

THE LIQUID NATURE OF GAS: OR, HOW TO CAPTURE A FUGACIOUS RESOURCE

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I. Introduction

Oil and gas interests do not fit comfortably within traditional definitions of land and the interests therein.¹ This is because the subjects of oil and gas interests are only transitory; they ebb and flow and are not generally capable of being bounded as the land is.² Oil and land are, in fact, viewed so disparately that oil and gas interests are not taxable as real estate in Pennsylvania.³ However, in the realm of ownership, oil and gas interests do function similarly to land.

At the theoretical beginning of ownership, there is a solitary estate in a parcel of land, and a solitary owner thereof. Ownership extends to the depths of the earths and the heights of the heavens.⁴ This estate, however, does not have to maintain its unity indefinitely. The owner of the entire parcel may, whenever he wishes, sell off portions of his estate. He can break this estate up not only by selling 20 of the 100 acres he owns, but also by selling the rights to the coal underneath all 100 acres, while maintaining his ownership of all 100 acres of the surface estate.

Over time, these subsurface segments of the original estate can themselves become fragmented. Eventually, due not only to sale of these estates, but testate and intestate transfers, the subsurface estate will have multiple owners, some of whom may

¹ See *Indep. Oil & Gas Ass'n of Pa. v. Bd. of Assessment Appeals of Fayette County, Pa.*, 814 A.2d 180, 184-85 (Pa. 2002).

² See *id.* at 180 n.1.

³ See *id.* at 184-85.

⁴ See, e.g., *Reilly v. Widmyer*, 23 Pa. D. 176, 1913 WL 3631, at *3 (C.P. Lancaster Mar. 20, 1913); *Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 598 (Pa. 1893).

have forgotten they even own such an interest.⁵ Should any of the owners of the estate want to make use of it, there are compelling reasons to first acquire the assent of all the other co-owners.⁶ How, then, can the subsurface estate be made use of when certain owners' consent cannot be gotten because no one knows who the owners actually are anymore?

This paper will seek to answer this question by examining the Dormant Oil and Gas Act (hereinafter DOGA).⁷ The approach followed will be to look at DOGA in the light of two main questions, each of which elucidates a partial answer to the question above. First, what happens under DOGA when a party who holds an oil and gas interest in an estate wishes to drill for oil, but the subsurface estate is owned by multiple parties, some of whom are unknown or un-locatable? Second, what becomes of the actual interests of these unknown parties under DOGA; do they sit forever with the missing owner, or can they pass to someone else without the owner's consent?

II. Background

The ebbing, flowing, wandering behavior of oil and gas is similar to that of a wild animal, which may happen to be or not to be upon a person's land at any time. Accordingly, the courts have drawn analogy to the principle of *ferae naturae*,⁸ which

⁵ See Cheryl Outerbridge et al., *Missing and Unknown Mineral Owners*, 25 ROCKY MTN. MIN. L. INST. 20, at *1-2 (1979).

⁶ See *id.* at *3.

⁷ Dormant Oil and Gas Act, 58 PA. STAT. ANN. §§ 701.1-7 (West 2009).

⁸ For an interesting examination into one of the most prominent cases on the subject, see Daniel R. Ernst, *Pierson v. Post: The New Learning*, 13 GREEN BAG 31 (2009). See, e.g., *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805); *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 18 A. 724 (Pa. 1889).

simply means of wild animals.⁹ This concept states that the objects at issue, in this case oil and gas,

belong to the owner of the land and are part of it, so long as they are on or in it, and are subject to [the owner's] control; but when they escape and go to the other land, or come under another's control, the title of the former owner is gone.¹⁰

This is to say that gas is the property of the owner of the surface estate while the gas is in place on or under said owner's land; however, that ownership can be lost in two ways.¹¹ First, the gas can migrate to the land of another.¹² Such migration can be through natural forces or due to the activities of man. The rule of capture¹³ deals with this situation, stating that: "If an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his."¹⁴

Despite the ability of gas to wander off, the comparison to *ferae naturae* is not absolute.¹⁵ For instance, in contradiction to this analogy, the court in *White v. New York State Natural Gas Corporation*¹⁶ held that oil and gas already brought up and possessed then re-injected into an underground storage field belonged to the party who had injected

⁹ See BLACK'S LAW DICTIONARY 653 (8th ed. 2004).

¹⁰ United States Steel Corp. v. Hoge, 468 A.2d 1380, 1383 (Pa. 1983) (citing *Westmorland*, 18 A. at 725.).

¹¹ See *Hoge*, 468 A.2d at 1383.

¹² See *id.*

¹³ A good history of the rule of capture and its application in Pennsylvania is available from Professor Ross H. Pifer of Penn State University, The Dickinson School of Law. See ROSS H. PIFER, THE AGRIC. LAW RES. AND REFERENCE CTR., THE RULE OF CAPTURE IN PENNSYLVANIA OIL AND GAS LAW (2009), http://law.psu.edu/file/aglaw/The_Rule_of_Capture_in_Pennsylvania_Oil%20and_Gas_Law.pdf.

¹⁴ *Westmorland*, 18 A. at 725.

¹⁵ See *Hamilton v. Foster*, 116 A. 50, 52 (Pa. 1922).

¹⁶ *White v. N.Y. State Natural Gas Corp.*, 190 F. Supp. 342 (W.D. Pa. 1960).

it, even if the gas subsequently wandered naturally under another man's field.¹⁷ This was so even if the other field owner had subsequently raised that gas.¹⁸

The second method by which the ownership interest in the gas and oil can change hands comes through a severing of the surface and subsurface estates. This is accomplished by the owner of the joined estate transferring the rights to the subsurface estate to a person other than the person who has the ownership interest in the surface estate.¹⁹ Such a transfer can seem relatively simple, with the granting party deeding the acquiring party the rights to the mineral estate itself, as well as the rights necessary to retrieve said minerals.²⁰

However, even in simple two party transactions where the sole owner of the entire estate sells the mineral rights to only one other party, things can become complicated. One example of this is shown by Dunham's Rule.²¹ The concept behind this rule comes from the 1882 case of *Dunham & Shortt v. Kirkpatrick*.²² The court in this case found that a reservation of "mineral rights" will not work to reserve rights to oil, as oil is not something in the contemplation of the general use of the word mineral.²³ The important facts of this case can be briefly summarized as follows: 1) the defendants, former owners

¹⁷ See *id.* at 349.

¹⁸ See *id.* at 344-45.

¹⁹ See *United States Steel Corp. v. Hoge*, 468 A.2d 1380, 1383 (Pa. 1983).

²⁰ There is much case law concerning the rights of the subsurface estate owner's right to access his estate interest, even by invading upon the surface estate owner's interest. See, e.g., *Dunham & Shortt v. Kirkpatrick*, 101 Pa. 36, 1882 WL 13478, at *2 (Pa. 1882); *Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 598 (Pa. 1893); *Belden & Blake Corp., v. Commonwealth, Dept. of Conservation & Natural Res.*, 969 A.2d 528, 532-33 (Pa. 2009).

²¹ See generally *Dunham*, 1882 WL 13478.

²² *Id.*

²³ See *id.* at *6.

of plaintiff's land, entered into a deed of sale which contained a reservation provision allowing defendants to enter the land and remove trees and minerals; 2) the defendants removed not only trees, but also oil from the property; and 3) the plaintiff contended that oil was not covered under the contractual use of the word minerals.²⁴ The actual contractual provision in the deed stated that the sale was for the lot "excepting and reserving all the timber suitable for sawing; also all minerals; also the right of way to take off such timber and minerals."²⁵

In the analysis of the case, the court held that, while petroleum is a mineral, the parties in this case could not have meant to have the word "mineral" read so broadly.²⁶ If, the court states, the intention had been to read the term as broadly as the defendants would have liked to claim, then not only oil, but rocks, clays, sand, and even water containing such substances would also be "minerals" within the contemplation of the contract.²⁷ If such reading were given this term, then the reservation would be for said waters, rocks, and soils, and would encompass, in fact, the entirety of the property, thus rendering the sale itself void.²⁸ On the other hand, the common understanding of mineral would not include these things, and would be limited to substances of a "metallic nature."²⁹ This latter interpretation allowed the contract to be enforced, and accordingly, the court held that the parties must have been acting as businessmen, with the normal

²⁴ *See id.* at *1.

