

Ownership of environmental attributes in the energy world

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Many law students learn about the rule of capture by reading *Pierson v. Post*, the seminal early nineteenth-century case in which the New York State Supreme Court awarded Pierson ownership of a fox because he was the first to possess it by having killed it. The rule of capture has long been used to assign ownership of more than foxes; indeed, it has been central to the [development of the American fossil fuel industry](#). Since commercial drilling for oil and gas began in the United States in the nineteenth century, the idea that the first party to capture oil and gas owns them [has played a role](#) in determining who initially owns these resources.

In the past several decades, the environmental impacts of fossil fuels have received heightened attention; at the same time, intangible goods have become increasingly economically important. In a [forthcoming article](#) in the *Yale Journal on Regulation*, we argue that a first-in-time rule should be used to allocate initial ownership of energy efficiency, which can help address the negative impacts of fossil fuels. Consider this scenario. Suppose thousands of people buy energy-efficient refrigerators on the same day. Thanks to advances in technology, it is currently possible to estimate how much energy is saved by the sale of the refrigerators and then sell this energy efficiency into some of the wholesale electricity markets regulated by the Federal Energy Regulatory Commission. But who in this scenario has the initial property right in the energy efficiency to be able to sell it? There are many potential claimants, including the buyers, the manufacturers, the retailers, the electric utilities supplying power to the refrigerators, and the aggregators that bundle energy efficiency.

Reducing the energy that people use to power their homes and businesses could help society shift from relying on fossil fuel-generated electricity to renewable sources of power. The less energy we use, the less we will need to burn fossil fuels to [generate electricity](#), and the fewer renewable sources of power will need to be built to replace fossil fuel sources of electricity. Reducing energy consumption also should save people and businesses money by reducing their energy costs. Allocating energy efficiency to the first party to claim it could induce a race to identify and capture more energy efficiency, similar to how the rule of capture historically incentivized oil and gas extraction. It would be fitting if the same legal rule that helped to create the climate crisis by encouraging fossil fuel extraction could help to limit global warming by helping us transition from fossil fuels to renewables.

Energy efficiency is only one example of a new class of less tangible environmental resources that can be isolated and marketed thanks to advances in measurement technology. The [carbon credits](#) that many companies are now buying and selling to offset their greenhouse gas emissions are another. [Not everyone agrees](#) that markets should be used to transition society away from fossil fuels. But if we are going to enlist markets to address societal problems like climate change, it is important to remember that we first need to allocate ownership of these novel resources to facilitate their sale.

It is a central principle of property law that one can transfer only what one owns. Unclear ownership of environmental resources is likely to reduce the market value of these resources and, therefore, the incentive to find them. Property law, a field often caricatured as static and unchanging, in fact offers a range of approaches that governments and private actors could use to determine who owns new environmental resources. For energy efficiency, first-in-time is a superior approach because it sets up a race to capture an abundant resource that generates positive environmental and economic benefits. But not every newly identifiable environmental resource should be allocated using a first-in-time rule, which, when resources are scarce, can lead to undesirable races to extract resources that result in their depletion, as we've seen in [ocean fisheries](#). Other options for allocating ownership, such auctions to the highest bidder, and assignment based on ownership of a [preexisting proximate resource](#), may be more desirable in certain contexts. For example, when governments are capping greenhouse gas emissions, they may wish to [auction carbon allowances](#) in order to raise funds for important social programs. In using markets to address the climate crisis, governments and private actors should consider drawing on the many tools that property law provides.