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## Rocked by Rocket: Applying Oklahoma's MRTA to Severed Mineral Interests After Rocket v. Donabar

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## NOTES

### Rocked by *Rocket*: Applying Oklahoma's MRTA to Severed Mineral Interests After *Rocket v. Donabar*

#### *I. Introduction*

In a 2005 quiet-title suit now approaching infamy—*Rocket v. Donabar*<sup>1</sup>—the Oklahoma Court of Civil Appeals held that some thirty-six years previous, on November 18, 1969, Oklahoma's Marketable Record Title Act (MRTA) severed and extinguished the mineral rights beneath appellant Clark Tomassian's property.<sup>2</sup> All agree that, before that date, Tomassian's predecessor in interest held the forty-acre tract in fee simple.<sup>3</sup> The divesting document—a mineral conveyance filed November 18, 1929, in the chain of title of appellee Rocket Oil and Gas (Rocket Oil)—ultimately derived from a stranger to title.<sup>4</sup>

#### *A. Background*

In many ways the hubbub surrounding *Rocket* since its announcement is surprising. The *modus operandi*, if not the *raison d'être*, of Oklahoma's MRTA (indeed all the progeny of the Model Marketable Title Act) is the extinguishment of properly recorded and filed property interests—regardless of the strength or legitimacy of the underlying claims—in order to establish defect-free title.<sup>5</sup> Subject to a few notable exceptions, the only factor determining which interests are extinguished and which are

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1. *Rocket Oil & Gas Co. v. Donabar*, 2005 OK CIV APP 111, 127 P.3d 625. I would like to thank Oklahoma title attorney Jereme Cowan for bringing this case to my attention and providing invaluable feedback for this Note.

2. *Id.* ¶ 48, 127 P.3d at 636.

3. *Id.*

4. *Id.* ¶ 41, 127 P.3d at 634. Black's defines "stranger" as "one not standing toward another in some relation implied in the context." *Stranger*, BLACK'S LAW DICTIONARY (10th ed. 2014). A stranger to title, then, is someone who purports to convey a property interest yet does not have recorded title as to the interest conveyed.

5. 16 OKLA. STAT. § 73 (2011) ("[S]uch marketable record title shall be . . . 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.").

preserved is the dates on which the documents creating or preserving the interests were filed.<sup>6</sup>

Nevertheless, this case, its implications, and the rationale underlying its result remain a source of significant discussion and confusion among Oklahoma oil and gas title attorneys.<sup>7</sup> The primary point of contention concerns *the type* of property interests to which the MRTA applies.<sup>8</sup> It was the common belief of many if not most Oklahoma title lawyers that severed mineral interests were altogether outside the realm of the MRTA's action.<sup>9</sup> This notion was not unfounded: section 76(A) of the statute stipulates that the act cannot be applied "to bar or extinguish any mineral or royalty interest which has been severed from the fee simple title of the land."<sup>10</sup> Generally, prior to *Rocket*, practitioners interpreted this language to bar the MRTA's use on all title chains containing severed mineral interests.<sup>11</sup> While not directly addressing the issue, *Rocket's* holding presumably contradicts this notion.<sup>12</sup> No doubt after the opinion came down, more than one attorney awoke in a cold sweat, wondering how many opinions she had gotten wrong and what, exactly, the scope of her liability might be.

This Note's primary purpose is to explain how title attorneys should employ the MRTA with respect to mineral rights in light of the *Rocket* holding. This demands an examination of relevant portions of the opinion itself. Some argue *Rocket* is bad law premised on bad statutory interpretation. This Note, however, demonstrates the opposite: *Rocket* is good law and adheres to the most literal reading of the statute. Yet this Note also suggests that the 1995 Amendment to the MRTA alters which deeds can serve as roots of title under the thirty-year version of the act. This effectively prevents mineral deeds filed by individuals who only owned severed mineral rights from serving as roots of title unless, as in the immediate instance, they were filed prior to 1930. In coming to that conclusion, this Note argues that the internal logic of the MRTA is premised on the assumption that it is not self-

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6. *Id.* § 74.

7. See Kraettli Q. Epperson, *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*, 82 OKLA. B.J. 623 (2011). Mr. Epperson's response to this Note can be found following Part V (Crib Sheet). His response focuses on this Note's interpretation of the severed mineral exception and the question of whether the MRTA is self-executing below, *infra* Parts III.A. and III.C, respectively.

8. *Id.*

9. *Id.*

10. 16 OKLA. STAT. § 76(A) (2011).

11. Epperson, *supra* note 7, at 623.

12. *Id.* at 624.

executing and is reliant on a quiet-title action to trigger its effect. Finally, this Note provides a “crib sheet” that outlines the basic ramifications of the holding for oil and gas title lawyers.

In order to view *Rocket* in context, this Note begins with a brief overview of the issues that gave rise to marketable title acts, followed by a history of Oklahoma’s MRTA. The conclusion of the preparatory section looks at how the MRTA was understood and used by title attorneys prior to the *Rocket* decision.

### *B. Defects and Marketable Title*

Marketable title is a bedrock concept in property law. In every real-property transaction (absent clear indication to the contrary), the law imputes to the seller of real property a promise to convey marketable title and grants to the buyer the right to receive such title.<sup>13</sup> The term itself, however, has frustratingly resisted satisfying, non-circular definitions—leaving vague the issue of what, exactly, the seller promises to convey and what the buyer is entitled to receive. On its own terms, the very fact the seller sold the property would seem to establish the title as “marketable.” But it does not. *Black’s* defines marketable title as “title that a reasonable buyer would accept because it appears to lack any defect and [appears] to cover the entire property that the seller has purported to sell.”<sup>14</sup> Lewis Simes, author of the Model Marketable Title Act (Model Act), alludes to a more cynical definition of marketable title: title a court would be willing to force upon a buyer.<sup>15</sup> Capturing aspects of both, the Oklahoma Bar Association’s definition requires the vendor to provide title “free from apparent defects, grave doubts and litigious uncertainty, and consist[ing] of both legal and equitable title fairly deducible of record.”<sup>16</sup>

The problem is that most title in the United States has a number of defects<sup>17</sup>—and, not surprisingly, any doubt or uncertainty is potentially “grave” for attorneys. This is especially true in the oil and gas industry where erroneously attributing mineral rights can mean rental fees and

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13. 77 AM. JUR. 2D *Vendor and Purchaser* § 86 (2006).

14. *Marketable Title*, BLACK’S LAW DICTIONARY (10th ed. 2014).

15. LEWIS M. SIMES, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION 11 (1960).

16. OKLA. BAR ASS’N, 2012 TITLE EXAMINATION STANDARDS HANDBOOK 1 (John B. Wimbish ed., 2011).

17. Jereme Cowan, *Anatomy of a Title Opinion* 7 (n.d.) (paper presented at the Oklahoma Bar Association’s Oil and Gas Title Examination CLE Preparatory Course, Sept. 12, 2013) (on file with the Oklahoma Law Review) (noting “[t]he record will most likely contain a host of title defects”).

royalties are paid to the wrong person and must be paid again to the rightful owner. Even in younger states like Oklahoma, the early years of most chains of title contain gaps in ownership, wild deeds, and ambiguous descriptions of land.<sup>18</sup> Furthermore, farmland in those days often passed intestate, occasionally not entering probate at all.<sup>19</sup> If you add to this the propensity of survivors of joint tenancies to convey the land without sufficiently recording their co-tenants death, the high number of title defects and uncertainties is not surprising.

Mineral interests in Oklahoma are plagued with their own special set of problems. In oil and gas producing areas, many owners will sever and retain their mineral interests when conveying property.<sup>20</sup> Because Oklahoma has been producing oil and gas for over one-hundred years, owners severed the minerals under some tracts of land long ago. When these owners died, the interests were often fractionalized as they descended to heirs.<sup>21</sup> Unlike fractionalized surface interests, which heirs often unite in one owner for practical reasons, mineral interests tend to stay fractionalized and keep dividing.<sup>22</sup> Generations of descendants of the owner of an undivided 1/3 interest may all die intestate, with subsequent generations owning undivided 1/9th interests, then 1/45th interests, then 1/270ths.<sup>23</sup> Eventually, especially as the minerals lay dormant, the exact fractional interest is forgotten, resulting in erroneously stated interests in deeds and wills or quitclaim deeds that do not even attempt to describe the conveyed interest.<sup>24</sup>

For these and other reasons, defects riddle most mineral chains.<sup>25</sup> The crux of the issue, then, is this: property transactions require that title be free of defect or danger of litigation, but title is full of these defects, potentially

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18. Joseph Shade, *Petroleum Land Titles: Title Examination & Title Opinions*, 46 BAYLOR L. REV. 1007, 1059 (1994) (noting “most chains of title, in their early years, reveal apparent gaps in title [and] conveyancing irregularities”).

