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Author(s): Arthur H. Chan

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# The Changing View of Property Rights in Natural Resources Management

By ARTHUR H. CHAN\*

ABSTRACT. The social, demographic, technological, and ecological circumstances in the United States have changed since its beginning. Society's view of *property rights*—*i. e.*, the way *resources* are to be used—has evolved accordingly. Resource owners' virtually unrestricted right to use their property as they wished disappeared along with the western *frontier*, pristine *wilderness*, and abundant *natural resources*. There is now a strong commitment to preserve what little *nature* and resource are left. To overcome the problem of abuse or destruction of nature, it is necessary to recognize, first and foremost, that the problem has become *institutionalized* over the years and, secondly, that humans and natural objects are interdependent and are of roughly equal importance in the *biotic community*. *Protection* of nature against *abuse* therefore requires that nature be granted legal rights on *moral* grounds, that consequently *human decisions* and actions must take into consideration their impacts on nature, and that defenders of nature be able to raise its rights in its own name in any *administrative* or *legal dispute*.

## I

### Changing Management Concerns

MANAGEMENT IS DEFINED in Webster's dictionary as the "judicious use of means to accomplish an end." This means-end relationship implies that when the end changes, it is likely that the means used or the way they are used to attain the end need to change as well.<sup>1</sup>

In its early days the United States was a big country with few people. The country needed to be settled and developed. Abundant land, water, and other natural resources were available to help. Natural resources management therefore meant devising ways to exploit these resources to the fullest extent in order to promote human settlement and economic development.

The situation is now drastically different. The western frontier of the last century is gone; population has multiplied; the economy has grown large; and resources are being depleted at an alarming rate. Environmental protection and natural resources preservation take on added urgency. As a result, natural re-

\* [Arthur H. Chan, Ph.D., is assistant professor of economics, New Mexico State University, Las Cruces, NM 88003.] The author thanks two anonymous referees for useful comments.

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sources management must be approached differently, mindful of these new societal concerns.

The publication of Rachel Carson's *Silent Spring* in 1962 brought the dawn to a new era. An environmental consciousness began to take root in the American society to reflect its changing values. But is the development of an environmental consciousness sufficient to solve the problems of resource exploitation and environmental degradation? That is not altogether certain as the problems are pervasive and entrenched.<sup>2</sup>

What is needed is to recognize that these problems are institutional in nature and that any solution must involve changing the way property is defined relative to resource use and management.<sup>3</sup> That would entail a re-evaluation of the human domineering attitude toward nature and a re-examination of humanity's interrelationship with nature, one that, as an outgrowth of a greater recognition of the interdependence between humanity and nature, acknowledges an approximately equal importance between *Homo sapiens* and natural objects. In the end, one could expect that, in the new setting of resource-environmental stress, greater restraints would be placed on how nature is treated and how resources are used. And consequently many uses once considered acceptable might become unlawful. Taking the ecological values and concerns of the American society as given, this paper will, first, present arguments to show the necessity and desirability of granting legal rights to nature (or to those who have responsibility for it) and, second, outline a viable legal-administrative mechanism within the constitutional context of property rights so that nature's rights will be protected.

## II

### **From Domination to Fellowship**

OUR ATTITUDE TOWARD NATURE has evolved a great deal since the founding of the republic. The opinion of the founding fathers was in no small measure molded by the tremendous advances in material production made possible by the Industrial Revolution as well as by the political philosophy of John Locke, not to mention the fact that as landowners they were concerned about protecting their economic proprietary interests. Consequently they were convinced that largely uninhibited use of natural resources would lead to technological and economic development. This attitude worked fine when the country was large, the population small, and the surroundings hostile.

