Dallas-Ft. Worth Association of Lease and Title Analysts, Fort Worth Association of Petroleum Landmen, National Association of Lease and Title Analysts, Oklahoma Bar Association, Oklahoma City Association of Lease and Title Analysts, Oklahoma City Association of Petroleum Landmen, Oklahoma State University-Oklahoma City, Sooner Association of Division Order Analysts, Tulsa Association of Petroleum Landmen, Tulsa Association of Lease and Title Analysts, University of Texas School of Law, Women in Energy, and Wichita Association of Professional Landmen.

Mr. Dowd’s primary area of practice is oil and gas law, including the rendering of title opinions, litigation and the drafting and negotiation of industry contracts.
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I. CHARACTERISTICS OF THE MINERAL-ROYALTY ESTATE

A. ELEMENTS OF A MINERAL INTEREST

OKLAHOMA

The mineral estate consists of the following elements:

1. the right to drill yourself;

2. the right to execute an oil and gas lease (usually called the leasing right or the executive right);

3. the right to receive bonus; and

4. the right to receive royalty (Oklahoma acknowledges nonparticipating royalty).

_Earp v. Mid-Continent Petroleum Corp._, 167 Okla. 86, 27 P.2d 855 (1933).

If a mineral owner drills a well himself or participates himself in the drilling of a well, he is entitled to receive his proportionate part of all production, less his share of expenses, and there is no bonus, delay rental or royalty paid to him. The mineral owner may execute an oil and gas lease and part of the consideration of granting said lease is the payment of bonus, delay rental and royalty. _Carroll v. Bowen_, 180 Okla. 215, 68 P.2d 773 (1931).

B. CONVEYABILITY

OKLAHOMA

Each element of the mineral estate can be owned, conveyed, reserved or inherited separately from the other elements. The leasing (or executive) right, however, has been held to be a personal right, not a real property right, and thus not inheritable when it was reserved by the grantor. The executive right will descend to the heirs if it is reserved by the "grantor, his heirs, executors, administrators and assigns." _Stone v. Texoma Production Co._, 336 P.2d 1099 (Okla. 1949); _Howard v. Dillard_, 198 Okla. 116, 176 P.2d 500 (1947).
C. **OVERRIDING ROYALTY**

**OKLAHOMA**

Overriding royalty interests are real property interests created out of or reserved in a conveyance of a leasehold, and along with royalty, burdens the leasehold owner. An overriding royalty is non-expense bearing and it reduces the net revenue available to the leasehold owner. An overriding royalty interest terminates upon the termination of the oil and gas lease it burdens, unless the instrument creating the overriding royalty contains language continuing the overriding royalty as to renewals and extensions of the original lease. *O'Neill v. American Quasar Petroleum Co.*, 617 P.2d 181 (Okla. 1980); *Probst v. Hughes*, 143 Okla. 11, 286 P. 875 (1930).

A. **DEFINITION OF “OIL, GAS” AND “CASINGHEAD GAS”**

**OKLAHOMA**

Seldom does a well produce oil only or gas only. It is the general understanding and commonly accepted custom and practice in the oil and gas industry that gas produced with a well classified as an oil well is called casinghead gas and belongs to the owner of the oil, while liquids produced from a well classified as a gas well is gas condensate and belongs to the owner of the gas. In Oklahoma, casinghead gas is considered neither oil nor gas. *Mussellem v. Magnolia Petroleum Co.*, 107 Okla. 183, 231 P. 526 (1924). *Hammet Oil Co. v. Gypsy Oil Co.*, 95 Okla. 235, 218 P. 501 (1923), 34 A.L.R. 275. In *Mussellem*, the court held that casinghead gas was covered by an oil and gas lease and was subject to a special royalty provision where the lease contained a provision for gas which is produced from an oil well and used off the premises. As a practical matter, the fact that casinghead gas is considered neither oil nor gas is important in only very old oil and gas leases which provide for royalty on oil and a flat annual payment for gas, but does not provide for any royalty for casinghead gas.

A. **TERM MINERAL INTEREST AND TERM ROYALTY INTEREST**

1. Term-royalty and term-mineral interest are divided into two basic types: A grant or reservation for a fixed term only, and a grant or reservation for a fixed term and "as long thereafter as oil or gas is produced" in paying quantities. For a term-mineral deed in its secondary term, production need not be on the land conveyed by the term deed but can be from a drilling and spacing unit encompassing the described land in the mineral deed. *Fox v. Feltz*, 1984 OK CIV APP 60, 697 P.2d 543, 84 O&GR 157. Unless there is contrary language in the deed, production from one tract in a deed will also perpetuate production from all tracts. *Turner v. McBroom*, 565 P.2d 44 (Okla. 1977), 56 O&GR 574.
1. Oklahoma courts have not ruled on a situation where the owner of a term interest and the owner of a possibility of a reverter join together in an oil and gas lease and whether it continues the term mineral interest.

1. To extend a term deed into its secondary term, there must be actual marketing of the oil and gas during the "primary term." The payment of a shut-in gas royalty pursuant to a lease will not continue a term mineral interest into its secondary term, unless the instrument creating the term mineral interest ties its term contractually into the term of an oil and gas lease covering said land or contains a shut-in gas royalty clause itself. A shut-in gas well will not perpetuate a term mineral interest into its second term if the deed calls for production. *Fransen v. Eckhardt*, 1985 OK 29, 711 P.2d 926 (Okla. 1985), 87 O&GR 326; *McEvoy v. First Nat'l Bank & Trust Co.*, 624 P.2d 559 (Okla. Ct. App. 1981).

1. In *Barton v. Crouch*, 42 O.B.A.J. 839 (Okla. Ct. App. 1971), 38 O&GR 455, the court reformed a term deed from "20 years unless oil is being produced therefrom" to mean "and as long thereafter as oil is being produced therefrom."

### A. DORMANT MINERAL ACT, MARKETABLE TITLE ACT OR TITLE STANDARDS?

#### OKLAHOMA

Oklahoma does not have a Dormant Mineral Act.

Oklahoma has had Title Examination Standards which govern marketability of title since 1946. 16 O.S., Ch. 1.

Oklahoma also has a Marketable Record Title Act which has been enacted in the statutes and has also been incorporated into the Title Examination Standards. 16 O.S. § 71-80. The Marketable Record Title Act provides for marketable record title when:

1. A person has an unbroken chain of title of record extending back at least 30 years; and
1. Nothing appears of record purporting to divest such person of title.

The unbroken chain of title of record, within the meaning of the Marketable Record Title Act, may consist of a single conveyance of other title transaction which purports to create an interest and which has been a matter of public record for at least 30 years, or a connected series of conveyances or title transactions of public record in which the root title has been a matter of public record at least 30 years. However, there are several interests that cannot be extinguished or barred by the act, including mineral or royalty interests. 16 O.S. § 76.
The importance is that parties may be able to rely upon this act when the owner owns the surface and all minerals and there are defects in title over 30 years old.

II. WHO CAN LEASE?

A. MARITAL PROPERTY

1. Jointly Owned - Community Property

OKLAHOMA

Oklahoma is a common law rather than community property state. Oklahoma was a community property state from 1939 until 1949. If a non-record owner spouse claimed a share of property acquired during that time, he was required to enter into an agreement or file suit regarding the community property status within one year from the repeal of the community property statute. 32 O.S. § 83.

1. Separate Property

OKLAHOMA

See II. A: 3. below.

1. Classification as either Separate or Community Property - Who must sign?

OKLAHOMA

a. Property acquired during marriage in the name of one spouse is owned solely by that spouse. Property acquired jointly during marriage is owned equally by both spouses. 32 O.S. § 4.

a. Upon the death of one spouse, the surviving spouse owns no legal interest in the property owned by the decedent spouse, except for their right to inherit pursuant to intestate succession and Oklahoma's forced heirship statute, both of which are discussed at II.E. infra.

