UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

2018 Fundamentals of Oil, Gas and Mineral Law

April 19, 2018
Houston, Texas

Perfection and Recording: JOAs, the UCC, and "I Did *What* via Email?"

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I. INTRODUCTION[3]

Regardless of the state in which he or she practices, an energy lawyer will need to be familiar with perfection of titles to and liens on myriad properties, including (but certainly not limited to) oil, gas and other minerals in the ground; the minerals severed from the ground; proceeds of sales of the minerals; accounts and general intangibles arising out of minerals transactions; the minerals as they are transported from the wellhead to the processing plant; the minerals as they are processed and marketed; the equipment used to produce, transport and process the minerals (such as the platform itself if the production site is in the water; equipment on the well; motor vehicles and boats; communications equipment; computer hardware as well as software used; intellectual property derived from seismic surveys; proprietary information that may be subject to disclosure to agencies under various laws; structures used for offices and crew housing; and contracts to which his or her client is a party.

Oil and gas exploration and production ("E&P") is usually conducted by two or more parties. This is so because of the high investment risk, the large capital investments required, the long payout period, the need for shared technical expertise, specific regional experience, possession of seismic and other necessary information, and, in some instances, compulsory regulatory requirements. This cooperation (not "co-operation!") usually begins at the earliest stages, such as bidding and the initial well, and continues for the economic life of the interests in which the parties are invested. The cooperation may also extend to joint marketing and construction of gathering lines and other facilities through the use of different contracts reflecting the nature of the risk, rights and obligations involved.

In the United States, the joint operating agreement ("JOA") is the agreement that is most basic to this relationship. Properly drafted, it regulates the rights and obligations of the parties, spelling out on a percentage of interest basis, the respective rights, obligations and liabilities of each party. The joint operating agreement also allows the parties to share risks and costs; establish an economy of scale in contracts and procurement for the covered E&P operations; establish joint bidding procedures; impose confidentiality restrictions; create areas of mutual interests; impose limits on transfers; create certain tax advantages; and in Texas, prevent the joint and several liability of the parties to third parties.

You should note that the suggestions which will be discussed in this paper will require physical changes to the JOA, not simply filling in a blank or making an election provided in the form. This paper will focus on the basics of identifying creditors and debtors under the JOA, the

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[1] The views and opinions expressed by the author in this paper are his personal views and opinions; they do not express the views or opinions of Baker & Hostetler LLP or its clients.

[2] Portions of this paper were presented at the 40th Annual Ernest E. Smith Oil, Gas and Mineral Law Conference March 27, 2014.

[3] The author acknowledges with gratitude the advice and encouragement of John English, a partner in the Houston office of BakerHostetler, a generous and patient mentor, and a friend the likes of which are far too difficult to find.

liens and security interests created under the JOA, and the methods of perfecting those liens and security interests. It will also provide a brief review of other options provided by the JOA to parties who are trying to protect their financial interests. Initially, however, we will provide a general overview of the principles of Texas law regarding perfection of titles and liens in oil, gas and other minerals, and the degree to which a pen and paper can be replaced by pixels, with no salvation under the Statute of Frauds.

II. WHY RECORD?

In general, there are three types of recording statutes recognized in the United States: race; race-notice; and notice. A "race" statute provides that a purchaser or lienholder who is second in time of conveyance prevails if he or she records first, regardless of whether that person has notice of other unrecorded interests. Under a "race-notice" statute, the subsequent purchaser or lienholder must acquire an interest without notice of the prior unrecorded interest and also must file for record before recordation of the prior unrecorded interest. A "notice" statute protects a subsequent purchaser or lienholder who acquires an interest without notice of a prior unrecorded conveyance or lien, regardless of when the subsequent purchaser's deed or subsequent lienholder's security instrument is recorded.[4]

Texas is a notice recordation state. Our courts have said time and again that the recording laws in Texas are meant to protect good faith purchasers and creditors without notice of prior transfers from being injured or prejudiced by their lack of knowledge of the competing claim;[5] that the intention of our recording laws is to compel every person receiving conveyances of real property to place such an instrument of record, not only that he or she may protect their own rights, but also those of all others who may afterwards seek to acquire an interest in the same property;[6] and that the purpose of our recording laws is to notify subsequent purchasers of the rights the prior recorded instruments intended to convey.[7]

Our legislature has codified this jurisprudence in the Texas Property Code by providing that a conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to or proved and filed for record as required by law;[8] and that an instrument that is properly recorded in the proper county is notice to all persons of the existence of the instrument.[9]

The legal effect of a properly recorded instrument in a grantee's chain of title is that it constitutes constructive notice to third parties.[10] Constructive notice creates an irrebuttable

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[4] Comments to Texas Title Examination Standard 4.40 and cases cited therein.
[5] *de Toca v. Wise*, 748 S.W.2d 449, (Tex 1998); *Sanchez v. Telles*, 960 S.W.2d 762 (Tex. App. – El Paso 1997, pet. denied).
[6] *Sanchez v. Telles*, 960 S.W.2d 762 (Tex. App. – El Paso 1997, pet. denied).
[7] *Boucher v. Wallis*, 236 S.W.2d 519 (Tex. App. – Eastland 1951, writ ref'd. n.r.e.).
[8] Texas Property Code § 13.001(a).
[9] *Id.* § 13.002.
[10] *HECI Exploration Co. v. Neel*, 982 S.W.2d 881 (Tex. 1998); *Sherman v. Sipper*, 152 S.W.2d 319 (Tex. 1941).

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First appeared as part of the conference materials for the
2018 Fundamentals of Oil, Gas and Mineral Law session
"Perfection and Recording: Practical Title Issues"