Ohio Appellate Court Clarifies Notice Requirements Under The 2006 Dormant Mineral Act

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Nearly 18 months after the Ohio Supreme Court issued a series of sweeping decisions interpreting Ohio's Dormant Mineral Act, led by Corban v. Chesapeake Exploration, LLC, 2016-Ohio-5796, the Ohio Court of Appeals for the Seventh Appellate District issued a ruling on March 5, 2018 that clarified questions left unanswered by Corban centering around the notice standard of the 2006 version of Ohio's Dormant Mineral Act found at O.R.C. 5301.56 ("2006 DMA").

In Shilts v. Beardmore, 2018-Ohio-863, the Court of Appeals examined a surface owner's attempts to comply with the 2006 DMA notice provisions required to abandon a reserved oil and gas interest created in 1914. Under the 2006 DMA, a surface owner must first "serve notice by certified mail, return receipt requested, to each holder or each holder's successors or assignees, at the last known address of each, of the owner's intent to declare the mineral interest abandoned." If notice "cannot be completed" through certified mail, the surface owner may publish a notice of abandonment in a newspaper of general circulation in the county where the minerals are located. The Shilts Court ruled that the surface owner was not required to first attempt to serve mineral holders by certified mail "when a reasonable search fails to reveal the addresses or even the names of the potential heirs that must be served."

In the Shilts case, the surface owner attempted to locate the heirs of the holder of the 1914 mineral interest by conducting, (1) a public records search (including a search of the probate records of Monroe County), (2) an online search, (3) a title search of the deed chain of title, and (4) a search of the Ohio Department of Natural Resources website. Despite these searches, the surface owner was unable to locate any heirs. Rejecting a "whatever it takes" approach urged by the mineral holders, the Court of Appeals adopted a "reasonable diligence" standard, finding that the surface owner took "reasonable efforts" to locate the heirs but was unable to do so. Therefore, the surface owner was not required to attempt certified mail service upon the heirs and notice by publication was appropriate. As a result, the Court affirmed the trial court's ruling that the 1914 reservation was abandoned under the 2006 DMA and vested in the surface owner.

While this ruling may at first glance seem rather mundane, it must be viewed in its proper context to appreciate its significance. Prior to Corban, surface owners often did not rely upon the 2006 DMA to abandon mineral interests, and when they did, the 2006 DMA notice standard was frequently not followed. A common belief at the time was that the 1989 DMA and its automatic abandonment provisions, not the 2006 DMA, applied to the abandonment of reserved mineral interests that pre-dated the 2006 DMA. Moreover, many surface owners did not want to serve notices of abandonment under the 2006

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DMA and run the risk that a mineral holder would file a preservation affidavit in response. Finally, surface owners believed that it was a futile act to attempt certified mail service on mineral holders who were known to be deceased.

After Corban, the 2006 DMA became the sole means by which a surface owner may abandon reserved mineral interests, and surface owners seeking to abandon mineral interests are required to follow the 2006 DMA notice provisions. After Corban, mineral holders also have a clear path to come forward to claim title to mineral interests that were previously believed to be automatically abandoned under the 1989 DMA.

One of the hotly contested issues after Corban was whether surface owners had complied with the 2006 DMA requirement to first attempt to serve mineral holders by certified mail. Prior to Shilts, the validity of a surface owner's abandonment could be challenged if there was no evidence of attempted certified mail service. Thus, surface owners who had already completed the 2006 DMA abandonment process prior to Corban were being asked to provide evidence of compliance with the 2006 DMA certified mail requirement. Indeed, producers who had previously relied upon recorded 2006 DMA abandonment affidavits and were paying royalties to surface owners on the basis of these affidavits began suspending royalties until surface owners could show compliance with the certified mail requirement. Additionally, mineral holders began coming forward after Corban to file 2006 DMA preservation affidavits and to challenge prior 2006 DMA abandonments because of alleged deficiencies in the notice procedure.

Now, under Shilts, there is a "reasonable diligence" test by which a surface owner's compliance with the 2006 DMA notice standard will be measured. Surface owners who can show that they exercised "reasonable diligence" to locate mineral holders and were unable to find them are more likely to prevail in lawsuits challenging their compliance with the 2006 DMA.

It is also important to note that the "reasonable efforts" to locate heirs articulated by Shilts included an online search for heirs. Thus, it can be argued the Shilts case articulates a much higher standard of diligence than a search of the county records, which is the standard that many surface owners have utilized. The added requirement of an online search will most certainly lead to more challenges by mineral owners. There are many situations where mineral holders and their heirs can be easily located using common websites such as ancestry.com and findagrave.com. If heirs can be easily located via an internet search, then surface owners may encounter difficulty establishing that their efforts to locate heirs were "reasonably diligent."

Also, prior to Corban, many surface owners made no effort to locate mineral holders, skipped the step of attempting certified mail service, and simply published a 2006 DMA notice of abandonment. In this situation, the surface owner will not have any evidence of "reasonable diligence" and will have to argue, after the fact, that had the surface owner attempted to search for heirs, the search would have been futile. However, surface owners who legitimately used "reasonable diligence" to locate heirs during the 2006 DMA abandonment process, but were unable to locate any heirs, will not be required to have attempted certified mail service on deceased mineral holders and their unknown heirs, and the Shilts court acknowledged that it would be absurd to require such an effort in futility.

Another interesting issue raised by Shilts involves the evidence surface owners may need to use to establish that they used "reasonable diligence" in their attempt to locate heirs. The evidence relied upon in the Shilts case was an affidavit of the surface owner's attorney. This will likely be a common occurrence in most 2006 DMA abandonment cases, because surface owners typically relied on legal counsel to research and prepare the necessary 2006 DMA abandonment documents. If this is the case, attorneys may be witnesses and could be required to disclose their files and provide testimony in support of showing compliance with the "reasonable diligence" standard. This gives rise to the question about whether counsel may continue to represent the surface owner if their testimony will be central to whether their client used "reasonable efforts" when, in fact, it was the attorney who attempted to locate heirs on behalf of the client.

The Shilts case demonstrates that the legal battles in Ohio courts over ownership of valuable mineral rights are far from over. Surface owners and mineral owners still have an array of potential statutory and common law claims to assert when seeking to claim or reclaim ownership of severed mineral rights. The law in this area evolves seemingly every day. The Shilts case illustrates the complexity of the legal issues and highlights the importance of retaining experienced oil and gas counsel to advise clients with regard to the ownership of mineral interests.

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