4. Conversion of Community Property to Joint Tenancy with Right of Survivorship

OKLAHOMA

There is no problem in Oklahoma for a spouse to convey his or her property to himself
for the purpose of creating a joint tenancy.

1. **Individual Acknowledgment**

   **OKLAHOMA**

   The Oklahoma short form acknowledgement for an individual, which can also be used for more than one person is as follows:

   STATE OF OKLAHOMA 
   )
   COUNTY OF OKLAHOMA 
   ) ss:

   This instrument was acknowledged before me on (date) by (name or names of person or persons acknowledging).

   ____________________________
   Notary Public
   
   My Commission Expires:

   ____________________________

B. **HOMESTEAD**

1. **Definition of Homestead Rights**

   **OKLAHOMA**

   In Oklahoma, the homestead right consists, in part, of the following:

   a. Homestead property is exempt from forced sale for debts except for purchase money liens, property improvement liens and taxes; 31 O.S. § 1. Because it is not possible to determine from the record whether property is homestead or not, the husband and wife should sign the same lease or conveyance of real property. *Grenard v. McMahan*, 441 P.2d 950 (Okla. 1968).

   b. A surviving spouse has the right to possession of the property for life or until abandonment, without regard to how title is then vested. 58 O.S. § 311.
c. A guardian for minor children has the right to possession of the property during the minority of the children, without regard to how title is then vested. 58 O.S. § 311.

d. If severed minerals are only owned by one spouse, the joinder of the spouse is not necessary for leasing, as severed minerals cannot be impressed with homestead character. 16 O.S., ch. 1, App. 7.1.

2. **Whom Does Homestead Benefit and the Types of Homestead?**

**OKLAHOMA**


   a. A homestead for an individual or family, not within any city, town or village, may consist of not more than 160 acres of land, which may be in one or more parcels. The homestead within any city or town owned and occupied as a residence, shall consist of not more than one acre of land as long as the equity value does not exceed the value of $5,000.00. In no event shall homestead be reduced to less than one-fourth of an acre, without regard to value. 31 O.S. § 2.

3. **Extent of Possession Necessary**

**OKLAHOMA**

Homestead rights attach to property which is actually occupied as a homestead or property which the owner intends to occupy as a homestead. In the latter situation, the property is not impressed with homestead character until the owner has made some "overt act of preparing" the property for homestead use. *Enosburg Falls Sav. Bank & Trust Co. v. McKinney*, 172 Okla. 298, 44 P.2d 987 (1975).

4. **Leasing Homestead**

**OKLAHOMA**

There is no question that an instrument relating to the homestead is void unless subscribed by both husband and wife. It is also settled that a husband and wife must execute the same instrument. Separately executed separate instruments would both be void. *Grenard v. McMahan*, 441 P.2d 950 (Okla. 1968). An oil and gas lease could be ratified if both spouses sign a Ratification which contains granting language.
A. CONVEYANCING RULES RELATING TO BUSINESS ENTITIES

1. Corporations

OKLAHOMA

a. General Principles

An Oklahoma corporation has the power to purchase, lease or own oil, gas and other minerals and oil and gas leases. Transfers of real property from a corporation in Oklahoma must be evidenced by an instrument which has been executed by a President, Vice President, Chairman or Vice-Chairman of the Board of Directors. 16 O.S. §§ 91, 93, 94.

Alternatively, a corporation can appoint an Attorney-in-Fact to execute specified documents affecting real property. 16 O.S. § 91. The Power of Attorney needs to be recorded in the county where the real property is located. See the section on Attorneys-in-Fact included herein.

If an instrument is recorded without meeting the formalities, the conveyance will not operate to serve as constructive notice of the conveyance. Smith v. Thompson, 402 P.2d 882 (Okla. 1965). The erroneous filing of the conveyance may be actual notice to any individual who has viewed the instrument. See Davidson Oil Country Supply v. Pioneer Oil, 1984 OK 65, 689 P.2d 1279, 82 O&GR 299.

Any corporate conveyance affecting real property which has been of record for five years or more can be considered marketable, even if it is defective because of:

(1) the failure of the property corporate office to sign the instrument;
(2) the lack of an acknowledgment;
(3) the corporate representative is not authorized to execute the instruments; or
(4) any defect in the execution, acknowledgment, recording or certificate of recording the same

16 O.S. § 27a.

b. Acknowledgment
The acknowledgment form for a corporate executed conveyance should be substantially as follows:

STATE OF OKLAHOMA )
 ) ss:
_____ COUNTY )

Before me, the undersigned, a Notary Public in and for said County and State, on this ___ day of ______, 20__, personally appeared _________ to me known to be the identical person who subscribed the name of the maker thereof to the within and foregoing instrument as its (Attorney-in-Fact, President, Vice-President, as the case may be) and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of said corporation, for the uses and purposes therein set forth.

Given under my hand and seal the day and year last above written.

(S E A L)  Notary Public

My Commission Expires:

_______

1. **General Partnership**

**OKLAHOMA**

a. **General Principles**

Oklahoma has adopted the Uniform Partnership Act. A partnership may purchase, own or lease minerals and oil and gas. General rules governing partnerships are applicable to oil and gas leasing. One partner can bind the partnership by executing an oil and gas lease for the partnership. 54 O.S. § 208. A partnership can hold title to real property in Oklahoma. 54 O.S. §§ 209, 215.

b. **Acknowledgment**

The acknowledgment for a general partnership is as follows: The same format can be utilized for limited partnerships.
STATE OF OKLAHOMA )
COUNTY OF ___ ) ss:

This instrument was acknowledged before me on this ____ day of ____, 20___ by
________ as general partner of __________.

(S E A L) Notary Public

My Commission Expires:

__________

1. Limited Partnerships

OKLAHOMA

a. General Principles

Oklahoma Statute Title 54 § 144 recites that a limited partnership may conduct any
business which a general partnership (without limited partners) may conduct. An oil
and gas lease may be executed by the general partner of the limited partnership. 54
O.S. § 150. The identity of the general partners of a limited partnership may be
established by the examination of a certificate of limited partnership on file in the
Office of the Secretary of State. 54 O.S. §§ 81-85.

b. Acknowledgment

See Section II. C.2.b above

1. Limited Liability Companies and Limited Liability Partnerships

OKLAHOMA

a. General Principles

Oklahoma has a Limited Liability Company Act. A limited liability company is
A manager is the person who may execute conveyances or oil and gas leases on behalf
a. Acknowledgment

No specific form has been set.

A. ATTORNEY-IN-FACT

1. General Rules

OKLAHOMA

An Attorney-in-Fact may execute an oil and gas lease if the Power of Attorney expressly grants the authority to execute said lease. Powers of Attorney are to be strictly construed. Matter of Estate of Rolater, 542 P.2d 219 (Okla. Ct. App. 1975). If the Power of Attorney authorizes the agent to sell the land, but the instrument is silent as to leasing, it is thought that the general power is not sufficient authority to lease.

1. Universal Power of Attorney

OKLAHOMA

A universal Power of Attorney, which gives the Attorney-in-Fact broad powers, usually stating that the Attorney-in-Fact has all authority that the principal would have, but does not expressly authorize executing an oil and gas lease, is usually given effect. (There is no Oklahoma case confirming this principle yet.)

1. Necessity of Recording Power of Attorney

OKLAHOMA

The Power of Attorney for the conveyance of real estate must be filed in the office of the County Clerk where the property is located. 16 O.S. § 20.

1. Curative necessary

OKLAHOMA

The principal's death generally revokes the power of attorney. Bowman v. Ledbetter, 173 Okla. 345, 48 P.2d 334 (Okla. 1935). However, the death of the principal may not render an act void if the attorney and the third person were without knowledge of the

1. **Durable Power of Attorney**

**OKLAHOMA**

A Power of Attorney which contains the words, "This Power of Attorney shall not be affected by subsequent disability or incapacity of the principal or lapse of time" is a Durable Power of Attorney which shall be effective regardless of the principal's disability or the principal's death, if the Attorney-in-Fact is not aware of the death. 58 O.S. §§ 1072-73.

