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Sharp v. Miller: Continued Refinement of the Notice Requirement Under Ohio's Dormant Mineral Act

Earlier this year, Ohio's Seventh Appellate District (Monroe County) in *Shilts v. Beardmore*, 2018-Ohio-863 (2018) (appeal not allowed by *Shilts v. Beardmore*, 153 Ohio St.3d 1433), provided clarification as to the notice standard under Ohio's 2006 Dormant Mineral Act (O.R.C. § 5301.56, eff. 2006) (the "2006 DMA"). In *Shilts*, the court examined the "reasonable diligence" standard imposed on surface owners in determining the last known heirs and location of "holders" of dormant oil and gas interests. The Court found that (1) a public records search, (2) an online search, (3) a review of the deeds contained in the chain of title, and (4) a search of the Ohio Department of Natural Resources all satisfied the "reasonable diligence" burden in the fact pattern unique to *Shilts* but did not go so far as to establish a "bright line" test for all cases. On November 26, 2018, the same court elaborated on the holding in *Shilts* in *Sharp v. Miller*, 2018-Ohio-4740 (7th. App.).

In *Sharp*, the fact pattern begins with a complete mineral reservation contained in a 1944 deed, which reserved all mineral rights in favor of grantors, I.W. Poole and R.S. Smith (the "Mineral Interests"). Following a series of conveyances, the present-day surface rights became vested in David R. Miller and Ruth A. Miller.

In 2004 and 2009, the Millers leased the Mineral Interests to Eric Petroleum Corporation ("EPC") (the "Miller Leases"). Not until July 9, 2014, however, did the Millers publish a notice of intent to declare the Mineral Interests abandoned, as they could not locate any of the heirs of I.W. Poole or R.S. Smith. Having read the published abandonment notice in the newspaper, an unrelated third-party, East Ohio Minerals Recovery, LLC, apparently located and informed Jeffrey Sharp that he may be an owner of the Mineral Interests and that he would need to file a claim of preservation by early September 2014. Mr. Sharp, however, did not file a preservation notice until November 12, 2014, *after* the Millers had already filed an affidavit of abandonment.

On March 17, 2015, Jeffrey Sharp and his brother Bradley filed a complaint against the Millers, EPC, and several other parties seeking an order that the Millers failed to comply with the 2006 DMA notice requirements, to quiet title to the oil and gas, and to declare the Miller Leases terminated. On June 15, 2015, the Sharps amended their complaint and asked for a declaratory judgment that the (1) Miller Leases constituted savings events under the DMA, and (2) Millers failed to comply with the notice requirements of the 2006 DMA by filing notice by publication. The complaint was also joined by later discovered Poole/Smith heirs.

On October 25, 2017, the trial court granted summary judgment in favor of the Millers finding that the Mineral Interests were abandoned pursuant to the 2006 DMA and common law. The Poole/Smith heirs appealed, arguing that (1) the Millers failed to comply with the notice requirements of O.R.C. § 5301.56(E) arguing that the Millers did not use "reasonable diligence" when researching the potential Poole/Smith heirs before making service by publication, and (2) the Miller Leases constituted savings events under the statute.

In contrast with the *Shilts* criteria described above, the record in *Sharp* reveals that an internet search was not conducted prior to notice by publication and the recording of the affidavit of abandonment. Significantly, the Court found that an internet search was not a steadfast requirement to satisfy the reasonable diligence standard and that a surface owner's efforts to locate last known holders are to be examined on a case-by-case approach. In *Sharp*, the Court found that an internet search would not have been helpful as a title report in addition to a search of probate and public records failed to reveal any potential heirs or addresses thereof aside from a post office box previously

held by I.W. Poole. Accordingly, a search of the public records alone constituted reasonable diligence, and an internet search was not required. Having determined that the notice requirements of the 2006 DMA had been satisfied, the Court quickly determined that the Poole/Smith heirs failed to file a timely claim of preservation or identify a savings event despite being informed to do so in August 2014.

The Court also rejected the Poole/Smith heirs' argument that the Miller Leases constituted savings events under O.R.C. § 5301.56(B)(3) regardless of the fact that the lessors were the surface owners. This argument was one of first impression in Ohio. The Court stated that the Miller Leases could not be construed as savings events as to the severed oil and gas because the Millers did not hold an interest in the minerals at the time the leases were executed.

Lastly, the Poole/Smith heirs argued that the trial court erred by finding that the Mineral Interest were abandoned under common law principals. The Court determined that this argument was without merit as the 2006 DMA is the sole governing authority of determining whether mineral interests are abandoned and any common law analysis is moot.

Accordingly, the Court upheld the determination of the trial court that the Poole/Smith heirs' interests were abandoned under the 2006 DMA.

Additionally, EPC filed a cross-appeal arguing that the trial court erroneously deemed its lease with the Millers a "nullity." However, the Court pointed out that the 2006 DMA addresses only whether mineral interest have been abandoned and not the status of relevant leases. Accordingly, the trial court's dicta pertaining to the Miller Leases did not affect their validity.

EPC also argued that the trial court failed to consider its Marketable Title Act ("MTA") defense claiming that the Poole/Smith heirs' interest was previously extinguished in 1985 under the MTA such that title had become vested in the Millers. EPC raised the MTA as an affirmative defense for the first time in their motion for summary judgment. As affirmative defenses must be raised in the pleadings or amendments thereto, the Court determined that the MTA defense was waived and did not address the merits thereof. However, when surface owners are confronted with claims brought by holders, the trend of raising the MTA as a shield (as opposed to a sword) will likely continue.

While the *Shilts* decision gave interested parties more guidance as to the "reasonable diligence" standard under the 2006 DMA, neither *Sharp* nor *Shilts* established any bright-line rules, and the Court appears to favor a case-by-case analysis.

For a copy of the *Shilts* or *Sharp* opinions, or for any additional insights on how the 2006 DMA continues to impact your ownership or development plans in Ohio, do not hesitate to contact the **Energy Group** with Dickie, McCamey & Chilcote, P.C.



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