

## Rule-of-Capture Showdown: Pennsylvania v. Texas

Energy Law, Litigation, Mineral Trespass, Title Disputes / August 5, 2019 / Thomas G. Ciarlone Jr.

Last year, I wrote about Pennsylvania's departure from Texas on the law surrounding trespass by hydraulic fracturing. As first stated in *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008), trespass claims for drainage by hydraulic fracturing are barred in Texas by the venerable "rule of capture"—shorthand for the theory that landowners acquire good title to the minerals they produce from wells on their land, even when some of the oil or gas migrates from adjoining tracts. In *Briggs v. Southwestern Energy Production Company*, 2018 Pa. Super. 79 (2018), however, an intermediate appellate court in Pennsylvania split with Texas, concluding that plaintiffs can sue for subsurface trespass from hydraulic fracturing, even in the absence of physical damage to reservoirs or offset wells.

Since our last post, the Pennsylvania Supreme Court has agreed to take up the case. Oral arguments are scheduled for next month.

Unsurprisingly, the issue is being closely watched by industry and landowner groups alike. This has led to a bevy of amicus briefing, including from:

- The American Petroleum Institute;
- The Marcellus Shale Coalition and the Pennsylvania Independent Oil & Gas Association;
- The Pennsylvania Chamber of Business and Industry; and
- The Pennsylvania Chapter of the National Association of Royalty Owners.

A particularly informative amicus brief was filed not by a lawyer, but by a geologist. You can read Thomas D. Gillespie's submission [here](#). Mr. Gillespie capably deconstructs the intermediate court's reasoning, which more or less was as follows:

1. Hydraulic fracturing aims to produce oil and gas that is, in its natural state, trapped in rock; in other words, minerals locked in shale formations do not migrate of their own accord.
2. Operators must therefore forcibly create artificial fissures through which oil and gas can migrate into take points along a horizontal well bore.
3. The essential premise of the rule of capture—the free and natural migration of minerals—is thus missing in the context of hydraulic fracturing.

Mr. Gillespie by no means minced words when he admonished the *Briggs* court for its lack of industry knowledge and technical sophistication:

The opinion issued by the Pennsylvania Superior Court ... was founded on fundamental misconceptions pertaining to the mechanisms by which natural gas occurs and migrates in geologic formations and the methods by which that gas is extracted from geologic strata to provide a vital resource for the public health, welfare and benefit. That lower court opinion established precedent whereby those misconceptions will be

perpetuated and will assume the force of law unless a respected representative of the community of professional geologists provides this Court with the information by which it can correct the technical misstep made by that lower Court.

If the Pennsylvania Supreme Court affirms, it will be a dark day for operators in the Keystone State.

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