But as these conditions gave way to fixed national boundaries, a declining resource base, a rising population, and a tamed or destroyed wilderness, that attitude was no longer valid. A new attitude arose during the early 20th century

to replace the old. The Conservation Movement represented the recognition of two opposing trends: declining ability of nature to sustain humanity and simultaneous increasing demands placed on nature by humanity. To head off disaster that could bring about drastic reductions in the standard of living, the policy of wise use and scientific management was implemented.<sup>4</sup>

One inherent pitfall of that policy can be found in its developmental orientation. Resources continued to be developed, used, and depleted; the environment continued to be degraded and knocked out of balance. The only difference was that the rate at which these were happening had slowed down somewhat. But the "saving" might not have been enough to offset the onslaught on another front—greater reliance upon science and technology for solutions—particularly since World War II. DDT, which caused serious ecological disasters and gave impetus to the *Silent Spring*, was simply the most infamous case of technological fix gone awry; yet this pesticide, along with air conditioning, made possible the settlement of places like Florida.

What is to be done? Experience and scientific studies have shown that the environment is actually a complex ecological system with humanity an integral part of it.<sup>5</sup> Aldo Leopold calls this the biotic community. Members within this community are dependent on each other, while the stability of the entire community is in turn dependent on the integrity of each member. Given the multitude of interdependent relationships, it is in the interest of the community as a whole as well as its constituent members that each member be "entitled to continuance." Respecting natural objects as fellow members of the biotic community frees us from the disingenuous pretense we feel obliged to manufacture in order to justify their continued existence. It negates the necessity to "invent subterfuges to give [them] economic importance."<sup>6</sup>

### III

#### **Rights of Nature**

TO ASSURE THEIR CONTINUANCE, to guarantee that natural objects have the biotic right to exist, Professor Christopher Stone has advocated the conferment of legal rights to natural objects.<sup>7</sup> This suggestion does not imply that nature has no rights. As will be made clear later, society has all along recognized, though perhaps only implicitly, that natural objects possess certain moral rights. Granting them legal rights is simply a method to make explicit what those rights are and to impose sanctions on individuals who violate those rights.

At first glance, granting legal rights to nature seems far-fetched and unsettling. Many in the society are reluctant to create new legal rights. Yet over the last two hundred years rights have been extended to once-rightless persons and

things such as children, women, minorities, the insane, the aged, animals, fetuses, churches, corporations, and nation-States. Thus society has a long history and ample experience in creating new rights.<sup>8</sup>

Others point to many natural objects that are lifeless or senseless and contend that these objects therefore cannot qualify to have rights. But they need to be reminded that legal rights have been bestowed on such similarly lifeless or senseless things as trusts and corporations. If these entities can have rights, there is no real reason why natural objects cannot have rights also. Besides, to say that nature should have legal rights is not to imply that it should have the same rights as human beings.<sup>9</sup>

A separate criticism relates to the operational aspect of the question. Since natural objects cannot communicate to humans when they are injured, having legal rights will not substantively benefit them regarding redress and, therefore, is not meaningful. However, with advances in biological and environmental sciences, communication systems now exist which can "send messages" to humans to warn of nature in distress. Examples abound: soft, wilted grass, trees or plants might be signs of thirst; humans could interpret data concerning declining populations of wild birds together with thin egg shells and deformed developing embryos to establish possible chemical contamination and genetic alterations. The point is, with the help of human intelligence, nature is capable of "informing" humans of its needs, recognizing of course that the capability is far from perfect.

Finally, there is the issue of underlying moral principles which justify creating legal rights for nature. Rights can be divided into two classes: legal and moral. Legal rights are conferred on the basis of legal rules. Those rights set forth in the Bill of Rights are examples. As a result of cultural, technological, social, and material differences, legal rights tend to change, sometimes drastically, in time or place. Too, "when it comes to legal rights, not all individuals are equal."<sup>10</sup> Moral rights, on the other hand, are based on moral principles.<sup>11</sup> As such, they are universal and equal. Justice is a good example of and perhaps the most important moral right. Unlike legal rights which are established through legislative debate, legal codification or judicial interpretation, moral rights are discovered through soul searching and consensus within the collective consciousness of humanity.

Rights have correlative duties. One person's claim to a right to life and liberty is empty unless it is coupled with others' duties to respect that right. Not surprisingly, there are two groups of duties. Corresponding to legal rights are "acquired duties."<sup>12</sup> These are (voluntary or prescribed) duties to treat others in certain acceptable ways due to their prior claim to be treated in those ways.<sup>13</sup>

Associated with moral rights are “unacquired duties.” These duties do not stem from others’ prior claims; they are totally independent of human will or institutional arrangements.<sup>14</sup> Individuals are moved, instead, by their conscience to act in a just or self-sacrificing way.

