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Biographical Sketch

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Kansas and Oklahoma Oil & Gas Law
Key Differences
by
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Surface Owner Rights

• Kansas:
  • Pre-entry notice obligations.
  • K.S.A. §§ 55-169 to 55-169b.
  • K.S.A. § 55-151. "[Intent to Drill] shall also include non-binding preliminary estimates of the location of roads or ingress or egress, any tank battery and any pipeline or electrical line." Copy delivered to surface owner.

Surface Owner Rights

• K.S.A. § 55-177. "Leaving the surface of lands with a part of the operating structure or other equipment intact after abandoning oil or gas wells is against public policy, and constitutes a public nuisance, and shall be hereafter prohibited."
• Misdemeanor, $100 to $500 fine.
Surface Owner Rights

- K.S.A. § 55-177. "[W]ithin six months [after abandonment] shall remove any rig, derrick or other operating structure, and all abutments and other obstacles of every kind or size used in the operation of such oil or gas lease . . . and shall grade the surface of the soil in such manner as to leave the land, as nearly as practicable, in the same condition after the removal of such structures, equipment and obstacles as it was before such structures and abutments were placed thereon, unless the owner of the land and the abandoning party have entered into a contract providing otherwise."

Surface Owner Rights

- as it was before such structures and abutments were placed thereon, unless the owner of the land and the abandoning party have entered into a contract providing otherwise.

Surface Owner Rights

- Oklahoma:
  - Oklahoma Surface Damage Act, Okla. Stat. tit. 52, §§ 318.1 to 318.9.
  - Okla. Stat. tit. 52, § 320 (expanded definition of “growing crops.”)

- Kansas:
  - Surface damage cases all interpret lease clauses.
Dormant Mineral Act

- Kansas
- K.S.A. §§ 55-1601 et seq.
- "[U]nused for a period of 20 years ..."
- Prevent "lapse" by "use" or filing a statement of claim.

Dormant Mineral Act

- Use includes: "Any use pursuant to or authorized by the instrument creating the mineral interest ..."
- How do your foreclose the possibility of a use within the past 20 years?
- Use the dormant mineral act procedure followed by a quiet title action.

Oil & Gas Lease

- Habendum Clause
- What sort of "production" is required to maintain the lease beyond the primary term?
- Actual production and marketing?
- Capability to produce?
Oil & Gas Lease

- Oklahoma: a well capable of producing in paying quantities.
- Kansas: actual extraction and marketing of the oil and gas in paying quantities.

Oil & Gas Lease

- Habendum Clause
- What sort of “production” is required to maintain the lease beyond the primary term?
- Paying quantities.

Oil & Gas Lease

- Oklahoma: Three-part test.
  - (1) Determine the accounting period that will be used to compare income and expenses;
  - (2) Identify income and expenses during the accounting period; and
  - (3) Consider any “compelling equitable considerations” that justify continued unprofitable operation of the lease.
**Oil & Gas Lease**

- "[C]ompelling equitable considerations' may save a lease from termination even with unprofitable well operations."

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**Oil & Gas Lease**

- Kansas: Two-part test.
  - (1) Determine the accounting period that will be used to compare income and expenses; and
  - (2) Identify income and expenses during the accounting period.

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**Oil & Gas Lease**

- Kansas court-selected accounting period: "a reasonable time depending upon the circumstances of each case, taking into consideration sufficient time to reflect the current production status of the lease and thus to provide the information which a prudent operator would take into account in whether to continue or to abandon the operation."

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Oil & Gas Lease

- Drilling/Delay Rental Clause (similar language in Commencement Clause).
- When is a well "commenced"?
- Will actions less than actual drilling suffice?

Oil & Gas Lease

- Oklahoma: Actual drilling not required; actions preparatory to drilling will maintain the lease.

Oil & Gas Lease

- Kansas: Anything less than actual drilling with a rig capable of drilling to the targeted depth is open to challenge.
  - Other court of appeals panels have been more accommodating.
  - No Kansas Supreme Court case.
Oil & Gas Lease

• Shut-In Royalty
• Oklahoma: The habendum clause and capability of production make it unlikely, under common shut-in language, that a lessee could lose a lease for failing to pay.

Defeasible Term Interests

• Will courts treat them like an oil and gas lease?

Defeasible Term Interests

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Defeasible Term Interests

• Kansas has applied the temporary cessation doctrine to defeasible term interests. *Wilson v. Holm*, 188 P.2d 899 (Kan. 1948).

