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The Dickinson
School of Law

Agricultural Law Resource and Reference Center

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The Rule of Capture in Pennsylvania Oil and Gas Law

Overview of Presentation

- Rule of Capture, Generally
- Historical Bases for Rule of Capture
- Application of Rule of Capture in Pennsylvania
- Modification to Rule of Capture
- Current / Upcoming Issues

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Rule of Capture – Definition

- “The owner of a tract of land acquires title to the oil and gas which he produces from wells drilled thereon, though it may be proved that part of such oil and gas migrated from adjoining lands.”
 - Robert E. Hardwicke (1935)

Rule of Capture – Common Understanding

- **Does the Rule of Capture Apply in Pennsylvania?**
 - This question normally reflects the landowner's concern regarding the “stealing” of *his or her* gas.
 - Landowner's want a yes or no answer.

Rule of Capture – Common Understanding

- **Use as a negotiating tool:**
 - Gas company would “place a gas well on neighboring property and take gas under plaintiff’s land under the ‘rule of capture’ and pay [plaintiff] nothing if he did not sign a lease.”
 - *Price v. Elexco Land Services*

Rule of Capture – Common Understanding

- **Use as a negotiating tool:**
 - Gas company would “negotiate leases with plaintiff’s neighbors and capture the gas under plaintiff’s land through the ‘rule of capture,’ leaving plaintiff without a lease for gas on his land.”
 - *Frystak v. Cabot Oil & Gas Corp.*

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Rule of Capture – Historical Bases

- ***Ferae Naturae***
 - *Pierson v. Post*, 3 Cai. 175 (N.Y. 1805)
- **Percolating Groundwater**
 - *Acton v. Blundall*, 152 Eng. Rep. 1223 (1843)

Pierson v. Post

- **Facts:**
 - Post expends resources in the pursuit of a fox.
 - Pierson captures said fox.
 - Post files suit alleging that he is the rightful owner of said fox.

Pierson v. Post

- **Issue Presented:**

- “Whether a person who, with his own hounds, starts and hunts a fox on **waste and uninhabited ground**, and is on the point of seizing his prey, acquires such an interest in the animal, as to have a right of action against another, who in full view of the huntsman and his dogs in full pursuit, and with knowledge of the chase, shall kill and carry him away?”

Pierson v. Post

- **Court ruling:**
 - Ownership of wild animals is acquired by occupancy.
 - Occupancy requires bringing a wild animal within one's "certain control."
 - Since Pierson brought the fox within his "certain control," he was the owner of the fox.

Percolating Groundwaters

- ***Acton v. Blundell***

- **Facts:**

- Competing water use between cotton mill and coal pit.

- **Court opinion:**

- Ownership of subsurface water is distinct from rights to flowing surface water.
- Ownership of land includes ownership of all that lies beneath.
 - Solid rock
 - Porous ground
 - Venous earth
 - Part soil, part water

Percolating Groundwaters

- ***Acton v. Blundell***
 - Draining of springs from under neighbor's land is *damnum absque injuria* (loss without legal harm).

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Application of Rule of Capture to Pennsylvania Oil and Gas Law

- ***Westmoreland & Cambria Natural Gas Co. v. De Witt*, 130 Pa. 235 (1889)**
 - Landmark Rule of Capture case
 - Lease forfeiture case
 - Rule of Capture language is arguably dicta.

Westmoreland case

- **Facts:**

- Westmoreland drilled and shut-in a well.
- Landowner sought to lease land to second company.
- Landowner took steps to exercise possession of land by ordering Westmoreland off his land.
- Landowner claimed that lease had been forfeited due to failure to make certain payments.
- Westmoreland filed suit to prevent drilling of well by second company.

Westmoreland case

- **Issues:**
 - **Whether the well proposed by the second company was on leased land.**
 - The discussion of this issue involved a discussion of possessory rights which led to the Rule of Capture language.
 - **Whether Westmoreland had forfeited its lease.**

Westmoreland case

- Reference to percolating waters
- Use of *ferae naturae* analogy:
 - “power and tendency to escape without the volition of the owner”
 - “fugitive and wandering existence within the limits of a particular tract was uncertain.”
 - *Brown v. Vandergrift*

Westmoreland case

- **Enunciation of general rule as between neighboring landowners**
 - Oil and gas “belong to the owner of the land, and are part of it, and are subject to his control; but when they escape, and go into other land, or come under another’s control, the title of the former owner is gone.”

