

OHIO OIL CO. V. INDIANA—A CRITICAL CHAPTER IN THE GROWTH OF PETROLEUM CONSERVATION LAW

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This article presents the essential aspects of one of the landmark U.S. Supreme Court cases by which a state was first allowed to prevent the waste of privately owned natural resources by the assertion of its police power. All subsequent state regulation of the production of petroleum is based, at least in part, upon this important decision.

Technology has brought magnificent benefits to the world's more advanced societies but the matchless wonders of applied science and innovative business structures have been accompanied by a number of complicated and far-reaching problems. One of the most interesting aspects of the proliferation of technology in the United States has been the struggle of the law to keep abreast of the rapidly developing problems brought by the new order of science and business. Few will question that the law follows the needs of society, but it often follows at a substantial distance and with a halting, confused gait. Credit should be given, however, to black-robed justices and responsible legislators who have labored manfully to forge meaningful substantive law by which order could be brought from chaos. The celebrated case of *Ohio Oil Company v. State of Indiana*, a landmark decision of inestimable importance, is an excellent example of the difficult process by which new legal concepts are produced to meet changing societal needs.

The petroleum industry came with its usual rush to the State of Indiana in the mid-1880's. Oil and natural gas discoveries in the Trenton Limestone near Lima and Findlay, Ohio, in 1885 and 1886 encouraged drilling to the west in the land of the Hoosiers. Commercial gas wells were quickly completed in the Trenton Limestone near Eaton and Kokomo, Indiana. Oil was discovered near Terre Haute and elsewhere from 1886 onward and by 1889 the state was producing 33,000 barrels of petroleum and a large but undetermined amount of natural gas (1, p. 63). A "gas belt" was outlined geographically and was developed as the use of natural gas for fuel and illumination spread rapidly. A number of cities installed natural gas distribution systems.

These included Indianapolis, Ft. Wayne, Richmond, Logansport, Anderson, Muncie, Marion, and Kokomo. The State of Indiana equipped several of its institutions for the use of natural gas. These included the state capitol, some of the hospitals and eleemosynary institutions, and various county court houses and municipal buildings (2, p. 190-191).

The economic benefits derived by Indiana's citizens from the newly found natural resources were substantial. Natural gas was an economical and dependable source of energy. Industries and businesses were encouraged to locate or to expand in the state. Hoosiers were proud of their vast natural gas deposits; but they were also fearful that these valuable hydrocarbons might be too rapidly dissipated by waste and exportation to other states. Thinking citizens could recall that oil and gas fields in other states had waxed and waned and many prominent individuals moved to safeguard Indiana's gas for her own denizens.

In 1889 the state legislature enacted a measure which prohibited the sale of Indiana gas beyond the state's boundaries and its provisions were intended to prevent the waste of valuable resources. This bold attempt at provincialism was struck down by the Indiana Supreme Court almost immediately in *State ex rel Corwin v. Indiana and Ohio Oil Co.* (120 Ind. 575, 22 N.E. 778, 1889), when the entire statute was declared in violation of the commerce clause of the U.S. Constitution. In 1891 the legislature succeeded in preventing the exportation of gas by enacting a law which forbade the use of any devices to increase the pressure or the flow of natural gas for transportation through pipe lines. The state supreme court in 1900 upheld the constitutionality of the enactment as a public safety

measure in the case of *Manufacturers Gas and Oil Co. v. Indiana Natural Gas and Oil Co.* (155 Ind. 461, 57 N.E. 912). Also in 1891 the Indiana legislature passed its first statute devoted solely to the conservation of petroleum which prohibited the burning of natural gas in flambeau lights. The measure specifically allowed the use of gas in jumbo burners provided such use occurred between the hours of 5 p.m. and 8 a.m. The Indiana high court in 1896 approved the validity of this act as a legitimate exercise of the state's police power in the case of *Townsend v. The State* (147 Ind. 624, 47 N.E. 19).

Then, in 1893, the Indiana general assembly set in motion the series of events which culminated in a direct and powerful confrontation between the forces which advocated the conservation of hydrocarbons and those who sought a continuation of production in the previously accepted manner which was substantially unfettered by state regulation. The legislature enacted a statute which among other things made it illegal

to allow or permit the flow of gas from any such well to escape into the open air, without being confined within such well or proper pipes, or other safe receptacle for a longer period than two (2) days next after gas or oil shall have been struck in such well . . . (3, p. 125)

The state thus sought to use its police power to curb the profligate waste of natural gas. The police power is a general grant of inherent authority which reposes in a government simply because it is a government by which the state can protect the health, welfare, morals, safety and the privacy of its population. Indiana thus asserted its conviction that the people of the state had a real and definable interest in the preservation and utilization of its gas reserves even though such gas resources were privately owned.

