

Oil, gas and mineral rights

How courts are deciding issues about ownership

INTERVIEWED BY ROGER VOZAR

Ohio's shale gas region has slated capital projects valued at more than \$12 billion, with the industry expected to add 66,000 jobs and \$5 billion annually to the state economy starting this year, according to economists at Cleveland State University.

More than 3 million acres have been leased for drilling, with gas and oil companies pouring nearly \$7.5 billion in bank accounts for the right to drill. The oil and gas industry, and the legal issues surrounding it, are going to have a profound economic impact on Ohio.

That activity has led to disputes about ownership of oil, gas, and mineral interests.

"There's a developing area of law regarding the Dormant Mineral Act of 1989, which was amended in 2006," says Christopher F. Swing, a partner at Brouse McDowell, with more than 22 years of experience in real estate law and litigation, focusing on title, land, mineral interests, and oil and gas disputes.

Smart Business spoke with Swing about the Dormant Mineral Act and how courts are addressing it in cases involving ownership.

What is the Dormant Mineral Act, and how was it changed in 2006?

Ohio's Dormant Mineral Act operates to 'abandon' sub-surface mineral rights, in favor of the surface owner, in instances where the surface and sub-surface rights previously were severed. Under the 1989 version of the statute, as originally enacted, owners of oil, gas and mineral interests must take some action to enforce or preserve those rights within a 20-year period, or the interests may be deemed abandoned. Under the 1989 version, therefore, abandonment may occur based upon nonuse alone. The

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2006 amendment, on the other hand, requires notice to potential mineral rights owners, and a mechanism for recording notices and affidavits, so that a potential mineral interests' owner first is made aware of any intent to declare those interests abandoned.

Two predominant issues have emerged, creating uncertainty in the statute's interpretation and application: first, which version of the statute applies in a given set of circumstances? And second, is the 20-year window 'static' or 'rolling'? For example, there is case law that says you need not apply the 2006 version of the statute (provide notice, among other things) if the mineral interests already may be deemed abandoned, based upon nonuse alone, under the 1989 version.

How have courts applied the legislation?

Although cases have interpreted and applied the legislation differently, the case that appears to most thoroughly explain the proper public policy and legislative rationale, in both interpreting and applying both versions of the statute, is a case decided last fall in Carroll County, *Dahlgren v. Brown Farm Properties*. In *Dahlgren*, the Honorable Judge Richard M. Markus ruled that, under the 1989 version of the statute, an actual abandonment claim, based upon

nonuse alone, must be made prior to the effective date of the 2006 amendment for the mineral rights to be declared abandoned under a static 20-year look-back period contained in the 1989 legislation. Markus applied the 2006 version of the statute, because there was no actual claimed abandonment prior to the 2006 enactment, notwithstanding the undisputed nonuse of the mineral rights in the preceding 20 years.

Markus also found that, unlike the 1989 version, the 2006 amendment contemplates a rolling 20-year savings window, calculated from the date the mineral rights owner receives notice of intent to declare those rights abandoned. Interestingly, he adopted the nonuse feature in the original act, and the notice and recording features in the amendment, suggesting their combination would pass federal constitutional due process scrutiny.

While the case is on appeal, what makes the opinion potentially attractive, ultimately, to the Ohio Supreme Court is that the judge accounted for the need to have an effective means of clearing land title (so as to encourage the development of these natural resources), employing an interpretation and application of the statute that addresses three key issues: nonuse, recording and constitutionality. ●