²⁵ *Id.* at *2.

²⁶ *See id.* at *6.

²⁷ *See id.*

²⁸ *See id.*

²⁹ *Id.*

understanding that businessmen would have, and thus they could not have meant “mineral” to include oil.³⁰

In *United States Steel Corporation v. Hoge*,³¹ the court applied the logic used in *Dunham* to find that the contracting parties intended to include only certain kinds of gas in the phrase “oil and gas.”³² In this case, the parties were the owner of the coal underneath a parcel of land and the owner of the surface estate.³³ Each was claiming the right to drill for, and reap, gas contained within the coal bed.³⁴ This coal-bed gas is far less efficient than natural gas, and has traditionally been treated as a hazard and waste product of coal mining.³⁵ In fact, the coal-bed gas was held in so little regard that, though a few companies made the gas a profitable resource,³⁶ most companies simply vented the gas to the outside world, letting it escape so as not to endanger the mine and miners.³⁷

The deed that severed the estates in this case dated to July 23, 1920.³⁸ The date is important in this context because the court looked not only to the language, but to the meaning that would have been present at the time such deed was signed.³⁹ With the deed

³⁰ *See id.*

³¹ *United States Steel Corp. v. Hoge*, 468 A.2d 1380, 1383 (Pa. 1983).

³² *See id.* at 1384-85.

³³ *See id.* at 1381-82.

³⁴ *See id.* at 1382.

³⁵ *See id.*

³⁶ *See id.* at 1383.

³⁷ *See id.* at 1384.

³⁸ *See id.* at 1382.

having been signed so long ago, there was no party available to testify to the meaning the parties attached in these specific instances. As such, the interpretations, even on the court, differed.⁴⁰ In the opinion of the majority of the court, a person at that time, and with the knowledge of the different profitabilities of the types of gas at issue, would not have included coal-bed gas in the term “oil and gas.”⁴¹ The dissent, however, felt that the meaning of the word gas, in the phrase “oil and gas” was clear, and would have included coal-bed gas.⁴²

III. Analysis

The issues raised above highlight the difficulty that exists in determining who has access to gas that underlies property when only one or two parties are involved. These problems are, of course, multiplied as the number of claimants, or potential claimants, increase.⁴³ This increase begins directly, with the owner of the subsurface estate selling or leasing off fractional interests, but can exponentially increase over time as the owners of these interests portion out their already divided interests through sale or the processes of testacy and intestacy at the fractional owner’s death.⁴⁴

³⁹ *See id.* at 1384-85.

⁴⁰ *Compare Hoge*, 468 A.2d at 1384-85 (Zappala J., majority) (“Although the unrestricted term “gas” was used in the reservation clause, in light of the conditions existing at the time of its execution we find it inconceivable that the parties intended a reservation of all types of gas.”) *with Hoge*, 468 A.2d at 1388-89 (Flaherty J., dissenting) (“In plain terms, the deed reserves to the grantor the right to drill for “gas”, without any express qualification limiting the types of gas that may be extracted. . . .[W]e believe the plain meaning of the term “gas” would be too far subverted were we to exclude coalbed gas.”).

⁴¹ *See Hoge*, 468 A.2d at 1384-85.

⁴² *See id.* at 1388-89 (Flaherty J., dissenting).

⁴³ *See Cheryl Outerbridge et al., Missing and Unknown Mineral Owners*, 25 ROCKY MTN. MIN. L. INST. 20, at *1-2 (1979).

⁴⁴ *See id.* at *2.

As the number of owners multiplies over time, one danger that increases is that whoever wants to drill the property will suddenly have a previously missing or unknown owner of a fractional interest in the subsurface estate show up and demand their portion of the profits from such an operation.⁴⁵ Of course, if there are no profits, the party that has invested the time and resources to drill is unlikely to recover any of their costs from this newly arrived fractional owner.⁴⁶

Pennsylvania is in a particularly likely situation to experience such a process of division of the oil interest. This is because Pennsylvania was one of the earliest jurisdictions to address oil and gas litigation, as the beginning of the modern oil era began in Titusville, PA.⁴⁷ However, the state has since seen a drop off as other states oil and gas production and jurisprudence has increased.⁴⁸ With the advent of Marcellus Shale deposits becoming profitable sources of petroleum, the interests that were once divided and forgotten take on a renewed importance. People are once again interested in making use of the subsurface rights, but now are often left wondering who else owns an interest therein.

A. How Does DOGA affect a party who holds an oil and gas interest in an estate and wishes to drill for oil when the subsurface estate is owned by multiple parties, some of whom are unknown or un-locatable?

1. Who Owns What / Who Owes What?

⁴⁵ *See id.* at *3.

⁴⁶ *See id.*

⁴⁷ *See* KATHY J. FLAHERTY AND THOMAS FLAHERTY, III, PA. GEOLOGICAL SURVEY, OIL AND GAS IN PENNSYLVANIA, at *28, (2002), <http://www.dcnr.state.pa.us/topogeo/education/es8.pdf>.

⁴⁸ *See* George A. Bibikos and Jeffrey C. King, *A Primer on Oil and Gas Law in the Marcellus Shale States*, 4 TEX. J. OIL GAS & ENERGY L. 155, 171 (2008-2009).

The Dormant Oil and Gas Act answers, or attempts to answer, some of the questions associated with this problem of unknown or missing interest owners. To begin, the statute states that its purpose is to “facilitate the development of subsurface properties,”⁴⁹ but, notably, not by vesting the severed subsurface estates back in the surface estate owner.⁵⁰ This approach is not universally followed. For instance, Ohio, Kentucky, West Virginia and Tennessee, among others, all have statutes which allow for surface owners to lay claim to the portions of the subsurface estate which belong to missing or unknown persons.⁵¹

While the Pennsylvania statute does not deal with who these interests may vest in, if anyone, it does deal with what must happen with the portion of the profits owed to the missing and unknown owners.⁵² It is the trek of those profits that this paper will attempt to track. To begin, a person who wants to develop the subsurface estate must have an interest in the property.⁵³ This interest “may be in fee, by lease, a royalty or by ownership of correlative rights in an oil and gas reservoir.”⁵⁴ This interested person must petition the appropriate division of the court of common pleas to declare a trust for all those owners who have an interest in the subsurface estate, but whose identity or address

⁴⁹ 58 PA. STAT. ANN. § 701.2 (West 2009).

⁵⁰ *See id.* § 701.2.

⁵¹ *See generally* Bradley J. Martineau, *Pennsylvania’s Dormant Oil and Gas Act: Another Statutory Solution for the Problem of Unknown Oil and Gas Owners*, LANDMAN, July/August 2007, <http://www.landman.org/landmanarchive/archive/Pennsylvanis%20Dormant%20Oil%20and%20Gas%20Act.doc>.

⁵² *See* 58 PA. STAT. ANN. §§ 701.4-.5.

⁵³ *See id.* § 701.4(a).

⁵⁴ *Id.*

is unknown, and has not been discovered by diligent efforts.⁵⁵ The petitioner must also show that the trust will be in the best interest of the unknown or un-locatable owners.⁵⁶

Once these requirements have been met, the court seems to be bound to create a trust for the unknown owners and appoint a financial institution as the trustee.⁵⁷ This is so because 58 PA. STAT. ANN. § 701.4(c) says that the court “shall” create a trust, which would seem to take away the court’s discretion.⁵⁸ However, this duty to create a trust is mitigated by the language of 58 PA. STAT. ANN. § 701.4(b)(3) which allows the court to determine if the “appointment of a trustee will be in the best interests of all [the unknown] owners,”⁵⁹ and by 58 PA. STAT. ANN. § 701.4(b)(1) which allows the court to determine if the petitioner has made diligent efforts to locate the unknown owners.⁶⁰

It is not known at the current time whether the above language will engender court battles, as DOGA has yet to be employed in any court case in Pennsylvania; however, it seems likely. At some point, a petitioner will claim that he has fulfilled the requirements of 58 PA. STAT. ANN. § 701.4(b), and thus the court is bound by 58 PA. STAT. ANN. § 701.4(c) to create a trust, yet the court will refuse do so. If such a case does arise, it is likely that on appeal the issue will turn on the court’s factual determinations under §§ 701.4(b)(1) and (3). As such, it would behoove the court to make clear findings of fact as to why it held the petitioner’s efforts to locate the unknown

⁵⁵ *See id.* §§ 701.4(a)–(b).