Defeasible Term Interests

• Habendum Clause
  • Will all the term interest acreage be perpetuated by production from a pooled or unitized area which contains some term interest acreage?

Defeasible Term Interests

• Oklahoma: Production from a statutory spacing unit formed by pooling order would maintain all acreage covered by the term interest, even though only part of the acreage was in the unit and the unit well was not on any of the term acreage.
Defeasible Term Interests

- Kansas: Only the portion of the defeasible term interest acreage that actually participates in pooled or unitized production will be perpetuated beyond the primary term; the outside acreage terminates.

Tenancy by the Entirety

- Okla. Stat. tit. 60, § 74: "A joint interest is one owned by several persons . . . in equal shares, being a joint title created by a single instrument . . . when expressly declared in the instrument . . . to be a joint tenancy, or as between husband and wife a tenancy by entirety or joint tenancy as the grantor may elect . . . ."

Tenancy by the Entirety

- Kansas abolished the tenancy by the entirety in 1891; and for periods of time prior to 1891 treated it more like a joint tenancy than a specialized marital estate.
- Already had homestead rights in Kansas.
Joint Tenancy

• K.S.A. § 58-501: "Real or personal property granted or devised to two or more persons including a grant or devise to a husband and wife shall create in them a tenancy in common . . . unless the language used in such grant or devise make it clear that a joint tenancy was intended to be created . . . ."

Severance of Joint Tenancy

• Not clear in Kansas whether intent will override a four unities analysis.
• Dicta on effect of liens on joint tenancy.
• Does entering into an oil and gas lease constitute a "severance" of a joint tenancy?
• Joint tenancy audits?

Joint Tenancy

• "It is undisputed that any joint tenant may sever his or her joint tenancy interest in real property by conveying the interest to a third person, or by mortgaging the joint tenancy interest, or — in some jurisdictions — by leasing that interest. Once the joint tenancy interest is severed, a tenancy in common results." Hall v. Hamilton, 667 P.2d 350, 354-55 (Kan. 1983) (dicta).
Joint Tenancy

- Dicta elevated to holding:
- "The Bank contends that the plain language in Hall requires Kansas courts to find that a pledge acts as a severance of the joint tenancy interest because there is no legal distinction in the operative effect of a mortgage or pledge (other than the type of property encumbered). We agree." Hutchison Nat. Bank & Trust v. Brown, 753 P.2d 1299, 1301 (Kan. Ct. App. 1988).

Transfer-On-Death Deeds

- K.S.A. §§ 59-3501 to 59-3513.
- As of July 1, 1997.
- "An interest in real estate . . . ."
- Main requirement is that it be recorded.
- Revocable.
- Revoked by filing another conveyance of the property—but cannot be revoked by will.

Transfer-On-Death Deeds

- Okla. Stat. tit. 58, § 1251 et seq.
- Nontestamentary Transfer of Property Act
- Effective November 1, 2008.
- Similar, but not identical, to the Kansas law.
Unique Kansas Provisions

• Statutory Dower and Curtesy
  • K.S.A. § 59-505. "[S]urviving spouse shall be entitled to receive one-half of all real estate of which the decedent at any time during the marriage was seized or possessed and to the disposition whereof the survivor shall not have consented in writing, or by a will, or by an election . . . ."

Unique Kansas Provisions

• Exception: Spouse was never a resident of Kansas during the existence of the marriage relation.
  • This is why the marital status of a grantor must be determined and, when married, have the spouse join in the conveyance or, if the spouse is not a record owner, consent to the conveyance in writing.

Unique Kansas Provisions

• K.S.A. § 58-2271:
  • Pipeline easement “shall be considered abandoned if”:
    • "pipeline is removed from the easement without provision for replacing of the pipeline" or
    • "if no pipeline is placed in the easement within ten years after the easement is granted."
Unique Kansas Provisions

• Procedure to demand release; 20 days to comply.
• Failure to comply: "recover . . . damages in the amount of $500, together with costs and reasonable attorney fees for preparing and prosecuting the action [plus any actual damages that can be proven]."
• "Pipeline" means "any pipeline designed to deliver an energy product other than for sale at retail."

Unique Kansas Provisions

• K.S.A. §§ 55-201, 55-202, 55-206
• Procedure to clear title of unreleased oil and gas leases.
• Notice, failure to respond.
• Attorney fees, statutory damages.

