

‘Responsibility’ as an imperative for addressing property rights conflict

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Abstract

In Australia, the institution of property rights in land and natural resources is currently under revision. The need for reform arises from the recognition that traditional property rights arrangements, which are focussed on agriculture and pastoralism as the dominant land uses, are now proving inadequate to accommodate new social values in the environment and emerging interests in the health and natural resources of Australia’s rural landscapes. Traditional views of private ownership of land and exclusive use of its resources are being challenged by emerging views of ecosystems, landscapes, and the environment generally as common resources. The difficulty arises in attempts to satisfy a strong and largely urban social demand for collective environmental benefits within an inherited framework of private land ownership and the expectations of the property rights associated with that ownership

Less understood and less articulated are the responsibilities that accompany rights of ownership, for the land itself and to other present and future users. This paper advances the idea that rights have counterpart responsibilities and that discussion about rights necessitates discussion of responsibilities. That idea becomes the basis of an argument for a more duty, or obligation-orientated conception of property and land ownership. This in turn has significant implications for policy designed to protect natural resources on private land.

Keywords: property rights, responsibility, conflict, natural resource management

Introduction

Most land in Australia is privately managed, either under freehold or leasehold title. Almost 70% is used for agriculture or pastoral pursuits (Australian State of the Environment Committee, 2001). Most concerns about land are therefore concerns about how private farms and grazing properties are managed. Although most of Australia’s rural landscapes are divided into parcels of private property, the way these individual parcels are managed as a whole is becoming a subject of public interest and political discourse. The historical predominance of agriculture as the highest and best use of land is being challenged by changing social attitudes to land, as landscapes provide newly identified values in natural and cultural heritage (ASEC, 2001). Agricultural and pastoral industries are facing increasing social demand for consideration of these ‘common’ environmental and cultural values in agricultural production (ASEC, 2001). It is

the tensions that arise between the management of resources at whole-of-landscape scale in the public interest and management of individual properties for private benefits that are at the core of many perceived environmental problems today.

These tensions have recently taken on a legal form as public rights to environmental benefits have been acknowledged in state and federal laws. Additionally, international treaties and cases have created a range of new federal government interests in land management. Most recently, obligations under international treaties such as the World Heritage Convention and the Convention on Biological Diversity have underpinned the enactment of the *Environment Protection and Biodiversity Conservation Act 1999* which gives the Australian federal government increased power to overrule state laws and intervene on private land. The signing of international treaties is particularly significant for Australia because most of the federal government's powers in relation to the environment have been gained through international obligations. Legislation for protecting public environmental values in agricultural landscapes has created conflict between interest groups, with debate revolving around win-lose situations of competing rights to resources and compensation for lost rights.

Many land managers see increasing environmental regulations as a threat to the 'bundle of rights' traditionally associated with land ownership (New South Wales Farmers' Association, 2001). Some argue that regulations impose unjustified harm on landowners for the benefit of the urban majority with those who have adopted good practice being penalized along with the bad. Landholder lobby groups have emerged to fight against further government 'interference' in the way they manage their land and for greater security of their property rights to resources (Martin and Verbeek, 2002; Property Rights Australia, 2003). The language of the resulting 'property rights' debate is confrontational and emotive and, by focussing on narrow views of individual versus public rights and compensation for lost rights, fails to reflect the social richness of many Australian farming communities. In many cases farming people and communities are characterised by an ethic of cooperation, innovation and stewardship of the land (Roberts, 1984; Gray, 1991).

Adding to existing government-landholder conflict over environmental protection on private land, contemporary models for environmental management emphasise the need to manage the dynamics of resource flows and ecosystem functions at catchment and landscape scales (Forman and Godron, 1986). This implies cooperation between administrative bodies and collective action by individual landholders to manage resources across traditional property boundaries. Such an approach is difficult to achieve when a siege mentality and recalcitrance sets in.

It is the combination of these trends that has led to a decade of confusion and contest over who “owns” the landscape. What are the rights of landholders? What are the rights of society? How can the economic relationships between contested views be resolved, and in their resolution, what combination of regulation, incentive and economic instruments is appropriate?