⁵⁶ *See id.* § 701.4(b)(3).

⁵⁷ *See id.* § 701.4(c).

⁵⁸ *See id.*

⁵⁹ *Id.* § 701.4(b)(3).

⁶⁰ *See id.* § 701.4(b)(1).

owners not to be diligent, or why it believes that the unknown owners' interests will not be served by the creation of a trust.

Should the court find in petitioner's favor and create a trust, the trustee will have the power to enter into oil and gas leases on behalf of the trust under terms approved by the court.⁶¹ It should be noted at this point that DOGA has also attempted to forestall some of the Dunham's Rule issues by providing definitions for both oil⁶² and gas.⁶³

Once such a trust has been created, the duties of the lessee⁶⁴ are laid out by the statute.⁶⁵ To begin, all income due to the unknown owner must be paid into the trust.⁶⁶ If the lessee does this faithfully, then he "shall not be liable for any further claims by the unknown owners for any other income produced from the oil and gas interests subject to the trust."⁶⁷ However, should the lessee fail to pay the income due within six months of its becoming due, he will be liable for not only the missed payments, but attorney's fees, court costs, and interest.⁶⁸

⁶¹ See *id.* § 701.4(c).

⁶² See *id.* § 701.3 ("**Oil.** Crude petroleum oil and all other hydrocarbons, regardless of gravity, produced at a well in liquid form by ordinary production methods. The term does not include liquid hydrocarbons that were originally in a gaseous phase in a reservoir.").

⁶³ See *id.* § 701.3 ("**Gas.** Natural gas and all other volatile hydrocarbons not defined in this section as oil, including condensate because it originally was in a gaseous phase in the reservoir. The term does not include methane gas that is contained within or produced from underground coal beds or mined out of underground coal mine areas.").

⁶⁴ For simplicity's sake, the term lessee will be used herein. However, it should be kept in mind that there are other interested parties that could be in this situation aside from lessees, such as a drilling party who is an actual owner of one of the partial interests in a subsurface estate.

⁶⁵ See 58 PA. STAT. ANN. §§ 701.5-.7.

⁶⁶ See *id.* § 701.5(b).

⁶⁷ *Id.* § 701.6.

⁶⁸ See *id.* § 701.7.

These provisions are the heart of DOGA. The whole purpose of the act is to promote the development of subsurface estates.⁶⁹ The protection offered by 58 PA. STAT. ANN. § 701.6 is one of the chief tools provided to reach this goal, because it should serve to allay the fears of potential developers that they will invest time, money, and resources into exploration and development of a subsurface estate, only to have a heretofore unknown party wander in with a, albeit legitimate, claim to some unknown portion of the profits. Section 701.6 should quiet the potential developer's concerns because it explicitly states that once the trust has been properly set up and properly paid into, the lessee will be liable for no further income generated by the subsurface estate.⁷⁰

Another way in which developer fears should be allayed is that, by function of § 701.6, in conjunction with § 701.4, a potential lessee should be able to figure out just what percentage of the profit churned out by the subsurface estate they will have to forego. Section 701.4 requires that the trust be created for *all* unknown owners.⁷¹ As such, the petitioner will have had to determine who owns what, and in what proportion, until 100% of the ownership is accounted for. It is true that some of the owners may be unknown, but all their interest will still be counted and given to the trust. As such, the potential lessee will be able to look at a property and determine, by what percentage of the ownership is managed by the trust, what percentage they will have to pay into said trust. This knowledge is advantageous because the potential lessee will no longer be in a situation where it could potentially keep part of the income due the unknown owners, and

⁶⁹ *See id.* § 701.2.

⁷⁰ *See id.* § 701.6.

⁷¹ *See id.* § 701.4(a).

count on that percentage of the income to make their investment profitable, only to have the unknown owner show up and take what is rightfully theirs. In other words: the potential lessee will know right from the beginning that a particular subsurface estate would entitle said lessee to retain, for instance, 50% of the profits, while paying 50% into the trust whereas, previously, the potential lessee might have gambled that the unknown owner would not have shown up and attempted to keep 100% of the profits.

2. What of the Corpus?

a. Fiduciaries v. Financial Institutions

Presuming that the strictures of DOGA have been followed and that a trust has been set up and properly paid into, what becomes of the corpus of that trust? DOGA deals with this in 58 PA. STAT. ANN. §§ 701.5(c) and (d). Section 701.5(c) states that the trust shall remain in force until the unknown owners are found and paid their due. Section 701.5(d), meanwhile, states that the funds are subject to The Fiscal Code's provisions on abandoned property.⁷² These provisions are found in the Disposition of Abandoned and Unclaimed Property Act (hereinafter DAUPA).⁷³

The first question which must be answered when dealing with the provisions of DAUPA is: Which section will apply? 72 PA. STAT. ANN. § 1301.8 is titled "Property held by fiduciaries." 72 PA. STAT. ANN. § 1301.3, meanwhile, is "Property held by financial institutions." Which section, then, controls when the property is held by "a financial institution . . . as trustee of a trust"?⁷⁴ That is to say: Which section controls when a financial institution holds property as a fiduciary?

⁷² See *id.* § 701.5(d).

⁷³ 72 PA. STAT. ANN. §§ 1301.1-29 (2006).

Attorney Bradley J. Martineau authored a paper on DOGA which presumes that the applicable section will be § 1301.8, which governs property held by fiduciaries.⁷⁵ He does not list the reasons for this assumption, but examination of the sections at issue lends credence to this approach.⁷⁶ Section 1301.8 applies broadly to “all property held in a fiduciary capacity for the benefit of another person.”⁷⁷ Section 1301.3, on the other hand, applies to a more limited category of property which includes demands, savings, and matured time deposits,⁷⁸ among others.⁷⁹ These three categories are the closest analogies in § 1301.3 to the trust fund created by DOGA,⁸⁰ but none is sufficiently close so as to make this section applicable.

Each of the above is a type of account in which a person puts in money, and then is able to later withdraw that money plus any interest which may have accrued. In each of these types of account there are two primary parties involved: the depositor and the financial institution which holds the funds. It is true that these types of accounts offer many permutations, one such being that a person could put money into the account of another, and thus be in a situation in which three primary parties were involved: the

⁷⁴ 58 PA. STAT. ANN. § 701.4(c).

⁷⁵ See Bradley J. Martineau, *Pennsylvania’s Dormant Oil and Gas Act: Another Statutory Solution for the Problem of Unknown Oil and Gas Owners*, LANDMAN, July/August 2007, at *4 n.19, <http://www.landman.org/landmanarchive/archive/Pennsylvanis%20Dormant%20Oil%20and%20Gas%20Act.doc>; 72 PA. STAT. ANN. § 1301.8.

⁷⁶ Compare 72 PA. STAT. ANN. § 1301.8 with 72 PA. STAT. ANN. § 1301.3.

⁷⁷ 72 PA. STAT. ANN. § 1301.8.

⁷⁸ Black’s Law dictionary defines a time deposit as “[a] bank deposit that is to remain for a specified period or on which notice must be given to the bank before withdrawal.” BLACK’S LAW DICTIONARY 471 (8th ed. 2004). A matured time deposit is one which has been with the bank long enough to meet that specified period.

⁷⁹ See 72 PA. STAT. ANN. § 1301.3.

⁸⁰ 58 PA. STAT. ANN. § 701.4(c) (West 2009).

depositor, the financial institution which holds the money, and the beneficiary. However, each of these permutations is distinct from the situation at hand.