6. **Acknowledgment**

**OKLAHOMA**

An Oklahoma short form acknowledgment for an Attorney-in-Fact:

**STATE OF OKLAHOMA**

) ss:

**COUNTY OF**

) ss: This instrument was acknowledged before me on (date) by (name of Attorney-in-Fact) as Attorney-in-Fact on behalf of (name of principal).

(SEAL) (Signature of Officer)
My Commission Expires: (Title of Officer)

A. **ESTATE OF RESIDENT DECEDENT**

1. **Rules of Descent and Distribution (sometimes called Intestate Succession)**

**OKLAHOMA**

The applicable rules of descent and distribution in Oklahoma are summarized as follows:

For a death prior to July 1, 1985:
a. Intestate and no issue--one-half (1/2) to surviving spouse and one-half (1/2) to decedent's parents.

b. Intestate and one issue--one-half (1/2) to surviving spouse and one-half (1/2) to child.

c. Intestate and more than one issue--one-third (1/3) to surviving spouse and remainder in equal shares to children.

For a death after July 1, 1985:

a. Intestate and no issue--the spouse inherits all property acquired by "joint industry" of husband and wife plus one-third (1/3) of all other property; the remaining two-thirds (2/3) of the other property is inherited by the decedent's parents, or other surviving heirs.

b. Intestate and issue, who are also issue of the surviving spouse--the spouse inherits one-half (1/2) of all property, whether acquired by "joint industry" or not; the remaining one-half (1/2) passes to the surviving children and issue of any deceased child by right of representation.

c. Intestate and surviving issue, when one or more are not also issue of the surviving spouse--the spouse inherits one-half (1/2) of the property acquired by "joint industry" during marriage, plus an equal share in the remainder of the estate with all issue. 84 O.S. § 213.

The provision regarding "joint industry" of husband and wife is a rule of descent and distribution and is not a rule of property. It does not vest the non-titleholding spouse with any interest in the property except upon the death of the titleholding spouse. Essex v. Washington, 198 Okla. 145, 176 P.2d 476 (1947).

1. **Lapse Doctrine**

**OKLAHOMA**

Oklahoma has adopted the common law lapse doctrine. Under Oklahoma law, a gift to a devisee who predeceases the testator lapses and passes under the residuary clause in the will, if the residuary clause is properly written. In the absence of a residuary clause or a sufficiently broad residuary clause, the devise passes according to the intestacy statutes. 84 O.S. § 177; Dean v. Moore, 380 P.2d 934 (1963). However, 84 O.S. § 142 provides that if the gift is to a "child or other relative of the testator," the
lineal descendants of the devisee inherit the estate devised by the will.

1. **Administration of Estate of Intestate Decedent**

   **OKLAHOMA**

   With the exception noted below, court approval is needed to obtain a lease from any estate, intestate or testate, in Oklahoma. Notice must be published in the county where the land is located and the lease must be sold to the highest bidder in an auction in the courtroom. 58 O.S. § 925. If the bonus value of the lease is less than $500.00, then approval by a judge having jurisdiction over the estate is sufficient without notice or a court proceeding. 58 O.S. § 928.1. This approval can be evidenced by a court order or simply by the judge's handwritten approval upon the lease. The lease should contain a recitation that the consideration was less than $500.00.

1. **Administration of Estate of Testate Decedent**

   **OKLAHOMA**

   If the will of the decedent empowers the executor to execute an oil and gas lease, the executor may execute an oil and gas lease and make a return of sale, which must be approved by the court. 58 O.S. §§ 426, 262, 924.

   Alternatively, practitioners will force pool all of the potential heirs at the Corporation Commission which will issue an order forcing the parties to either lease or participate in the well. See, 52 O.S. § 87.1. Whether the leasing statute is the exclusive means of acquiring a lease from an estate in Oklahoma or whether the Commission can also force the estate to lease under the police power has not been adjudicated. It is necessary that the Corporation Commission make inquiry into the sufficiency of the search for the whereabouts of any heirs for the pooling to be valid as to unknown heirs. *James Energy Co. v. HCG Energy Corporation*, 1992 OK 117, 847 P.2d 333.

1. **Rules Relative to Closing Estate**

   **OKLAHOMA**

   The determination of heirs and devisees of the decedent is confirmed in an Order issued by the probate court frequently called the Final Decree or Order Determining Distribution of Estate. 58 O.S. §§ 631-32. The determination of heirship is conclusive as to the rights of all heirs, legatees or devisees, subject to being reversed, set aside, or modified upon appeal. 58 O.S. § 632.
1. **Forced Heirship Statute**

**OKLAHOMA**

A surviving spouse may not be deprived of less of a share of the deceased spouse's estate by will than he would be entitled to under the intestate succession statutes. 84 O.S. § 44.

A. **ESTATE OF NON-RESIDENT DECEDENT**

1. **If Ancillary Probate of Foreign Will is Not Necessary**

**OKLAHOMA**

Where Oklahoma minerals are owned by an out-of-state resident, the estate of the decedent will need to go through the probate process in order for the heirs or devisees to obtain clear and marketable title.

2. **If Ancillary Probate of Foreign Will is Necessary**

**OKLAHOMA**

This process is termed an "ancillary probate." Failure to conduct an ancillary probate will result in a cloud on the title to the minerals, difficulty in selling such minerals, and possible problems with regard to leasing or the distribution of monies from productive wells on the property.

An ancillary probate is almost identical to the probate of a will of an Oklahoma resident. The out-of-state will must be admitted to probate pursuant to 58 O.S. §§ 51-53. To do this, you will need authenticated copies of the will and of the foreign order admitting the will to probate in the foreign state where the decedent resided.

The following is a summary of the steps required in an ancillary probate:

a. Upon filing the petition to have the will admitted into probate, notice must be mailed to all the heirs pursuant to 58 O.S. §§ 25 and 26. Also, this notice will be needed to be published in the county where the estate proceeding is being conducted;

b. The judge will sign an order appointing the personal representative who will manage the estate;
c. Notice to creditors must be published after the personal representative is appointed under 58 O.S. § 331;

d. If the Personal Representative is not from Oklahoma, he must appoint an agent residing in the county where the probate proceedings are held to receive service of any legal process. 58 O.S. § 162. Generally, the agent is an attorney in the county where the property is located, or an acquaintance or relative;

Summary probate proceedings may be used if:

(1) the estate is $175,000.00 or less;
(2) the decedent has been dead for at least five years, or
(3) the decedent lived in another state at the time of death, but owns property in Oklahoma. 58 O.S. §245.

Leasing is identical to that for a resident decedent.

1. Conflict of Law Rules

OKLAHOMA

The law of Oklahoma governs intestate succession as to real property located in Oklahoma. White House Lumber Co. v. Howard, 1930 OK 126, 286 P. 327.

As Oklahoma law governs the descent and distribution of an intestate decedent, Oklahoma courts are not concerned with the question as to whether or not the property is separate property or community property.

1. Use of Affidavit of Death and Heirship

OKLAHOMA

Often the estate of an individual will not be probated due to cost or the apparent lack of value of the minerals involved. In such an instance, the landman may have no choice but to rely upon an Affidavit of Death and Heirship. While this affidavit does not render title to the property marketable, it is the best (and sometimes only) source of information as to the heirs of the decedent. The affidavits should be relied upon only for facts as to dates of death and identity of the surviving heirs, and should not be relied upon for the affiant's view as to the present ownership of property.

Despite the recitation that affidavits can relate to “heirships”, the title standards recite
that affidavits cannot be used as a substitute for a probate of a will. 16 O.S. Ch. 1, App. 3.2. However, 16 O.S. 67 recites, effective after November 1, 2000, that a purchaser of a severed mineral interest from a party who claims the interest, immediately or remotely, through a recorded affidavit of death and heirship or recital of death and heirship in a recorded transaction of record for ten years, acquires marketable title as against any person claiming adversely to the recorded affidavit or recital. The recorded affidavit or recital must recite:

The decedent died without a will;
The names of the decedent’s heirs and their relationship to the decedent; and
The maker is related to the decedent or otherwise has personal knowledge of the facts stated therein.