Westmoreland case

- **Enunciation of general rule as between neighboring landowners**
 - “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.”

Westmoreland case

- **As between landowner and gas company**
 - The party “who controls the gas – has it in his grasp, so to speak – is the one who has possession in the legal as well as the ordinary sense of the word.”

Clarification of *Ferae Naturae* Analogy

- **Ownership in Place**
 - Wild animals are not owned until capture.
 - Oil and natural gas are capable of ownership “in place” prior to “capture.”
- **Case Law**
 - *Kier v. Peterson*, 41 Pa. 357 (1861)
 - *Hamilton v. Foster*, 272 Pa. 95 (1922)

Ownership in Place

- ***Kier v. Peterson***
 - Land leased for salt manufacturing.
 - Oil was recovered as a byproduct of the salt process.
 - Ownership of the oil was at issue.

Ownership in Place

- ***Kier v. Peterson (Woodward concurring opinion)***
 - “Petroleum . . . is included in the very comprehensive idea which the law attaches to the word *land*. It is part of the land. It is land. As such it belonged to Peterson, in the place where the present dispute arose. He held it by the same title by which he held the surface, or the salt which underlay the surface.”

Ownership in Place

- ***Hamilton v. Foster***

- **Facts:**

- Lessor executed lease agreement granting rights to all gas under entire tract.
- Lease agreement precluded the drilling of wells on a portion of the tract.
- There was a dispute as to whether a well had been drilled on the excluded area.

Ownership in Place

- ***Hamilton v. Foster***
 - Lessor argued that, as trespassor, lessee could not acquire title to gas recovered.
 - i.e., had not captured gas prior to trespass.
 - **Court ruled that gas belonged to lessee whether or not he had actually trespassed on the land.**
 - Court limited / clarified *ferae naturae* analogy of *Westmoreland*.
 - Reaffirmed ownership in place theory expressed in *Kier*.

Specific Applications of Rule of Capture

- **Use of Mechanical Devices to Increase Production**
 - *Jones v. Forest Oil Co.*, 194 Pa. 379 (1900)
- **Drilling Close to Property Lines**
 - *Barnard v. Monongahela Natural Gas Co.*, 216 Pa. 362 (1907)
- **Gas Storage Fields**
 - *White v. New York State Natural Gas Corp.*, 190 F.Supp. 342 (W.D. Pa. 1960)

Specific Applications of Rule of Capture

- **Waste**
 - *Hague v. Wheeler*, 157 Pa. 324 (1893)
- **Ownership of Coal Bed Methane**
 - *United States Steel Corp. v. Hoge*, 503 Pa. 140 (1983)

Use of Mechanical Devices to Increase Production

- ***Jones v. Forest Oil Co.***
 - **Facts:**
 - Jones and Forest Oil operated wells on adjacent tracts.
 - Forest Oil began to use a gas pump to increase production.
 - As a result, the production from Jones' wells decreased.

Use of Mechanical Devices to Increase Production

- ***Jones v. Forest Oil Co.***
 - **Issue:**
 - “[T]o what extent an owner of oil wells may use mechanical devices for bringing the oil to the surface. In operating his wells, may he use appliances which diminish the production of his neighbor’s wells.”

Use of Mechanical Devices to Increase Production

- ***Jones v. Forest Oil Co.***
 - **Analysis:**
 - Percolating water analogy
 - *Ferae naturae* analogy for migrating gas
 - **Holding:**
 - Since Forest Oil had a lawful right to extract oil, it could “resort to the use of all known lawful modern machinery and appliances.”

Use of Mechanical Devices to Increase Production

- ***Jones v. Forest Oil Co.***
 - The court noted that gas pumps were widely used, were not cost-prohibitive, and “when used by all, none are injured.”
 - Current application to hydrofracing?

Drilling Close to Property Lines

- ***Barnard v. Monongahela Natural Gas Co.***
 - **Facts:**
 - Gas company held leases on two adjoining tracts.
 - 66 acre tract owned by Plaintiffs Barnard
 - 156 acre tract owned by neighbor Barnard
 - Gas company drilled well on property of neighbor Barnard.
 - 75% of well's drainage area was beneath land of Plaintiffs Barnard.

Drilling Close to Property Lines

- ***Barnard v. Monongahela Natural Gas Co.***
 - **Issues Discussed:**
 - Landowner v. Landowner
 - Landowner drills near property line and draws gas from underneath tract of adjoining landowner.
 - Landowner v. Lessee gas company
 - Lessee holds leases on adjoining tracts owned by separate landowners.
 - Lessee drills well on adjoining tract that draws gas from underneath tract of landowner.

