

THE CAPTURE DOCTRINE REVISITED: IN THE LIGHT OF THE DAY CASE, TEXAS

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ABSTRACT

The study examined the Capture doctrine and its impact on Texas groundwater laws in the Day case. It explains the development of Texas's groundwater law, which allows the State to regulate its groundwater resources. The Day case has changed the main groundwater rules of Texas and seems to overturn them. In Day case, the Supreme Court held that landowners and the State own groundwater could not prevent them from benefiting from their private property without proper compensation. This means that the decision goes against what is applied in case law and legislation in Texas. This paper provides a critical analysis of the Day case and explains the impact of the Supreme Court decision on groundwater laws in Texas.

Keywords: Capture doctrine, Day case, Texas, groundwater

INTRODUCTION

The capture doctrine has its mooring in the common law principle ingrained in the early law about groundwater and *ferae naturae*. It was created as a no-fault rule to deal with objects of dispute that are unrestrained, not confined to a location, percolating, or wild. Such objects' behaviour is unclear and difficult to interpret using conventional property law concepts. The doctrine helps determine the ownership of natural resources like groundwater, oil, and gas. The rule facilitates owners to extract resources available on their land. It propounds that the first person who "captures" a resource has rightful ownership. Though developed by English common law, the doctrine is applied in courts across the globe, including in the US. An early application of the doctrine can be traced to the context of oil and gas law in Canada. It was also applied widely to the US's flourishing oil and gas industry towards the end of the nineteenth century. The present study intends to examine the application of the doctrine in the famous Day case in Texas State.

Texas is a dry state in the United States. It faces periodic droughts. This means that the State and citizens are forced to seek new sources of water to face droughts, often groundwater (Weinert, 2014). In the 1930s, groundwater was the primary tool in returning from a wasteland to a thriving agricultural land. Moreover, large cities, such as San Antonio, rely entirely on groundwater for survival (Hardberger, 2018). Furthermore, the population increase may put the State under stress to rely on groundwater more than the current reliance, as the population is predicted to increase to 82% between 2010 and 2060 (Hardberger, 2012). As a result, the legislature enacted many laws, such as the Edwards Aquifer Authority Act, restricting groundwater withdrawal without a permit. In addition, courts encouraged the State to enact laws to manage groundwater due to the urgent need for these essential sources (Hardberger, 2012).

However, In the Day decision, the Supreme Court seems to adopt another approach that goes against the idea of enacting laws by the State to manage its groundwater and held that groundwater is a private property for landowners and the State cannot take this right without

compensation. The Court also put standards outlined in *Penn Central Transp. Co. v. New York City* that governs regulatory taking challenges in Texas. This means that the State may not be able to manage its natural resources as putting restrictions on landowners might be considered a taking, and thus compensation is required. In other words, enacting laws for managing groundwater could be worthless and pointless for the State.

This paper argues that the Court's decision in the Day case seems to contradict the rule of capture, which applies to Texas' groundwater, and the concept of allowing the State to enact laws. Moreover, it could be noted that even in the same case, the Court seems to contradict itself and raises more questions than answers between the concept of ownership of groundwater with the rule of capture and the role of the State in enacting laws to manage its natural resources. To discuss these issues in depth, the paper is structured as follows. The first section addresses the role of capture doctrine after the Day case and how the decision makes the doctrine unclear concerning its application. The second section discusses the role of state authority after the Day case and examines the extent to which the State has the potential to enact effective laws to manage its groundwater resources.

METHODOLOGY

The research approach used is an Inductive Research Approach. The paper focuses on testing the effectiveness of Day case on groundwater laws in Texas. The specific approach used for analyzing case law in the U.S would be a Qualitative approach as the research is aimed at a deeper understanding of groundwater doctrine after Day case from the secondary data sources.

RESULTS AND DISCUSSION

Before embarking on the effect of the *Edwards Aquifer Authority v. Day* decision on the rule of capture in Texas, an explanation of the meaning of the capture doctrine would be beneficial. In this context, the role of capture means allowing anyone to draw water from the ground without limitation, regardless of the purpose of withdrawing (Thompson et al., 2018). However, although capture gives the landowner the right to withdraw groundwater with no limitations, it does not give the landowner ownership over that water; the landowner does not own the water until it has been reduced to possession at the surface (Jones et al., 2018). As a result, Texas can manage its natural resources by enacting laws that put limits on withdrawing groundwater. In other words, the State could argue that limiting groundwater withdrawal is not the same as taking the water, as the State owns it and not the landowner.