‘Property rights’ dialogue appears to be dominated by legal and economic definitions of ‘rights’, with little or no reference to the social and ethical dimension of responsibilities and reciprocities that accompany those rights (e.g. Mobbs and Moore, 2002). In this paper I argue that ‘rights’, as a social institution are inherently conflict laden, and that the focus of the debate needs to shift away from assertion or defence of public and private rights and toward inclusive discussions about shared values and reciprocal responsibilities for a sustainable future.

Property rights and the nature of conflict

“Resolving conflict over competing rights to Australia’s natural resources is now an issue of national prominence” (Quinn, 2001, p15). Attempts at resolving this conflict have been focussed on more clearly defining individual and collective rights to the environment and then using policy, legal and market instruments to allocate and distribute those rights equitably among society (e.g. WWF, 2002; Sheehan and Small, 2002). To understand and critique this approach it is first necessary to understand the nature of rights, how rights issues emerge in society and how they become a source of conflict.

Rights can be thought of as claims that individuals have against other individuals, groups, or society as a whole (in democratic societies, represented as the ‘government’). This makes rights issues inherently confrontational. Rights commonly represent freedoms, either to have

something, or to be free of something (Nino, 1992). However, not all freedoms are captured or codified in 'rights' (Schmidtz, 1994). Having freedom to do or have something means it is permissible for everyone, whereas having a right to do something has the additional implication that others are not free to interfere with that right. That is, rights can be violated but freedoms cannot (Schmidtz, 1994). This point is relevant to natural resource management in Australia because many of the rights traditionally thought of as property rights in land ownership are actually freedoms to use resources that have not been contested by society and are not enshrined in law. Some of these freedoms to resource use have been maintained through positions of power, as rural landowners have traditionally enjoyed considerable power and influence in the history of Australian politics (and particularly in Queensland) (Waterson, 1968; Davidson, 1997). The privileges of unquestioned use of resources have until recently remained largely uncontested. This is perhaps because agriculture, as Australia's dominant industry, remained an undisputed social value. However, as the significance of agriculture to the Australian economy declines (Gleeson, 2001), along with the voting population in rural areas (McKenzie, 1994), agricultural enterprises are now being forced to justify their resource use to an increasingly urban society, whose interests in rural landscapes are not only in its consumable products. Indeed, as the significance of Australia's unique landscapes and ecosystems are realised internationally, the way in which these systems are managed comes under increasing international scrutiny.

To have a 'right' means to be empowered, either through power-related privilege, social acceptance or law. It involves making a claim and having that claim recognised and respected by society. Claiming a right, however, involves the limitation or cancellation of other peoples' freedoms so that it is no longer permissible or acceptable to act in ways that interfere with the claimed right (Schmidtz, 1994). For an individual to claim a property right to land and resources changes other peoples' relation to the environment so that they are longer able to use or enjoy it without the right-holder's permission. The problem with strengthening property rights in land and resources is that new social and cultural values in land (including non-use) and are increasingly the object of rights claims (e.g. *Native Title Act 1993*, *Environment Protection and Biodiversity Conservation Act 1999*). The historical freedoms of landowner (production) based use are being challenged by an urban claim of rights to a common environment. The recognition of the rights of non-owners can be framed as a limitation on traditional property rights if they

were legally defined rights in the first place, or as placing on existing property owners an obligation to respect the newly recognised rights of others. The first construct leads to confrontation about whose rights are valid and whose should prevail, whereas the second construct appeals to a shared sense of responsibility for the future of both agriculture and natural systems. Inherently, the framing of changing social values in the environment as a rights issue is conflict-laden, whereas the second approach is more conciliatory.