Further, it is required that no instrument inconsistent with the heirship alleged in the affidavit or recital has been filed in the office of the county clerk in the county in which the real property is located.

A. TRUSTEE

1. Power of Trustee Derived from the Trust Instrument

OKLAHOMA

In the absence of contrary or limiting provisions in a Trust Agreement or by Order of the Court, a Trustee has the power to execute an oil and gas lease and related instruments. 60 O.S. § 175.24(c).

1. Powers of Trustee Derived from the Trust Statute

OKLAHOMA

A trustee of an express trust has the power to grant, assign or release leases, real property, or any interest subject to the trust. These acts are binding upon the trust and the beneficiaries unless the trust instrument containing limitations has been recorded in the county where the real estate is located. 16 O.S. ch. 1, app. 22.1; 60 O.S. §§ 171, 175.7 & 175.45

3. Title in Trust but No Trustee Named; “Blind” Trust

16
OKLAHOMA

A trust (without a named Trustee) is a legal entity. However, the Trustee is required to file a Memorandum of Trust with the County Clerk in which the real property is located. Oklahoma Statute Title 60 § 175.6 validates conveyances to a Trust (without a named Trustee), unless any person claiming adversely to the trust files an Affidavit relating to the matter within one year from November 1, 1989.

The words "Trustee," "as Trustee" or agent following the name of a grantee, without additional language actually identifying a trust, does not give notice, or put one on notice that a trust does exist or that any other person holds a beneficial interest. Thus, a subsequent conveyance by the grantee, whether or not his name is followed by such words in the subsequent conveyance, vests title in the grantee of the subsequent conveyance. 60 O.S. § 156.

1. **Allocation of Proceeds to Principal and Income**

OKLAHOMA

In the absence of a provision providing for the disposition of the net proceeds, 60 O.S. § 175.411 provides that the percentage used to be allocated as principal and held for the benefit of the remainderman by a trustee is 15% to principal and 85% to income.

A. **LIFE TENANT/REMAINDERMAN AND OPEN MINE DOCTRINE**

1. **General Rules**

OKLAHOMA

The life tenant, of either a legal life estate or a conventional life estate, has the right to possession of the property with the remainderman obtaining possession upon the death of the life tenant. Neither the life tenant nor the remainderman can execute an effective oil and gas lease without the joinder of the other. *Nutter v. Stockton*, 1981 OK 30, 626 P.2d 861, 69 O&GR 497.

The bonus, delay rental, and interest on the royalty, all being considered income, are paid to the life tenant, while the corpus of the royalty is preserved for the remainderman. *Franklin v. Margay Oil Corp.*, 194 Okla. 519, 153 P.2d 486 (1944).

1. **Open Mine Doctrine**
OKLAHOMA

An exception to the above is the "Open Mine Doctrine." This doctrine states that, if a lease was in effect or if a well was producing, at the time the life estate was created, the life tenant can use the land for that purpose and is thus entitled to receive all royalty himself. The theory is that the person creating the life estate must have intended that the life tenant benefit from the activities being conducted at the time the life estate was created. A lease alone will open the mine. Nutter v. Stockton, 1981 OK 30, 626 P.2d 861. In re Shailer's Estate, 266 P.2d 613 (Okla. 1954).

Normally, if the lease in effect at the time the life estate was created terminates, then the "mine closes" and the Nutter v. Stockton rule becomes effective.

I. MINORS AND MENTAL INCOMPETENTS

1. Minors

OKLAHOMA

A minor is defined by law in Oklahoma as a person under 18 years of age; all other persons are classified as adults. 15 O.S. §§ 13, 14. A minor can execute an oil and gas lease, however the lease is voidable by the minor upon reaching the age of majority, for one year after reaching the age of majority. 15 O.S. § 19. To obtain a lease with a minor that is not voidable, a lessee can have a guardian appointed to act on behalf of the minor. 30 O.S. § 1-113. A guardian has the duties of a trustee, must post a performance bond, and must be approved by a judge. 30 O.S. §§ 1-100, § 4-105 & § 4-201.

A guardian can sell or execute an oil and gas lease for a minor for a term not to exceed ten years or as long as oil or gas is produced, and the court needs to approve the transaction. 58 O.S. § 924. If the lease bonus is greater than $500.00, a public auction must be held in the courtroom, and notice of the action must be published in a paper where the land is located at least five days in advance of the auction. 58 O.S. § 924. If the lease bonus is less than $500.00, a guardian can grant a lease without an auction if the court approves. 58 O.S. § 928.1.

1. Mental Incompetents

OKLAHOMA
In the absence of actual or constructive notice to the contrary, it is presumed that a grantor has the mental capacity to convey. 16 O.S. ch. 1, app. 23.2. An adjudication of a grantor's incompetency in a sanity or mental health case filed prior to June 13, 1977, constitutes constructive notice of lack of capacity. On or after June 13, 1977, lack of mental capacity must be established (a) in a civil action; or (c) in a guardianship proceeding. 43A O.S. § 5-401.

The time period for the commencement of a lawsuit to recover real property is two years after the legal disability (i.e., minority or mental incapacity) is removed. 12 O.S. § 94.

A. MINERAL OWNERS THAT CANNOT BE LOCATED

1. Receivership for Mineral Owner Who Cannot be Located

OKLAHOMA

When a mineral owner's residence, business address or current location is unknown, the district court of the county where the land is located can appoint a receiver to protect and administer his interest. 52 O.S. § 521.

To obtain such relief the lessee must file a verified petition showing that due diligence has been used to locate the mineral owner. 52 O.S. § 522.

Notice must be given by publication one time in a newspaper of general circulation in the county where the land is located at least 15 days prior to the hearing. 52 O.S. § 522.

The primary term of a lease executed under this statute cannot exceed 5 years in length. 52 O.S. § 522.

The bonus money, delay rentals and/or royalty paid to the receivers shall be deposited in the registry of the court to be held for the benefit of the unlocated owners. 52 O.S. § 523. The funds escheat to the state after three years. 60 O.S. § 657.

2. Receivership for Contingent Future Interest

OKLAHOMA

Oklahoma Statutes Title 60, §§ 71-72 provides the procedure for appointing a Trustee to execute an oil and gas lease on behalf of contingent remaindermen.
3. **Effect of Force Pooling on the Above**

**OKLAHOMA**

If certain formations underlying the land have been designated drilling and spacing units, unlocated owners can be force pooled. At the hearing, the applicant must show that they made a diligent effort to locate the party and the order must show judicial inquiry into the sufficiency of the search. Under the pooling order the unlocated parties will lease their interest pursuant to the default election in such orders. 52 O.S. § 871. See III.C. - Pooling infra.

The bonus money in a pooling procedure is placed into an escrow account. One year after the date of the pooling order, the holder shall transmit to the Corporation Commission the funds held for the pooler. 52 O.S. § 522(e).

**A. PUBLIC ENTITIES**

1. **Cities, Towns or Other Political Subdivisions**

**OKLAHOMA**

Oklahoma Statutes Title 64, § 405 allows the following entities to execute oil and gas leases:

Any county, township, school district, or town that now owns or may hereafter acquire any land under control of the Board of County Commissioners, Board of Town Trustees, Directors of School Districts, Boards of Education or the governing body of any city acting by and through its duly constituted officers is hereby authorized and empowered to enter, from time to time, into valid oil and gas mining lease or leases of such land to any person, firm, association, or corporation for oil and gas development for a primary term not to exceed ten (10) years and as long thereafter as oil or gas is or can be produced, and any such oil and gas lease may provide that the lessee therein shall have the right and power to consolidate the land covered by said lease with other adjoining land for the purpose of joint development and operation of the entire consolidated premises as a unit. . . .

