



Texas Institute for Property Rights

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Property Rights and Subsurface Resources

Throughout the United States, two legal concepts dominate ownership of subsurface resources. Both of these concepts are flawed and have destructive consequences.

One of these concepts is the rule of capture, which has its roots in English common law. The rule holds that “that the first person to capture a natural resource owns that resource. A rule of capture helps in determining the ownership of natural resources like groundwater, oil and gas that is captured.”¹ Fundamentally, the rule of capture is founded on the premise that use of a resource confers a property right to the user. In other words, the user attains a right to use, keep, trade, and dispose of the resource, as well as exclude others from using or attaining the resource.

The second concept is that of “mineral rights,” which holds that the owner of land is also the owner of everything below his land. All of the rights of ownership—such as use, trade, disposal, and exclusion—are conferred upon the land owner.

To understand why these concepts are flawed, we must first understand the nature and source of property.

The Nature and Source of Property

The things that we call property—such as real estate, automobiles, computers, money, and jewelry—are material values. They are things that we seek to attain or keep because they sustain or enhance our lives. All property is a material value, but not all values are property.

Some values—such as friends, family, and scenic vistas—are not property. The differentiating characteristic between values that are property and values that are not is: property is a material value that is owned.

Ownership means control. It means the freedom to determine use and disposal. It means the freedom to determine what happens to a thing. Ownership means that we can determine who may use our property and under what conditions. It means that we can trade our property on terms that we choose. It means that we can give our property away or destroy it. The very nature of property implies an owner.

But where does property come from? What is its source?

John Locke held that the individual who “mixes” his labor with the resources provided by nature becomes the owner of that resource. The individual who picks wild berries or captures a fish becomes the owner of the berries and fish. But we do not automatically know which berries are poisonous and which are nutritious. We are not born with the knowledge of how to catch a fish.

1. “Rule of Capture Law and Legal Definition,” USLegal.com, <https://definitions.uslegal.com/r/rule-of-capture/>, accessed November 12, 2018.

Attaining these values requires more than physical effort; we must, as Ayn Rand pointed out, use our minds to identify what actions will produce values and what actions will not.

The source of property is the use of the mind to identify and guide the actions necessary to attain or create material values. On the surface, this might seem to validate the rule of capture. After all, the individual who “captures” wild berries or a fish becomes the owner of the berries or the fish—they become his property to use and dispose of as he chooses.

Picking berries or catching a fish does confer a property right, but that right is limited to the berries or the fish. Even though he used the stream to catch the fish, the fisherman has no property right in the stream. Even though he used the briar patch to pick berries, he doesn’t own the briar patch.

When the fisherman catches a fish, he transforms a resource—the fish—into a human value. Swimming in the stream, the fish has no value to humans. But when it is caught, it becomes a source of food. The fisherman owns the resource that he has transformed into a human value. But he does not own the resource—the stream—that he has not transformed.

Property is the result of transforming natural resources into human values. In transforming resources, an individual attains a right to use, keep, trade, and dispose of that which he has transformed. It is his property. But his right is limited to that which he has transformed. It is not use of a resource that confers this right, but the transformation of the resource into a human value. This is a fundamental distinction. And it explains why the fisherman owns the fish that he catches, but not the stream from which he catches them.

Still, this might seem to validate the rule of capture. If an individual drills a well and extracts oil, gas, or water, he has transformed a natural resource into a human value. He has captured the resource, just as a fisherman captures a fish. The fisherman owns the fish; why shouldn’t the driller own the oil, gas, or water that he captures?

The Injustice of the Rule of Capture

Oil exists far below the surface. While we know that it exists, we don’t know where. It takes considerable effort and knowledge to identify the location of an oil field. In the early days of the oil industry, the discovery of an oil field created a stampede of drillers and speculators eager to capture their share of the oil that others had discovered. According to the rule of capture, ownership of the oil wasn’t established until the oil was extracted from the ground.

Each driller sought to maximize his production, because whatever he didn’t capture today would be captured by someone else tomorrow. The result was a rapid depletion of the field, and a perpetual boom and bust cycle in the industry. There was no incentive, or means, to maximize the long-term production of the field. But this economic issue isn’t the fundamental problem with the rule of capture.

The individual who discovered the field was rewarded only to the extent that he could extract oil from the ground. He did not own the field, but only the oil that he could bring to the surface. Even though he had transformed a resource—the previously unknown oil field—into a human value, he benefited only to the extent that he could pump oil out of the ground. And if others pumped out more than him, the rule of capture served as justification that they benefit from his discovery.

The discoverer of an oil field exerted the time, effort, thought, and money to prove the presence of oil in a particular location. But he had no means to exclude others from exploiting his discovery. He had no means of protecting the value that he had created, because according to the rule of capture, the oil field was not his property. Indeed, the oil field was nobody’s property. It was

regarded as a part of “the commons,” open to use by all. And the result was the “tragedy of the commons.”²

Economically, the rule of capture is impractical. Morally, it is a gross injustice. It deprives those who create material values (property) from owning those values.

Rights and Use

Mere use of a resource does not create property. For a resource to become property, it must be transformed into a human value. Where property does not exist, property rights cannot exist. But use of an unowned resource does confer a right—the right to continue using the resource without interference from others. (Use of a resource can promote human well-being and be a value. But use alone does not transform the resource.)