If rights protect those social values thought to be especially important (Dworkin, 1981; Rolston, 1993; Nino, 1994), then rights issues arise when one or more of those values are perceived to be threatened by the actions or intrusions of others. Yet as one group claim a value or object as a right, another will defend what they believe to be their freedoms, usually also using rights discourse as the defence. If rights protect the things that society values as being 'good' or 'right', then it is implied that the successful rights claim represents what is 'right' in society and the action that threatens those rights is 'wrong'. As public rights to environmental values become increasingly recognised in law and political literature, it follows that actions perceived as threatening those values are 'wrong'. In the context of natural resource management, this infers that current practices in agricultural production are 'wrong'. This presents society with an ethical dilemma. In most cases, the actions perceived as threatening environmental values are the very ones that provide the nation with food and fibre and export commodities (ASEC, 2001). This approach confounds the issue by placing the 'right' to protect biodiversity in direct conflict with the 'right' to produce food and fibre. Nor does it acknowledge that 'wrong' is also a social construct rather than reality, and can be only someone else's definition of what is 'right'. The current language of rights and competition for supremacy of rights does not adequately reflect the complexity of this dilemma.

The dilemma of right versus right

Rights to nature, the right to a healthy environment and a right to natural and cultural heritage, including the preservation of biodiversity and endangered species are claims now receiving significant attention in the sphere of political discourse in Australia and many other countries (Hanna *et al.*, 1996; ASEC, 2001). Previously, such rights were less acknowledged, mainly because the threats were not as widely known or recognised (ASEC, 2001). As rights issues in

the environment emerge, the main response of government has been to provide protection for environmental values through legislation (Martin and Verbeek, 2002.) Historically, in the case of land and natural resource protection, this has been through regulations against threatening processes and the resuming of land as protected areas. Until recently, environmental legislation in agricultural landscapes was not perceived as a direct or serious threat to the values associated with individual property ownership. However, as the environmental imperative shifts from property scale practices and creating spatially bounded protected areas to much broader protection of ‘ecosystem services’ and ‘life support systems’ such as biodiversity and hydrological flows, legislation for the protection of these values has had more direct impact on the decision making autonomy of private landowners.

Society is now forced to choose between protecting the ‘right’ of private property, which represents important social values of individual freedom and private enterprise with the ‘right’ of environmental protection, which represents important values such as ecological sustainability and intergenerational equity. However, debate is largely based on the perception that it is possible within the existing culture of private property rights, to force landowners to use their land more ethically (responsibly) and grounded in the assumption that this is not already being done. The challenge becomes to combine the institution of private property in land, which has to do with individual rights and economic freedoms, with an ecologically sound land ethic. Implicit here is the assumption that private property and a land ethic are different and irreconcilable concepts. One is about private rights and the other about public responsibility. Is it valid to assume they are so different? Contemporary rural research suggests otherwise (Campbell, 1994; Falk and Guenther, 1999; Gleeson, 2001; Williamson *et al.*, 2003). It seems they are more alike than is currently demonstrated by the ‘property rights’ debate. The common ground between private property and sustainable, ethical resource use lies within the concept of ‘responsibility’ but this is hidden by ‘rights’ rhetoric and conflict over whose rights are valid and acknowledged and hence should prevail.

The problems of rights-based discourse

Contemporary ‘property rights’ debate over individual rights and the environment reveals a paradox. Society is claiming rights to the environment and demanding that landholders respect

these rights by protecting and conserving common values such as functioning ecosystems and biodiversity on private land (ASEC, 2001). At the same time, consumers continue to demand agricultural products of the highest quality at the best prices, often placing enormous strain on the natural and human resources needed in production. The production-protection paradox cannot be resolved without broader social discourse about the values found in the environment, and why they are important to society. This requires expanding the dimension of the current property rights debate to include moral and ethical considerations about what is 'good' and 'right' in the way we use resources and the values that are sufficiently important to warrant protection. Identifying the values of importance is a first step to finding a social 'ethic' for resource use (Rolston, 1993). This must include recognition and integration of non-use values into the management process (Carter and Bramley, 2002).