In *Edwards Aquifer Authority v. Day*, the Texas Supreme Court held that, for the first time, groundwater is owned by landowners, similar to oil and gas. The Court reached this conclusion based on similarities between groundwater, oil, and gas (King, 2018) and rejected the authority's argument that groundwater differs from oil and gas and, thus, should be treated differently. In short, the Court expressed clearly that a landowner owns any substance under the land. Therefore, given that groundwater is owned by the landowner and not by the State, the State shall not put limitations on this right without compensation. Further, it calls into question the State's argument that the landowner does not own the water until it has been reduced to possession at the surface.

On the surface, this judgment could be seen as a victory for landowners against the State, but as we will see below, the capture doctrine could also lead to more problems than solutions

for the State to enact laws to protect its resources. In short, it could be argued that the Day case protected the rule of capture in groundwater (Hardberger, 2012).

It has been argued by scholars and judges such as Justice Hecht (the Chief justice of the Supreme Court of Texas) that the Day decision, which says that landowners own the groundwater on their property, does not contradict the rule of capture Thompson et al.,. They argue that groundwater ownership means the landowner can withdraw the water beneath his land without limitation. It means that the role of capture does not contradict the ownership rule as the landowner already owns the water drawn, and thus he is exercising the role of capture on his property. It could be argued, then, that the role of ownership is to protect landowners from having groundwater taken by the State without compensation. Without this, states could enact laws prohibiting the withdrawal of groundwater and thus absolve them of their requirement to compensate landowners.

However, this argument has three main criticisms. First, following the Day decision, the Court held that groundwater is a landowner's property that cannot be removed without compensation (Torres, 2012). This completely contradicts the role of capture, which is the right to withdraw groundwater without any limitations. It means that a landowner could withdraw another's groundwater without being liable for compensation, which contradicts the idea that no property shall be taken without compensation. In other words, the concept of ownership ensures that groundwater on the property shall not be taken without compensation, while the role of capture maintains that groundwater can be taken without limitation with no liability.

Second, this decision seems to protect individual rights from government invasion but does not protect them from other entities (Thompson et al., 2018). In other words, as the Court upheld the application doctrine of capture, large companies with well-developed wells might pump the groundwater without being liable (Thompson et al., 2018). This means that they might take unlimited groundwater even if this negatively affects the property of others . However, this argument seems inconsistent with the Court's point of view, which says that groundwater is owned by the landowner, as this would mean that large companies would not be able to take groundwater, which would harm others. Theoretically, a company would only be able to do this if it compensated the landowners from whom it had taken the groundwater. It could then be argued that the ownership doctrine completely contradicts the role of capture after the Day decision, and this judgment raised many more questions than it answered and further mystified the role of capture (Weinert, 2014). This also means that the Court contradicted itself as it upheld the role of capture while at the same time maintaining that groundwater is a property.

Third, although the Supreme Court held that groundwater, oil, and gas are similar (and thus saw no reason to treat groundwater differently) (King, 2018), significant differences between them appear, necessitating different treatments (Thompson et al., 2018). One key difference is that groundwater can be replenished on a time scale useful for human planning, while oil and gas cannot (Thompson et al., 2018). Another main difference is that oil and gas are seen as commodities for sale, while groundwater plays a more critical role for the public (Thompson et al., 2018). In Texas, most of the population relies on groundwater for drinking and agriculture (Hardberger, 2012). In other words, groundwater is used for drinking, agriculture, and recreation and does not often involve the sale of water. It can also be argued that groundwater is connected to surface water, which means that anything that affects groundwater also affects surface water. This, however, is not the case for oil and gas, which are entirely separate from surface water (Thompson et al., 2018).

Moreover, the Texas Supreme Court seems to have moved away from the capture role to unitization management concerning oil and gas. This tendency started after the Great Depression when oil prices collapsed, and the role of capture was not seen as a valuable strategy for recovery. Thus, compulsory unitization management was adopted. This led to comprehensive legislation regulating the withdrawal of oil and gas (Thompson et al., 2018). Courts upheld these restrictions on the role of capture by maintaining that regulations tended to be more beneficial for all users (than the role of capture). However, in the Day decision, the Court held that the capture role still applies to groundwater. This shows that the Supreme Court contradicted itself in saying that groundwater is the same as oil and gas and as the landowner must own such, yet the role of capture applies to groundwater but not to oil and gas. It could then be argued that the role of capture concerning groundwater would not improve solutions to water problems, unlike oil and gas, where courts tended to adopt compulsory unitization management rather than the role of capture.