Unique Kansas Provisions

• K.S.A. §§ 55-205
• Affidavit of Production
• Recording of an oil and gas lease "shall impart notice to the public of the validity and continuance of said lease for the definite term therein expressed, but no longer . . . [unless, before the end of the primary term the lessee files an] affidavit . . . setting forth . . . facts showing the required contingency has happened. . . ."
Unique Kansas Provisions

- K.S.A. § 58-2273:
  - General property descriptions.
  - Potential penalty for using clause covering "all of the grantor's property in a certain county," or "describes unspecified other mineral or royalty rights or interests of the grantor in an entire township, county or state . . ." or "purports to cover . . . rights not owned by the grantor . . . ."

- "and such . . . [provision] should not have been included in such deed or conveyance, then any party . . . may make written demand upon the grantee or grantor, as applicable . . . to rescind or reform the general conveyance provision."
- Damages: $10,000 per title affected, or an amount equal to the value of the interests conveyed, plus attorney fees.

Oddities of Kansas Oil & Gas Law

K.S.A. § 79-420

- K.S.A. § 79-420. Whenever the fee to the surface of any tract . . . of land is in any person . . . and the right or title to any minerals therein is in another . . . , such mineral interest shall be listed and the market value, if any, determined separately from the fee of such land . . . . Such land and such mineral interest shall be separately taxed to the owners thereof respectively. . . . When such reserves or leases are not recorded within 90 days after execution, they shall become void if not listed for taxation.
Oddities of Kansas Oil & Gas Law
K.S.A. § 79-420

• What is the impact of failing to record within 90 days or having the mineral interest "listed for taxation"?
• It is as though the conveyance was never made - it is "void."
• Compliance with the statute is "a condition precedent to the vesting of title in the transferee," *Becker v. Rolle*, 508 P.2d 509, 513 (Kan. 1973).

Oddities of Kansas Oil & Gas Law
K.S.A. § 79-420

• April 22, 1929 Beckers convey one-half interest in the minerals to Rolle's predecessor in interest.
• April 5, 1930 the deed was recorded.
• Tax listing date at this time was January 1 of each year (January 1, 1930 for Rolle).
• Rolle missed the 90-day recording option; also missed the listing option.

Oddities of Kansas Oil & Gas Law
K.S.A. § 79-420

• The defendants' mineral interest was challenged in a quiet title action in 1969.
• Henry Becker to Leighton (1929); Leighton to Vycital & Durr (1935); tax sale, Munsell purchaser (1954); Leighton also retained a partial interest. (Dead chain of title.)
• Not a forfeiture; defendants never had an interest in the minerals.
• No laches; not a divestment of title.
Oddities of Kansas Oil & Gas Law
K.S.A. § 79-420

• The "condition precedent" to vesting imposed by K.S.A. § 79-420 can be satisfied either by recording: (1) within 90 days after execution (delivery); or (2) prior to the next tax listing date.


Oddities of Kansas Oil & Gas Law
K.S.A. § 79-420

• However, "listing" can be accomplished by means other than "recording."

• *Templing v. Bennett*, 131 P.2d 904 (Kan. 1942) (need not record the deed if you in fact present it to the assessor and ask that it be listed; grantee's presentment effective even though there was no system set up to take the interest).

Oddities of Kansas Oil & Gas Law
K.S.A. § 79-420

• Step #1: Obtain a copy of every version of K.S.A. § 79-420 from its enactment in 1897 to the present.

• Reason: the listing dates are stated in the early statutes – and they vary.

• Must use the version applicable at the time the deed at issue took effect.
Oddities of Kansas Oil & Gas Law
K.S.A. § 79-420

• It is a factual issue whether the grantee presented the interest to the assessor for "listing" by some means other than recording.
• Because the statute has been around since 1897, it may be impossible to provide factual information other than the documents of record and recording data.
• Who has the burden of proof?

Oddities of Kansas Oil & Gas Law
K.S.A. § 79-420

• Step #2: Once it is determined the recording dates do not meet either the 90-day or listing deadline requirement, determine whether the deed may have been in escrow, or delivery otherwise delayed.
• This is a factual issue that does not have to appear of record to apply.

Oddities of Kansas Oil & Gas Law
K.S.A. § 79-420

• Deeds executed January 23, 1929, placed in escrow, released from escrow March 5, 1929, recorded by grantee on May 3, 1929.
• Conditional delivery on January 23 to be placed in escrow, was not the delivery date; delivery date was March 5.
Oddities of Kansas Oil & Gas Law
K.S.A. § 79-420

- K.S.A. § 79-420 does not apply to a grantor that excepts a mineral interest from a conveyance of the balance of the rights to its grantee.
- Deed delivered August 1944, recorded by grantee March 15, 1945 (March 1, 1945 listing date).