The lease shall be executed only after notice by publication for two weeks in a newspaper of general circulation in the county in which the land is situated and a public sale thereof to the highest bidder.
1. County and other Unincorporated Public Entities

OKLAHOMA

See paragraph 1 above.

1. Minerals Owned by the State

OKLAHOMA

The Commissioners of the Land Office are authorized to lease State lands in Oklahoma. 64 O.S. § 281. A State lease contains at least the following limitations:

a. The lease must be for a term of at least one year and not more than five years, and as long thereafter as production occurs in paying quantities.

b. The lease must provide for a minimum 1/8 royalty, and granted after taking sealed bids after at least 15 days notice of sale is given in a newspaper in the county where the land is located.

If the fee title to a public road is in the name of a public entity, then that entity has the authority to execute an oil and gas lease, as discussed above.

1. Quasi-Public Land - Cemeteries, Churches and Other Unincorporated Associations

OKLAHOMA

a. The owner of a lot in a cemetery, regardless of the wording of the deed, does not own fee simple title. The owner's title is analogous to a perpetual easement or license. Heiligman v. Chambers, 338 P.2d 144 (Okla. 1959).

Ownership of the mineral rights underlying a cemetery depend upon how title to the tract was acquired by the cemetery operator and what has been done subsequently. If the land was acquired by condemnation, the proceedings should be examined to determine who owns the fee.

If the land in question had been devoted to cemetery use by a common-law dedication, only the dedicant need execute the lease. Langston City v. Gustin, 191 Okla. 39, 127 P.2d 197 (1942). If the land was "donated" or "granted" by statutory dedication by plat, the public owns a fee interest, and a lease must be secured from the appropriate body. If the cemetery operator acquired a fee by
conveyance or the commencement of burial, the operator owns the minerals. If any reversionary interest has been retained by the grantor, he should also execute or ratify the lease.

There is some question in Oklahoma as to the status of title after abandonment of a cemetery. The safest alternative, whenever possible, is to secure a lease from the last person to hold fee title prior to a statutory dedication. See, McClain v. Oklahoma City, 192 Okla. 4, 133 P.2d 198 (1943).

b. In Oklahoma, an unincorporated association for charitable purposes (not-for-profit) cannot hold title, but property conveyed to them can be held by the Trustees of the association. A lease should be secured from the Trustees of the association. A lease should be secured from the Trustees of that organization or, if no Trustee has been appointed, the court can appoint a Trustee to administer the property conveyed to it. Matter of Estate of Anderson, 571 P.3d 880 (Okla. Ct. App. 1977).

c. It is generally agreed that the surface of a cemetery may not be used for oil and gas operations. Boggs v. McCasland, 117 Okla. 54, 244 P. 768 (1936). The issue of the surface use on church property has never been decided in Oklahoma.

L. RIVERBEDS AND STREAMS

1. Navigable Streams or Rivers

   OKLAHOMA

   Riparian owners adjacent to navigable streams own only to the high water mark. The title to the bed remains in the state or certain Indian tribes. In Oklahoma, all of the major rivers have been judicially determined as non-navigable except that portion of the Arkansas River between the confluence with the Grand River and the Arkansas state line. Vickery v. Yahola Sand and Gravel Co., 158 Okla. 120, 12 P.2d 881 (1932).

1. Non-Navigable Streams or Rivers

   OKLAHOMA

   As to non-navigable streams, the adjacent (riparian) owners own the oil and gas underlying said stream, each to the middle of the stream. Ellis v. Union Oil Co., 630 P.2d 306 (Okla. 1981). If the channel for a stream or river changes as the result of a natural flow, then the private ownership changes with the changes in the stream.
Goins v. Merryman, 183 Okla. 155, 80 P.2d 268 (1938). Avulsion, which is the sudden change in riparian land, does not change the boundaries of ownership. The boundary line remains at the old water line and becomes fixed with the ownership of the old stream bed remaining with its former owner. Mapes v. Neustadt, 197 Okla. 585, 173 P.2d 442 (1946).

1. Mineral Rights in the Red River

OKLAHOMA

The boundary line between the states of Oklahoma and Texas is the gradient boundary on the Texas side. Oklahoma v. Texas, 256 U.S. 70 (1921).

III. INTERPRETATION OF PROVISIONS OF THE OIL AND GAS LEASE

A. HABENDUM CLAUSE - GENERALLY

1. General Nature of Oil and Gas Lease

OKLAHOMA

Oil and gas is owned in fee simple and an oil and gas lease is a conveyance of a fee simple determinable in the oil and gas. The habendum or term clause of the lease establishes the period for which the lease rights will extend. Normally the term is divided into two distinct terms: the primary term and the secondary term. The primary term is that fixed term of years in the lease during which the Lessee has the option, but not the obligation, to pay delay rentals and/or explore for and produce oil and gas. At the expiration of the primary term, the lease terminates as a matter of law unless there is the capability of commercial production. This does not necessarily mean marketing of production. Shields v. Moffitt, 1984 OK 42, 683 P.2d 530, 81 O&GR 151; Mason v. Ladd Petroleum Corp., 630 P.2d 1283 (Okla. 1981); Stewart v. Amerada Hess Corp., 604 P.2d 854 (Okla. 1980); and State ex rel. Comm'nrs of the Land Office v. Carter Oil Co., 336 P.2d 1086 (1959), 10 O&GR 790. However, see III.A.3.

1. Doctrine of Indivisibility

OKLAHOMA
One well, producing in paying quantities on the land covered by the lease, or on land pooled with the lease, will continue to hold the lease as to all land covered by the lease and as to all depths, unless the lease contains a provision requiring partial termination of the lease after production is obtained (sometimes called a Pugh Clause) and subject to the statutory Pugh Clause discussed below. *Wilds v. Universal Resources Corp.*, 1983 OK 35, 662 P.2d 303, 76 O&GR 291; *McClain v. Harper*, 244 P.2d 301 (Okla. 1952), 1 O&GR 872.

1. **Statutory Pugh (Termination) Clause**

**OKLAHOMA**

The "Statutory Pugh Clause" provides that a lease executed after May 25, 1977, will expire as a matter of law 90 days after the primary term has expired to the extent the land covered by the lease exceeds a drilling and spacing unit of 160 acres or more in size. 52 O.S. § 87.1(b).

1. **Requirement to File Affidavit Confirming Production in Paying Quantities**

**OKLAHOMA**

Oklahoma has no statute requiring the recording of an affidavit confirming obtaining production in paying quantities.

1. **Statutory Requirement to Release Oil and Gas Lease**

**OKLAHOMA**

Oklahoma Statute Title 41, § 40 requires that a lessee, or his successor, release a lease within 30 days after receipt of lessor's written demand.

### A. PRODUCTION IN PAYING QUANTITIES

1. **General Rule**

**OKLAHOMA**
In Oklahoma, the discovery of hydrocarbons which are capable of production in paying quantities will satisfy the requirement that there be "production" at the end of a primary term, as long as diligent effort is being made to market the gas as acquired under the implied covenant to market. *McVicker v. Horn, Robinson & Nathan*, 322 P.2d 410 (Okla. 1958), 8 O&GR 951. See III.A.3. infra.

1. **Operating Expenses**

**OKLAHOMA**

The term "production in paying quantities" means that the lessee must produce in quantities sufficient to yield a return, however small, in excess of "lifting expense," even though the drilling and completion costs might never be recovered. *Stewart v. Amerada Hess Corp.*, 604 P.2d 854 (Okla. 1979), 65 O&GR 530.

Items that have been held directly related to lifting costs are:

i. royalties payable to the Lessor;
ii. salaries paid to pumpers;
iii. cost of electricity;
iv. cost of operating pumps;
v. cost of supervision;
vi. cost of repairs;
vii. cost of telephone; and
viii. other incidental operating expenses.