Under DOGA, once the lessee deposits the money it is gone from him. He can not go back and pull the money out, even should he wish to do so. The bank, in its role under § 701.4(c), takes the money as both a financial institution holding the money and as the trustee over those funds held. The duties of a trustee created under DOGA are controlled by the provisions of 20 Pa. C.S. § 7771, *et. seq.*,⁸¹ and involve more than simply holding the money.⁸²

The argument can certainly be made that one of the vast number of permutations available under the concepts of checking, saving, or time deposit accounts could be crafted to mirror the account set up by a trust under § 701.4(c). In this case, would not these non-DOGA permutations be covered under the auspices of § 1301.3 relating to property held by a banking institution rather than § 1301.8's provisions for property held by a fiduciary? This argument must fail because even were the accounts similar, there is one critical difference. This difference is related to whether a financial institution holds funds, is a "holder,"⁸³ or is a trustee, a distinction which may cause some confusion. As this section points out, however, the delineation of these categories is critical.

Whether a bank merely holds funds or serves as a trustee, it is a "holder."⁸⁴ However, just because a bank is a holder does not mean that the "holder" subcategories

⁸¹ *See id.* § 701.5(a).

⁸² *See id.* § 701.4(c) (granting the trustee power to execute leases); 20 PA. CONS. STAT. ANN. § 7772 (2006) (dealing with a trustee's duty and the relationship between a trustee and beneficiary).

⁸³ *See* 72 PA. STAT. ANN. § 1301.1.

⁸⁴ *See id.*

of one who holds property and one who is a trustee are equal.⁸⁵ Specifically, someone who merely holds property of another is not subject to the same duties which are incumbent upon a trustee.⁸⁶ This difference in duty is the critical divide between any account created which properly falls under § 1301.3 and the trust as created by § 701.4(c). The money in the trust is not merely held by the bank, as the property is under § 1301.3; the bank is also trustee over the funds and as such serves in a fiduciary capacity. Therefore, § 1301.8, which governs property held by a fiduciary, is the more proper section to apply. This argument would not be defeated even if someone was to go so far as to create a checking, savings, or time deposit account with a third party beneficiary and name the bank a trustee. Were such to happen, the arguments would apply equally as strongly to that account as to the DOGA account because it would cross the threshold between a financial institution merely holding property and its holding property as a fiduciary.

b. The Presumption of Abandonment

Proceeding, then, under the auspices of § 1301.8, the question is: What happens to the trust funds which the lessee has deposited when the unknown owner of the oil and gas interest cannot be identified?⁸⁷ The language of the statute is quite clear; the property held by the trust is presumed abandoned unless:

the owner within five (5) years after it has or shall become payable or distributable has increased or decreased the principal, accepted payment of principal or income, corresponded in writing concerning the property or

⁸⁵ *See id.*

⁸⁶ *See* 20 PA. CONS. STAT. ANN. § 7772.

⁸⁷ If such owner can be identified, then 58 PA. STAT. ANN. § 701.5(b) (West 2009) dictates that the trustee shall pay such owner their due.

otherwise indicated an interest therein as evidenced by a writing on file with the fiduciary.⁸⁸

This language presents two important questions. First, what can the trustee do to prevent the property from becoming abandoned? Second, what happens to property that nonetheless becomes presumed abandoned under the statute?

In this trust situation, there may be money coming into the account from the lessee on a fairly regular basis. The lessee is required to deposit rental payments, bonuses, and the like.⁸⁹ However, this influx of cash may not be sufficient to delay the clock running on the five year period. In fact, it is possible that a lessee could deposit a monthly rental payment one day, and have the rental payment he put in five years ago become presumed abandoned the very next day.

To understand why this is so, the text of 72 PA. STAT. ANN. § 1301.1 must be examined. Under this section, an “owner” is defined broadly as any person “having a legal or equitable interest in property subject to this article, or his legal representative.”⁹⁰ In the situation of a trust, the equitable title is with the beneficiary, who is the missing owner, and the legal title is with the trustee.⁹¹ Accordingly, it would seem that the trustee may act as “owner” for two reasons. First, as the trustee, he has a legal interest in the property at issue. Second, in his capacity as a trustee, he also serves as a legal representative for the equity owner. If the trustee is viewed as the owner, then by accepting payments from the lessee, or even in communicating with the lessee or other

⁸⁸ 72 PA. STAT. ANN. § 1301.8.

⁸⁹ See 58 PA. STAT. ANN. § 701.5(b).

⁹⁰ 72 PA. STAT. ANN. § 1301.1.

⁹¹ See *In re Fulton*, 240 B.R. 854, 862-63 (Bkrtcy. W.D.Pa. 1999).

potential lessees in writing, he would seem to safeguard the trust from abandonment under § 1301.8.

However, “because the legislature is presumed to have intended to avoid mere surplusage, every word, sentence, and provision of a statute must be given effect.”⁹² Section 1301.1 also defines another classification of person: the aforementioned category of “holder.”⁹³ A “[h]older’ shall include any person ... who is a trustee in case of a trust.”⁹⁴ It is, therefore, clear, that the trustee of a DOGA trust is a holder. The question, then, is: Can that trustee be both a holder, which it explicitly is, and an owner, which it meets the criteria for?

There is a public policy argument to be made that viewing a holder as an owner is good for the trust’s beneficiary as well as the trustee. As mentioned above, if the holder is regarded as an owner, then his actions regarding the trust will serve to keep the funds from becoming presumed abandoned.⁹⁵ In this way, the money stays in the private sector, with the financial institution benefiting by receiving its customary fee as a trustee. The beneficiary of the trust will likewise be benefitted by the accumulation of interest, which the government is not required to pay should the property be presumed abandoned.⁹⁶

⁹² *Indep. Oil & Gas Ass’n of Pa. v. Bd. of Assessment Appeals of Fayette County, Pa.*, 814 A.2d 180, 184-85 (Pa. 2002) (citing *Unionville-Chadds Ford School Dist. v. Chester County Bd. of Assessment Appeals*, 692 A.2d 1136, 1143 (Pa. Commw. Ct. 1997), *aff’d*, 714 A.2d 397 (Pa. 1998)).

⁹³ *See* 72 PA. STAT. ANN. § 1301.1.

⁹⁴ *Id.*

⁹⁵ *See id.* § 1301.8.

⁹⁶ *See generally* *Simon v. Wiessman*, No. 04-941, 2007 WL 2461707 (E.D.Pa. Aug 27. 2007).

The alternate public policy argument would be that the trust should transfer to the state, where it can be aggregated with other similarly situated property to generate income.⁹⁷ By the trust property following that route, its benefit can be spread among the people of the Commonwealth, and not concentrated in the hands of a single institution.

There is no Pennsylvania case law which is directly on point as to the question of whether a trustee can be both a holder and an owner.⁹⁸ A reading of the rest of the statute, however, seems to support the view that the trustee cannot be regarded as an owner, but must be confined to the role of holder. To begin, this is because all holders which qualify under the trustee language of § 1301.1 would also meet the requirements to be owners, as laid out above. This would thus create a large class of people who would be initially entrusted as fiduciaries, but were treated, instead, with all the rights of the person to whom they owe the fiduciary duty. The rights granted to owners elsewhere in the statute seem to be incongruous with this idea that they should be equally enjoyed by a trustee.

For instance, 72 PA. STAT. ANN. § 1301.11 lays out that holders must make report to the state of all property which has become presumed abandoned under the statute.⁹⁹ Subsection (g) discusses the enforceability of powers of attorney or other agreements for the reclamation of abandoned property.¹⁰⁰ One requirement for such to occur is that there

⁹⁷ See 72 PA. STAT. ANN. § 1301.18.

⁹⁸ The case which comes the closest to dealing with the issue treats the categories as separate, but does not suggest that they could not overlap. See *Simon*, 2007 WL 2461707.

⁹⁹ See 72 PA. STAT. ANN. § 1301.11(a).

