

How to Determine if an Old Oil and Gas Lease is Abandoned

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Due to the existence of signing bonuses for subsurface rights in the Utica and Marcellus Shale regions of Ohio, the question of abandonment of rights under a recorded oil and gas lease has taken center stage in courts in the eastern part of Ohio.

The issue generally being decided is whether a 1989 version of the Ohio Revised Code (R.C.) § 5301.56 or the later version enacted in 2006 applies to answer the abandonment question.

For now, trial courts are following the 1989 version of R.C. § 5301.56, which is known as the Dormant Minerals Act. In doing so, courts have applied some version of the “twenty-year rule” under statute. The twenty-year rule requires that the holder of the sub-surface rights take some affirmative steps to preserve those rights in the land records for the property or risk having the rights/ownership revert to the surface owner.

The twenty-year period can be one of the following: (a) March 22, 1969 to March 22, 1989, which corresponds to the effective date for the statute plus 20 years; or (b) March 22, 1972 to March 22, 1992, which corresponds to the effective date of the statute plus a three year grace period, plus 20 years; or (c) 20 years from the date of inquiry into the abandonment question.

After determining which 20-year period applies, courts have to determine if some action was taken to preserve the sub-surface rights. The possible actions are: (a) that the rights are the subject of a “title transaction;” or (b) there is actual production of minerals (oil, gas); or (c) the property is being used to store natural gas; or (d) a drilling permit has been issued; or (e) a claim to preserve the interest has been filed; or (f) a tax parcel number has been assigned by the county to the sub-surface rights.

Interestingly, courts are rejecting the notion that some reference to the sub-surface rights in the chain of title for the surface rights is sufficient to preserve ownership of these rights. Therefore, if a chain of title lacks a specific reference to those rights and none of the other categories apply, then the rights can revert to the surface owner. This has immediate financial ramifications to the owners of both sets of rights because the surface owner, if approached by an oil/gas company, wants to be able to sign a lease for the sub-surface rights and get a “signing bonus,” as well as to have the potential down the road for royalty payments, if a producing well is drilled. Keeping in mind that horizontal drilling is now viable as a production tool and gas companies are pooling leases to aggregate land to create large, unitized tracts to make production economically viable, the fact that an existing well on a tract of land is not producing (and is subject, therefore, to abandonment) does not mean that future drilling through

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that tract is unlikely.

As to the newer version of the Dormant Minerals Acts, if it applies, a surface owner must still determine if there is production or storage along with a filing of a right of preservation. However, instead of the abandonment being “automatic,” the owner has to notify the alleged holder of the sub-surface rights that the surface owner deems the rights to be abandoned and then files an affidavit of abandonment with the county recorder. If the holder of the rights responds with the filing of an affidavit countering the attempt to abandon, then there is no abandonment.

There is some consternation in applying the new act on the theory that “letting sleeping dogs lie” is a better approach to eliminating what, by all appearances, is an abandoned lease.

With either approach, some investigation of the current status of the sub-surface rights must be taken. There are a number of ways to approach that task. One of the easiest is to visit the Ohio Department of Natural Resources website at <http://oilandgas.ohiodnr.gov> where there is abundant information on the status of drilling and wells all over Ohio. Another method is to contact a local geologist who can do a similar search of the area in question.

If you are looking to verify ownership of sub-surface rights, it is essential to have a search done independently of a search of the surface title. There are a number of companies and independent examiners who actively work on this area now who can assist.

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