Drilling Close to Property Lines

- ***Barnard v. Monongahela Natural Gas Co.***
 - **Landowner v. Landowner:**
 - Landowner is free to drill as close to property line as he wishes.
 - Remedy for adjoining landowner is to drill and offset well.
 - “What then can the neighbor do? Nothing; only go and do likewise. He must protect his own oil and gas. He knows it is wild and will run away if it finds an opening and it is his business to keep it at home.”
 - Court acknowledged potential waste arising from this rule.

Drilling Close to Property Lines

- ***Barnard v. Monongahela Natural Gas Co.***
 - **Landowner v. Lessee gas company:**
 - Drilling near property line is acceptable so long as conduct is not done with fraudulent intent.
 - Refusing to develop complaining landowner's lease may constitute fraud.
 - Monongahela drilled a subsequent drill well on land owned by Plaintiffs Barnard.

Gas Storage Fields

- ***White v. New York State Natural Gas Corp.***
 - **Facts:**
 - Gas company using depleted reservoir in Potter County for gas storage.
 - Plaintiff White had an interest in nearby operating wells.
 - The ownership of the gas produced from these wells – that may have migrated from the storage field – was at issue.

Gas Storage Fields

- ***White v. New York State Natural Gas Corp.***
 - **Issue:**
 - Whether title to natural gas is lost by injecting it into a storage reservoir
 - **Plaintiff's argument:**
 - Escaped gas was like a captured animal that had “escaped to its natural habitat.”

Gas Storage Fields

- ***White v. New York State Natural Gas Corp.***
 - **Problems with *ferae naturae* analogy:**
 - Storage company was still in possession of gas as it remained within the storage field.
 - This was not the native habitat of gas transported from Southwestern United States.
 - *Ferae naturae* analogy “would no more divest a storage company of title to stored gas than a zookeeper in Pittsburgh of title to an escaped elephant.”

Gas Storage Fields

- ***White v. New York State Natural Gas Corp.***
 - **Holding:**
 - Title to natural gas is not lost following injection into an underground storage field.

Waste

- ***Hague v. Wheeler***

- **Facts:**

- Three wells by three operators are drilled into a pool.
- Wheeler allows gas produced by his well to escape into air.
- Plaintiffs seek to enjoin Wheeler's conduct.

Waste

- ***Hague v. Wheeler***
 - **Court found that Wheeler had not acted with malice or negligence.**
 - Inability to market was unfortunate.
 - **Dominion over natural gas lawfully extracted was absolute.**
 - Property can be sold, used, given away, or squandered.

Waste

- ***Hague v. Wheeler***
 - Impact of Oil and Gas Conservation Law re: public interest in preventing waste?
 - Continued application between private parties?

Ownership of Coal Bed Methane

- ***United States Steel Corp. v. Hoge***
 - **Facts:**
 - 1920 severance of coal rights
 - Severance contained a reservation “to drill and operate through said coal for oil and gas.”
 - **Issue:**
 - Who owns the coal bed methane?

Ownership of Coal Bed Methane

- ***United States Steel Corp. v. Hoge***
 - **Supreme Court opinion:**
 - Title to gas rests with whoever has title to the substance in which the gas rests.
 - Relied upon *Westmoreland, Hamilton*
 - Any coal bed methane that migrates out of the coal belongs to owner of surrounding mineral estate.
 - Title to coal bed methane is held by the owner of the coal in which the coal bed methane is held.

Ownership of Coal Bed Methane

- ***United States Steel Corp. v. Hoge***
 - **Dissent:**
 - Majority and Dissenting opinions differ on interpretation of “gas” in reservation clause.
 - Since coal bed methane was a dangerous waste product in 1920, majority opined that it “strains credibility” that right to it would have been reserved.
 - Dissent opined that since parties were aware of coal bed methane in 1920, “the plain meaning of the term ‘gas’ would be far too subverted were we to exclude coalbed gas as a recoverable gas.”

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Conservation Laws

- **Conservation laws modify “pure” application of Rule of Capture by:**
 - Prohibiting waste;
 - Restricting placement of wells;
 - Limiting production from wells;
 - Compelling participation in natural gas activities; and
 - Providing royalties be paid for offsite landowners.