¹⁰⁰ See *id.* § 1301.11(g).

is an authorizing writing signed by the owner.¹⁰¹ However, under subsection (j), if this other agreement is between an owner and a trustee, such is not required.¹⁰² The salient point to pull out of these sections at this time, then, is that § 1301.11 devotes one subsection to what an owner must do to recover via proxy, then, in the next section, negates these same requirements if the transaction is between an owner and a holder instead. This, then, discusses the owner's abilities and the holder's abilities separately, regarding each as independent actors. Having such a dichotomy tends to indicate that holders and owners should be viewed separately. This point is bolstered in the next section of DAUPA.¹⁰³

72 PA. STAT. ANN. 1301.12(a) and (b) discuss the notice and publication which are required to be published detailing the property that has become presumed abandoned and gone into custody of the state. The notice is to be titled "Notice of Names of Persons Appearing to be Owners of Abandoned and Unclaimed Property."¹⁰⁴ Such notice must contain the names and last known addresses of the owners in the report, as well as the same information for the holders.¹⁰⁵ Simply put, this publication is designed to give notice to the actual owners of the property, the beneficiaries of the trust. The idea that the publication is intended to notify the trustee, who is the holder, in his capacity as a fiduciary to the owner, with the attendant legal interest which would then make the

¹⁰¹ *See id.* § 1301.11(g)(1).

¹⁰² *See id.* § 1301.11(j).

¹⁰³ *See id.* § 1301.12.

¹⁰⁴ *Id.* § 1301.12(b).

¹⁰⁵ *See id.* § 1301.12(b)(1).

trustee not only the holder, but the statutory owner as well, seems to be stretching the bonds of logic to the breaking point.

It would seem, then, that the more likely interpretation is that a holder, which a DOGA trustee certainly is, will not be adjudged to be an “owner” for purposes of DAUPA. If this is so, then the property will pass into the custody of the state¹⁰⁶ five years after the lessee gives the property to the holder,¹⁰⁷ with the only exception being if the holder actually manages to locate, or be located by, one of the missing oil and gas estate holders.¹⁰⁸ However, if the alternate view is taken, that a DOGA trustee meets the qualifications of both a DAUPA holder and a DAUPA owner, the holder’s action in receiving property will be sufficient to keep the property from being presumed abandoned, and the property of the trust will only pass to the state 5 years after the last action is taken on the account by the trustee.¹⁰⁹

This is so because in order for property to be presumed abandoned under § 1301.8, two things must happen.¹¹⁰ First, the property must have been in the trust for five years.¹¹¹ Second, the trust must have had no activity by the owner for five years.¹¹²

¹⁰⁶ Though the property passes to the state under DAUPA, it is not necessarily correct to say that the property escheats as the property is only presumed abandoned, and is not unqualifiedly deemed abandoned. For a discussion on the distinction, see *Simon v. Wiessman*, No. 04-941, 2007 WL 2461707, at *6-7 (E.D.Pa. Aug 27, 2007).

¹⁰⁷ *See* 72 PA. STAT. ANN. § 1301.8.

¹⁰⁸ *See* 58 PA. STAT. ANN. § 701.5(b) (West 2009).

¹⁰⁹ *See* 72 PA. STAT. ANN. § 1301.8.

¹¹⁰ *See id.*

¹¹¹ *See id.*

¹¹² *See id.*

The second qualification cannot be met until the first is, but it is also capable of not occurring until long after the first is met.

If the trustee is but a holder, the property will pass to the state in discrete packets, each going at the end of its first five years in the trust account. This is so because, after five years, each packet will have met the first requirement of a five year period in the account to be classified as abandoned. Second, there can be no activity by the owner for those five years if the owner is not known, and the holder does not qualify as one.

If, however, the holder qualifies as an owner, then the property will all be transferred to the state in one lump sum. This is because the first requirement, five years in trust, will be met after the first five years; however, the second qualification will not be met. The trustee / holder / owner's activity of accepting the payments from the lessee will be enough to keep the account active,¹¹³ and the first time that the account will have inactivity for five years will be at least five years after the last payment has come in, at which point all the funds will have met both criteria, and will all transfer to the state together. Thus it is that, at some point, unless the owner is found, the res of the trust will eventually pass to the state.

c. Voluntary Abandonment by the Trustee

If the trustee so wishes, he can speed this process up by voluntarily turning the res of the trust over to the state before the statutory period has run.¹¹⁴ Doing so will relieve the trustee of more than just the duty to safeguard the property; it will relieve him of all further liability to the beneficiaries.¹¹⁵ 72 PA. STAT. ANN. §1301.14 states that:

¹¹³ *See id.*

¹¹⁴ *See id.* § 1301.13(d).

Any person who pays or delivers property to the State Treasurer under this article is relieved of all liability with respect to the safekeeping of such property so paid or delivered for any claim which then exists or which thereafter may arise or be made in respect to such property.¹¹⁶

Again, this language contains some potential ambiguity. Breaking this language down by clause, the “person who pays or delivers property to the State Treasurer under this article”¹¹⁷ is the DOGA trustee. This is straightforward and unambiguous. However, the next portion of the statute carries two interpretations, with the ambiguity arising due to the breadth of the language used.

The statute says that the DOGA trustee will be relieved of “*all* liability with respect to the safekeeping of” the property, and further this is to “*any* claim” which currently exists or may be brought.¹¹⁸ On one hand this can be read to mean simply that the DOGA trustee will be relieved of the requirement to pay any unknown owners of oil and gas interests who the trust covers. Under this interpretation, the state will have the funds and will therefore be responsible for making such payments. This stance makes sense both practically and within the confines of DAUPA. However, there is another interpretation which is textually supported.

Due to the breadth of the language used, an enterprising DOGA trustee could mismanage the trust, and then seek to avoid any liability should an unknown owner show up to claim his due. The wording of the statute may allow the DOGA trustee to do this merely by turning over the res of the trust to the state. The trustee’s argument would be

¹¹⁵ *See id.*

¹¹⁶ *Id.* § 1301.14.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

fairly straightforward, with a few convenient premises: 1) the previously unknown owner brought a claim against the trustee for failing to keep the res of the trust safe; 2) the trustee turned the property over to the state; 3) 72 PA. STAT. ANN. § 1301.14 plainly states that the trustee is “relieved of all liability with respect to the safekeeping of such property”¹¹⁹ as soon as he turns it over to the state; and thus 4) the trustee is relieved of his liability to the previously unknown owner.

Such an interpretation would obviously make a DOGA trustee a very favorable position to be in, as such trustee could literally raid the res with impunity. Under the right circumstances, a trustee could put this defense forward with at least a hope that it may succeed. For instance, if the trustee did not convert the funds, but simply invested them poorly, thereby accidentally depleting the res, the trustee could make the following argument that he should have no liability. First, the purpose of DOGA is to “facilitate the development of subsurface properties,”¹²⁰ Second, in order to make this happen, the legislature laid out a process whereby a financial institution would be a trustee over the interests of unknown owners which would otherwise have halted development.¹²¹ Third, to accomplish this, the financial institution must be prepared to agree to leases which may end unfavorably.¹²² Fourth, similarly, part of managing the res of the trust is investing it.¹²³ Fifth, investments are not guarantees, and the legislature must have known that if the financial institution were held to a strict liability standard no such institution would

¹¹⁹ *Id.*

¹²⁰ 58 PA. STAT. ANN. § 701.2 (West 2009).

¹²¹ *See id.* §§ 701.4-.5.

¹²² *See id.* § 701.4(c).

¹²³ *See* 20 PA. CONS. STAT. ANN. § 7209 (2005).

agree to take the funds, as the risk would be too great. Finally, if this were the case, no financial institution would serve as trustee, therefore no lease could be signed, and therefore the subsurface property could not be developed. Such a result is a clear defeat of the purpose of the statute.¹²⁴ As grounded as this argument may seem, it is still unlikely that the legislature would draft a provision which would allow trustees to escape their fiduciary duties, and even less likely that they would bury such a clause in the middle of a section.

