

# ENVIRONMENTAL LAW

Lewis & Clark Law School

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## SYMPOSIUM

### THE RULE OF CAPTURE AND ITS CONSEQUENCES

Introduction..... 647

*Frank Lupo*

### SYMPOSIUM ESSAY

The Role of Captives and the Rule of Capture ..... 649

*Lea VanderVelde*

The rule of capture created several unintended consequences regarding human liberty when it was applied to the American west. Examining these consequences today allows us to avoid these pitfalls in later applications of the rule of capture as a distributional method. Professor VanderVelde examines the limited property rights granted to Native Americans and the inability of slaves—even those exploring new territory with Lewis and Clark’s Corps of Discovery—to acquire property, despite their own labor expended in the task highlighting the iniquitous deprivations of liberty created by the rule of capture.

### SYMPOSIUM ARTICLES

The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife..... 673

*Michael C. Blumm and Lucas Ritchie*

In this Article, Professor Blumm and Mr. Ritchie examine the origins, development, and current utility of the rule of capture as it applies to wildlife. They maintain that an intrinsic aspect of the American rule of capture has been state ownership of wildlife, a concept which has survived several seemingly adverse Supreme Court rulings. They also explain why the state ownership doctrine continues to be a vital aspect of wildlife law in the 21st century.

<p>Western Grazing: The Capture of Grass, Ground, and Government...  <i>Debra L. Donahue</i></p> <p>In this Article, Professor Donahue posits and explores a “capture metaphor,” which she argues helps to explain the inordinate influence of public-land ranchers on federal grazing policy. The metaphor incorporates the rule of capture, the capture thesis of interest-group liberalism, and the “cowboy” myth, which has captured so many facets of American life and culture. The article argues that the capture metaphor perpetuates federal grazing policies that are unsupported by law, science, or history, but which are wreaking havoc on public rangelands.</p>	721
<p>Three Cases / Four Tales: Commons, Capture, the Public Trust, and Property in Land .....  <i>Dale D. Goble</i></p> <p>The rule of capture is a fundamental doctrine in natural resource law. The rule is often illustrated with the decision in <i>Pierson v. Post</i>, a case involving an animal <i>feræ naturæ</i>. But <i>Pierson</i> is only a small part of the law that bounds the rule. This article outlines the legal doctrines of public trust and the wildlife easement as they were enunciated in two contemporaneous cases, <i>Arnold v. Mundy</i> and <i>Inhabitants v. Baker</i>.</p>	807
<p>The Rule of Capture and the Economic Dynamics of Natural Resource Use and Survival Under Open Access Management Regimes.....  <i>Jason Scott Johnston</i></p> <p>Professor Johnston seeks to show that the dynamic economic analysis of natural resource harvest under the rule of capture applies to natural resource harvest and private land development, and that this dynamic does not imply resource catastrophe. He asserts that rather than the economic incentives created by the rule of capture, it is often state-sponsored subsidization of resource harvest that spurs overuse and overdevelopment.</p>	855
<p>The Rule of Capture—An Oil and Gas Perspective.....  <i>Bruce M. Kramer and Owen L. Anderson</i></p> <p>The early development of the rule of capture was subsumed within the larger question of whether oil and gas was a possessory or non-possessory interest or whether it was real property or personal property. As the rule of capture moved on to more complex issues, other than pure ownership, the rule was modified in a number of significant ways. Oil and gas conservation statutes have had the greatest impact on the rule of capture by limiting the ability of oil and gas owners to drill wells. Nevertheless, the rule of capture continues to apply to the extent conservation law or orders do not preempt it. Indeed, continued recognition of the rule,</p>	899

together with a recognition of correlative rights, is essential to the efficient administration of conservation laws.

The Spiritual Values of Wilderness ..... 955  
*John Copeland Nagle*

Religious ideas have long played an important role in American thinking about wilderness, yet recently they have been overlooked. The spiritual values discussed throughout the legislative history of the Wilderness Act of 1964, and since then in the writings of several theologians, can complement the other values of wilderness and help to inform decisions about wilderness protection.

Questioning the Rule of Capture Metaphor for Nineteenth Century  
Public Land Law: A Look at R.S. 2477 ..... 1005  
*James R. Rasband*

The conference's use of "The Rule of Capture" as a metaphor for nineteenth century public land law overlooks that land and resource ownership more often depended upon cultivation and improvement than upon simple resource capture. As a vehicle for testing this proposition the article investigates a provision of the 1866 mining law known as R.S. 2477 which grants to state and local governments "the right of way for the construction of highways over public lands, not reserved for public uses." What counts as an R.S. 2477 road—which has significant implications for what lands can be considered roadless and eligible for wilderness designation—depends in significant part on whether R.S. 2477 is understood to have granted rights-of-way created by mere use, as suggested by a capture metaphor, or to have granted rights-of-way only for roads whose creation required some labor and improvement.

## ESSAY

The Wild Free-Roaming Horses and Burros Act of 1971 ..... 1049  
*Roberto Iraola*

Under the Wild and Free-Roaming Horses and Burros Act and its implementing regulations, the Departments of the Interior and Agriculture manage and protect wild and free-roaming horses and burros on public lands. Over the course of the past thirty years, the Act has been the subject of litigation, both with respect to the management of these animals, as well as their protection. Mr. Iraola provides a general overview of the developing judicial and administrative case law in these areas.

**BOOK REVIEW**

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