The American petroleum industry had enjoyed a lusty existence for over three decades, but by the 1890's much scientific and legal confusion still attended petroleum operations. The anticlinal theory of petroleum reservoirs was still in the process of verification and the sea level gas theory, which contended that natural gas could not be found below sea level, had not been disproved by the drilling of deep gas wells until 1888 (1, pp. 62-63). Some authorities

and laymen likened petroleum reservoirs to underground lakes or rivers. The jurists were even less accurate in their concept of the nature of petroleum deposits. Three analogies of fact were used in the law as guides to legal disposition of controversies: the consideration of oil or gas as (a) wild animals (animals *ferae naturae*), (b) percolating ground water and (c) solid minerals in place. The application by the courts of these analogies had developed a precept of law known as the "rule of capture" by which oil and gas belonged to the surface owner who reduced the pesky substance to his possession above ground even though the oil and gas might have come, at least in part, from petroleum deposits beneath the land of an adjacent land owner. Furthermore, it was common production practice for operators of gas wells in areas where there was no ready market for gas to allow the gas to spew unimpeded into the air in the hope that the well would blow into an oil well. If the Indiana conservation statute of 1893 was valid, a substantial change in petroleum legal concepts and production practices would be necessitated!

The Ohio Oil Company, an Ohio corporation which had become an oil producing subsidiary of the great Standard Oil Trust, was authorized to conduct business in Indiana. The Ohio Oil Company was interested primarily in producing oil, not gas, and when it drilled a gas well in an isolated area in Madison County, Indiana, the company allowed the gas to blow into the air while hoping that oil would eventually be produced from the well. The company refused to comply with the gas conservation statute and the state then moved to obtain an injunction to prevent the continued waste of gas at the well (2, pp. 190 ff.).

The stage was set for one of the most famous and important controversies in the annals of legal history of the conservation of oil and gas. The Ohio Oil Co. retained the most talented legal practitioners that wealth and power could command and marshaled an imposing array of common law principles and constitutional authorities in its attempt to prevent state regulation. In the main the company argued that such action by Indiana constituted an unlawful taking of property by the state in

direct violation of the due process clause of the Fourteenth Amendment to the U.S. Constitution. The State of Indiana, represented by competent and dedicated counsel, and clad in the armor of the righteous cause of conservation, rode full tilt into the fray with the lance of its police power clutched tightly at the ready.

The Indiana Supreme Court in 1898 upheld the constitutionality of the statute in *State v. Ohio Oil Company* (150 Ind. 21, 49 N.E. 809), and the company appealed the case on a writ of error to the U.S. Supreme Court. Oral argument on the matter was heard by the high tribunal on December 18 and 19, 1899. Associate Justice Edward D. White was assigned the task of preparing the court's opinion. Justice White was a remarkable man and yet he was a product of his time.

Born in Louisiana in 1845, White had fought for the Confederacy and its "Lost Cause" during the Civil War. Subsequently he became a lawyer and rose to be a justice of the Louisiana Supreme Court. In 1894, while White was serving in the United States Senate, President Grover Cleveland appointed him to the U. S. Supreme Court. White was noted for his judicial acumen and the sense of unity which he inspired in his fellow justices. When Chief Justice Melville Fuller died in 1910, the other members of the high court respectfully petitioned President William Howard Taft to appoint the distinguished southerner to the Chief Justiceship. Taft acceded to this request and in 1921 himself succeeded to the Chief Justiceship upon White's death. The Louisianan was the author of some of the high court's most important decisions in that era. He wrote the "rule of reason" decisions in the antitrust cases which distinguished between legal and illegal business organizations. In 1915 White wrote the opinion which invalidated the "grandfather clause" provision of several southern states by which Negroes there had been disfranchised (4, p. 854).

Judge White delivered the Court's opinion in *Ohio Oil Co. v. Indiana* on April 9, 1900. The decision was a formidable declaration of the authority of the state to prevent the waste of natural gas. The Court relied heavily upon a Pennsylvania case, *Westmoreland & C. Natural Gas Co. v. DeWitt*

(130 Pa. 235, 5 L.R.A. 731, 18 Atl. 724), which had sought to consider more scientifically the true nature of oil and gas in place. Justice White supported the constitutionality of the Indiana statute on two grounds:

the police power of the state to legislate for the prevention of waste of natural resources for the protection of the public interest, and the power of the state to legislate for the protection of the rights of owners in a common source of supply of oil and gas. (3, p. 134)

This opinion was one of the first judicial recognitions of the "peculiar physical facts of oil and gas" and the legal relations of land owners in petroleum reservoirs. Justice White

"... exposed the fallacies of the wild animal analogy, and pointed out that land owners' privileges to take oil and gas actually constitute a property interest. He also explained that all land owners in a common source of supply of oil and gas are equally privileged to take, and that an unlimited exercise of such privileges by one "may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of others, or by waste by one or more, to the annihilation of the rights of the remainder." (3, p. 134)

So clear was the Court's concept of the nature of oil and gas and the correlative rights of owners of a common source of supply that subsequent cases have improved little on the fundamentals involved. Coming as it did in 1900, at the end of the petroleum industry's "age of illumination" and at the outset of the industry's "age of energy," the case of *Ohio Oil Co. v. Indiana* was a landmark decision relative to the production of petroleum (5, pp. 601-625). The law had finally approximated the scientific facts of petroleum reservoirs and production operations. The bases were laid for intelligent state regulation of production and the prevention of waste of valuable natural resources as an incident to their proper utilization. The way had been long and difficult but the law after some 40 years had finally caught up with the needs of society in an area of vital concern.

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