However, even bereft of this overarching protection which a DOGA trustee might seek, this provision can still be very helpful to the trustees. While the first interpretation above, that §1301.14 merely relieves the trustee of the obligation to distribute funds, does not protect DOGA trustees from lawsuits should they be unable to pay the unknown owners, it does give them several other benefits. First, the clearest benefit, and one which should not be overlooked, is that, should the financial institution decide that managing the property is not in its best interest, it may simply turn the property over to the state and thereby relieve itself of its obligation to deal with any unknown owners.¹²⁵ Second, while the DOGA trustee would likely not receive protection from this statute if they did mismanage the funds, the DOGA trustee could turn the funds over to the state at the first sign of trouble, and avoid the issue of mismanagement preemptively.

d. Demise of the Corpus

¹²⁴ See 58 PA. STAT. ANN. § 701.1.

¹²⁵ However, it seems that the DOGA trustee would have to continue dealing with the lessee, receiving whatever payments may become due, and then turning these additional funds over to the state as the funds came in. This seems likely because 72 PA. STAT. ANN. § 1301.13(d) (2006) does not contain a provision allowing the state to assume the trustee's position, but only to accept property before it would otherwise be due.

The final DAUPA requirement on the DOGA trustee comes in 72 PA. STAT. ANN. § 1301.10.¹²⁶ Thereunder, the holder is required to report to the state the information that it has about the property which has become presumed abandoned or which the holder has decided to turn over.¹²⁷ This report is required to be verified¹²⁸ by a high ranking person in the company.¹²⁹ The report should contain, at a minimum,¹³⁰ the name and last known address of the unknown or un-locatable owner of the oil and gas interest,¹³¹ a description of the property turned over,¹³² and the provenance of the property.¹³³

DAUPA also lays out what must happen once the property has passed to the state. First, the State Treasurer must publish a notice¹³⁴ in a legal newspaper and an English language newspaper in the un-locatable owner's last known county of residence.¹³⁵ If the owner is unknown, then the publication must be made in the Pennsylvania Bulletin, as well as on the Treasury Department's webpage.¹³⁶ The state may then place the money

¹²⁶ This presumes that the final requirement of the DOGA trustee did not occur under 58 PA. STAT. ANN. §§ 701.(b) and (c) with the trustee finding the unknown owners and turning over the corpus of the trust to them.

¹²⁷ See 72 PA. STAT. ANN. § 1301.11.

¹²⁸ See *id.* § 1301.11(b).

¹²⁹ See *id.* § 1301.11(e).

¹³⁰ See *id.* § 1301.10(b)(4) (allowing the State Treasurer to prescribe regulations requiring more information on in the report); *Id.* § 1301.10 (other specific provisions provide for certain special circumstances, such as if the property is worth less than \$50).

¹³¹ See *id.* § 1301.11(b)(1).

¹³² See *id.* § 1301.11(b)(2).

¹³³ See *id.* § 1301.11(b)(3).

¹³⁴ For the requirements of this notice see 72 PA. STAT. ANN. § 1301.12.

¹³⁵ See *id.* § 1301.12(a).

¹³⁶ See *id.*

turned over by the DOGA trustee into the General Fund of the Commonwealth.¹³⁷ However, the state must also have a separate trust set up¹³⁸ under which the rightful owners of the funds may claim against the state.¹³⁹ Should a previously unknown owner be found, they may not be happy with this disposition of things, as the state will not have to pay the owner any interest which accrues in the period between the property being presumed abandoned and the owner filing his claim.¹⁴⁰

The following timeline, then, summarizes what can be expected to occur with oil and gas interests under DOGA. First, a petitioner, who must have an interest in an oil and gas subsurface estate, files with the state to have a trust set up to manage the interest of any unknown owners in that estate.¹⁴¹ Second, presuming that the court grants such a trust, a financial institution is appointed as a trustee over it, and can enter into a lease with a person interested in developing that subsurface estate.¹⁴² Third, the lessee pays whatever income would be due the unknown owners to the trust.¹⁴³ Fourth, either the missing owners are found and paid,¹⁴⁴ or the trust funds will eventually become presumed abandoned at which point they will pass to the state.¹⁴⁵ Finally, the property

¹³⁷ *See id.* § 1301.18(a).

¹³⁸ *See id.*

¹³⁹ *See id.* § 1301.19.

¹⁴⁰ *See generally* Simon v. Wiessman, No. 04-941, 2007 WL 2461707 (E.D.Pa. Aug 27, 2007).

¹⁴¹ *See* 58 PA. STAT. ANN. § 701.4(a) (West 2009).

¹⁴² *See id.* § 701.4(c).

¹⁴³ *See id.* § 701.5(b).

¹⁴⁴ *See id.*

¹⁴⁵ As discussed above, the most probable path is that this will happen five years after the funds are put in the account. However, it is possible that the DOGA trustee will be regarded as an owner for purposes of

sits with the state's other funds and may be used by the state,¹⁴⁶ though the owner will still be allowed to claim against the state should he ever determine that his property is under the state's custody.¹⁴⁷

B. What becomes of the actual interests of these unknown parties?

This timeline leaves one very important question unanswered, though. What happens to the actual interest in the property itself, as opposed to the profits derived therefrom? All the provisions so far cited relate to the money paid by the lessee in recognition of the unknown owner's interest in the subsurface estate. As DOGA explicitly states, the act is not intended to give the surface owner the rights to the dormant interests in the subsurface estate.¹⁴⁸ The entire preceding discussion is, in fact, predicated on the unknown owner's interest in the property staying with an unknown owner for as long as the lessee is paying income to the DOGA trustee. If the interest were to change hands at any point while the lessee is paying, the lessee would no longer be required to pay the trustee, but would instead be required to pay whoever was the new owner of the subsurface interest.¹⁴⁹

1. Can the Unknown Owner's Interest Pass Through Adverse Possession?

The most likely way for these subsurface interests to change hands is through the process of adverse possession, absent a legislative determination that the interests should

accepting payment, and thus the trust property would not be presumed abandoned until 5 years after all income stopped coming in. *See* 58 PA. STAT. ANN. § 701.5(d); 72 PA. STAT. ANN. § 1301.8 (2006).

¹⁴⁶ *See* 72 PA. STAT. ANN. § 1301.18.

¹⁴⁷ *See id.* § 1301.19.

¹⁴⁸ *See* 58 PA. STAT. ANN. § 701.2.

¹⁴⁹ This is provided, of course, that the unknown interest does not pass through testacy or intestacy or some other manner in which the transfer remains unknown to the lessee and trustee.

pass in some other statutory way. In Pennsylvania, adverse possession of land requires the claimant to “prove that he had actual, continuous, exclusive, visible, notorious, distinct, and hostile possession of the land for twenty-one years.”¹⁵⁰ Further, “one cotenant cannot claim adverse possession against another cotenant unless there is an ouster of the latter.”¹⁵¹

In the field of surface / subsurface disputes over oil and gas interests, the subject of adverse possession has not come up very often.¹⁵² However, there are a few cases which discuss the subject, and a few more which touch upon it collaterally. In *Thomas v. Oviatt*, the plaintiffs were the owners of the surface estate, and had lived there for thirty-six years at the time of the suit.¹⁵³ The defendants were the owners of the subsurface estate, which was transferred by quitclaim deed nineteen years before the plaintiffs moved onto the surface estate.¹⁵⁴ It was undisputed that defendants never drilled for oil.¹⁵⁵ Neither did either party dispute that in the thirty-six years in which plaintiffs had lived on the surface estate, the plaintiffs had signed three oil and gas leases with a total running time of twenty-three years.¹⁵⁶

¹⁵⁰ *Conneaut Lake Park, Inc. v. Klingensmith*, 66 A.2d 828, 829 (Pa. 1949).

¹⁵¹ *Id.*

¹⁵² *See Thomas v. Oviatt*, 5 Pa. D. & C.4th 83, 84 (1989).

¹⁵³ *See id.* at 83-4.

¹⁵⁴ *See id.*

¹⁵⁵ *See id.* at 83.

¹⁵⁶ *See id.* at 83-4.