In analyzing the basis of bestowing legal rights on nature, it should be recognized that “. . . a right is a claim, and the basis of a claim is a reason, and when reasons are sufficiently cogent, they have a coercive effect on our judgments. When this is so, we feel that we have no more choice in making the judgment than we do when we report the findings of our senses about some matter of empirical fact.”<sup>15</sup>

The moral right in question is the right to just treatment. It is a claim made against humanity by nature. The reason for this claim is grounded on Leopold’s land ethic—an ethic “dealing with man’s relation to land and to the animals and plants which grow upon it.”<sup>16</sup> Leopold explains that “all ethics . . . rest upon a single premise: that the individual is a member of a community of interdependent parts. His instincts prompt him to compete for his place in the community, but his ethics prompt him also to cooperate (perhaps in order that there may be a place to compete for). The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land. . . . A land ethic of course cannot prevent the alteration, management, and use of these ‘resources,’ but it does affirm their right to continued existence, and, at least in spots, their continued existence in a natural state.

In short, a land ethic changes the role of *Homo sapiens* from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community as such.”<sup>17</sup> Natural objects in a community setting thus clearly have a valid claim to just treatment. Nature makes this claim against humanity to be treated with respect, to be allowed to exist, sometimes in its natural state. Not only is it within humans’ ability to fulfill those claims, they are morally bound to do so because of the moral obligations embodied in the respect principle.<sup>18</sup>

To summarize, nature is a citizen in the land community. It is therefore entitled to just treatment—treatment in accordance with the principle of respect that will safeguard its continued existence. Since the respect principle is a moral principle, the claim to just treatment entitles nature to possess the moral right to just treatment.<sup>19</sup> It follows, therefore, that legal right *could* be bestowed on nature. And by appealing to the authority of the community concept, the land ethic and the respect principle, it further follows that legal right *should* be bestowed on nature. To clarify, it is not out of love or kindness that nature should be treated with respect to ensure its integrity; instead, it is out of a sense

of justice that it be treated that way. Nature is valued for its intrinsic value, and not merely viewed as the receptacle for some value.

## IV

**Protecting Nature's Rights**

IF LEGAL RIGHTS were created for nature, how could those rights be accommodated in the existing legal-administrative framework? The central issue here concerns the operational aspect of exercising those rights, of making claims against violators of those rights, given that canyons and forests, streams and meadows can neither verbalize their grievances nor demand redress. Professor Stone suggests that a system be established wherein a friend of a natural object, upon discerning it to be in peril, could petition a court for the creation of a guardianship.<sup>20</sup> As guardian, it would represent the interests of its ward in a court, at a legislative body or an administrative agency.

If, for example, the Environmental Defense Fund should have reason to believe that some company's strip mining operations might be irreparably destroying the ecological balance of large tracts of land, it could, under this procedure, apply to the court in which the lands were situated to be appointed guardian. As guardian, it might be given rights of inspection (or visitation) to determine and bring to the court's attention a fuller finding on the land's condition. If there were indications that under the substantive law some redress might be available on the land's behalf, then the guardian would be entitled to *raise the land's rights in the land's name*.<sup>21</sup>

Administratively nature's rights would be raised through the overt and conscientious accounting of impacts resulting from human actions. If, for example, an application for an operating license of a nuclear power plant were being considered, nature could issue *its* objections regarding safety through its guardian on grounds that a nuclear accident could do immeasurable damage to *its* health and integrity. No longer would society be concerned only with the adverse impacts of such disaster on human health and safety, but those on nature as well. Decision to grant or deny the operating license should explicitly consider these and other relevant factors.

## V

**Public Rights and Responsibilities**

IT IS POSSIBLE that an owner's flexibility to control, use or otherwise dispose of his property could be diminished as a result of nature exercising its rights. But while the private owner is clearly entitled to certain proprietary rights, the State also has the unambiguous right to impose limits or conditions on those private rights. With the granting of legal rights to nature and the way in which those rights are exercised (with the help of the State), it is quite conceivable that

public power and responsibility could become broader. Of course, constitutional safeguards are designed to prevent abuses.