19. See Julius J. Zschau et al., *Using Land Trusts to Prevent Small Farmer Land Loss*, 44 REAL PROP. TR. & EST. L.J. 521, 522 n.1 (2009).

20. Gregory D. Russell & Lauren N. Fromme, *The Problem of Dormant Minerals*, 33 ENERGY MIN. L. FOUND § 8.02, 289 (2012), [http://www.emlf.org/clientuploads/directory/whitepaper/russell\\_fromme\\_12.pdf](http://www.emlf.org/clientuploads/directory/whitepaper/russell_fromme_12.pdf).

21. *Id.*

22. *Id.* § 8.02, at 289-90.

23. See Shirley Norwood Jones, *Constitutional and Practical Problems in Legislation to Terminate Non-Productive Mineral Interests*, 3 MISS. C. L. REV. 175 (1983); see Zschau et al., *supra* note 19, at 528 (noting a farm that passed intestate for multiple generations from 1935 to 1978, resulting in sixty-seven people owning an interest, the smallest of which was 1/19,440th).

24. See Zschau et al., *supra* note 19, at 529.

25. See COWAN, *supra* note 17, at 7.

making property transactions a quagmire of liability. The need to convey otherwise defective title without incurring liability has given rise to a variety of curative measures, including the Model Act.<sup>26</sup>

*C. The Model Marketable Title Act*

Lewis M. Simes introduced the Model Act, based on the Michigan Marketable Title Act, in 1960.<sup>27</sup> Written with the express purpose of “simplifying and facilitating land title transactions,”<sup>28</sup> it basically allowed that, if a person had an unbroken and recorded chain of title for forty years, during which time no other person filed a conflicting claim, any and all claims to a property interest recorded prior to the forty-year period were extinguished.<sup>29</sup> In practice, the key document in the operation of the act is the “root of title.”<sup>30</sup> This document must be a recorded conveyance or title transaction in the property owner’s chain of title.<sup>31</sup> Furthermore, it must “purport[] to create the interest claimed by such person, upon which [she] relies as a basis for the marketability of [her] title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined.”<sup>32</sup> The act extinguishes *all* defects and other interests in real property, unless otherwise exempted, that are reflected in the record *before* the date the root of title was filed.<sup>33</sup> And the Model Act exempts only three interests from its extinguishing work: 1) a lessor’s reversionary right of possession at the end of a lease; 2) any easement or similar interest clearly observable by physical evidence of its use; and 3) any interest owned by the United States.<sup>34</sup>

An interest otherwise subject to extinguishment can be preserved in two ways. First, the owner can file a notice within the forty-year period plainly stating the nature of the claim and a desire to retain it.<sup>35</sup> In this manner, by filing a notice every thirty-nine years, successors in interest can preserve the interest indefinitely. The second manner of preservation is more complex. If the *same* record owner of a possessory interest in land (1) possesses it for more than forty years, (2) her interest is not otherwise

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26. See SIMES, *supra* note 15, at 5.

27. *Id.* at 10.

28. *Id.*

29. *Id.* at 4.

30. See Epperson, *supra* note 7, at 625.

31. See SIMES, *supra* note 15, at 10.

32. *Id.*

33. *Id.* at 8.

34. *Id.* at 9.

35. *Id.* at 8.

preserved,<sup>36</sup> and (3) she is still in possession at the time that marketable title is being determined, then her period of possession will be given the same effect as filing a notice just prior to the expiration of the forty-year period.<sup>37</sup> But note: if she dies or conveys the property before the time of determination, this exception does not apply, and the claim is lost.

Finally, with an eye towards fairness and due process concerns, the Model Act provides a two-year window after its enactment for the owners of potentially extinguished property interests to file a preserving affidavit. Only after this period does the act begin its extinguishing operation.<sup>38</sup>

Assuming the Model Act were enacted as written, an examiner inspecting title would use it as follows: beginning with the date forty years before the date on which he is determining title and moving chronologically backwards therefrom, he would find the most recently recorded conveyance of the subject parcel. This document is his *potential* root of title. After giving a cursory examination of the previous title documents to determine easements, interests owned by the federal government, and reversionary, possessory interests in leases, he would closely scrutinize the documents in the chain of title for the forty years immediately following the root. Finding no competing recorded interests, he could safely assume that all interests previous to the root of title not otherwise excepted were extinguished and that the title was defect free up to the date of the root. If, however, he found competing claims in the chain, he would go back to the next closest preceding conveyance and repeat the process. He would continue moving back until he found a conveyance followed by forty years of clean title. That document would be his root, and he could safely conclude that the act extinguished all competing interests recorded prior to that date.

As a piece of legislation written to address the problem of unmarketable title due to long-abandoned interests and ancient defects, the Model Act is unquestionably successful and startlingly thorough. Since its introduction, eleven states have adopted some version of either the Model Act or its progeny, the Uniform Marketable Title Act, with nine others adopting related measures.<sup>39</sup> Many of these states' legislatures were concerned the

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36. This could be by another conveyance of an interest or notice of the interest in the record, such as granting an oil or gas lease or conveying duck-hunting rights to the land. *See id.*

37. *Id.*

38. *Id.* at 10.

39. Jennifer Cohoon McStotts, *In Perpetuity or for Forty Years, Whichever Is Less: The Effect of Marketable Record Title Acts on Conservation and Preservation Easements*, 27 J.

act was too thorough or that people might exploit it by unfairly divesting individuals of their property with little notice or by fraudulent means.<sup>40</sup> In response, these states carved out additional exceptions to the act's extinguishing power.<sup>41</sup> Oklahoma's decision to do this, and the language it chose in so doing, lies at the heart of the *Rocket* controversy.

#### *D. Oklahoma's Forty-Year MRTA*

Oklahoma has passed two versions of the MRTA, the Forty-Year MRTA and the Thirty-Year MRTA, with the latter amended in 1995 and 1997.<sup>42</sup> The legislature passed the Forty-Year MRTA in 1963, granting property owners until September 13, 1965, to file affidavits preserving potentially extinguished interests.<sup>43</sup> As passed, the forty-year version is almost identical to the Model Act in wording and operation, save for the interests exempted from extinguishment.<sup>44</sup> While leaving the exceptions for the reversionary interest of lessors and interests owned by the federal government unaltered, it expanded the easement exception to preserve an interest in any easement whatsoever. It further shielded any additional rights granted, exempted, or reserved in a document that also created an easement.<sup>45</sup> Finally, the legislature barred "any mineral or royalty interests which has been severed from the fee simple title of the land" from extinguishment by the MRTA.<sup>46</sup> A detailed analysis of this exception is below.

#### *E. Oklahoma's Thirty-Year MRTA and Its Amendments*

In 1970 the legislature amended the MRTA to be a thirty-year act.<sup>47</sup> In this instance, property owners had until July 1, 1972, to preserve potentially extinguished interests. The legislature further stipulated that this provision did not resurrect claims barred under the Forty-Year MRTA.<sup>48</sup> Aside from

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LAND RESOURCES & ENVTL. L. 41, 46 (2007) (describing the states that have adopted various title acts).

40. Patrick H. Martin, *Dormant Mineral Acts: Possible Game Changers?* 10 (conference paper presented at "Development Issues in Major Shale Plays: What's on the Horizon," sponsored by the Rocky Mountain Mineral Law Foundation, May 1-2, 2014), Westlaw, 2014 No. 2 RMMLF-Inst Paper No. 4.

41. *Id.*

42. 16 OKLA. STAT. §§ 71-80 (2011).

43. 16 OKLA. STAT. §§ 71(b), 81 (1971).

44. 1963 Okla. Sess. Laws 33-35.

45. 16 OKLA. STAT. § 76 (1971).

46. *Id.* Agreements related to subdivision developments are also excepted therein.