Given these facts, the plaintiffs stated that they had satisfied the requirements to adversely possess the defendant's subsurface estate.¹⁵⁷ The court, however, held that, while they were unaware of any case law applying the rule of adverse possession to an oil interest, the rule itself was well settled, and the plaintiffs had not satisfied it.¹⁵⁸ The court went on to cite precedent which held that a severance of coal from the surface gave the recipient of the coal an estate in land, and that this estate could not be taken away but through adverse possession.¹⁵⁹ Further, the adverse possession must be of that coal interest, not solely of the surface estate, as possession of the surface estate has nothing whatsoever to do with the possession of the severed subsurface estate.¹⁶⁰ Based on these considerations, the court held that the requirements for adverse possession had not been met.¹⁶¹

The court held that this was so for several reasons.¹⁶² First, once an estate is severed, nothing that the surface owner does upon the surface is sufficient to adversely possess the subsurface.¹⁶³ Second, the leases were insufficient to effect adverse possession because "one may not lose title to realty simply by [another] claiming a right thereto."¹⁶⁴ This was so because, otherwise, no property would be safe.¹⁶⁵ Lastly, the

¹⁵⁷ *See id.* at 84.

¹⁵⁸ *See id.*

¹⁵⁹ *See id.* at 84-5.

¹⁶⁰ *See id.* at 85.

¹⁶¹ *See id.*

¹⁶² *See id.* at 84-5.

¹⁶³ *See id.* at 85.

¹⁶⁴ *Id.*

plaintiffs argued that they had obtained the oil and gas rights through adverse possession because they had not been separately assessed for the estates, and so had paid real estate taxes on both the surface and subsurface estates.¹⁶⁶ The court, however, held that “[t]itle to realty may not be acquired by payment of taxes.”¹⁶⁷

The first basis the *Oviatt* court found for rejecting adverse possession is echoed in the case of *Shearer v. Rochester & Pittsburgh Coal Company*.¹⁶⁸ This case concerns rights to subsurface coal, but is applicable by analogy. In this case, a coal company had not exercised its rights to extract coal from a mine in approximately 50 years.¹⁶⁹ Even with this lengthy inactivity, the court in this case went so far as to say that

[e]ven when there are outward appearances of discontinued mining operations such as a collapse of the overlying strata into the mine entries and openings and a discontinuance of actual mining for a period of time in excess of 35 years, adverse possession is not established by anything short of actual possession of the mine workings.¹⁷⁰

The second basis for the *Oviatt* court’s decision finds its counterpart in the case of *Morrison v. Coleman*,¹⁷¹ a case from not only the same court, but the same judge who would decide *Oviatt* seven months later. Contrary to *Oviatt*, the court in *Morrison* held that the requirements for adverse possession of an oil interest had been met. This was accomplished because the plaintiff had, for more than 29 years, behaved as the sole

¹⁶⁵ *See id.*

¹⁶⁶ *See id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Shearer v. Rochester & Pittsburgh Coal Co.*, 20 Pa. D. & C.3d 67 (1981).

¹⁶⁹ *See id.* at 68-9.

¹⁷⁰ *Id.* at 77.

¹⁷¹ *Morrison v. Coleman*, 50 Pa. D. & C.3d 333 (1988).

owner of the subsurface estate.¹⁷² Evidence that the court cited in support of its decision that the plaintiff had adversely possessed the oil and gas interest included that he and his predecessors had not deducted any amount from sales of oil and gas to pay other interested parties,¹⁷³ members of the community knew the plaintiff as the sole owner,¹⁷⁴ and that the plaintiff had drilled wells and removed the resulting oil without interference from anyone else for longer than the statutory period.¹⁷⁵

The *Oviatt* court's third basis for denying adverse possession was touched upon again when oil and gas interests and tax collided once more in the subsequent case of *Independent Oil and Gas Association of Pennsylvania v. Board of Assessment Appeals of Fayette County, Pennsylvania*.¹⁷⁶ As mentioned earlier, the *Independent Oil* Court held that, for tax purposes, oil and gas interests cannot be regarded as interests in land.¹⁷⁷ The Court acknowledged that precedent has "establish[ed], to some extent, oil and gas interests as interests in real estate."¹⁷⁸ Despite this, the Court found that oil and gas, for taxation purposes, cannot be considered as "land," and thus are not subject to taxes on land.¹⁷⁹ This decision is based largely on the fact that the specific statute which

¹⁷² *See id.* at 337-8.

¹⁷³ *See id.* at 335.

¹⁷⁴ *See id.*

¹⁷⁵ *See id.* at 337.

¹⁷⁶ *Indep. Oil & Gas Ass'n of Pa. v. Bd. of Assessment Appeals of Fayette County, Pa.*, 814 A.2d 180 (Pa. 2002).

¹⁷⁷ *See id.* at 184-85.

¹⁷⁸ *Id.* at 182 n.5.

¹⁷⁹ *See id.* at 184-85.

authorized the tax at issue laid out a list of what could be considered land, and oil and gas interests were not on that list.¹⁸⁰ The Court did, however, expressly recognize the ability of the state to tax coal interests.¹⁸¹ Further, subsequent case law has recognized the ability of the state to tax subsurface limestone, specifically noting how limestone's sedentary properties markedly differ from the fugacious nature of oil and gas.¹⁸²

Where does this case law leave the status of the unknown oil and gas owners' interest under DOGA, then? As DOGA expressly declines to vest the surface owner with the title to the oil and gas interests of the unknown owners,¹⁸³ and there is currently no other Pennsylvania statute which deals with the disposition of these interests, adverse possession serves as the best conduit for transfer of these interests.

2. How May Adverse Possession Serve to Transfer the Unknown Owner's Interest?

The preferable way to determine how dormant oil and gas interests may be transferred is to allow the legislature to consider the situation, listen to reports, weigh public policy and come up with a measured response. Reconsideration of this issue by the legislature may be especially warranted in light of oil and gas interests' renewed vitality and importance, as well as their continuing fragmentation, in this new Marcellus Shale era. The end result of this examination would be for the legislature to decide upon an appropriate course of conduct and pass a new statute. This new statute, after careful consideration, and likely review of other states' statutes on the matter, could provide a

¹⁸⁰ *See id.* at 183.

¹⁸¹ *See id.* at 184.

¹⁸² *See Coolspring Stone Supply, Inc. v. County of Fayette*, 929 A.2d 1150, 1151 (Pa. 2007).

¹⁸³ *See* 58 PA. STAT. ANN. § 701.2 (West 2009).

clear and comprehensive guide relating to if and how dormant oil and gas interests could be transferred to a new owner in Pennsylvania.¹⁸⁴

However, until such a law is passed, a party interested in gaining title to the missing oil and gas owner's interests must proceed under adverse possession. There may be several problems with this approach. Initially, as has been repeatedly stated, many of these oil and gas interests are highly fractionalized. In such a situation, one question is who would have standing to bring an action for adverse possession? Who could claim that they meet the requirements of the *Conneaut Lake Park* test?¹⁸⁵ Further, with fragmentation comes co-tenancy, and when this is involved, who could meet the further requirement under *Conneaut Lake Park* that the co-tenant who wishes to adversely possess the property must oust the missing co-tenant whom he wishes to claim against?¹⁸⁶

The case law seems fairly set, requiring that all the above strictures of *Conneaut Lake Park* must be met, even in cases of oil and gas interests.¹⁸⁷ However, this may have been truer before the Pennsylvania Supreme Court decided the cases of *Independent Oil* and *Coolspring Stone Supply, Inc. v. County of Fayette*.¹⁸⁸ Prior to these decisions, the

¹⁸⁴ Such a review is beyond the scope of this paper; however, any interested party may consider Bradley Martineau's article on the subject a good starting point. *See generally* Bradley J. Martineau, *Pennsylvania's Dormant Oil and Gas Act: Another Statutory Solution for the Problem of Unknown Oil and Gas Owners*, LANDMAN, July/August 2007, <http://www.landman.org/landmanarchive/archive/Pennsylvanis%20Dormant%20Oil%20and%20Gas%20Act.doc>.