In addition to the impact of the Day decision discussed above, it also raises more questions than answers. The Court initially tended to treat groundwater the same as oil and gas (due to their similarities) and give ownership to landowners. Nevertheless, the Court upheld management for oil and gas but not for groundwater and held that regulations for withdrawing groundwater by the EAAA Act were unconstitutional, and thus compensation was required. Moreover, the Court held that while groundwater was property, one could withdraw groundwater and negatively affect other properties without being liable. In other words, it appeared that the government could not enforce rules to restrict water withdrawal without compensation, yet any individual could withdraw groundwater – even draining groundwater on other properties – without having to pay compensation.

The Court's decision could be seen as offering protection from the government but not from other entities. In a sense, the Court intended to convey ownership to landowners to protect their water rights but opened the door for well-developed companies to withdraw groundwater without being restricted by state laws. In other words, before the Day decision, companies could not claim ownership of groundwater as this water was not owned until reduced to possession, which meant that the State could restrict groundwater withdrawal. However, the State seemed incapable of putting restrictions as groundwater was considered property and could not be removed without compensation. It could then be argued, as explained below, that the Day decision caused more issues than it solved and raised more questions than answered.

Before the Day decision, courts in Texas appeared to give the State and districts the right to enact laws to conserve groundwater resources (Thompson, et al., 2018). However, in 1996, courts refused many constitutional challenges to the Edwards Aquifer Authority Act (Thompson, et al., 2018). This meant that courts upheld the right of the State to allow districts to manage their groundwater sources. It also meant that states could limit the capture doctrine in some districts. In other words, courts gave states the right to restrict withdrawing groundwater from landowners without being liable for compensation because landowners did not own groundwater until it was reduced to possession at the surface. Thus, the State's restriction was not seen as taking as this concept would mean that the State took from a property, which was not the case.

The rights of states to enforce restrictions on withdrawing groundwater can be seen clearly in the Conservation Amendment and in the Texas Water Code. The code specifically listed reasons for states to create groundwater conservation districts, primarily to manage natural resources (Torres, 2012). This meant that the rights of landowners to withdraw groundwater

might vary based on their location and the type of district the land was in. Even in the same district, limitations might vary from one landowner to another depending on the aquifer's conservation needs and physical limitations (Torres, 2012). It could then be argued that courts tended to move away from the role of capture – where there is no limitation in withdrawing groundwater – to a system where the State could establish limitations and rules to restrict the role of capture doctrine. It could also be argued that the role of capture is not required of the whole State but rather of districts with no limitations and restrictions enforced by the State.

However, with the Day decision, the Court held that groundwater is indeed property, and thus no taking shall occur without compensation. One of the reasons for this judgment was that the State could not deprive landowners of their rights to withdraw water simply because the landowner did not use it during a historical period or because the supply was limited. Moreover, the Court argued that due to difficulties in determining the availability of water in a rechargeable aquifer that is constantly changing due to climate conditions, the State could not restrict withdrawing groundwater without proper compensation. As a result, the Court held that groundwater was property and that the State could not restrict this right without compensation. The Court finally explained that this judgment did not mean that the State could not enact laws but rather that the State could regulate so long as it provided for adequate compensation.

The Court set standards regarding regulatory challenges in *Penn Central Transp. Co. v. New York City*, which identified several factors for evaluating regulatory claims. The first factor is the economic impact of the regulation on the claimant. This meant that if a regulation seemed to harm the landowner, it would be considered for compensation by the State. The second factor, linked to the first one, is the extent to which the regulation interfered with distinct investment-backed expectations. In other sense, this means that if regulation affects the expectation of an investment, the investors are entitled to compensation due to their investments having been affected by the actions of the State. The third factor is how much this interference by the State amounts to a physical invasion. Finally, the Court admitted that applying these factors would be difficult, but it argued that this difficulty is not a reason to excuse applicability (Thompson et al., 2018).

The Day decision seems to go against the idea that the State of Texas can manage its natural resources by restricting groundwater withdrawal. Many academic observers believed that courts in Texas would allow for the regulatory control of groundwater withdrawal (Bray, 2014). Courts clarified in previous cases that the State could enact laws to control withdrawing groundwater and manage its natural resources, which implied that in the name of protecting its natural resources, the State could also prevent landowners from withdrawing groundwater without compensation. However, the determination that landowners owned the groundwater automatically meant that by restricting the withdrawal of groundwater, the State prevented landowners from benefiting from their property, which opened the door to compensation. In other words, it could be argued that any prevention of landowners using groundwater by the State could be considered taking from the property.