*Stewart v. Amerada Hess Corp.*, 604 P.2d 854 (Okla. 1979). *Stewart* also held that depreciation of equipment used in lifting operations is regarded as a production expense and may be considered in determining whether a well is producing in paying quantities.

A. **SHUT-IN GAS ROYALTY**

1. **General Rules**

**OKLAHOMA**

a. Oklahoma does not require that there be actual production, or a contractual substitute therefore, at the end of the primary term. Oklahoma requires only that there be a discovery of hydrocarbons capable of commercial production during the primary term for the lease to continue into the secondary term. The Lessee has an

If oil and gas is discovered by the end of the primary term the lease is held by production if the lessee is making a diligent effort to sell the hydrocarbons. As such, the need for a shut-in clause in Oklahoma to prolong the lease is not nearly as important as in Texas. *McVicker v. Horn, Robinson & Nathan*, 322 P.2d 410 (Okla. 1958).

b. Failure to make shut-in gas royalty payments in the right amount or by the due date will not cause a lease to terminate. However, the Lessee still owes the debt created by the unpaid shut-in gas royalty and the Lessor could sue to recover the debt. *Gard v. Kaiser*, 582 P.2d 1311 (Okla. 1978), 61 O&GR 394.

1. **Amount of Shut-in Gas Royalty**

   **OKLAHOMA**

   The amount of the shut-in royalty is, historically, $1.00 per net acre. Shut-in gas royalty, being a substitute for actual production, is paid to the royalty owners, if different than the mineral owners.

A. **TEMPORARY CESSATION OF PRODUCTION**

1. **General Rule**

   **OKLAHOMA**

   Even if the lease does not provide, if there is a temporary cessation of production due to mechanical problems in the secondary term, the lease will not terminate for a reasonable time if the Lessee is making reasonable good faith efforts to restore production. Whether a cessation of production is temporary is a question of fact that will depend on the individual circumstances. *Cotner v. Warren*, 330 P.2d 217 (Okla. 1958), 9 O&GR 706.

1. **Lease Provision**

   **OKLAHOMA**
To avoid this uncertainty, most leases contain a "cessation of production" clause which defines the length of time the lease continues without additional reworking or drilling operations. These clauses are strictly construed against the Lessee but usually allow 60 or 90 days within which additional operations must commence. See French v. Tenneco Oil Co., 725 P.2d 275 (Okla. 1980), 90 O&GR 97.

A. **DELAY RENTAL CLAUSE**

1. **General Rule**

**OKLAHOMA**

   a. The usual "unless" lease form is interpreted to mean that the lease will terminate on any anniversary date of the lease "unless" the lessee:

   i. conducts “operations” (as defined in Section III.B.2.) for the drilling of a well on that date; or

   ii. pays a rental payment to the lessor on or before that date; or

   iii. is actually producing oil and gas or has paid a shut-in gas royalty payment on or before said date.


1. **Permitted Excuses for Faulty Payment**

**OKLAHOMA**

Regardless of the lease form, Oklahoma courts have allowed a lease not to terminate when the check was mailed on or before the anniversary date or where a clerical error by the depository bank did not result in a timely deposit. *Oldfield v. Gypsy Oil Co.*, 123 Okla. 293, 253 P. 298 (1927). Equitable relief from termination has been permitted where the mistake was by an independent agency, not under the supervision and control of the lessee, and was not due to the mistake of an agent or employee of the lessee in the performance of his duties while acting under the supervision and direction of the lessee. *Knight v. Yoakum*, 338 P.2d 1075 (Okla. 1959), 10 O&GR 970. Other decisions providing equitable excuses include:
i. The depositing of delay rentals in the depository to the credit of all lessors. *Superior Oil Co. v. Jackson*, 207 Okla. 437, 250 P.2d 23 (1952), 10 O&GR 1730.

ii. The postal authorities delivering the check to the wrong bank in the same town. *Oldfield v. Gypsy Oil and Gas Co.*, 123 Okla. 293, 253 P. 298 (1927).

iii. Depository bank failed to deposit check until after the due date. *Brazell v. Soucek*, 130 Okla. 204, 266 P. 442 (1928).

1. **Modification of Delay Rental Provision - Change Condition into a Covenant**

**OKLAHOMA**

In the case of *Lewis v. Grininger*, 198 Okla. 419, 179 P.2d 463 (1947), the Oklahoma Supreme Court did not give validity to a provision in an oil and gas lease that failure to pay delay rentals when due did not operate to terminate the lease until lessor gave notice of the failure to pay delay rentals, and which also provided the lessee with ten days to correct the omission. The court held that this provision was contrary to the delay rental provision and that any conflict would be construed most strongly against the lessee. Oklahoma thus concurs with the majority of states which hold that the notice requirement contained in most leases applies to covenants in the lease, not conditions, such as the delay rental obligation.

A. **DEFINITION OF “OPERATIONS”**

1. **General Rule**

**OKLAHOMA**

Unless the term "operations" is defined differently in the lease, "commencement of drilling operations" means, as a minimum, conducting some type of surface operation required for the drilling and completion of the well. This activity can be determined objectively. *Wilds v. Universal Resources Corp.*, 1983 OK 35, 662 P.2d 303, 76 O&GR 291.

1. **Obstruction Doctrine of Lockout Rule**

**OKLAHOMA**
If the lessor or surface tenant obstructs the lessee's operations, courts will generally excuse diligent commencement operations if the operations were conducted in good faith and would have continued except for the obstruction. 21st Century Inv. Co. v. Pine, 1986 OK CIV. APP. 27, 734 P.2d 834, 96 O&GR 597.

When the lessee of an oil and gas lease is ready, willing and able to develop the premises and proceed with due diligence, an attack upon lessee's title by the lessor will relieve the lessee of all duty to further proceed with drilling operations during the continuance of the attack, and the lessee is entitled to a reasonable time within which to proceed with drilling operations after the final resolution of the suit questioning title. Jones v. Moore, 338 P.2d 872 (Okla. 1959), 10 O&GR 963. Also see V.C. infra.

A. POOLING

1. Definition

OKLAHOMA

The voluntary pooling clause is seldom used in Oklahoma because the Oklahoma Corporation Commission can establish drilling and spacing units which supersedes the voluntary units. To avoid the possibility of subsequent changes in his unit, the lessee normally applies to the Corporation Commission to establish these drilling and spacing units. Hladik v. Lee, 541 P.2d 196 (Okla. 1975), 53 O&GR 45; Nisbet v. Midwest Oil Corp., 451 P.2d 687 (Okla. 1968), 32 O&GR 547.

Voluntary pooling is accomplished by the agreement of all lessees (and any unleased mineral owners) and by the recording of a declaration of pooling.

1. Procedures by Which Voluntary/Compulsory Units are Formed

OKLAHOMA

a. Normally, a drilling and spacing unit is established before a well is drilled by showing that the unit is underlaid by a prospective common source of supply and that the prospective well would effectively and efficiently drain the proposed unit preventing waste and protecting correlative rights. 52 O.S. § 87.1.

b. An applicant who desires to have a tract of land spaced must make an application before the Corporation Commission. After notice and a hearing, the Corporation
Commission has the power to establish drilling and spacing units of approximately uniform size covering a formation or common source of supply. 52 O.S. 87.1(d). The formation of a drilling and spacing unit is a jurisdictional prerequisite to obtaining a force pooling order. Gulfstream Petroleum Corp. v. Layden, 632 P.2d 376 (Okla. 1981), 71 O&GR 66.

c. Once a drilling and spacing unit is established, the amount of leasehold that will be held by production into the secondary term is limited by statute. In the case of a spacing unit 160 acres or more in size, no oil and gas leasehold interest outside the spacing unit may be held by production more than 90 days beyond the expiration of the primary term. 52 O.S. § 87.1(b). This limitation only extends to leases taken after May 25, 1977, the effective date of the act. Wickham v. Gulf Oil Co., 623 P.2d 613 (Okla. 1981), 71 O&GR 399.

