

OHIO'S SEVENTH DISTRICT COURT OF APPEALS FURTHER CLARIFIES NOTICE REQUIREMENTS UNDER THE 2006 DMA



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On November 26, 2018, Ohio's Seventh District Court of Appeals issued a ruling that clarified the "reasonable due diligence" standard that applies to surface owners who are attempting to comply with the notice requirements of the abandonment procedure in the 2006 Dormant Mineral Act (2006 DMA). (The Seventh District Court of Appeals includes Belmont, Carroll, Columbiana, Harrison, Jefferson, Mahoning, Monroe and Noble Counties.)

In *Sharp v. Miller*, 2018-Ohio-4740, the Court held surface owners are not required to perform an internet search in every case to demonstrate reasonable diligence was used to locate mineral owners for DMA notice purposes, stating that it "did not establish ... a bright-line rule or definition of 'reasonable diligence'" that would require an online search in every case. Explaining further, the *Sharp* Court noted, "Because the standard relies on the reasonableness of any party's actions, whether that party's efforts constitute 'due diligence' will depend on the facts and circumstances of each individual case. In other words, reasonable actions *in one case may not be reasonable in another case.*" (Emphasis added.) The Court was urged to adopt a

rule that required surface owners to conduct an internet search in every case as part of the due diligence required to locate mineral owners for the service of a 2006 DMA abandonment notice. The *Sharp* Court stopped short of this, adopting a reasonableness standard that requires a case-by-case review.

This decision answers an important question left open in the Seventh District's earlier ruling in *Shilts v. Beardmore*, 2018-Ohio-863, which held that the certified mail service requirement in the 2006 DMA is not necessary "when a reasonable search fails to reveal the addresses or even the names of the potential heirs that must be served." Since the due diligence under scrutiny in the *Shilts* case involved an internet search, many mineral holders have argued post-*Shilts* that an internet search should be required of every surface owner seeking to follow the 2006 DMA abandonment procedure in every case. *Sharp v. Miller* has rejected this argument.

A review of the facts in *Sharp v. Miller* is important to understand its holding. The original parties who reserved the mineral interest in dispute were named I.W. Poole and R.S. Smith. In 1944, Poole and Smith transferred the surface rights to the property in question,

"excepting and reserving all mineral rights." In 2014, the current surface owners, the Millers, were seeking to abandon this severed mineral interest under the 2006 DMA and attempted to locate the Smith/Poole heirs. Unable to locate them, the Millers published a notice of their intent to declare the Poole/Smith mineral interests abandoned, without first attempting service of the notice via certified mail. Thereafter, the Smith/Poole heirs filed suit to quiet title to the minerals, claiming among other things that the Miller did not comply with the 2006 DMA.

To establish the surface owners' due diligence, there was evidence that the Millers searched the public records, including the probate and deed records of Jefferson County, Ohio, the county where the property is located. There was also evidence of a subsequent internet search that was conducted during trial preparation in the underlying case that was also unsuccessful in locating heirs.

Importantly, the Court of Appeals noted that at issue was the reasonableness of the surface owner's search that occurred before the abandonment notice was filed, not any search that was done after the abandonment notice was filed. Ruling in favor of the surface owners, the Court stated that

2006 continued on page 14

"[t]here was no evidence that a simple internet search would have revealed the actual Smith/Poole heirs." Therefore, the Court concluded that a public record search of the Jefferson County deed and probate records constituted reasonable due diligence.

Several important aspects of this decision are noteworthy. First, although the Court states that the surface owner's pre-abandonment due diligence is the only relevant search, it also cited to a lengthy post-abandonment internet search to conclude that a pre-abandonment internet search would not have been successful. It seems that a post-abandonment search would always be relevant to test the reasonableness of a surface owner's pre-abandonment search, because each

search and each case is different, and the reasonableness standard is applied on a case-by-case basis. Some mineral owners are easier to find than others. And the internet is a powerful tool commonly used to locate mineral owners. In fact, there are situations where the surface owner's pre-abandonment search did not include an internet search and a post-abandonment search located the heirs within minutes. In this instance, the reasonableness of the surface owner's pre-abandonment search may be viewed as unreasonable, given the ease with which mineral owners were located on the internet.

Second, *Sharp v. Miller* was based on a set of facts that were unfavorable for the mineral owners. For example, it appears that the Smith/Poole heirs did not introduce any evidence about the

reasonableness of the internet search at all, and therefore were not able to rebut the surface owner's evidence of reasonableness of its search efforts. From the mineral owner's standpoint, in order to challenge a surface owner's due diligence, it is critical to re-trace the steps necessary to locate the heirs. If the heirs were easily located, mineral owners can to introduce evidence of how the heirs were located and how the surface owners search efforts fell short of being reasonable. Therefore, the online search element remains a vital tool when challenging a surface owner's pre-abandonment search and whether such search was reasonable. It may not be required of the surface owner in every case, as the *Sharp v. Miller* Court held, but the only way to

DMA continued on page 15



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know in each case is through a post-abandonment search.

Also, the Smith/Poole heirs received actual notice of the publication of the abandonment notice in time to file an affidavit to preserve their mineral interest, had an opportunity to file an affidavit to preserve, but failed to do so. On appeal, the Court noted that there was “no reasonable excuse” as to why they waited until it was too late to file a preservation claim. In fact, the Smith/Poole heirs were alerted about the Millers’ published notice of abandonment by a company known as East Ohio Minerals Recovery, LLC (EOMR). So, at the very least, EOMR was able to locate the Smith/Poole heirs (presumably when EOMR saw the Millers’ abandonment notice published in the local newspaper) and even alert them about the notice within the 60-day deadline to file a preservation affidavit. There was no mention in the Court’s decision as to how EOMR was able to locate the Smith/Poole heirs so fast, and certainly their search efforts would have been relevant evidence to challenge the reasonableness of the Miller’s due diligence: EOMR located the heirs,

why couldn’t the Millers? Instead, the Smith/Poole relied on the argument that, because the Millers did not conduct an internet search, they did not use reasonable diligence under the 2006 DMA.

The *Sharp* case further 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 abandon or preserve ownership of severed mineral interests. The law in this area is evolving seemingly every day. The *Sharp* case illustrates the complexity of the legal issues and highlights the importance of retaining experienced oil and gas attorney to advise clients with regard to the abandonment, preservation and the ownership of mineral interests.

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