The test that the Court put in the *Penn* case seems mysterious and difficult – if not impossible – to be measured. For instance, in the second section of the *Penn* case, which relates to distinct investment-backed expectations, the Court assumed that anticipating investments in a region lacking groundwater is possible, as districts would not be created until there is a severe threat to groundwater. However, even if there were no issues with groundwater levels, it would be challenging to anticipate profits as groundwater is unpredictable and subject to heavy rains or

deadly droughts brought about by climate change. In other words, the investment profits might be extremely high or low due to the vulnerability of groundwater. Even in a stable market, one cannot predict the investment outcome. This argument is supported by economists who say that markets are not predictable for many reasons, including changing customer demands (Sharp et al., 1999). It could then be argued that the economic impact of regulation on investors is difficult – if not impossible – to be measured or even predict.

Furthermore, it is not clear what the Court meant in the third factor of the *Penn* case when it held that to examine the regulatory challenge. One must consider the extent to which state interference amounts to a physical invasion. The main reason for this ambiguity is that the line between the State's power to manage society – and thus deprive individual rights – and an actual invasion by the State is unclear. To explain this, the philosophy of a state or a government is based on the management and protection of society by removing some individual rights for the good of the whole. For instance, the State levies taxes that infringes on individual rights, for the benefit of the public interest without being liable for compensation.

Conversely, if the government is liable for compensation, it does not have the right to enforce rules to organize society. For this reason, it is difficult to determine whether state regulation is considered an invasion that requires compensation. It could then be argued that the State is not liable for compensation if it has the right to enact laws to protect its natural resources. It could be questioned whether the State can enact laws limiting groundwater withdrawal from landowners without compensation if it passes the *Penn* case test. The Court held that the State has the right to enact laws within reason, and this statement indicates that the State has the right to restrict individual rights if the law is reasonable. In other words, the Court arguably meant that the law is reasonable if it passes the *Penn* case, as this case examined the regulatory takings challenges. Looking at it differently, one might argue that if the Court were liable for compensation regardless, it would have no reason to apply the reasonableness test. The reason behind this is that there is no need for the State to enact reasonable laws while applying the *Penn* case if it were to compensate anyhow. In other words, if the Court intended the State to compensate regardless, this would deter the State from enacting reasonable laws limiting the right to withdraw groundwater, making the *Penn* case test pointless.

However, it also could be argued that the *Penn* case test means that the State is always liable for compensation to landowners if it restricts groundwater withdrawal. This argument is based on the Court's statement that no taking shall occur without compensation. More specially, following the court decision that groundwater is a property that is constitutionally protected, any interference without proper compensation is prohibited. This argument is based on the fact that groundwater is owned by the landowner and not by the State (Ley, 2013). Moreover, if the State has the right to enact laws restricting water withdrawal, it would be pointless to argue that landowners own groundwater and that no restriction shall occur without compensation. In other words, before the Day decision, the State relied on the fact that landowners did not own groundwater and thus could restrict water withdrawal without being liable for compensation. Following the decision that landowners own groundwater, states could not fall back on their argument that landowners did not own groundwater and therefore did not deserve compensation. It could then be argued that the State was always liable for compensation when it enacted laws limiting landowners' rights to withdraw their groundwater, and the *Penn* case was the test to determine the amount of compensation required for landowners who had had their rights infringed upon.

One might even go further and argue that the State must not enact laws unless it can satisfy the Penn test, and then it could compensate landowners due to this law. The State would likely compensate anyway, but the test would determine whether the existence of the law itself is reasonable or not before compensating landowners. The main reason for this argument is that the Court requires the law to be reasonable; if it is unreasonable, it must not be enacted as this could affect landowners' constitutional individual rights over their groundwater. Nevertheless, this argument seems inaccurate as the Court has expressed on many occasions in the Day decision that the State always has the right to enact laws to manage its resources. Controversy surrounded whether the State had to compensate all landowners when enacting laws or only those that passed the Penn case test, and the Court seemed to adopt the opinion that the State is always required to compensate when it imposes restrictions or laws on withdrawing groundwater in some districts.