Public concern for threats to environmental values attributed to agricultural practices has generated an impetus for private rural landholders to become more accountable in their use of natural resources such as biodiversity, native vegetation and water (Aretino *et al.*, 2001; Australian Conservation Foundation, 2002). Landowners, however, argue that they are, and must be responsible managers of land and resources, as their livelihoods depend on their continued availability and condition (NSW Farmers' Association, 2002; Campbell, 1994). The problem in this sense appears to be less about unclear rights than lack of consensus about what are appropriate and acceptable uses of resources leading to misunderstandings about it means to be 'responsible' managers of resources. This is perhaps confounded by a lack of agreed mechanisms through which landowners (producers) can show society (consumers) they are being 'responsible' land and resource managers.

Adding to the complexity of the issue are notions of 'stewardship', 'common sense' and a 'land care' ethic that are well-documented values held among land owning families (Roberts, 1984; Falk and Guenther, 1999). Landowners define themselves as stewards, whose ethic is based on common sense (Gray, 1991), independence and human-land connection. They feel threatened by government policies that ignore their experience, replace 'responsible autonomy' with forced coercion, and trivialise their sense of connection with the land with scientific generalisations (Falk and Guenther, 1999). Property rights discourse that focuses on individual versus public

rights to resources fails to recognise the role of these values in decision making for sustainable natural resource management.

Building social capital and self-management capacity in rural communities is recognised as an important step toward sustainable natural resource management (Pretty and Ward, 2001). This approach relies on enhancing fundamental social tenets of trust, reciprocity and sharing (Falk and Guenther, 1999; Pretty and Ward, 2001, Pretty, 2002). Imposing legislation and regulations for responsible resource use on private land without first understanding the role of existing norms of responsibility generates mistrust, conflict and bitterness between public and private interests as landowners lose autonomy to make innovative and 'sensible' decisions to meet the changing demands of globalised markets and the changing expectations of society (Cox *et al.*, 1988; Hodge, 1991, 2001), especially within the vagaries of climate change and the future role of agriculture. A legislative approach, based on legal and economic definitions of rights therefore appears to be inconsistent with visions of sustainable rural communities, that is, empowered, innovative, tolerant and trusting, knowledge sharing communities (Falk and Guenther, 1999; Pepperdine, 2001). It fails to acknowledge the practical realities in managing farming systems and the dynamics in ecological systems. Nor does it appear to encourage the collective and community initiated action implied in models for sustainable environmental management.

Another concern about rights-based discourse is the view put forward by property rights lobbyists that the current property rights (and freedoms) of land ownership need to be clearly defined in law with legislation to ensure their protection from future government 'interference' (PRA, 2003). While recognising that some security in the expectation of resource allocation is necessary for future planning and investment, the idea that property rights should be forever 'etched in stone' does not adequately recognise the essentially contractual nature of property rights as a social institution. That is, property rights exist and evolve to reflect changing social values and norms of ethical behaviour. The idea that existing norms of use associated with property rights should be protected by legislation ignores the social and evolutionary nature of these ideas. As the general concept of sustainability becomes a social norm of resource use, conceptions of what are legitimate property rights in the environment are changing, and will continue to change to reflect further advances in ecological knowledge and understandings of

human-nature relationships. Such issues raise questions about the adequacy of a rights-based paradigm for resolving conflict over the appropriate use of common natural resources.

The emerging view of land as a complex and dynamic ecological system (the environment), and landscapes as places of natural and cultural heritage, gives rise to idea of both land and landscapes as 'commons' (see Hardin 1968). The idea of rural landscapes as commons challenges traditional ideas of land as dividable space, and traditional ideas of exclusive land ownership. The most distinguishable social feature of a collective or common good is its non-distributive nature (Ostrom, 1990). That is, it is impossible to break up the 'good' or overall benefit into pieces and assign separate pieces to individuals. However, many of these emerging 'common good' values in natural resources such as ecosystems and biodiversity occur on privately owned land where, according to traditional conceptions of property, their benefits attribute exclusively to the owner (Freyfogle, 1998). Although it is easy to comprehend how someone can own and be responsible for a fenced paddock or farming system, it is harder to justify private ownership of an ecological system or try and allocate rights to its interconnected parts. This implies the need for a reconstruction of the meaning of land 'ownership' in modern Australian society.