Oddities of Kansas Oil & Gas Law
K.S.A. § 79-420

- Deed executed and delivered Jan. 30, 1964 conveying minerals to grantee, subject to a reserved joint life estate in the grantors.
- Deed recorded July 3, 1967 (after the death of one of the grantors).

Oddities of Kansas Oil & Gas Law
K.S.A. § 79-420

- Last life tenant died May 6, 1979, at which time the vested remainder became a present possessory interest.
- The recording clock did not begin until May 6, 1979; recording on July 3, 1967 was timely.
Oddities of Kansas Oil & Gas Law
K.S.A. § 79-420

- K.S.A. § 79-420 does not apply to an oil and gas lease. *Kansas Natural Gas Co. v. Bd. of Comm'rs of Neosho County*, 89 P. 750 (Kan. 1907).
- Deed/lease distinctions.

Oddities of Kansas Oil & Gas Law
K.S.A. § 79-420

- Royalty/Mineral Distinction.
- K.S.A. § 79-420 is the source of much of the Kansas Supreme Court's tortured analysis to distinguish a "royalty" interest from a "mineral" interest.

Oddities of Kansas Oil & Gas Law
Rule Against Perpetuities

- Another reason for courts to manipulate the mineral/royalty distinction.
- As of this writing: a perpetual non-participating royalty interest violates the rule against perpetuities and is void.
Oddities of Kansas Oil & Gas Law
Rule Against Perpetuities
• The Kansas Supreme Court's reasoning:
  • A grant of "royalty" does not vest until, and unless, there is production from the land.
  • But: A grant of a mineral interest vests immediately.
  • But: A grant of a non-participating mineral interest, devoid of all rights except the right to receive royalty, vests immediately.

Oddities of Kansas Oil & Gas Law
Rule Against Perpetuities
• Rucker reaffirmed the Kansas Supreme Court's rule, but also extended it to an exception of the royalty interest in the grantor.
  • Deed delivered May 17, 1924; recorded August 29, 1925 (beyond listing date too).
  • Quiet title action filed in 2008 seeking to void the grantor's retained interest.

Oddities of Kansas Oil & Gas Law
Rule Against Perpetuities
• "The grantor . . . Reserves 60% of the land owner's one-eighth interest to the oil, gas or other mineral that may hereafter be developed under any oil and gas lease made by the grantee or by his subsequent grantees."
  • Court concluded this is a "royalty" interest.
  • Avoids 79-420 problems but trigger RAP.
Oddities of Kansas Oil & Gas Law
Rule Against Perpetuities
• Court, in 2008, invalidates an interest that was created in 1924. A mere 84 years!
• It is "void" so it is as though it never existed; grantee took the entire interest in 1924.

Oddities of Kansas Oil & Gas Law
Rule Against Perpetuities
• Kansas enacted its version of the Uniform Statutory Rule Against Perpetuities effective July 1, 1992.
• Abolishes the common law rule prospectively from July 1, 1992 forward, replaces it with a statutory rule similar to the common law rule, plus an alternative 90-year wait-and-see provision.

Oddities of Kansas Oil & Gas Law
Rule Against Perpetuities
• Abolishes rule for most "nondonative transfers." K.S.A. § 59-3404(1).
Oddities of Kansas Oil & Gas Law
Rule Against Perpetuities
• One provision of the Uniform Statutory
Rule Against Perpetuities has retroactive
effect and applies to all conveyances
prior to July 1, 1992.
• K.S.A. § 59-3405(b). Reformation to
comply with common law rule but extend
the duration as long as possible.

Oddities of Kansas Oil & Gas Law
Rule Against Perpetuities
• Just to keep it interesting:
• The bill that passed in 1992 containing the
Uniform Statutory Rule Against
Perpetuities was the result of combining
three different acts.
• Arguably that violated art. 2, § 16 of the
Kansas Constitution and therefore all the
acts under the bill are void.

Oddities of Kansas Oil & Gas Law
Rule Against Perpetuities
• The issue was raised in a Kansas Court of
Appeals case and rejected; case was not
appealed to the Kansas Supreme Court.
• One commentator believes the act is void
(me): “Void Enactments of the Kansas
Legislature,” 80 J. of the Kansas Bar Ass’n
28 (July/August 2011).
• If so, we are back to the common law rule
against perpetuities in Kansas.