Another question that can be asked is the situations the state should compensate landowners. In other words, it is unclear whether the State has to compensate landowners if they were damaged or without any damage. To answer this question, two assumptions must be examined. The first assumption is that State must compensate landowners only when damage occurs. This assumption is based on the Court putting the Penn case test to determine whether there is a taking from landowners and thus shall be compensated. In different words, if the State would compensate anyway, there would be no meaning in determining whether taking occurs or not as compensation would be paid. Thus, this leads to a logical conclusion: the compensation occurs only where damages occur to landowners and this damage was a result of the taking from the State after applying the Penn case test.

The second assumption is whether the State has to compensate landowners regardless of whether damages occur. This assumption is based on the Court's statement that groundwater is private property and no taking shall occur without compensation. In other words, holding that groundwater is a private property would seem pointless if the State would not compensate unless damage occurs. To explain further, before the Day case, the State could put restrictions on withdrawing groundwater as landowners do not own the groundwater, but after the Day decision, when the Court held that landowners own groundwater, State cannot put restrictions on withdrawing groundwater as doing so would not seem different than the situation of landowners who did not own groundwater. This assumption could also be proven by the State's understanding of the court decision in the Day case. The State demonstrates that the decision will be nothing short of disastrous. It continues by saying that landowners in the area cannot show the historical use necessary for a permit, and thus the number of taking claims is enormous. The State argued that the financial burden would make applying the law seem impossible and pointless. This clearly shows, as the State understood, that the State would compensate any landowners if they put restrictions in withdrawing groundwater, even if there were no damages to the landowners.

The Final vague issue that has arisen after the Day decision is the State of Texas's role in managing its natural resources (Bray, 2014). This confusion is based on the Court's contradictions in its decision in the Day case. For instance, the Court stated that the State could manage its natural resources by enacting laws, but at the same time, it held that landowners have ownership of their groundwater. This means that compensation must be given to landowners as a result of depriving landowners of using their private rights. This clearly shows the uncertainty of the State's role in managing its natural resources, as the State said that this uncertainty increases the expense and risk of liability, making enacting laws and regulations burdensome and

worthless. Another example of the Court's contradiction which makes the role of the State unclear is the Court's expression that the role of capture still applies, but at the same time, groundwater is private property. In a sense, this means that the State cannot put groundwater restrictions without compensation as it is private property, but at the same time, landowners can withdraw groundwater even if they damage others by taking their groundwater. This might mean that the Court aims to serve moneyed land developers and energy interests rather than the broader public welfare (Lewis, 2014). In short, after all the contradictions and uncertainties of the decision, it could be argued that the role of the State remains unclear.

CONCLUSION

The paper has examined and discussed the Day decision's impact on Texas groundwater law. Most specifically, it focuses on the impact of the Day decision on the role of capture doctrine and the State of Texas in enacting laws to manage its natural resources such as groundwater. In the first section, the paper sheds light on how the Day decision changed the capture role after holding that groundwater is private property. This section analyses the court arguments that led to its final decision, such as the argument that the Court considered groundwater to be similar to gas and oil. The second section discusses the impact of the Day decisions on the role of the State of Texas in managing its groundwater. The Court also explained that when taking by the State occurs from landowners, they should be compensated. This section finally analysis whether the State of Texas is required to compensate landowners when damages occur or whether the State needs to compensate landowners regardless of the damage.

It could be concluded that the Day decision changed dramatically the role of capture in groundwater as well as the role of the State in regulating law to manage its natural resources. Before the day decision, the State could put laws that limit the withdrawal of groundwater based on the fact that the public owns groundwater, not private, which means that it can put restrictions on withdrawing groundwater without compensating landowners. Now, however, the State seems incapable of putting restrictions as groundwater is private property, and thus, no taking shall occur without compensation. The Court's statement that groundwater is private property also contradicts the role of the capture doctrine, which the Court upholds this doctrine in the same case, as the government cannot put roles to restrict the withdrawal of water without compensation. However, any private individual can withdraw groundwater even if others' groundwater becomes dry without compensating them. In a sense, the Court seems to protect landowners from the government but not from other landowners, as they might withdraw as much groundwater as needed due to the role of the capture doctrine without being liable for compensation. This contradicts the idea of privatizing groundwater, as no taking by the government or private entities shall occur without compensation. It then could be argued that the Day decision made both the role of capture and the ability of the State to enact laws to manage its natural resources unclear and vague. The current study has thus examined the capture doctrine in the backdrop of the Day case. It is expected that this study would induce scholars to examine the doctrine more objectively.

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