Attempts to allocate individual and tradable rights to environmental resources (e.g. commodification of ecosystem services) do not overcome the essentially collective good/common resource issues, particularly the non-distributive nature of the resources in question (Reeve, 1999; Williamson *et al.*, 2003). For example, the allocation of a quota of water to one individual does not remove that quota from the eco-hydrological equation. Rather than encourage the responsible use of a resource held in common, it reinforces the idea of individual rights and freedoms associated with private 'ownership'. Purely economic approaches, without consideration of the ethical dimension of resource allocation, may result in serious social justice and equity issues in the future as benefits accrue only to those who can pay the highest price.

This analysis and discussion of contemporary property rights discourse shows a debate highly polarised between private versus collective rights, conservation versus production ideals and state control versus free enterprise. The language of 'rights', and competing rights, without being

balanced by discussion of responsibilities does not appear to work for common environmental resources.

Consequently, there is increasing interest in looking for alternatives to achieving sustainable resource use without an extension of government powers. This provides a strong impetus to revive informal frameworks in which social norms of trust and responsibility can be developed anew. It is a mistake however, to believe that responsibility, trust and harmony can be imposed from above. Although compliance may be achieved by using this approach, the goals of securing social harmony and vital communities will not (Hodge, 2001).

The apparent inability to arrive at an acceptable resolution to rights based conflict creates the opportunity for construction of an alternative framework based on a parallel set of expressed responsibilities. If rights in the debate were replaced with responsibility, the tenor of the argument changes without necessarily disadvantaging any of the players. What is proposed is a different symmetry which can be created when established thinking on property rights is restated in terms of responsibility. Balancing rights to resources with responsibility for resource condition has major implications for future natural resource management policy.

An alternative framework of responsibility

The discussion has identified that rights protect those social values thought to be especially important. Also, that rights issues arise when those values are threatened and an affected player perceives their position to be in need of protection against the interference of others. However, a view of individuals as impersonal rights holders claiming or defending their rights against other individuals is devoid of context and incomplete. A society is made from groups of individuals but a group of individuals does not make a society. In a society, everything happens within the cultural environment of people interacting with other people (Freyfogle, 1998). Rights, conferred and supported by society, carry with them implicit responsibilities to society in return. It is at this very human and ethical level of interaction where an understanding of the concept of responsibly becomes especially important.

Rights to resources imply responsibility for the condition of the resources, both now and into the future. Responsibility is a term usually found in legal and economic fields. In its legal sense, it is associated with attributing blame or liability for the consequences of chosen actions; economically, it means rational and efficient decision making. Responsibility in its colloquial use reveals an additional dimension to its meaning- a dimension that is not completely captured by economic or legal definitions. It is the meaning implied when we talk about being a responsible person, or, having a 'sense of responsibility' which is about normative behaviour and the expectations of society (Troxell, 1994). However, when society demands responsible resource use, there is no adequate or conferred definition of what that might mean in practical terms. Does responsibility have a set of identifiable characteristics? If the concept of responsibility in its normative sense could be better understood then this would enable society (and legal and government institutions) to recognise responsibility in a person or a decision. This is important not only for landholders to be able to demonstrate responsible resource use but also for public servants and decision makers who are also under increasing pressure to be accountable to society. Consequently, what is needed is an internal description of this 'sense of responsibility' so that society can recognise and reward responsibility in natural resource management and decision making.

Despite its most common application in law, responsibility is largely an ethical concept. Troxell (1994) describes the conditions for responsibility as autonomy and awareness. Responsibility is said to arise from our inherent moral capacity as humans to choose our actions in terms of 'right' against 'wrong' (Audi, 1991). As with the concept of rights, responsibility is closely linked with the notion of freedom, in that freedom to choose actions generates responsibilities (Jonas, 1984).