47. 1970 Okla. Sess. Laws 116.

48. *Id.* at 118.



this stipulation and the shortening of the necessary unbroken chain of defect-free title from forty to thirty years, the law remained unchanged.

In 1995, and again in 1997, the legislature modified the Thirty-Year MRTA to address potential abuses. The 1997 amendment, which forbade and punished the filing of sham or slanderous title documents, did not affect the operation of the act and is outside the scope of this Note.<sup>49</sup>

The 1995 amendment broadened the traditional definition of “severed mineral interest” and altered the MRTA’s operation in two ways.<sup>50</sup> First, the amendment defined “severed mineral interests” to include mineral leasehold, working, royalty, and overriding royalty interests, as well as the traditional definition—a mineral interest without a corresponding interest in the surface estate.<sup>51</sup> It altered the operation of the act by limiting the instruments that could serve as a root of title for a severed mineral interest to those executed by a person or entity who—as reflected in the record—owned more than a severed mineral interest in that parcel.<sup>52</sup> Second, it exempted stray instruments from serving as roots of title under certain conditions.<sup>53</sup> This exception was triggered when the following conditions were met: (1) the record otherwise contained a valid, uninterrupted chain of record tracing back at least thirty years to a root of title and (2) the current owner in the valid chain filed an affidavit alleging (3) that she was in possession of the property and (4) that the owners under the stray deed owned no interest in it.<sup>54</sup>

#### *F. Law Before the Case*

Prior to *Rocket*, very few Oklahoma courts had rendered decisions on the MRTA, leaving attorneys with little precedent to aid their understanding of the statute. Relevant caselaw consisted of three, contradictory rulings—one from the Oklahoma Supreme Court, another from the Oklahoma Court of Civil Appeals, and a third from the District Court for the Western District of Oklahoma. In 1982, the Oklahoma Supreme Court issued *Mobbs v. City of Lehigh*.<sup>55</sup> Beyond giving a basic overview of the purpose of the MRTA and its action, *Mobbs* is noteworthy for those issues which it specifically

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49. 16 OKLA. STAT. §§ 75, 79 (2011).

50. 1995 Okla. Sess. Laws 932; 16 OKLA. STAT. § 76(D) (2011).

51. 16 OKLA. STAT. § 76(D).

52. *Id.* § 76(E).

53. *Id.* § 76(B).

54. *Id.*

55. 1982 OK 149, 655 P.2d 547.

declined to settle: the constitutionality of the act<sup>56</sup> and whether it was self-executing or needed a quiet-title action to trigger its application.<sup>57</sup> The Oklahoma Supreme Court likely chose to mention the issue of self-execution in response to a much-criticized<sup>58</sup> portion of the 1975 Oklahoma Court of Civil Appeals opinion, *Anderson v. Pickering*.<sup>59</sup> There, the *Anderson* Court declared that the MRTA was not self-executing but was instead a statutory method for quieting title, requiring formal action to trigger its operation.<sup>60</sup> Unfortunately, the court did not provide the underlying rationale for its conclusion.<sup>61</sup> Perhaps this was why, in 1988, the District Court for the Western District of Oklahoma declined to follow *Anderson* by concluding that the act was self-executing.<sup>62</sup> It further found the act constitutional.<sup>63</sup>

The most debated aspect of *Rocket* is its implied understanding of the act's exception for mineral or royalty interest "severed from the fee simple title of the land"<sup>64</sup>—an understanding contradicting general industry practice at that time.<sup>65</sup> In Kraettli Epperson's article on *Rocket* for the Oklahoma Bar Journal, he provided two interpretations of this exception.<sup>66</sup> The second of these will be described in the Analysis section below, but the first articulates the industry interpretation at the time *Rocket* was decided.<sup>67</sup> Most attorneys believed that severing the minerals from the surface of a parcel completely barred the MRTA's extinguishing power as to that mineral chain.<sup>68</sup> In other words, under this reading severed minerals can neither be extinguished by operation of the act nor be used as a root of title to extinguish other mineral interests, severed or unsevered. This understanding did not survive the *Rocket* holding.<sup>69</sup> Understanding why requires a close examination of the case.

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56. *Id.* ¶ 7, 655 P.2d at 549. It is not obvious if the court is declining to rule on whether the act violates the Oklahoma Constitution, the United States Constitution, or both.

57. *Id.* ¶ 7 n.6, 655 P.2d at 550 n.6.

58. *Bennett v. Whitehouse*, 690 F. Supp. 955, 961-62 (W.D. Okla. 1988).

59. 1975 OK CIV APP 42, ¶ 16, 541 P.2d 1361, 1365.

60. *Id.*

61. *Id.*

62. *Bennett*, 690 F. Supp. at 962.

63. *Id.* at 960-62.

64. 16 OKLA. STAT. § 76(A) (2011).

65. Epperson, *supra* note 7, at 624.

66. *Id.* at 627.

67. *Id.* at 624, 627.

68. *Id.*

69. *Id.* at 624.

## II. Statement of the Case

In 2001, Rocket Oil and Gas Company (Rocket Oil) filed an action in Pushmatah County court to quiet title in a mineral estate against a number of defendants.<sup>70</sup> Clark Tomassian, trustee of the Martin V. Tomassian Family Trust and the owner of the surface estate, is the only defendant of concern here.<sup>71</sup> The Pushmatah County court found the Forty-Year MRTA extinguished all mineral rights, save Rocket Oil's, and quieted title accordingly.<sup>72</sup> Tomassian appealed the ruling to the Oklahoma Court of Civil Appeals.<sup>73</sup> Its resulting opinion is at issue here.

### A. The Facts

At trial, all parties stipulated to the material facts.<sup>74</sup> Rocket Oil and Tomassian derived their competing claims from separate chains of title originating in the same source—a warranty deed filed August 11, 1924, conveying the subject parcel in fee simple from R. Van Tress to G. M. O'Donnell.<sup>75</sup> See *Figure 1*.

Taking Tomassian's chain first, he traced his interest to a warranty deed filed June 20, 1922.<sup>76</sup> Therein, O'Donnell purported to convey the subject parcel in fee simple to Avedis Donabed, a resident of Massachusetts.<sup>77</sup> Note that the deed reflecting O'Donnell's sale of the property appears in the record two years *before* the deed reflecting O'Donnell's acquisition of the property.<sup>78</sup> Donabed filed nothing more of record concerning the parcel before dying intestate on September 30, 1966.<sup>79</sup> On August 30, 1971, the decedent's brother, Elias Donabar, filed the next instrument in the chain—a

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70. Rocket Oil & Gas Co. v. Donabar, 2005 CIV APP 111, ¶¶ 1-2, 127 P.3d 625, 627-28.

71. *Id.* ¶ 1, 127 P.3d at 627. Likewise, while there are several named plaintiffs, this Note will subsume them all under the name "Rocket Oil".

72. *Id.*

73. *Id.*

74. *Id.* ¶ 3, 127 P.3d at 628.

75. *Id.*

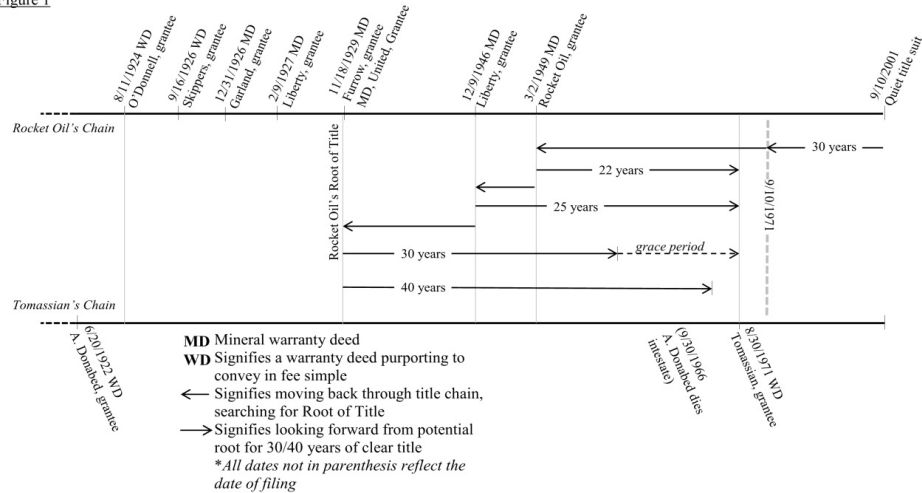
76. *Id.* ¶ 5, 127 P.3d at 628.