There are several well-established mechanisms by which the State can exercise its rights and fulfill its responsibilities. Chief among them, insofar as property right issues are concerned, include tax and spending powers, right of condemnation, and police power. Tax and spending can be properly viewed as different forms of an incentive program. Much has been written on this subject and hence it will not be delved into here.

The public's right to condemn private property for public use is effectuated through due process of law and just compensation in a democracy to guard against the tyranny of the State. If, for instance, the public is contemplating to appropriate private land and turn it into a public park, the owner must be afforded an opportunity to defend his/her interests in a condemnation proceeding and be compensated at fair market value for the land lost to the public.

The police power is used to protect both private and public rights. Regarding property rights, the police power is most commonly brought to bear through land use planning and zoning. They undoubtedly restrict the uses private individuals can make of their property. But at the same time they are potent instruments to protect private property values as well as the public welfare.<sup>22</sup>

The question of justice is definitely involved in the relationship between private and public rights. From the preceding discussion, there appears to be a sound system in the United States to adequately protect both. There is however one final problem left—the issue of intergenerational justice. How are the rights of future generations protected or their welfare promoted when they are not here to defend themselves? Unfortunately, available evidence indicates that, until recently, moral obligations to future generations have largely been ignored.<sup>23</sup> The granting of legal rights to nature probably will not directly affect to a significant degree the overall pattern to date. But by forcing the recognition of the long-term interdependence between humanity and nature, it could have the indirect effect of focusing society's attention on the necessity of promoting the welfare of future generations.

## VI

### **Conclusion**

MUCH IN THE WAY of how we treat our property has been changed in the last two hundred years. Consider the image provided by Leopold.

When god-like Odysseus returned from the wars in Troy, he hanged all on one rope a dozen slave-girls of his household whom he suspected of misbehavior during his absence. The hanging involved no question of propriety. The girls were property. The disposal was then . . . a matter of expediency, not of right and wrong. . . . The ethical structure of that day . . . had not yet been extended to human chattels.<sup>24</sup>



This was the prevailing view on property in the United States at its beginning. Today we are awakening to our moral responsibilities to nature, to treat it with respect, and to ensure its continued existence. Professor Laurence Tribe calls this progression the "spiral toward an evolving environmental ethic."<sup>25</sup> The conferment of legal rights to nature signifies the recognition of our responsibilities to natural objects, and it represents the first step of that "spiral."

And finally there is the practical question of whether we have any realistic alternative to ignoring nature's right to ecological integrity. Present conditions seem to suggest the negative, for in the final analysis, we are dependent on a healthy environment for survival. A public service announcement on West German television sums up our relationship to nature quite succinctly: *Natur braucht uns nicht, aber wir brauchen die Natur* (Nature does not need us, but we need nature).

### Notes

1. Property is defined here as a right to control (which may also entail use) an economic good, subject to various limitations. It is in this context that the discussion of property rights in this paper will proceed.

2. For a concurring observation regarding economic (use and exchange) value, see Siegfried G. Karsten, "Nature in Economic Theories: Hans Immler Traces Recognition of the Environment—and Its Neglect—in Various Classics," *American Journal of Economics and Sociology*, Vol. 46, No. 1 (January, 1987), p. 70.

3. Christopher Stone, *Should Trees Have Standing?* (Los Altos, CA: William Kaufmann, Inc., 1974), p. 48, n. 125.

4. Ian Barbour, *Technology, Environment, and Human Values* (New York: Praeger Publishers, 1980), p. 26.

5. One example of such an ecosystem is presented in Charles E. Cobb, Jr., "The Great Lakes' Troubled Waters," *National Geographic*, Vol. 172, No. 1 (July, 1987), pp. 4, 24–25. As the ultimate predator, the health and welfare of human beings are intimately linked to those of their environment.

