

## AMENDING RIGHTS TO NATURE

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“Broadly viewed, environmental problems are problems arising from incomplete and asymmetric information combined with incomplete, inconsistent or unenforced property rights. Without a solution to the property rights problem, the environmental problem will remain.”<sup>i</sup>

It is no surprise that the Trends project on Environment was led quickly to focus on governance. From IGY to Rio, the research and policy agenda in the environmental field was primarily the ‘old’ agenda--the ‘end-of-pipe’ concern with discharges resulting from human, principally industrial, activities<sup>ii</sup>. By contrast, if we think of the UN’s decadal markers from Stockholm (1972) to the World Charter for Nature (1982) to Rio (1992), and look forward to the next milestone in 2002, we will likely be looking at a research and policy agenda focussed not on discharges and changing production technologies, but on harvesting practices and changing consumer behaviour. While industrial ecology and ‘dematerialization’ will remain a big part of the thinking behind attempts to reduce human impacts on the ecosphere, greater attention will be directed toward institutional design and the reshaping of endogenous preferences toward a more sustainable ‘resocialization’ of communities<sup>iii</sup>. And central to these is the question of property rights or, more precisely, legitimate procedures for amendment of property rights in the face of changing understandings of complex, uncertain systems.

The issue is highlighted in the forthcoming report of the Panel on Global Change and Marine Resources convened by the Canadian Global Change Program. This panel focussed on alternative institutional designs for the management of human activities impinging on living marine

resources, with the observation that the key problem is aligning incentives and shaping motivations so as to assure that individual and community action is consistent with overall goals of ecosystem integrity. In particular, however, the report stressed that property rights to ecological resources must be recognized as contingent on socially responsible use of those resources, whether by individuals or by communities. “In a changing and uncertain world, no one can reasonably claim a right to a guaranteed revenue stream. All rights, including what may be termed property, use, or management rights relating to natural capital, are in some sense attenuated, subject to overall social responsibilities for stewardship. Adjustment of such rights must be expected in response to ‘surprises’ in the system, and such adjustments do not create a case for financial compensation. What might be claimed is a right to a fair procedure for adjustment of returns or amendment of constraints on the exercise of rights. If certainty of outcome is not possible, then confidence that fair procedures will prevail in sharing the consequences of unanticipated outcomes is essential.”<sup>iv</sup>

Interestingly, the basic research agenda involved can in one way be seen as defined substantially by two revisionist comments. Garrett Hardin has been quoted as observing that despite the many critiques of his famous article in *Science*, he would revise his original proposition only to the extent of inserting the one omitted word ‘unmanaged’ in speaking about ‘the tragedy of the (unmanaged) commons’. Ronald Coase has been quoted as suggesting that the point of his original work on what is now known as the Coase theorem was prompted, not by any expectation that transactions costs actually are sensibly zero, but by the desire to stimulate research into the impact of significant transactions costs on the allocative and distributional

outcomes of different systems of property rights or organizational forms.

Work now might head in one of two directions. The Beijer program described by Hanna et al (endnote 1) focused on intermediate forms of community ownership (common property strictly speaking) and explored circumstances where the rules evolve in response to changing circumstances as a result of deliberation within nested sets of self-governing institutions. The alternative direction concerns itself with private (corporate) use, and explores the question of investor rights and compensation if rules change in such a way as to compromise the value of rights or tenures currently held. (In a way, it might be thought odd to draw such a hard distinction between the two cases, since the only relevant difference is in the rules of corporate governance which determine how decisions and distributions are made within the group of shareholders, managers and employees as compared with the rules of community governance which govern how decisions and distributions are made in the collection of individuals holding membership in the relevant self-governing institutions. In both cases, the incentives rest principally on the power to exclude those outside the group. Nevertheless, the tradition persists of thinking of corporate ownership as more akin to individual ownership than to community ownership. More research is needed on the consequences of the differing structures and cultures of governance. Williamson provides the essential starting point<sup>y</sup>.)

This focus on institutional design, incentives and the definition of property rights opens up difficult issues. These issues are immediate and practical, not just conceptual and academic. At the national level, the question has been central in the debate over proposed legislation on endangered species and the comments of the new Environment Minister on the question of

compensation. In British Columbia, where both the conflict over perceived rights to Nature and procedural innovations in the resolution of such conflicts have perhaps advanced further, in more extreme ways, than anywhere else in the country, the problem has been starkly posed by recent controversies over claims for compensation arising from government decisions to abridge or alter the conditions associated with rights held by corporations to harvest public resources.