77. *Id.*

78. *Id.* ¶¶ 3, 5, 127 P.3d at 628.

79. *Id.* ¶ 5, P.3d at 628.

Figure 1



warranty deed conveying the property to appellant's father, Martin V. Tomassian.<sup>80</sup> Subsequently, Martin conveyed the parcel into a family trust where it stayed, and from which taxes were paid, until trial.<sup>81</sup> By time of trial, Clark Tomassian was trustee.<sup>82</sup>

Rocket Oil derived its chain of title from a warranty deed filed four years after Donabed's, on September 16, 1926.<sup>83</sup> Therein, O'Donnell again purported to convey the subject parcel in fee simple, this time to W.R. and Estelle Skipper.<sup>84</sup> On December 31, 1926, the Skippers filed a deed conveying only the severed mineral estate to R. F. Garland.<sup>85</sup> Garland conveyed the same via mineral deed, filed February 9, 1927, to Liberty Royalties Corporation (Liberty).<sup>86</sup> Subsequently, in a deed recorded November 18, 1929, Liberty conveyed the minerals to its president, John Fernow.<sup>87</sup> Fernow then conveyed the interest to United Royalty Company,

80. *Id.* Elias's last name on this deed is Donabar, not Donabed. There was likely a scrivener's error regarding either the brother or sister's last name, but neither the record nor the opinion clarify the issue.

81. *Id.*

82. *Id.*

83. *Id.* ¶ 4, 127 P.3d at 628.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

who later declared bankruptcy.<sup>88</sup> This resulted in the bankruptcy trustee conveying the estate back to Liberty in a mineral deed filed December 9, 1946.<sup>89</sup> Finally, in a mineral deed filed March 2, 1949, Liberty conveyed the severed minerals to Rocket Oil and Gas Company, appellee.<sup>90</sup> If Rocket Oil filed further instruments of record reflecting its interest in the mineral estate, the opinion does not reflect it.

### *B. Findings of District Court of Pushmataha County*

In the District Court of Pushmataha County, Tomassian asserted he was the rightful owner of the mineral estate based on the Doctrine of After Acquired Title.<sup>91</sup> Rocket Oil replied that its forty years of unbroken mineral title extinguished Tomassian's interest in the minerals beneath Tomassian's parcel.<sup>92</sup> The court quieted title in Rocket Oil.<sup>93</sup> On appeal, Tomassian raised multiple errors in the court's application of the MRTA and challenged the act's constitutionality.<sup>94</sup>

### *C. Corollary Issues*

The *Rocket* court articulated the "precise issue" on appeal as "whether Plaintiffs have 'marketable record title' to the minerals sufficient to extinguish Defendant's mineral interest."<sup>95</sup> The court additionally rendered decisions on a number of other issues, some concerning the operation of the MRTA and others concerning the act's constitutionality. This Note addresses corollary issues only insofar as they help to understand the working of the MRTA. It will not address the constitutional issues.

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88. *Id.* It appears from the opinion that the deeds conveying from Liberty into Fernow and Fernow into United were filed on the same date. Though this is never explicitly stated, when searching for a root of title, the court moves from considering the 1946 deed out of United to analyzing November 18, 1929. *See id.* ¶¶ 34-35, 127 P.3d at 633.

89. *Id.* ¶ 4, 127 P.3d at 628.

90. *Id.*

91. *Id.* ¶ 7, 127 P.3d. at 629. The Doctrine of After Acquired Title is the principle that, if a seller purports to sell a buyer property the seller does not own, should the seller subsequently acquire title, it will automatically vest in the buyer. *After-Acquired-Title Doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014).

92. *Rocket*, ¶ 7, 127 P.3d at 629.

93. *Id.*

94. *Id.* ¶ 8, 127 P.3d. at 629.

95. *Id.* ¶ 21, 127 P.3d. at 631.

*1. Doctrine of After Acquired Title Does Not Bar the Subsequent Use of the MRTA*

On appeal, Tomassian renewed his argument that the application of the Doctrine of After Acquired Title caused ownership of the full estate to transfer to Donabed as rightful owner the moment it was conveyed to O'Donnell on August 11, 1924.<sup>96</sup> The court agreed but noted that the extinguishing work of the MRTA is not concerned with the legitimacy of the underlying claims but with the elapse of the requisite number of years of unbroken title.<sup>97</sup> Therefore, it held, assuming the requirements of the MRTA were met, the legitimacy of Donabed's interest did not bar its extinguishment.<sup>98</sup>

*2. Marketability Determined from Time of Filing Suit*

The court held that the MRTA determines marketability from the time a suit is filed by moving back through the chain of title to find the root of title.<sup>99</sup> The court began by determining that the start date for seeking the root of title, *the time when marketability is being determined*, is the date upon which a quiet-title suit is filed<sup>100</sup>—in this instance, September 10, 2001. With this holding, the court overtly rejected Rocket Oil's argument that the MRTA moved forward through the chain.<sup>101</sup> Rocket Oil's argument assumed the effective date of the root of title was the filing date of the first document in a title chain—in its instance, December 4, 1926—with the thirty years of clean title measured from this date forward.<sup>102</sup>

*3. Continuous Possession by Same Owner for Statutory Period Does Not, on Its Own, Preserve Interest*

The court then held that Donabed's ownership of the property for forty-six years was not enough to trigger the owner-in-continuous-possession exception found in section 74(b).<sup>103</sup> This exception posits that if the owner in possession of the land *at the time title is being determined* has continuously possessed it for more than a thirty- or forty-year period (depending on the version of the statute), it has the same effect as if the

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96. *Id.* ¶¶ 13-14, 127 P.3d at 629-30.

97. *Id.* ¶ 16, 127 P.3d at 630.

98. *Id.* ¶ 18, 127 P.3d at 630.

99. *Id.* ¶ 30, 127 P.3d at 632-33.

100. *Id.* ¶ 29, 127 P.3d at 632.

101. *Id.* ¶¶ 23, 27, 127 P.3d at 631, 32.

102. *Id.*

103. *Id.* ¶ 45, 127 P.3d at 635.

owner had filed notice of record that she intended to preserve the interest, thwarting the MRTA's extinguishing power.<sup>104</sup> Because Donabed's forty-six-year ownership ended thirty-five years *prior to* the time of title determination, the court ruled Tomassian's interest was excluded from this provision's protection.<sup>105</sup>

*D. Primary Issue*

The primary holding of *Rocket* was that Rocket Oil had market record title sufficient to extinguish Tomassian's mineral interest on November 18, 1969, forty years after the filing of Rocket Oil's root of title.<sup>106</sup> Recall that under the MRTA, a conveyance must create or convey the interest claimed to qualify as a root.<sup>107</sup> In this case, Rocket Oil claimed the mineral estate underlying Tomassian's forty-acre parcel.<sup>108</sup> The court, therefore, limited its search to only those deeds purporting to convey severed mineral rights.<sup>109</sup>

The court began its analysis with the Thirty-Year Act.<sup>110</sup> As demonstrated in *Figure 1*, to find Rocket Oil's root, the court searched potential roots of title by preceding back through its title chain, beginning on September 10, 1971, thirty years prior to the date for which title was being determined, September 10, 2001.<sup>111</sup> The first such conveyance was the mineral deed filed March 2, 1949.<sup>112</sup> With this as a potential root, the court then examined the next thirty years for a competing interest of record.<sup>113</sup> One such interest was found twenty-two years later in the warranty deed filed in Tomassian's chain on August 30, 1971.<sup>114</sup> The 1971 deed purported to convey the parcel in fee simple.<sup>115</sup> Because Rocket Oil's possible root and the 1971 deed conflicted as to ownership of the subject parcel's mineral interest, the 1949 deed could not serve as root.<sup>116</sup> The court then proceeded back to the next potential root of Rocket Oil's chain: a

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104. *Id.*

105. *Id.*

106. *Id.* ¶ 48, 127 P.3d at 636.

107. *Id.* ¶¶ 21, 22 127 P.3d at 631.

108. *Id.* ¶ 1, 127 P.3d at 627.

109. *Id.*

110. *Id.* ¶¶ 28-31, 127 P.3d at 632-33.