Conservation Laws

- **1906 – Louisiana enacted first Conservation Law.**
- **1935 – Interstate Compact to Conserve Oil and Gas formed. The organization is now known as the Interstate Oil and Gas Compact Commission (IOGCC).**
- **1961 – Pennsylvania enacts Oil and Gas Conservation Law (58 P.S. §§ 401-419).**

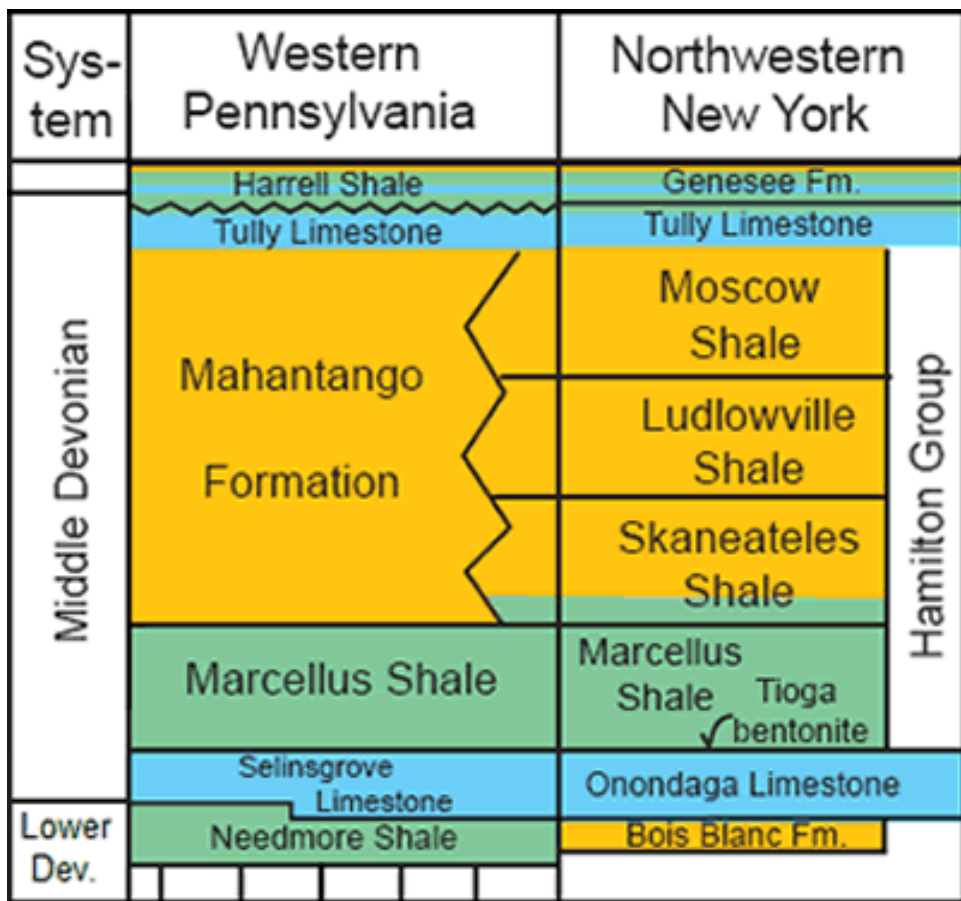
Oil and Gas Conservation Law

- **Declaration of Policy**
 - “[F]oster, encourage, and promote the development, production, and utilization” of Pennsylvania’s oil and gas resources;
 - Prevent the waste of oil and natural gas;
 - Permit the Commonwealth to “realize and enjoy the maximum benefit of these natural resources.”
 - Impractical to include shallow wells

Oil and Gas Conservation Law

- **Application – Section 3**
 - **OGC Law applies to all land within Pennsylvania.**
 - **The following wells are excluded from OGC Law:**
 - Those that do not penetrate the Onondaga horizon;
 - Those that are less than 3,800 feet where the Onondaga horizon is closer than 3,800 from surface;
 - Those drilled prior to OGC Law;
 - Those for use in storage reservoir.

