

XXIV FIG Congress. Sydney



Property Rights for a New World:

Can our property regime adapt to an ethic of sustainability?

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Private property

- The institution of private property is a social arrangement that should promote the welfare and common good of society
- Rules about private property are not fixed, but should adapt to the needs of society



Development of Property Rights

Locke (1690):

- The earth was provided by God for all mankind
- It could be appropriated into private possession by the application of labour
- He has property in as much land as he can till, plant, improve, cultivate and use
- But he should only take what he needs – not so much as will spoil



Development of Property Rights

Tom Paine (1795) - (supporter of American & French revolutions)

- Earth owned by people in common
- Appropriation was accepted and justified because it promoted the common good
 - Increased productivity – provided sustenance
 - More wealth to share – economic development
- But private property causes inequality
 - implicitly dispossesses non-owners



Indigenous Property

- Tribal societies often had sophisticated property arrangements, with clearly defined use rights that supported the common good
 - but they did not aggregate these to private property as known by western law.
- The land does not belong to people
 - people belong to the land
- Land is an ancestor, the mother, part of the wider family of living (and even inanimate) things.
- Land has intrinsic value.
- Rights and Responsibilities arise from **occupation** and maintaining a **relationship** with the land.



Colonial expansion in NZ

- Europeans came to settle and tame new lands
- Settlers needed greater powers to use their land intensively (and exclusively)
- Property law developed to support them
- The absolute protection of property rights by the law is relatively new



Assertions about Property

- Private Property is at the heart of capitalism
- Means of creating and accumulating wealth
- Essential tool in promoting growth
- Private Property is fundamental to individual freedom
- We can craft spheres of privacy – places of retreat
- Private Property allows for democracy to flourish
- Land owners have some autonomy from absolute power of state
- We now tend to think that property exists to benefit the owner



Private Property / Common good ?

- Private property allows for disproportionate and unequal possession of the earth
- And by the 'magic of the market' (the alchemy of money) has become a commodity
- Eventually Private Property degrades the common good
- People get excluded, land accumulates in hands of wealthy, ecosystems are degraded, community interests are overridden



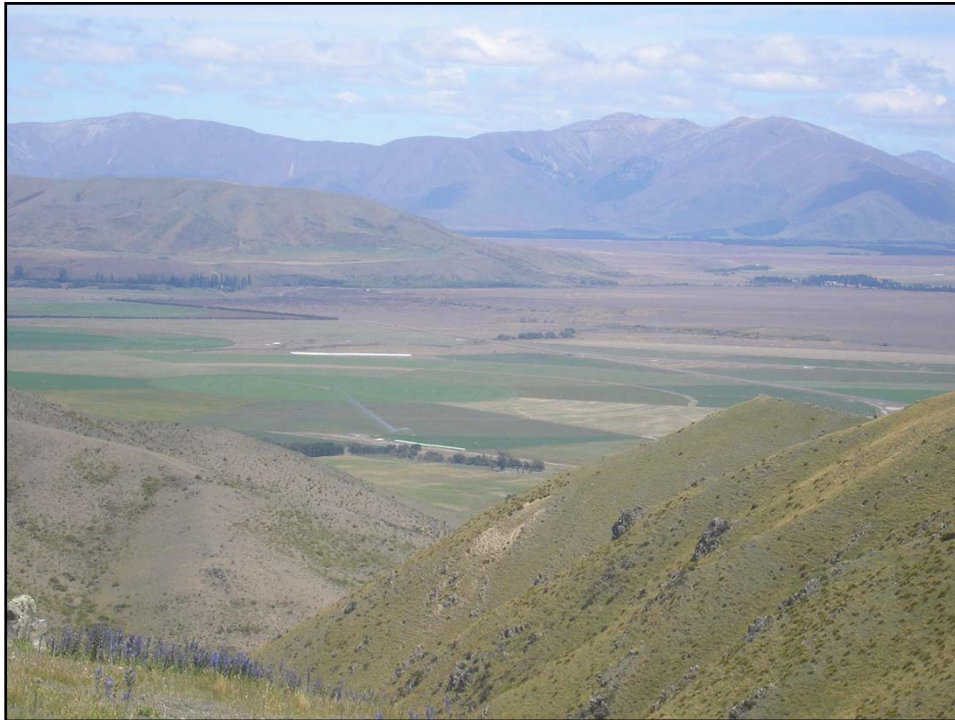
A new world order?