111. *Id.* ¶ 31, 127 P.3d at 633.

112. *Id.*

113. *Id.*

114. *Id.* ¶ 5, 127 P.3d at 628.

115. *Id.* ¶ 33, 127 P.3d at 633.

116. *See id.*

mineral deed filed in 1946.<sup>117</sup> However, the same competing interest—the 1971 deed in Tomassian’s chain—again ended the period of unchallenged title before the necessary thirty years elapsed, this time after twenty-five years.<sup>118</sup>

Moving back yet again, the court found Rocket Oil’s root, a mineral deed filed November 18, 1929.<sup>119</sup> Once more, no competing interest in Tomassian’s chain appeared until the above-mentioned 1971 deed.<sup>120</sup> Although this forty-two year period easily met the required stretch of clear title under the Thirty-Year Act, the grace period of that act extended until July 1, 1972, meaning the 1971 deed again denied the extinguishing power of the Thirty-Year Act.<sup>121</sup>

The court then turned its attention to the forty-year version.<sup>122</sup> Applying this act, the court determined that on November 18, 1969, the 1929 deed met the requisite forty-year period of clear title and extinguished all competing claims filed prior to Rocket Oil’s root.<sup>123</sup> Because one such competing claim was the 1922 warranty deed Tomassian relied on for his claim, the court held that his mineral interest was severed from the surface and extinguished in 1969.<sup>124</sup> Finally, noting that the MRTA specified that an interest, once extinguished, cannot be revived by a later reintroduction in the record, the court ruled that neither the 1971 warranty deed in Tomassian’s chain nor his subsequent tax payments could serve to reestablish his interest.<sup>125</sup>

### III. Analysis

#### A. Severed Minerals

Recall that the debate surrounding *Rocket* centered on the court’s implied interpretation of the MRTA’s severed-minerals exception.<sup>126</sup> In particular, this interpretation contradicted the general industry understanding among attorneys at that time—that the MRTA excepted severed minerals from

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117. *Id.* ¶ 34, 127 P.3d at 633.

118. *Id.*

119. *Id.* ¶¶ 35, 41, 127 P.3d at 633, 634.

120. *Id.* ¶ 36, 127 P.3d at 633-34.

121. *Id.*

122. *Id.* ¶ 39, 127 P.3d at 634.

123. *Id.* ¶ 40, 127 P.3d at 634.

124. *Id.*

125. *Id.* ¶¶ 38-39, 127 P.3d at 634.

126. Epperson, *supra* note 7, at 623.



extinguishment *and* excepted severed-mineral conveyances from serving as roots of title to extinguish competing non-severed interests.<sup>127</sup>

The industry's previous interpretation has several advantages. First, it intuitively seems right. Whatever reason the legislature chose to protect severed mineral interests would seem to apply with at least as much force to mineral interests still attached to the surface. Further, and this may be the crux of this interpretation's appeal, this understanding provided practitioners with an easy-to-understand, bright-line rule: the MRTA can be ignored as to severed mineral title chains. However, because the *Rocket* court held that a mineral deed extinguished an unsevered mineral interest, this interpretation did not survive the holding. Unfortunately, the court never overtly discussed the severed-mineral exception in its opinion, thereby yanking from title attorneys their traditional interpretation of it while simultaneously providing no new interpretation to fill the void.

Epperson has suggested a second interpretation of the severed-mineral exception—this one in keeping with the *Rocket* holding.<sup>128</sup> His reading is focused on the MRTA's description of the excepted interest itself—a “mineral . . . interest *which has been severed from the fee simple title of the land.*”<sup>129</sup> He suggests this language be read to bar a severed mineral interest from being extinguished by a subsequent deed *in the same chain of title* when the grantor of a surface interest fails to except the previously severed minerals when describing the lands.<sup>130</sup>

Imagine the following: In 1967, *O* granted Blackacre to *A* in fee simple. In 1968, *A* conveyed the minerals under Blackacre via mineral deed to *B*. Then, in 1969, *A* conveyed the surface of Blackacre to *C*, excepting the minerals. Five years later, *C* conveyed Blackacre to *D* via warranty deed but forgot to except the minerals therein, triggering the presumption that *C* conveyed to *D* in fee simple.<sup>131</sup> *B* never filed any notice of record to preserve her mineral interest.

Under Epperson's preferred interpretation, *C*'s warranty deed to *D* could not serve as a root of title to extinguish *B*'s severed mineral interest because they are in the same chain of title. However, on the same facts, now assume

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127. *Id.* at 624.

128. *Id.* at 627. Mr. Epperson's response to this Note's suggested reading of the mineral exception is found below.

129. *Id.*

130. *Id.*

131. 16 OKLA. STAT. § 29 (2011). (“Every estate in land . . . granted, conveyed or demised by deed . . . shall be deemed an estate in fee simple . . . unless limited by express words.”).

that in 1972, *K*, who is not part of *D*'s title chain, purported to convey Blackacre to *L* in fee simple via warranty deed. Under Epperson's reading, after thirty years, the 1972 conveyance from *K* to *L* would extinguish *B*'s severed mineral interest. This is because, under this interpretation, the exception only applies when a severed mineral interest would otherwise be extinguished by a subsequent conveyance *in the same chain of title*. Because *L*'s interest was not from the same chain, the exception does not apply, and the MRTA would extinguish the severed-mineral interest just as it would a fee-simple interest or surface interest.

This reading has the advantage of explaining the statute's otherwise awkward description of the excepted interest: "any mineral . . . interest which has been severed from the fee simple title of the land . . . ."<sup>132</sup> The logic of the argument is that if the drafters wished to bar the extinguishing of all severed minerals, they would have simply said the MRTA exempts severed minerals from extinguishment. Epperson suggests the otherwise superfluous phrase "from the fee simple title of the land" denotes which title cannot be used to extinguish the minerals—the title from which the minerals were originally severed.<sup>133</sup> This reading has the further advantage of addressing the foreseeable scenario in which the oversight of a surface owner in forgetting to exempt the mineral interest in a granting deed inadvertently divests the rightful owner of her minerals.

Whatever advantages Emerson's interpretation possesses, it is plagued by the same significant drawback as the traditional interpretation: it requires the interpreter to assume things not within the four corners of the statute. Under the so-called "golden rule" of statutory interpretation, one should look outside the four corners of the text for interpretive help only if the statute is ambiguous on its face.<sup>134</sup> The MRTA's exception for severed minerals, while perhaps confounding, is not ambiguous.

In this Note I suggest a third possible interpretation of the severed-mineral exception. This interpretation posits that severed minerals are *always* barred from being extinguished by the MRTA and that they are *only* barred from *extinguishment*, not from serving as roots of title. Like Epperson's, this interpretation adheres to the *Rocket* holding. But it has the further benefit of being the most straightforward reading of the statute. The statute's plain and unambiguous language is that the exception applies to *severed* mineral interests.<sup>135</sup> Mineral interests, in general, are nowhere

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132. *Id.* § 76.

133. Epperson, *supra* note 7, at 627.

134. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

135. 16 OKLA. STAT. §§ 72, 76.

barred from extinguishment. This makes sense. If all mineral interests were excluded from the act's work, a fee-simple root of title could not fully extinguish a competing fee-simple interest. The surface interest would be extinguished, but the mineral interest, being exempted from the act's work, would remain—defeating the act's purpose of rendering defect-free title.

The question, then, becomes whether the MRTA, on its face, allows a conveyance of severed minerals to serve as a root of title to extinguish unsevered mineral interests. The answer, supplied by the interrelationship of three definitions in section 78 of the MRTA, is an unequivocal “yes.”<sup>136</sup> The act defines “marketable record title” as “a title . . . which operates to extinguish . . . interests . . . existing prior to the . . . *root of title* . . . .”<sup>137</sup> “Root of title” is defined as “that conveyance or other *title transaction* . . . upon which [a person] relies as a basis for the marketability of his title . . . .”<sup>138</sup> Finally, “[t]itle transaction” is “any transaction affecting title to any interest in land, including title by . . . mineral deed . . . .”<sup>139</sup> Taken together, the unavoidable conclusion is that a mineral deed is a title transaction that can serve as a root of title and provide the basis for extinguishing other interests—including mineral interests—assuming no exceptions apply. Therefore, because only *severed* minerals are explicitly exempted from this action, it follows that a mineral deed can extinguish mineral interests that have not been severed from the fee-simple title.<sup>140</sup> Any doubts that still survive should fall to the statute's instruction to construe it “liberally” to “allow[ ] persons to rely on a record chain of title . . . subject only to such limitation as appear in . . . this act.”<sup>141</sup> A mineral deed, then, can serve as a root of title to extinguish any interest not expressly excepted from the MRTA's work—including a non-severed mineral interest.