The problem arises because private property confers rights to socially acceptable uses of specified resources or, conversely, imposes on the owner a duty to refrain from socially unacceptable uses of the property. Unfortunately, in circumstances where ecosystem integrity matters, and profound uncertainty surrounds our understanding of the consequences of particular actions within highly interdependent resource systems, and adaptive management is essential, the expectations and rules governing what is socially acceptable are themselves constantly and inevitably changing in the face of new knowledge and a continually changing balance of understandings about rights and consequences. Sadly, this means that the goal of establishing secure tenures and certainty in property rights is simply not attainable, no matter how desirable it might be for encouraging and reassuring investors. We need to explore the foundations for legitimate processes to amend, on a continuing basis, in response to the requirements of adaptive management in eco-system based governance of human activity, our politically and socially constructed structures of property rights<sup>vi</sup>.

There is a substantial literature to provide a start for such a research program; it is reviewed, for example by Bromley<sup>vii</sup> and by the participants in the Beijer Institute research program described in the book by Hanna et al cited in endnote 1. These discussions are founded

on the core idea that, as indicated at the beginning of this note, all systems of property rights impose the constraint that others have a duty to observe the rights of the property owner only so long as the uses to which the property is put themselves conform to social commitments. (Of course there is a long literature extending deep into the past on this issue, but for present purposes we take the conceptual principle as just sketched to be the relevant outcome for policy formation.) As noted at the beginning, the Beijer program moves in the direction of traditional structures for self-governing institutions and common property solutions to the challenges of managing human activities and their impacts on common pool resources. The alternative direction for further work, however, is in exploring the procedures and articulating the criteria for legitimacy in changing the rules constraining exercise of property rights held privately as a result of licenses or tenures issued to corporate entities to harvest public resources. Here too there is a long tradition of debate. But the conclusion is clear: a policy on compensation should be centered on a presumption that no compensation is due as a result of government decisions to change rules of general application in light of new knowledge or new understandings of socially acceptable conduct in regulating human activities with significant impacts on ecosystem function<sup>viii</sup>.

This is not, of course, to question the idea that in some circumstances clear identification of and respect for private rights of access to or management of living resources (even perhaps ownership rights) might be economically efficient and at the same time the most effective means to pursue goals of conservation and sustainability. But it is to underline the fact that such rights are socially constructed and socially conditioned. Property rights (with corresponding entitlement to compensation) cannot be secured against social learning and changing

understandings of the spillovers, externalities, and impacts on the rights of others arising out of particular management practices. Speculative expectations arising from interests in ecological resources may be denied even while respecting interests arising from past investment commitments or ‘sweat equity’.

The examples of the Macmillan-Bloedel and Carrier Lumber cases in British Columbia should serve as dramatic alarm calls about the importance of these questions. In the Macmillan-Bloedel case, public hearings served to underline public discomfort with the thought of turning over massive tracts of Crown land to a private claimant as if there were some underlying right to unfettered tenure regardless of changes in fundamental social values and outlook. In the Carrier case, the judge found (the decision is under appeal) that the procedure followed by the government and public service in BC was inappropriate, even dishonest (and moreover the contract in this particular case was much more specific as to obligations on both sides than is the usual forest tenure). But the learned judge seems not to have recognized fully the depth of the dilemma in circumstances where harvesting decisions with possibly irreversible consequences were being contemplated at a time when both public values with respect to recognition of aboriginal rights and public convictions about the importance of ecosystem-based forestry as opposed to traditional industrial extraction of timber had changed dramatically (as reflected both in treaty processes and changes in legislation). The procedures adopted for adjusting tenures were found not legitimate in this case. But legitimate and accepted procedures for adjusting the social constraints around property rights, without creating expectations of compensation, must be found<sup>ix</sup>. The constraints on socially acceptable use, as reflected in changing legislation,

changing policy, and changing management decisions, are essential conditions on which the exercise of property rights is contingent. Those conditions, which now are perhaps too much implicit, need to be spelled out clearly, and with clear understandings as to how changes will become effective<sup>x</sup>.