The Oil and Gas Conservation Law and the Marcellus Shale



The Oil and Gas Conservation Law does not apply to wells that *do not* penetrate the Onondaga horizon, meaning *wells drilled into the Marcellus Shale are not covered by this law.*

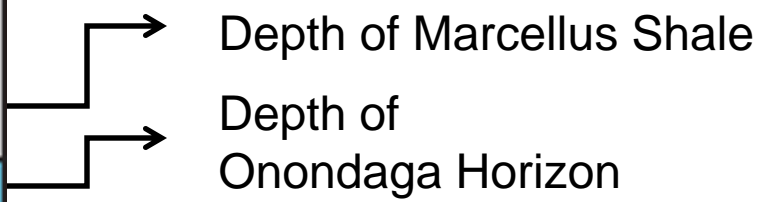


Image by: Robert Milici and Christopher Swezey, 2006, Assessment of Appalachian Basin Oil and Gas Resources: Devonian Shale–Middle and Upper Paleozoic Total Petroleum System. Open-File Report Series 2006-1237. United States Geological Survey.

Oil and Gas Conservation Law

- **Prohibition of Waste – Section 4**
 - **Physical waste**
 - Allowing gas, oil, or water to migrate to a different stratum
 - Drowning a stratum
 - Unnecessary loss of oil or gas at the surface
 - **Inefficient spacing of wells**
 - “drilling of more wells than are reasonably required to recover, efficiently and economically, the maximum amount of oil and gas from a pool.”

Oil and Gas Conservation Law

- **Well Spacing – Section 7**
 - **Definition of pool:**
 - “an underground reservoir containing a common accumulation or oil and gas, or both, not in communication laterally or vertically with any other accumulation of oil or gas.”

Well Spacing

- When a well is drilled into, or below, the Onondaga horizon, those “directly and immediately affected by the drilling” of the well can apply to DEP for a well spacing order.

Well Spacing

- **Process to Establish Spacing Order**
 - Notice of hearing
 - DEP holds public hearing
 - DEP will render determination within 45 days.

Well Spacing

- **Spacing Order**
 - DEP will establish a “unit” representing the area in which a well can efficiently and economically extract natural gas.
 - The units within a pool generally will have uniform sizes and shapes.
 - The order will cover all land believed to be in the pool up to a size of 10 square miles.

Well Spacing

- **Spacing Order**
 - **DEP will consider the following factors:**
 - Surface topography and individual property lines;
 - Proposed well spacing plans;
 - Depth of production;
 - Characteristics of the producing formation;
 - Other geologic and scientific data.

Well Spacing

- **Spacing Order**
 - DEP will set a minimum distance that a well must be located from a unit boundary.
 - Under some circumstances, an operator may be permitted to drill a well outside prescribe distance, but production of well may be limited.

Oil and Gas Conservation Law

- **Integration of Interest in Spacing Units – Section 8**
 - Multiple owners within a spacing unit may voluntarily integrate their separate parcels to develop natural gas within spacing unit.
 - If voluntary agreement is not reached, an operator can apply for an integration order.
 - DEP will conduct public hearing after notice.
 - DEP can issue “just and reasonable” order.

Effect of Unitization

- ***Fox v. Wainoco Oil and Gas Co.*, 46 Pa. D. & C. 3d 439 (Crawford Co. 1986)**
 - Absent language in a lease showing a contrary intent, inclusion in a drilling unit converts lease into secondary term.

Oil and Gas Conservation Law

- **Penalties – Section 12**
 - Violations are punishable by:
 - A fine ranging from \$500 to \$5,000;
 - Imprisonment not more than six months.
 - Each day is considered to be a separate offense.

Oil and Gas Conservation Law

- **Enforcement – Section 14**
 - DEP can pursue injunctive relief to prevent or stop violations.

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Oil and Gas Conservation Law and Marcellus Shale

- Until further legislation is passed, drilling into the Marcellus Shale will remain exempt from the unitization and spacing provisions of the OGC Law.

Proposed Amendments to the Oil and Gas Conservation Law

- **2009 – 2010 Session**
 - **House Bill 977**
 - Proposing amendments to the Oil and Gas Conservation Law, 58 P.S. §§ 401-419, to make the law applicable to Marcellus Shale wells.
 - Reintroduction of House Bill 2453 from 2007-2008 legislative session.
 - Impact of legislation?

Current / Upcoming Issues

- **Can hydrofracing constitute a subterranean trespass?**
 - *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008).
 - Contents of frac fluid that travelled under adjoining land did not constitute a trespass.

Current / Upcoming Issues

- **Can seismic testing be used without permission to enter the property?**



The Agricultural Law Resource and Reference Center is a collaboration between:

- Penn State Dickinson School of Law**
- Penn State College of Agricultural Sciences**
- Pennsylvania Department of Agriculture**





Contact Information

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