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136. *Id.* § 78. These definitions have remained unchanged since the original passing of the Forty-Year Act.

137. *Id.* § 78(a) (emphasis added).

138. *Id.* § 78(e) (emphasis added).

139. *Id.* § 78(f). The full list of conveyances includes “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, quitclaim deed, or mortgage.” *Id.*

140. As alluded to above, *see supra* note 50, and more fully examined below, *see* discussion *infra* Part III.B, in 1995 the legislature limited the instances in which mineral deeds could serve as roots of title in section 76(C).

141. 16 OKLA. STAT. § 80.

*B. 1995 Amendment to Section 76*

While the traditional interpretation of the MRTA banning mineral deeds from serving as roots of title cannot be supported by the severed-minerals exception, section 76(C)—a product of the 1995 amendment to the MRTA—partially does. The *Rocket* court considered most of the MRTA's exceptions, but it failed to consider section 76(C), an exception that initially would appear to bar the 1929 mineral deed in Rocket Oil's chain from being used as a root to extinguish Tomassian's interest.<sup>142</sup> The court nodded to the 1995 amendment only to say it did not apply,<sup>143</sup> explaining via footnote that the amendment forbade stray deeds from serving as roots under certain conditions.<sup>144</sup> That accurately describes section 76(B).<sup>145</sup> However, section 76(C) reads that "[a]n instrument executed by a person . . . who . . . does not otherwise appear in the chain of record title to a tract of real property, except as an owner of severed mineral interest therein, shall not create a root of title."<sup>146</sup> That is, a deed executed by a person who the record reflects never owned more than a mineral interest in the parcel cannot be used as a root. This exactly describes the 1929 deed the court identifies as Rocket Oil's root.

Recall that the deed the court identified as Rocket Oil's root was a mineral deed with Liberty as grantor and Furrow as grantee.<sup>147</sup> Liberty received this mineral interest from Garland in a deed filed in 1927.<sup>148</sup> Garland, in turn, received the mineral estate via a conveyance filed December 31, 1926, with the Skippers as grantors.<sup>149</sup> The Skippers, having received the subject parcel in fee simple from O'Donnell in September of that year, appear to be the last conveyors in Rocket Oil's chain that owned more than a mineral estate in the subject parcel.<sup>150</sup> So if section 76(C) governs mineral deeds serving as roots under the Forty-Year Act, a deed executed by Furrow, who never owned more than mineral interest, could not serve as a root. Neither could one executed by Liberty nor could one by Garland. If section 76(C) applies, Rocket Oil's root must be the December

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142. *Id.* § 76(C); *Rocket Oil & Gas Co. v. Donabar*, 2005 OK CIV APP 111, 127 P.3d 625.

143. *Rocket*, ¶ 11, 127 P.3d at 629.

144. *Id.* ¶ 11 n.5.

145. 16 OKLA. STAT. § 76(B).

146. *Id.* § 76(C).

147. *Rocket*, ¶ 4, 127 P.3d at 628.

148. *Id.*

149. *Id.*

150. *Id.*

31, 1926, mineral deed. The relevant question then, and the one not answered by caselaw, is at what point section 76(C) limitations take effect.

Because Tomassian's chain of title contains nothing of record from 1922 to 1971,<sup>151</sup> whether the correct root is the 1929 or 1926 deed is inconsequential to the result. However, on slightly different facts—say if Donabed had leased the minerals in 1927—that question would be outcome determinative. Foreseeably, on other parcels where minerals were severed early, section 76(C) could move roots of title back seventy or more years.

There are three possible options for when section 76(C) would bar qualifying deeds from use as roots of title.

- *Option One*: Section 76(C) always applies, both to situations governed by the Forty- and Thirty-Year Acts.
- *Option Two*: Section 76(C) does not apply to situations governed by the Forty-Year Act—deeds filed before March 27, 1930<sup>152</sup>—but applies to all situations governed by the Thirty-Year Act.
- *Option Three*: Section 76(C) only applies to deeds that become potential roots of title at some point after the 1995 amendment was passed. Because deeds can only become roots thirty years after filing, Option Three would limit the applicability of section 76(c) to only deeds filed after 1965.

Analyzing each option in turn, it becomes evident that Option Two (section 76(C) applies to all roots governed by the Thirty-Year act) is likely correct. Returning to Option One, in passing the Thirty-Year MRTA, the legislature specifically stipulated that it did not revive claims barred under the Forty-Year MRTA.<sup>153</sup> Because it is hard to imagine that an amendment to the Thirty-Year MRTA could do what the Act itself could not—revive a previously barred claim—Option One is unlikely.

Between Options Two and Three, a difference of thirty-five years, the issue turns on whether the Act is self-executing. Here is why: if the Act was self-executing, by the end of 1994, all the competing interests to roots filed before the close of 1964 would already be extinguished. So, at the passing of 1995 amendment, any interests in competition with roots to which it

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151. *Id.* ¶ 5, 127 P.3d at 628.

152. March 27, 1970, is the date upon which the Thirty-Year MRTA was enacted, thereby terminating the work of the Forty-Year. 1970 Okla. Sess. Laws 118. March 27, 1930, then, would be the last day on which a deed filed could meet the forty-year period of defect-free title prior to the cessation of the Forty-Year MRTA's work.

153. 1970 Okla. Sess. Laws 118.

might apply prior to 1964 were extinguished. As a practical matter, as to these interests, the 1995 amendment would have no effect. For example, a July 1, 1964, mineral deed that is uncontroverted for thirty years would extinguish all competing interests on July 1, 1994. An amendment the following year would not spare these interests from extinguishment. For these reasons, if the MRTA is self-executing, Option Three—that section 76(C) applies only to deeds filed after 1965—must be correct.

On the other hand, if the MRTA is not self-executing, thus requiring the filing of a quiet-title suit to trigger its action, any root established under the Thirty-Year MRTA would be subject to 76(C), making Option Two correct. The logic here is straightforward. If the filing of a suit triggers the action of the statute, the act as enacted at the time the suit was filed would control what documents could serve as roots and, by extension, what interests could be extinguished.<sup>154</sup> If, as is argued below, the inner-workings of the MRTA are best explained as not self-executing, Option Two is likely correct. In that instance, deeds recorded after March 27, 1930, by persons whom the record does not reflect ever owned more than a severed mineral interest, cannot serve as roots of title.

### C. MRTA Is Not Self-Executing

The best understanding of the MRTA is that its inner workings require the filing of a quiet-title suit to actually extinguish interests, but that its purpose is to allow practitioners to rely on it as if it were self-executing.<sup>155</sup> As mentioned above, whether the MRTA is self-executing is undecided under Oklahoma law. In 1975, the Court of Civil Appeals declared the Act was not,<sup>156</sup> and in 1982 the Oklahoma Supreme Court expressly declined to rule on the issue.<sup>157</sup> The Western District of Oklahoma's 1988 finding in *Bennett* that it was self-executing is neither binding nor, as is argued below, particularly persuasive.<sup>158</sup> The *Rocket* court did not specifically address the issue, but in many ways the opinion reads as if the Act is self-executing. For instance, the court states, "On that date [November 19, 1969], Donabed's pre-root interest in the minerals became extinguished . . ."<sup>159</sup>

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154. The logic here is premised on the assumption that the quiet-title action was filed after the addition of section 76(C) in 1995.

155. *Contra* Addendum by Kraettli Q. Epperson, *infra*.

156. *Anderson v. Pickering*, 1975 OK CIV APP 42, ¶ 16, 541 P.2d 1361, 1365.

157. *Mobbs v. City of Lehigh*, 1982 OK 149, ¶ 7, n.6, 655 P.2d 547, 550 n.6.

158. *Bennett v. Whitehouse*, 690 F. Supp. 955, 962 (W.D. Okla. 1988).