- We have reached the life supporting limits of our earth
 - Over-population
 - Environmental degradation – climate change
 - Energy supply/price
- Sustainability is an evolving paradigm
 - But not quite accepted yet by capitalism



Sustainability

- About the life supporting benefits of nature (land and resources)
- About public morality / public good – non-selfish behaviour
- About public and common values in land



How is this playing out?

NZ High Country as Crown land

Public ownership – value for common good:

- Iconic landscapes – scenery preservation
- Access for recreation – active & passive
- Open space
- Water catchments
- Fauna & flora preservation



Or ?

High Country as Private Property

Pastoral Leases are Private property

- Can be bought and sold (commodity)
- Allow occupation and defined uses
- Allow for exclusion of others
- Promote valued production
- Do not allow for other development
- Value assessed by limited land use



The law - 2009

Access

- *Fish & Game* (representing the public good - sustainability) v *The Crown* (High Country Accord – representing private property rights)
- Does a leasehold title give rights of exclusion?
- **YES**
- Property (and production) won't work without the ability to exclude
- "... the right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee."

United States v. Shoshone Tribe (1938) 304 U.S. 111 at 116



The law - 2009

Valuation – *Crown v Minaret Station*

- Challenged whether the lease fee should include intrinsic values of land (those common good values) – location, view etc.

- **NO**

- lease based on economic return (value of production) only



Headlines: “Minaret Station a victory for property rights”

- “the High Country is not the only area in which the Government needs to focus its attention. Indeed, the Resource Management Act is crying out for compensation provisions to establish the right of lawful users to receive compensation should a right in property be extinguished.” President of Federated Farmers



So although Property involves

- Rights
 - Responsibility
 - Regulation
-
- NZ law continues to uphold the Rights
 - The Responsibility part is being lost to NZ law
 - And there is resistance to interference by Regulation



What could be different?

Proposal for Germany's constitution amendment:

- "Property imposes duties. Its use should also serve the public well-being and the sustainability of natural conditions of life."

Brazil's constitution:

- defines property rights to include environmental responsibility

BUT in New Zealand:

- National Party (in opposition) proposed a bill to add greater protections to property **rights** in the Bill of Rights!



New ethic

- Individuals not separate from environment
- Entitlements not separate from responsibilities
- Private not separate from public
- Local not separate from global
- Present not separate from future



Conclusions

- In the conflict between property rights and sustainability, the current government (with support from our courts) is still favouring private property rights over the common good
- The environmental crisis and the ethics of sustainability will require a change from an insistence to protect individual property rights to a concern for communal welfare and responsibility
 - humans cooperating within our limited ecosystem
 - **a land ethic.**



Land Ethic

Aldo Leopold 1949

- The long-term welfare of humans is best served by sustaining the healthy ecological functioning of nature – understood as an integrated community of life.
- “A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it does otherwise.”



A New Covenant with Earth

“A new covenant with earth requires the confirmations and assurances that come from knowing that we share a common human condition and that there are ways we can help one another accept and live by it. We require not only individual, but collective acceptance of the reality and rules with which we must abide if life in abundance is to continue to flourish on the finite planet. We need to promise to one another and to all cohabitants of Earth, present and future, that we will accept the same risks, and the same burdens we expect them to accept, and that we do this for their sakes as much or more than for our own.” J. Ronald Engel 2009. Auckland conference.



The Earth Charter

Represents a new vision for the Earth

- Respect and care for the Community of Life
- Ecological Integrity
- Social and Economic Justice
- Democracy, Nonviolence, and Peace

“Let ours be a time remembered for the awakening of a new reverence for life, the firm resolve to achieve sustainability, the quickening of the struggle for justice and peace, and the joyful celebration of life.”