¹⁸⁵ *See* *Conneaut Lake Park, Inc. v. Klingensmith*, 66 A.2d 828, 829 (Pa. 1949).

¹⁸⁶ *See id.*

¹⁸⁷ *See e.g.*, *Lehmann v. Keller*, 684 A.2d 618, 620 (Pa. Super. Ct. 1996); *Morrison v. Coleman*, 50 Pa. D. & C.3d 333, 338 (1988).

¹⁸⁸ *Coolspring Stone Supply, Inc. v. County of Fayette*, 929 A.2d 1150 (Pa. 2007).

courts had interpreted oil and gas interests as real estate interests and followed the provisions for adverse possession of land famously laid out in *Conneaut Lake Park*.¹⁸⁹ However, these two cases may have allowed room for an argument that the last requirement, that the land be adversely possessed for twenty-one years, may be susceptible to change.

Before considering any changes which the Pennsylvania Supreme Court may be open to hearing in the law of adverse possession as applied to oil and gas interests, an acknowledgement must be made. As the above case law has laid out the rule, particularly *Conneaut Lake Park*, any attempt at adverse possession would preclude the interested claimant from proceeding under DOGA. This is because any potential claimant who utilized DOGA would have to pay into the DOGA trust for the missing owners.¹⁹⁰ Paying into any such account is starkly incompatible with not only the requirement of hostility, but also the notion of ouster required by *Conneaut Lake Park*.¹⁹¹

This idea of preclusion can be seen in the evidence that the *Morrison* court cited as to why the plaintiff in that case had achieved adverse possession.¹⁹² As mentioned above, the court there found it important that the plaintiff had not deducted any amount from the sales of oil and gas to pay to another party.¹⁹³ One of the most basic functions of DOGA, perhaps the most basic, is that the lessee must deduct the unknown owner's

¹⁸⁹ *Conneaut Lake Park*, 66 A.2d at 829.

¹⁹⁰ See 58 PA. STAT. ANN. §§ 701.4-.7 (West 2009).

¹⁹¹ See *Conneaut Lake Park*, 66 A.2d at 829.

¹⁹² See *Morrison*, 50 Pa. D. & C.3d at 335-37.

¹⁹³ See *id.* at 335.

share from all profits, and pay that money to the trustee.¹⁹⁴ Similarly, the *Morrison* court found it important that the plaintiff had drilled for oil without interference from anyone for longer than the statutory period.¹⁹⁵ DOGA would nullify this basis as well, as under § 701.4(c) the lessee would not only have to deal with the trustee in any lease agreement and negotiation, but also the court itself.¹⁹⁶ As such, any adverse possession action must therefore be brought by a claimant not using DOGA, and the call of the question for this section has been answered.

To reiterate, the call of the question was: What happens to the oil and gas interests of unknown owners in light of DOGA? The simple answer is that DOGA provides no means to transfer these interests, nor does DAUPA provide a means for transferring more than the income gotten from these interests. Further, the best extant option is adverse possession, and such a route precludes the use of DOGA. As such, the oil and gas interests of a DOGA unknown owner must, at least currently, be left with that owner. However, a brief excursion beyond the call of the question, into a potential means of alleviating this problem of dormant oil and gas interest transfers, seems apropos, even if it necessarily must be done somewhat summarily and outside of the statute which this paper focuses on.

While recognizing that the weight of precedent goes against such an argument, and that the test case would have to fall within a strict factual scenario,¹⁹⁷ there is one

¹⁹⁴ See 58 PA. STAT. ANN. § 701.5(b).

¹⁹⁵ See *Morrison*, 50 Pa. D. & C.3d at 337.

¹⁹⁶ See 58 PA. STAT. ANN. § 701.4(c).

¹⁹⁷ The factual scenario here would have to be strict because the claimant would need to meet the requirements laid out in *Conneaut Lake Park*. The simplest way for a case of this kind to come forward

argument which would modify the longstanding rule of adverse possession which recent Supreme Court of Pennsylvania decisions suggest may meet some success. The initial indication of the possibility comes in the *Independent Oil* case, in footnote 5, when the Court characterizes the precedent case law as only “establish[ing], to some extent, oil and gas interests as interests in real estate.”¹⁹⁸ (emphasis supplied) Subsequently, in *Coolspring*, the Court acknowledges former Justice Russell Nigro’s concurrence in *Independent Oil*, where he stated that oil and gas were of a “fundamentally different character than real estate.”¹⁹⁹ The *Coolspring* majority then goes on to state that “it is evident that the physical characteristics of the fuels was central to the Court’s ultimate holding that oil and gas do not fall within the term ‘lands.’”²⁰⁰

With these statements in mind, it may be possible to bring an action for adverse possession which meets all of the *Conneaut Lake Park* requirements save one. Instead of being brought after twenty-one years, the action may be able to be brought after six. The reason for the discrepancy in time is that adverse possession has typically proceeded after 21 years because, under 42 PA. CONS. STAT. ANN. § 5530(a)(1), an action for possession of real property must be brought within twenty-one years.²⁰¹ Conversely, then, an action

would be if there were two owners of an oil and gas interest: one an unknown party, the other the party who actively drilled for the oil himself. If the known owner merely leased the property, the situation may be as it was in *Oviatt*, where the court held that the leases, mere claims to property, were not sufficient to satisfy adverse possession. Similarly, if there are more than two owners in the oil and gas interest, it may become difficult to navigate the exclusivity requirement for adverse possession, though it is possible. See *Conneaut Lake Park, Inc. v. Klingensmith*, 66 A.2d 828, 829 (Pa. 1949).

¹⁹⁸ *Indep. Oil & Gas Ass’n of Pa. v. Bd. of Assessment Appeals of Fayette County, Pa.*, 814 A.2d 180, 182 n.5 (Pa. 2002).

¹⁹⁹ *Id.* at 185 (Nigro, J., concurring).

²⁰⁰ *Coolspring Stone Supply, Inc. v. County of Fayette*, 929 A.2d 1150, 1155 (Pa. 2007).

²⁰¹ See *Brennan v. Manchester Crossings, Inc.* 708 A.2d 815, 818 (Pa. Super. Ct. 1998).

to quiet the title in the adverse possessor must be brought after the statute of limitations has run in which the rightful owner could have brought an action in ejectment.

If the Court is willing to say that oil and gas interests are not definitively interests in real property, the possibility exists that the court may say that they are not properly subject to the twenty-one year limitation for real property, but are more properly considered under 42 PA. CONS. STAT. ANN. § 5527(b). This section is the catch-all, which covers all property types not specifically covered by other sections on limitations of time.²⁰² Placing oil and gas interests under this heading would allow the Court to leave an absolute definition of the type of property that oil and gas interests are to another day, while still promoting the development of subsurface estates by shortening the time necessary for an appropriately situated party to claim adverse possession from twenty-one years to six.

IV. Conclusion

In the final consideration, the Dormant Oil and Gas Act as it currently stands would serve a beneficial purpose for a party interested in developing an oil and gas estate which is partially owned by unknown parties. By proceeding under the auspices of this act, interested developers would obtain many benefits. For instance, they would be able to have all owners consent to enter into a lease, because the DOGA trustee could sign for all the unknown owners. Also, they would have certainty in their profit margin. The trustees under this act would also receive benefits: they would receive their customary fee as trustees, and they would be free to turn over the res to the state at any point if they no longer wished to deal with it.

²⁰² See 42 PA. CONS. STAT. ANN. § 5527(b) (2006).

However, DOGA also has certain downsides. The foremost being that it not only does not define a way by which the dormant oil and gas interests themselves may pass, but the use of DOGA would preclude an interested party from pursuing a claim for adverse possession, which is the best current method to transfer such interests.

These positive and negative attributes taken together suggest that DOGA is a valuable piece of the puzzle in handling dormant gas and oil interests, but that the field would benefit from additional regulations, promulgated by the legislature, which would set forth Pennsylvania's policy on how to not only mitigate the problems caused by unknown fractional interests in oil and gas estates, but to end them.