159. *Rocket Oil & Gas Co. v. Donabar*, 2005 OK CIV APP 11, ¶ 40, 127 P.3d 625, 634.

The *Bennett* finding that the MRTA is self-executing relies exclusively on the U.S. Supreme Court's decision in *Texaco, Inc. v. Short*,<sup>160</sup> a case that determined the constitutionality of Indiana's Mineral Lapse Act.<sup>161</sup> This act, while extinguishing mineral interests, is materially different from the MRTA in its execution. Under the Lapse Act, severed mineral interests allowed to lie dormant for twenty years automatically lapse back to the surface owner unless a preserving affidavit is filed.<sup>162</sup> The filing of a quiet-title suit is not necessary to trigger this action, and it applies equally to all severed mineral interests.<sup>163</sup> In contradiction, the MRTA, as *Rocket* makes explicit, requires that the filing of a quiet-title suit is the "time when marketability is . . . determined"<sup>164</sup> and, as such, controls what deeds may count as roots of title<sup>165</sup> and whether the exception for owners in possession is triggered.<sup>166</sup> By itself, *Texaco* does not settle this issue.

There are strong hints within the internal logic of the MRTA that it cannot be self-executing. To begin with, only the filing of a quiet-title suit can trigger the owner-in-possession exception. Recall this exception creates the legal fiction that a preserving affidavit was recorded just before the end of the thirty-year period of clean title if, at the time of filing an action, an owner in possession for more than thirty years continued to possess the subject parcel.<sup>167</sup> At the least, that exception is not self-executing. But if the rest of the Act is self-executing, an after-filed root might have already extinguished the owner in possession's interest, making the affidavit moot and the exception meaningless.

Further, by statute and as outlined by the *Rocket* court, the manner in which the root is determined *requires* the filing of a quiet-title suit. First, the root by definition is limited to those deeds relied upon to create the interest claimed.<sup>168</sup> Therefore, it is the filing of the action that determines what deeds can serve as roots—and, by extension, what interests are

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160. 454 U.S. 516 (1982).

161. *Bennett*, 690 F. Supp. at 960, 962. The *Rocket* court relied heavily on *Texaco* for determination of constitutionality issues. These issues, while interesting and, in my belief, far from decided, are not within the purview of this Note.

162. *Texaco*, 454 U.S. at 518.

163. *See id.*

164. *Rocket*, ¶¶ 29-30, 127 P.3d at 632 (emphasis omitted).

165. 16 OKLA. STAT. § 71 (2011).

166. *Id.* § 74(b).

167. *Id.*

168. *Rocket*, ¶ 30, 127 P.3d at 632; 16 OKLA. STAT. § 78(e) ("'Root of title' means that conveyance . . . in the chain of title of a person, purporting to create the interest claimed by such person . . .").

extinguished. Second, the root is determined by beginning at the time of filing suit and moving backwards. A self-executing statute would move forward through time. Consider the immediate case. The subject parcel was conveyed in fee simple by a deed filed in Rocket Oil's chain on September 16, 1926.<sup>169</sup> From this filing date until 1971, a competing claim was not filed in Tomassian's chain.<sup>170</sup> If the MRTA were self-executing, Tomassian's entire estate would have been extinguished on September 16, 1966, forty years after the 1926 deed's filing. Indeed, this is the approach adopted by the district court—an approach specifically condemned within the *Rocket* opinion.<sup>171</sup>

The *Rocket* court never considered that Tomassian's entire property interest was extinguished because (1) by statute, Rocket Oil would be limited to a deed creating the interest it was claiming—a mineral interest—to serve as its root, and (2) the court was working backwards, so it never even reached the 1926 deed. If the act is self-executing, these stipulations are nonsensical and the *Rocket* holding is misleading. The mineral estate the court declares extinguished in 1969 would have been extinguished several years earlier, along with the rest of appellant's estate. On the other hand, if the MRTA requires the filing of a quiet-title action to trigger its extinguishing power, the stipulations make sense. Because interests are not extinguished until a suit is filed and because the interest claimed at the suit's filing determines what is extinguished, the MRTA's internal logic must operate on the premise that the act is not self-executing.

On the other hand, if the MRTA is to achieve its stated purpose of expediting the conveying of property,<sup>172</sup> it is evident that, as an external matter, the MRTA must be relied on as if it were self-executing—or at least as if the quiet-title suit had already been filed and decided. This makes sense of the language in section 80 that states that the act should be construed to “allow[ ] persons to rely on a record chain of title . . . .”<sup>173</sup> Admittedly, it does not exactly square with the language of section 73, which states that all competing claims are “hereby declared to be null and

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169. *Rocket*, ¶ 4, 127 P.3d at 628.

170. *Id.* ¶ 5, 127 P.3d at 628.

171. *Id.* ¶ 30, 127 P.3d at 632-33 (“[O]ne must begin at [the time marketability is being determined] and proceed back through the chain, not forward from the chain's source, as erroneously decided by the trial court.”) (emphasis omitted).

172. 16 OKLA. STAT. § 80.

173. *Id.*



void” once the statutory period of defect-free title has been met,<sup>174</sup> but it does give effect to it.

When a law contains apparently contradictory assumptions, the wisest course of action—until the courts or the legislature offer clarification—may be to proceed as if each assumption is true in its realm. Because aspects of the MRTA cannot be self-executing and the internal workings of the Act would be non-sense if it were, relative to its internal workings and amendments to them, the MRTA is best understood as not self-executing. When considering these issues, assume the MRTA requires legal action to extinguish interests. For title examination purposes, however, the practitioner should rely on the MRTA as if it is self-executing and interests are extinguished the moment the statutory period of clear title has elapsed. Another way of stating this is that it takes legal action for the MRTA to actually extinguish mineral interests, but the act is self-executing in declaring title “marketable,” and that declaration is sufficiently reliable to functionally extinguish other interests. While this approach may be logically problematic, lawyers in practice have done this with no difficulty since 1965, and it is the best way to make sense of statutory language and the *Rocket* holding.

#### IV. Conclusion

In 2005 *Rocket v. Donabar* rocked the world of Oklahoma oil and gas title by contradicting the settled industry interpretation of the severed-minerals exception to the MRTA—a statute title attorneys use and rely upon daily. Since that holding, no general consensus has formed regarding how this important exception should now be construed. This Note has suggested one interpretation: the MRTA can never be used to extinguish any severed mineral interests, but severed mineral conveyances can serve as roots to extinguish mineral interests not yet severed from the surface. This reading is in keeping with the *Rocket* holding and has the added benefits of being easy to implement and the most literal interpretation of the statutory language. This Note further opined that section 76(C), a product of the 1995 MRTA amendment not discussed within the *Rocket* opinion, limits instances where mineral conveyances can serve as roots of title. This provision limits such instances to those in which the grantor had an ownership claim of record to some interest in the property beyond the severed minerals. Finally, this Note suggested that section 76(C) would

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174. *Id.* § 73.

likely apply to all potential roots governed by the Thirty-Year MRTA but not those governed by the Forty-Year.

As improved extraction techniques have resurrected long-dormant or barely producing oil and gas fields, oil and gas title opinions on mineral interests are the basis for the distribution of millions of dollars.<sup>175</sup> With these millions comes millions in legal liability. Because these opinions often deal with property—like that in *Rocket*—where mineral interests were long ago severed from the surface, a solid understanding of the implications of *Rocket* for the application of the MRTA to severed mineral interests is essential for oil and gas title attorneys. With that in mind, this Note concludes with an MRTA “crib sheet” of sorts for attorneys in the field. This crib sheet summarizes the implications of the severed-mineral-exception interpretation suggested above in two formats: a list of assertions and a flowchart. Both include operative dates and basic instructions predicated on the approaches outlined in this opinion, including deeds that fall within the transitional period from the Forty-Year to the Thirty-Year MRTA.

#### V. Crib Sheet

The basic manner in which roots of title are found and competing interests extinguished, above,<sup>176</sup> was confirmed by the *Rocket* court and is assumed throughout this crib sheet and the accompanying flowchart (See *Figure 2*).