The second precursor to responsibility is the power to act (Jonas, 1984). This may come in the form of physical (and mental) capacity, technology, or empowerment to act through either permit, or a right. Advances in technology have significantly increased the individual's power to act as well as the scale of impact of individual actions. With increasing power to act emerges the ethical imperative to use that power responsibly in the social normative sense. This generally means considering the impacts of possible actions on other people (and environmental ethicists argue other non-sentient beings, e.g. Nash, 1990) that may be affected. The discussion leads to

the conception of responsibility as a filter in decision making (Fig.1). Rights can be legally defined and allocate power or permission to act or, extra-legal or moral/ethical rights, which leave the freedom to individuals to choose their life's path and the morally 'right' actions to take. Responsibility in this model acts as a moral filter on the actions chosen. Actions are therefore not just individuals exercising their rights and freedoms but are set within the context of the interrelationships between others in the social and ecological systems. This model is relevant because it increasingly acknowledged that many ecological problems are due to human choice.

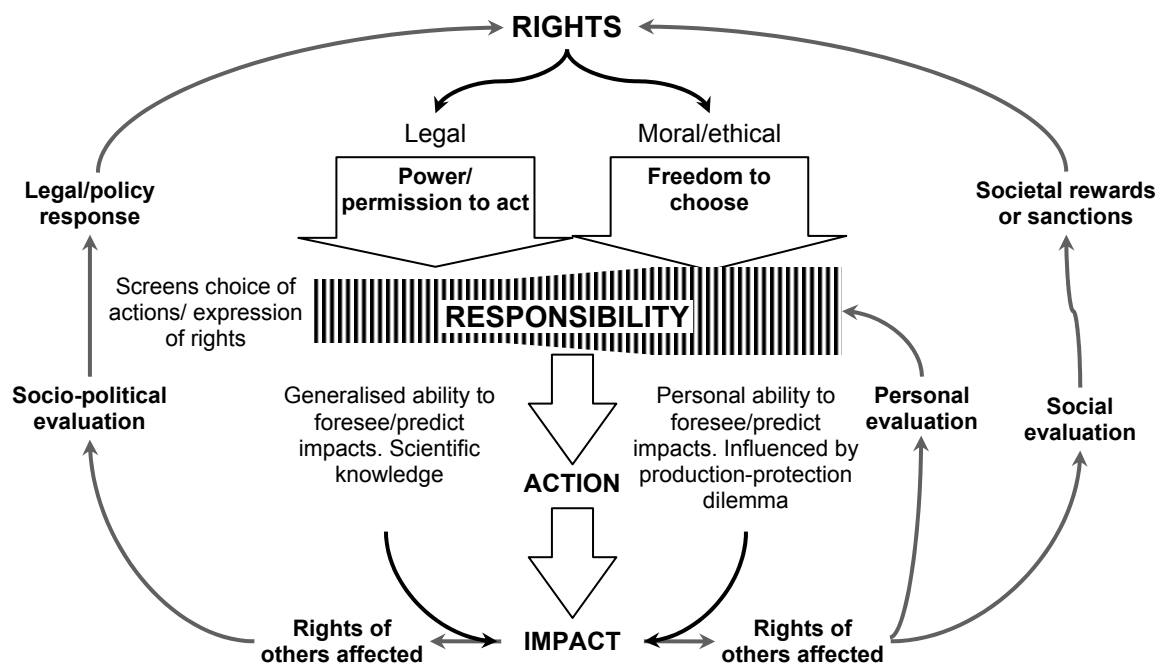


Figure 1. The role of responsibility as a moral filter in decision making. Responsibility is influenced by the ability and willingness to foresee potential impacts of actions on others. Increasing regulatory controls decrease the operative domain of an internal sense of responsibility.