1. **Effect of Pooling (or Not Pooling) Non-Participating Royalty Owner**

**OKLAHOMA**

A drilling and spacing unit established by the Corporation Commission essentially "pools" the royalty owners so that they share in the revenues from any well in that unit. 52 O.S. § 87.1; see also Shell Oil Co. v. Corporation Commission, 389 P.2d 951 (Okla. 1963), 20 O&GR 841 (the "Blanchard Decision").

If a government section of 640 acres is spaced for gas and the unit well is completed as an oil well, then the royalty is paid on its spaced 640-acre basis, maintaining all leases until such time as spacing is changed, if ever. Meredith v. Corporation Commission, 368 P.2d 828 (Okla. 1961), 16 O&GR 618.

Upon application, notice and hearing, the Corporation Commission also had the authority to:

i. change the size of the drilling and spacing unit (smaller or larger); and/or

ii. permit additional wells to be drilled within the unit (usually called “increased density” wells.)


1. **Effect of Having an Unleased Mineral Owner Within the Pooled Unit and the Effect of Completing a Unit Oil Well When the Unit was Pooled for Gas Production**

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OKLAHOMA

A force pooling order is normally obtained where the unleased mineral owners and working interest cotenants cannot agree on a development plan, or where there are unlocated mineral owners or working interest cotenants. The force pooling order determines:

a. the operator;
b. the dry hole costs;
c. the completed well costs;
d. the elections in which the lessee or unleased mineral owner must (a) "lease" its interest (at a stated value), or (b) participate in the drilling and development of the initial well and unit.

The order also creates the operator's lien rights as to any unpaid drilling and operating costs. Assuming all unleased mineral owners and all lessees have been made parties to the force pooling proceeding, there are no unleased mineral owners and no lessees within the unit who are not bound by the force pooling order.

1. Different Types of Units

OKLAHOMA

Oklahomans are not confused by the use of the term "unit," which normally means a drilling and spacing unit.

A. CALCULATIONS AND PAYMENT OF ROYALTIES

1. Meaning of a “Market Value” Gas Royalty Clause

OKLAHOMA

Gas royalty is calculated on a contract price received for the gas sold by the lessee, regardless of whether the lease contains a market value, market proceeds, or market price royalty provision. *Tara Petroleum Corp. v. Hughey*, 1981 OK 65, 630 P.2d 1269, 71 O&GR 386.
1. **Items of Expense Deducted From Royalty Payment**

OKLAHOMA

The royalty payable under a gross proceeds and a market value lease, is to be calculated after deduction of the cost of transportation to the pipeline. *Johnson v. Jernigan*, 475 P.2d 396 (Okla. 1970); Costs cannot be deducted when the costs are associated with creating a marketable product. *Mittelstaedt v. Santa Fe Minerals, Inc.*, 1998 OK 7, 954 P.2d 1203. However, a lessee is not entitled to deduct the cost of gas compression at least when the compressors and connectors are located on the leasehold. *Wood v. TXO Production Corp.*, 1992 OK 100, 854 P.2d 880.

1. **Implied Covenant to Market**

OKLAHOMA

The lessee has an implied obligation to obtain a fair market price for the gas sold, whether the royalty is paid pursuant to a "proceeds" royalty clause or a "market value" royalty clause. A fair price should reflect market value at the time. *See Tara Petroleum Corp. v. Hughey*, 1981 OK 65, 630 P.2d 1269.

1. **Methods by Which Royalties are Calculated**

OKLAHOMA

If a drilling and spacing unit has been established by the Oklahoma Corporation Commission, any party producing gas must pay to the operator the royalty share of proceeds from sale of all gas produced during the month. The operator then distributes the royalty proceeds. 52 O.S. 570.4 (effective July 1, 1993).

1. **When Are Royalties Due and Penalties for Late Payment**

OKLAHOMA

By statute, the operator is required to distribute funds to the interest owners within six months of the date of first sale, or within 60 days of the end of the month the oil or gas is produced. Failure to timely pay these sums results in interest being due at a rate of 12%, if title is clear, or 6% if title defects are present. An owner can file suit if he has not been paid and can collect his royalties, interest, costs and attorney fees if he prevails. 52 O.S. § 540. However, the owner cannot force the cancellation of the lease for failure to receive payment.
1. **Statute Allowing Interest Owners to Perfect a Security Interest in Proceeds From a Well**

**OKLAHOMA**

The owner of an interest in a well in Oklahoma has the ability to file an Oil & Gas Owners Lien pursuant to 52 O.S. § 548. A notice of lien needs to be filed with the land records of the county clerk within 90 days of the time payment is due under 52 O.S. § 540, and a certified copy of the lien needs to be sent to the purchaser. This lien will apply to the oil or gas or proceeds therefrom, and actions to foreclose on the lien must be taken within a one year period or it expires. This statute was enacted to give the mineral owner and working interest owners the ability to create a perfected security interest in the proceeds from a well in which they have an interest.

1. **Statute Allowing One Working Interest Owner to Share in the Proceeds of Another Working Interest Owner’s Gas Contract**

**OKLAHOMA**

Oklahoma Statutes permit each uncontracted owner in a natural gas well to share in the revenues from other parties’ gas contracts if the uncontracted owner gives appropriate notice to the designated marketer. A contracted party must agree to revenue share with the other owners unless a private contract exists governing gas balancing. 52 O.S. § 581.5.

1. **Are Take or Pay Process Royalty Bearing?**

**OKLAHOMA**

Oklahoma law does not require take-or-pay proceeds to be shared with the royalty owner. *Roye Realty & Developing, Inc. v. Watson*, 1996 OK 93, 949 P.2d 1208.

IV. **SEISMIC ACTIVITY**

1. **Who Has the Right to Conduct or Authorize Seismic Tests?**

**OKLAHOMA**

An unleased mineral owner, a mineral lessor, or a mineral lessee, not the surface owner, owns the right to conduct or to authorize seismic tests for the presence of oil or gas. *Enron Oil & Gas Co. v. Worth*, 1997 OK CIV APP. 60, 947 P.2d 610.
1. **Does the Lease Grant the Exclusive Right to Conduct Seismic Tests?**

**OKLAHOMA**

If the granting clause of a lease conveys the exclusive right to explore to the lessee, then the mineral lessor no longer retains any geophysical rights. Whether the lessee has the exclusive rights to conduct seismic exploration depends upon the language in the oil and gas lease. *Royer Realty v. Southern Seismic*, 1985 OK CIV APP 43, 711 P.2d 946, 87 O&GR 361.

1. **Liability for Wrongfully Condemning Land**

**OKLAHOMA**

Oklahoma has not decided the issue of damages for subsurface trespass. It is likely that the damages for subsurface trespass would be same as Texas. *See Ohio Oil Co. v. Sharp*, 135 F.2d 303 (10th Cir. 1943). For example, in an unreported decision, a court directed a verdict on liability and held a seismic company was liable for geographical trespass for shooting seismic on property without a permit from a mineral owner. *Burns v. Western Geophysical*, No. CIV 87-2319 (W.D. Okla. 1989). *See also, Ohio Oil Co. v. Sharp*, 135 F.2d 303 (10th Cir. 1943).

A. **SURFACE DAMAGES**

1. **General Rule as to Payment; Surface Damage Act**

**OKLAHOMA**

The Oklahoma Surface Damage Act (52 O.S. §§ 318.1-318.9) requires a lessee to pay a surface owner for damages and provides the following procedure:

a. The lessee must notify the surface owner in writing of his intent to commence operations and institute good faith negotiations as to damages. If the parties enter into a written contract settling damages, the lessee can enter the property immediately and commence operations.

b. If the surface owner and lessee do not reach agreement, then the lessee must file a petition for the appointment of appraisers in the district court before he can enter the property. After a hearing the court subsequently determines the damages, unless one party requests a jury trial.
c. Failure to abide by the Surface Damage Act can result in treble damages being awarded to the surface owner.