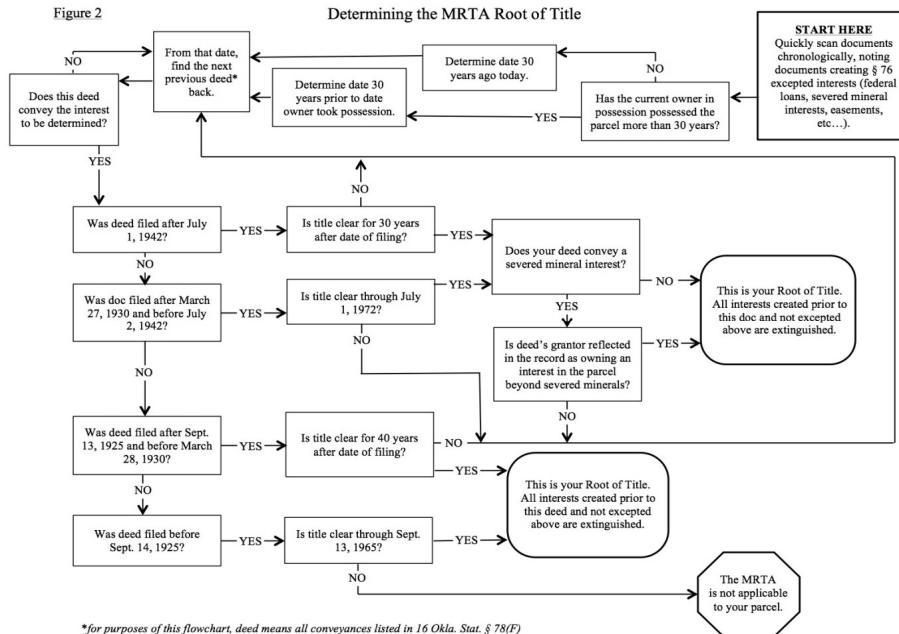
##### *Severed Mineral Interests*

- Severed mineral interests are always exempted from extinguishment. To begin the examination, while scanning chronologically forward through the documents of record for exceptions to the MRTA’s work, note all documents purporting to create a severed mineral interest. These interests are not extinguishable by either the Thirty- or Forty-Year MRTA. These chains must be carefully analyzed for defects of any type not otherwise subject to curative measures.

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175. A total of 351,000 barrels per day were produced in Oklahoma in October of 2014, *Petroleum and Other Liquids*, U.S. ENERGY INFO. ADMIN., <http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFPOK2&f=M> (last visited Jan. 19, 2015), at a value in excess of \$80 per barrel, *Crude Oil*, NASDAQ, <http://www.nasdaq.com/markets/crude-oil.aspx?timeframe=6m> (last visited Jan. 19, 2015).

176. *Infra* Part I.C.



- Conveyances of severed mineral interests can serve as roots of title. A severed-mineral conveyance can always serve as a root of title to extinguish non-severed mineral interests. For documents filed on or after March 27, 1930,<sup>177</sup> this ability to serve as a root is subject to the limitations imposed by section 76(C), further described below.

#### *Potential Roots of Title Filed on or After March 27, 1930*

- These conveyances are subject to the Thirty-Year MRTA.<sup>178</sup>
- A potential root filed on or between March 27, 1930,<sup>179</sup> and July 1, 1942, requires a period of uncontroverted chain of title extending until July 1, 1972, to serve as a root of title.<sup>180</sup>

177. See *supra* note 153.

178. See *supra* note 153.

179. See *supra* note 153.

180. See 16 OKLA. STAT. § 71 (2011). Under the Thirty-Year MRTA, possessors of property interest had until July 1, 1972, the act's effective date, to file notice of their intention to preserve a potentially extinguished claim. Therefore, potential roots whose

- A potential root filed on or after July 2, 1942,<sup>181</sup> requires a thirty-year period of defect-free title to qualify as a root of title.
- Section 76(C) does apply. A document executed by a person or entity who the record reflects never had an ownership claim except to the severed minerals in a particular parcel is barred from serving as a root of title.
- To serve as a root of title in a title chain, the document must create the interest claimed.<sup>182</sup>

*Potential Roots of Title Filed Prior to March 27, 1930*

- These conveyances are subject to the Forty-Year MRTA.<sup>183</sup>
- A potential root filed on or before September 13, 1925, requires a period of defect-free title extending until September 13, 1965, to serve as a root of title.<sup>184</sup>
- A potential root filed on or between September 14, 1925,<sup>185</sup> and March 26, 1930,<sup>186</sup> requires a forty-year period of defect-free title to qualify as a root of title.
- Section 76(C) does not apply. No special limitations are placed on a document filed by an owner of a severed mineral interest to serve as a root of title.

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thirty-year period of clear title end prior to that date must continue to be defect free until that date.

181. The first date of filing for a potential root whose period of clear title extends beyond the effective date of the Thirty-Year Act.

182. *Rocket Oil & Gas Co. v. Donabar*, 2005 OK CIV APP 111, ¶ 30, 127 P.3d 625, 632.

183. *See supra* note 153, for an explanation of how March 27, 1930, is determined as the final date upon which potential deeds filed are governed by the Forty-Year MRTA.

184. *See Rocket*, ¶ 9, 127 P.3d at 629. Under the Forty-Year MRTA, possessors of property interest had until September 13, 1965, the Act's effective date, to file notice of their intention to preserve a potentially extinguished claim. Therefore, potential roots whose forty-year period of clear title end prior to that date must continue to be defect free until that date.

185. The first date of filing for a potential root whose period of clear title extends beyond the effective date of the Forty-Year Act.

186. *See supra* note 153.

- To serve as a root of title in a title chain, the document must create the interest claimed.<sup>187</sup>

*Jason Hubbert*

*Addendum by Kraettli Q. Epperson*

Jason Hubbert has crafted an excellent article concerning the meaning of the Oklahoma Court of Civil Appeals decision *Rocket v. Donabar*<sup>188</sup> and it is a significant contribution to the discussion among Oklahoma's mineral title examiners.

Mr. Hubbert suggests a solution to the continuing question as to whether Oklahoma's powerful curative act, the thirty-year Marketable Record Title Act,<sup>189</sup> helps to clarify land titles involving mineral interests.

The dilemma is caused by the two apparently conflicting provisions of the MRTA: (1) the clear listing a "mineral deed" as a possible "root of title"<sup>190</sup> and (2) the express exclusion of "severed" mineral interests from the extinguishment effect of the Act.<sup>191</sup>

However, with the application of piercing analysis, Mr. Hubbert reconciles these two seemingly inconsistent provisions by suggesting that a mineral deed, which is recorded for at least thirty years, can and does act as a "root of title" and, thereby, does extinguish any potentially competing pre-root *un-severed* mineral interests. For instance, if a pre-root owner holds fee simple title (including 100% of both the surface and minerals) and a mineral deed is subsequently filed, then, after thirty-years (and with no additional recorded transaction by the original fee simple owner) the holder of the mineral deed owns Marketable Record Title to the previously *un-severed* mineral interest.

Mr. Hubbert also addresses the other significant nagging (but usually ignored) question, as to whether the MRTA is "self-executing" or whether a court action needed in every instance to establish title in any person claiming title based on the MRTA's extinguishment ability. If the Act could be conclusively determined to be self-executing (as most examiners currently assume), such feature would go a long way towards implementing

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187. *Rocket*, ¶ 30, 127 P.3d at 632.

188. 2005 OK CIV APP 111, 127 P.3d 625

189. 16 OKLA. STAT. §§ 71-80 (2011).

190. *Id.* §§ 78(f).

191. *Id.* §§ 72, 76.

the Act's "legislature purpose of simplifying and facilitating land title transactions," by confirming that there is no need for court action.

However, Mr. Hubbert suggests, based on some of the language in *Rocket*, that a court action is needed, to achieve any benefit under the Act. However, the Act is directed at current and prospective owners. The consideration of the Act by title examiners and courts is only secondary. It is true that the thirty-year cleansing effect of the Act is considered only when a person (e.g., a prospective purchaser or lender) is reviewing the title, and, consequently, such date of review is a moving target, as time passes.

There is no reason for such date of determination to be limited to the date a lawsuit is filed. The application of the law is not "triggered" only by the action of filing a lawsuit. It is activated by the proper placement of instruments in "the record" at the time of such determination by a prospective buyer/lender, or by a title examiner or a court. In other words, you can acquire Marketable Record Title (after thirty-years), and then rest in the assurance that you have statutory Marketable Record Title. However, you must remember to "re-record" every thirty years.