In many instances the filter role of responsibility in this process is subconscious. It is implicit and sensed rather than a conscious or explicit part of the rational choice process. Choices are often made on the basis of emotions, which includes a sense of responsibility and relationships of care, rather than purely rational and dispassionate cost-benefit calculations (Anderson, 1996). If environmental issues arise from a mix of reason and emotion, then so must their solutions. Any solution that does not take into account feelings of responsibility and care, as well as self

determination and pride in achievement, will not be sustainable. As regulatory controls increase, the role of responsibility in decision making is diminished, as compliance sets in. This is illustrated by the narrowing of the 'responsibility' domain in the model. Responsibility is also a factor of the ability to foresee or predict the impacts of actions on others. This knowledge takes on two distinct forms. First is the personal ability of individuals, based largely on locally specific experiential knowledge and relationships of care. The other is a generalised ability to predict impacts at larger spatial and temporal scales. This ability is typically generated by scientific research and applied generally through public policy. Conflict arises between the specific and emotionally influenced knowledge of individual decision makers and the need for more generally applicable rules for resource use that are not sensitive to individual circumstances. The challenge for addressing conflict in natural resource management and for future environmental policy is to gain a better understanding of the responsibility dimension in decision making and the potential of its contribution to achieving sustainable outcomes.

The model shows responsibility as the consideration of the possible impacts of chosen actions on other people and other things. Goodpaster (1993) described a responsible person as one who considers things that an irresponsible person does not. Responsibility, as social normative behaviour, implies a heightened sense of awareness of other people and other things in the decision making environment on which chosen actions may have an impact. The view of resources as just 'things to be used' for personal benefit changes to one of resources and others as part of an interrelated socio-ecological system (Berkes and Folke, 1998)

Consideration of others is also implied in the National Strategy for Ecologically Sustainable Development (Australian Government 1992). Principles of intergenerational equity and participation in decision making acknowledge that consideration is due to all potentially affected parties both now and into the future. Although a relatively recent document, the principles reflect older communitarian views. The idea of a 'land ethic' was proposed by Aldo Leopold (1949), in which he urged landowners (and all citizens) to consider land use as an issue of ethics as well as economics. The land ethic acknowledges that people must use the land to sustain themselves, but that they should do so only in ways that preserve the "integrity, stability and beauty" of the

“biotic community” as well as social communities (p.224-25). This is not so different from modern mantras of ecological, economic and social sustainability.

Achieving the triple dimensions of sustainability requires revisiting the concept of a ‘land ethic’. A ‘land ethic’ means considering the needs of others in our community; a community which extends to include global interests and the natural systems that support it. As the ‘land ethic’ and modern versions of it have gained support, the issue arises of how a land ethic can be achieved within the traditional boundaries of private property. Understanding the concept of responsibility and how it applied in everyday resource use decision making is an important step toward achieving these goals.

Conclusion

Changing views about land and land values mean changing ideas about private property in land. If ‘property’ and ‘property rights’ are seen as a social institution comprising social and cultural norms for ‘proper’ relations between people and the land (and between property owners) then the ‘property rights’ debate becomes an ethical rather than legal or economic issue. This is because both ‘property rights’ and a ‘land ethic’ are about socially acceptable ways of using land and natural resources.

The framing of environmental protection in agricultural landscapes as rights-based issues places too much focus on conflict and competition and winners and losers, whether they be real or perceived. A paradigm of individual rights and freedoms is not sufficient to address new and emerging common good values in the environment. However, rights carry with them responsibilities, the nature of which is poorly understood. Many landowners see themselves as responsible stewards of the land, and believe they know, or are willing to find out what is “right” for their land. A better understanding of this ‘sense of responsibility’ among landholders may reveal where existing norms of ownership compliment or enhance the development of more generally understood ‘land ethic’ for sustainable land use. This requires the focus of the current ‘property right’s debate to shift from conflict over ‘rights’ to tangible resources and more toward shared values and responsibilities for sustainable landscapes and communities. Understandings of, and appeals to responsibility may provide better solutions to conflict over natural resources.

New policy is needed that reflects and is responsive to complexity and multiple values in natural resource management issues; policy that can recognise responsibility and reward it, policy that will encourage the development of a community based land ethic, rather than relying on the old and blunt tools of regulation and an arguably outdated paradigm of rights.

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