1. **Lessee’s Right to Use the Surface, Water, etc.**

   **OKLAHOMA**

   An oil and gas lease impliedly conveys to the lessee the right to use all of the oil, gas, water, soil, etc., that is reasonably necessary to carry out the lessee's operations under the lease, including secondary recovery operations such as water flooding. *Wilcox Oil Co. v. Lawson*, 341 P.2d 591 (Okla. 1959).

1. **Obstruction Doctrine**

   **OKLAHOMA**

   The filing of a petition under the Surface Damages Act authorizes the petitioner to enter the drilling site. 52 O.S. § 318.5. The lessee can enforce his right to enter by obtaining a Temporary Restraining Order or Injunction. The surface owner may be liable to the lessee for damages.

1. **Accommodation Doctrine**

   **OKLAHOMA**

   Oklahoma has not adopted the Accommodation Doctrine.

A. **Severance of Title From the State (PATENTS)**

   **OKLAHOMA**

   A. If a patent was issued by the United States of America, or any of the Indian Tribes, the minerals were also granted. If a patent was issued prior to 1933, the State did not reserve any part of the mineral estate.

   B. As to any land granted by the United States of America to Oklahoma pursuant to the Enabling Act subsequent to 1933, if the Commission of the Land Office determined that the lands were valuable for oil and gas purposes, then the Commission had the authority
to reserve mineral rights in its patent. 64 O.S. § 282.

C. All lands foreclosed upon by the Commissioners of the Land Office can be resold by the Commission. In such sale, the Commissioners must reserve 50% of the mineral rights. 64 O.S. § 96.

A. RECORDING RULES

1. Nature of the Oil and Gas Lease for Recording Purposes

OKLAHOMA

Although an oil and gas lease is a hybrid estate in Oklahoma, with attributes of both real and personal property, for recording purposes, a lease is treated as real property. *Davis v. Lewis*, 187 Okla. 91, 199 P.2d 994 (1940).

1. Effect of Not Recording

OKLAHOMA

An oil and gas lease, an assignment of a lease, or any conveyance of a mineral interest that is not recorded in the county where the minerals are located is void as to a creditor or a subsequent purchaser who pays a valuable consideration without notice, unless the instrument has been acknowledged or proved and filed for record as required by law. An unrecorded instrument is binding on a party to the instrument, the parties' heirs, and a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument. 16 O.S. § 25; *Barker v. British American Oil Producing Co.*, 208 Okla. 426, 256 P.2d 807 (1953); 2 O&GR 976.

1. Doctrine of Bona Fide Purchaser

OKLAHOMA

Because there may be title risks that do not arise from a "conveyance," the protection of 16 O.S. § 15 is limited. The equitable doctrine of "bona fide purchaser" (hereinafter referred to as BFP) provides greater protection. In order for a grantee to be a BFP and prevail over a prior equitable claim, the grantee must:

a. acquire a recordable interest;

b. pay value;
c. be in good faith; and

d. be without "notice" of the prior claim.

Both 16 O.S. § 15 and the BFP doctrine require a person claiming their benefit to be "without notice" of the prior claim of the contesting party. There are two kinds of "notice":

a. the notice provided by the County Records, generally called "constructive notice," means that a purchaser and creditor have notice imputed to them of every recital, reference, reservation and provision of every instrument in their chain of title, and of every unrecorded instrument that is referred to in their chain of title.

b. "inquiry notice" means that the purchaser or creditor has actual knowledge of facts which would lead a reasonable person to inquire further, the most common example being the possession of the land by an adverse claimant or by his tenant.

_Tenneco Oil Co. v. Humble Oil & Refining Co._, 449 P.2d 264 (1969); 33 O&GR 143.

1. **Instruments that are Void or Voidable Even if Recorded**

   **OKLAHOMA**

   Neither 16 O.S. § 15 nor the BFP doctrine can protect a grantee from void instruments or some voidable instruments, such as:

   a. Forgery--a forged deed is void, and even though recorded in due form is ineffectual as a muniment of title, even as to good faith purchasers for value. _Parduhn v. Rodman_, 201 Okla. 242, 204 P.2d 869 (1949).

   b. Mistaken identity--the execution of an instrument by grantor having the same name as the owner of the land conveys no interest and is void.

   c. Agent without authority--see II.D. supra.

   d. Minority--an instrument executed by a minor is voidable by him until a reasonable time after the minor reaches majority. _See_ II.I. supra.

1. **Priority of Recording**

   **OKLAHOMA**
Generally, instruments can be made effective at, before, or subsequent to the date actually signed. However, if there is a constructive notice problem, then the "first recorded is right," if the purchaser is without notice, actual or constructive, of a prior grantee. *Barker v. British American Oil Producing Co.*, 208 Okla. 426, 256 P.2d 807 (1953), 2 O&GR 976.

A. SOME IMPORTANT/INTERESTING CONVEYANCING RULES

1. **Duhig Rule (Overconveyance)**

   **OKLAHOMA**

   Duhig Rule (overconveyance)--if a warranty deed reserves a specific interest without acknowledging a prior reserved mineral or royalty interest, then, in the event all mineral or royalty owners cannot be made whole, the grantee of the deed is made whole at the grantor's expense. If, however, both the grantor and the grantee have a mutual mistake of fact, then equity will permit reformation of the deed to correct the mistake of law. *Birmingham v. McCoy*, 358 P.2d 824 (Okla. 1960), 15 O&GR 486.

2. **Reference to “Interest Conveyed” v. “Land Described”**

   **OKLAHOMA**

   Oklahoma courts have ruled that in the event of ambiguous deeds, the cardinal rule is to discern the true intent of the parties, considering the instrument itself, and viewing it in the light of the circumstances existing at the time of its execution. *Dwelle v. Greenshields*, 305 P.2d 1038 (Okla. 1956).

3. **Effect of a Large Non-Participating Royalty**

   **OKLAHOMA**

   Oklahoma has held that where a stated fractional interest in oil and gas is described as a "royalty" interest, and further where a lease is outstanding at the time the deed is executed, the interest may be classified as a nonparticipating royalty interest and not a mineral interest. *Colonial Royalties v. Keener*, 266 P.2d 467 (Okla. 1953), 3 O&GR 445.

4. **“Strip and Gore” Doctrine**

   **OKLAHOMA**
Conveyance excepting road, railroad right-of-way, etc. (the "strip and gore" doctrine)--a warranty deed conveying a tract of land less a right-of-way conveys the tract subject to the right-of-way estate. *Jennings v. Amerada Petroleum Corporation*, 66 P.2d 1069 (1937).

However, a mineral deed which clearly excepts a small right-of-way tract was held not to have conveyed the minerals underlying the right-of-way tract. *Continental Oil Co. v. Patchell*, 198 Okla. 624, 180 P.2d 825 (1947).

1. **Conveyance of Mineral Acres or Royalty Acres Instead of an Undivided Interest**

   **OKLAHOMA**

   A conveyance of an acre amount was held to be controlling over the same fractional interest. In *Wade v. Roberts*, 356 P.2d 727 (Okla. 1959), 11 O&GR 529, the court construed a deed to a riparian tract which reserved . . . an undivided 5/32 interest amounting to an undivided five (5) acre interest in mineral rights. . ." The court gave credence to the recitation of five acres, even though 5/32 of tract amounted to more than seven (7) acres.

1. **Legal Description**

   **OKLAHOMA**

   a. **Sufficiency of Description**

      The description in deed must be so certain as to enable land to be identified. *Arbuckle Realty Trust v. Southern Rock Asphalt Co.*, 189 Okla. 304, 116 P.2d 912 (1941).

   a. **Omnibus/Coverall Description**

      Although courts in Oklahoma have never ruled on the question of a broad description such as "all land in Latimer County," it is the author's opinion that the conveyance would be valid between the parties, but would not be descriptive enough so as to constitute constructive notice under the tract index system of public record.
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