Consider a parcel of land near a lake. A hiker pitches a tent for the night. He is using the land, but he has done nothing to transform it. He has not created property, and thus, he has no property rights to that land. However, his use does give him the right to stay as long as he desires and others may not morally interfere with his use. When he packs up his tent and moves on, others are free to use the same spot.

If use conferred a property right, then the hiker could exclude others from using the land after he leaves, even if he never set foot on it again. But use alone does nothing to transform the resource. When the hiker leaves, the land will be essentially the same as when he arrived.

Individual rights protect the freedom of individuals to take the actions that they judge best to sustain and enhance their lives. This includes the freedom to use unowned resources, as well as the freedom to transform those resources into material values (property) if one has the desire and skills to do so. Morally, others may not physically interfere with these freedoms.

The hiker has a right to camp by the lake for as long as he chooses and nobody has a right to interfere with his use. But he does not attain a property right to that land. He does not attain a right to sell the land, bequeath it to his heirs, or exclude others once he has vacated the site. His use gives him the right to use the land and nothing more. But the premise underlying the rule of capture holds that he does attain a property right because he has “captured” the camping spot.

The rule of capture is an injustice because it grants the unearned. It confers a property right through use rather than transformation.

Transforming Resources

Transforming a resource into a human value means changing that resource in a significant manner. But this is contextual. The change may be minor in many respects, but it must be contextually significant.

For example, picking wild berries is a minor change. The transformation consists of the simple act of removing them from the bush and placing them in a basket. But contextually, it is significant. On the bush, the berries are useless. But once picked, they can be eaten, transported, sold, or saved for the future. On the bush, they are potential values. Once picked, they become actual values. The act of picking the berries transforms them from a potential value to an actual value.

While picking berries is a simple example, the principle applies to all resources. Unknown oil deep in the ground is a potential value, but the discovery of that oil transforms it into an actual value. As evidence, consider the fact that oil companies consider and record known reserves—oil in the ground—as an asset—a value.

2. See “The Tragedy of the Commons,” Texas Institute for Property Rights, <https://texasipr.com/2017/10/the-tragedy-of-the-commons-part-1/>.

Transforming a natural resource into a human value creates property, and the individual (or business) responsible for that transformation is the rightful owner. Morally, he has a right to determine the use and disposal of his property.

The rule of capture might seem consistent with this position. For example, when an oil company extracts oil from underground, it has transformed the oil. But the fundamental transformation was not the extraction of the oil but its discovery. The discovery created the property, and the discoverer of that oil is the rightful owner. Though the rule of capture is legal in some jurisdictions, but it is tantamount to legalized theft.

The rule of capture grants an unearned and immoral right to take property from others. The most common alternative—often called mineral rights—also grants an unearned property right over a resource.

Mineral Rights

Roman law held that “whosoever owns the soil, it is theirs up to the sky and down to the depths.”³ According to this doctrine, the owner of a parcel of land also owned everything below that land, all the way to the center of the earth. The subsurface minerals, oil, gas, water, and other resources belonged to the land owner.

Where the rule of capture holds that if you can grab it, it is your property, mineral rights hold that it is your property regardless of what you have or haven’t done. Neither of these theories recognizes the essential nature of property, and so, both ultimately grant an unearned right to property.

Property is created when a natural resource is transformed into a human value. A land owner who has done nothing to transform whatever resources lie below the surface has no moral claim of ownership to those resources. Those resources are unowned, and anyone who can locate and extract them is the rightful owner.

However, morally the extraction of those resources cannot interfere with the land owner’s use of his property. An oil company cannot trespass and start doing tests or drilling wells. A mining company cannot dig under the property and cause subsidence of the surface. If they can access and extract the resources without interfering with the land owner’s property use, then they have a moral right to do so.

If a land owner discovers oil, gas, minerals, or other resources under his land, then he rightfully becomes the owner of those resources, and he can sell the rights to that property on terms that he deems appropriate.

The concept of granting ownership of subsurface resources to the land owner is an understandable alternative to the rule of capture. It eliminates the “tragedy of the commons” that arises from the rule of capture. But it also grants an unearned property right. In we want justice in regard to property, then we must reject both concepts.

Conclusion

Property rights in values such as land, buildings, and automobiles are usually relatively easy to identify. But property rights in other values, such as subsurface resources, can be much more complex and difficult. The resource can exist over a great distance and seldom (if ever) adheres to surface boundaries. Identifying and applying property rights to such resources can be challenging.

3. “Rule of Capture,” Wikipedia, https://en.wikipedia.org/wiki/Rule_of_capture, accessed November 8, 2018.

If we wish to address these challenges in a rational and just manner, then we must begin by identifying the nature and source of property. Without a proper understanding of what property is, then any attempt to address property rights issues will result in confusion and bad decisions.

Property is the means by which humans sustain and enhance their lives. Without property, humans are reduced to living moment to moment, struggling to attain what is needed to survive. If we want to promote human well-being, human flourishing, then we must recognize the essential role that property plays. And that includes recognizing the nature and source of property.



The Texas Institute for Property Rights provides analysis, training, and resources for legislators, businesses, organizations, and property owners.

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