6. Aldo Leopold, *A Sand County Almanac* (New York: Ballantine Books, 1970), p. 247.

7. Stone, *op. cit.*, pp. 9–11.

8. Some may wish to point out that granting legal rights to, say, corporations is merely to create a legal fiction for the sake of convenience. But much more than convenience is at stake. Consider the case of a child. Even before children were accorded explicit legal rights, mistreating a child was considered no less a crime against society than mistreating a white male adult citizen. The point, again, is that entities possessing no legal rights may still possess moral rights.

9. No less a champion for the sacredness of all life than Albert Schweitzer has recognized that not all life forms enjoy the same right, that a system of rights exists in which superior rights will be upheld at the expense of inferior rights. The killing or destruction of germs, viruses, bacteria or other growth to save a human life illustrates the priority system at work. See Albert Schweitzer, *Out of My Life and Thought* (New York: Henry Holt, 1933), Chaps. 13 and 21. Others expressing a similar view include Christopher Stone and Laurence Tribe. See Stone, *op. cit.*, pp. 10–11; Laurence H. Tribe, "Ways Not to Think About Plastic Trees," in Laurence H. Tribe, Corinne S. Schelling and John Voss, eds., *When Values Conflict* (Cambridge, MA: Ballinger Publishing Company, 1976), p. 83.

10. Tom Regan, *The Case for Animal Rights* (Berkeley, CA: University of California Press, 1983), p. 267.
11. Joel Feinberg, "Human Duties and Animal Rights," in Richard Knowles Morris and Michael W. Fox, eds., *On the Fifth Day*, (Washington: Acropolis Books Ltd., 1978), p. 57.
12. Regan, *op. cit.*, p. 273.
13. *Ibid.*; Feinberg, *op. cit.*, p. 45.
14. Feinberg, *ibid.*, p. 46.
15. *Ibid.*, p. 59.
16. Leopold, *op. cit.*, p. 238.
17. *Ibid.*, pp. 239–40.
18. Regan, *op. cit.*, p. 278.
19. Having accepted that both humankind and nature are citizens of the land community and that nature has a moral right to just treatment by people, some would insist on nature treating humans in a just way. But this is incorrect because humans lack a valid claim against nature in how it should conduct itself. Regan explains, "Individuals are everyday affected, for good or ill, by what happens as a result of nature's running its course, but no one can reasonably complain that nature violates his or her rights. Nature *could* violate our rights only if we could validate our claims-against it, and we could validate our claims-against it only if we could make the case that nature has direct duties to us to do or forbear doing certain acts that are our due. But nature has no duties. . . . What happens as a result of natural laws happens; it is neither just nor unjust, fair nor unfair, though it can be, and frequently is, beneficial or harmful. Nature no more violates our rights than it respects them." See *ibid.*, p. 272.
20. Stone, *op. cit.*, p. 17.
21. *Ibid.*, p. 19, emphasis added.
22. See, for example, Stephen Wermiel, "Justices Back Restriction on Coal Firms; Ruling Will Bolster State Land-Use Laws," *Wall Street Journal*, March 10, 1987, p. 8.
23. Christopher P. Mooney, "Criteria for Justice," *American Journal of Economics and Sociology*, Vol. 45, No. 2 (April, 1986), pp. 224, 232, n. 3.
24. Leopold, *op. cit.*, p. 237.
25. Tribe, *op. cit.*, p. 86.

### ***What Price Freedom?***

THE INDUSTRIALIZED NATIONS face the beginning of a new technological revolution which promises greater abundance and yet threatens to afflict them with mass unemployment on the scale of that in the Great Depression. What does this portend for "the time-honored process of emancipation, with the promise of a higher level of material welfare, of more equitable interrelations, and of a wider range of freedom"?

This is the problem Adolph Lowe investigates in his new book, *Has Freedom a Future?* (New York 10010: Praeger Publishers, 1988, \$12.95 paper, \$32.95 cloth). "This is no scientific inquiry," Professor Lowe points out. "There are hardly any footnotes, and only a few references to supporting or dissenting opinion." But the book is a report of a philosophic inquiry by a world class economist whose studies have made him at home also in the fields of sociology and philosophy. Hence what we have here is an interdisciplinary examination of the current situation in the leading economies, their trends and their problems.