Evidently we must get our thoughts in order on these matters soon. The next round of international trade negotiations, perhaps to be launched at the meeting of the WTO scheduled soon for Seattle, is likely to take some definitive steps on trade-environment and trade-society linkages. In tracing the evolution of UN initiatives in the environment and sustainability, we must not overlook the much more powerful evolution, in many ways antithetical, taking place in the international financial and trade machinery (the Bretton-Woods institutions). Before investor rights are entrenched in a new MAI building aggressively on Chapter 11 of the NAFTA text, in ways that would handcuff efforts at public policy to pursue adaptive management for sustainability and ecosystem integrity, the machinery of governance in environmental matters has to be worked out, and the criteria for procedural legitimacy thrashed out to the point of general acceptance. With the growing recognition of the crucial importance of social, cultural and natural capital, we are in the midst of a massive push to achieve effective enclosure of all these collective assets. There is not much time to get the ground-rules right.

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i. Hanna, Susan S., Carl Folke and Karl-Goran Maler. *Rights to Nature: Ecological, Economic, Cultural and Political Principles of Institutions for the Environment*. (Washington, D.C.: Island Press, 1997) p. 3

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ii. Clark, William C. et al. *Social Learning in the Management of Global Environmental Risks*. (Cambridge: MIT Press, forthcoming, 2000)

iii. Dobell, A. R. “Environmental Degradation and the Religion of the Market”, in Coward, Harold (ed), *Population, Consumption and the Environment* (Albany, SUNY Press, 1995); Robinson, John and Jon Tinker “Reconciling economic, ecological and social imperatives”, in Schrecker, Ted (ed) *Surviving Globalism*. (London, Macmillan, 1997)

iv. de Young, Brad, Randall Peterman et al. *Canadian Marine Fisheries in a Changing and Uncertain World*. (Ottawa: NRC Press, forthcoming 1999).

v. Williamson, Oliver E. *The Mechanisms of Governance*. (Oxford: Oxford University Press, 1996).

vi. For a positive theory of politically constructed systems of property rights, see Sened, Itai. *The Political Institution of Private Property*. (Cambridge: Cambridge University Press, 1997). For a discussion of criteria for legitimacy in such matters, see Habermas, Jurgen. *Between Facts and Norms*. (English translation, Cambridge: MIT Press, 1996).

vii. Bromley, D.W. *Environment and Economy: Property Rights and Public Policy*. (Oxford: Basil Blackwell, 1991).

viii. “In sum, a rule against compensation for losses stemming from changes in the use of publicly owned resources is likely to lead to more efficient use of resources than the alternative....Changes in the value of private assets result from changes in competitive conditions; and similar changes can be brought about in the use of publicly owned resources as well. Like the failure to compensate for other changes in public policy—including changes in interest rates, taxes, regulations and the provision of welfare services—these losses seem best left where they fall.” (P.169) .”...a policy of no compensation for losses due to changes in land use would promote more efficient location, investment and conversion decisions; and here too compensation would distort the efficiency incentives and result in socially less valuable allocations.” (P. 168). Knetsch, Jack L. *Property Rights and Compensation*. (Toronto: Butterworth, 1983). “It is important...that compensation policy be known, credible and certain....We advocate a presumption against compensation in the event of environmental regulatory takings....The fact that firms have been allowed, and perhaps even supported by the government, to practice forestry in a non-sustainable manner in the past should not create rights to compensation when new knowledge sheds light on destructive practices. The fact is that economic and environmental analysis does not support awarding such compensation, and it is unlikely that advocates of compensation can find an alternative justification that is convincing.” Cohen, David and Brian Radnoff “Regulation, Takings, Compensation and the Environment: An Economic Perspective”,

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in Tollefson, Chris (ed) *The Wealth of Forests* (Vancouver: UBC Press, 1998). (p. 325)

ix. It's perhaps worth emphasizing that the rights discussed here are those arising from socially-sanctioned exclusive access to ecological resources or natural capital. The legitimacy of claims to some compensation for the depreciated value of warranted investments actually undertaken (perhaps compounded to reflect opportunity costs) in reasonable anticipation of exercising such rights, and now compromised by virtue of abridgements of those rights, is not in question here.

x. Corporate arguments for compensation frequently claim payment of the full value of the enterprise as a 'going concern'—i.e., full compensation for the value of 'goodwill', which is to say for the value of the human and institutional capital of the firm as calculated by its accountants beyond the value of physical, intellectual or other marketable properties. Similar arguments are not made for the value of social or cultural capital when the world changes so that firms are themselves unable to honour commitments into which they have entered. Indeed, compensation is not expected to be paid by firms to communities where the firm's interpretation of changed economic conditions leads to hierarchical decisions to amend their relationships with those communities; it is odd that the firm might have expectation of full compensation when, symmetrically, the community's changing understandings of ecosystem function lead to collective decisions as to the necessity to alter the community's regulations governing the firm's use of the community's resources.